Judicial Protection of the Criminal Defendant Against Adverse Press Coverage

John E. Stanga Jr.
JUDICIAL PROTECTION OF THE CRIMINAL DEFENDANT AGAINST ADVERSE PRESS COVERAGE

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INTRODUCTION

Widespread agreement exists that press comment on a criminal case is potentially prejudicial to the defendant when information is reported that may not be admissible as evidence in a trial.1 If a confession or other evidence is held to be admissible, the possibility still exists that this information will reach jurors through press comment before or during the trial, thereby prejudicing them against the defendant. This article deals with the remedies courts have at their disposal to protect the defendant whose case has received adverse press coverage before or during a trial. Because Sheppard v. Maxwell2 was a watershed in the development of case law on the fair trial-free press problem, this article first examines the major remedies developed prior to Sheppard and then assesses the consequences of Sheppard by examining the legal developments which have occurred in the fair trial-free press area since 1966.

LEGAL REMEDIES FOR PRETRIAL PUBLICITY

The Voir Dire

One of the chief legal remedies available to protect the criminal

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1. See A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 3-4 (Tentative Draft 1966) [hereinafter cited as the REARDON REPORT].

defendant from deleterious incidents of adverse press comment is the 
*voir dire*, the examination of members of a jury panel by the judge, 
counsel, or both. If a venireman indicates bias against a criminal de-
fendant, he may be challenged for cause and excused from service. The 
problem of the *voir dire*, however, is not the juror who candidly an-
nounces an irremovable bias against the accused, but the juror who does 
not recognize his bias. Justice Peckham once observed that “prejudice 
is such an elusive condition of the mind that it is most difficult, if not 
impossible, to always recognize its existence, . . .” and that “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 unin-
fluenced by anything but the evidence.”

The nature of modern communications further complicates the problem by making it likely that 
a juror will have some knowledge of a criminal case before it comes to 
trial.

The established rule is that neither mere knowledge about a case nor 
an opinion regarding the guilt or innocence of the accused is sufficient 
ground to sustain a challenge for cause. The widely publicized case of 
*United States v. Burr* presented the question whether a juror with a 
preformed opinion should be qualified to serve in a criminal case. Al-
though a juror should enter a case with an open mind, Chief Justice 
John Marshall noted “that light impressions which may fairly be sup-
posed to yield to the testimony” do not disqualify a juror, “but that 
those strong and deep impressions which will close the mind against the 
testimony” do constitute valid grounds to sustain a challenge for cause.

In *Reynolds v. United States*, Chief Justice Waite observed that if the 
preformed opinion is “hypothetical only, the partiality is not so mani-
fest as to necessarily set the juror aside.” Thus, in a day “of newspaper 
enterprise and universal education” when “every case of public interest 
is almost, as a matter of necessity brought to the attention of all the 
telligent people in the vicinity,” the trial court’s ruling not to dismiss 
a juror for cause should not be reversed “unless the error is manifest.”

The *Reynolds* Court found that there was no “positive and decided” 
opinion held by the jurors, and indicated that great deference should

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5. *Id.* at 51.
6. 98 U.S. 145 (1878).
7. *Id.* at 155.
8. *Id.* at 155-56.
be given to the decision of the trial judge on the question, for the
demeanor and manner of witnesses and jurors are more indicative of
their true state of mind than the printed record. 8

The Reynolds rule is strongly adhered to in both state and federal
courts. 10 Moreover, 25 states have enacted statutes which permit jurors
to serve if they have tentative opinions about the merits of the case or
the guilt or innocence of the accused. 11 California law is typical in re-
quiring that no “person shall be disqualified as a juror by reason of
having formed or expressed an opinion upon the matter or cause to be
submitted to such jury, founded upon public rumor, statements in
public journals, circulars, or other literature . . . .” 12 A New York
statute provides that “the . . . expression or formation of an opinion or
impression in reference to the guilt or innocence of the defendant . . . is
not sufficient ground of challenge for actual bias . . . .” 13 Neither ex-
posure to publicity nor the holding of a mere opinion by the juror is
valid ground for challenge.

9. Id. at 157.
10. See, e.g., Holt v. United States, 218 U.S. 245 (1910); Butler v. United States, 351
F.2d 14 (8th Cir. 1965); Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965); Hickock v. Crouse,
334 F.2d 95 (10th Cir. 1964); United States v. Mitchell, 319 F.2d 402 (7th Cir. 1963);
Beck v. United States, 298 F.2d 622 (9th Cir. 1962); Torrance v. Salzinger, 297 F.2d 902
(3d Cir. 1962); Rowe v. State, 224 Ark. 671, 275 S.W.2d 887 (1955); Howell v. State,
220 Ark. 278, 247 S.W.2d 952 (1952); Clemson v. State, 218 Ga. 755, 130 S.E.2d 745
(1963); State v. Brazile, 234 La. 145, 99 So. 2d 62 (1958); Garlitz v. State, 71 Md. 293,
18 A. 39 (1889); State v. Wilson, 436 F.2d 633 (Mo. 1969); State v. Johnson, 362 Mo.
833, 245 S.W.2d 43 (1951); State v. Casey, 34 Nev. 154, 117 P. 5 (1911); State v.
Simmons, 120 N.J.L. 85, 198 A. 294 (1937); Fleming v. State, 62 Okla. Crim. 446, 72
P.2d 403 (1937); Commonwealth v. Swanson, 432 Pa. 293, 248 A.2d 12 (1968); Common-
wealth v. Richardson, 392 Pa. 528, 140 A.2d 828 (1958); State v. Flack, 77 S.D. 176, 89
N.W.2d 30 (1958); Manning v. State, 155 Tenn. 266, 289 S.W. 451 (1927); State v. Beck,
56 Wash. 2d 474, 349 P.2d 387 (1960); State v. Nutley, 24 Wis. 2d 527, 129 N.W.2d 155
(1964).
22, § 662 (1951); Ore. Rev. Stat. § 2.145 (1953); S.D. Comp. Laws § 23-43-35 (1967);
Tenn. Code Ann. § 40-2507 (1956); Tex. Code Cr. Proc. art. 35.16 (1965); Utah Code
Of course, the question remains, What constitutes actual bias? When does an opinion pass the threshold of being tentative and become fixed? How does the trial or appellate judge determine if an opinion is fixed and therefore prejudicial to the accused? The case law suggests that one significant, sometimes determinative, indication is the use the accused makes of his peremptory and for cause challenges. If the accused does not use all of his peremptory challenges or does not challenge a juror for cause, courts are likely to hold that the defendant in waiving some or all of his challenges has expressed his satisfaction with the impartiality of the chosen jury. The time to challenge jurors is at the voir dire, not on appeal or after the jury’s verdict has been delivered. This rule tends to place the defense attorney in a dilemma. He can challenge a juror for actual bias, have that challenge overruled, and risk the possibility that the juror will be prejudiced against the accused as a result of the challenge itself. On the other hand, the defense attorney can refrain from challenging a juror for actual bias and hope that the juror has not been biased against the accused by exposure to prejudicial press comment. In contrast to the assumption that a fair jury has been obtained if the defense attorney does not fully exercise his challenges, there is also a tendency to regard an exhaustive voir dire as an indication of judicial care likely to result in an impartial jury. Thus, in the Brink’s robbery case it was held that the judge’s voir dire of some 1,104 veniremen and the exercise of 262 peremptory challenges by the defendants were signs of “a patient and careful” employment of judicial discretion.

Another judicial requirement is that the accused has the burden of showing actual bias. The burden must “be sustained not as a matter

14. Actual bias refers to a state of mind which renders a juror partial.
16. REARDON REPORT 126-128 (1966) deals with voir dire problems relating to motions for continuance or change of venue.
of speculation but as a demonstrable reality."\textsuperscript{19} The mere possibility that a juror may have been biased as a result of pretrial press publicity is not enough to sustain a showing of actual bias. Moreover, great weight is accorded to the opinion of the trial judge, who is in a position to observe the demeanor and mannerisms of veniremen.\textsuperscript{20} The trial judge may sustain or overrule a challenge for actual bias within the sound exercise of his discretion, and his decision will be reversed only on the clear showing that he has abused that discretion.\textsuperscript{21} For example, an appellate court is likely to affirm the decision of a trial judge when merely conflicting testimony respecting the impartiality of a juror is introduced on the \textit{voir dire}.\textsuperscript{22}

The language of courts regarding jury bias seems somewhat archaic in an era which values the psychology of unconscious motivations. To assert that jurors can set aside initial impressions formed by pretrial press comment is contrary to the findings of modern research indicating that a person's first exposure to information about an issue will shape his future attitudes toward that subject.\textsuperscript{23} This does not imply that the juror is dishonest who says he can set aside a "tentative opinion," but suggests that such a juror may not be aware of his latent biases. Yet, the discretion of the trial judge on \textit{voir dire} is only infrequently disturbed by appellate judges who operate on the assumption that impartiality and objectivity are realities that can be ascertained by the trial judge. There are limits, however, within which trial judges must remain if they are not to abuse their discretion. A trial judge may not force declarations of impartiality from jurors by extensive cross-examination of veniremen, by asking leading questions, or by appeals to the juror's civic duty to be impartial.\textsuperscript{24} It is reversible error for a trial judge to

\textsuperscript{19} The quotation is from Adams v. United States \textit{ex rel.} McCann, 317 U.S. 269, 281 (1942), and is frequently quoted in cases on jury bias.

\textsuperscript{20} A representative statement is found in People v. McGonegal, 136 N.Y. 62, 71, 32 N.E. 616, 619 (1892).

\textsuperscript{21} See notes 10 and 15 \textit{supra}.

\textsuperscript{22} See State v. Flack, 77 S.D. 176, 89 N.W.2d 30 (1958).

\textsuperscript{23} The Reardon Committee relied upon psychological data and inferences to support its argument that prejudicial press publicity may shape the kinds of opinions jurors hold. \textit{Reardon Report} 61-65 (1966). For a similar approach, see Comment, \textit{Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform}, 38 S. Cal. L. Rev. 672 (1965). The findings of the University of Chicago Jury Project on the \textit{voir dire} suggest that the values of jurors play a definite role in jury decision-making and that attorneys are likely to use the \textit{voir dire} as a means of educating jurors rather than detecting bias. \textit{See} Broeder, \textit{Voir Dire Examinations: An Empirical Study}, 38 S. Cal. L. Rev. 503 (1965).

\textsuperscript{24} Coughlin v. People, 144 Ill. 140, 33 N.E. 1 (1893). \textit{Cf.} Fuller v. State, 269 Ala
overrule a challenge for cause when the juror declares on voir dire that
it will take evidence to change his opinion.\textsuperscript{25} Similarly, it is reversible
error not to sustain a challenge for cause when the juror declares that
as a result of press accounts he has an opinion which would lead him to
choose the testimony of a witness for the prosecution over that of the
accused.\textsuperscript{26}

Although jurors are not disqualified for holding tentative opinions
concerning the guilt or innocence of the accused, the Court of Appeals
for the Fifth Circuit in 1954 held, in \textit{Juelich v. United States},\textsuperscript{27} that it is
reversible error to try an accused before a jury every member of
which possesses a belief in the guilt of the accused. Juelich and his co-
defendant had been convicted of the murder of a Deputy United States
Marshal, and the media characterized the defendants as “outlaws, desperados, killers, and murderers.”\textsuperscript{28} The press also reported that Juelich
had a long criminal record and had confessed to the crime.\textsuperscript{29} Of the 71
jurors examined on voir dire, 65 testified to their belief in the guilt of
one or both defendants.\textsuperscript{30} The court cited the \textit{Reynolds} rule as applicable
to the case, but in view of the difficulty in securing an impartial
jury, it held that the trial court should have granted the defendants’
application for a change of venue, or in the alternative a continuance
of the case.\textsuperscript{31}

While \textit{Juelich v. United States} has been regarded by some as the first
significant step toward greater protection of the criminal defendant
against adverse press comment,\textsuperscript{32} it was not until 1961, in \textit{Irvin v.

\textsuperscript{25} Singer v. State, 109 So. 2d 7 (Fla. 1959).
\textsuperscript{26} State v. Spidle, 413 S.W.2d 509 (Mo. 1967).
\textsuperscript{27} 214 F.2d 950, 955 (5th Cir. 1954).
\textsuperscript{28} Id. at 952.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 956.
\textsuperscript{32} McKay, \textit{An Academic View in Symposium, Free Press and Fair Trial}, 11 Vill. L.
(W.D. La. 1954). This case was a habeas corpus proceeding in which relief was
granted where the accused was arrested, indicted, tried, and convicted within 19 days.
The press in \textit{Waller} published articles concluding that the accused was guilty, and the
defendant confessed without the assistance of counsel. The state trial judge denied
motions for continuance and change of venue. The federal court ordered that the
accused be discharged and released unless the state granted the accused a fair trial within
six months.
that the Supreme Court reversed a conviction on the grounds that prejudicial press publicity had denied the accused his constitutional right to a fair and impartial trial. Irvin was indicted in 1955 by a Vanderburgh County, Indiana, grand jury for one of six murders committed in the vicinity of Evansville, Indiana. The Vanderburgh County prosecutor and police officials released statements to the press indicating that Irvin had confessed to the six homicides, and the news media gave extensive coverage to the crimes and to Irvin's arrest and confession. Indiana statutory law allowed a criminal defendant charged with any crime punishable by death the right to transfer his case to a different jurisdiction. Under this provision Irvin applied for and was granted a change of venue to Gibson County, adjacent to Vanderburgh County. Although the Indiana statute allows only one change of venue, Irvin applied for a second transfer and made eight motions for continuances. All were denied. The United States Supreme Court granted certiorari after the Court of Appeals for the Seventh Circuit denied the petitioner habeas corpus relief.

Speaking for the Court, Justice Clark pointed out that it would be "an impossible standard" to rule "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 . . . ." Whether the nature and strength of an opinion is sufficient to rebut the presumption of impartiality is a question of mixed law and fact with the burden on the accused to prove actual bias. In questions of mixed law and fact involving constitutional principles of due process, the federal courts have a duty to adjudicate the question. Consequently, the Court held that the court of appeals should have independently evaluated the voir dire testimony to determine whether any of the juror's preconceived opinions were of sufficient magnitude to deny the accused his right to an impartial trial.

33. 366 U.S. 717 (1961). During the same term as *Irvin*, the Court reversed the conviction of an accused whose case received adverse press publicity while the trial was in progress and in which the jury was allowed to separate. *Janko v. United States*, 366 U.S. 716 (1961), *rev'd* 281 F.2d 156 (8th Cir. 1960).
34. 366 U.S. at 719-20.
35. IND. ANN. STAT. § 9-1305 (1956).
36. Id.
38. 366 U.S. at 723.
39. Id.
Justice Clark observed that Irvin’s case was subjected to massive press coverage which reported not only his confession but also his past criminal record. It was estimated that newspaper articles discussing aspects of the case reached 95 percent of the homes in Gibson County.\textsuperscript{40} The Court said, “It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County.”\textsuperscript{41} Further, the voir dire evidence indicated a pattern of prejudice. Two hundred sixty-eight veniremen were excused for cause upon the trial court’s determination that their opinions were fixed. Eight of the 12 jurors thought Irvin guilty, and 90 percent of those examined on voir dire had some opinion concerning his guilt.\textsuperscript{42} The Court was of the opinion that “[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.”\textsuperscript{43} Although each juror had said he could set aside any preconceived opinion and treat the accused fairly and impartially, the Court observed that the “psychological impact requiring such a declaration before one’s fellows” is often responsible for such response. “Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.”\textsuperscript{44}

Insofar as \textit{Irvin} is the first Supreme Court case to reverse a state conviction on grounds of prejudicial publicity, it may appear that it set new guidelines for courts to follow in adjudications involving voir dire issues. Such an assumption, however, fails to recognize that much of the language in \textit{Irvin} is cast in the traditional phraseology of cases involving the impartiality of jurors. Jurors, the Court said, need not be “totally ignorant of the facts and issues involved” in a case. Any important case “can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.”\textsuperscript{45}

Thus, the \textit{Reynolds} rule lives on in \textit{Irvin}, which did not break altogether with prior cases involving impartiality of jurors in the face of

\begin{itemize}
\item \textsuperscript{40} \textit{Id.} at 725.
\item \textsuperscript{41} \textit{Id.} at 726.
\item \textsuperscript{42} \textit{Id.} at 727.
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} at 728.
\item \textsuperscript{45} \textit{Id.} at 722.
\end{itemize}
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widespread prejudicial press publicity.\textsuperscript{46} Indeed, many appellate cases have relied upon Justice Clark's "totally ignorant of the facts and issues" phrase to sustain the decisions of trial judges not to excuse jurors for cause based on alleged actual bias.\textsuperscript{47} Both \textit{Irvin} and \textit{Juelich} suggest that in some cases publicity can be so widespread and opinions of guilt so prevalent among veniremen and jurors that courts can presume actual bias.\textsuperscript{48} This suggestion, that under certain conditions bias may be presumed, is most pronounced in the reliance both \textit{Irvin} and \textit{Juelich} place on the quantitative examinations of the \textit{voir dire}.

\textit{Irvin} is a good case for the application of Karl Llewellyn's "accordion" theory: Precedent may be either expanded or contracted to apply to a particular case.\textsuperscript{49} \textit{Irvin} may be interpreted to mean that the traditional \textit{Reynolds} formula should govern cases involving possible jury bias, or it may be interpreted to mean that bias may be presumed in some situations.

\textit{Beck v. Washington}\textsuperscript{50} exemplifies the interpretation of \textit{Irvin} as holding that the traditional \textit{Reynolds} formula should govern jury bias cases. Beck was convicted of grand larceny in a Washington court, and the Supreme Court granted certiorari. It must be presumed, the petitioner argued, that because of widespread and adverse publicity any jury would be biased. The Select Committee on Improper Activities in the Labor or Management Field of the U.S. Senate had conducted investigations during which the petitioner was reported to have invoked his fifth amendment privilege against self-incrimination approximately 210 times in three appearances before the Committee. Beck's appearances received widespread coverage from both the printed and electronic media, including live television coverage. The Committee was quoted as saying that nearly $250,000 had been taken from the funds of the International Teamsters Union, of which Beck was president, and used for his own personal benefit. The chairman of the Senate Committee was quoted as saying that it was his belief that Beck had "committed many criminal

\textsuperscript{46} For the view that \textit{Irvin} is within the \textit{Reynolds} tradition, see Manes, \textit{Irvin v. Dowd: Retreat from Reality}, 22 LAW IN TRANSITION 46 (1962).

