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FREEDOM OF THE PRESS VERSUS FAIR TRIAL: THE REMEDY LIES WITH THE COURTS

EDWARD G. HUDON†

I

THE NATURE AND MAGNITUDE OF THE PROBLEM

Two essential requirements for the existence of a democracy such as that which we have in this country are a free press and the right to a fair trial. Neither was specifically provided for in the Constitution as it was brought forth from the Federal Convention of 1787 and presented to the states for ratification; instead, both were incorporated into the Constitution by way of the Bill of Rights—the first and the sixth of the first ten amendments which were adopted by the First Session of the First Congress, and immediately ratified by the states. The purpose of all ten amendments was to allay the apprehensions of some who feared for the rights of the individual unless certain rights which were considered “natural” and “inalienable” were expressly provided for.¹

The first of these amendments, the protection which the Constitution gives to the press, might be said to impose a moral duty on, as well as to grant a right to, the press to keep the people informed. The people have a right to know—the free and unfettered right to read and acquire knowledge.² But of equal importance and just as fundamental as freedom of the press is the sixth amendment, the right to a fair trial—the

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¹Elbridge Gerry and George Mason refused to sign the proposed Constitution as it was brought forth from the Federal Convention because of its lack of a Bill of Rights. See letter written by James Madison to Thomas Jefferson, October 24, 1787, HUNT, 5 WRITINGS OF JAMES MADISON 33-37 (1900-10). See also FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 637-40 (1911).

²In the Virginia Convention which met to consider the adoption of the Federal Constitution, Patrick Henry expressed his dissatisfaction with the document in the following words: "By this Constitution, some of the best barriers of human rights are thrown away." See ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (2d ed. 1876). As a result, Virginia, New York and Rhode Island appended proposed bills of rights to their ratifications. For the ratifications of all of the states, see Documents Illustrative of the Formation of the Union of the American States H.R. Doc. No. 398, 69th Cong., 1st Sess. 1009 (1926).

²See DOUGLAS, THE RIGHT OF THE PEOPLE 33-35 (1958); CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); also, Article 19 of the Declaration of Human Rights in which it is stated: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."
right to a trial that is free of even the suspicion of community hostility and local prejudice.

Although both of these rights are considered basic and fundamental, it is inevitable that frequently the two should conflict. Even though the two exist side by side as they must in both federal and state constitutions, more often than not the two clash whenever a case—particularly a criminal case—involves any amount of community interest and local concern. The reason why can perhaps best be explained by a statement attributed to Walter Lippmann which was quoted before a Senate Committee by Alfred Friendly, the managing editor of the *Washington Post*. Quoted Friendly: “The trouble with crime and punishment as it concerns the press is that it is too interesting and too absorbing because it comes out of real life.”

The stage for the frequent clash between freedom of the press and the right to a fair trial was set quite some time ago—as early as 1440 when printing with movable type was invented. Since then, as a result of the mass dissemination of information through printing and through other means, the problem of *freedom of the press versus fair trial* has presented a dilemma that has frequently been very troublesome to the administration of justice—how troublesome was perhaps best explained by Mr. Justice Frankfurter when he wrote in his concurring opinion in *Irvin v. Dowd*:

> Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor’s collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury.

Regrettably, in spite of Mr. Justice Frankfurter's eloquent appraisal of the freedom of the press versus fair trial dilemma, it took the assassination of a President of the United States to bring the matter to the forefront in so far as the public at large is concerned. The events that followed the assassination of the late John F. Kennedy illustrate how tragic the outcome of trial by newspaper, radio and television can be—how devastating the outcome can be to the rights of the accused. No matter how heinous Oswald's crime was, had he lived he would have been entitled to a fair trial. But, as the Warren Commission pointed out in its report, it is very doubtful that he could have been given such a trial anywhere.  

Concern with the problem of freedom of the press versus fair trial has now reached a point where the Congress of the United States has become involved. During the 89th Congress, subcommittees of the Senate Committee on the Judiciary held extensive hearings on the subject. There are indications that additional hearings will be held, and it may well be that if the courts cannot take care of the matter, Congress will attempt to do it for them.

II

THE WARREN COMMISSION, THE PRESS, SELF-RESTR AiNT, AND THE HAUPTMANN CASE

A number of proposals have been offered for the solution of the problem posed by the clash between freedom of the press and the right to a fair trial. These include a bill introduced in Congress by Senator Wayne Morse that would make it contempt of court to disclose for publication "information not already filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has not already been admitted at the trial." The Attorney General of the United States has placed limitations on what type of information representatives of the Department of Justice can release; at the state level, the Ohio Judicial Conference has proposed that a code be prepared that would limit the number of reporters present at a trial and prohibit statements thought to interfere with a fair trial. The general effect of most

7. See note 3 supra.
10. For a summary of this and other proposals, see Associated Press Managing Editors Association, APME Fact Guide on the Free Press-Fair Trial Debate, prepared.
of the proposals advanced would be to shroud in as much silence as possible police and court activities from the moment of arrest through the trial of an accused. More often than not, the proposals tend to present what may be termed "short cut" solutions to the problem. They seek to by-pass two factors that are involved which cannot be so easily ignored: (1) the freedom and the protection guaranteed the press and other news media by both federal and state constitutions; (2) the nature of the press itself. It must be recognized that newspaper reporters, unlike officers of the law, "are under no legal obligation to protect the constitutional rights of the accused. Too many of them seem to regard it as their right and duty to 'get the story' regardless of whose rights they may invade or how they made invade them."  

Without a doubt, the most widely publicized of all the proposals advanced to solve the freedom of the press versus fair trial dilemma is the recommendation of the Warren Commission that a code of conduct governing all news media be adopted. However, no sooner was this recommendation made than, together with the other proposals, it was challenged by no less than the Press-Bar Committee of the American Society of Newspaper Editors. In a report that was unanimously approved April 14, 1965, by the Board of Directors of the Society, the conclusion reached was "that the repression entailed by those proposals would not only cause a forfeiture of the public's credence in their news media but would withdraw the essential safeguard of public awareness and scrutiny from the processes of justice." The Press-Bar Committee defended its position by asserting:

A large part of the administration of justice in this country operates within, and is a part of, a political system: many judges, prosecutors and sheriffs are elected officials, subject to all the political pressures, good and bad, that characterize our democracy. If that part of the system is to operate successfully, another part, the press, must exercise without fetters both its responsibility for watching the administration of justice and its freedom to report what it observes.

Whether one agrees or disagrees with the Press-Bar Committee's Report, one can only wonder what the effect of the Warren Commis-
sion's recommendation would be even if it were adopted— not only because of the explicit nature of the constitutional prohibition against the infringement of speech and press, but also because of the extent to which the effectiveness of such a code would depend on self-restraint. In the newspaper business, success or failure may often depend on readiness to satisfy the public's thirst for the sensational. For that reason, the profit motive could be a very strong deterrent to any great amount of self-restraint. The spirit might be willing but the flesh could be weak. And if this were the case, what it could lead to is perhaps best illustrated by the intensive publicity and the carnival atmosphere that prevailed throughout the trial of Bruno Richard Hauptmann for the murder of the first-born child of Charles A. Lindbergh thirty-two years ago.

