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FREE PRESS-FAIR TRIAL: *How may a defendant's right to a fair criminal trial be protected from prejudicial newspaper publicity?*

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"Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards of the fair administration of justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication." Memorandum by Frankfurter, J., denying certiorari, Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950).

The first amendment provides for freedom of the press.[1] Thus the press may report to the public the facts of crimes, as well as the backgrounds of persons accused of crime, so long as these publications are not libelous.[2] In its zeal to inform the public, the press sometimes publishes information which tends to establish or disprove to the public the charges against a defendant.[3] Such newspaper publicity, when read by prospective jurors prior to the trial or by jurors during the trial, may influence their decision in the case.

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[1] U.S. CONST. amend. I.

[2] Freedom of the press is not an absolute and unfettered license, Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F.2d 673 (8th Cir. 1926); but may be limited where in the public interest as libel, Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288 (2nd Cir. *aff'd*, 316 U.S. 642 (1942); or as sedicious material, Gitlow v. Kiely, 44 F.2d 277 (S.D. N.Y. 1930).

[3] Recently in Chicago, one Barry Cook was indicted, tried, and acquitted of the murder of middle-aged Margaret Gallagher. Miss Gallagher was beaten to death July 22, 1956, while sunbathing in a Chicago lake shore park. Cook was suspected of the murder because of the similarity of the pattern of his attacks on other women with the murder of Miss Gallagher. While in prison for assaults on several women, Cook supposedly confessed the murder.

Prior to his trial, Chicago newspapers ran many articles on Cook, the murder, supposed evidence expected by the press to be offered at the trial, and the expected outcome of the trial. Even though Cook was acquitted, many of the reports were highly prejudicial to his defense.

For example, some of the publications rebutted Cook's presumption of innocence: "There is no longer any considerable doubt about who killed Miss Gallagher. The police of Chicago can fairly claim to have solved the murder. . . ." Chicago Tribune, October 17, 1958, p. 10 (Editorial). Other publications contained admissions not admitted in evidence as that Cook had confessed ("Beating her numerous times on the head and shoulders, ripping off her clothes, and then continuing to beat her", Chicago Daily News, Oct. 14, 1958, p. 1, 7); or Cook's criminal background which is irrelevant to proof of the murder and usually inadmissible at trial (the "questioning took place in Joliet Prison where Cook is serving a 1–14 years prison term for assault of women and attempted robbery," Chicago Daily News, Oct. 16, 1958, p. 6); accusations by police concerning crimes with which Cook was not charged (Cook "is still the prime suspect in the Judy May Anderson murder. There is no doubt in my mind that Cook killed Judy too, Fitzgerald said," *Ibid.*); character traits usually not admissible and not relevant to proof of the crime (detectives described Cook "as the most vicious sadist we have ever encountered," Chicago Daily News, Oct. 14, 1958, p. 5); accusations by witnesses not then available for cross-examination ("Four witnesses place Cook at the . . . scene or near

The Constitution, of course, does not provide for the determination of criminal guilt or innocence by the press.[4] It does provide, however, that one accused of crime is entitled to a public trial by an impartial jury,[5] and this judicial determination should not be "in competition with any other means for establishing the charge."[6]

The purpose of this paper is to consider how a defendant's right to a fair criminal trial may be protected from the prejudicial effects of newspaper publicity without infringing upon the freedom of the press.

It should be noted at the outset that fair comment on the facts of the crime and the background of the accused, when accurately and objectively written, is not offensive unless the material is inadmissible as evidence at the accused's trial. On the other hand, the publication of slanted, incorrect accounts, or of factually accurate but legally prejudicial accounts of the crime and the accused, is objectionable. These publications, which portray the guilt or innocence of the accused, will be called *trial by newspaper.*

Trial by newspaper is undesirable. By virtue of its influence on a judge or jury, trial by newspaper deprives the defendant of his right under the sixth amendment to be faced by his accusers and to cross-examine them, to present rebuttal or affirmative evidence in his own defense, and to a trial by an impartial jury.[7] Trial by newspaper also deprives the accused of the safeguards of the rules of evidence and of the traditional presumption of innocence.

First Amendment Prohibits Judicial Control of Trial by Newspaper

In order to understand clearly the conflict between the individual's right to a fair trial and freedom of the press, one must consider the historical development of the law in this area.