\textsuperscript{47} Illustrative of those cases which distinguish \textit{Irvin} and use Justice Clark's language to sustain a trial judge's decision is Odom v. Nash, 226 F. Supp. 855 (W.D. Mo. 1964).

\textsuperscript{48} For the view that \textit{Irvin} breaks with the \textit{Reynolds} tradition, see Note, \textit{The Changing Approach to "Trial by Newspaper"}, 38 ST. JOHN'S L. REV. 136 (1963). McKay, \textit{supra} note 32, suggests that \textit{Irvin} modified but did not abandon the \textit{Reynolds} formula.


\textsuperscript{50} 369 U.S. 541 (1962).
offenses.” Not only did the state indictments against Beck receive widespread press attention, but federal grand jury indictments for income tax evasion also received considerable press comment. Again speaking for the Court, Justice Clark observed that by the time Beck came to trial the news value of the case “was diminished.” Other labor leaders had begun to attract the greatest portion of press coverage, and even page one articles about Beck “were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness.” The lapse of almost five months between the indictment and the trial and nearly nine and one-half months between Beck’s appearances before the Senate Committee and the trial were long enough for the impact of any publicity to subside. Most important, of the 52 veniremen examined on voir dire, only eight admitted bias. These eight and six others whose responses on voir dire suggested the presence of bias were excused. The trial judge sustained each of petitioner’s challenges for cause, and the petitioner exercised each of his six peremptory challenges. Thus, Irvin’s standard of impartiality was met and even exceeded in Beck.

United States ex rel. Bloeth v. Denno exemplifies the alternate interpretation of Irvin as holding that jury bias may be presumed in some situations. In Bloeth the petitioner had been convicted of first degree murder and sentenced to death by a New York court. The pretrial publicity was widespread and highly emotional. The press referred to Bloeth as a “Mad Killer” and reported that he had confessed to three homicides, an assault with a claw-hammer on an elderly woman, and at least three armed robberies. It was also reported that Bloeth had failed a polygraph examination. Using the Irvin case as the standard for judging juror impartiality, the Court of Appeals for the Second Circuit observed that it “must determine, from a review of the entire voir dire, whether the extent and nature of the publicity has caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial.” The publicity was not only widespread and volu-
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ominous, but also highly inflammatory. It reached the overwhelming majority of veniremen, 36 of the 38 examined on the *voir dire* having read about the case. Further, 31 veniremen stated that they had formed opinions about the guilt of the accused. Of the 16 regular and alternate jurors who were seated, eight stated that they believed the accused was guilty, although they claimed to be able to decide the case impartially. Even though nine months had elapsed between the time of the crimes and Bloeth’s trial, the court held that the time lapse between the original publicity and the trial was not enough to blunt the impact of highly inflammatory publicity which had reached a saturation level. The court reversed Bloeth’s conviction, because there was too great a burden on the jurors “in the light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the opinions had been held and their persistence.”

*Juelich, Irwin, Beck,* and *Bloeth* are the major cases establishing the criteria for judging juror impartiality. When a high proportion of the jurors believe the defendant guilty or the *voir dire* suggests a pattern of prejudice, actual bias may be presumed. Highly inflammatory publicity, such as existed in *Irwin* or *Bloeth,* indicates that the trial judge should proceed with extraordinary caution. Indeed, in cases of inflammatory publicity even a substantial lapse of time between the publicity and the trial may not be sufficient to guarantee the defendant a fair and impartial trial. In cases such as *Beck* a significant lapse of time may be sufficient to protect the defendant against the deleterious aspects of widespread publicity. When appellate courts have found prejudicial error because jurors were biased by publicity, the overriding consideration has been whether the court, in an independent examination of the *voir dire,* has found a substantial proportion of jurors with beliefs in the guilt of the accused. While one or two jurors with tentative or hypothetical opinions will not be enough to set aside a verdict on appeal, if a large enough proportion of jurors hold such opinions or if a pattern of prejudice is revealed in the jurors’ responses on the *voir dire,* then there is ground for reversal.

**Change of Venue and Continuance**

Not only is the *voir dire* an important safeguard in its own right, but also in most cases the trial judge will attach great importance to

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58. *Id.* at 367-68.
59. *Id.* at 373.
60. *Id.* at 372.
the *voir dire* in considering applications for change of venue or continuance. Obviously, there is no purpose in moving or delaying a trial because of prejudicial publicity when the *voir dire* indicates that jurors have neither exposure to such publicity nor preconceived opinions regarding the guilt or innocence of the accused. The general rule is that the trial judge will be overruled only when it has been demonstrated that he has clearly abused his discretion. The failure of an accused to exercise all of his peremptory or for cause challenges is a strong indication that the trial judge did not abuse that discretion in denying a motion for transfer or continuance.

Publicity may be both widespread and adverse to the defendant, but the important question is whether an impartial jury can be selected. Accordingly, many states require, either by statute or court decision,

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There is, of course, some overlap between the above cases on change of venue and continuance and cases dealing with juror bias; see notes 10 and 15 supra. The *voir dire* cases hold that a juror can have a tentative opinion and still be fair; the venue and continuance cases hold that the *voir dire* indicates whether there should have been a change of venue or continuance. Sometimes it is held that an extensive *voir dire* itself is an indication that a fair jury was chosen and that the trial judge was cautious and careful. See People v. Carter, 15 Cal. Rptr. 645, 364 P.2d 477 (1961), where all 115 veniremen had read of the case but a change of venue was denied; Application of Palakiko, 39 Hawaii 167 (1951), where more than 100 veniremen were exhausted and it was held that this indicated that the biased jurors were weeded out. Cf. United States v. Moran, 236 F.2d 361 (2d Cir. 1956) (change of venue); United States v. Moran, 194 F.2d 633 (2d Cir. 1952) (continuance). Both cases found no judicial abuse of discretion in denying motions for change of venue and continuance because there was no difficulty in impaneling the juries.

that a motion for a change of venue be supported by affidavits from residents of the community stating that the defendant cannot receive a fair trial. The mere existence of the pretrial publicity is not a sufficient ground for transfer or continuance.

Many of the legal considerations that apply to cases involving jury bias vis-à-vis the voir dire also apply to cases involving motions for transfer or continuance. For example, a long lapse of time between the publicity and the trial may suggest to judges that any community prejudice has abated, thereby eliminating the need for a transfer or continuance. In addition, the volume and quality of the publicity is a variable to be considered. If press comment is basically factual and accurate and does not appeal to the emotions, then it will be difficult for the defendant to obtain a change of venue or continuance. As in


64. See, e.g., Bearden v. United States, 320 F.2d 99 (5th Cir. 1963); United States v. Decker, 304 F.2d 702 (6th Cir. 1962); Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953); Mathis v. State, 280 Ala. 16, 189 So. 2d 564 (1966); People v. Duncan, 53 Cal. 2d 824, 350 P.2d 103 (1960); State v. Cypher, 92 Idaho 159, 438 P.2d 904 (1968); People v. Berry, 37 Ill. 2d 329, 226 N.E.2d 591 (1967); State v. Rogers, 241 La. 841, 132 So. 2d 819 (1961); State v. Lupino, 268 Minn. 344, 129 N.W.2d 294 (1964).


The above citations are to cases involving motions for both changes of venue and continuances, but the standards for both are not always the same. United States v. Dioguardi, 147 F. Supp. 421 (S.D.N.Y. 1956), suggests that some publicity may make it necessary to grant a continuance but not to take the more extreme measure of granting a transfer. But cf. United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952).

66. See, e.g., Harney v. United States, 306 F.2d 523 (1st Cir. 1962) (publicity not
cases involving jury bias, the defendant should move for a transfer or continuance before the jury is selected or he will be deemed to have waived his right to so move.\(^7\)

Some cases suggest that there is not as much occasion to grant a change of venue or continuance to a defendant who is to be tried in a metropolitan jurisdiction, for the heterogeneous composition of an urban population enhances the prospect of obtaining jurors who have not been exposed to publicity.\(^8\) Conversely, the close-knit character of the rural

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\(^7\) See, e.g., United States v. Bletterman, 279 F.2d 320 (2d Cir. 1960) (publicity non-inflamatory, routine); Odom v. Nash, 226 F. Supp. 855 (W.D. Mo. 1964) (reporting narrative and factual); McClendon v. State, 196 So. 2d 905 (Fla. 1967) (news reports fair and covered same material as introduced in evidence); Schweinefuss v. Commonwealth, 395 S.W.2d 370 (Ky. App. 1965) (news articles create no public resentment against accused); State v. Kramotrich, 282 Minn. 182, 163 N.W.2d 772 (1968) (news reports substantially restate information in complaints); State v. Crawford, 416 S.W.2d 178 (Mo. 1967) (news reports conservative, brief, not prominently displayed); Spillers v. State, 84 Nev. 23, 436 F.2d 18 (1968) (articles assign crime ordinary news value only).

Moreover, unfavorable publicity about a general class of events but not about a specific criminal defendant or criminal case is not sufficient to obtain a change of venue or continuance. See, e.g., United States v. Mesarosh, 223 F.2d 449 (3d Cir. 1955); United States v. Flynn, 216 F.2d 354 (2d Cir. 1954); United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956); United States v. Malinsky, 20 F.R.D. 300 (S.D.N.Y. 1957); State v. Miles, 103 Ariz. 291, 440 P.2d 911 (1968); State v. Glenn, 429 S.W.2d 225 (Mo. 1968).


It has also been held that there is no violation of a federal right for an accused to be tried without a jury when the defendant waives his right to a jury trial after a motion for a change of venue or continuance has been denied. See, e.g., Butzman v. United States, 205 F.2d 343 (6th Cir. 1953); Austin v. Peyton, 279 F. Supp. 227 (W.D. Va. 1968). Cf. People v. Heirens, 6 Ill. 2d 131, 122 N.E.2d 231 (1954); Grammer v. State, 203 Md. 200, 100 A.2d 277 (1953); People v. Ryan, 28 App. Div. 2d 916, 282 N.Y.S.2d 6 (1967). Convictions were upheld where the defendants waived jury trials but did not move for changes of venue or continuances. There is a suggestion in United States v. Daniels, 282 F. Supp. 360 (N.D. Ill. 1968) that there may be occasions when massive publicity will allow an accused to waive a jury trial without the government's consent. See also People v. Sepos, 16 N.Y.2d 662, 209 N.E.2d 285 (1965), aff'g 22 App. Div.2d 1007, 254 N.Y.S.2d 759 (1964), which permitted a remand to the county court for a hearing to determine if a televised re-enactment of the crime denied the accused a fair trial, even though the defendant entered a guilty plea.

or small town community makes it likely that widespread publicity will have reached virtually the entire population.69

Case and statutory law also suggests that a change of venue is a measure primarily to be used when physical violence or mob activity seems likely. At least nine states have statutory provisions which suggest that a change of venue should be granted when “public excitement” is great or when lawless conditions prevail.70 Many of the cases in which appellate courts have reversed convictions on community prejudice grounds have involved much more than press publicity. When a state of lawlessness prevails and the trial becomes merely a façade, then an appellate court is on solid ground in reversing the conviction. This is so regardless of whether newspaper publicity adverse to the defendant was one of the factual conditions suggesting community prejudice.71 In other words, press publicity may be one reason for granting a change of venue, but quite frequently press publicity is so intermixed with other consid-

69. See State v. BeBee, 110 Utah 484, 175 P.2d 478 (1946); note 108 infra, and accompanying text. See also note 107 infra.


The New Hampshire law concerning change of venue is unique. The state Constitution provides that it is

essential to the security of the life, liberty, and estate of the citizen, that no crime or offense ought to be tried in any county than that in which it is committed;—except in cases of general insurrection in any particular county, when it shall appear to the judges of the superior court that any impartial trial cannot be had in the county where the offense may be committed, and upon their report, the legislature shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained.

N.H. Const. art. 17.

71. The prototype of this category of cases is Moore v. Dempsey, 261 U.S. 86 (1923). Cf., e.g., Fouquette v. Bernard, 198 F.2d 96 (9th Cir. 1952); People v. McKay, 37 Cal. 2d 792, 236 P.2d 149 (1951); People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914); Jones v. State, 185 Md. 481, 45 A.2d 330 (1946); People v. Mleczko, 193 Misc. 253, 83 N.Y.S.2d 821 (1948); Williams v. State, 162 Tex. Crim. 202, 283 S.W.2d 239 (1955).

See also Shepherd v. Florida, 341 U.S. 50 (1951), where the Supreme Court reversed a state conviction on the ground that the method of jury selection discriminated against Negroes. However, the case is frequently cited as involving prejudicial press publicity because of the concurring opinion by Justice Jackson, joined by Justice Frankfurter. See 341 U.S. at 51-55. But cf. Cox v. State, 90 Tex. Crim. 106, 234 S.W. 72 (1921), which held that newspaper publicity is an important variable, though not the only one, to consider in change of venue applications. Cox also held that a change of venue should be granted if the accused shows that a fair trial is improbable; the impossibility of a fair trial need not be demonstrated. Cox, of course, is a minority view.
erations that it becomes difficult to determine how much weight publicity was given in the judicial decision.

Although publicity alone generally is insufficient to result in a change of venue or continuance, there are situations where the publicity can be so widespread and prejudicial that a change of venue or continuance is required. In *Rideau v. Louisiana*, the United States Supreme Court reversed the conviction of the accused whose confession to bank robbery, murder, and kidnapping was broadcast over a Lake Charles, Louisiana, television station on three separate occasions. The trial court denied the petitioner's motion for a change of venue and overruled the challenges for cause of three members of the jury who testified on *voir dire* that they had seen and heard Rideau's confession. Speaking through Justice Stewart, the Supreme Court held that it was a denial of due process for the trial judge not to move Rideau's trial from Calcasieu Parish where the television broadcast originated. The televised confession “in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.”

Justice Stewart observed that the proceeding was no less a “kangaroo court” simply because physical brutality was lacking.

The Court found the *Rideau* case so lacking in due process that it did not consider it necessary to examine the transcript of the *voir dire* in order to determine whether any juror was infected with bias. Due process required “a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised interview.”

Justices Clark and Harlan, dissenting, noted that although Rideau's conviction might have been reversed under the exercise of the Court's supervisory powers if the case were one arising in a federal jurisdiction, the majority opinion failed to establish “any substantial nexus between the televised 'interview' and petitioner's trial which occurred almost two months later.” There is no ground for reversal, the dissenters argued, unless the adverse publicity can be shown “to have fatally infected the trial . . . .” The three jurors who saw Rideau's televised

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73. Id. at 724-25.
74. Id. at 726.
75. Id.
76. Id. at 727.
77. Id.
78. Id. at 729.
79. Id.
confession all said they could accord the accused the presumption of innocence. Irvin v. Dowd recognized that "it is an impossible standard to require [a jury] to be a laboratory, completely sterilized and freed from any external factors." Although Rideau was not free from such factors, the burden of showing unfairness, according to Justices Clark and Harlan, was not met by the accused.

Irvin and Rideau also speak for the incidental proposition that the purpose of a trial is to ensure justice, notwithstanding state statutes limiting the accused to only one change of venue or transfer to an adjacent county or judicial district. Indiana is one of 15 states with statutes prohibiting the defendant from obtaining more than one change of venue. In Irvin the Supreme Court did not consider the constitutionality of the Indiana statute, for the Indiana Supreme Court itself had previously held that the courts must provide the accused a fair trial even if a second change of venue contravenes the state statute. Similarly, Louisiana is one of 17 states having some kind of statutory or constitutional provision placing geographical restrictions on the forum to which a trial may be moved. The Louisiana statute provides that


Some cases suggest that there is no point in moving a trial when the publicity is great, for the transfer will not avoid publicity. See, e.g., Shockley v. United States, 166 F.2d 704 (9th Cir. 1948). Similarly, in cases involving continuance it has sometimes been suggested that a continuance would not be useful, for the publicity would only reappear at a later date. See, e.g., Paschen v. United States, 70 F.2d 491 (7th Cir. 1934).
the transfer should be to an adjoining parish of the same judicial district or to a parish of an adjoining district.\textsuperscript{84} In \textit{Rideau} the television coverage of Rideau's confession reached both the judicial district in which Rideau was tried and an adjoining judicial district.\textsuperscript{86} In light of \textit{Irvin} and \textit{Rideau}, the Louisiana courts eventually moved the trial beyond an adjacent judicial district on the ground that the state legislation was merely "procedural legislation" and the right to a change of venue in a case like \textit{Rideau} was a "basic constitutional" guarantee.\textsuperscript{86}

Not only may publicity be so pervasive and prejudicial that a change of venue is required without showing actual prejudice, but publicity may be so adverse and widespread that a postponement is required. In \textit{Delaney v. United States},\textsuperscript{87} the Court of Appeals for the First Circuit held that the district court erred in refusing a continuance to the petitioner whose tax bribery prosecution received widespread press comment as a result of a public investigation by the House Ways and Means Committee. The Committee, the court observed, heard testimony not relevant to the indictments pending against Delaney.\textsuperscript{88} Further, the Committee chairman publicly accused Delaney of betraying his trust as a public officer.\textsuperscript{89} The resulting publicity was not limited to Boston, where Delaney was to be tried, but was nationwide, and included an article in \textit{Life} magazine about the investigation and testimony relating to Delaney.\textsuperscript{90} The House Committee was largely responsible for the widespread publicity which "blackened and discredited" Delaney's character, since the hearings were held after Delaney's indictment but before his trial.\textsuperscript{91}

The court of appeals found no error in the failure of the trial court to dismiss the indictments after widespread adverse publicity, but the court noted that the trial judge should have foreseen the impossibility of a fair trial being held in the foreseeable future.\textsuperscript{92} The judge decided correctly in granting two postponements, but it was held reversible error to deny a third, even though he was conscientious in questioning the jury about publicity and in cautioning them about exposing themselves

\begin{itemize}
\item \textsuperscript{84} LA. REV. STAT. § 15:293 (1950).
\item \textsuperscript{85} \textit{Rideau v. State}, 246 La. 451, 165 So. 2d 282 (1964).
\item \textsuperscript{86} 165 So. 2d at 284-85.
\item \textsuperscript{87} 199 F.2d 107 (1st Cir. 1952).
\item \textsuperscript{88} \textit{Id.} at 110.
\item \textsuperscript{89} \textit{Id.} at 111.
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.} at 112.
\end{itemize}
to press comment. The court reasoned that "[o]ne cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity."93

The court of appeals saw no precedent for the Delaney case, noting that Delaney was no ordinary instance of pretrial publicity in which the press, through its own initiative, published information adverse to a criminal defendant. Instead, a committee of the United States Congress had "caused and stimulated this massive pretrial publicity, on a nationwide scale."94 It made no difference that the publicity proceeded from the Congress rather than the Justice Department; the judicial abuse of discretion would have been just as great had a third continuance been denied in an atmosphere polluted by the release of information by the prosecution.95

The court distinguished Stroble v. California96 on the ground that the only information released by the prosecution to the press in Stroble was the defendant's confession, which was later admitted in evidence at the trial. In Stroble the press was responsible for initiating most of the adverse publicity, but in Delaney the adverse publicity was initiated by the government.97 The Court also noted that Stroble was a state prosecution, "concerned only with the rock-bottom requirements of the due process clause of the Fourteenth Amendment" and not with the supervisory powers of the federal appellate courts over federal criminal proceedings.98 The government imposed a burden on Delaney by making it difficult for him to receive a fair trial and, therefore, it was "neither right, nor in harmony with the spirit of the Sixth Amendment, for the government to try him while the damaging effect of all that

93. Id. at 112-13.
94. Id. at 113.
95. Id.
96. In Stroble the accused argued that due process required a new trial without a showing of actual prejudice. However, Justice Clark, speaking for the majority, observed that the accused did not seek a change of venue, that the publicity soon abated, that the defendant's confession became a matter of public record at the preliminary hearing, and that the accused did not show how publication of the confession influenced his trial when it was made public two months before the trial. There was no showing of actual prejudice. 343 U.S. 181, 192 (1952). See also People v. Stroble, 36 Cal. 2d 615, 226 P.2d 330 (1951).
97. 199 F. 2d 107, 113 (1st Cir. 1952).
98. Id.
hostile publicity may reasonably be thought not to have been erased from the public mind.”