The Hauptmann Trial and the Press

The Hauptmann trial is reported to have been characterized by an American writer as "The Trial of the Century" and by an English writer as "the most sensational American murder trial of the century." Even today it can be considered the most publicized trial ever held in this country. It was held at Flemington, New Jersey, a little community of about 2,500 people, in a court house that was originally built around 1700 and reconditioned in 1828 after a fire. The normal maximum capacity of the courtroom was about 260, but during the trial it was jammed with at least 1,000, some seated, others standing or leaning against the walls, perched on window sills, craning over balcony rails and peering through doorways. The most favored gained admission and good seats through the use of subpoenas. Publicity was given out by both the prosecution and the defense. Before the trial even started newspapers argued the case in headlines. Early in the trial, a half page of pictures in one newspaper carried headlines which referred to "The Flemington Circus," and made references to the trial as a "sideshow" and a "jamboree." There were also references to it as a "holiday," a "freak show," for

16. For a good first-hand account of the setting in which the Hauptmann trial took place, see Oscar Hallam, Some Object Lessons on Publicity in Criminal Trials, 24 Minn. L. Rev. 453 (1940). The material for the discussion of the Hauptmann trial which follows is taken from Mr. Hallam's article, and from the Report of the Special Committee on Criminal Trials appointed by the Criminal Law Section of the American Bar Association. The Special Committee was headed by Mr. Hallam and the Report is reprinted at the end of his article.
17. Id. at 454.
18. Ibid.
19. Id. at 485.
20. Ibid.
thousands who were said to be "laughingly gathered to see a man fight
desperately for his life."21 Before the trial, a street poll was taken and
published which indicated that the man in the street considered Haupt-
mann guilty.22 While the trial was in progress, betting pools were organ-
ized in Flemington and Trenton hotels on the outcome of the trial. In
the court room, on several occasions spectators had to be admonished
against demonstrations such as laughter and applause.

Under normal conditions, Flemington had one telegraph operator,
but during the trial there were forty-five direct telegraph wires, special
teletype connections to London and Halifax, and fast news service to
about every capitol in the world. There were about 700 news men and
129 cameramen present; talking pictures were taken of the trial from
the courtroom balcony, and news photographs were taken and published
of Colonel and Mrs. Lindbergh, and of Hauptmann, on the witness
stand. Pictures were even taken and published of jurors in the jury box.
One picture of a juror referred to as "Hauptmann Juror No. 11" carried
the comment: "Every time he sees a news photographer's camera lens
pointed his way he ducks, averts or covers his face. This picture was
made at the trial today."23 All of these pictures were taken in spite of a
court order forbidding the taking of pictures during sessions of the court.

Curious crowds of perhaps 20,000 a day surged through the streets
of the town, jammed the entrance to the court house, and filled its narrow
passages. Souvenir hunters even tried to walk off with the courtroom
chairs, one person tried to buy the witness chair; and souvenir ladders,
reminders of the one used in the commission of the crime, were offered
for sale and eagerly bought.

Hauptmann was convicted of murder, his conviction was upheld by
the Supreme Court of New Jersey,24 and the Supreme Court of the
United States refused to review the case when it refused to grant a writ
of certiorari.25

The conditions under which the trial took place prompted the Crimi-
nal Law Section of the American Bar Association to appoint a special
committee headed by Oscar Hallam, a former Associate Justice of the
Supreme Court of Minnesota, to look into the matter. The report of this
committee26 depicted in detail the lurid, carnival atmosphere that pre-
vailed throughout and even before the trial, and concluded with sixteen

21. Id. at 486.
22. Id. at 485.
23. Id. at 491.
25. 296 U.S. 649 (1935); motion to file a petition for a writ of habeas corpus de-
nied, 297 U.S. 693 (1936).
26. See note 16 supra.
recommendations that were directed at the excesses that were found to have taken place. This, in turn, prompted the appointment of a joint press-bar committee headed by Newton D. Baker which was made up of members of the American Bar Association and of representatives of the press and radio. The purpose of the Baker committee was to look into the report and the recommendations of the Hallam committee.

The Baker committee reviewed the position of the press, and that of the Bar, with relation to the judicial process. It examined the recommendations of the Hallam Report, some of which it accepted and others of which it rejected. It recognized that the Hauptmann trial "exhibited, perhaps, the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." However, about the only effect that this had was to cause the American Bar Association to add a new canon 35 to the Canons of Professional and Judicial Ethics. How effective this canon, which is directed at the improper publicizing of court proceedings, has been is questionable. The various news media have quarreled with it ever since it was adopted.

If a lesson was learned from the Hauptmann case, it was soon forgotten. "Trial by newspaper" is still very much with us. To expect now that the evil can be cured through self-restraint on the part of the news media is to ignore the voice of experience and to place too much hope on something that is much more idealistic than real. A more practical approach is the recognition that in the final analysis the responsibility for the rights of the accused lies with the courts—that to the extent the courts fail to use existing judicial machinery to maintain complete control over the conduct of a trial, and the circumstances surrounding it, the problem is one of their own creation. If the machinery is adequate, but is not used or is misused, then the blame for "trial by newspaper" must be placed as much on the courts as it is on the news media.

III

JUDICIAL MACHINERY DESIGNED TO ASSURE A FAIR TRIAL

In the American legal system, the judicial machinery designed to as-

27. See Hallam, supra note 16, at 506-08.
28. For the report of the Committee, see 62 A.B.A. REP. 851 (1937).
29. Id. at 861.
30. For a summary of early criticism of this canon see Hallam, supra note 16 at 465 et seq.
sure a fair trial was described as follows in the opinion of the Supreme Court in *Estes v. Texas*:

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. . . . We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions.

To be more specific, the safeguards referred to by the Court may be summarized as follows: (1) the power to punish for contempt; (2) waiver by the accused of his right to trial by jury; (3) continuance until the effect of publicity subsides; (4) voir dire; (5) change of venue.

*The Power of the Courts to Punish for Contempt*

Without a doubt, the power to punish for contempt is one of the most drastic powers that the courts have. It is of ancient vintage, and in this country it has had a very interesting and "checkered" history. At common law and under the Federal Judiciary Act of 1789 it was understood to grant authority to punish summarily—even "with the celerity of lightning." However, the power granted the courts of the United States by the 1789 act—"to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same"—was so sweeping that it soon led to abuses. It led to the impeachment of Judge James H. Peck after he ordered imprisoned and suspended from practice an attorney whose only offense consisted of publishing a criticism of one of the judge’s opinions.

