Journal of Criminal Law and Criminology

Volume 56
Issue 1 *March*

Article 1

Spring 1965

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The Journal of
CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE

VOL. 56 MARCH 1965 NO. 1

THE PRESS AND THE OPPRESSED—A STUDY OF PREJUDICIAL NEWS REPORTING IN CRIMINAL CASES*

Part I: The Problem, Existing Solutions and Remaining Doubts

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When the news media publicize information commonly referred to as "prejudicial publicity," a criminal defendant's right to a fair trial may be jeopardized. In Part I of this two-part article, the author first examines the applicable standards of impartiality which a jury must meet in order for a trial to be constitutionally "fair," and then defines that "prejudicial publicity" which can render a jury unconstitutionally partial and hence a trial not constitutionally fair. Finally, existing methods which have been used in an attempt to prevent defendants from being convicted by juries rendered partial by publicity are critically examined, with emphasis on the effect of each of these methods upon the co-existing interests of the press, the defendant, and the Government which are sought to be preserved.

In Part II, scheduled to be published in the next issue of the *Journal*, the author examines the possibility of expanding some of the existing solutions, with emphasis on the importance of formulating and making known to the press, Bar, and police a set of standards delineating the kinds of material which are likely to deprive a defendant of a fair trial. After examining the sources of prejudicial publicity and noting the probable futility of internal control by the press, the author proposes a remedial statute. Results of a poll of lawyers, police officials, and newsmen conducted by the author are tabulated in appendices to Part II.—EDITOR.

In the exercise of their constitutional right to freedom of the press, news media publish information concerning criminal cases. In the exercise of his constitutional right to a fair trial, every criminal defendant may demand trial by an impartial jury. Often, however, publicity exposes potential or actual jury members to information which is not eventually admitted in evidence at the trial. By thus enabling the jury to consider incompetent material, publicity can be prejudicial to the defendant, with the result that he is unable effectively to exercise his right to a fair trial. Frequent conflict between these fundamental rights constitutes a serious problem to the administration of criminal justice and raises the question of how the criminal defendant's right to a fair trial can be preserved without infringement of the equally important right to freedom of the press. A third right is also concerned whenever this conflict occurs—that of the prosecuting government to perform one of its vested functions, the administration of criminal justice.

In an effort to formulate a solution to this increasingly serious problem, these articles will review the elements of these three distinct rights: that of the defendant to a fair trial, that of the government fairly to administer criminal justice, and that of the news media to freedom of the press; will attempt to define what is meant by the phrase "prejudicial publicity;" and will analyze the efficacy of existing methods of attempting to deal with the problem in the light of their respec-

* This article was submitted by the author in partial fulfillment of the requirements of the degree of Master of Laws, Northwestern University School of Law, May 1964. Minor changes have been made to bring it up to date.

tive effects on the co-existing and conflicting rights sought to be preserved.[1]

I: An Impartial Jury

The United States Constitution entitles every defendant in a federal criminal action to a fair trial by an impartial jury.[2] Although the Constitution does not require the states to provide trial by jury,[3] every state by its own constitution guarantees jury trials in criminal cases.[4] The Constitution does require, however, that whatever methods a state elects to use for disposition of criminal cases must be in accordance with due process of law;[5] if the jury system is used, the jury must be impartial.[6] Consequently, defendants in state as well as federal criminal prosecutions possess a right to trial by an impartial jury.

To satisfy federal constitutional requirements, the jury must meet the federal constitutional standard in state as well as federal criminal cases.[7] Since this standard is not specified in the Constitution, it has been variously fashioned by the courts. "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."[8] Because "The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside information, whether of private talk or public print,"[9] the basic question in resolving the issue whether a trier of fact possesses this "mental attitude of appropriate indifference" is whether he has the ability to decide the facts in a criminal case solely on the basis of the evidence presented in court. Obviously a juror with this ability is the impartial juror required by the federal constitutional standard. And since, within the scope of this paper, impartiality of the jury is the determinant of whether or not a given trial was fair, nothing less than trial before a jury composed of such impartial jurors is a fair trial. The problem of how to establish the existence of this ability entails both the substantive test of impartiality used and the procedure for applying the test.

Until recently, with but a few exceptions, the substantive test of whether a juror is sufficiently impartial has been whether he testifies that he can render a fair and impartial verdict based solely on the evidence presented at the trial. If this criterion is met, a juror is not challengeable for cause, nor is his presence on the jury grounds for mistrial or continuance merely because he has been exposed

[1] A related question involving the same constitutional rights is whether courtroom photography and broadcasting should be permitted. ABA Canon of Judicial Ethics 35 flatly prohibits use of any cameras in court. Texas and Colorado alone have not adopted this Canon. Some controversy was recently afoot regarding the propriety of televising the Texas murder trial of Jack Ruby, who killed Lee Harvey Oswald, alleged assassin of the late President John F. Kennedy, on television. See Time, Dec. 13, 1963, p. 82. Judge Brown announced on Dec. 19, 1963, that all still cameras and electrical equipment, as well as television broadcasting equipment, would be banned from Ruby's trial in his courtroom. Further, there has been controversy within the ABA itself as to whether or not the Canon should be amended to permit photography and broadcasting at the discretion of the trial judge. See Wilkin, *Judicial Canon 35 Should Not Be Changed*, 48 A.B.A.J. 540 (1962). Although broadcast of court proceedings may impede the judicial process and impugn its integrity, the reasons are wholly different from those which indicate that publication of prejudicial publicity about a criminal case will have that same deleterious effect.

[2] U.S. Const. amend. VI prevents federal abridgement of the right to a trial by jury in criminal cases.

[3] The fourteenth amendment has not been held to require the states to grant a right to trial by jury equivalent to the sixth amendment right. Irvin v. Dowd, 366 U.S. 717, 721 (1961) (dictum); Palko v. Connecticut, 302 U.S. 319, 324 (1937) (dictum).

[4] Columbia Univ. Legislative Drafting and Research Fund, Index Digest of State Constitutions 578–79 (1959).

[5] Upholding the constitutionality of New York's statutory "blue ribbon jury" system in criminal cases, whereby lists of prospective jurors were limited by occupation, the United States Supreme Court stated: "The function of this federal court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever means the state sees fit to employ." Fay v. New York, 332 U.S. 261, 294 (1947). *Accord*, Maxwell v. Dow, 176 U.S. 581, 605 (1900) (due process does not require states to provide for indictment by grand jury) ("[T]he state has full control over the procedure in its courts, both in civil and criminal cases . . . ."); Walker v. Sauvinet, 92 U.S. 90, 93 (1875) (trial by jury need not be granted by the state in common law cases—the requirement of due process is met "if the trial is had according to the settled course of judicial proceedings.").

For examples of non-jury proceedings which, though judicial, did not satisfy due process, see *In re* Murchison, 349 U.S. 133 (1955); *In re* Oliver, 333 U.S. 257 (1948).

[6] Irvin v. Dowd, 366 U.S. 717 (1961); Spies v. Illinois, 123 U.S. 131 (1887). See Riave, *Fair and Impartial Trial by Jury in the United States and in England*, 50 A.B.A.J. 232, 233 (1964).

[7] *Federal:* Frazier v. United States, 335 U.S. 497 (1948); United States v. Wood, 299 U.S. 123 (1936); Holt v. United States, 218 U.S. 245 (1910); Reynolds v. United States, 98 U.S. 145 (1878). *State:* Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, *supra* note 6, at 727; Spies v. Illinois, *supra* note 6.

[8] United States v. Wood, *supra* note 7, at 145–46, cited in Irvin v. Dowd, *supra* note 6, at 724–25.

[9] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

to prejudicial articles or broadcasts, even if he admits that he has formed an opinion as to the guilt or innocence of the accused.[10] Recognizing the intricacies and frailties of human nature, the federal courts and a few state courts have recently held this test an inadequate measure of impartiality, with the result that a juror with preconceived opinions of an accused's guilt may be found partial if his declaration of impartiality, sincere though it may be, is objectively untenable in the light of his exposure to extrajudicial information about the case.[11] The following statement by the Supreme Court of Florida is illustrative:

"[A] juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence [impartiality], if it appears *from other statements made by him or from other evidence* that he is not possessed of a state of mind which will enable him to do so."[12]

Generally, the defendant complaining that his trial was unfair due to prejudicial publicity bears the burden of proving actual rather than speculative prejudice.[13] While speculative prejudice is established upon proof of the existence of a condition which might result in prejudice, actual prejudice is not established unless it is proved that at least one juror in fact formed an opinion which influenced his verdict. The "actual prejudice" test compelled affirmance in two recent cases where, although newspapers containing highly prejudicial material were found in the jury room, the defendant failed to prove that any juror read the articles.[14]

[10] Holt v. United States, 218 U.S. 245 (1910); Hopt v. Utah, 120 U.S. 430 (1887); Reynolds v. United States, 98 U.S. 145 (1878); Dillon v. United States, 218 F.2d 97 (8th Cir. 1955); Rowley v. United States, 185 F.2d 523 (8th Cir. 1950); United States v. Griffin, 176 F.2d 727 (3d Cir.), *cert. denied*, 338 U.S. 952 (1950); United States v. Carruthers, 152 F.2d 512 (7th Cir.), *cert. denied*, 327 U.S. 787 (1945); Commonwealth v. Geagan, 339 Mass. 487, 505–07, 159 N.E.2d 870, 883–85, *cert. denied*, 361 U.S. 895 (1959); State v. LaRocca, 81 N.J. Super. 40, 194 A.2d 578 (App. Div. 1963); State v. Moran, 142 Mont. 423, 448–51, 384 P.2d 777, 790–92 (1963). See HOLMES, THE SHEPPARD MURDER CASE 303–07 (1961), for an example of the hardship this criterion can impose on a defendant. See Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), for the outcome of Dr. Sam Sheppard's case.

Since each state conviction invalidated by the United States Supreme Court on prejudicial publicity grounds had been rendered by a jury of which more than one member was found or deemed partial, the question whether the presence on a jury of *one* juror who states that he has an opinion which he can lay aside causes that jury to be unconstitutionally partial—and hence the included question whether that test is constitutionally permissible—has not yet been decided by the Court. In Irvin v. Dowd, 366 U.S. 717 (1961), eight of the jurors had so stated; in Rideau v. Louisiana, 373 U.S. 723 (1963), the Court presumed prejudice. See text accompanying notes 17 & 18 *infra*.