At common law, before the time of Blackstone, constructive contempt of court—that is, contempt by publication, words, or acts outside the court's presence—was unknown.[8] The theory of constructive contempt first appeared in Blackstone's treatise. Blackstone's theory that "speaking or writing contemptuously of the court or judges, acting in their judicial capacity"[9] constituted contempt was based on an undelivered opinion of Judge Wilmot from the case of *King v. Alman.*[10] Judge Wilmot, a friend of Blackstone, was removed from the bench before he could deliver his opinion. Nevertheless, Blackstone accepted the theory and published it as the law of England.[11]

In the formative years of American legal thinking, Blackstone was often the sole source of judicial authority, and his theory was accepted as law. Around the end of the 18th century, however, two protests were heard with respect to the summary exercise by state courts of the power of constructive contempt. Several unpopular decisions marked the beginning of a trend toward abandonment of Blackstone's theory.

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by . . . ," Chicago Daily News, Oct. 16, 1958, p. 6); irrelevant and inflammatory admissions not admissible in evidence (Cook "has admitted more than 200 attacks and attempted assaults on women in the area in the last three years," Chicago Daily News, Oct. 14, 1958, p. 1 (Bulletins); see also Chicago Sun-Times, Oct. 15, 1958, p. 31).

[4] The term "Press" will be used herein to cover all forms of news reporting media.

[5] U.S. CONST. amend. VI.

[6] Memorandum opinion of Frankfurter, *J., denying certiorari,* Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950).

[7] Sheppard v. Florida, 341 U. S. 50, 52 (1951) (Concurring opinion). Also see: U.S. CONST. amend VI; and similar provisions found in state constitutions as, ILL. CONST. art. II, sec. 9, (1870). The sixth amendment does not apply to state proceedings. In the absence of an appropriate state constitutional provision, however, the right to a fair and impartial trial would be implicit in the due process clause of the fourteenth amendment to the federal constitution. Betts v. Brady, 316 U.S. 455 (1942).

[8] FOX, HISTORY OF CONTEMPT OF COURT 21 (1927).

[9] 4 BL. COMM. 285.

[10] [1765] Wilm. 243.

[11] English courts have strongly supported the use of constructive contempt to control the press. Under English law, any publication that can be reasonably calculated, by the court, to interfere with the administration of justice is contempt. Actual interference need not be shown, nor is intent a material factor of the contempt. Depending on the circumstances of each case, a publication may be contempt merely if it was one which might conceivably prejudice a pending trial. Rex v. Daily Mail, 44 T.L.R. 303, 306 (K.B. 1928); Ludwig, *Journalism and Justice in Criminal Law,* 28 ST. JOHNS L. REV. 197 (1954).

The following publications have been cited as contempt in England: the publication of information not admissible as evidence, King v. Tibbits, (1902) K.B. 77 (1901); pre-trial comments accusing the defendant of other crimes, King v. Parke, (1903) 2 K.B. 432; supposed confessions, Rex v. Clarke, 27 T.K.R. 32 (K.B. 1910); findings of private investigations, Rex v. Evening Standard, 40 T.L.R. 833 (K.B. 1924); cartoons or pictures of the accused or related to the crime or the accused, Rex v. Daily Herald, 75 Sol. J. 119 (K.B. 1931); King v. Daily Mirror, (1927) 1 K.B. 845. Rex v. Hutchison, (1936) 2 All Eng. 1514 (K.B.). Also see: Appendix to memorandum opinion of Frankfurter, *J., denying certiorari,* Maryland v. Baltimore Radio Show 338 U.S. 912 (1949); HALSBURY'S LAWS OF ENGLAND, *Contempt of Court,* §2 (2nd. ed. 1932).

In one of these cases, *Republic v. Oswald*,[12] Oswald, an editor and publisher, was held in contempt for having claimed possible prejudice on the part of a Pennsylvania trial court during a pending libel suit because a brother of one of the parties sat on the Supreme Court of the State. Oswald later asked the legislature to impeach the judges. Although the impeachment attempt failed, the incident illustrates the rise of public sentiment against judicial restraint of the press.