Peck was acquitted, but within a matter of days legislation was introduced in Congress that became the Act of March 2, 1831. This act continued the power of the courts to punish for contempt, *provided* the
power should "not be construed to extend to any cases except the mis-
behavior of any person or persons in the presence of the said courts, or
so near thereto as to obstruct the administration of justice." 38

Most of the states soon enacted similar laws so that between 1831
and the Civil War in only two states was contempt by publication held
summarily punishable. 39 However, after the Civil War the federal and
state courts both drifted back to their old ways. In the federal courts
this was done through the "so near to" clause of the 1831 statute which
was given a causal, rather than a geographical, meaning. Thus, in
Toledo Newspaper Co. v. United States, decided in 1918, 40 the 1831 stat-
ute was interpreted as conferring "no power not already granted" and as
imposing "no limitation not already existing." The "so near to" clause
was said to include action that had a "reasonable tendency" to obstruct
justice. 41 This lasted until 1941 when, in Nye v. United States, 42 the Su-
preme Court rejected the "causal" interpretation of the "so near to" clause as an historic inaccuracy. Instead, the Court substituted a geo-
graphical connotation as it held that conduct one-hundred miles away
from a court could not be held to constitute undue influence on an ad-
ministrator to terminate a suit for wrongful death.

Eight months after the Nye case the Supreme Court decided Bridges
v. California, 43 which involved two state court convictions for contempt
by publication: one was the conviction of an editor and publisher of a
newspaper for publishing editorials and comments about cases that were
pending in the sense that the defendants were awaiting sentence after
having been found guilty; the other was the conviction of Harry Bridges
for the publication of a telegram which he sent to the Secretary of Labor
in which he criticized the decision of a state judge in a labor case and
indicated that a strike would follow the enforcement of the decree. Writ-
ing for the Court, Mr. Justice Black rejected the idea that the English
common law of contempt by publication was carried over into American
law: "One of the objects of the Revolution was to get rid of the English
common law on liberty of speech and of the press." 44 Rejecting "inher-
ent" or "reasonable tendency" as the proper measure of the power to

39. Tenny's Case, 23 N.H. 162 (1851); State v. Morrill, 16 Ark. 384 (1855).
40. 247 U.S. 402 (1918).
41. 247 U.S. 402, 418, 421 (1918).
42. 313 U.S. 33 (1941).
43. 314 U.S. 252 (1941).
44. 314 U.S. at 264, quoting from Schofield, Freedom of the Press in the United
States, 9 Publications of the American Sociological Society 67, 76. Cf. Levy, Leg-
acy of Suppression; Freedom of Speech and Press in Early American History 182
(1960).
punish for contempt, he turned instead to "clear and present danger" and held that it was for the Court to determine as an original question whether the publications in question created such a likelihood of a substantive evil as to deprive them of constitutional protection. The possible influence of the editorials was dismissed as negligible, and Bridges's telegram was found not to constitute a threat of illegal action.

The Bridges case was reaffirmed in Pennekamp v. Florida, decided in 1946. Here, while cases were awaiting new trial or re-indictment, judges were criticized in editorials or caricatured in cartoons as using "every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution." In the indictment this was said to have reflected on and to have impugned the integrity of the courts, wilfully to have withheld and suppressed the truth, and as tending to obstruct the fair and impartial administration of justice. "Clear and present danger" was again invoked by the Supreme Court to upset the conviction and the Bridges case was said to have set "reasonably well-marked limits" around the power of courts to punish newspapers and others for comments upon, or criticism of, pending litigation. The danger to the fair and impartial administration of justice was found not to be so great that it closed the door to permissible public comment.

The following year, 1947, Craig v. Harney rounded out the law of contempt by publication as the Court held that the principles announced in Bridges and Pennekamp also applied to litigation between private individuals—in this instance to comment on a judge's conduct of an action for forcible detainer in which a lease was held to have been forfeited for non-support of rent. While the case was pending, news items and an editorial deplored the manner in which the case was handled by the judge. The direction of a verdict for the plaintiff, at which the jury balked several times, but finally complied with under protest, was characterized as "arbitrary action" and a "travesty of justice." The fact that the judge was a layman rather than a lawyer was commented on. He was, among other things, said to have brought the "wrath of public opinion on his head." The state appellate court admitted that "clear and present danger" was controlling, but it tried to distinguish the Bridges case, apparently on the theory that there was a greater range of permissible comment in cases that generate public concern than there is in those between private individuals. The Supreme Court rejected this with the comment that the Bridges and the Pennekamp cases established a rule "fashioned

45. 328 U.S. 331 (1946).
46. See 328 U.S. at 339 for the citation for contempt.
47. 331 U.S. 367 (1947).
48. See appendix to the Court's opinion, 331 U.S. at 378, 380.

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to serve the needs of all litigation, not merely select types of pending cases."

Freed of the abuses that prevailed before *Nye v. United States* and *Bridges v. California*, the power of courts to punish for contempt when properly used can serve not only to assure that law and order prevail in the courtroom, but also to assure that justice is administered free from outside control and influence. However, under the guidelines laid down in *Bridges*, *Pennekamp*, and *Craig v. Harney*, there is no room for the courts to use this power against a press that does no more than exercise its constitutionally protected power to keep the public informed. Nor can the courts adopt the British system whereby any publication that tends to interfere with the due course of justice is summarily punishable by contempt. To hold otherwise would mean to return to the situation as it prevailed before the 1831 statute was enacted and to the law as it existed at the time of the *Toledo Newspaper Co.* decision.

**Waiver by the Accused of His Right to Trial by Jury**

In the Anglo-American tradition, the right to trial by jury dates back many centuries, the original idea having been brought to England by the Normans at the time of the Conquest. By 1215 it had gained enough of a foothold as a part of the law of England to be included in Magna Carta, the charter of rights wrested by the rebellious barons from King John at Runnymede. In the American Colonies, interference with this right was considered serious enough to be included in the Declaration of Independence, the indictment drawn up and directed at George V at the start of the American Revolution. After the nation was founded the

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49. 331 U.S. at 378.
50. For a recent discussion of all of these cases see Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. Rev. 504 (1965).
52. Chapter XXIX. "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land."
53. "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation:

"For depriving us in many cases, of the benefits of Trial by Jury."

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right was made explicit, rather than left to inference, by the sixth and seventh amendments to the Constitution; moreover, the right is provided for in the constitution of each state in the Union.