[11] See United States *ex rel.* Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963). "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." Irvin v. Dowd, *supra* note 10, at 728. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner.... [but] where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Ibid.* See Sheppard v. Maxwell, 231 F. Supp. 37, 58, 60 (S.D. Ohio 1964); SULLIVAN, TRIAL BY NEWSPAPER 232–33 (1961). See also Stroble v. California, 343 U.S. 181, 198 (1952) (dissenting opinion of Frankfurter, J.); Shepherd v. Florida, 341 U.S. 50, 50 (1951) (specially concurring opinion of Jackson, J.); Coppedge v. United States, 272 F.2d 504, 505–08 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961); Delaney v. United States, 199 F.2d 107, 113–14 (1st Cir. 1952); United States v. Smith, 200 F. Supp. 885 (D. Vt. 1962). See note 90 *infra* and accompanying text.

However, the mere presence of an opinion as to the guilt or innocence of the accused, without more, cannot disqualify a juror who attests to his ability to be fair and impartial. The trial court must "determine whether the nature and strength of the opinion formed are such as, in law, necessarily to raise the presumption of partiality." Reynolds v. United States, *supra* note 10, at 156.

[12] Singer v. State, 109 So. 2d 7, 24 (Fla. 1959). (Emphasis added.) To allow the mere presence of an opinion to disquality a juror, it is said, would render it impossible to conduct jury trials under present conditions of press coverage. Holt v. United States, 218 U.S. 245, 251 (1910); United States v. Keegan, 141 F.2d 245, 258 (2d Cir. 1944); Baltimore Radio Show v. State, 193 Md. 300, 330, 67 A.2d 497, 511 (1949), *cert. denied*, 338 U.S. 912 (1950).

Nevertheless, two trial courts in 1963 found it possible. A federal trial court in Minnesota excused potential jurors for the mere presence of opinion, United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963), while a state trial court in Washington excused all potential jurors who might *possibly* have formed an opinion. State v. St. Peter, 63 Wash. 2d 495, 387 P.2d 937 (1963) (all who had read or heard of defendant were excused).

Query whether the "mere presence of an opinion, without more" does not deprive the defendant of the presumption of innocence. See Irvin v. Dowd, *supra* note 10; United States *ex rel.* Bloeth v. Denno, *supra* note 11; Marson v. United States, 203 F.2d 904, 909 (6th Cir. 1953); Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952); Singer v. State, *supra* at 23–24.

[13] Stroble v. California, 343 U.S. 181, 198 (1952); Ferrari v. United States, 244 F.2d 132, 138 (9th Cir.), *cert. denied*, 355 U.S. 878 (1957); Smith v. United States, 236 F.2d 260, 269–70 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956); United States v. Carruthers, 152 F.2d 512, 519 (7th Cir. 1945), *cert. denied*, 327 U.S. 487 (1946); Oxenberg v. State, 362 P.2d 893, 899 (Alaska), *cert. denied*, 368 U.S. 56 (1961); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954).

[14] United States v. Leviton, 193 F.2d 848, 857 (2d Cir. 1951); State v. Harris, 62 Wash. 2d 858, 863–65, 385 P.2d 18, 22–24 (1963).

However, it has been held that when potentially prejudicial material has been publicized, a presumption of prejudice arises.[15] For example, in *Commonwealth v. Crehan*,[16] the Massachusetts Supreme Court presumed prejudice because the jury was allowed to separate, and since the trial court denied defendant's motion to poll the jury after damaging articles were published, it was impossible to rebut the presumption of prejudice. In *Rideau v. Louisiana*,[17] where a film of defendant's interrogation by a group of local police officials and his confession were broadcast on several occasions over a local television station, the United States Supreme Court reversed defendant's state murder conviction without even using the transcript of the voir dire examination to ascertain whether any juror had seen the film. The Court held that the highly prejudicial nature and wide dissemination of the film rendered a fair trial in that locality impossible, and therefore examination of the voir dire was unnecessary. In *Irvin v. Dowd*,[18] the first Supreme Court case upsetting a state conviction on prejudicial publicity grounds, the Court had found the jury not sufficiently impartial after carefully considering the voir dire.[19] The *Rideau* case is the first in which the Supreme Court has reversed a state conviction on proof of speculative prejudice.

Because a trial judge has broad discretion in such matters, an appellate court will not overturn a finding of impartiality unless error is so manifest that the judge's action amounts to an abuse of that discretion.[20]

With this background in mind, we must now try to define exactly what is the "prejudicial publicity" which can operate to deprive a defendant of that impartial jury to which his federal constitutional right to a fair trial entitles him.

II: What Is "Prejudicial Publicity"?

The trier of fact in a criminal case must reach its conclusions as to a defendant's guilt only on the basis of evidence presented in open court, and not on any outside influence. A jury failing to accomplish this task does not meet federal constitutional standards of impartiality, and the trial at which the jury is not properly impartial is not "a fair trial" within the federal constitutional re-

[15] United States v. Accardo, 298 F.2d 133 (7th Cir. 1962); Briggs v. United States, 221 F.2d 636, 639 (6th Cir. 1955). When the presumption arises, the trial judge must take steps considered necessary by him to rebut it, and if not convinced that it has been rebutted, he must grant the requested relief (see notes 68–81 *infra* and accompanying text). *Ibid.* The court in *Briggs* relied on Stone v. United States, 113 F.2d 70 (6th Cir. 1940), a case involving attempted bribery of a juror. The court in the *Stone* case stated the applicable rule:

> "The question is, not whether any actual wrong resulted . . . but whether [the circumstances] created a condition from which prejudice might arise. . . . [T]he law concerning juries . . . presumes that [outside] influence may act on some of them . . . so as to be beyond detection."

Id. at 77.

This principle was applied by the Supreme Court of Vermont in the recent civil case of Bellows Falls Village Corp. v. State Highway Bd., 123 Vt. 408, 190 A.2d 695 (1963). Upon finding that eight of the jurors had either read the contents of or heard about an editorial slanted against the defendant, the trial court set aside a condemnation award for plaintiff and ordered a new trial. Affirming the lower court's action, the Supreme Court of Vermont stated: "[T]he test is not whether the irregularity actually influenced the result, but whether it had the capacity of prejudicing the verdict. . . . Indeed, the human mind often may be unaware of what factors influenced its judgment in a given situation." *Id.* at 414, 190 A.2d at 699.

In Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), the district court granted habeas corpus to Ohio state prisoner Dr. Sam Sheppard, stating, "[T]he prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial . . . ." *Id.* at 60.

[16] 345 Mass. 609, 188 N.E.2d 923 (1963).

[17] 373 U.S. 723 (1963).

[18] 366 U.S. 717 (1961).

[19] Eight of the 12 jurors stated that they had an opinion as to defendant's guilt which, they further stated, they could set aside. See *id.* at 728.

[20] Holt v. United States, 218 U.S. 245, 248 (1910); Reynolds v. United States, 98 U.S. 145, 156 (1878); Hoffa v. Gray, 323 F.2d 178 (6th Cir. 1963); Dillon v. United States, 218 F.2d 97, 103 (8th Cir. 1955); Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952); Rowley v. United States, 185 F.2d 523 (8th Cir. 1950); Stunz v. United States, 27 F.2d 575, 578 (8th Cir. 1928); Perez v. State, 236 Ark. 921, 370 S.W.2d 613 (1963); Hammons v. People, 385 P.2d 592, 595 (Colo. 1963); Singer v. State, 109 So. 2d 7, 13 (Fla. 1959); State v. Hickock, 188 Kan. 473, 482, 363 P.2d 541, 548 (1961); Nickell v. Commonwealth, 371 S.W.2d 849 (Ky. 1963); Commonwealth v. Geagan, 339 Mass. 487, 501, 508, 159 N.E.2d 870, 881, 885, *cert. denied*. 361 U.S. 895 (1959) (Brink's robbery case) ("The judge . . . was in a better position than we to evaluate the effect of publicity at that time."); Hagans v. State, 372 S.W.2d 946, 948 (Tex. Ct. Crim. App. 1962), *cert. denied*, 375 U.S. 957 (1963), *rehearing denied*, 375 U.S. 989 (1964).

The trial judge's discretion extends to his disposition of motions for any remedies available to a defendant against prejudiced jurors, since the granting of such motions presupposes a finding of partiality. See notes 68–81 *infra* and accompanying text. Moreover, since mandamus will not lie to compel performance of discretionary acts, this writ is generally not available to compel the granting of such trial level reliefs. See, *e.g.*, Hoffa v. Gray, *supra*. *But see* State v. Thompson, 123 N.W.2d 378 (Minn. 1963), where mandamus was granted to compel change of venue.

quirement. Within this framework, the publicity with which we should be concerned is publicity which, if read or heard by potential or actual jurors, may reasonably be used by them in deciding the issue whether a criminal defendant is guilty, and which might not be admitted as evidence at his trial. If jury members are exposed to such material and the material is not eventually admitted as evidence, then the defendant's right to a fair trial will have been violated in that the jury had the opportunity to consider matters not presented in open court in determining his guilt.

For example, in *Marshall v. United States*,[21] defendant was on trial for unlawfully dispensing drugs in violation of a federal statute. Seven members of the jury admitted having read news articles containing facts relating to defendant's prior convictions for practicing medicine without a license. The trial court had held evidence of these convictions inadmissible on the ground that it was irrelevant to the issues in the case and would be prejudicial to defendant. In the exercise of its supervisory power over the lower federal courts, the United States Supreme Court reversed Marshall's conviction, stating: "[The jurors were exposed] to information of a character which the trial court ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."[22]

On the other hand, where the text of defendant's confession was published before trial, the United States Supreme Court affirmed his state conviction on the ground that since the confession was subsequently admitted in evidence, defendant was not prejudiced by the publication.[23] Moreover, where a jury was exposed to publicity containing proffered testimony which the trial court had excluded merely on grounds of irrelevance rather than because of its prejudicial nature, the Alaska Supreme Court affirmed defendant's conviction.[24]

The case law follows the general test outlined above—if material, read or heard by jurors, was likely to influence their decision as to a defendant's guilt, and if the material was not admitted as evidence, then the material was prejudicial to that defendant's right to a fair trial.