The government, of course, may hold public investigations that might result in publicity injurious to a criminal defendant, but the consequence may be a postponement of a trial until the danger of bias “may reasonably be thought to have been substantially removed.” Further, the Delaney court held that it did not matter that the defendant failed to seek a change of venue, for the accused “is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed . . . .” In view of the nationwide publicity in Delaney, the failure to move for a transfer was forgiven. Nor was it fatal for the accused not to exhaust his peremptory challenges. In an atmosphere enveloped by publicity hostile to the defendant, there was “little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions . . . .” Although each juror said he was prepared to decide on the evidence alone, the court held that the judgment must be vacated in view of the pervasiveness and adverse nature of the government-produced publicity.

Despite Rideau and Delaney, the clear tendency is for appellate courts to sustain trial judges in their refusals to move or postpone cases where pretrial publicity exists. Changes of venue and continuances may not be effective in any event since the cause célèbre will attract press attention regardless of where or when the trial is conducted. The trials of Bruno Hauptmann, Sam Sheppard, Richard Speck, and Jack Ruby suggest that widespread publicity adverse to the accused is inevitable when the crime is horrendous or bizarre, or when the accused or his victim is a person of public standing. National network broadcasting and communications by the national press services make a change of venue a slender protection at best against prejudicial reporting. When a continuance is granted in the cause célèbre, reporters may write fewer column inches but are unlikely to forget the date for which the trial has been rescheduled.

99. Id. at 114.
100. Id.
101. Id. at 116.
102. Id.
103. Id.
104. Id.
105. On change of venue and continuance see Austin, Prejudice and Change of Venue, 68 Dick. L. Rev. 401 (1964); Bailey and Golding, Remedies for Prejudicial Pub-
While it is true that in many cases the effectiveness of a change of venue or continuance might be undermined by the pervasiveness of the modern mass media, it is well to keep in mind Telford Taylor's observation that in many cases publicity may be localized yet sufficient to arouse considerable community interest or excitement. Even brutal crimes may not be unusual enough to attract press comment outside a restricted locale. A qualitative examination of the cases suggests that there is much truth in Taylor's observation. Typically, these cases suggest that a change of venue might be an effective remedy against community prejudice when the original forum is in a rural area or a small town.

State v. BeBee was representative of this type case. BeBee was convicted of first degree murder in San Pete County, Utah. The Utah Supreme Court observed that BeBee was said to be about 100 years old and that he "wears long braids and dresses in a style sufficiently different from that of the ordinary man as to attract the attention of the casual passer-by." The victim of the homicide was well known in San Pete County, consequently the newspaper publicity was adverse to BeBee. One newspaper headline read: "Eyewitness Saw Lon Larsen Shot and Killed By A Man Identified By The Sheriff As Hiram BeBee. Why Wait?" The Utah court found no error in the trial court's

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107. It is, of course, difficult to verify Taylor's hypothesis on the basis of court reports alone. Yet the facts given in the following cases provide some support for the inference that prejudice may have been great because of the rural or small town jurisdictions in which the cases were tried. Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966); People v. McKay, 37 Cal. 2d 792, 236 P.2d 145 (1951); People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914); Johnson v. State, 112 Fla. 189, 150 So. 278 (1933); Hickock v. Hand, 190 Kan. 224, 373 P.2d 206 (1962); Veney v. State, 251 Md. 182, 246 A.2d 568 (1968); Jones v. State, 185 Md. 481, 45 A.2d 350 (1946); People v. Mleczko, 193 Misc. 253, 83 N.Y.S.2d 821 (1948); State v. Sisson, 58 R.I. 200, 192 A. 209 (1937); Allen v. State, 169 Tex. Crim. 318, 333 S.W.2d 855 (1960); Williams v. State, 162 Tex. Crim. 202, 283 S.W.2d 239 (1955); State v. BeBee, 110 Utah 484, 175 P.2d 478 (1946).


109. 175 P.2d at 479.

110. 175 P.2d at 480.
refusal to grant a change of venue, but indicated that a transfer would have been a wise course for the trial court to follow.\textsuperscript{111}

\textit{Dismissal of an Indictment or Information}

The significance of \textit{Rideau} and \textit{Delaney} is the proposition that in some cases prejudice may be so obvious that there need be no showing of actual bias, and prejudice will be presumed. If there are occasions when bias may be presumed as a result of the publicity involved, it follows that in extreme cases the publicity could be so prejudicial and widespread that the only effective judicial remedy would be the dismissal of the indictment or information against the accused. Indeed, one court of appeals judge has made the off-the-bench suggestion that the best remedy in highly publicized cases is to dismiss the charges against the defendant.\textsuperscript{112} No appellate court, however, seems to have followed this express line of reasoning.\textsuperscript{113}

Another argument advanced for dismissal of an indictment or information is that a change of venue, even if effective in overcoming community prejudice, would deny the accused his right to a trial in the county or district in which the crime was committed, and that a continuance would deny him his right to a speedy trial.\textsuperscript{114} Appellate courts have met this argument by requiring the accused to make a choice when constitutional rights are in conflict.\textsuperscript{115}

In addition, it has been argued that dismissal of the charges is an effective way to control governmental release of information adverse to the accused.\textsuperscript{116} If criminal cases are dismissed when officials release information adverse to the accused, proponents say, then prosecutors will exercise greater care in preventing the release of such information to the press. The judicial response is that court interference with the duty of government officials to investigate and prosecute crime and to make public any material deemed in the public interest "could be an unwar-

\begin{itemize}
\item \textsuperscript{111} 175 P.2d at 482.
\item \textsuperscript{112} Wright, \textit{Fair Trial-Free Press}, 38 F.R.D. 435 (1965).
\item \textsuperscript{113} Trial courts, however, on occasion have dismissed indictments or informations. For instance, Judge Gordon for the Eastern District of Wisconsin dismissed federal indictments against ten defendants accused of destroying Selective Service records. Judge Gordon said that only one of the 142 prospective jurors had not heard of the case. N.Y. Times, June 12, 1969, at 9, col. 1.
\item \textsuperscript{114} State \textit{ex rel. Schulter v. Roraff}, 39 Wis. 2d 342, 159 N.W.2d 25, 30-31 (1968).
\item \textsuperscript{115} State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810 (1966).
\item \textsuperscript{116} State \textit{ex rel. Schulter v. Roraff}, 39 Wis. 2d 342, 159 N.W.2d 25, 31 (1968).
\end{itemize}
ranted interference with the balance of power.” Further, courts have interpreted Delaney (which dealt with government-inspired publicity) as not containing the suggestion that dismissal is the proper remedy in cases where the government is responsible for the publicity. Most courts and judges agree with this interpretation.

LEGAL REMEDIES FOR TRIAL COMMENT AND COVERAGE

Remedies for Jury Exposure to Trial Publicity

However prejudicial pretrial publicity may be to the criminal defendant, there exist judicial remedies to neutralize it. The voir dire can be used to screen potential jurors so that few who serve are biased against the accused. If the voir dire indicates a fair jury cannot be obtained, a change of venue or continuance may be effective in protecting the defendant against community prejudice aroused by pretrial publicity. But the gravity of the evil may be greater when prejudicial publicity occurs during a trial, for the accused may no longer resort to pretrial protective procedure. When press publicity reaches jurors during a trial, the accused may move for a mistrial on the ground that juror exposure to extrajudicial materials makes a fair trial impossible. Of course, sequestration of the jury in criminal cases reduces the possibility that press comment will reach jurors, but locking up the jury is both an inconvenient and expensive undertaking. Moreover, press comment has been known to reach even sequestered juries.

117. State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 818 (1966).
118. 142 N.W.2d at 817.
120. Indeed, there is some indication that courts take trial publicity more seriously than pretrial publicity, for then the opportunity to utilize pretrial protective remedies is gone. See, e.g., Allen v. United States, 4 F.2d 688 (7th Cir. 1924), a case involving the trial of 75 defendants for violation of the National Prohibition Law. The court observed that most of the publicity appeared before the jurors were drawn, but that it would have been a different situation had sensational articles appeared after the selection process. See also Basiliko v. State, 212 Md. 248, 129 A.2d 375 (1957).
121. See, e.g., Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1958).
Many of the rules applicable in cases of jury exposure to trial publicity are similar to those rules applicable to cases of pretrial publicity. For example, the mere possibility that news comment reached a juror is not sufficient to warrant a mistrial. The accused, as in the voir dire cases, has the burden of showing that members of the jury have become biased against him as the result of such comment. Actual bias must be shown, not presumed. Courts will not presume that jurors read newspaper accounts of a trial or are exposed to trial accounts by the electronic media just because there is the opportunity for such exposure.\(^{122}\) Even when prejudicial news articles have been found in the jury room, itself, courts have not automatically assumed that members of the jury have read the articles.\(^{123}\) Moreover, even if jurors are exposed to press-comment, the mere fact of this exposure may not be enough to secure a mistrial.\(^{124}\) The trial judge may interrogate the jurors to determine if

\(^{122}\) See, e.g., United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); Aiuppa v. United States, 393 F.2d 597 (10th Cir. 1968); Cardarella v. United States, 375 F.2d 222 (8th Cir. 1967); Massicot v. United States, 254 F.2d 58 (5th Cir. 1958); Ferrari v. United States, 244 F.2d 132 (9th Cir. 1957); Smith v. United States, 236 F.2d 260 (8th Cir. 1956); Cohen v. United States, 201 F.2d 386 (9th Cir. 1953); Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); United States v. Weber, 197 F.2d 237 (2d Cir. 1952); United States v. Griffin, 176 F.2d 727 (3d Cir. 1949); United States v. Keegan, 141 F.2d 248 (2d Cir. 1944); rev'd on other grounds, 325 U.S. 478 (1945); Welch v. United States, 135 F.2d 465 (D.C. Cir. 1943); Stewart v. United States, 300 F. 769 (8th Cir. 1924); McHenry v. United States, 276 F. 761 (D.C. Cir. 1921); People v. Lessard, 58 Cal. 2d 447, 375 P.2d 46 (1962); People v. Moore, 209 Cal. App. 2d 345, 26 Cal. Rptr. 36 (1962); People v. Sando, 43 Cal. 2d 319, 273 P.2d 249 (1954); People v. Marino, 95 Ill. App. 2d 369, 238 N.E.2d 245 (1968); Harris v. State, 249 Ind. 681, 231 N.E.2d 800 (1967); Wilson v. State, 247 Ind. 454, 217 N.E.2d 152 (1966); State v. Sefcheck, 261 Iowa 1159, 157 N.W.2d 128 (1968); State v. Eldridge, 197 Kan. 694, 421 P.2d 170 (1966); State v. Hume, 146 Me. 129, 78 A.2d 496 (1951); State v. Losieau, 174 Neb. 320, 117 N.W.2d 775 (1962); People v. Lynch, 23 N.Y.2d 262, 244 N.E.2d 29 (1968); People v. Agron, 10 N.Y.2d 130, 176 N.E.2d 556 (1961); Glasgow v. State, 370 P.2d 935 (Okla. Crim. 1962); State v. Elkins, 248 Ore. 322, 432 P.2d 794 (1967); Swain v. State, 219 Tenn. 145, 407 S.W.2d 452 (1966); O'Brien v. State, 205 Tenn. 405, 326 S.W.2d 759 (1959); Johnson v. State, 421 S.W.2d 114 (Tex. Crim. 1967); Banner v. State, 154 Tex. Crim. 153, 225 S.W.2d 975 (1950); State v. Harris, 62 Wash. 2d 858, 385 P.2d 18 (1963); Commodore v. State, 33 Wis. 2d 373, 147 N.W.2d 283 (1967); State v. Stevens, 26 Wis. 2d 451, 132 N.W.2d 502 (1963).


\(^{124}\) See, e.g., Hall v. United States, 396 F.2d 428 (10th Cir. 1968); United States v. Smith, 393 F.2d 687 (6th Cir. 1968); Malone v. Crouse, 380 F.2d 741 (10th Cir. 1967); United States v. Kelly, 349 F.2d 720 (2d Cir. 1965); United States v. Kahaner, 317 F.2d 459 (2d Cir. 1963); United States v. Gibas, 300 F.2d 836 (7th Cir. 1962); United States v. Carlucci, 288 F.2d 691 (3d Cir. 1961); Bullock v. United States, 265 F.2d 683 (6th Cir. 1959); Dillon v. United States, 218 F.2d 97 (8th Cir. 1955); Rowley v. United States, 185
the exposure has influenced them, and the judge has wide discretion in determining whether the jurors are impartial.\textsuperscript{125} Even if a tentative opinion is formed as a result of exposure there may not be a valid ground for a mistrial.\textsuperscript{126}

There may, of course, be exposure to news articles not inherently prejudicial. The chances for a mistrial are slight when the news reporting does not arouse passion, is not inflammatory, is a factual account of the trial proceedings, relates information already a part of the jury's knowledge, or is routine.\textsuperscript{127}

Even if the jury is exposed to prejudicial information, the accused may fail to obtain a mistrial if he does not call the judge's attention to the exposure before the trial is over. The accused cannot wait until an adverse verdict has been rendered and then move for a mistrial on the ground that prejudicial publicity influenced the verdict.\textsuperscript{128} Some courts have held that exposure to extrajudicial information could not prejudice the accused because the evidence in the case was not close and evidence of guilt was overwhelming.\textsuperscript{129} In cases of possible or actual juror expo-

\begin{itemize}
\item F.2d 523 (8th Cir. 1950); Reining v. United States, 167 F.2d 363 (5th Cir. 1948); United States v. Carruthers, 152 F.2d 512 (7th Cir. 1945); United States v. Hirsch, 74 F.2d 215 (2d Cir. 1934); Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926); United States v. Wilshire Oil Co., 282 F. Supp. 902 (D. Kan. 1968); People v. Malmenato, 14 Ill. 2d 52, 150 N.E.2d 806 (1958); People v. Genovese, 10 N.Y.2d 478, 180 N.E.2d 419 (1962); Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959); Oseman v. State, 32 Wis. 2d 523, 145 N.W.2d 766 (1966).
\item See, e.g., Rowley v. United States, 185 F.2d 523 (8th Cir. 1950).
\item See, e.g., United States v. Kelly, 349 F.2d 720 (2d Cir. 1965).
\item See, e.g., United States v. Barnes, 383 F.2d 287 (6th Cir. 1967); United States v.
sure to extrajudicial news comment of a prejudicial nature, there is a strong presumption that cautionary instructions are adequate to overcome the possibility of any prejudice to the accused.130 The assumption is that jurors are true to their oaths and follow the trial judge's cautionary instructions not to expose themselves to news comment and not to be influenced by press comment if they are exposed.

Despite the difficulties of securing a mistrial because of juror exposure to trial publicity, there are occasions when juror exposure to publicity so pollutes a trial as to render it unfair. The Supreme Court, in Mattox v. United States,131 held that a verdict should be set aside when it was shown that a prejudicial newspaper article was read to the jury during its deliberations. In Griffin v. United States,132 in 1924, the Court of Appeals for the Third Circuit reversed a conviction in which the jury had been exposed to press accounts quoting the prosecutor as saying that the defendants wanted to enter into a negotiated guilty plea, but that the prosecution had declined to make such a deal. The Court of Appeals for the Sixth Circuit in 1953 reversed the conviction of a defendant whose request to have the jury interrogated about a prejudicial article appearing during the trial was denied by the trial judge.133

The first federal case to give some solid basis to the possibility that prejudice might be presumed in some circumstances was Briggs v. United States,134 decided in 1955. Although there was no direct evidence that any juror had read the extrajudicial publications, the court thought it

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130. See, e.g., Hillard v. Arizona, 362 F.2d 908 (9th Cir. 1966); Adjmi v. United States, 346 F.2d 654 (5th Cir. 1965); United States v. Lombardozzi, 335 F.2d 414 (2d Cir. 1964); Cohen v. United States, 297 F.2d 760 (9th Cir. 1962); United States v. Postma, 242 F.2d 488 (2d Cir. 1964); United States v. Howell, 240 F.2d 149 (3d Cir. 1956); United States v. Leviton, 193 F.2d 848 (2d Cir. 1952); United States v. Pisano, 193 F.2d 355 (7th Cir. 1951); King v. United States, 25 F.2d 242 (6th Cir. 1928); Halko v. Anderson, 344 F. Supp. 702 (D. Del. 1965); People v. McKee, 265 Cal. App. 2d 53, 71 Cal. Rptr. 26 (1968); People v. Canard, 257 Cal. App. 2d 444, 65 Cal. Rptr. 15 (1968); People v. Blackwell, 257 Cal. App. 2d 313, 64 Cal. Rptr. 642 (1967); Hammons v. People, 153 Colo. 193, 385 P.2d 592 (1963); People v. Hagel, 32 Ill. 2d 413, 206 N.E.2d 413 (1965); Pacheco v. State, 82 Nev. 172, 414 P.2d 100 (1966).
131. 146 U.S. 140 (1892).
132. 295 F. 437 (3d Cir. 1924).
133. Marson v. United States, 203 F.2d 904 (6th Cir. 1953).
134. 221 F.2d 636 (6th Cir. 1955).
“obvious that one or more of the jurors probably did.” Had the trial court interrogated the jury, more prejudice might have resulted. An accused has a right to be tried on the evidence offered in open court. The court held that “[u]nder the circumstances there was a rebuttable presumption that the rights of the appellant were prejudiced.”