With such a time-honored history behind it, it hardly seems conceivable that one should ever think it necessary to waive his right to trial by jury to be assured a fair trial. Nevertheless, it does happen that such a drastic course must be followed as the only way to avoid trial by a jury subjected to prejudicial pretrial publicity. How drastic such a course is considered to be is well illustrated by rule 23(a) of the Federal Rules of Criminal Procedure. There it is stated that "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."54

Continuance Until the Effect of Prejudicial Publicity Subsides

The theory behind a continuance is that in time the public forgets—that the effect of prejudicial publicity can be alleviated by postponing the date of a trial to permit publicity to subside and be forgotten. However, there is nothing to prevent the press from reminding the public of past events by disseminating further prejudicial information when the trial is actually held at a later date.55 Furthermore, an accused has a right to a "speedy" trial.60 This right might be said to be infringed if a continuance is used as a substitute for other means of assuring a fair trial.57

Generally, when a motion for a continuance is made because of prejudicial pretrial publicity, to grant or deny such a motion rests within the discretion of the trial court; unless there is an abuse of that discretion, the denial of such a motion will be upheld.58

Motions for continuance have been denied for very much the same reasons that motions for changes of venue have, i.e., the lack of a showing that identifiable prejudice exists against the accused as a result of publicity.69 In addition, it may be said that there is a likelihood that

54. The Federal Rules of Civil Procedure are not so demanding. While rule 38(a) states that "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate," rule 38(b) states that "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." (Emphasis added.)
55. See Estes v. Texas, 381 U.S. 532 (1965), in which a continuance served only to enable the mass media to better prepare themselves to give greater trial coverage when the trial actually took place.
56. U. S. CONST. amend. VI.
59. Discussed infra.
publicity unfavorable to the defendant will continue, or that granting a
continuance will not change the effect of publicity which has already
taken place.60 A continuance has even been denied on the rather tenuous
ground that to delay the start of a trial might be unduly burdensome or
prejudicial to the prosecution.61 But this does not take into considera-
tion the language of Sheppard v. Maxwell in which it is said:

Of course, there is nothing that proscribes the press from re-
porting events that transpire in the courtroom. But where there
is a reasonable likelihood that prejudicial news prior to trial
will prevent a fair trial, the judge should continue the case until
the threat abates, or transfer it to another county not so per-
meated with publicity.62

Voir Dire

The voir dire examination applies to both witnesses and jurors. In
essence, it is a preliminary examination conducted so that a court may
determine the competency of a witness or a juror.63 The term itself is
taken from the law French and it denotes “to speak the truth.”

As applied to jurors, voir dire is used to determine whether a juror
has an interest or a bias such that it should disqualify him from serving
on a jury. Under early practice, and according to the older texts, if a
juror was challenged for cause a distinction was drawn between two con-
ditions that could render him incompetent.64 One was termed principal.
It had to do with any relation or connection that, on voir dire, a juror
was found to have with any of the parties or the cause to be tried. It
was, therefore, independent of the juror’s volition; it included kinship
to a party, or any other relationship to him such as master, servant, coun-
sellor, steward, attorney, or that the juror was of the same society or
corporation with him, or had an interest in the cause. A principal chal-

60. Annot., 10 L. Ed. 2d 1291 (1964).
61. Ibid.
63. See Coke on Littleton, 158b, in which it is written: “If the cause of challenge
 touch the dishonor or discredit of the juror, he shall not be examined upon his oath, but
 in other cases he shall be examined upon his oath, to informe the triors.” In his edition
 of Coke on Littleton, Hargrave commented on this as follows: “This is one instance of
 the examination called a voir dire; for as a witness is on a voir dire to try an objection
to his competency to give evidence, so a juror may be sworn in like manner to try a
cause of challenge to him. It is thought fit to take notice of this; because in some of
our books, the voir dire is described, as if confined to the challenge of a witness, and
only used to distinguish such a partial swearing of a witness from swearing him in
chief.” See also note, The Trial of Francis Francis, 15 Howell’s State Trials 898 (1717).
64. Proffatt, A Treatise On Trial By Jury §§ 166-68 (1877). The distinction
between the two conditions is also explained by Blackstone in his Commentaries. See
3 Blackstone, Commentaries 363.
lenge established prima facie evidence of bias or favor, but actual existence of bias was tried and determined by the court. 85

The second condition that could render a juror incompetent was termed to the favor. It was based on some probable circumstance or suspicion of acquaintance, or to the state or condition of the juror’s mind as to the parties or the subject-matter in controversy. The validity of such a challenge was left to triors whose duty it was to determine whether a juror so challenged met the required standard of impartiality.

The dividing line between the two conditions was very indistinct. Controversies could, and did, arise as to whether a challenge for cause fell within one category or the other. For that reason, although the distinction existed in early American practice, it is now disregarded. 86 Today the problem is not whether a challenge for cause is principal or to the favor, but rather what effect pretrial publicity may have on a juror. However probing the questioning of a prospective juror may be on voir dire, it may still be inconclusive as to his true state of mind as a result of modern methods of mass communication. A prospective juror may be unwilling to admit his prejudice. He may not even be conscious of the fact that he is prejudiced. Once accepted, he may, wittingly or unwittingly, give more weight to evidence that is consistent with pretrial publicity to which he has been subjected than to evidence that is not. The effect may be to deprive a trial judge of effective control over testimony that a jury considers as a trier of fact. 87

It is only if voir dire is coupled with a liberal use of the other safeguards that an accused can be assured of any semblance of a fair trial. This is particularly true whenever a trial becomes a cause célèbre and is made to feel the full force and effect of prejudicial, pretrial publicity that may come from the press, radio, and television. Any other course must inevitably lead to the dilemma presented by Mr. Justice Frankfurter’s query: “How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered

65. The challenge in The Trial of Francis Francia, see note 63 supra, was of this type. For an American example of what appears to have been a principal challenge see the opinion of Chief Justice John Marshall in Mima Queen & Child v. Hepburn, 7 Cranch 290, 297 (1813). In this case the plaintiffs asserted their freedom as against others who claimed them as slaves. On voir dire, one prospective juror appeared at first not to have formed or expressed an opinion on the particular case, but on further questioning he avowed his detestation of slavery to be such that in a doubtful case he would have found for the plaintiffs. The trial court’s instruction to the triers that the juror did not stand indifferent between the parties was upheld.

66. Proffatt, op. cit. supra note 64, § 167, particularly the quotation from Mann v. Glover, 2 Green 195, quoted at page 222.

the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."

**Change of Venue**

The change of venue safeguard is also of ancient vintage. The need for it was recognized at common law. Blackstone wrote of it as follows:

The administration of justice should not only be chaste, but should not even be suspected. A jury coming from the neighborhood has in some respects a great advantage; but is often liable to strong objections; especially in small jurisdictions, as in cities which are counties of themselves; and where such assises are but seldom holden; or where the question in dispute has an extensive local tendency; where a cry has been raised, and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that, if a whole county is interested in the question to be tried, the trial by the rule of law must be in some adjoining county; but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias without any pecuniary interest. In all these cases, to summon a jury, laboring under local prejudices, is laying a snare for their consciences: and, though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretenses to another mode of trial. The courts of law will therefore in transitory actions very often change the *venue*, or county wherein the cause is to be tried.