Six categories of material appear to meet this general test: (1) Confessions; (2) Prior criminal activities; (3) Incriminating tangible evidence; (4) Statements of persons who may not actually testify; (5) Reports of proceedings from which the jury has been excluded; and (6) Miscellaneous inflammatory material which may sway a jury's sympathies against a defendant.

(1) *Confessions*. No defendant can be convicted upon evidence which includes an involuntary confession, regardless of the truth of the confession,[25] and regardless of independent evidence sufficient to sustain his guilt.[26] Moreover, federal courts must exclude certain voluntary confessions as well, if they resulted from prohibited official activity.[27]

Since the jury must not consider the fact that a defendant has confessed or the contents of his confession unless and until that confession is held admissible, a defendant whose purported confession is published and then not admitted in evidence, whether because not offered or because found inadmissible, is certain to be prejudiced by such publication.[28] Reports that a defendant has offered or attempted to enter a plea of guilty or of *nolo*

[21] 360 U.S. 310 (1959).

[22] *Id.* at 312.

[23] Stroble v. California, 343 U.S. 181, 192 (1952).

[24] Oxenberg v. State, 362 P.2d 893 (Alaska), *cert. denied*, 368 U.S. 56 (1961).

[25] Rogers v. Richmond, 365 U.S. 534 (1961).

[26] Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958).

[27] McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957) (violation of FED. R. CRIM. P. 5(a), speedy arraignment); Wong Sun v. United States, 371 U.S. 471 (1963) (arrest illegal by fourth amendment standards). Furthermore, the states will most probably have to follow *Wong Sun* under compulsion of the principle of Mapp v. Ohio, 367 U.S. 643 (1961), and thus exclude voluntary statements which resulted from (*i.e.*, were "fruits" of) official action violative of due process. See, *e.g.*, State v. Mercurio, 194 A.2d 574 (R.I. 1963), where the Supreme Court of Rhode Island applied the *Wong Sun* rule without discussion.

Moreover, state courts must now exclude incriminating pre-indictment statements made by a defendant during a time when his right to counsel was being violated. Escobedo v. Illinois, 378 U.S. 478 (1964).

[28] See, *e.g.*, Marshall v. United States, 360 U.S. 310 (1959); Shepherd v. Florida, 341 U.S. 50, 50 (1951) (Jackson, J., concurring) (published confession never offered as evidence); *cf.* People v. Brommel, 56 Cal. 2d 629, 636, 15 Cal. Rptr. 909, 913, 364 P.2d 845, 849 (1961) (published confession erroneously admitted). In a poll of lawyers, police officials and newsmen, taken by this writer, 41.94% of the 124 persons responding cited publication of confessions as being the kind of material most likely to be harmful to a criminal defendant. See Table IX, in Part II of this article, and the Explanatory Note to the appendices & tables in Part II.

contendere[29] are tantamount to reports that he has admitted guilt, and thus should be treated the same as publicity concerning confessions. It would be extremely naive to expect a juror who has read or heard a statement referring to a defendant as a "confessed killer," or has read or heard that a defendant has confessed or the purported contents of his confession, to put this out of his mind merely because no confession was admitted in evidence and he was told to consider only evidence admitted in court.

That in many cases confessions are properly admitted does not in any way vitiate the prejudice suffered by the defendant whose confession, though not admitted in evidence, was publicized. Nor can the general pre-admission publication of confessions be justified by maintaining that it would serve to relieve the public hysteria which often follows an unsolved crime of violence, unless we are willing to cite the desire for public complacency as a rationale for the denial of a fundamental constitutional right.[30]

(2) *Prior criminal activities.* Evidence of a defendant's alleged criminal activities unrelated to the crime for which he is being tried is ordinarily inadmissible in court.

> "The state may not show defendant's prior trouble with the law [or] specific criminal acts . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character [as evidenced by prior criminal activities] is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[31]

Unless one of the few exceptions to this general rule can be invoked, admission of such evidence constitutes prejudicial, reversible error.[32] For example, in a rather extreme holding, the Fourth Circuit recently granted a state convict's petition for habeas corpus on the ground that the jury's improper knowledge of defendant's prior convictions in and of itself constituted a denial of his federal constitutional right to a fair trial.[33]

Since evidence of prior arrests, convictions, and pending indictments and accusations of crimes unrelated to the offense charged are all likely to cause the jury, probably through conscious or subconscious use of a "leopard never changes its spots" thought process, to believe that defendant committed the crime charged, publication of such material is reasonably certain to be prejudicial if not later admitted.

(3) *Incriminating tangible evidence.* No criminal defendant can be convicted by means of evidence obtained in violation of the constitutional prohibition against unreasonable search and seizure.[34] If the fact that incriminating tangible evidence has been discovered is published in such a way that the defendant is connected with the commission of a crime, he will be prejudiced unless the evidence is found to have been lawfully obtained and is admitted against him at the trial. A defendant can be equally prejudiced by such publicity concerning tangible evidence which may prove inadmissible by reason of some non-constitutional evidentiary rule.[35] If, however, the discovery of evidence is publicized without connecting any

[29] See, *e.g.*, Hammons v. People, 385 P.2d 592, 594 (Colo. 1963).

[30] However, this desire may warrant such a rationale in a truly exceptional case. See text in Section IX, *infra*.

[31] Michelson v. United States, 335 U.S. 469, 475–76 (1948).

[32] Evidence of other crimes is inadmissible against a defendant unless offered for certain specified purposes. People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); McCormick, Evidence §157 (1954); Comment, *Admitting Evidence of Prior Sex Offenses—A New Trend*, 58 Nw. U.L. Rev. 108 (1963). Prior convictions are admissible only for purposes of impeachment. McCormick, Evidence §43 (1954). In a few jurisdictions, the fact that a defendant has been arrested, State v. Christofaro, 70 R.I. 57, 37 A.2d 163 (1944), or indicted, State v. Goodwin, 29 Wash. 2d 276, 186 P.2d 935 (1947), is admissible to impeach him; but by the general rule, only prior convictions can so be used. Pearson v. United States, 192 F.2d 681 (6th Cir. 1951). Admission of facts concerning arrest for an offense other than that for which defendant is presently on trial is prejudicial error. *Id.* at 698. Even in a jurisdiction where evidence of arrest or indictment is admissible for purposes of impeachment, publication of such facts prior to the prosecution's opportunity to impeach defendant would be prejudicial to defendant if he does not later testify.

For cases involving the publication of inadmissible facts *re* criminal activities, see, *e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); United States v. Accardo, 298 F.2d 133 (7th Cir. 1962); Gicinto v. United States, 212 F.2d 8 (8th Cir. 1954); Marson v. United States, 203 F.2d 904 (6th Cir. 1953); Rowley v. United States, 185 F.2d 523 (8th Cir. 1950); United States *ex rel.* Brown v. Smith, 200 F. Supp. 385 (D. Vt. 1962); State v. Halko, 193 A.2d 817 (Del. 1963); Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963); State v. LaRocca, 81 N.J. Super. 40, 194 A.2d 578 (App. Div. 1963); State v. Harris, 62 Wash. 2d 858, 863–65, 385 P.2d 18, 22–24 (1963). 32.26% of the persons responding to the writer's poll deemed publication of such information a type most likely to be harmful. See Table IX, in Part II of this article.

[33] Lane v. Warden, 320 F.2d 179 (4th Cir. 1963).

[34] Mapp v. Ohio, 367 U.S. 643 (1961).

[35] See notes 99–101 and accompanying text.

particular person to the crime, it is not prejudicial to a defendant even if, for some reason, the evidence is not subsequently admitted. For example, if police discover the "murder weapon," publication of that fact alone would not be prejudicial, while publication of the fact that they found it in the possession of the defendant would be.

(4) *Statements of persons who may not actually testify.* Since every criminal defendant has a federal constitutional right to be confronted by and to cross-examine his accusers,[36] a defendant may be prejudiced for inability to exercise this right if the news media publish an extra-judicial statement made by a person not subsequently called as a witness against him. Such statements may independently tend to lead a juror to believe that the defendant committed the crime charged, *e.g.*, statements of "experts" regarding the results of polygraph tests, ballistics tests, and other scientific evidence, identification by "eye-witnesses," statements of official opinion that defendant is guilty, statements which might not qualify as dying declarations, and the like; or, such statements could reasonably tend to discredit an accused's possible defense without actually incriminating him, *e.g.*, statements impeaching the credibility of defense witnesses, or indicating that a defendant pleading insanity is actually sane.

(5) *Reports of proceedings from which the jury has been excluded.* Since a judge's exclusion of the jury from a court proceeding is generally based on the probability that the proceeding will contain information the jury is not entitled to know, publication of occurrences which take place during such proceedings is very likely to be prejudicial to a defendant. Most proceedings of this nature are hearings at which the trial court rules on the admissibility of evidence or confessions. Only if and when the evidence or confession is admitted can the proceedings on which that determination was based be published without probable prejudice to the defendant.[37]

(6) *Miscellaneous inflammatory material.* Material in this category may consist of "human interest" interviews with the victim or his family, publication of the fact that a murder victim's estate is to be disposed of, editorials or factual reports concerning a "crime wave," or reports of the greater deterrent nature of capital punishment as compared with prison sentences.[38] This type of material tends to be inflammatory—that is, to cause the jury to want to convict—and thus to be prejudicial to whomever happens to be the defendant, not because he is any particular person about whom publicity has been disseminated, but merely because he is the defendant. For example, members of the jury which found a defendant guilty of murder and sentenced him to 299 years in prison later admitted that they had been influenced by articles concerning the then-pending proposed parole of Nathan Leopold.[39]

It can be argued that, since material of the kinds enumerated tends to disclose The Truth, their publication should be encouraged. However, even if a coerced confession is true, and even if unconstitutionally seized evidence would conclusively establish a defendant's guilt, the United States Constitution as interpreted by the United States Supreme Court will permit no state or federal court in America to convict on such evidence. While conceding that evidence of previous criminal activities is not irrelevant and, in fact, is independently probative of present guilt, courts generally refuse to admit such evidence because of its extremely prejudicial nature. Surely only a perverted form of justice would permit jurors to be aware via news media of information which that same justice forbids those jurors to take cognizance of in open court.