The holding of the *Oswald* case was followed in 1802 in a similar Pennsylvania case, *Republic v. Passmore*.[13] Also, there again followed an attempted impeachment of the judges. Finally, in 1810, the Pennsylvania legislature passed a statute abolishing constructive contempt.[14] Similarly, in New York, the case of *People v. Yates*[15] gave rise to a New York statute abolishing constructive contempt.[16]

Federal law soon followed the trend begun by the states. In 1826, Judge Peck of the United States District Court of Missouri imposed an eighteen month suspension of practice on a lawyer, Luke Lawless, for having published an unfair criticism of the judge's opinion against him in a land grant case. Lawless later petitioned Congress to impeach Judge Peck.[17] The attempted impeachment failed, but in 1831 Congress passed an act prohibiting summary punishment for contempts not committed "*in the presence of the court, or so near thereto as to obstruct the administration of justice.*"[18] (Emphasis added.) Early cases interpreted the new federal statute strictly. In the case of *Ex parte Poulson*[19] the court interpreted the phrase "in the presence of the court" to mean physical presence, thus placing a geographical limitation on the contemptuous act committed.

[12] 1 U.S. (1 Dall.) 319 (1788).
[13] 3 Yeares (Pa.) 438 (1802).
[14] PA., ACTS (1808–1809), ch. 78, p. 146.
[15] 6 Johns R. (N.Y.) 355 (1810).
[16] N.Y. REV. STAT., (1829), part iii, c. iii, tit. 2, sec. 10. Drafting of the New York act was influenced by a model code proposed in LIVINGSTON, SYSTEM OF PENAL LAW, (1st. ed. 1824). Livingston proposed that the courts should only have the power to cite in contempt those acts that take place in the actual presence of the court.
[17] STRANSBURY, REPORT OF THE TRIAL OF JUDGE PECK (1833).
[18] 4 STAT. 487 (1831); currently see, 62 STAT. 701, 18 U.S.C.A. 401 (1948).
[19] 19 Fed. Cas. 1207 (No. 11,350) (E.D. Pa. 1835). Also see: United States v. New Bedford Bridge, 27 Fed. Cas. 91 (No. 15, 867) (C.C. Mass. 1885); Culyler v. Atlantic & N.C. R. Co., 131 Fed. 95 (S.D. N.Y. 1904).

By the time of the Civil War, twenty-three of the thirty-three states had statutes similar to those of Pennsylvania, New York, and the United States.[20] After the Civil War, however, the trend toward abolition of constructive contempt changed its course. Slowly the state and lower federal courts returned to the view of Blackstone. Statutes which prohibited constructive contempt were overcome by either finding them unconstitutional[21] or by reasoning that the statutes were declaratory rather than mandatory.[22]

The Supreme Court of the United States joined the trend and returned to the view of Blackstone in the case of *Toledo Newspaper Co. v. United States*.[23] In that case, petitioner was held in contempt for severely criticizing the trial judge's finding in connection with the re-negotiation of a street car franchise. The Court found that the contempt statute of 1831 did no more than express a limitation on the constitutional power of the Court to sustain itself. The portion of the act reading "or so near thereto as to obstruct the administration of justice" was interpreted as establishing a test of causation which looked to the effect of the contemptuous act upon the court. Earlier appellate court interpretations placing a geographic limitation on the contemptuous act were thus overturned.

The view of the *Toledo Newspaper* case remained as the federal law of constructive contempt until 1941 when the case was reversed by *Nye v. United States*.[24] Nye, an attorney, was held in contempt for acts committed one hundred miles from the court room. On appeal, the Supreme Court returned to a strict interpretation of the contempt act, holding that Congress intended to limit the

[20] Nelles & King, *Contempt by Publication in the United States*, 28 COL. L. REV. 401, 525, 533 (1928). More recently in Ludwig, *Journalism and Justice in Criminal Law*, 28 ST. JOHNS L. REV. 197, 218 (1954), the author points out that as of 1954, twenty-six states had no statute prohibiting constructive contempt or had codified the common law; seven states privileged true reports; six states by statute provided that the press could be held in contempt; one state privileged only non-libelous material; and eight states had statutes similar to the Federal Act.
[21] *Ex parte* Sturm, 152 Md. 114, 126, 136 Atl. 312 (1927); *In re* Merrill, 88 N.J. Eq. 261, 283–84, 102 Atl. 400 (1917); Carter v. Commonwealth, 96 Va. 791, 811, 813, 32 S.E. 780 (1899).
[22] Nichols v. Judge, 130 Mich. 187, 193, 89 N.W. 691 (1902); *Ex parte* Barry, 85 Calif. 603, 25 Pac. 256 (1890); People v. Wilson, 64 Ill. 195 (1872). Nelles & King, *Contempt by Publication in The United States*, 28 COL. L. REV. 525, 537 (1928).
[23] 247 U.S. 402 (1918).
[24] 313 U.S. 33 (1941).

contempt power of the federal courts to acts having a geographic relationship to the court room.