Coupled with voir dire, change of venue is perhaps the most practical and the most effective safeguard that the courts have at their disposal with which to assure a fair trial. It requires a realistic view of the effect of pretrial publicity which, unfortunately, does not always exist. Much reliance has been placed on *Reynolds v. United States*, a Utah bigamy case decided in 1878, in which the Supreme Court upheld the denial of a change of venue by asserting:

In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity,

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69. 3 BLACKSTONE, COMMENTARIES 383, 384.
71. 98 U.S. 145 (1878).
brought to the attention of all intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.72

This could be interpreted to mean that the price we have to pay for literacy—the ability to suppress ignorance—is resignation and even submissive acquiescence to “trial by newspaper.” This is true even though, in Reynolds, the Court explained that whether the “nature and strength” of the opinion formed are such as in law to necessarily raise a presumption of partiality presents a question of mixed law and fact, to be tried upon the evidence like any other issue of that character—that the finding of a trial court should not be set aside unless error is “manifest.” The Court continued:

No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found that the juror had formed such an opinion that it could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the “conscience or discretion” of the court.”3

While this formula may be adequate for the ordinary “run of the mill” case, it is not adequate for the cause célèbre. It does not suffice for the trial that has been preceded by intensive pretrial publicity. It does not take into consideration, as Mr. Justice Frankfurter pointed out in his dissent in Stroble v. California,74 the fact that jurors are “human beings and even with the best of intentions in the world they are, in the well-known phrase of Holmes and Hughes, JJ, ‘extremely likely to be impregnated by the environing atmosphere.’ Frank v. Mangum, 237 U.S. 309, 349.”75 The burden, it is true, is on the state to establish guilt through evidence in court under circumstances that assure the accused all the safeguards of a fair trial. But here again there is a failure to recognize that even though a juror who has been exposed to pretrial publicity asserts that he is impartial, he may, in fact, be unwilling to admit his prejudice during the voir dire examination, or he may even be unconscious of his own prejudice.76 For, as was pointed out in Irvin v.

72. Id. at 155, 156.
73. Id. at 156.
74. 343 U.S. 181, 198 (1952).
75. Id. at 201.
76. See Annot., 10 L. Ed. 2d 1243, 1247 (1964).

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Dowd: “The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.”

IV

THE REYNOLDS FORMULA: HOW MUCH OF IT STILL PERSISTS?

It can safely be said that the Reynolds formula prevailed through the first half of this century. The presence of the formula was very evident in Stroble v. California, decided in 1952. Even though this was not a change of venue case, the objection on appeal was that newspaper accounts of the arrest and conviction of the accused were so inflammatory that they made a fair trial impossible in the Los Angeles area, the scene of the crime. The facts in the case were as follows.

In between the time of the sex killing of a six-year-old girl and the arrest of the accused the Los Angeles newspapers featured in banner headlines the “manhunt” the police were conducting. On the day of the arrest of the accused, the newspapers printed extensive excerpts of his confession made in the District Attorney’s office, obviously released to the press by that office. Four days later the full text of the confession was reprinted by the newspapers as it had become a matter of public record at a preliminary hearing. Both in headlines and in the text of news stories the accused was described as a “werewolf,” a “fiend,” a “sex-mad killer,” etc. A special session of the legislature was called by the Governor of the state to deal with “sex crimes” and other matters; a four-day conference of law enforcement officers was held on “sex crimes”; and hearings were held by a committee of the state’s legislators at which the District Attorney stated that he did not see why sex offenders should not be disposed of in the same manner as mad dogs. As these events were reported in the Los Angeles newspapers, references were made to the murder which the accused was charged with having committed.

While the Supreme Court of the United States deprecated the action of the State District Attorney’s office when it released to the press the details of the accused’s confession on the day of his arrest, the Court noted, as it upheld the conviction, that this information would have become available to the press anyway four days later. Quoting the cliché

78. 343 U.S. 181 (1952).
79. Id. at 191-93.
from *Craig v. Harney* that "[W]hat transpires in the court room is public property," the Court then remarked that at no time during the trial was a change of venue asked for although specifically provided for by California law. Furthermore, the Court found significant the fact that the confession, one of the most prominent features of the newspaper accounts, was voluntarily made and was introduced in evidence at the trial itself. There was no affirmative showing that community prejudice ever existed, or in any way affected the deliberation of the jury, because of the newspaper accounts which appeared approximately six weeks before the start of the trial. For that reason, the Court held that it could not simply read these stories and then declare that they necessarily deprived the accused of due process, particularly after a contrary finding of two state courts.

An indication of a change of direction away from *Reynolds* first appeared in 1958 in *Marshall v. United States*. During the trial of this case, seven of the jurors saw newspaper accounts of prior convictions of the accused that the trial judge had ruled not admissible in evidence. After the judge questioned these jurors he ruled that no prejudice was present. He based his decision on the assurance of each juror that he would not be influenced by the news accounts and that he would decide the case only on the evidence of record. As it reversed and ruled that a new trial should be granted, the Supreme Court held that "prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution’s evidence. . . . It may indeed be greater for it is then not tempered by protective procedures."

*Irvin v. Dowd* and Its Aftermath

In *Marshall v. United States* the Supreme Court was exercising its supervisory power over the lower federal courts. However, three years later, the Court decided *Irvin v. Dowd*, a case which came from a state court on a writ of habeas corpus. For that reason, the latter case is a much more significant decision with which to follow the course of the *Reynolds* formula.

In the *Dowd* case, as in the *Stroble* case, at the time of the arrest of the accused there were press releases of a confession which received extensive publicity, and the crime with which the accused was charged

80. 331 U.S. 367 (1947).
82. 360 U.S. 310 (1959).
83. 360 U.S. at 312, 313.
aroused excitement and was extensively covered by the news media of the locality. (Actually, six murders were committed, but the accused was tried and convicted of only one.) Unlike the Stroble case, in the Dowd case counsel sought a change of venue. One such change was granted but a second was denied on the basis that Indiana law permitted only one change. At the trial, the jury panel consisted of 430 persons. Of these, 268 were excused for cause, 103 because of conscientious objections to the imposition of the death penalty. All of the peremptory challenges permitted were used.

As in Reynolds, the Court again quoted from Chief Justice Marshall in Burr's Trial: "The theory of the law is that a juror who has formed an opinion cannot be impartial." Nevertheless, the Court expressed the opinion that it is not required that jurors "be totally ignorant of the facts and issues involved," again as in Reynolds, the Court noted that in these days "of swift, widespread and diverse methods of communication" an important case, particularly a criminal 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 would not "have formed some impression or opinion as to the merits of the case." Referring to Reynolds and other earlier cases, Mr. Justice Clark wrote for the Court:

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

This assertion, however, was not permitted to rest as it stood. Instead, it was tempered with the statement that the adoption of such a rule "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." Referring directly to the test in Reynolds that whether the nature and strength of the opinion formed are such as in law to necessarily raise a "presumption of partiality," the Court again

86. 1 Burr's Trial 416 (1807), quoted by the Court at page 722.
87. 366 U.S. at 722.
88. Ibid.
89. 366 U.S. at 723.
90. Ibid., quoting from Lisenba v. California, 314 U.S. 219, 236 (1941).
91. Id. at 723, quoting from Reynolds v. U.S., 98 U.S. 145, 156 (1878).
held that the question thus presented was "one of mixed law and fact" with the affirmative of the issue still upon the challenger—that unless such an opinion was shown to exist in the mind of the juror as would raise a presumption of partiality, "the juror need not necessarily be set aside." Reaching still further into Reynolds, the Court again held that the finding of a trial court on the issue ought not to be set aside by a reviewing court "unless the error is manifest.”