III: Existing Methods

Accepting the above general definition of prejudicial publicity and tentative characterization of specific kinds of material which may be prejudicial, we must now examine the means which have been

[36] U.S. Const. amend. VI, applicable to the states by the due process clause of the fourteenth amendment. *In re* Oliver, 333 U.S. 257, 273 (1948). "[Due process requires] that no person shall be tried and convicted of an offense unless he is . . . afforded an opportunity to examine adverse witnesses." Williams v. New York, 337 U.S. 241, 245 (1949). See State v. Swenson, 62 Wash. 2d 259, 382 P.2d 614 (1963); Pettit v. Rhay, 62 Wash. 2d 515, 383 P.2d 889 (1963). 14.52% of the persons responding considered publicity of this type most likely to be harmful to a defendant. See Table IX, in Part II of this article.

[37] See, *e.g.*, Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961); Bucher v. Krause, 200 F.2d 576 (7th Cir.), *cert. denied*, 345 U.S. 997 (1952); People v. Lambright, 36 Cal. Rptr. 851, 856–58 (Dist. Ct. App. 1964).

[38] See, *e.g.*, People v. Purvis, 60 Cal. 2d 323, 332–42, 33 Cal. Rptr. 104, 110–16, 384 P.2d 424, 430–36 (1963).

[39] Interview with Gerald Getty, Public Defender, Cook County, Ill., April 16, 1962. See also State v. Arrington, —— Mo. App. ——, 375 S.W.2d 186 (1964) (publicity of case similar to defendant's); *Ex parte* Pineda, —— Tex. Crim. ——, 373 S.W.2d 689 (1964) (adverse publicity *re* defendant's counsel).

used in an attempt to prevent defendants from being convicted by juries influenced by such material. In evaluating each method, its effect upon each of the three co-existing interests—of the defendant, the government, and the news media—will be considered.

Methods currently available to American courts for the purpose of attempting to solve the free press-fair trial dilemma are: (1) issuing contempt citations against those responsible for publication of prejudicial information; (2) granting of trial level procedural reliefs designed to prevent a biased jury from rendering a verdict; (3) use of cautionary instructions to prevent or erase the harmful effects of prejudicial publicity; and (4) reversing convictions resulting from trials unfair because of prejudicial publicity.

(1) *Contempt citations*

Contempt citations against those responsible for the publication of prejudicial information have been little used by American courts because of their general reluctance to apply the doctrine of constructive contempt.[40] Used with much success in Great Britian,[41] this doctrine allows a court to punish as contempt any act which interferes with proceedings before it even though that act did not take place in or in the immediate vicinity of the court.[42]

Perhaps the reason for rejection of this concept is that constructive contempt is almost invariably committed by publication,[43] and its exercise is regarded by the press, radio, and television[44] as violative of the federal constitutional guarantee that neither federal nor state action may abridge freedom of speech and of the press.[45] While freedom of the press protects almost absolutely against prior restraint,[46] the government may take corrective action to punish past misconduct—such as issuing

[40] *E.g.*, Nye v. United States, 313 U.S. 33 (1941), *overruling* Toledo Newspaper Co. v. United States, 247 U.S. 403 (1918), construed 28 U.S.C. §385 to cover, as punishable contempts, only acts committed in the court's immediate presence or so geographically near thereto as to obstruct the orderly administration of justice. *Accord*, Rees v. United States, 293 F. Supp. 864 (D. Md. 1961), construing 18 U.S.C. §401 (1958). See generally GOLDFARB, THE CONTEMPT POWER 89–100 (1963); Nelles & King, *Contempt by Publication*, 20 COLUM. L. REV. 525, 530 (1928). See also McGuigan, *Crime Reporting: The British and American Approaches*, 50 A.B.A.J. 442 (1964). But narrow construction of a statutory contempt power may not affect the court's inherent contempt power. See, *e.g.*, *In re* Simmons, 248 Mich. 297, 300–01, 226 N.W. 907, 908 (1929).

[41] See Speiser, *Trial Topics, The Ward Trial and the Press*, 68 Case & Com. 12 (Nov.-Dec. 1963). Only the fact of arrest and matters concerning pre-trial procedure can be published before conclusion of the trial. See generally Baltimore Radio Show v. Maryland, 338 U.S. 912, 921–36 (1950) (appendix to opinion of Frankfurter, J., respecting denial of certiorari); Pennekamp v. Florida, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring); Singer v. State, 109 So. 2d 7, 15 (Fla. 1959); Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935); Laski, *Procedure for Constructive Contempt in England*, 41 HARV. L. REV. 1031 (1928). In response to the question what kinds of material are most likely to harm a criminal defendant, 25% of the persons responding in effect stated that only such matters as can be published under the English system are not likely to be harmful if published before admission as evidence at the trial. See Table IV, in Part II of this article.

[42] GOLDFARB, *op. cit. supra* note 40, at 77–89; SULLIVAN, CONTEMPTS BY PUBLICATION 6 (2d ed. 1940); Goldfarb, *Ensuring Fair Trials: The Impropriety of Publicity*, The New Republic, Feb. 29, 1964, p. 11.

[43] Contempts by publication have as a matter of custom been called constructive contempts, and the term is almost one of special connotation. Non-direct contempts other than press contempt cases, such as attempted bribery of a witness or juror, are referred to as indirect contempts. GOLDFARB, *op. cit. supra* note 40, at 69.

[44] The first amendment's express guarantee of freedom of speech and of the press has been construed to extend to radio, Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950), and motion pictures, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), and most certainly, therefore, extends to television, as well, though no case regarding television has come to the writer's attention.

[45] *Federal:* U.S. CONST. amend. I. *State:* "[L]iberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action ...." Near v. Minnesota, 283 U.S. 697, 707 (1931); see also *id.* at 716–20. *Accord*, Schneider v. State, 308 U.S. 147, 160 (1939); Whitney v. California, 274 U.S. 357, 362, 372 (1927) (concurring opinion); Gitlow v. New York, 268 U.S. 652, 666 (1925) (leading case).

[46] "[T]he protection even as to prior restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." Near v. Minnesota, *supra* note 45, at 716. *Accord*, Patterson v. Colorado, 205 U.S. 454, 462 (1907). *But see* Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), which indicates that prior restraint of motion pictures in nonexceptional cases is not unconstitutional per se, and may be unobjectionable if definite standards and fair purcedures are employed. For the view that freedom of the press prohibits *only* prior restraint, see SULLIVAN, CONTEMPTS BY PUBLICATION 165 (2d ed. 1940); SULLIVAN, TRIAL BY NEWSPAPER 245–46 (1961).

In the *Near* case, *supra*, the Court held that a statute which deemed any publication of a defamatory or malicious nature a nuisance was an unconstitutional abridgement of freedom of speech and of the press. The crux of the decision was that the statute, although purportedly describing a corrective process, operated in such a way as to amount to prior restraint, inasmuch as a violation of the injunction against the nuisance was punishable as a criminal contempt. Four Justices dissented on the ground that the statute was not a prior restraint.

a contempt citation[47]—if, under the circumstances, the words uttered or published create a "clear and present danger that they will bring about the substantive evils that Congress [or the state] has a right to prevent."[48] Interference with the fair administration of justice, such as by publication of material which presents a clear and present danger to the fairness of a particular trial, is an evil which the government has a right to prevent. Freedom of the press has been held subject to restriction where there was a clear and present danger that its exercise would cause serious political, economic, or moral injury to the government,[49] would impede the performance of governmental duties,[50] or would endanger the foundations of organized government.[51] A fair judicial system surely is one of the foundations of our government, and maintenance of such a system a governmental duty. The United States Supreme Court has expressly recognized "the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions."[52]

The Supreme Court, though, has never affirmed a contempt citation issued for a contempt committed by publication. However, in reversing three cases in which newspapers had been held in contempt for the publication of prejudicial material,[53] the Court based its decisions not on the per se invalidity of holding newspapers in contempt, but rather on the absence of a "clear and present danger" to the orderly administration of the judicial process in the cases in question. It should be noted that these three cases were not tried before juries. It has been suggested that the danger of impeding the judicial process via prejudicial publications is substantially lessened where the case is tried by a judge, a law-trained man regarded as capable of being objective, rather than before a jury of impressionable laymen.[54] In *Wood v. Georgia*,[55] a recent contempt by publication case involving publication of a sheriff's statements designed to influence a grand jury, the United States Supreme Court reversed for lack of a clear and present danger, noting that the instant case did not involve a criminal trial pending before a jury.[56] This dictum indicates that, presented the proper case of dissemination of prejudicial material regarding a criminal case pending before a jury, the Supreme Court would affirm a contempt conviction.

The purpose of freedom of the press is to "assure unfettered interchange of ideas for the bringing about of social changes desired by the people,"[57] and this right thus is essential to our system of government. Arguably, only publications consistent with the legitimate purpose of freedom of the press are entitled to its full protection.[58] In an analogous situation, freedom of the press does not extend to confidential government documents,[59] since disclosure to the press of secret government information could seriously undermine the ability of the various branches of government in discharging their constitutionally defined responsibilities.[60]

[47] Bridges v. California, 314 U.S. 252, 290 (1941) (Frankfurter, J., dissenting); *Consensus of Reform of Sensational Reporting*, 20 J. AM. JUD. SOC'Y 83, 84 (1936) (quoting from Address by Frank J. Hogan). Although citing for contempt is, as a matter of form, a corrective process, the United States Supreme Court has indicated that, in effect, such process may amount to unconstitutional prior censorship.

"[The question is to what extent the judgments of contempt] as a practical matter . . . would affect the liberty of expression. . . . [A]nyone who might wish to give public expression to his views on a pending case . . . would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted."

Bridges v. California, *supra* at 268–69 (majority opinion).