Since the *Nye* case concerned only federal courts, the power of the state courts to cite summarily for constructive contempt continued until the 1941 decisions of the Supreme Court in *Bridges v. California* and its companion case, *Times-Mirror Co. v. California*.[25]

Bridges was convicted of contempt by the California court for sending a threatening telegram to the Secretary of Labor stating that he would call a longshoremen's strike on the west coast if the court found against him in a harbor area union representation dispute. The Times-Mirror was convicted of contempt for publishing editorials during a pending criminal trial of labor union organizers. The editorials called for strict sentences rather than mere probation or parole. The California Supreme Court affirmed the contempt citations in both cases.

On *certiorari*, the Supreme Court of the United States reversed both cases. The Court held that the freedoms of the first amendment which are implicit in the due process guarantee of the fourteenth amendment prohibited the state courts from punishing for constructive contempt publications or statements which tended to affect the outcome of the pending trial unless the publications or statements presented a *clear and present danger* to the impartial administration of justice. The *Bridges* case did not go so far as the *Nye* case and require that the contemptuous act transpire in the physical proximity of the court room. The sole requirement was that the acts constitute a clear and present danger to the administration of justice.

The question of what is a clear and present danger to the impartial administration of justice cannot be answered in exact words or terms. In *Bridges* the Court said that to constitute a clear and present danger the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[26]

Subsequent cases have further developed the philosophy and defined the limits of the clear and present danger test. In *Pennekamp v. Florida* the Court characterized the problem as one of striking "a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."[27] The Court then proceeded to reverse the contempt citation, which grew out of a severe criticism of the Court during a bench trial for rape, holding that although it must protect the defendant's right to a fair trial, "Freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice."[28]

In *Craig v. Harney*,[29] the press was cited for contempt in attacking the judge, an elected layman, who refused to accept a jury verdict in a forcible entry and detainer action. The criticism came after the trial but during the pendancy of a motion for a new trial. The Supreme Court, in reversing, stated that freedom of the press should not be impaired "unless there is *no doubt* that the utterances . . . are a serious and imminent threat to the administration of justice."[30] (Emphasis added.) The danger of imminent threat "must not be remote or even probable; it must immediately imperil" a fair trial.[31] In effect, this decision seemed to require a direct act of contemp in the presence of the Court.

Craig v. Harney is the last decision handed down by the Supreme Court on this subject. However, in a later case, *State v. Baltimore Radio Show*,[32] the Maryland Supreme Court, applying the clear and present danger test as laid down by the Supreme Court of the United States, found that the broadcasting of sensational commentaries on a child murder, and about the accused and his supposed confession and reenactment of the crime, would not prevent a fair and impartial bench trial or vitiate a subsequent jury trial. From the Maryland Supreme Court decision, the state petitioned the United States Supreme Court for review on *certiorari*. The Supreme Court denied *certiorari*, with Mr. Justice Frankfurter delivering a memorandum opinion.[33]

The *Baltimore Radio* decision of the Maryland Supreme Court was the first decision by any court indicating that the clear and present danger test

[25] 314 U.S. 252 (1941).
[26] *Id.* at 263.
[27] 328 U.S. 331, 336 (1946). Petitioners published two editorials portraying the judge as the friend of crime for his action in dismissing two cases and quashing an indictment for rape. The rape case was pending on re-indictment when the publications were made, but the Court found that the editorials did not exert a clear and present danger to the decision of the judge. The effect on a jury was considered too remote for consideration.
[28] *Id.* at 347.
[29] 331 U.S. 367 (1947).
[30] *Id.* at 373.
[31] *Id.* at 376.
[32] 193 Md. 300, 67 A.2d 497 (1949).
[33] See note 6 *supra*

applies to jury trials as well as to situations where only judges are concerned.[34] Prior cases reviewed by the Supreme Court all involved bench trials. Thus the Supreme Court has yet to say whether the clear and present danger test will also be applied to pending jury trials.[35]

Procedural Remedies to Protect Defendant's Rights Under the Sixth Amendment from Trial by Newspaper

It seems clear that the press, without fear of citation for contempt of court, may freely practice trial by newspaper. To protect his right to a fair and impartial jury trial by avoiding the effects of adverse publicity, the accused must thus look to procedural remedies.