Briggs was followed by *Carter v. United States,* in 1956, which held that it was error for the trial court to allow jurors to separate during a capital case without admonishing them not to communicate with others about the case and not to expose themselves to news accounts of the case. In 1957, the Court of Appeals for the Fifth Circuit reversed a conviction where prejudicial trial publicity was caused by action of the government attorney. The court reversed the conviction even though the jurors said they were not exposed to any of the publicity.

The leading federal case involving jury exposure to press comment during a trial, *Marshall v. United States,* was decided by the Supreme Court in 1959. While Marshall was being tried for the violation of a federal drug law, newspaper articles were published stating that the accused had a prior criminal record and had practiced medicine with only a $25 mail-order diploma for a degree. The trial judge had previously ruled that this information could not be introduced in evidence. Seven jurors read either one or both of the newspaper articles, but all said they would not be influenced by their exposure to the extrajudicial information and could decide the case on the courtroom evidence alone. Nonetheless, the Court invoked its supervisory powers over the federal criminal judicial process to reverse the conviction. The per curiam opinion noted that each judge has broad discretion in passing upon mistrial motions. The Court felt that “[g]eneralizations beyond that statement are not profitable, because each case must turn on its special facts.” In *Marshall,* the jury was exposed to evidence that had been ruled inadmissible. The defendant would be no less prejudiced, the Court said, if such inadmissible evidence were made part of the prosecutor’s case. The Court opined that the impact of such information

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135. Id. at 639.
136. Id.
137. Id.
138. 252 F.2d 608 (D.C. Cir. 1956).
139. Henslee v. United States, 246 F.2d 190 (5th Cir. 1957)
140. 360 U.S. 310 (1959).
141. Id. at 312.
142. Id.
143. Id.
"may indeed be greater for it is then not tempered by protective procedures." 144

United States v. Accardo 145 was a significant application of Marshall. During the selection of the jury, press comment asserted that Accardo had connections with organized crime and referred to the accused as "Chicago's jet-age Capone." During the trial, newspaper articles recounted the murder of the father of a prosecution witness, the father having testified before the grand jury which indicted Accardo. 146 The Court of Appeals for the Seventh Circuit reversed the conviction on the ground that the trial judge did not take adequate precautions to protect the accused from the adverse publicity. Both before and after the jury selection, the trial judge instructed the jury to avoid publicity concerning the case. This was held inadequate, since the sensational publicity accorded Accardo was available to the jurors as they separated nightly. There was no guarantee that "jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity." 147 The judge should have conducted individual interviews with each juror outside the presence of the others to determine what effect, if any, the publicity had on them. 148 The press comment could not have been introduced in evidence without prejudicing the accused. Its "effect would be at least as great if it reached the jury through news accounts." 149

Not only has Marshall been applied since 1959 to reverse federal convictions in which there was trial publicity, 150 but state courts, both before and since Marshall, have reversed convictions on the ground that it was error to deny mistrials to defendants whose trials received news coverage. Cases preceding Marshall had reversed convictions when a newspaper article stated that two jurors would try to obtain a hung jury, 151 when a juror's wife read a prejudicial newspaper article to him, 152 when jurors read newspaper accounts that exceeded a mere sum-

144. Id. at 313.
145. 298 F.2d 133 (7th Cir. 1962).
146. Id. at 135-36.
147. Id. at 136.
148. Id.
149. Id.
150. See Mares v. United States, 383 F.2d 805 (10th Cir. 1967); Paschal v. United States, 306 F.2d 398 (5th Cir. 1962); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962); Coopedge v. United States, 272 F.2d 504 (D.C. Cir. 1959).
152. People v. Wong Loung, 159 Cal. 520, 114 P.2d 829 (1911).
mary of the proceedings, when jurors read a newspaper article containing inadmissible evidence, when jurors were exposed to an article indicating the judge believed the accused guilty, and when the court failed to inquire whether a prejudicial newspaper article influenced the jury. Cases subsequent to Marshall have found reversible error when jurors were exposed to extrajudicial information on the credibility of witnesses, when a press article reported the judge’s order that the defendant’s past criminal record not be reported and the judge refused to interrogate the jurors on whether they had seen or been influenced by the article, when information reached the jury that was not admitted in court, and when the jury was exposed to reports that the defendant was also charged with the commission of three unrelated murders. While it is still a sound generalization that appellate courts are unlikely to disturb the discretion of a trial judge in passing on a motion for a mistrial, appellate courts, both before and since Marshall, have realized that jury exposure to trial publicity may render a criminal jury trial unfair.

Remedies for Prejudicial Trial Atmosphere

Prejudice may infect a criminal case during the trial as the result of press publicity, but trial prejudice is not limited to jury exposure to press comment. A criminal case may attract so much attention that the courtroom atmosphere itself is one of prejudice. In the words of Justice Holmes, “Any judge who has sat with juries knows, that in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.”

Indeed, one of the assignments of error in the appeal of the Bruno Hauptmann conviction was that the circumstances under which the trial was conducted were prejudicial to the accused, although the New Jersey Supreme Court found that the trial judge took steps to maintain order and that there was no chaos or prejudicial atmosphere.

153. State v. Caine, 134 Iowa 147, 111 N.W. 443 (1907).
The press was accommodated, for the public was “entitled to reports of the daily happenings, and it was quite proper for the trial judge to afford reasonable facilities for sending such reports.”

As early as 1917 the Illinois Supreme Court had observed that it was possibly prejudicial to the accused, and certainly not in keeping with judicial dignity, to stop a trial to allow newsmen and movie cameramen to take pictures of the trial participants. Similarly, the Supreme Court of Maryland, in 1927, supported a trial judge’s order prohibiting courtroom photography and upheld the contempt citation of a photographer for violating the rule. The court felt the order was instrumental in preserving courtroom dignity and decorum and was necessary to protect the accused “from an unnecessary and perhaps objectionable degree of publicity.”

An Illinois court, in 1941, reasoning that photographing a criminal defendant and the jury during the trial might cause jurors to attach more importance to the case than it deserved, reversed the conviction partly because of the conduct of the trial.

In 1965, in *Estes v. Texas*, the Supreme Court cast doubt on the legality of any kind of courtroom broadcasting or photography. The trial judge allowed photographers and television cameramen to cover a pretrial hearing on the issue of whether the trial itself should be broadcast and televised. After ruling that trial coverage by the electronic media would be permitted as long as the cameramen were not inside the bar, the judge set October 22, 1962, as the trial date. Later, the trial judge modified his ruling to prohibit live coverage of interrogation of the veniremen on *voir dire*, and live coverage of the witnesses. He said that only four television cameras could be installed and that they were not to be equipped for sound. The only news photographers to be permitted were from the two major wire services and from the local press, with films and photographs to be supplied to other media representatives through a pooling arrangement.

Before the October 22 trial, one television station built, with the court’s permission, a booth in the rear of the courtroom, with an opening

163. 180 A. at 827.
166. People v. Ulrich, 376 Ill. 461, 34 N.E.2d 393 (1941).
167. 381 U.S. 532 (1965). At the time of *Estes*, the only jurisdictions to allow courtroom television were Texas, Colorado, and possibly Oklahoma. See the discussion in Chief Justice Warren’s concurring opinion. 381 U.S. at 580-81, 580-83 nn.38-41.
ADVERSE PRESS COVERAGE for the four television cameras. The cameras were equipped to record both film and sound and were clearly visible despite an attempt to disguise the booth by painting it nearly the same color as the courtroom. The first day’s proceedings were not broadcast or televised live, but both television sound film and radio tapes were made for later showings and broadcasts. The next day the trial judge again modified his ruling and prohibited any sound recordings until after all the evidence was introduced. Not until November 7, when the trial judge permitted live coverage of the prosecutor’s arguments to the jury and the return of the verdict, was there any live television or radio coverage. The defense attorney objected to the photographing of the defense’s argument and summation to the jury. However, while defense counsel was speaking, cameras photographed the judge, and the defense argument was monitored with sound equipment and relayed to the television audience by an announcer. 168

The Supreme Court was unable to agree whether televising trials was prejudicial per se, but did agree that Estes' conviction lacked due process. Delivering the opinion of the Court in a five to four decision, Justice Clark noted that in most cases involving due process claims there is a requirement to show “identifiable prejudice to the accused.” 169 However, in some cases procedures may be employed which involve “such a probability that prejudice will result that it is deemed inherently lacking in due process.” 170 In Rideau v. Louisiana, for example, there was no showing of actual prejudice but a presumption that the trial was unfair. 171 The Court opined that it may not be possible to point to a “specific mischief and prove with particularity wherein he (the accused) was prejudiced;” however, television, “by its very nature, reaches into a variety of areas in which it may cause prejudice to the accused.” 172 In Rideau and other cases the circumstances were “inherently bad and prejudice to the accused was presumed.” 173 Such was the case in the televising of the Estes trial.

Although the jury was sequestered in Estes, this did not mean that prejudice was prevented. The televising of a trial makes it a cause célèbre. The interest of the community is awakened, and the “trial

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168. 381 U.S. at 556-57.
169. Id. at 542.
170. Id. at 542-43.
171. Id. at 543-44.
172. Id. at 544.
173. Id.
immediately assumes an important status in the public press and the ac-
cused is highly publicized along with the offense with which he is
charged. Every juror carries with him into the jury box these solemn
facts and thus increases the chance of prejudice that is present in every
criminal case." \textsuperscript{174} In addition, telecasting a trial could distract the jury,
even if the physical presence of the camera is unobtrusive, for the juror’s
mind might well stray.\textsuperscript{175}

Error might result in the testimony of witnesses who know that their
testimony is being recorded for telecast.\textsuperscript{176} The trial judge might also
be impeded in his duty of ensuring the accused a fair trial because of
the distraction. The problem becomes even more serious when the judge
is an elected official, for the presence of cameras in the courtroom
“becomes a political weapon, which along with other distractions inher-
ent in broadcasting, diverts his attention from the task at hand—the fair
trial of the accused.” \textsuperscript{177}

Of course, television might also have an impact on the defendant
himself. Not only might it distract the accused from the proceedings,
but televised trials are a “form of mental—if not physical—harassment,
resembling a police line-up or the third degree.” \textsuperscript{178} Courtroom television
causes a “heightened public clamor” which “will inevitably result in
prejudice. Trial by television is, therefore, foreign to our system.” \textsuperscript{179}

Not only did these possibilities of error present themselves during the
Estes trial, but the several modifications of the trial judge’s orders re-
specting courtroom television “made the trial more confusing to the
jury, the participants and to the viewers.” \textsuperscript{180} The result of televised
coverage of this trial was to offer “a public presentation of only the
State’s side of the case.” \textsuperscript{181}

Chief Justice Warren, joined by Justices Douglas and Goldberg,
concurred. The Chief Justice observed “that our condemnation of tele-
vised criminal trials is not based on generalities or abstract fears. The
record in this case presents a vivid illustration of the inherent prejudice
of televised criminal trials and supports our conclusion that this is the

\textsuperscript{174} Id. at 545.
\textsuperscript{175} Id. at 546.
\textsuperscript{176} Id. at 547.
\textsuperscript{177} Id. at 548.
\textsuperscript{178} Id. at 549.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 551.
\textsuperscript{181} Id.
appropriate time to make a definitive appraisal of television in the courtroom." Courtroom television, the Chief Justice argued, violates due process because it diverts the attention of all trial participants away from the proceedings, presents a false image of the judicial process, and detracts from the dignity of courtroom proceedings, thereby influencing the reliability of trials. Further, it singles out the defendants who are subjected to trial under prejudicial conditions from others who do not experience such prejudice. For these reasons, actual prejudice need not be demonstrated. "The prejudice of television may be so subtle that it escapes the ordinary methods of proof, but it would gradually erode our fundamental conception of trial." Courtroom television "diverts the trial process from its proper purpose," and must not be allowed.

In a separate concurring opinion, Justice Harlan spoke in less sweeping terms. Justice Harlan noted that courtroom television "undeniably has mischievous potentialities," but he argued that to ban it "would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." He conceded, however, that in the cause célèbre courtroom television is so injurious that it cannot be allowed without denying the defendant due process. Noting that "the impact of television on a trial exciting wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another," and that closed circuit television might be used either to make a record of the case or for use in educational institutions, Justice Harlan made it clear that his vote with the majority was based only on the circumstances surrounding the highly publicized trial in question. Harlan said the resolution of issues involving courtroom television should await the adjudication of those issues. He added, "The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now."

Justice Stewart dissented, joined by Justices Black, Brennan, and White. There was no showing, he said, that any member of the jury was influenced by television coverage, and there was no proof that the

182. Id. at 552.
183. Id.
184. Id. at 587.
185. Id. at 590.
186. Id.
187. Id. at 591.
trial was conducted any differently with television coverage than it would have been had the electronic media been excluded.\(^{188}\)

Justice White also wrote a dissenting opinion, observing that the sweeping language in the Court’s opinion “in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials.”\(^{189}\) Judicial experience with courtroom television is not great enough to “justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case.”\(^{190}\) Justice Brennan observed that only four Justices agreed to the broad rule that “televised criminal trials are constitutionally infirm, whatever the circumstances.”\(^{191}\) Therefore, Justice Brennan concluded that “today’s decision is not a blanket constitutional prohibition against the televising of state criminal trials.”\(^{192}\)

**Preventive Legal Remedies Relating to Pretrial and Trial Publicity**

In a sense, all of the judicial remedies discussed above are ex post facto; that is, they can be used to detect already existing prejudice or to set aside a conviction, but they do not prevent bias from entering the criminal justice process. Thus, the *voir dire* can be used to screen out prospective jurors who appear to be already biased against the accused. When the setting for a criminal trial has become infected with bias or hostility toward the accused, the court may try to escape the prejudice by moving the trial to a new forum or by granting a continuance. When a juror has been exposed to prejudicial press comment during a trial (or when there is a strong probability that he has been exposed), the judge may avoid such prejudice by granting a mistrial. Similarly, when the conduct of the trial itself is disturbed by the press, the judge may grant a mistrial. But all of these remedies lack preventive qualities, for they are designed to deal with situations where either prejudice already exists or where there is a strong probability of prejudice. The ensuing discussion focuses on remedies which attempt to prevent the operation of factors which would bias jurors.

\(^{188}\) *Id.* at 613.

\(^{189}\) *Id.* at 616.

\(^{190}\) *Id.*

\(^{191}\) *Id.* at 617.

\(^{192}\) *Id.*
Exclusion of Newsman from the Courtroom

Considerable attention has been directed toward the American Bar Association's suggested preventive remedy that newsmen be excluded from the courtroom during both pretrial hearings and portions of the trial itself when the danger of prejudicial reporting is great.\textsuperscript{103} There is historical precedent for this approach in United States v. Holmes.\textsuperscript{104} In 1841 the American ship William Brown, with 65 passengers and a crew of 17, struck an iceberg. The captain left 31 passengers on the sinking ship while the crew and the remaining passengers found refuge on life boats. Later, 14 men and two women passengers were thrown overboard from the life boats, but all members of the crew remained.\textsuperscript{105} The resulting case was described as one "replete with incidents of deep romance, and of pathetic interest."\textsuperscript{106} Fearful of the results of widespread press attention which he expected to attend the opening of the trial, and unable to employ the contempt power as a result of an 1831 act of Congress,\textsuperscript{107} the trial judge decided to regulate the admission of persons attending the trial and thereby exclude the press. However, the judge agreed to admit the press on the condition that newsmen suspend the publication of any news until the trial was over.\textsuperscript{108}

Certainly, there are occasions when attendance at a trial may be restricted. Members of the general public who are young, or who show extraordinary interest in salacious testimony, may be excluded from trials involving public morals.\textsuperscript{109} The courtroom may be cleared of disorderly persons,\textsuperscript{200} and the court may restrict the number attending a trial to the number of seating spaces available.\textsuperscript{200} If a witness is embar-

\textsuperscript{193} Reardon Report 8-12 (1966).
\textsuperscript{194} 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842).
\textsuperscript{195} Id. at 360-62.
\textsuperscript{196} Id. at 316.
\textsuperscript{198} 26 F. Cas. 360, 363 (No. 15,383) (C.C.E.D. Pa. 1842).
\textsuperscript{199} See, e.g., State v. Johnson, 26 Idaho 609, 144 P. 784 (1914); Carter v. State, 99 Miss. 435, 54 So. 734 (1911).
\textsuperscript{200} See, e.g., United States v. Fay, 350 F.2d 967 (2d Cir. 1965).
\textsuperscript{201} See, e.g., State v. Salee, 308 Mo. 573, 274 S.W. 393 (1925). Cf. Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916), which reversed a murder conviction in part because a trial was transferred from the court to a theater.
rassed to speak before a public gathering, attendance at the trial may be restricted.\textsuperscript{202}

However, attempts to restrict press attendance at pretrial or trial proceedings may contravene the sixth amendment’s guarantee of a public trial. The authorities disagree as to how far the courts can go in restricting attendance at a trial and whether the public trial guarantee is for the benefit of the accused or of the public-at-large,\textsuperscript{203} but there is common agreement that members of the press should be permitted to attend trials even when other members of the general public are excluded.\textsuperscript{204} The case law does not seem to indicate whether the judge may temporarily exclude members of the press from a trial while he hears testimony in the absence of the jury to determine admissibility.

The public trial problem becomes more complex when consideration is given to barring the press from pretrial hearings on probable cause, bail, and the exclusion of evidence. Not only does the Reardon Report recommend that the press on occasion be excluded from such pretrial hearings,\textsuperscript{205} but statutes of six states make it mandatory for the magistrate, upon the request of the accused, to exclude the general public, including the press, from preliminary hearings.\textsuperscript{206} Only a few cases deal with the question, and two recent cases point in different directions.