[48] Schenck v. United States, 249 U.S. 47, 51 (1919).

[49] Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion of Brandeis,).

[50] Gitlow v. New York, 268 U.S 652, 667 (1925).

[51] Whitney v. California, 274 U.S. 357, 371 (1927).

[52] Near v. Minnesota, 283 U.S. 679, 715 (1931).

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

[54] *Cf.* United States v. Rees, 193 F. Supp. 861, 863 (D. Md. 1961).

[55] 370 U.S. 375 (1962).

[56] *Id.* at 389–90.

[57] Roth v. United States, 354 U.S. 476, 484 (1957). "The importance of this [freedom of the press] consists . . . in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts, between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."

Ibid. [Citing 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774).]

[58] "Because freedom of public expression alone assures the unfolding of truth, it is indispensible to the democratic process." Bridges v. California, 314 U.S. 252, 293 (1941) (dissenting opinion of Frankfurter, J.). It is interesting to note that Mr. Justice Frankfurter, eloquently though he may extoll the necessity of freedom of the press, as in the above quotation, recognizes that this freedom must not be exercised in a manner inconsistent with the fair administration of the judicial system. See, *e.g.*, quotation in text at note 61 *infra*.

[59] See, *e.g.*, Trimble v. Johnston, 173 F. Supp. 651 (D.D.C. 1959).

[60] *Id.* at 656. See Will, *Free Press vs. Fair Trial*, 12 DEPAUL L. REV. 197, 200–01 (1963). Cohen, *A Free*

Use of the freedom of the press which results in the denial of a defendant's right to a fair trial and prejudices the outcome of a criminal case seems a perverted exercise of that right, and repugnant to its purpose. For example, consider Mr. Justice Frankfurter's pointed observation:

> "In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exericse of the right to vote."[61]

The fair comment which serves the purpose of freedom of the press does not include material published with the intent to influence the result of a criminal trial.[62] Moreover, material published without such intent but nonetheless reasonably certain to have that incidental effect constitutes a "clear and present danger" under a fair interpretation of that test, since the danger lies in the probable effect of publication.[63]

Use of the contempt power to punish a contempt committed by publication of prejudicial material would seem to be constitutional so long as the clear and present danger test was met, because the action would not impose prior restraint, and the publication would be of a nature inconsistent with the purpose of freedom of the press.[64]

Another reason for judicial reluctance to exercise the inherent contempt power may rest upon the position of most of our judges as elected officials dependent on the press for political support.[65] A further reason may be judicial ignorance that the inherent contempt power extends beyond the power to cite for contempt those who scandalize the court.[66]

Although it is essential to our system of government that no person be convicted but by an impartial jury, it is just as essential that no organ of public sentiment be effectively prohibited from making fair comment on that government. Only publications not constituting fair comment as defined above would be contemptuous, but limited restrictions with fair and reasonable beginnings may eventually compound into an oppressive whole. Use of the contempt power may thus projectively undermine freedom of the press even if it would not presently violate that freedom.

Furthermore, what does it help a particular convicted defendant that the newspaper which helped to convict him has been held in contempt? And future defendants will not be aided by present contempt citations unless definitive standards of contemptuous conduct are established; in absence of such standards, punishment for contempt lacks deterrent effect.[67] The prosecuting government's interests are also neglected by use of the contempt

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Press Vs. Fair Trial, Chicago Sun-Times, July 5, 1964, sec. 2, p. 3.

[61] Pennekamp v. Florida, 328 U.S. 331, 366 (1946) (concurring opinion of Frankfurter, J.).

[62] See Craig v. Hecht, 263 U.S. 255, 278 (1923) (concurring opinion of Taft, C.J.). *Cf.* Craig v. Harney, 331 U.S. 367, 376–77 (1947); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); *id.* at 365 (concurring opinion of Frankfurter, J.); SULLIVAN, CONTEMPTS BY PUBLICATION 176 (2d ed. 1940); SULLIVAN, TRIAL BY NEWSPAPER 211–24 (1961).

[63] See Baltimore Radio Show v. State, 193 Md. 300, 331, 67 A.2d 497, 511 (1949), *cert. denied*, 338 U.S. 912 (1950), where the Maryland Court indicates that material published or broadcast without intent to influence the result could constitute a "clear and present danger." *Cf.* Abrams v. United States, 250 U.S. 616 (1919) (espionage), where pamphlets intended to aid the Russian Revolution, but necessarily having the incidental effect of harming the United States' war effort, were held to constitute a punishable "clear and present danger."

[64] *Cf.* Roth v. United States, 354 U.S. 476 (1957) (freedom of speech does not protect obscenity). 41.94% of the persons responding thought the contempt power could be used. Of those responding that it could not, only 40.68% based their answer on grounds of unconstitutionality. See Tables I & III, in Part II of this article.

[65] "The election of . . . judges for short terms obviously made them subservient to press requirements." Editorial, *Publicity Scandals Demand Exercise of Authority*, 20 J. AM. JUD. SOC'Y 82, 83 (1936). "The reason why . . . [the courts] fear the power of newspapers is because that power is political power . . . . [T]he popular election of judges for fixed terms is the greatest single evil of our judicial system." Perry, *The Courts, The Press, and The Public*, 30 MICH. L. REV. 228, 234 (1931). "[T]here is a widespread and firmly established system of trading official information and official favor for newspaper publicity and newspaper influence. . . . It is precisely and definitely from this system that the evil of trial by newspaper derives." *Id.* at 233. Of the persons responding that the contempt power could not be used, 23.73% based their answer on this political reason. See Table III, in Part II of this article.

[66] SULLIVAN, CONTEMPTS BY PUBLICATION 126–30 (2d ed. 1940).

[67] *Cf.* In the Matter of Seed, 140 Misc. 681, 251 N.Y. Supp. 615 (Sup. Ct. 1931). The New York Supreme Court cited a news photographer for contempt after having been advised that an explosion ensued at a criminal trial when he attempted to take a photograph. Finding Seed guilty of contempt but discharging him in light of his lack of knowledge of the illegality of his conduct, the court stated:

> "[This occurrence and similar ones] have been brought about by a lack of knowledge on the part of those seeking to obtain the pictures as to their rights and . . . duties toward the court. This memorandum is written with the thought that the information therein contained will lead to a proper conduct on the part of those seeking to take pictures in the vicinity of the court."

Id. at 684, 251 N.Y. Supp. at 618.

power, because so long as this process is not uniformly applied according to some standards, it serves no deterrent function and thus does not tend to help secure the effective enforcement of justice in the long run.

(2) *Trial level remedies*

Various remedies designed to prevent a defendant from being tried by a prejudiced jury are available at the trial level. Included are motions for dismissal of a prospective[63] or impanelled[69] juror for cause, for declaration of mistrial,[70] for continuance,[71] for change of venue,[72] and for new trial.[73] Failure to grant the requested relief is reversible error only where a defendant has been prejudiced thereby and where such failure amounts to an abuse of discretion.[74] However, these remedies fail to protect defendants' rights and the corollary sovereign rights simply because they are so seldom granted,[75] probably due to the nebulous nature of impartiality[76] and the trial court's broad discretion as to disposition of such motions.[77] Another reason these procedures are ineffective is that, if granted, such remedies as change of venue, continuance, and even new trial, will be unable to assure a fair trial if widespread and intense publicity concerning the trial continues to be disseminated.[78] Even

[63] *E.g.*, Hopt v. Utah, 120 U.S. 430 (1887); Reynolds v. United States, 98 U.S. 145 (1878).

[69] *E.g.*, United States v. Griffin, 176 F.2d 727 (3d Cir.), *cert. denied*, 338 U.S. 952 (1949); United States v. Carruthers, 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946).

[70] *E.g.*, Marshall v. United States, 360 U.S. 310 (1959); Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961); State v. Puckett, 92 Ariz. 407, 377 P.2d 779 (1963); Hammons v. People, —— Colo. ——, 385 P.2d 592 (1963); Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963); People v. Genovese, 10 N.Y.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 34 (1963); State v. Harris, 62 Wash. 2d 858, 385 P.2d 18 (1963).

In State v. Puckett, *supra*, the trial court (sitting without a jury) declared a mistrial sua sponte upon publication of an article declaring that the judge's decision in the case would be politically influenced. Defendant challenged retrial on double jeopardy grounds. The Arizona Supreme Court held that the new trial did not constitute double jeopardy, inasmuch as the trial court had a "legal reason" for declaring the mistrial.

[71] *E.g.*, United States v. Holovachka, 314 F.2d 345, 349–53 (7th Cir. 1963); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); Perez v. State, 236 Ark. 921, 370 S.W.2d 613 (1963); State v. Hickock, 188 Kan. 473, 363 P.2d 541 (1961); State v. St. Peter, 63 Wash. 2d 495, 387 P.2d 937 (1963).

[72] *E.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963); Hoffa v. Gray, 323 F.2d 178 (6th Cir. 1963); United States *ex rel.* Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963); Latham v. Crouse, 320 F.2d 120 (10th Cir. 1963); United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963); People v. Magee, 217 Cal. App. 2d 443, 472–74, 31 Cal. Rptr. 658, 677–78 (1963), *cert. denied*, 376 U.S. 925, *rehearing denied*, 376 U.S. 967 (1964); Singer v. State, 109 So. 2d 7 (Fla. 1959); Blevins v. State, 108 Ga. App. 738, 134 S.E.2d 496 (1963); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954); Nickell v. Commonwealth, 371 S.W.2d 849 (Ky. 1963); Smith v. Commonwealth, 366 S.W.2d 902, 903–04 (Ky. 1962); State v. Thompson, —— Minn. ——, 123 N.W.2d 378 (1963); State v. Odom, —— Mo. ——, 369 S.W.2d 173 (1963), *cert. denied*, 375 U.S. 993 (1964); Hagans v. State, —— Tex. Crim. ——, ——, 372 S.W.2d 946, 948 (1962), *cert. denied*, 375 U.S. 957 (1963), *rehearing denied*, 375 U.S. 989 (1964); Crouse v. State, —— Wyo. ——, ——, 384 P.2d 321, 331 (1963).