Selecting a jury and instructing it as to the evidence it may consider offers the accused some protection from trial by newspaper. *Voir dire*, the examination of prospective jurors, is considered an adequate remedy against adverse publicity on the theory that if a fair and impartial jury can be chosen then the inflammatory articles will have no material effect.[36] Notwithstanding a challenge for cause, courts will allow a juror to serve who has read the newspapers and even formed or expressed an opinion about the outcome of the trial, unless it appears that the juror could not yield his opinion to the evidence presented in court.[37] This standard for disqualification is harsh. It allows persons to serve who may not realize the full effect of their prior judgements on their present ability to reach a decision on the evidence. The courts justify this procedure on the basis that mass communication makes it impossible to pick and keep a jury that has not come in contact with the publications.[38] Thus on *voir dire* the defense attorney is left to exercise his peremptory challenges wisely in an attempt to pick out those persons more affected than others. He also faces the dilemma of wording his inquiry so as not to arouse the jurors' curiosity and stimulate them to read the publications.[39]

Instructions by the trial judge at the outset and close of the trial to the effect that jurors should avoid reading commentaries on the trial and that only the evidence presented in court should be considered in reaching a verdict are also considered sufficient to protect the defendant against inflammatory publicity.[40] It is possible that the court's instructions may keep jurors from viewing prejudicial publications, but it is difficult to understand how the instructions may keep the jurors from being unconsciously influenced by what they have already read.

In a recent federal case, *Marshall v. United States*,[41] the Supreme Court reversed Marshall's conviction for violation of the Pure Food, Drug, and Cosmetic Act and granted him a new trial on the ground that he could not have received a fair trial where seven members of the jury admitted reading inflammatory newspaper publicity during the trial, even though the judge questioned the jurymen and each stated that he was not prejudiced by the publicity and could decide solely on the basis of the evidence offered in court. This decision faced up the inadequacies of judicial instructions to the jury as a remedy for trial by newspaper and decided that a mistrial was a more appropriate remedy in this case.

Where publicity is so prejudicial that it cannot be cured by *voir dire* or instructions to the jury, the accused may seek a change of venue or a continuance.[42] Publicity alone, however, is an

[34] See note 32 *supra*, at 325–26.

[35] See note 6 *supra*.

[36] For cases where the trial court considered the examination of jurors on *voir dire* and the lack of difficulty of choosing a jury see: Mayo v. Blackburn, 250 F.2d 645 (5th Cir. 1957); Cole v. State, 46 Okla. Crim. 365, 287 Pac. 782 (1930); State v. Gallo, 128 N.J.L. 172, 24 A.2d 557, *aff'd*, 129 N.J.L. 52, 28 A.2d 95 (1942).

[37] Where the juror admits that he would be unable to find on the evidence in court, he should be dismissed for cause or a mistrial granted. Singer v. State, 109 So.2d 7 (Fla. 1959); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954). However, where the juror merely read the prejudicial article but stated that it did not prejudice him against the defendant so that he could not reach a verdict on the evidence presented in court, the court found no ground for reversal. United States v. Pisano, 193 F.2d 361 (7th Cir. 1951), United States v. Leviton, 193 F.2d 848 (2nd Cir. 1951); *contra*, Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

[38] Marshall v. United States, 258 F.2d 94, 98 (10th Cir. 1958); Shockley v. United States, 166 F.2d 704, 709 (9th Cir. 1948); Singer v. State, 109 So.2d 7 (Fla. 1959).

[39] Briggs v. United States, 221 F.2d 636 (6th Cir. 1955).

[40] People v. Herbert, 340 Ill. 320, 172 N.E. 740 (1930); Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953); United States v. Pisano, 193 F.2d 361 (7th Cir. 1951); Honda v. People, 111 Colo. 279, 141 P.2d 178 (1943); Commonwealth. v. Spallone, 154 Pa.Super. 282, 35 A.2d 727 (1944).

[41] Marshall v. United States, 258 F.2d 94 (10th Cir.), *rev'd*, 360 U.S. 310 (1959).