In 1966, the Arizona Supreme Court issued a writ of prohibition against a trial judge who had ordered the press excluded from a pretrial


\textsuperscript{203} The majority of cases hold that a blanket exclusion of the general public from a criminal trial is a denial of a public trial and that no prejudice to the accused need be shown. See, e.g., United States v. Kobli, 172 F.2d 919 (3rd Cir. 1948); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); Davis v. United States, 247 F. 394 (8th Cir. 1917).

But in United Press Association v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954), it was held that the press and public at large possess no enforceable right to insist on a public trial. Cf. People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954). However, in E. W. Scripps Co. v. Furlon, 100 Ohio App. 157, 125 N.E.2d 896 (Cuyahoga County Ct. of Appeals 1955), it was held, though the case was moot, that the press has a remedy through the writ of prohibition to enforce its right to a public trial.


\textsuperscript{205} REARDON REPORT 8 (1966).

\textsuperscript{206} See ARIZ. R. CRIM. P. 27 (1968); CAL. PENAL CODE § 868 (1956); IDAHO CODE ANN. § 19-811 (1947); MONT. REV. CODES ANN. § 95-1202 (1968); NEV. REV. STAT. § 171.204 (1967); UTAH CODE ANN. § 77-15-13 (1953).
ADVERSE PRESS COVERAGE

habeas corpus hearing which reviewed the sufficiency of the evidence upon which the defendant had been bound over.207 The court, holding that the hearing was part of a public trial and that the action by the judge was a violation of the prohibition against prior restraint of the press, stated that the “accused, by request, may not foreclose the right of the people and the press from freely discussing and printing the proceedings held in open court.”208 Thus, the press exclusion order violated the freedom of the press provision of the Arizona Constitution.209 Contrary to the Arizona decision is *Azbill v. Fisher*,210 in which the Nevada Supreme Court upheld a statute211 allowing the defendant to request the removal of the press from the preliminary hearing and ruled that it was reversible error for the judge not to obey the legislative mandate. The *Azbill* case should be compared to a 1967 federal district court case holding that the defendant had no right to waive a public hearing on the suppression of evidence, even though potential jurors might be prejudiced by the resultant publicity;212 the court was careful to note that such a rule might not apply to actions other than the anti-trust prosecution involved.213

There is no certainty that legal authorization to close pretrial hearings or portions of trials to the press will result in judges doing so. Geis observes that many practitioners of criminal justice administration “are apparently totally unaware” of the statutory authority in six states which enables judges to close preliminary hearings.214 For all practical purposes the statutes have remained dead letters on the books.

In England, the magistrate at a probable cause hearing has the authority to close the examination, but, despite this authorization, the threat of press reporting prejudicial to the accused has been more likely to occur at the pretrial probable cause examination than at any other point in the process. Widespread press publicity, for instance, surrounded the probable cause hearing of Dr. John Bodkin Adams. At the hearing the press reported the testimony concerning the death of three of Dr.

209. 418 P.2d at 597.
210. 84 Nev. 414, 442 P.2d 916 (1968).
213. Id. at 795.
Adams' patients, but Dr. Adams was later tried for only one homicide.\textsuperscript{216} There is no evidence to suggest that American magistrates will avoid similar pressures to keep preliminary hearings open to the general public, even assuming they have the legal authority to close such hearings.\textsuperscript{216}

Although the Supreme Court has not dealt with the constitutionality of restricting press attendance at pretrial hearings and examinations, it has provided strong support for the proposition that courtrooms should remain open to the general public. \textit{In re Oliver,}\textsuperscript{217} decided in 1948, involved a contempt conviction arising out of an investigation by the Michigan one-man grand jury. The Michigan judge (also the one-man grand jury), in a proceeding from which the press and general public were excluded, had held Oliver in contempt on the grounds that he did not believe Oliver's testimony in view of other secret testimony that at least one previous witness had given.\textsuperscript{218} Stating that the legality of the one-man grand jury was not in question, Justice Black observed that the necessity for grand jury secrecy has "never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail."\textsuperscript{219} Although the judge conducting the grand jury investigation may be performing a judicial role, the due process clause applied once "the judge-grand jury suddenly [made] a witness before it a defendant in a contempt case."\textsuperscript{220} The Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."\textsuperscript{221}

\textbf{Judicial Contempt Power and Court Rules Prohibiting the Release of Information}

Although the judicial contempt power cannot undo the harm that may have been caused by adverse publicity to the criminal defendant, the threat of a contempt citation may serve to deter pretrial or trial press comment. However, the use of the contempt power against newsmen for pretrial or trial publicity may violate the first amendment's guaran-

\textsuperscript{215} Id. at 401-02.
\textsuperscript{216} Note, \textit{Controlling Prejudicial Publicity by the Contempt Power: The British Practice and Its Prospect in American Law}, 42 Notre Dame Law. 957, 963 (1967).
\textsuperscript{217} 333 U.S. 257 (1948).
\textsuperscript{218} Id. at 259-60. Cf. Levine v. United States, 362 U.S. 610 (1960).
\textsuperscript{219} Id. at 264.
\textsuperscript{220} Id. at 265.
\textsuperscript{221} Id. at 266.
ADVERSE PRESS COVERAGE

The Supreme Court has held that the use of the contempt power will not be sustained unless the questionable press comment presents a clear and present danger that can be averted only through the use of the power. This principle has been elucidated in *Bridges v. California*, where the Court overturned the contempt conviction of the petitioner, saying that the clear and present danger test contains the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Although the *Bridges* opinion did not rule out the possibility that a carefully drafted contempt statute might withstand constitutional scrutiny, the *Bridges* doctrine has been reaffirmed in subsequent decisions.

In *Pennekamp v. Florida*, the Court overturned the contempt conviction of both the Miami *Herald* and its associate editor after the publication of editorials critical of the judges of a state court. Justice Reed noted that *Bridges* sets "reasonably well-marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation." Although suggesting that there may be cases where the contempt power could be called upon to "protect the interests of prisoners and litigants... from unseemly efforts to pervert judicial action," the Court held that in borderline cases freedom of expression "should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." The Court adopted the standard that to sustain a contempt conviction on the ground that a clear and present danger is present, "a solidity of evidence should be required..."


222. 314 U.S. 252 (1941).
223. Id. at 263.
224. "[T]he legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance." Id. at 260-61 (Emphasis supplied).
225. 328 U.S. 331 (1946).
226. Id. at 334.
227. Id. at 347.
228. Id.
inal defendants, and the Court felt the effect of such comment on juries "is too remote for discussion." Since the press comment did not bear on evidence in the judicial proceeding, the Court found none of "the clearness and immediacy necessary to close the door of permissible public comment." Craig v. Harney reversed the contempt conviction of the petitioner who had been editorially critical of the trial judge's decision in a civil case. The Court again relied on the clear and present danger doctrine, finding no "imminent or serious threat to a judge of reasonable fortitude." The Court stated that the danger stemming from free comment "must not be remote or even probable; it must immediately imperil." The mere fact that the language was vehement did not make it punishable through the judicial contempt power. Justice Douglas noted that "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion." Bridges, Pennekamp, and Harney did not involve jury trials, and thus did not answer the question whether the judicial contempt power might reach similar press comment in criminal cases involving jury trials. In 1960, in Atlanta Newspapers, Inc. v. State, the Georgia Supreme Court reversed the contempt conviction of the petitioner for the publication of newspaper articles in the Atlanta Journal and Atlanta Constitution giving the past criminal record of a defendant described by the press as "'formerly Georgia's number one wanted man.'" The court recognized that there may be occasions when the contempt power can reach newspaper publications, but the newspaper corporation was not required to anticipate that the publication would reach the jurors and thereby interfere with the trial. The press "had a right to expect that the jury would have been kept together until the conclusion of the trial or otherwise properly instructed upon being permitted to disperse." The Supreme Court denied certiorari in Baltimore Radio Show, Inc.

229. Id. at 348.
230. Id. at 350.
231. 331 U.S. 367 (1947).
232. Id. at 375.
233. Id. at 376.
234. Id.
236. Id. at 405, 116 S.E.2d at 584. See also Worcester Telegram & Gazette, Inc. v. Commonwealth, 354 Mass. 578, 238 N.E.2d 861 (1968), and Shaw v. Commonwealth, 354 Mass. 583, 238 N.E.2d 876 (1968), where contempt convictions for the publication of inadmissible evidence were reversed.
v. State. 237 Several Baltimore radio stations had been convicted of contempt for broadcasts prejudicial to a defendant accused of first degree murder in the stabbing death of an eleven-year-old girl. The defendant waived his right to a jury trial on the ground that he could not get a fair trial because of the widespread adverse publicity. 238 Among other items, the broadcasts reported that the accused had confessed to the crime and had been charged with or suspected of past assaults. On appeal, the Maryland Supreme Court reversed the contempt conviction of the radio stations, citing Bridges, Pennekamp, and Harney as authority. 239 Although those cases did not involve jury trials, they did involve "publications calculated and designed to influence the court's decision." 240 The court felt it would not be sound to argue that the Supreme Court would view the circumstances differently in a situation involving juries. There was no evidence of prejudice as a result of the broadcasts, and the factors did not meet the standard that "requires more than an inherent or reasonable tendency to prejudice, or even a probability that it will do so." 241 Further, the court reasoned that the judiciary is not "immune to human influences calculated to affect the rest of mankind," and many jurors "by training and character are capable of the same firmness and impartiality as the judiciary." 242

The authority of judges to cite newsmen for contempt for publishing comments which threaten the right of an accused to a fair jury trial is uncertain at best. It seems unlikely that the Supreme Court will reverse Bridges, for as late as 1962 the Court invoked the clear and present danger test to reverse the contempt conviction of a sheriff candidate in Bibb County, Georgia, who publicly charged a judge with racial agitation during the election campaign. 243 The state judge had impaneled a grand jury and charged it to investigate both "'an inane and inexplicable pattern of Negro bloc voting'" and also "'rumors and accusations'" that candidates for public office had paid large sums of money to get the Negro vote. 244 The Court, in reversing the sheriff's contempt conviction, noted that the Georgia Court of Appeals gave lip service to the clear and present danger test but failed to cite or

238. Id. at 316, 67 A.2d at 504.
239. Id. at 323-26, 67 A.2d at 507-09.
240. Id. at 323, 67 A.2d at 508.
241. Id. at 331, 67 A.2d at 508-09.
242. Id. at 325, 67 A.2d at 511.
244. Id. at 376.
discuss *Bridges*, *Pennekamp*, or *Harney.*

Nor was there any indication how the publication of the sheriff's remarks interfered with either the grand jury or the general administration of justice. The Court declared that in the absence of a showing of "substantive evil actually designed to impede the court of justice," the petitioner's remarks are entitled to the protection of the first and fourteenth amendments.

If the federal courts were to abandon *Bridges* or to distinguish it and allow the exercise of the judicial contempt power in criminal cases involving jury trials, there is no guarantee that trial judges would be willing to use the contempt power to protect defendants from adverse press comment. When the constructive contempt power was constitutionally permissible, it was rarely used to protect a defendant, but rather to protect judges from critical publications; the contempt power was invoked most often in cases involving "scandalizing" the court. Nelles and King in their classic examination of the constructive contempt power between 1831 and 1928 found, out of 58 reported cases, only 15 in which the contempt power was exercised in cases involving jury trials, while 42 cases involved publications impugning the fairness, independence, or integrity of a judge or court. Most of the cases also involved heated political affairs and were civil rather than criminal in nature.

Judges work within a political environment, making it unlikely that they would be willing to use the contempt power against the media in most criminal cases. Moreover, the protection that a restored judicial power of constructive contempt would offer the criminal defendant would be marginal. The constructive contempt remedy is only exercised after a publication has been made, and the ex post facto exercise of such power is usually unable to undo what harm may already have been

245. Id. at 387.

246. Id. at 389.

247. Nelles and King, *Contempt by Publication in the United States*, 28 COLUM. L. Rev. 525, 548-49 (1928). A recent count of 21 reported cases since *Bridges* (excluding those which went to the United States Supreme Court) showed that state courts in 20 of these cases held the publication not to be contemptuous. Barist, *The First Amendment and Regulation of Prejudicial Publicity—An Analysis*, 36 FORDHAM L. REV. 425, 430 (1968).

248. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918), is perhaps the prototype of the kind of constructive contempt case most often decided by American courts. For a list of cases, see Nelles and King, supra note 247 at 554-62.
caused by the publication.\textsuperscript{249} This is a major weakness of the constructive contempt power under English law.\textsuperscript{250}

\textbf{Use of Court Rules Prohibiting Release of Information}

Although the use of the contempt power against newsmen may be of doubtful legality, courts seem to be on firmer ground when promulgating rules to govern the release of information by witnesses and counsel in criminal cases. The Reardon and other reports suggest that courts may exercise control over the extrajudicial statements of participants in criminal cases.\textsuperscript{251}

The New Jersey Supreme Court, in \textit{State v. Van Duyne}, announced that the Canons of Professional Ethics should be interpreted "to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests."\textsuperscript{252} The court also included statements by law enforcement personnel not members of the bar as "warrant[ing] discipline at the hands of the proper authorities."\textsuperscript{253} The New Jersey court applied the \textit{Van Duyne} principle in \textit{State v. Kavanaugh}\textsuperscript{254} by revoking the permission of defense attorney F. Lee Bailey to appear \textit{pro hac vice} for the accused as a result of extrajudicial statements Bailey had made in a pending criminal case, thus applying a punitive rather than a preventive measure.

There have been other isolated cases dealing with the promulgation of court rules designed to prevent prosecution and defense lawyers and


\textsuperscript{252} 43 N.J. 369, 204 A.2d 841, 852 (1964).

\textsuperscript{253} 204 A.2d at 852.

\textsuperscript{254} 52 N.J. 7, 243 A.2d 225 (1968).
others from releasing information to the news media. A trial court in Orlando, Florida, issued a court rule which provided that the news media should not report testimony or evidentiary features of a case unless such information has been introduced into evidence in the presence of the jury. The rule also prohibits the release of such information by the prosecution, defense, police, and other officials. Recently, a Los Angeles County trial court issued a preliminary injunction prohibiting officials from disclosing information to the press during the prearrangement phase of a criminal proceeding, but a California appellate court ruled that the trial court did not have the authority to issue such an injunction. The recent adoption of the Reardon Report by the American Bar Association may have paved the way for further developments in this area. 

Sheppard v. Maxwell

The preceding survey of the law on the fair trial-free press issue illustrates the gradual judicial adoption of new legal guidelines for cases involving possible prejudice as the result of press coverage. As the law has developed, the requirement of demonstrating actual prejudice to the accused has been replaced with the standard that some news coverage and courtroom procedures are inherently prejudicial and bias may be presumed. Sheppard v. Maxwell is the culmination of this trend.

Sam Sheppard's case was one of the most famous causes célébres in the history of trials. "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals," the Ohio Supreme Court observed in upholding Dr. Sheppard's conviction. Dr. Sheppard's pregnant wife, Marilyn, had been discovered bludgeoned to death July 4, 1954, in the couple's fashionable suburban

256. Id.
258. The Reardon Report standards, as they relate to lawyers, were incorporated into the new A.B.A. Code of Professional Responsibility, adopted August 12, 1969, by the House of Delegates to become effective for A.B.A. members January 1, 1970. See DR 7-107 of the Code.
home. Suspicion centered about Sheppard from the first. He was arrested July 30, 1954, indicted August 17, and convicted of murder in December of that same year.

From the day of the murder until Sheppard was convicted, press coverage of the crime was massive and largely adverse to Sheppard. Newspaper articles published in three Cleveland newspapers during this time filled five volumes. Even before Sheppard’s arrest, one newspaper editorial proclaimed, “Why Isn’t Sam Sheppard in Jail?” A separate editorial said Sheppard had been “prove[n] under oath to be a liar.” Another said Sheppard should “have been subjected instantly to the same third-degree to which any person under similar circumstances is subjected.”

Jurors were exposed to both pretrial and trial publicity. On the voir dire every juror except one testified to having read newspaper accounts of the case or listened to broadcasts about it. During the voir dire one newspaper story was headlined, “But Who Will Speak For Marilyn?” Cleveland newspapers printed verbatim accounts of the trial proceedings, including objections raised by counsel and rulings by the judge, and seven of the 12 jurors received at least one Cleveland newspaper in their homes. The day before the verdict was announced, jurors were divided into two groups to pose for photographers. Even when the jurors were sequestered for five days and four nights during their deliberations, they were permitted to make telephone calls from the bailiff’s rooms.

Despite the extensive publicity, on only one occasion during the trial were jurors asked whether they were exposed to and influenced by media comment. Walter Winchell made a broadcast in which he claimed that a woman under arrest in New York City for robbery had said that she was a former mistress to Sheppard and had given birth to his child. Two jurors admitted in open court that they had heard the broadcast, but said it would not influence them. The trial judge denied a

261. 384 U.S. at 342. The facts in Sheppard as presented here are all drawn from the Supreme Court opinion. For an excellent survey of the publicity involved in the case see Sheppard v. Maxwell, 346 F.2d 707, 756-67 (6th Cir. 1965). See also the journalistic account by P. Holmes, The Sheppard Murder Case (1961).
262. 384 U.S. at 341.
263. Id. at 339.
264. Id. at 345.
265. Id. at 344-45.
266. Id. at 345.
267. Id. at 349.
motion for a mistrial, saying he did not know how such an incident could have been prevented. 268

The conduct of the trial was also a major element in the case. A special table to accommodate 20 newsmen was placed inside the bar during the trial, with one end of the table less than three feet from the jury box. The first three rows of benches behind the bar were also reserved for newsmen. Telegraphic equipment and private telephone lines were installed in rooms off the courtroom so that it would be more convenient for newsmen to report their stories. One broadcasting station was permitted to establish broadcasting facilities in a room next to the one where the jury was housed during recesses and where it conducted its deliberations. From this room newsmen made broadcasts throughout the trial, including the period of jury deliberations. 269

Photography was not allowed when the court was in session, but newsmen were allowed to photograph in the courtroom during recesses. In addition, motion picture cameras occasionally recorded the participants in the trial as they entered and left the courthouse. One television broadcast featured an interview with the trial judge. The corridors outside the courtroom were crowded with newsmen who took still and moving pictures of trial participants, including veniremen during the selection of the jury. Sheppard himself was the subject of much photography, and was surrounded by newsmen when he was brought to the courtroom about ten minutes before each session began. 270

During the nine-week trial the movement of reporters in and out of the courtroom created so much noise that at times it was difficult to hear witnesses or counsel, even though a loudspeaker system had been installed. Sheppard and his lawyer were often unable to engage in confidential conversations because of the presence of newsmen within the bar. When the attorneys wished to raise a point outside of the jury’s hearing, it was necessary to go to the judge’s chambers. So many newsmen crowded inside the judge’s anteroom that it was often difficult for the judge and counsel to return to the courtroom. Frequently, newsmen would publish accounts of discussions between the judge and counsel held in chambers. Since jurors were not sequestered, these discussions made in the absence of the jury nonetheless became available to the jurors. 271

268. Id. at 348, 357.
269. Id. at 343.
270. Id. at 344.
271. Id.
Among the 37 assignments of error raised on appeal to the Cuyahoga County Court of Appeals, one urged that it was reversible error for the trial court to deny a change of venue to the accused, another that it was prejudicial error to deny a continuance, and a third that the publicity denied Sheppard a fair trial. The court of appeals cited the rule that mere publicity does not indicate prejudice in the absence of any showing that jurors were in fact influenced by publicity, and held that there was no ground for a mistrial when no actual jury misconduct was shown.