[73] *E.g.*, Stroble v. California, 343 U.S. 181 (1952); State v. Halko, —— Del. ——, 193 A.2d 817 (1963).

[74] An appellate court will not overturn a trial court's finding of impartiality unless error is so manifest as to amount to an abuse of discretion, Holt v. United States, 218 U.S. 245, 248 (1910); Dillon v. United States, 218 F.2d 97, 103 (8th Cir. 1955); Singer v. State, 109 So. 2d 7, 13 (Fla. 1959), apparently because the trial judge is presumed to be in a better position than is the appellate court to weigh all the factors in determining the question of what effect, if any, publication of prejudicial information has upon the fairness of a given trial. Commonwealth v. Geagan, 339 Mass. 487, 501, 508, 159 N.E.2d 870, 881, 885, *cert. denied*, 361 U.S. 895 (1959) (Brinks' robbery case). Since determination of whether or not to grant the various motions depends on a finding of partiality or no partiality, appellate courts allow trial courts that same broad discretion as to disposition of the motions.

[75] Address by Mr. James R. Thompson, Assistant States Attorney, Cook County, Ill., Conference on Prejudicial News Reporting in Criminal Cases, Northwestern Univ. School of Law, May 3, 1962, in FREE PRESS-FAIR TRIAL: A REPORT OF THE PROCEEDINGS OF A CONFERENCE ON PREJUDICIAL NEWS REPORTING IN CRIMINAL CASES 7, 12–15 (Inbau ed. 1964); Address by Mr. James R. Thompson, Second Annual Short Course for Newsmen in Crime News Analysis and Reporting, Northwestern Univ. School of Law, Summer 1960, in INBAU & SOWLE, CRIMINAL JUSTICE 810, 813 (1960); Will, *supra* note 60, at 209 n.39.

[76] See notes 10–15 *supra* and accompanying text.

[77] See note 74 *supra*.

[78] Furthermore, it has been suggested that the remedies of continuance and change of venue not only would be to no avail [Commonwealth v. Geagan, 339 Mass. 487, 501, 159 N.E.2d 870, 881, *cert. denied*, 361 U.S. 895 (1959), wherein the argument was advanced that since the prejudice engendered was so strong and widespread that no fair trial which properly could be called "speedy" could be had anywhere in the Commonwealth, defendants could never be constitutionally tried in Massachusetts], but also would entail waiver of the constitutional right to a speedy trial in the county where the alleged crime was committed. Address by Mr. James R. Thompson, Second Annual Short Course, *supra* note 75.

Of course, the perils of being tried by a biased jury would disappear if a defendant were to elect to be tried by the court alone, assuming that judges are immune to prejudice. But this constitutes waiver of the constitutional right to trial by jury. "A citizen should not be coerced to relinquish his right to a jury trial . . . in order to escape an intolerable situation of a trial before a prejudiced jury." Jones v. State, 185 Md. 481, 486, 45 A.2d 350, 352 (1945).

when granted, these motions have little tendency to deter future publication of prejudicial material.

It would appear that the trial level technique of sequestering the jury (*i.e.*, keeping the jurors "locked up" during the course of the trial) is the most effective way to prevent the defendant's being prejudiced by publicity appearing after the jury has been impanelled.[79] This method has been infrequently employed, however, perhaps because of a desire to avoid coercing the unhappily confined jurors to concur in a hurried verdict. However in a recent case the Seventh Circuit approved the trial judge's sua sponte sequestration of the jury for the purpose of protecting defendant from the effects of prejudicial publicity over defendant's contention that this action resulted in a coerced verdict against him.[80] Furthermore, sequestration requires large expenditures by the state.[81]

(3) *Cautionary instructions*

Where the trial court instructs the jury not to read or listen to accounts of the case which may appear during the course of the trial[82] or not to consider any matters other than evidence presented at the trial,[83] appellate courts generally presume that the instructions were effective and thus find no prejudice due to pre-trial publicity or publicity appearing during the trial;[84] accordingly, failure to give cautionary instructions has been held to constitute reversible error.[85]

However, for several reasons, preventive cautionary instructions nonetheless fail to protect a defendant's right to a fair trial and the sovereign's right to preserve the orderly administration of justice by giving him a fair trial. First, they cannot protect against the possible effects of pre-trial publicity, simply because of the time element. Second, jurors may disregard preventive cautionary instructions and fail to admit it for fear of reprisal by the court. For example, in *Smith v. United States*,[86] a prejudicial article was published after cautionary instructions had been given. Upon defense counsel's request that despite the instructions the jury be polled as to whether any had read the article, the court addressed the jury as a whole as follows: " '[I]f any juror violated the instructions of the court and read the article . . . hold up your hands.' "[87] A better procedure involving the private interrogation of individual jurors is outlined by Judge Kiley in *United States v. Accardo*.[88] Third, these instructions may call to a juror's attention articles which might otherwise have gone unnoticed.[89] Corrective cautionary in-

[79] *E.g.*, in the recent Hoffa criminal fraud trial, Judge Richard B. Austin, N.D. Ill., sequestered the jury. In this case, however, the reason for sequestration appears to have been not only to insulate against the effects of prejudicial publicity but also to prevent interests representing the defendant from contacting jurors for the purpose of threatening or bribing them.

[80] United States v. Holovachka, 314 F.2d 345, 349–53 (7th Cir. 1963).

[81] See Will, *supra* note 60, at 209 n.39.

[82] Termed preventive cautionary instructions.

[83] Termed corrective cautionary instructions.

[84] *E.g.*, *Preventive:* Smith v. United States, 236 F.2d 260 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956); *Corrective:* United States v. Leviton, 193 F.2d 848, 857 (2d Cir. 1951) (article found in jury room, corrective cautionary instructions presumed effective); United States v. Griffin, 176 F.2d 727 (3d Cir.), *cert. denied*, 338 U.S. 952 (1949) (no proof that any juror read article); United States v. Carruthers, 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946) (one juror saw article, but no proof of prejudice); Hammons v. People, 385 P.2d 592, 594–95 (Colo. 1963) (general corrective cautionary instruction presumed effective to cure any prejudice caused by news report of defendant's offer to plead *nolo contendere*); State v. Cox, 188 Kan. 500, 501, 363 P.2d 528, 529 (1963) (corrective cautionary instruction presumed to have cured prejudicial effects of radio broadcast); Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963) (general corrective cautionary instruction ineffective to cure prejudice).

However, current thinking in the behavioral sciences is that the human mind is inexorably affected by impressions lodged in the subconscious. See note 90 *infra*.

[85] *E.g.*, *Preventive:* United States v. Accardo, 298 F.2d 133, 136 (7th Cir. 1962) (general preventive cautionary instructions inadequate); Coppedge v. United States, 272 F.2d 504, 507–08 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961) (trial court under duty to give preventive cautionary instructions); Carter v. United States, 252 F.2d 608 (D.C. Cir. 1956) (failure to give preventive cautionary instruction reversible error though actual prejudice [see note 13 *supra*] not shown); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952) (failure to give preventive cautionary instructions rendered subsequent corrective cautionary instructions ineffective); Briggs v. United States, 221 F.2d 636 (6th Cir. 1955) (publication during trial, no request by defendant for instruction); *Corrective:* King v. United States, 25 F.2d 242, 244 (6th Cir. 1928) (trial court under duty to give cautionary instructions when articles appear); People v. Purvis, 60 Cal. 2d. 323, 332–42, 33 Cal. Rptr. 104, 110–16, 384 P.2d 424, 430–36 (1963) (trial court's failure to give specific corrective cautionary instruction amounted to approval of prosecutor's argument *re* prejudicial publicity).

[86] 236 F.2d 260 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956), *rehearing denied*, 353 U.S. 989 (1957).

[87] *Id.* at 269–70.

[88] 298 F.2d 133, 136 (7th Cir. 1962).

[89] See Briggs v. United States, 221 F.2d 636, 639 (6th Cir. 1955); Marson v. United States, 203 F.2d 904, 909 (6th Cir. 1953). Judge Julius J. Hoffman, N.D. Ill., has told the writer that subsequent to decision of the *Accardo* appeal, *supra* note 88, which in effect requires district judges in the Seventh Circuit to give preventive cautionary instructions before every recess, a number of defense attorneys have waived the right to such instructions, specifically requesting that they not be

structions are likely to be ineffective for the third reason above, and also because of the difficulty, if not impossibility, for a juror not to be at least subconsciously influenced by extra-judicial matters to which he was exposed despite honest efforts to remain fair and impartial and to discharge his oath.[90]

Exposure to extra-judicial matters not in evidence at the trial may cause a juror subconsciously to resolve disputed issues of fact against the defendant even though that juror is not in fact deciding defendant's guilt on the basis of consciously considered facts gained other than at the trial. Moreover, extra-judicial exposure to matters which are subsequently admitted in evidence may lead a sincere juror to resolve disputed issues of fact, and, perhaps more importantly, issues of credibility of witnesses, against defendant. The pre-admission exposure may well cause a juror to give more weight to the evidence than he would if his first and only contact with the matter were as evidence in court.

(4) *Reversal of Convictions*

Many factors are considered by reviewing courts in determining whether a judgment of conviction should be overturned on prejudicial publicity grounds. Invariably the reversible error alleged by appellant will be denial of a fair trial occasioned by the trial court's failure or refusal to grant trial level remedies or cautionary instructions. Hence, the issues reviewing courts discuss tend to establish the presence or absence of prejudice.

State or Federal Convicting Court. The question whether the conviction was rendered in a state or federal court is peculiar to the federal courts, since only a federal court can hear cases which originate in both federal and state courts.[91] If the conviction was rendered in a federal court, the United States Supreme Court can reverse in exercise of its general supervisory power over the lower federal courts.[92] When a federal court is reviewing a state conviction, however, habeas corpus can be granted[93] or reversal ordered[94] only if the defendant was denied a fair trial in violation of due process.[95] However, the fact that the 1963 case of *Rideau v. Louisiana*[96] allowed speculative proof of prejudice to establish that the constitutionally compelled impartiality requirement was not met by the state jury indicates that the state-federal distinction will seldom be meaningful in cases to come.