[42] Change of venue is the usual remedy unless the publicity had so broad a coverage that a fair trial could not be had elsewhere in which case continuance would be granted. Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

insufficient ground for a change of venue or continuance,[43] unless it has so aroused public hostility toward the accused as to make a fair trial unlikely.[44] The courts look for evidence of public hostility in the results of *voir dire* and the use of peremptory challenges,[45] in the sufficiency of the jury instructions,[46] in public conduct,[47] in the timing of the publication and the volume and coverage of its circulation.[48]

Where public sentiment is not found to have been sufficiently aroused to justify a change of venue, the courts find that the defendant's rights are protected by *voir dire* and jury instructions.[49] On the other hand, where the publicity appears to have been particularly damaging, other courts have granted changes of venue without proof of actual public prejudice.[50] A change of venue preserves the defendant's right to a prompt trial and thus assures that the memory of witnesses will not fade and that his incarceration pending trial will not be unduly prolonged. This remedy will avoid harmful publicity, if it is local in nature. It is more than likely, however, that in a time of mass communications, the publicity will reach the new forum before the defendant.

The opportunity of obtaining a continuance not only denies the defendant a prompt trial but also provides time for witnesses to disappear or for their memories to dim. Moreover, this remedy cannot assure the defendant that the publicity will not be renewed and public sentiment refreshed at the time of trial.

Generally, where the defendant has applied for a procedural remedy during the trial process, the courts have not required that the clear and present danger test be applied. In *Leviton v. United States*,[51] however, the Court of Appeals for the Second Circuit applied the test of the state contempt cases and required the defendant to prove that the newspaper publicity constituted a clear and present danger to his right to a fair trial. Judge Frank strongly dissented on the ground that contempt cases do not involve the same issues as change of venue cases and should not be subject to the same standards of proof.[52] In the contempt cases, the court faces the problem of limiting freedom of the press, and a grave threat to the administration of

[43] People v. Sangren, 75 N.Y.S.2d 753, 190 Misc. 810 (1947); Shockley v. United States, 166 F.2d 704 (9th Cir. 1948).

[44] State v. Collins, 50 Wash.2d 740, 314 P.2d 660 (1957); Henslee v. United States, 246 F.2d 190 (5th Cir. 1957).

[45] Many courts have denied continuance or change of venue because *voir dire* did not expose alleged hostile sentiment toward the accused. The claimed prejudice must exist throughout the county from which the jury is selected and not merely in any one part of the county. Keeton v. Commonwealth, 314 S.W.2d 204 (Ky. 1958); People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914); United States v. Moran, 194 F.2d 623 (2nd Cir. 1952).

In examining the results of *voir dire* in State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340 (1956), the court considered that only fourteen out of forty-seven available jurors were dismissed in selecting a jury and that the defense exercised only five of his six peremptory challenges. See also: Irvin v. Dowd, 357 U.S. 374 (1959); State v. Faciane, 237 La. 1028, 99 So.2d 333 (1958); Shuskan v. United States, 117 F.2d 110 (5th Cir. 1941).

[46] See note 40 *supra.*

[47] In Sheppard v. Florida, 341 U.S. 50 (1951) the state militia was called upon to keep the peace in the community during the trial. In State v. Faciane, 237 La. 1028, 99 So.2d 333 (1958) the defendant was removed to an adjoining county to await trial so as to remove him from threats of the public.

[48] Change of venue denied, where publicity and sentiment were so wide spread that defendant could get no fairer trial elsewhere. State v. Rini, 153 La. 57, 95 So. 400 (1923); Schockley v. United States, 166 F.2d 704 (9th Cir. 1948). Change of venue is also denied where sentiment is localized and does not cover all of the county. See note 44 *supra.*

The courts have denied a remedy on the ground that the publicity was too remote from the trial where the publication was made ten months prior to trial, State v. Jager, 85 N.W.2d 240 (N.D. 1957); six weeks prior to trial, People v. Stroble, 36 Cal.2d 615, 226 P.2d 330, *aff'd*, 343 U.S. 181 (1952); and four weeks prior to trial, People v. Fernandez, 89 N.Y.S.2d 421, 195 Misc. 95 (1949).

[49] See notes 36 and 40 *supra.*

[50] Where the defendant was indicted and ready for trial but a few days prior to trial a sub-committee of a Senate investigating committee made public damaging information, since the publicity was nation-wide, a change of venue would not have insured a fair trial, thus the court held defendant should have been granted a continuance for longer than one month because of public sentiment adverse to him. Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). Also see: United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952) where publicity was particularly intense on the morning the jury was to be impanelled.