After this extensive review of Reynolds, the Court then held that in Dowd the build-up of prejudice was "clear and convincing"; that the pattern of deep and bitter prejudice shown to be present throughout the community was "clearly reflected" in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight of the twelve thought the petitioner guilty. With such an opinion permeating the minds of these eight, the Court concluded that "it would be difficult to say that each could exclude this preconception of guilt from his deliberations." Wrote Mr. Justice Clark for the majority: "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." The conviction was vacated and the case remanded with the instruction that the petitioner be retried or set free.

To a certain extent, the Supreme Court clarified, and perhaps even limited, its Dowd decision in Beck v. Washington in which it refused to upset the conviction of Dave Beck for grand larceny of union funds. The objection in behalf of Beck, the former head of the Teamster's Union, was "that such a strong case of adverse publicity ha[d] been proved that any jury selected in Seattle at the time he was tried must be held to be presumptively biased and that the trial court's adverse rulings for a change of venue and for continuances were therefore in error." After examining the pretrial publicity which was nationwide when it took place, the Court found that it had largely diminished by the time the

92. Ibid.
93. Ibid.
94. Ibid.
95. Id. at 725.
96. 366 U.S. at 727.
97. Ibid.
98. 369 U.S. 541 (1962).
99. Id. at 556.
100. The conviction was upheld by the Supreme Court of Washington by an equally-divided court. Judge Donworth wrote for the four judges who voted to reverse: "The amount, intensity, and derogatory nature of the publicity received by appellant during this period is without precedent in the state of Washington." 56 Wash. 2d, at 511. This publicity is summarized in the majority opinion of the Supreme Court of the United States as follows: The Select Committee on Improper Activities in the Labor or Manage-

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trial took place five months after Beck's indictment. The following factors and the following comparisons indicated to the Court that in the Beck case each juror's qualifications as to impartiality "far exceeded" the minimum standards established in the Dowd and other cases:

1. All persons summoned as prospective jurors in the Dave Beck, Jr., case a month earlier were excluded from the panel in the Dave

...
Beck, Sr., case, and anyone who was in the courtroom during the earlier trial was excused from serving on the jury in the later trial.

2. In the Dowd case, several persons who served on the jury were unsuccessfully challenged for cause; in the Beck case, the petitioner exercised all of his peremptory challenges and every juror challenged for cause by him was excused.

3. In the Dowd case the voir dire examination indicated that 90% of the 370 prospective jurors and two-thirds of those seated on the jury had formed an opinion as to guilt. In the Beck case, of the 52 prospective jurors examined by the trial court and counsel, only 8 admitted bias or a preformed opinion as to Beck's guilt and 6 others suggested that they might be biased or might have formed an opinion. All 14 were excused.

In the light of this, the Court concluded that it could not say that:

[T]he pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinions as a matter of law.\textsuperscript{101}

Rideau v. Louisiana,\textsuperscript{102} decided in 1963, was another change of venue case, but in this one the voir dire examination did not play a significant part as it did in Irvin v. Dowd.\textsuperscript{103} The basis for the request for a change of venue, which was denied, was a twenty-minute jail "interview"—a motion picture film with sound track showing the sheriff interrogating the accused who admitted perpetrating a bank robbery, kidnapping three of the bank's employees and murdering one of them. The "interview" was shown over the local television station three days in a row. Without hesitation the Court reversed the conviction with the statement:

[W]e do not hesitate to hold, without pausing to examine a particularized transcript of the \textit{voir dire} examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview."\textsuperscript{104}

Turner v. Louisiana,\textsuperscript{105} decided in 1965, presented a situation in which two deputy sheriffs who were the principal prosecution witnesses

\begin{itemize}
  \item 101. 369 U.S. at 557.
  \item 102. 373 U.S. 723 (1963).
  \item 103. Discussed \textit{supra}.
  \item 104. 373 U.S. at 727.
  \item 105. 379 U.S. 466 (1965).
\end{itemize}
had custody of the jurors. Throughout the trial for murder which ended in a conviction and a sentence of death, these two officers freely mingled with the jurors and conversed with them. Here there was no question of change of venue or of the nature of the conduct of the trial itself. Nevertheless, the Dowd case was found controlling. The basic guarantees of trial by jury were found to be lacking. Quoting from Dowd and other cases, the very essence of trial by jury was said to guarantee an accused a trial by impartial, indifferent jurors. When this is absent, the very minimal standards of due process were said to be lacking. The case was reversed and remanded.

The question in Estes v. Texas, also decided in 1965, was whether it was a violation of the fourteenth amendment for a state court, over the objection of the defendant, to permit telecasts and broadcasts of the courtroom proceedings of a criminal trial. The case received massive nationwide, pretrial publicity. Then, the two-day hearing on the defense motion to prevent telecasting, broadcasting and news photography of the trial was carried on live television. Later, a videotape of this was used to replace a "late movie." During the trial itself, which took place after a continuance of a month, the state's opening and closing statements, as well as the return of the jury's verdict and its receipt by the judge, were on live television. In addition, while the trial progressed, film clips from it were used daily on regularly scheduled news broadcasts as backdrops for news commentaries which included excerpts from testimony as well as reportorial remarks.

The state based its position on the fact that the petitioner had not established "isolatable prejudice" which, it maintained, had to be done to invalidate the conviction. But there were, Mr. Justice Clark pointed out for the majority of the Court, instances in which the Court itself had found that a showing of actual prejudice was not a prerequisite to reversal. "It is true," he wrote, "that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." This was the rule that was

106. Id. at 471.
108. "The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture the page of the paper from which he was reading while sitting at the counsel table." 381 U.S. 532, 538 (1965).
109. 381 U.S. at 542-43.
followed in the \textit{Rideau}^{110} and the \textit{Turner}^{111} cases; it was clear to
the Court that the same rule had to be applied again. The chief function of
our judicial machinery, the Court asserted, is "to ascertain the truth,"
and the use of television could not, it now held, contribute materially
to this objective. Instead, its use would, the Court found, amount to the
"injection of an irrelevant factor into court proceedings."^{112} Moreover,
the Court recognized that there are numerous instances in which its use
might cause actual unfairness—"some so subtle as to defy detection by
the accused or control by the judge."^{113} What these could be were sum-
mrarized as follows by the Court:

1. The potential impact of television on jurors—the probability
that it could have a direct bearing on his vote as to guilt or innocence.

2. The possible impairment of the quality of testimony in criminal
trials caused by the impact upon a witness of the knowledge that he is
being viewed by a vast audience.