To the Ohio Supreme Court, the trial was a “Roman holiday,” but it nonetheless affirmed the conviction. The court held that it was within the sound discretion of the trial court to refuse each of the eight motions for a change of venue. However, Judge Taft, joined by Judge Hart, dissented on the ground that there was error in the court’s charge to the jury and in the admission of hearsay evidence. The dissent also pointed out that a second trial could be conducted in less of a “Roman holiday” atmosphere, since much of the suspense present in the first trial would be lacking in a second.

Ten years after his conviction Sheppard won a writ of habeas corpus. Chief Judge Weinman observed that even though only 14 of the 72 veniremen said they had prejudged the case, “the publicity was so prejudicial . . . that the assurances of the jurors must be disregarded.” The Supreme Court in Rideau v. Louisiana, Weinman commented, did not examine the jurors’ voir dire. The prejudicial effect of the publicity “was so manifest that no jury could have been seated . . . in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge.” The trial publicity was as prejudicial as the pretrial publicity, Weinman noted, so much so “that no admonition or charge of the court could vitiate the effect of that publicity.” Not only were the jurors not questioned about exposure to the trial publicity, but the court-

273. 128 N.E.2d at 480-82.
275. 135 N.E.2d at 343.
276. 135 N.E.2d at 352-53.
278. Id. at 59.
281. Id. at 63.
room atmosphere itself was prejudicial because so many newsmen were accommodated. Segments of the press were hostile to the accused, and the practice of running photographs of jurors and the judge was a conscious attempt on the part of the press to create a climate favorable to the prosecution.282

The Court of Appeals for the Sixth Circuit, however, reversed.283 Judge O'Sullivan, speaking for the court, said that the accused must demonstrate the constitutional vice in his conviction.284 An independent evaluation of the voir dire, as required by Irvin v. Dowd,285 suggested to the court that no prejudice resulted. Rideau and Irvin were distinguished: Unlike Sheppard there was publication of the defendants' confessions in Rideau and Irvin. In Irvin eight of the 12 jurors had expressed opinions regarding the guilt or innocence of the accused, but in Sheppard's trial the 12 jurors all said they were free of preconceptions.286 Neither were Marshall v. United States287 and Delaney v. United States288 in point, for those holdings rested on the supervisory powers over federal law enforcement and, in the case of Delaney, on the fact that the government itself was responsible for the greater part of the publicity.289

The court of appeals also found that the publicity would not create lasting opinions, and that no direct evidence that the jurors were biased had been introduced.290 The jury had been warned frequently about exposure to trial press comment, and it was presumed that the jurors obeyed the instructions given them and were faithful to their oaths to be impartial. To question jurors more often about the trial publicity might well have impressed them with notions that did not previously exist.291 Finally, it was felt that there was no reason for the trial judge to believe that the publicity would have abated if a change of venue or

282. Id. at 63-64. The district court also found violations of due process in the failure of the trial judge to disqualify himself, in the admission of testimony that Sheppard had refused to take a lie detector test, and in the unauthorized communications the jurors made while deliberating. Id. at 65-71.
284. Id. at 712.
286. 346 F.2d at 714-19.
288. 199 F.2d 107 (1st Cir. 1952).
289. 346 F.2d at 720.
290. Id.
291. Id. at 723.
continuance had been granted. Judge Edwards dissented on the grounds that the jury was exposed to trial publicity and that unauthorized communications had been made.

The Supreme Court granted certiorari in 1965 and on June 6, 1966 reversed the decision of the court of appeals. Speaking for the Court in the eight to one decision, Justice Clark observed that the Court had always eschewed direct restraints on the press in the courtroom, for the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Yet, the Court observed that there are occasions when convictions should be reversed because of jury exposure to publicity, as in Marshall, or because of the character of the pretrial publicity, as in Irvin and Rideau. The Court recognized that in Rideau it had not even been necessary for the accused to demonstrate the unfairness of the trial, and that the conviction in Estes v. Texas was set aside with no showing of prejudice.

Justice Clark noted that "[i]t is clear that the totality of circumstances in this case also warrants such an approach." Estes was granted a change of venue, Sheppard was not; the Estes jury was sequestered, the Sheppard jury was not. The judge's admonitions in Sheppard were weak and inadequate, and "jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers." The publicity in Sheppard was more widespread than that in Estes, and included live television coverage of the inquest at which Sheppard testified for more than five hours without the assistance of counsel.

Sheppard may not have been denied a fair trial solely because of the pretrial publicity, but the failure of the judge to protect him against the

292. Id. at 725. The court also held there was no denial of due process in the trial judge's refusal to disqualify himself, in the introduction of evidence that Sheppard refused to take a lie detector test, and in the unauthorized communications by jurors. Id. at 725-36.
293. Id. at 754-55.
296. Id. at 350.
297. Id. at 351-52.
298. Id. at 352.
299. Id.
300. Id. at 352-53.
301. Id. at 353.
302. Id. at 353-54.
incidents of pretrial publicity combined with the conduct of the trial itself were sufficient to work such a denial. The Court observed, “The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard.” 303 Providing a table for newsmen within the bar, Justice Clark continued, “is unprecedented.” Moreover, the judge did not have the ability to control the courtroom environment once he had assigned most of the available seats in the courtroom to newsmen.304

Aside from the pretrial publicity and the courtroom bedlam, the news coverage of the trial itself posed the possibility of prejudice. Much of the press comment during the trial was never introduced in evidence, and the press “often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard’s bloodstained pillow was published after being ‘doctored’ to show more clearly an alleged imprint of a surgical instrument.” 305 The Court concluded that members of the jury had been exposed at least to some of the adverse publicity.306

The “fundamental error” of not protecting the accused from trial and pretrial publicity was compounded by the trial court’s “holding that it lacked power to control the publicity about the trial.” 307 There were means “to reduce the appearance of prejudicial material and to protect the jury from outside influence.” The Court found that it was not necessary to consider “what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.” 308 Both the courthouse and courtroom were subject to the control of the trial court, and steps should have been taken to prevent the “carnival atmosphere” which surrounded the trial. The number of newsmen attending the trial could have been restricted; newsmen should not have been allowed inside the bar, and should not have been allowed to handle and photograph exhibits during trial recesses; press contact could have been restricted with witnesses such as Susan Hayes

303. Id. at 355.
304. Id.
305. Id. at 357.
306. Id.
307. Id.
308. Id. at 358.
who made frequent pretrial comments to the press regarding an alleged love affair with Sheppard.  

The trial judge could also have attempted to control the release of information by police, counsel for both sides, and witnesses. Much of the information released to the press was never introduced as evidence, and much of it was inaccurate or misleading. The judge's failure to exercise control over the release of information was not excused by claims that much of the unwarranted publicity came from the defense as well as the prosecution. The participation of the prosecution in the release of information to the press "aggravate[d] the judge's failure to take any action."  

Citing *State v. Van Duyne*, the Court suggested that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." The trial judge could also have asked that city and county officials issue a regulation regarding the improper release of information by municipal and county employees. Reporters could have been warned or cautioned as to the dangers of press comment on matters not introduced as evidence. Such procedures would have enhanced the possibility that Sheppard would receive a fair trial "without corresponding curtailment of the news media."  

Observing that cases involving prejudicial press coverage are "increasingly prevalent," Justice Clark concluded that "trial courts must take strong measures to ensure that the balance is never weighed against the accused." Further, the Court indicated that appellate courts should independently evaluate the circumstances of a case on review. "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom," Clark added. Nonetheless, the Court noted, if pretrial publicity threatens the fairness of a trial, the judge should take the initiative in suggesting to counsel that the jury be sequestered, or order a new trial. Yet "reversals are but palliatives; the cure lies in those remedial meas-
ures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." The trial court should not allow any participant in a criminal trial or any law enforcement officer within its jurisdiction to prevent the accused from having a fair trial by coloring the atmosphere through the release of press statements.

The trial judge did not protect Sheppard "from the inherently prejudicial publicity which saturated the community," nor did he "control disruptive influences in the courtroom." Therefore, the habeas corpus petition was properly granted and the court of appeals was in error in reversing.

**LEGAL DEVELOPMENTS SINCE SHEPPARD**

What do *Rideau v. Louisiana*, *Irvin v. Dowd*, *Estes v. Texas*, and *Sheppard v. Maxwell* mean? Some observers detect a "decided trend, on the part of the appellate courts, ever gaining in momentum and respectability, to reverse criminal convictions on the ground that the verdict may have been induced, at least in part, by newspaper reporting prejudicial to the defendant." Some see *Sheppard* as the "last patient effort" of the Supreme Court to deal with cases involving prejudicial publicity. The real question, however, is what impact *Rideau*, *Estes*, and *Sheppard* are having on subsequent cases involving prejudicial publicity.

**Venue and Continuance**

The most notable case dealing with change of venue is *Maine v. Superior Court*, which held that appellate courts may review a trial court's decision to deny a change of venue even though the accused has not been tried. It is a customary judicial practice to delay ruling on

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317. Id. at 363.
318. Id.
319. On retrial Sheppard was acquitted. See N.Y. Times, Nov. 17, 1966, at 1, col. 7.
motions for change of venue until after the *voir dire* indicates whether a fair jury can be obtained.\(^{323}\)

In *Maine* the petitioners asked the California Supreme Court to issue a writ of mandamus directing the Superior Court of Mendocino County to grant a change of venue on the ground that the case, involving charges of murder, kidnapping, forcible rape, and assault with intent to commit murder, had been so widely publicized that they could not get a fair trial in Mendocino County. The court observed that it had never before issued a writ of mandamus to compel a trial court to grant a change of venue in a criminal case before the case had been tried, but that the legislature had enacted legislation making the writ available to review trial court orders granting or denying venue changes in civil cases. The court reasoned, "A fortiori similar review should apply to assure a fair trial in criminal cases where life and liberty are the premium."\(^{324}\)

The court did not believe the new practice would unduly delay trials, for, should there be a great flood of petitions, many would be frivolous and summarily denied. Moreover, by giving preliminary review to motions for changes of venue, the court felt that it would be able to provide safeguards against subsequent reversals on appeals.\(^{325}\) The court found little support for the contention favoring the traditional practice of conducting the *voir dire* before passing on motions for changes of venue.

Delaying judgment on change of venue motions until the *voir dire* is completed poses delicate problems for the defense counsel. Unless he exhausts all of his challenges, he will have no ground for appeal. Yet to exhaust all of his challenges may mean accepting a juror who is more biased than the one excused.\(^{326}\) When the juror is consciously or sub-

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\(^{323}\) Note 61 *supra* and accompanying text.


\(^{325}\) *Id.* at 727, 438 P.2d at 375.

\(^{326}\) *Id.* The court observed that its holding on this point was consistent with the Reardon Report recommendation that a showing of actual prejudice need not be required in a motion for a change of venue or continuance. The Report also recommends that a motion for a change of venue or continuance be disposed of prior to the impaneling of a jury. The Reardon standard for granting a change of venue or continuance is based on the "reasonable likelihood that in the absence of such relief, a fair trial cannot be had." The Report suggests that affidavits need not be required before a change of venue or continuance is granted, and recommends that qualified public opinion samples be used to help determine whether the defendant can get a fair trial. It also recommends that if a motion for a change of venue is made after a jury has been selected, the mere fact that the jury meets "prevailing standards of acceptability" should not prevent the accused from receiving a change of venue or continuance. Finally, the
consciously biased, the difficulty of detecting this prejudice is compounded when the atmosphere is hostile to the accused. "We can only conclude that the naked right to renew the motion for change of venue is not an adequate remedy at law to require denial of a mandamus petition." However, it would not be proper for the accused to seek mandamus during or after the impaneling of the jury, for then the defendant could stay the proceedings if the application were to appear meritorious.

Although the holding in Maine runs contrary to the practice of most American jurisdictions, the California court noted that courts in Minnesota do follow the Maine standard. The California court also interpreted Sheppard as rejecting the traditional approach allowing the trial court to grant or deny a change of venue within the sound exercise of its discretion. Sheppard held that appellate courts have the duty to make an independent evaluation of the circumstances of a case, "an unmistakable implication that appellate courts must, when their aid is properly invoked, satisfy themselves de novo on all the exhibits and affidavits that every defendant obtains a fair and impartial trial." In addition, State v. Van Duyne suggested to the California court that courts should be sympathetic to the notion that jurors cannot entirely erase publicity from their unconscious minds. The Reardon Report, the California court observed, is correct in suggesting that a change of venue can often substantially reduce prejudice. These considerations led the California court to regard the Reardon recommendations on change of venue as "authoritative."
Indeed, *Sheppard*, though not dealing with pretrial publicity alone, has “rendered imperative the implementation of the standard governing change of venue or continuance recommended in the Reardon Report.” Should the Reardon Report standard be applied by trial courts, there would not be much occasion for appellate courts to hear cases on appeal or by writ of mandamus involving changes of venue. Such a phenomenon also would be consistent with the admonition in *Sheppard* that reversals are at best palliatives, and remedial measures are needed. *Maine* was cited with approval by the Oklahoma Court of Criminal Appeals in its reversal of a manslaughter conviction. Although the accused failed to exercise all of his peremptory challenges, the Oklahoma court agreed with *Maine* that conventional voir dire practices place the defense counsel in an awkward position. The ten affidavits submitted by the accused that suggested he could not get a fair trial anywhere in the county were part of the “totality of circumstances” surrounding the defendant’s motion for a change of venue. The prosecutor’s proof was “not sufficient to overcome defendant’s proof of the possibility that prejudice might have been generated from the newspaper articles.”

The Oklahoma court held that when there is a reasonable possibility that prejudice exists, a change of venue should be granted. Although the record showed that each juror read something about the case, each said he could be impartial. Nonetheless, the court said, “[W]here a reasonable possibility of prejudice is shown to exist, concerning widespread pre-trial publicity, and its possible effect on the jury panel is shown to exist, then discretion seems . . . to dictate the change of venue.” The court recognized that applications for changes of venue are filed in many cases merely for the record, but in those cases the accused does not produce ten affidavits supporting the claim that the defendant cannot get a fair trial in the original jurisdiction. In revers-

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333. *Id.* at 730, 438 P.2d at 378.
334. *Id.* The court then reviewed the facts of the case and found the crime atrocious, the victims prominent, the accused friendless, the locale not heavily populated, the community interest widespread, and press accounts prejudicial in that the confession of one of the defendants was reported. In addition, the two opposing counsel were opponents in a current electoral race for county judge. The court issued the writ of mandamus, suggesting that the trial be removed to a large city like San Francisco. *Id.* at 731-33, 438 P.2d at 378-81.
336. *Id.* at 274.
337. *Id.*
338. *Id.*
339. *Id.* at 274-75.
ing and remanding to the trial court on the venue questions the court noted that *Sheppard* requires appellate courts to make their own independent evaluations of circumstances surrounding a trial and not to “defer unduly to the discretion of the trial judge.”

A federal court, in *Pamplin v. Mason* also took the position that a change of venue may be an effective protection against community prejudice. Mason was convicted in a Texas court of aggravated assault upon a local peace officer, a misdemeanor for which Texas law denied him the right to transfer his case. Nonetheless, Mason sought a change of venue on the ground that there was great community prejudice against him as a result of his participation in the first civil rights demonstration ever held in Falls County, Texas, the venue for his trial. The trial judge denied the motion for a change of venue, and also refused the defendant’s request that jurors be examined individually on the *voir dire* instead of being examined and qualified as a group.

The Court of Appeals for the Fifth Circuit observed that although *Irvin v. Dowd* requires that there be a clear nexus between community prejudice and the possibility of jury bias, *Rideau, Estes, and Turner v. Louisiana* hold that prejudice may be presumed and that “the probability of prejudice is inherent” in certain situations. The court said, “Where outside influences affecting the community’s climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.” *Rideau, Estes, and Sheppard* have made it “unnecessary to prove that local prejudice actually entered the jury box.” In *Pamplin*, where racial prejudice was strong, the group *voir dire* was insufficient to detect actual prejudice.

The Supreme Court elevated the change of venue in misdemeanor

340. *Id.* at 275.
341. 364 F.2d 1 (5th Cir. 1966).
342. Although the offense charged was classified as a misdemeanor, the accused received a jail sentence of two years and was fined $1,000. *Id.* at 3-4. Cf. *Duncan v. Louisiana*, 391 U.S. 145 (1968).
343. 379 U.S. 466 (1965). In *Turner* the Court reversed a conviction because the two chief prosecution witnesses were deputy sheriffs in custody of, and thereby in close association with, a sequestered jury.
344. 364 F.2d at 5.
345. *Id.* In the original habeas corpus proceeding the court held that a change of venue is a constitutional guarantee, not just a privilege granted by the state. Mason v. Pamplin, 232 F. Supp. 539 (W.D. Tex. 1964).
346. 364 F.2d at 6.
347. *Id.* at 7.
cases to the level of a constitutional right in *Groppi v. Wisconsin.*\(^{348}\)

Father Groppi was convicted in a Wisconsin court on a charge of resisting arrest, and was denied a change of venue by the trial judge on the ground that a Wisconsin statute prohibited a change of venue in misdemeanor cases.\(^{349}\) The Court held that, the Wisconsin statute notwithstanding, the fourteenth amendment requires that "a defendant must be given an opportunity to show that a change of venue is required in his case."\(^{350}\)

**Voir Dire**

*Silverthorne v. United States*\(^{351}\) is a significant *voir dire* case which placed reliance on *Sheppard.* San Francisco area newspapers published more than 300 articles concerning Silverthorne, who was convicted of misapplying bank funds and making false entries in bank records.\(^{352}\)

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\(^{348}\) 91 S. Ct. 490, 491 (1971).