In People v. Murawski, 394 Ill. 236, 128 N.E. 387 (1946), where publicity was published during the trial in the community's only newspaper, the court did not require proof of actual prejudice. Or where the prosecutor made public prejudicial information during the trial for no acceptable purpose other than to influence the jury, no proof of actual prejudice was required. Henslee v. United States, 246 F.2d 190 (5th Cir. 1957); Griffen v. United States, 295 Fed. 437 (3rd Cir. 1924); Briggs v. United States, 221 F.2d 636, 640 (6th Cir. 1955).

[51] 193 F.2d 848, 857 (2nd Cir. 1951) (defendant was convicted of violation of the federal export act, senate investigating committee made public during the trial other crimes defendant committed, the court required that defendant prove such publicity constituted a clear and present danger to his receiving a fair trial.)

[52] 193 F.2d 848, 857 (2nd Cir. 1951).

justice must be proved before the press will be restrained. In the change of venue and continuance cases, however, the court is faced with the question of whether the defendant's right to a fair trial has been infringed. And it may be that the publicity, although it will justify a procedural remedy, will not constitute contempt of Court.[53]

Under the Supreme Court holding in *Stroble v. California*,[54] newspaper publicity six weeks prior to the trial was found to be insufficient ground for reversal in the absence of proof of public hostility toward the accused, a test similar to that applied by the state courts. In *Sheppard v. Florida*,[55] however, where the publicity was accompanied by a charge on the jail to lynch the defendant, by the burning of defendant's home, by forcing defendant's relatives to leave town in fear of their lives, by calling out the state militia, and by enforcing special court rules to preclude weapons and keep order in the court room, Justices Jackson and Frankfurter in a concurring opinion, thought the press had sufficiently aroused public sentiment hostile to the accused so as to deny him due process of law.

The Supreme Court does not apply the clear and present danger doctrine in deciding issues related to change of venue or continuance. Nevertheless, by requiring proof of strong adverse public sentiment, the Court gives effect to a harsh standard of proof. The public may be prejudiced against the accused without such prejudice being evidenced by actual public hostility.

If procedural relief is to be a remedy for trial by newspaper, the degree of proof of prejudice required must be eased. Some evidence of a more liberal view is found in the concurring opinion of Justices Jackson and Frankfurter in the *Sheppard* case where, having found the publicity was so inflammatory that it rendered the judicial process a sham, Mr. Justice Jackson said, "These convictions, accompanied by such events [publicity], do not meet any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal."[56] The idea here presented, of automatic reversal, to cure the inflammatory effects of publicity without proof of actual prejudice was also expressed by Justice Frankfurter, dissenting in *Stroble*, where he said, "I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as a part of the "traditional concept of the American way of conduct of the trial!"[57] He then added, "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."[58] Mr. Justice Frankfurter's strong stand on reversal leads one to believe that he would favor a more liberal stand in granting continuances and changes of venue.

The recent Supreme Court decision in *Marshall v. United States*[59] furthers the views of Justices Jackson and Frankfurter by holding that the trial court's instruction to the jury to disregard newspaper articles concerning the trial was not sufficient to protect the accused's right to a fair trial even though the jurors claimed their reading of the articles did not prejudice them. The Court handed down a brief opinion, limiting itself to the particular facts of the case; nevertheless the opinion does show a movement by the Court in the direction of relief for the accused from trial by newspaper.

Mistrial is not a completely adequate remedy, for the defendant must again stand trial, pay fees, and hope that witnesses are available and that their memories are undimmed by time. And still the defendant has no assurance that the stigma of the first trial will not carry over to the second trial to refresh the publicity and public sentiment. Nevertheless, an automatic reversal could be more than a remedial process to protect the defendant. It could also be used to reprimand officers of the court and those involved in law enforcement who may disclose information or express opinions prejudicial to the defendant. Reversal might also act as a reprimand to the press, who though they have no interest in the trial, may reconsider their policy when they find that their publications have resulted in the reversal of an otherwise valid conviction.

[53] The Supreme Court of the United States supports Judge Frank, for in Stroble v. California, 343 U.S. 181, 191 (1952), the Court stated that it is not considering a contempt case; rather, it was considering whether press publicity had so prejudiced the defendant that a fair trial could not be had. The Court considered the fair trial issues without applying the clear and present danger test.

[54] 343 U.S. 181 (1952). The defendant was convicted of murdering a young girl. Publicity six weeks prior to his trial was claimed to be prejudicial to his receiving a fair trial; the Court, however, found that defendant failed to prove that the articles gave rise to any hostile sentiment toward him in the community.

[55] 341 U.S. 50 (1951).

[56] *Id.* at 53.