3. The additional responsibilities placed on the trial judge by the
presence of television. Without television, to make certain that an ac-
cused receives a fair trial requires the undivided attention of a trial
judge; when television is present, the trial judge has the added burden
of supervising its use.

4. The impact of courtroom television on the defendant. Its pres-
ence was said to be a "form of mental—if not physical—harassment,
resembling a police line-up or the third degree."^{114}

The facts in the case, Mr. Justice Clark wrote for the Court, demon-
strated clearly the necessity "for the application of the rule announced in
\textit{Rideau}."^{115} The judgment was reversed.

\textbf{The Sheppard Case and Freedom of the Press Versus Fair Trial}

\textit{Sheppard v. Maxwell},^{116} decided June 6, 1966, is perhaps as signifi-
cant a case as has ever been decided by the Supreme Court of the United
States in the area of \textit{free press versus fair trial}. At the trial court level,
some aspects were present which did not exist at the trial of Bruno
Richard Hauptmann several decades earlier.^{117} Nevertheless, the later
trial was very reminiscent of the earlier one in many respects. This is
well demonstrated by the following which is taken from the opinion of

\begin{itemize}
\item 112. 381 U.S. at 544.
\item 113. \textit{Id.} at 545.
\item 114. \textit{Id.} at 549.
\item 115. \textit{Id.} at 550.
\item 117. Discussed \textit{supra}.
\end{itemize}

http://scholar.valpo.edu/vulr/vol1/iss1/15
the Supreme Court of Ohio which upheld the conviction of Dr. Sam Sheppard for the second degree murder of his wife:

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. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a "Roman holiday" for the news media, Sam Sheppard stood trial for his life.\(^\text{118}\)

From the outset of the investigation of the murder of Marilyn Sheppard, suspicion was focused on her husband. On the morning of the tragedy, after a search of the house and premises where the crime took place, the Coroner is reported to have told his men: "Well, it is evident the doctor did this, so let's go get the confession out of him."\(^\text{119}\) On the day of the murdered woman's funeral a newspaper story appeared in which the Assistant County Attorney, later the chief prosecutor in the case, sharply criticized the refusal of the Sheppard family to permit the immediate questioning of the doctor. From then on, front-page headlines stressed repeatedly Sheppard's lack of cooperation with the police and other officials. Then there developed a barrage of front-page "editorial artillery" charging that someone was "getting away with murder";\(^\text{120}\) the investigation was alleged to be inept and this was attributed to "friendships," "relationships," and "hired lawyers."\(^\text{121}\) On the same day that a front-page editorial appeared with the headlines, "Why No Inquest? Do It Now, Dr. Gerber," an inquest was called and Dr. Sheppard was subpoenaed.\(^\text{122}\) The three-day inquest was held in a school gymnasium; it was broadcast live and a swarm of reporters, television and radio personnel were present, together with their broadcasting equipment. Sheppard was brought into the room by police and searched before several hundred spectators; although his counsel were present, they were not permitted to participate. At one point, when Sheppard's chief

\(^\text{118. 165 Ohio St. 293, 294.}\)
\(^\text{119. 384 U.S. at 337.}\)
\(^\text{120. Id. at 339.}\)
\(^\text{121. Ibid.}\)
\(^\text{122. Ibid.}\)
counsel attempted to place documents into the record, he was forcibly ejected from the room by the Coroner who was then cheered, hugged and kissed by ladies in the audience.

At the time of the trial, television and newsreel camera motion pictures were taken on the sidewalk and the steps in front of the courthouse of those who participated in the trial, including the judge and jury;\textsuperscript{123} during the selection of the jury, perspective jurors were photographed in the corridors outside the courtroom by photographers and television personnel. Once the trial started, witnesses, counsel and jurors were photographed and televised whenever they entered or left the courtroom. Picture-taking was prohibited in the courtroom during the actual sessions of the court, but there were no such restrictions during the morning and afternoon recesses. Sheppard himself was extensively photographed for newspapers and television as he was brought to the courtroom about ten minutes before each session. Throughout the nine weeks of the trial there was so much confusion in the courtroom as representatives of the news media moved in and out that even with loudspeakers it was difficult for witnesses and counsel to be heard. Sheppard and his counsel frequently had to leave the courtroom in order to be able to talk in privacy, away from the reporters who were clustered within the bar of the court. Many times, for counsel to be able to raise a point with the judge out of the hearing of the jury, it had to be done in the judge’s chambers. But even then, the judge’s anteroom was filled with representatives of the news media who vied with each other to find out what had been discussed; often what had been discussed appeared later in newspapers which were accessible to the jury since the jurors were exposed to the various news media in which the daily proceedings appeared \textit{verbatim}. The court even permitted photographers to photograph the jury in the jury box, as well as individual jurors in the jury room; the day before the verdict was rendered, while the jurors were at lunch and sequestered by two bailiffs, they were separated into two groups for photographs which appeared in the newspapers.

Throughout the trial, “bedlam reigned in the courthouse”\textsuperscript{124} and the intense pretrial publicity continued unabated. It was not until the case was submitted to the jury that the jurors were sequestered. Before then, they were allowed to go their separate ways while the proceedings were not taking place, without having been given adequate instructions not to read or listen to anything concerning the trial. During the five days and

\begin{footnotes}
\item[123.] On one television broadcast, a staged interview was carried of the judge as he entered the courthouse. \textit{Id.} at 343.
\item[124.] 384 U.S. at 355.
\end{footnotes}
four nights of their deliberations, although the jurors were sequestered they were permitted to make phone calls from the bailiff’s room in the hotel. It is true that a bailiff was present when these calls were made, but he only heard one end of the conversations and no record was kept of who made the calls or to whom they were made. No instructions had been given to prevent such calls.  

125. Other episodes which the Court characterized as “only the more flagrant” were summarized as follows:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel’s random poll of people on the streets as to their opinion of Sheppard’s guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey “smacks of mass jury tampering,” called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as “non-judicial, non-legal, and nonsense.” The article was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard’s counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard concealed his guilt by hiring a prominent criminal lawyer. Sheppard’s counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that “WHK doesn’t have much coverage,” and that “[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can.”

3. While the jury was being selected, a two-inch headline asked: “But Who Will Speak for Marilyn?” The front-page story spoke of the “perfect face” of the accused. “Study that face as long as you want. Never will you get from it a hint of what might be the answer . . . .” The two brothers of the accused were described as “Prosperous, poised. His two sisters-in-law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan.” The author then noted Marilyn Sheppard was “still off stage,” and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author—through quotes from Detective Chief James McArthur—assured readers that the prosecution’s exhibits would speak for Marilyn. “Her story,” McArthur stated, “will come into this courtroom through our witnesses.” The article ends:

“Then you realize how what and who is missing from the perfect setting will be supplied.

“How in the Big Case justice will be done.

“Justice to Sam Sheppard.