\(^{349}\) Id. The Wisconsin Supreme Court also construed the state statute as limiting the change of venue to felony cases.

\(^{350}\) Id. at 494. Justice Black dissented on the ground that remedies other than the change of venue can be exercised to give the defendant a fair trial by an impartial jury.

Other cases suggest judicial concern over the change of venue and continuance as tools to neutralize publicity. In *United States v. Daniels*, 282 F. Supp. 361 (N.D. Ill. 1968), the court granted the accused a continuance, but refused to allow the defendant to waive a jury trial without the government's consent. In *People v. Pratt*, 27 App. Div. 2d 199, 278 N.Y.S.2d 89, 91-93 (1967), a New York court granted a change of venue where the defendant's confession had received widespread press attention as the result of a pretrial hearing on the admissibility of the confession. It was held that the trial court could have excluded the press from the pretrial hearing and that, in any event, the publicity given to the confession had created a reasonable probability of prejudice to the defendant. Cf. *United States v. Birrell*, 269 F. Supp. 716 (S.D. N.Y. 1967), where the court denied the defendant's motion for a pretrial hearing on the exclusion of evidence. The court held that such a hearing would be likely to prejudice the defendant's right to a fair trial under *Sheppard.* In any event, a change of venue or continuance would be likely should the pretrial hearing be held. Thus, it was held that a postponement of the hearing would minimize the possibility that the defendant would be denied a fair trial because of press publicity. 269 F. Supp. at 728. *Contra*, see *United States v. American Radiator & Standard Sanitary Corp.*, 274 F. Supp. 790 (W.D. Pa. 1967), Note 212 *supra* and accompanying text. Relying on *Rideau v. Louisiana*, the Louisiana Supreme Court approved the violation of two articles of the state constitution by holding that a state trial judge had not erred in granting two changes of venue and in moving the case beyond a district adjacent to the original district. The court reasoned that a mere "legislative pronouncement" should not endanger the "basic requirement of constitutional due process." State v. Mejia, 250 La. 518, 197 So. 2d 73, 76 (1967). Cf. notes 81, 83, and 86 *supra* and accompanying text.

\(^{351}\) 400 F.2d 627 (9th Cir. 1968).

\(^{352}\) Id. at 630-31. Coverage by the electronic media was also great. State charges were brought against the defendant, but were dismissed by the trial judge because of the
The court of appeals believed that widespread publicity was inevitable in a case involving the failure of a major bank, an investigation by the Senate Committee on Governmental Operations, and the defendant's own "flamboyant and bizarre conduct including his marital and gambling activities with losses of almost one-half million dollars . . . ." The important question did not involve the fact that there was widespread publicity adverse to the accused, but dealt with the trial court's success in neutralizing the publicity and guarding the defendant against prejudice.

The court rejected the argument that the indictments themselves were invalid because of the surrounding publicity, and held that it was not error for the trial court to deny the defendant's motion for a continuance prior to the completion of the voir dire. It was reversible error, however, for the trial judge not to conduct the voir dire in a manner that would allow him to discover biased jurors.

Each of the 65 veniremen had some knowledge of the case before being called for service. In the face of such widespread pretrial exposure to publicity, the trial judge adopted the "Arizona Plan" on the voir dire, asking all the questions himself and, for the most part, directing his questions to the panel at large and not to individual jurors. As a result of this procedure, four jurors never responded to the judge's questions concerning their opinions of the case, with two of the four never being questioned about the publicity issue at all. Sheppard's requirement that the balance should never be weighed against the accused was, therefore, violated. If the voir dire is to mean anything, it must mean that prejudice has not been allowed to infiltrate the jury box. The voir dire for Silverthorne was not adequate since the judge's questions were leading and designed to evoke responses from the veniremen that they were not prejudiced. Further, the entire voir dire was too general to be effec-
tive. Since the trial judge did not determine what the jurors had or had not read or heard, he was in no position to pass on their impartiality. Merely going through the form of a *voir dire* was not sufficient.\(^{359}\) Although *Irvin v. Dowd* held that jurors need not be altogether unknowing about a case, the question of “whether a juror *can* render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror’s own assessment of self-righteousness *without something more.*”\(^{360}\)

**Trial Press Coverage and Trial Conduct**

Although the pretrial publicity raised a strong probability of prejudice, the publicity which occurred during the course of the *Silverthorne* trial bore “less of the indicia of probability; it approached prejudice per se.”\(^{361}\) On numerous occasions the trial judge refused defense motions for a mistrial and for interrogation of the jurors to determine the effect of trial publicity on them. The trial court took the position that interrogation of the jurors would call newspaper stories to their attention. On one occasion jurors were observed reading newspapers in the jury room, and one juror had collected all news articles relating to the trial. Even when this irregularity was called to the judge’s attention, he denied the defense counsel’s request to prohibit jurors from reading newspapers on the ground that he could not deprive them of the pleasure of reading a morning newspaper.

The court of appeals held that the trial court had an affirmative duty to protect the defendant from possible prejudice resulting from trial publicity. In such a situation, the ordinary assumption that jurors are faithful to their oaths and follow the judge’s instructions not to expose themselves to trial publicity was of little, if any, weight.\(^{362}\) Although preventing jury exposure to trial publicity is difficult when the jury is not sequestered, *Sheppard,* the court said, requires the trial judge “to assume until he has established otherwise by *voir dire* examination, ‘that

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359. *Id.* at 638.

360. *Id.* at 639. The court observed that the failure of the judge to inquire of the jury what information they had and its source was especially prejudicial in view of the fact that almost 30 percent of the veniremen expressed fixed opinions of the guilt of the accused. Moreover, only five jurors were ever questioned individually, and the trial court denied the defendant’s request that the *voir dire* be more specific and individual. It was prejudicial error for the court not to interrogate those jurors who had not committed themselves. *Id.* at 640.

361. *Id.*

362. *Id.* at 640-41.
Some of this material reached the members of the jury.’” The trial judge should have interrogated each member of the jury in camera when requested to do so by the defense counsel. The failure of the trial judge to discharge his duties created a “probability of prejudice.”

Since 1966, other appellate courts have reversed convictions because of exposure to potentially prejudicial influences during the trial. The Nevada Supreme Court relied on Sheppard to reverse a conviction where the trial court erred in not interrogating jurors to determine whether they had been exposed to newspaper articles appearing during the trial. The court observed that while most due process claims require a showing of actual prejudice, Estes and Sheppard require that the judge control the courtroom. Moreover, Estes and Rideau hold that there are times when a showing of probable prejudice can be substituted for the actual bias standard. Illinois courts have also relied on the “total circumstances” rule of Sheppard to reverse convictions where the trial judge failed to determine if jurors had been exposed to trial publicity.

In trial conduct cases, the Supreme Court has reversed other convictions since Sheppard on similar grounds. In Parker v. Gladden, the Court overturned an Oregon murder conviction where the bailiff assigned to watch the locked jury told one juror that the accused was wicked and guilty and told another juror that the Supreme Court would reverse a conviction if there should be an error in finding the defendant guilty. The Supreme Court also reversed a Texas conviction on the ground that the trial judge violated Rideau in permitting television and still camera photography in the courtroom. Other appellate courts have reversed convictions when the jury was exposed to trial publicity,

363. Id. at 643-44.
364. Id. at 644.
366. 441 P.2d at 93.
368. 385 U.S. 363 (1966). In the per curiam opinion the Court relied on Sheppard, but Justice Harlan dissented on the ground that the case, unlike Estes, was not “inherently lacking in due process.” Thus the actual prejudice standard of Irvin v. Dowd, 366 U.S. 717 (1961) and Stroble v. California, 343 U.S. 181 (1952), should apply. 385 U.S. at 368.
ADVERSE PRESS COVERAGE

but have relied on the "older" rule of Marshall v. United States rather than on the "new" cases of Rideau, Estes, and Sheppard.\textsuperscript{370}

Release of Information and Exclusion of Newsmen

As a consequence of the greater attention given to publicity in the new cases attempts have been made by some judges to issue court rules restricting the release of information. Such was the case in the trial of Richard Speck.\textsuperscript{371} The judge in the Charles Manson trial also adopted a court rule prohibiting lawyers, police, grand jurors, and prospective witnesses from making extrajudicial statements about the merits of the case.\textsuperscript{372} However, attempts to prohibit pretrial publication of information by court order have not always been successful.\textsuperscript{373}

Similarly, attempts to close pretrial hearings or portions of trials to the press have met with mixed success. Azbill v. Fisher\textsuperscript{374} upheld the exclusion of the press from a Nevada preliminary hearing, but Phoenix Newspapers, Inc. v. Superior Court\textsuperscript{375} and other cases point in the opposite direction. In Oxnard Publishing Co. v. Superior Court,\textsuperscript{376} the court issued a writ of mandamus to the Superior Court of Ventura County to open a trial to the press when the record indicated that more than half the trial had been held in camera. The court reprimanded the

\textsuperscript{370} See Mares v. United States, 383 F.2d 805 (10th Cir. 1967); Watson v. State, 413 P.2d 22 (Alaska 1966); State v. Rinkes, 70 Wash. 2d 854, 425 P.2d 658 (1967), all resting on Marshall v. United States, 360 U.S. 310 (1959). If appellate courts seem to have reversed more cases involving trial publicity than pretrial publicity since 1966, the reason may be that the standards for finding prejudice in cases involving trial publicity were more stringent than were the standards in cases involving pretrial publicity before Rideau, Estes and Sheppard. Cf. notes 120-60 supra and accompanying text.

\textsuperscript{371} See People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968). The court held that the massive publicity surrounding the Speck case did not deny the accused a fair trial. The Chicago Superintendent of Police prior to Speck's arrest made a public statement identifying Speck as the slayer, saying that he had been identified by the only survivor in the slaying of several Chicago nurses and that his fingerprints had been found at the scene of the slayings. Prior to the trial the court issued an order prohibiting the release and publication of various categories of information, including the names and addresses of prospective witnesses. 242 N.E.2d at 212, 214-15. See notes 403, 404 infra and accompanying text.


\textsuperscript{374} 84 Nev. 414, 442 P.2d 916 (1968), note 210 supra and accompanying text.

\textsuperscript{375} 101 Ariz. 257, 418 P.2d 594 (1966), note 207 supra and accompanying text.

\textsuperscript{376} 261 Cal. App. 2d 505, 68 Cal. Rptr. 83 (1968).
trial court for relying on the Reardon Report and Sheppard as authority to restrict press attendance at the trial, for the report recommends restricted press attendance only in cases where there is a real possibility that press coverage might endanger the defendant's right to a fair trial, and Sheppard contains no suggestion that trials or portions of trials be closed to the public and press.\footnote{377. 68 Cal. Rptr. at 94-95. The Court also cited A. Friendly & R. Goldfarb, Crime and Publicity (1967) to support its argument that closing trials to the public and press may well do more harm than good. Id. at 96-97.}

The Kentucky Supreme Court has held that a Kentucky statute excluding the general public from all cases involving children does not apply to the trial of an adult for contributing to the delinquency of a minor. Indeed, the press “should be accorded some priority . . . for they have facilities to disseminate the information of what transpires to a much broader audience than those who can gather in a crowded courtroom.”\footnote{378. Johnson v. Simpson, 433 S.W.2d 644, 648 (Ky. 1968).} A California court issued a writ of mandamus ordering the Superior Court of Marin County to vacate an order prohibiting the inspection of the transcripts of witnesses’ testimony at grand jury proceedings. Although Sheppard gives the judge authority to protect the accused from publicity, the court felt the trial judge exceeded his authority by permanently removing the records from public inspection.\footnote{379. Craemer v. Superior Court, 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1968).}

\textbf{AN ASSESSMENT OF RECENT DEVELOPMENTS}

How does one assess the impact of the line of cases culminating in Sheppard? Obviously, they (and the work of groups like the American Bar Association) have had some effect: Convictions have been reversed because of the probability that prejudice might result from press comment or coverage. Protections such as change of venue have been given greater attention, and court rules to protect the accused from prejudicial publicity have been adopted in some jurisdictions. But a more comprehensive examination requires a qualified assessment of the Rideau, Estes, and Sheppard line, for in the vast majority of cases the criminal justice system goes on as before, with or without press comment, and the reversal of a conviction on prejudicial press publicity grounds is the exception. Of 202 cases involving publicity issues decided over a period of about three years beginning in 1966, only 12 resulted in the setting aside or reversal of convictions.\footnote{380. Although the 202 cases have been thoroughly indexed, they have not been cited}
To be sure, there is the possibility that the survey of recent cases did not include all appellate cases involving publicity, and some reversals may have been overlooked; however, the searching procedure was a systematic one, supplemented by checking citations in law review articles. Any error would probably result from overlooking cases which affirmed convictions, for judges are more likely to cite authorities in reversing lower courts than in upholding them. 381

Another indicator suggesting that the 202 cases constitute a reliable estimate is that an independent count of cases by the Legal Advisory Committee on Fair Trial and Free Press of the American Bar Association revealed only 421 federal and state appeals between 1951 and 1969. 382

The 12 reversals seem even less significant than their statistical proportion might indicate when they are examined individually, since six of the reversals involved jury exposure, or possible jury exposure, to press comment during a trial. There seems to be a greater tendency for courts to reverse convictions in cases involving trial publicity than in cases involving pretrial publicity, because the traditional legal view has been that once the trial is underway the trial judge cannot employ the change of venue, continuance, voir dire, or other pretrial remedies designed to detect juror bias and neutralize adverse publicity. 383

Of the six reversals dealing with pretrial publicity, Rubenstein v. State, 384 involving the trial of Jack Ruby, seem to be sui generis. Although the Texas Court of Criminal Appeals relied on Estes, Sheppard, etc. for purposes of brevity. The author will supply the citations upon request. Groppi v. Wisconsin, 91 S. Ct. 490 (1971), was decided after the survey was made. See notes 348, 349, and 350 supra and accompanying text.

381. For the suggestion that legal periodicals may be cited more often when precedent is reversed than when it is upheld, see Newland, Legal Periodicals and the United States Supreme Court, 3 Midwest Journal of Political Science 58 (1959).


383. The six reversals involving trial publicity include Mares v. United States, 383 F.2d 805 (10th Cir. 1967); Watson v. State, 413 F.2d 22 (Alaska 1966); People v. Cain, 36 Ill. 2d 589, 224 N.E.2d 786 (1967); People v. Cox, 74 Ill. App. 2d 342, 220 N.E.2d 7 (1966); Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968); State v. Rinkes, 70 Wash. 2d 854, 425 P.2d 658 (1967). See notes 365, 367, and 370 supra and accompanying text. Rinkes is not a conventional case, prejudicial news items having been sent to the jury room by mistake along with prosecution exhibits. See also United States v. Chase, 372 F.2d 453 (4th Cir. 1967), where the court of appeals affirmed the trial judge’s decision to declare a mistrial for all defendants in a joined jury-non-jury trial where newspaper articles of the past record of the jury defendants were found in the jury room. The trial judge reasoned that to continue with the trial of the non-jury defendants would prejudice the jury defendants should the former be found guilty. 372 F.2d at 464-65.

and *Rideau* in holding that the trial court erred in not transferring Ruby's case to a venue other than Dallas, it seems reasonable to suggest that the Texas court may have perceived the case as one where the entire system of criminal justice in Texas was on trial. If many cases involving prejudicial publicity are *causes célèbres*, then the Ruby case is a *caus célèbre* of a special kind.

One reversal, State v. Spidle, did not involve the usual prejudicial publicity claim. In *Spidle* a juror acquired his first information about a criminal case from the press, said he believed from the press account that the accused was guilty, and admitted that he would choose the testimony of the prosecution witness, a state trooper, over that of the accused in case of doubt.

Of the remaining four reversals, *Silverthorne v. United States* has already been discussed. In *State v. Shawan*, the New Mexico Supreme Court reversed a conviction on the ground that the trial judge erred in denying a change of venue to the defendant without hearing the question of whether jurors read a newspaper article detailing the criminal record of the accused. The court thought this to be especially important since the defendant had used all his peremptory challenges. An Ohio Court of Common Pleas, in 1967, vacated a ten-year-old conviction on the ground that no actual prejudice need be shown in a case in which pretrial publicity catalogued the defendant's past criminal record and previewed the prosecution's case before it was presented in court. Finally, the Supreme Court, in a memorandum opinion in 1968, relied on *Rideau* in reversing a Texas conviction where television and still cameras were used in the courtroom.

The record of appellate and trial courts since 1966 is not solely one of reversals; these courts have been aware of the new standards of probable and inherent prejudice in *Rideau, Estes,* and *Sheppard.* Appellate courts have granted evidentiary hearings to criminal defendants so that lower courts could determine whether the defendants were injured by

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385. *Id.* at 795, 798.
386. 413 S.W.2d 509 (Mo. 1967).
387. Notes 351-64 *supra* and accompanying text.
publicity.\textsuperscript{391} Of course, an appellate court’s remand of a case for an evidentiary hearing on the impact of pretrial or trial publicity does not mean that the defendant’s conviction will be reversed. The Supreme Court of Dutchess County, New York, for example, conducting such a hearing on command of the New York Court of Appeals, has interpreted the \textit{Sheppard} rule as meaning that publicity must be “so inescapably and inexorably prejudicial to an accused as to militate against his being accorded a fair trial.”\textsuperscript{392} Bias cannot be presumed on the basis of mere publicity, since \textit{Sheppard} deals not only with pretrial publicity but with the conduct of the trial itself. To presume prejudice a court must consider the total circumstances surrounding a case, not merely the publicity.\textsuperscript{393}

Counting reversals is neither the only nor necessarily the best way to measure the impact of Supreme Court decisions, but such a procedure is useful in illuminating some of the special problems of the law in the trial by newspaper area. The new publicity cases may have had some impact on prosecutors, police, defense counsel, and trial judges,\textsuperscript{394} but they have resulted in relatively few reversals. One reason the reversal rate has not been greater may be that an increasing number of appeals are frivolous. The 202 cases analyzed above are quite a large number when compared with the 421 cases cited by the American Bar Association for the period from 1951 to 1969. Thus, one result of \textit{Rideau}, \textit{Estes}, and \textit{Sheppard} may be encouragement of criminal defense counsel to make appeals and claim errors involving prejudicial publicity. A political scientist has noted a similar trend in appeals involving search and seizure issues,\textsuperscript{395} and it is probable that without \textit{Rideau}, \textit{Estes}, and \textit{Sheppard}, the impetus for a large number of apparently frivolous prejudicial publicity claims would not exist.\textsuperscript{396}


\textsuperscript{392} People ex rel. Rohrich v. Follette, 55 Misc. 2d 201, 284 N.Y.S.2d 770, 773 (1967). The case was heard on remand from the New York Court of Appeals, 282 N.Y.S.2d 729, 20 N.Y.2d 297, 229 N.E.2d 419 (1967).