Admissibility of Information Complained of. Publicity relating facts unfavorable to a defendant which are inadmissible as evidence at the trial is very likely to be prejudicial, since a juror who reads such publicity will have been exposed to evidence not introduced at the trial, and might consider such facts in his deliberations.[97] Con-

given so that the jurors will not be curious to read what they would have been warned against.

[90] See note 11 *supra* and accompanying text. It should be noted that, even though one may not be consciously influenced by prior exposure to prejudicial publicity in the task of arriving at a verdict, he may in fact be unable to put the extra-judicially acquired material out of his mind and thus may subconsciously utilize it in reaching his verdict while sincerely believing that he is deciding the case objectively and "solely on the basis of the evidence presented in court." For discussion of the subtle machinations of prior experience, see, *e.g.*, KRECH & CRUTCHFIELD, THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY 87 (1948); TOLMAN, PURPOSIVE BEHAVIOR IN ANIMALS AND MEN 394 (1932); Siipola, *A Study of Some Effects of Preparatory Set*, in HARTLEY, OUTSIDE READINGS IN PSYCHOLOGY 266–75 (1950); WICKENS & MEYER, PSYCHOLOGY 276–85 (1961); Eckstrand & Wickens, *Transfer of Perceptual Set*, 47 J. EXPERIMENTAL PSYCHOLOGY 274 (1954). See also Comment, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216 (1964).

[91] For example, a federal district court may review a state conviction in a habeas corpus proceeding, and a federal appellate court may review a district court's decision on a habeas petition. The United States Supreme Court may have occasion to review a state conviction directly.

[92] See, *e.g.*, Marshall v. United States, 360 U.S. 310 (1959). The Court reversed and granted a new trial in exercise of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts." *Id.* at 313. Although such supervisory power is initially exercised to correct prejudicial error, application of rules so formulated may result in reversal where a defendant was not in fact prejudiced, but where such circumstances as were present at his trial may, in other cases, result in prejudice.

[93] Irvin v. Dowd, 366 U.S. 717 (1961), United States *ex rel.* Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963), Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), and United States *ex rel.* Smith v. Brown, 200 F. Supp. 885 (D. Vt. 1962), appear to be the only cases to date wherein federal habeas corpus issued to a state prisoner on this ground.

[94] Rideau v. Louisiana, 373 U.S. 723 (1963), the Supreme Court's latest state prejudicial publicity case, came up on certiorari.

[95] Our "dual sovereignty" system of federalism, based on the tenth amendment, permits a federal court to overturn a state conviction only if it was obtained in a manner repugnant to the defendant's federal constitutional rights.

[96] *Supra* note 94. See note 17 *supra* and accompanying text.

[97] Marshall v. United States, 360 U.S. 310, 312 (1959) (seven jurors saw articles *re* fact of prior convictions, previously held inadmissible at trial—rev'd); Shepherd v. Florida, 341 U.S. 50 (1951) (rev'd per curiam on other grounds) (concurring opinion of Jackson, J.) (article stated defendants had confessed; no confessions offered as evidence); United States v. Accardo, 298 F.2d 133 (7th Cir. 1962) (publication of inadmissible

versely, if information published prior to trial is subsequently admitted, defendant cannot successfully allege that the publicity prejudiced his rights.[98] The rule in the federal courts, controlled by *Marshall v. United States*,[99] requires reversal where the jury was extra-judicially aware of information inadmissible because of its prejudicial nature,[100] not simply because of some evidentiary rule.[101]

Time Between Publication and Trial. Although it is difficult to measure so subjective a thing as impartiality—admittedly a state of mind—on an objective scale, some courts have attempted to do so. If a relatively long period of time has elapsed between publication of the material complained of and time of trial, a reviewing court is not likely to find prejudice.[102]

Action Taken by Defense Counsel Prior to or During Trial. If defense counsel fails to move the court to interrogate the prospective jurors on voir dire, or the impanelled jurors during the trial, as to whether they read the articles complained of, and if so whether they were prejudiced thereby,

evidence *re* criminal activities—rev'd); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952) (publication of inadmissible evidence—rev'd); People v. Purvis, 60 Cal. 2d 323, 332–42, 33 Cal. Rptr. 104, 110–16, 384 P. 2d 424, 430–36 (1963) (publication of inflammatory, inadmissible information *re* capital punishment—rev'd); Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (Mass. 1963) (publication by three major local newspapers of fact that trial judge requested them not to print defendants' criminal records—rev'd).

[98] Stroble v. California, 343 U.S. 181, 192 (1952) (text of confession published before trial, confession later admitted as evidence—aff'd); United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963) (publicity circulated during trial contained no material not eventually admitted as evidence—motions for new trial or for acquittal denied).

It may be argued nevertheless that a prejudicial effect existed. Even if the contents (substance) of the publicity were later admitted in evidence, it would appear that a defendant could still be prejudiced, inasmuch as a jury might well be more likely to believe the prosecution's evidence after having been conditioned to it by the pre-trial publicity. See note 90 *supra*. Even if jurors follow instructions not to read material about the case, this cannot erase the effects of impressions formed derived from exposure to pre-trial publicity. See notes 82–90 *supra* and accompanying text.

The elusive nature of impartiality renders even the factor of subsequent admission of the evidence inconclusive, since the fact that evidence inadmissible because of its prejudicial nature was perceived by the jury does not technically render a trial unfair unless the jury is found partial under the particular test of impartiality applied. For example, where all jurors, upon interrogation by the trial court, stated that they had not been prejudiced against defendant by a news article published during the trial referring to him as an "ex-convict," the court's finding of no prejudice was affirmed in Rowley v. United States, 185 F.2d 523 (8th Cir. 1950). A conviction was affirmed for lack of a finding of partiality where there was no proof that any juror had read an article published during the trial which contained the fact of defendant's pending trial for another offense, and where a cautionary instruction had been given admonishing the jury to consider only evidence admitted at the trial. United States v. Griffin, 176 F.2d 727 (3d Cir.), *cert. denied*, 338 U.S. 952 (1950).

[99] 360 U.S. 310 (1959). See text accompanying notes 21 & 22 *supra*.

[100] The crux of the *Marshall* decision is that the jurors were exposed to "information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence." *Id.* at 312.

Relying on *Marshall*, the Court of Appeals in Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961), reversed a conviction handed down by a jury which might have read articles containing accounts of transactions which occurred in court during the jury's absence. These included statements made by an accomplice witness to the effect that he was in mortal fear of defendant, and that defendant had pistol-whipped the witness's brother. The Court of Appeals stated, "These articles . . . contained additional facts . . . which the jurors were not entitled to know . . . and which were devastating to . . . [defendant's] cause." *Id.* at 508. See United States v. Accardo, 298 F.2d 133 (7th Cir. 1962).

In Oxenberg v. State, 362 P.2d 893 (Alaska), *cert. denied*, 368 U.S. 56 (1961), the Supreme Court of Alaska affirmed denial of defendant's motion for mistrial, although the material complained of consisted of testimony which had been excluded by the trial court. Choosing to apply the *Marshall* rule, the court distinguished *Marshall* on the ground that the excluded testimony in the instant case was inadmissible because of irrelevancy, not because of its prejudicial nature. The court stated: "If the conversation had not been excluded, it would have amounted to . . . additional corroborative evidence of the same general type that was admissible and had been introduced." *Id.* at 899.

[101] Under the *Marshall* rule, evidence which is incidentally prejudicial to the defendant but held inadmissible because of some evidentiary rule (e.g., hearsay, irrelevancy, etc.), would probably be treated as if it had been excluded by reason of its prejudicial nature, inasmuch as the effect of the material, not the stated reason for its inadmissibility as evidence, determines whether or not a defendant was in fact prejudiced by its publication.

[102] Beck v. Washington, 369 U.S. 541 (1962), *affirming* 298 F.2d 622 (9th Cir. 1962) (10 months); Stroble v. California, 343 U.S. 181, 192 (1952) (6 weeks); United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963) (2 years); Commonwealth v. Geagan, 339 Mass. 487, 501, 159 N.E.2d 870, 881, *cert. denied*, 361 U.S. 895 (1959) (4–5 months). The rationale seems to be: the longer the lapse of time, the less the likelihood that an atmosphere of prejudice still prevails. Some defense lawyers share this opinion that in all but exceptional cases, the passage of time does have this effect. Interview With Mr. Gerald Getty, Public Defender, Cook County, Ill., April 16, 1962. It may be, however, that the objective yardstick is of no practical value, for prejudice may not die a natural death with the passage of time—especially in a case which has received widespread publicity. See note 78 *supra* and accompanying text. For an example of a case in which the persisting atmosphere of prejudice was overwhelming, see Moore v. Dempsey, 261 U.S. 86 (1923).

most reviewing courts will not disturb the result.[103] It has been recognized, however, that such questioning may be harmful to a defendant's cause. For example, in *Briggs v. United States*,[104] defendant moved for a mistrial, but declined to accept the trial court's offer to interrogate the jury. Reversing the conviction rendered after the trial court refused to declare a mistrial, the Sixth Circuit stated, "It could very well be that questioning the jury would be more prejudicial than helpful. We do not believe that appellant was required to agree to such questioning in order to preserve his contention that [he] was entitled to a mistrial."[105] In another case,[106] defense counsel suggested voir dire questions designed to elicit the existence of prejudice without alerting jurors to prejudicial material. The trial court's insistence on asking questions in such a form as to make the jurors aware of the material constituted one ground for reversal.[107]

Failure of a defendant to exhaust his peremptory challenges, to challenge for cause, or to move for continuance, change of venue, or mistrial, though not usually precluding the appellate court from deciding the issue of impartiality,[108] may lead the court to infer that the articles complained of did not in fact generate such widespread and lasting prejudice as the defendant would like the court to believe.[109]

Source and Intent of the Information. If the in-

[103] *E.g.*, Ferrari v. United States, 244 F.2d 132, 138 (9th Cir.), *cert. denied*, 355 U.S. 873 (1957) (failure to interrogate on voir dire *re* pre-trial publicity); Gicinto v. United States, 212 F.2d 8 (8th Cir.), *cert. denied*, 348 U.S. 884 (1954) (failure to move court to interrogate *re* publicity printed during trial); Bucher v. Krause, 200 F.2d 576, 583–84 (7th Cir.), *cert. denied*, 345 U.S. 997, *rehearing denied*, 346 U.S. 842 (1953) (failure to take advantage of opportunity further to interrogate impanelled jurors *re* publicity during trial); State v. Hickok, 188 Kan. 473, 484–85, 363 P.2d 541, 549 (1961) (no attempt to show prejudice either before or during trial).