“And to Marilyn Sheppard.”

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while they inspected the Sheppard home. The time of the jury’s visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss’ confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the
As the Supreme Court appraised the record of the Sheppard trial after Doctor Sheppard had served ten years of a life prison sentence, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

“Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. . . . We are not going to harass the jury every morning. . . . It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury. . . .”

6. On November 24, a story appeared under an eight-column headline: “Sam Called A ‘Jekyll-Hyde’ By Marilyn, Cousin To Testify.” It related that Marilyn had recently told friends that Sheppard was a “Dr. Jekyll and Mr. Hyde” character. No such testimony was ever produced at the trial. The story went on to announce: “The prosecution has a ‘bombshell witness’ on tap who will testify to Dr. Sam’s display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition.” Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcasted over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard’s mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: “Would that have any effect upon your judgment?” Both replied, “No.” This was accepted by the judge as sufficient; he merely asked the jury to “pay no attention whatever to that type of scavenging. . . . Let’s confine ourselves to this courtroom, if you please.” In answer to the motion for mistrial, the judge said:

“Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don’t justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with it in the Court’s mind, as far as its outrage is concerned, but—”

“MR. CORRIGAN: I don’t know what effect it had on the mind of any of these jurors, and I can’t find out unless inquiry is made.”

“THE COURT: How would you ever, in any jury, avoid that kind of a thing?”

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard’s allegations which appeared under the headline: “‘Bare-faced Liar,’ Kerr Says of Sam.” Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors’ rooms, the jurors were permitted to use the phones in the bailiff’s rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors’ end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.


126. Actually, this was the third time that the Sheppard trial was brought to the attention of the Supreme Court of the United States. On November 13, 1956, the Su-
it started with the principle that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." Not only does the press "simply publish information about trials," Mr. Justice Clark who was again the spokesman for the Court wrote, but it "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Quoting from Craig v. Harney129 and Bridges v. California,130 he noted that the framers of the Constitution intended that liberty of the press be given the broadest possible scope in an orderly society—for that reason the Court had consistently required that the press have a free hand, even though it sometimes deplored the "sensationalism" of the press. However, again quoting from Bridges v. California, Justice Clark noted that the Court had also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspapers."131 Repeating the language of Pennekamp v. Florida that "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice,"132 he nevertheless went on to assert, as the Court had done earlier in Cox v. Louisiana, that this "must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'"133 And, as the Court had held in Marshall v. United States,134 he pointed out that a jury's verdict must be based on evidence received in open court, not from outside sources.

Without citing the case, the Court recognized the Reynolds formula135 when it acknowledged that in most cases where a deprivation of due process is claimed, there must be a showing of "identifiable prejudice to the accused." However, as in Estes v. Texas, the Court also recognized that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking

127. 384 U.S. at 350.
128. Ibid.
129. 331 U.S. 367, 374 (1947), quoted at page 350 of the Court's opinion.
130. 314 U.S. 252, 265 (1941), quoted at page 350.
131. Id. at 271, quoted at page 350 of the Court's opinion.
132. 328 U.S. 331, 347 (1946), also quoted at page 350.
134. 360 U.S. 310 (1959), referred to by the Court at page 351.
135. Discussed supra.
in due process." The "totality of circumstances" present, the Court held, again warranted the latter approach—particularly in view of the denial of a change of venue, the failure to sequester the jury during the trial, the exposure of the jury to newspaper, radio and television coverage of the trial, the failure of the court to give adequate directions to the jurors not to read or listen to anything concerning the case while it was in progress, and the massive and pervasive attention given by the press to Sheppard's prosecution which even exceeded the press coverage given the Estes trial.

Mr. Justice Clark sought to lay "ground rules" for trial courts as he wrote:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

The Justice continued the drift away from the Reynolds formula as follows:

Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.

The Reynolds formula still exists, but the drift away from it has become so broad that there must be serious doubt as to its effectiveness in anything but the ordinary, "run of the mill" case.

Sheppard v. Maxwell also serves as a very good example of how long it can take for damage done at the trial court level to be rectified. Eleven and one-half years elapsed from the time Sheppard was convicted of the second degree murder of his wife on December 21, 1954, until, on June 6, 1966, the Supreme Court of the United States ordered him released from custody unless the state should "put him to its charges again

137. Ibid.
138. Ibid.
139. 384 U.S. at 362.
140. 384 U.S. at 362-63. (Emphasis added.)
within a reasonable time."”141 It took more than one decade to finally determine that at his trial the judge did not fulfill his duty “to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom.””142

SUMMARY AND CONCLUSION

Dissenting in Stroble v. California, Mr. Justice Frankfurter wrote that even if guilt is clear:

[T]he dignity of the law would be best enhanced by establishing that guilt wholly through the processes of the law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all.143

How to assure that these rights will, in fact, be accorded to all has been a problem with which the courts have been plagued for quite some time. Blackstone recognized the existence of the problem when he wrote his celebrated Commentaries during the latter half of the 1700’s,144 the founding fathers did also when the sixth and the seventh amendments to the Constitution of the United States were adopted. Nevertheless, the problem still persists. It becomes increasingly serious as modern methods of communication no longer simply entail the press in the traditional sense—newspapers, periodicals and books—but also radio, television, and now telstar, which make the dissemination of information, and even misinformation, ever more efficient and far-flung, often to the detriment of the rights of the accused.

To expect that the problem will be solved through the adoption of a code of ethics, which largely depends on self-restraint by the news media for its effectiveness, is to be idealistic indeed. Such an approach ignores man’s insatiable interest in the bizarre and the sensational. Equally idealistic is the dependence on an inflexible formula which requires that identifiable prejudice to the accused be shown to exist whenever a deprivation of due process through “trial by newspaper” is claimed. This approach ignores the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity once it becomes implanted in the minds of those who serve as jurors. A more realistic approach is the recognition that Anglo-American judicial machinery is adequately

141. 384 U.S. at 363.  
142. Ibid.  
143. 343 U.S. 181, 198, 202 (1952).  
144. 3 BLACKSTONE, COMMENTARIES 363-64.
equipped with procedural safeguards designed to assure anyone accused of a crime of a fair and impartial trial—that when “trial by newspaper” takes place, as often as not, it is because this judicial machinery is not used to the extent that it should be, or is misused. And when this happens, the blame must be placed on the courts rather than on the news media. For, as Mr. Justice Holmes wrote in dissent in Frank v. Mangum: “Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.”

To the extent that a trial is held in an “environing atmosphere” that is not free of prejudicial publicity, then there is not the fair and orderly administration of justice that the Constitution requires and the very purpose of having a court system fails. All that is left is something which is not as brutal as, but is nevertheless akin to, the verdict of the assembly in the Roman arena when it turned thumbs up or thumbs down to seal the fate of a fallen gladiator.

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145. 237 U.S. 309, 349 (1915). Mr. Justice Holmes was joined in his dissent by Mr. Justice, later Chief Justice, Hughes.