\textsuperscript{393} 284 N.Y.S.2d at 773-74.


\textsuperscript{396} See, e.g., Marxuach v. United States, 398 F.2d 549 (1st Cir. 1968) (there is no error if no juror can recall having heard or seen any publicity and the only publicity took place two months before the trial); Loraine v. United States, 396 F.2d 335 (9th Cir. 1968) (there is no ground for reversal if there is no showing that publicity is at
Another reason that so many appeals have been unsuccessful is that courts easily distinguish the nonrepresentative and extreme cases from other cases characterized by widespread publicity adverse to the accused. In 1967, the Supreme Court of Maine affirmed the conviction of an accused convicted of the murder of a state trooper, even though two jurors had contributed to a fund for the slain trooper's family and 12 had knowledge of the fund and the case. The court interpreted Sheppard and Estes to apply to both pretrial and trial publicity, and found those authorities not applicable when the issue was limited to pretrial publicity. In a case involving possible jury exposure to trial publicity, a California appellate court held that it was not reversible error for the trial judge to fail to poll the jury about articles appearing during the trial.

The "totality of circumstances" rule espoused in Sheppard as a guide to evaluate cases involving prejudicial publicity also raises questions. Obviously, the "totality of circumstances" includes both pretrial and trial press comment and coverage, but does this mean that there would have been no reversal in Sheppard had there been no pretrial publicity? Or does it mean that there would have been no reversal had the conduct of the trial and the nature of the trial press coverage been different, though the pretrial publicity may have been as great? Although Rideau makes it clear that pretrial press coverage alone can be inherently prejudicial and Estes suggests that inherent prejudice can be based on the conduct of the trial itself, the fact remains that many courts have regarded Sheppard as an unusual case with application in only limited situations.

The Court of Appeals for the Seventh Circuit found no denial of due process in the failure of a state trial judge to grant a change of venue where the pretrial publicity was extensive and 38 out of 120 veniremen had formed opinions based on the publicity. The court held that Irvin, Rideau, Estes, and Sheppard were all extreme situations, and added that in Rideau, Estes, and Sheppard, the trial judge or the state promoted publicity or permitted laxity in the courtroom. The Court

least potentially prejudicial to the accused); State v. Corliss, 430 P.2d 632 (Mont. 1967) (the mere fact that a news account of a crime has been published does not mean that the accused has been prejudiced).

397. State v. Beckus, 229 A.2d 316, 318-20 (Me. 1967). The Maine Supreme Court observed that the widespread publicity about the fund and the slain trooper's family did not constitute prejudicial publicity.


399. Myers v. Frye, 401 F.2d 18, 20 (7th Cir. 1968).
of Appeals for the Eighth Circuit held that widespread publicity adverse
to the accused did not result in a due process violation when the pub-
licity did not even remotely resemble that in Sheppard. The Eighth
Circuit held that the actual prejudice rule may be discarded, but only
when there is massive publicity of a saturation level which makes preju-
dice highly probable.400

When the publicity given a case has approached the same magnitude
as that in Sheppard, there has been no easy test to determine whether
the accused has been prejudiced. A Maine television station presented,
with the active cooperation of law enforcement agencies, a documentary
concerning a crime carrying the clear implication that the defendant was
guilty. The Maine Supreme Court held that, while the documentary was
deplorable, Irvin, Sheppard, and Rideau were not applicable to the case:
The voir dire did not reveal a pattern of prejudice, the documentary
was shown but once, the accused did not confess, and the trial judge
allowed the defendants to challenge for cause any juror who had seen
the film or any objectionable parts of it.401 Likewise, the Wisconsin Su-
preme Court dismissed the Sheppard rule as not being appropriate, in
a widely publicized case involving the murders of two girls and the
attempted murder of another, holding that Irvin does not require that
jurors be totally ignorant.402

The Illinois Supreme Court upheld the conviction of Richard Speck
with the wry reminder that Speck "had to be tried in some community
in the State of Illinois." 403 In the trial, which had been transferred
from Chicago to Peoria, the defendant was given 160 peremptory chal-
lenges (the defense used less than half), and 250 to 300 jurors were
excused or refused because of a preconceived belief in Speck's guilt.
The court held that Irvin does not require that jurors be totally ignorant
of a case and there was, therefore, no prejudicial error in Speck's trial.
The court distinguished the cases on the ground that Irvin, unlike Speck,
exhausted all his peremptory challenges. Moreover, as in Beck v. Wash-
ington, the publicity in Speck dissipated after the first coverage given
the mass murders themselves and the search for a suspect.404

400. McWilliams v. United States, 394 F.2d 41, 44 (8th Cir. 1968).
403. People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208, 212 (1968).
404. 242 N.E.2d at 212-14.
Conclusion

The preceding analysis does not purport to indicate that Sheppard and the other new cases have been incorrectly applied. Rather, it points out the difficulty in attempting to apply the rules to concrete fact situations with any certainty that such applications are deserving. It is, of course, impossible to achieve exactitude with most verbal formulas, but Sheppard poses more problems than most. The fact situations underlying the new line of publicity cases make it difficult to apply the legal norms embodied in these decisions to cases involving some, but not too much, publicity. There is no mathematical formula to determine when the burden of proof should be on the accused to show actual bias or when the facts reveal inherent prejudices. From this study it is not possible to develop a quantitative measure of the effects of Rideau, Sheppard, and Estes, but it is clear that the publicity cases have not had the kind of influence that cases involving racial discrimination have had.405

Similarly, the new publicity cases have not had the influence that Miranda v. Arizona has had, even though the Miranda decision is one thing on paper and another in practice.406 The difference is not because there are no borderline situations in cases involving racial discrimination or police interrogations, but because those cases deal with more general phenomena and thereby make it easier to proscribe certain categories of behavior.

The limited success that courts have had in applying Rideau, Estes, and Sheppard, however, should be considered in the light of the fair trial and free press problem at the trial level. In the end, the wisdom of Sheppard lies in the admonition to trial judges to do what they can in an imperfect world to protect the accused from adverse press coverage. The problem of trial by newspaper will not disappear, but Sheppard will have been a success in averting the problem if it alerts judges to steps they can take to mitigate the potential harmful effects of press coverage adverse to the accused. In holding out the possibility of relief to the accused whose case has received widespread and adverse press comment, the message of Sheppard is directed to trial courts, where relief can be best secured.


ADVERSE PRESS COVERAGE

ADDENDUM

Shortly before this article was published, the murder trial of Bobby Seale in New Haven, Connecticut, ended with a hung jury. The judge then dismissed all indictments against Seale on the ground that the extensive and adverse publicity would make it extremely difficult to secure an impartial jury for a second trial. As the Seale murder trial ended, another cause célèbre was beginning in Yuba City, California, where Juan V. Corona was arrested in connection with the mass murders of migrant farm workers. The Seale and Corona cases illustrate the successes and failures in protecting the criminal defendant against adverse press coverage.

The Seale case involved the torture and murder of Black Panther Alex Rackley. The brutal crime itself was enough to raise serious questions as to the possibility of widespread press comment which would prejudice any defendant charged. The fact that all 14 persons implicated in connection with the crime were Black Panthers raised the additional question of the public image of the Black Panther Party itself. The press and government, party defenders said, had created an opprobrium of the party that would make it difficult, perhaps impossible, for any Panther to receive a fair trial." For instance, during the jury selection phase of one Panther trial, the F.B.I. released its annual report which described the Black Panther Party as the country's "most dangerous and violence-prone of all extremist groups." 407

Another facet of the case involved Seale himself, known to the public as the defendant in the Chicago Conspiracy trial whose disruptive behavior had led to a contempt citation. 409 In addition, securing of a fair trial for Seale and co-defendant Mrs. Ericka Huggins was made even more difficult because the trial was preceded by that of Lonnie McLucas,

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407. Yale University President Kingman Brewster, Jr., was quoted as saying that he was skeptical of the ability of black revolutionaries to achieve a fair trial anywhere in the United States. See N.Y. Times, April 25, 1970, at 1, col. 1. For press coverage generally unfavorable to the Black Panther Party, see Time, May 11, 1970, at 25, 29, and Epstein, The Panthers and the Police: A Pattern of Genocide?, The New Yorker, Feb. 13, 1971, at 45.


409. Seale's lawyer was ill and could not defend him during the Chicago trial, and Seale protested the trial judge's refusal to allow him to defend himself. For an account of the Chicago trial, see Danelski, The Chicago Conspiracy Trial in Political Trials 49 (T. Becker ed. 1971). Seale did not disrupt the New Haven trial, and seemed to respect the trial judge. See N.Y. Times, May 23, 1971, Sect. IV, at 8, col. 1 and April 22, 1970, at 52, col. 1.
one of the original 14 Panthers arrested.\textsuperscript{410} The prosecution’s main argument in the Seale trial was that Seale ordered the murder of Rackley because the Panthers believed Rackley to be a police informer; much of the evidence to be presented at the Seale trial on this and other points was first presented at the McLucas trial.\textsuperscript{411}

Aware of the possibility of prejudice to the defendants because of press coverage, the court took steps to insure a fair trial. The judge issued an “Order for Courthouse Procedure” which prohibited the use of photographic, television or sound equipment in the courthouse or on the grounds immediately adjacent and the making of sketches in the courtroom. In addition, the order enjoined all participating lawyers and their employees from making statements for publicity purposes, or from making statements likely to result in the public disclosure of prejudicial information. The order also prohibited the county medical examiner, court officials, prospective witnesses and jurors from making extrajudicial statements about the case, and enjoined demonstrations in the courthouse or within 500 feet of it, save on the New Haven Green.\textsuperscript{412}

Great care was also exercised in the selection of jurors for the case. The time taken to select the jury (from November 17, 1970 to March 11, 1971) is believed to be the longest for any trial. Some 1,550 veniremen were called, of whom 1,035 were examined on the \textit{voir dire}. Most of the veniremen examined were excused because they admitted that they had preconceived opinions about the case or about the Black Panther Party which would prevent them from being impartial.\textsuperscript{413}

The jury began its deliberations on May 19th, but was unable to reach a verdict by May 24th. On May 25th the judge granted a defense motion to dismiss all charges against the defendants. He said, “I find

\textsuperscript{410} Scale and Mrs. Huggins were charged with kidnapping resulting in death, conspiracy to murder, and conspiracy to kidnap. Scale was also charged with first degree murder, and Mrs. Huggins was charged with aiding and abetting murder with intent to commit a crime. \textit{N.Y. Times}, September 30, 1970, at 35, col. 3. McLucas was convicted of conspiracy to murder but acquitted of intent to commit a crime. After the jury reached its verdict in the McLucas trial, McLucas’ attorney said, “I believe they gave a black revolutionary a fair trial.” \textit{See N.Y. Times}, September 1, 1970, at 1, col. 3.


\textsuperscript{412} \textit{See} McLucas \textit{v.} Palmer, 427 F.2d 239 (2d Cir. 1970), where four of the Panther defendants unsuccessfully sought to have the “Order for Courthouse Procedure” set aside. On at least one occasion during the trial the order was violated by a potential witness. \textit{See N.Y. Times}, August 15, 1970, at 51, col. 1.

it impossible to believe that an unbiased jury could be selected without superhuman effort—efforts which this court, the state and these defendants should not be called upon either to make or to endure.” Judge Mulvey observed that it would be almost impossible to select a new jury before the end of 1971.

*Sheppard* and its progeny seem to have influenced the trial court in its adoption of procedures designed to protect Seale and Mrs. Huggins from adverse press coverage. It may well be that the use of protective procedures by the court did shield the defendants from harm flowing from prejudicial publicity. In a broader sense, however, the law failed to provide tools which would allow the successful completion of the judicial process. The Seale case is a study of the judicial system under stress, a stress which the system was unable to withstand. When Judge Mulvey dismissed the charges against the defendants, he in essence admitted its inability to meet the challenge.

The decision to dismiss the charges against Seale and Mrs. Huggins may have been based on the recognition that a trial court’s utilization of procedures to protect a defendant from publicity is often inversely related to its ability to secure the defendant a speedy trial. Seale and Mrs. Huggins remained imprisoned from the time of their arrests to the dismissal of the charges against them. Clearly, the great care exercised in the selection of the jury contributed to the defendants’ failure to receive a speedy trial. Whatever protection against adverse press coverage may have been afforded was obtained at the expense of the lengthy incarceration of defendants who were found to be neither guilty nor innocent.

The *Corona* case illustrates the failure of judicial rules in preventing the pretrial publication of information adverse to an accused. Corona, a migrant labor recruiter, was arrested in Yuba City, California, on May

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414. N.Y. Times, May 26, 1971, at 1, col. 5.

415. *Id.* For the suggestion that Judge Mulvey should have made the “superhuman effort” required to select a new jury, see N.Y. Times, May 30, 1971, Sect. IV, at 6, col. 5.

416. There were sympathetic demonstrations on behalf of the Panthers and allegations that the Black Panther arrests were part of a government conspiracy to eliminate the party. On May 1, 1970, for instance, some 15,000 demonstrators in New Haven protested the arrests and pending trials of Panthers. But it is possible, perhaps likely, that the demonstrators generated more antipathy than good will toward the Panthers. For an account of the May 1 demonstration, see N.Y. Times, May 2, 1970, at 1, col. 4.

417. The trial judge made references to the lengthy incarceration of the defendants in dismissing the charges against them. See N.Y. Times, May 26, 1971, at 1, col. 5.
26, 1971, and charged with the murders of 10 men. The bodies of the 10 men and other bodies were found buried in shallow graves about five miles outside Yuba City. The victims were believed to be migrant farm workers, and each was hacked in the face, the back of the head, and the chest with either a machete or heavy knife.

When Corona was brought before a judicial officer on the day of his arrest for his initial appearance, the court issued an order prohibiting the sheriff's office, the district attorney's office, and other public officials involved in the case from making statements about evidentiary matters not a matter of public record. The order also prohibited the taking of photographs of Corona. The order, however, came after Sutter County Sheriff Roy Whiteaker had informed the press that he believed Corona guilty of the crimes: "We're certain he [Corona] committed the murders," the sheriff said, adding that the murders seemed to be the work of one man.

After the court issued its order, the press continued to obtain and publish information adverse to the accused. The order has not prevented the publication of such information partly because some officials covered by the order seem to have violated it. In addition, the press obtained information about Corona and the case from unofficial news sources and relied upon information available in public records in their coverage of the case. Press reports that police seized a machete and two pairs of bloodstained men's undershorts from Corona's pickup truck were obtained from public records.

The press also relied upon public records to report that about 15 months before Corona's arrest one José Raya had been found in a cantina in nearby Marysville "viciously beaten with wounds about the

418. See L.A. Times, May 27, 1971, at 1, col. 2. It was expected that Corona would later be charged with more murders.
419. At this writing, 25 bodies have been found.
422. Sheriff Whiteaker told the press the following: "In my opinion, the nature of the wounds and their savagery, the disposition of the bodies of the murder victims and the sheer number of victims, indicates that the perpetrator of these offenses is at least seriously mentally ill and probably a homicidal maniac." See L.A. Times, May 30, 1971, at 20, col. 1. The public defender representing Corona early in the case also confirmed the existence of a ledger maintained by Corona. The ledger contained 34 names, some of which were believed to be the names of murder victims. See L.A. Times, June 5, 1971, at 1, col. 2, and June 17, 1971, at 32, col. 1.
back of the head similar to those of the men whose bodies have been unearthed.\textsuperscript{425} Raya survived after 18 hours of brain and plastic surgery. The press reported that Corona had been at the cantina at the time, but had not been charged for lack of evidence. A jury, however, had returned a $250,000 judgment against Navidad Corona, Juan's brother and owner of the cantina.\textsuperscript{426}

Widespread press comment adverse to the defendants characterizes both the Seale and Corona cases, but there are qualitative differences in the press coverage. Much of the potentially injurious publicity in the Seale case was directed at the Black Panther Party generally rather than at the individual defendants. In addition, the focus of the publicity was not on evidentiary matters. The unfavorable publicity about the Black Panther Party unquestionably made the Seale-Huggins trial a difficult one for any judge to supervise, but who can deny that the Black Panther Party is not a legitimate subject of public discussion?

In contrast to the news coverage in the Seale case, press coverage in the Corona case has emphasized evidentiary matters and Corona's character and background. It could be argued that the press ought to publish some evidentiary information in a case involving crimes of the magnitude with which Corona was charged in order to quiet public apprehensions, but the press has shown far too much zeal in meeting any such obligation. Moreover, press reports that Corona was once committed to a mental institution and that some persons believe Corona to be somewhat peculiar seem hardly necessary to provide the citizenry with the information it needs to make intelligent decisions about crime.\textsuperscript{427}

The above analysis suggests that in both the Seale case and the early stages of the Corona case the law has not adequately dealt with a defendant's right to a fair trial in the face of adverse press coverage. This is not to say, however, that recent judicial approaches to the fair trial-free press problem have been generally ineffectual, or that judicial remedies which place direct restraints on the press should be utilized. Indeed, the careful supervision of the Seale trial by the court seems to have made a difficult case manageable, at least for one trial. Although the judicial system can be found wanting for failing to resolve the Seale case, the courts are not the only political institutions which sometimes malfunction under the stresses and strains of American society.

\textsuperscript{426} Id.
Should the Corona case go to trial, careful judicial supervision may well counterbalance any adverse pretrial publicity. Direct restraints on the press, however, as in the exercise of the constructive contempt power, are inimical to the American tradition of a free press. Such restraints, in any case, would not likely be countenanced by many American judges.\textsuperscript{428} The law can alleviate, but not solve, the problem of trial by newspaper. Rather than ask that government restrict the press, a democratic citizenry should demand that the press provide balanced and responsible coverage of criminal cases.

\textsuperscript{428} See notes 222-50 supra and accompanying text.