This rule is a logical corollary to the rule that actual prejudice must be shown (see notes 13 & 14 *supra* and accompanying text), for without the record of the results of such interrogation, a reviewing court following this rule can have no basis for a finding of actual prejudice. Those courts which adhere to the view that only speculative prejudice need be shown (see notes 15–18 *supra* and accompanying text) do not require interrogation as a procedural prerequisite to a finding of prejudice on review. See, *e.g.*, Briggs v. United States, 221 F.2d 636 (6th Cir. 1955). This rule is just as logical a corollary to the speculative prejudice rule, for if the circumstances raise the presumption of prejudice, the reviewing court must find prejudice if the presumption is not rebutted. Moreover, since the speculative prejudice rule does not rely on jurors' answers to questions regarding their bias or prejudice, absence of answers to such questions does not impair operation of the rule.

[104] *Supra* note 103.

[105] *Id.* at 639.

[106] Marson v. United States, 203 F.2d 904 (6th Cir. 1953).

[107] "[T]he last thing counsel wished to suggest [to prospective jurors during voir dire] was any connection of appellant with criminal activities. The Court . . . interrogating the jurors for the purpose of insuring a fair trial for appellant, proceeded to ask the very questions which appellant's counsel were most emphatically insisting constituted prejudice to his right to a fair trial."

Id. at 909. A case which illustrates the possibly disastrous effects of clumsy interrogation is Smith v. United States, 236 F.2d 260 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956), *rehearing denied*, 353 U.S. 989 (1957), discussed in the text accompanying notes 86 & 87 *supra*. See Note, 50 J. CRIM. L., C. & P.S. 374, 381 (1960).

[108] In State v. LaRocca, 81 N.J. Super. 40, 194 A.2d 578 (App. Div. 1963), however, the court held that defendant's failure to exercise an available peremptory challenge to an allegedly prejudiced juror who was not challengeable for cause precluded his attempt to overturn the verdict on appeal, stating, "To do so would render the *voir dire* meaningless." *Id.* at 44, 194 A.2d at 580.

[109] The following language is indicative of the inductive reasoning typically practiced by many courts:

"Every juror who sat in the case was pronounced acceptable to the defendant by his counsel and this could hardly have occurred if there had been any impression in his mind that the jurymen had been prejudicially affected by the objectionable publications . . . ."

People v. Becker, 215 N.Y. 126, 152, 109 N.E. 127, 135 (1915).

"[D]efendants waived some of their peremptory challenges . . . [so] we must assume that . . . they were able to obtain fair and impartial jurors who were not biased or prejudiced by reason of the news media complained of."

State v. Hickock, 188 Kan. 473, 485, 363 P.2d 541, 550 (1961).

"[I]n an effort to determine whether there was public hysteria or widespread community prejudice against petitioner at the time of his trial, we think it significant that . . . [his attorneys] saw no occasion to seek a transfer of the action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County."

Stroble v. California, 343 U.S. 181, 194 (1952). *Accord*, Beck v. Washington, 369 U.S. 541 (1962) (failure to challenge petit jurors for cause implied trial court's acceptance of their declarations of impartiality was correct); Latham v. Crouse, 320 F.2d 120 (10th Cir. 1963) (failure to request more than one change of venue and to challenge for cause); Stunz v. United States, 27 F. 2d 575 (8th Cir. 1928) (failure to move for change of venue); People v. Magee, 217 Cal. App. 2d 443, 472–73, 31 Cal. Rptr. 658, 677–78 (1963), *cert. denied*, 376 U.S. 925, *rehearing denied*, 376 U.S. 967 (1964) (failure to move for change of venue); Gonzales v. State, —— Okla. Crim. ——, 388 P.2d 312 (1964) (waiver of two peremptory challenges). *Contra*, Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952) (failure to move for change of venue and to exhaust peremptory challenges did not affect reviewing court's decision to reverse on grounds of prejudice). See Note, 50 J. CRIM. L., C. & P.S. 374, 378–81 (1960). *But cf.* note 78 *supra* and accompanying text.

formation contained in the publicity complained of was instigated solely by the press, federal and state reviewing courts have been less likely to reverse than if an agent of the prosecuting government was responsible for dissemination.[110] Indeed, the "state action" concept of due process seems especially applicable to support federally compelled reversal of state convictions contaminated by publicity promulgated by an officer of the state.[111] However, in *Rideau v. Louisiana*,[112] where the United States Supreme Court reversed defendant's state murder conviction on prejudicial publicity grounds, the Court expressly disclaimed reliance on state action as to promulgation of the prejudicial broadcasts, stating that, although it appeared that local officials probably had prompted the filmed interview, "the question of who originally initiated the idea . . . is . . . a basically irrelevant detail."[113] The state action held by the Court to have deprived defendant of his federal rights was the state trial court's refusal to grant his motions for change of venue.[114] This notion utilized by the *Rideau* court—that it is the prejudicial effect of an occurrence upon the defendant rather than the identity or motive of the person who caused the event which is the sole determinant of whether defendant's trial was fair,[115] and that the trial court's failure to cure the effects of the prejudicial occurrence constitutes "state action" for due process purposes[116]—would seem to eradicate any previously persisting distinction between prosecution-generated publicity and publicity emanating from other sources.

In short, reviewing courts are slow to reverse convictions attacked on prejudicial publicity grounds, mainly because it is extremely difficult, as a practical matter, to prove prejudice. Even in the case where the rights of a particular defendant are vindicated by reversal of his conviction, this method is an incomplete solution. Reversal of a few convictions influenced by prejudicial publicity will have little, if any, deterrent effect upon promulgation of like material in subsequent cases.[117] Further, the right of the prosecuting government fairly to administer criminal justice and to protect its citizens is entirely neglected by this "solution."[118] Where the publicity which occasions reversal and remand emanates without participation of any government official, the government has been unjustly "punished"—by the trouble and expense of a new trial, or, if retrial is impossible as a practical matter or because the appellate court

[110] *Federal: E.g.*, Stunz v. United States, 27 F.2d 575 (8th Cir. 1928). Affirming a conviction on the ground that there was no abuse of discretion in the trial court's denial of defendant's motion for continuance, the court of appeals noted that "[I]t is not claimed that the government in any way aided or encouraged these publications [purporting to outline the government's case]." *Id.* at 577. See also Delaney v. United States, 199 F.2d 107 (1st Cir. 1952) (pre-trial publicity caused by congressional committee hearings—rev'd). *State: E.g.*, People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915). Although the court affirmed defendant's conviction, it stated:

> "The case would be quite different if the record disclosed any substantial foundation for the suggestion that the district attorney or his agents were responsible in any way for any publications by which it was sought to influence the outcome of the trial."

Id. at 152, 109 N.E. at 135.

[111] "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods [constituting due process of law] which centuries of experience have shown to be indispensible to the fair administration of justice."

Stroble v. California, 343 U.S. 181, 201 (1952) (dissenting opinion of Frankfurter, J.). See also Moore v. Dempsey, 261 U.S. 86, 88 (1923) (inflammatory articles designed to arouse public sentiment against Negroes were promulgated by committee of state governor—Negro defendants' convictions reversed); United States *ex rel.* Brown v. Smith, 200 F. Supp. 885 (D. Vt. 1962) (criminal record released to press by prosecutor—habeas corpus granted).

[112] 373 U.S. 723 (1963). See text accompanying note 17 *supra*.

[113] 373 U.S. at 726.

[114] *Ibid.*

[115] This concept recently has gained increasing acceptance among state courts. See, *e.g.*, State v. Lea, 259 N.C. 398, 399, 130 S.E.2d 688, 689 (1963) ("[I]t is the probable effect or influence upon the jury . . . and not . . . [the judge's] motive, that determines whether the right of the defendants to a fair trial has been impaired . . . ."); People v. Roof, 216 Cal. App. 2d 222, 227, 30 Cal. Rptr. 619, 622 (1963) ("It is the effect of the . . . statement, and not the motive behind it, which is determinative of the question whether the case of defendant was substantially impaired."); People v. Robertson, 12 N.Y.2d 355, 360, 190 N.E.2d 19, 21, 239 N.Y.S.2d 673, 677 (1963) ("The fault of . . . [one who unintentionally gave false testimony] may be less but the effect is the same . . . .").

[116] *Cf.* DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), where the trial court's failure to cure the prejudicial effects of comment by co-defendant's counsel upon defendant's failure to testify was held to amount to governmental action. See especially language in *id.* at 153–55.

[117] See Will, *Free Press vs. Fair Trial*, 12 DEPAUL L. REV. 197, 209–10 (1963).

[118] See A. T. Burch, *Press Coverage of Trials—Is Cause of Justice Hindered?*, Chicago Daily News, May 30, 1964, p. 17, col. 8: "It is the parties to the trial—not only the defendants, but the prosecution, the witnesses, and even the public treasury—that suffer inconvenience and expense if a new trial is ordered by a reviewing court [because of prejudicial publicity]."

reversed without remand, by the danger that one who may be a criminal remains at large—while the guilty press is allowed to go free. And, as we have seen, the method which would punish the press by contempt is rarely resorted to.

Summary

It appears that the above methods, as currently practiced by American courts, are inadequate solutions to the freedom of the press-fair trial conflict,[119] for the following brief reasons: (1) contempt, because of disuse; (2) trial level reliefs because of disuse and lack of deterrent effect; (3) cautionary instructions, because of human nature; and (4) reversal, because of disuse, failure to protect sovereign rights, and lack of deterrent effect.

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[119] 44.35% of the persons responding to the writer's poll agreed that the existing law fails to protect a defendant's right to a fair trial. See Table I, in Part II of this article. Moreover, 12.44% of those responding that the law generally is adequate in this regard stated that it is not adequate in highly publicized cases. *Ibid.*