[57] 343 U.S. 181, 201 (1952).

[58] *Id.* at 202.

[59] See note 41 *supra*.

Conclusion

In any consideration of the various remedies of an accused to shield him from public prejudice stimulated by inadvertent publicity, one factor is always prevalent. Once public sentiment has been aroused, once the publications have been made, the accused's right to a fair and impartial jury trial has probably been infringed, and the initial presumption of innocence is difficult to achieve.

Weighing the values of a press free from restraint by the courts, and of a trial free from prejudice by the press, punishment of the press for constructive contempt may be too high a price to pay for the elimination of trial by newspaper. The use of constructive contempt is objectionable because its bounds and limits are undefined and left to be acted upon at the sole discretion of the court in a summary proceeding.

Of the few state contempt cases to reach the Supreme Court, where the press has been held in constructive contempt for its publications, none has involved a legislative enactment designating the limits of the court's discretion, defining contemptuous material, or establishing other than summary procedure. The Court in the *Bridges* case noted that no California statute was under consideration.[60] Mr. Justice Frankfurter, dissenting in *Bridges*, analogizes trial by newspaper to the federal crime of obstructing justice.[61] Perhaps a criminal code providing for indictment, arraignment, and trial by jury for the designated and defined crime of trial by newspaper would fulfill the needs of justice. Nevertheless, even if a statute were enacted, it would still be subject to interpretation under the clear and present danger doctrine. As the Court stated in *Bridges*, "legislative preferences or beliefs cannot transform matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression."[62]

To avoid the constitutional problems of restraining the press, the defendant may take advantage of procedural steps to avoid adverse publicity. Although some authors have argued that on *voir dire* a more liberal number of challenges should be allowed to combat adverse publicity, a jury might never be selected if every prospective juror who had read or knew of prejudicial publicity was excused. Likewise, the court's instructions to a jury may be of doubtful value, for no one can predict whether a jury will decide solely on the evidence presented in court. And in some cases, instructions to the jury may even be harmful, for they may arouse the interest of the jurors and lead them to read prejudicial articles contrary to the court's instructions.

Change of venue and continuance would provide the accused with opportunity to gain an impartial trial without placing restraints on the press. However, the law with respect to changes of venue and continuances requires not only proof of prejudicial publicity but also of resulting public hostility so strong as to make a fair trial unlikely. This standard of proof is too high. Publicity may have a prejudicial effect on prospective jurors without necessarily causing outbursts of public hostility. A more liberal standard of proof of prejudice should be developed in order to allow greater use of change of venue and continuance. The liberal standards of proof that should be developed for change of venue and continuance should also be applicable to motions for mistrial, where the publication is made during the trial.

Trial by newspaper might also be fought on another front beyond the reach of the defendant but within the reach of the bench and the bar. In many instances prejudicial news releases are made by persons related to the trial, such as the defense or prosecuting attorneys or police officers.[63] Canon

[60] Bridges v. California, 314 U.S 252, 260, 269 (1941).

[61] 314 U.S. 252, 305 (1941). Dissenting, Mr. Justice Frankfurter refers to what is currently 62 STAT. 769, 18 U.S.C. 1503 (1948) which provides, "Whoever corruptly or by threats of force or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness . . . or any grand or petit juror, or officer in or of any court of the United States shall by fined . . . or imprisoned . . . or both." A companion section, 62 STAT. 770, 18 U.S.C. 1504 (1948), provides, "Whoever attempts to influence the action or decision of any grand or petit jury of any court of the United States on any issue or matter pending before such juror or the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication in relation to such issue or matter shall be fined . . . or imprisoned . . . or both." Note that section 1503 of 18 U.S.C. requires corrupt intent, threats or force, while section 1504 of 18 U.S.C. would require merely an attempt to influence, but neither statute applies directly to the press nor defines what would be the crime of trial by newspaper.

[62] See note 60 *supra*, at 263.

[63] Sheppard v. Florida, 341 U.S. 50, 51 (1951) (the press published statements of the sheriff that the defendant had confessed); Baltimore Radio Show, Inc. v. State, 193 Md. 300, 65 A.2d 497 (1949) (Commissioner of Police disclosed facts of the accused's criminal record, confession, re-enactment of the crime); People v. Murawski, 394 Ill. 236, 128 N.E. 387 (1946) (Prosecutor disclosed prior trial and acquital of defendant for same crime). Two pending State cases involving statements of