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

Part II: Some Speculations and Proposals

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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, published in the March, 1965 issue of the *Journal*, 56 J. CRIM. L., C. & P.S. 1 (1965), the author first examined the applicable standards of impartiality which a jury must meet in order for a trial to be constitutionally "fair," and then defined 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 were 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, 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.

IV: EXPANSION OF EXISTING METHODS

When the conclusion that existing means are inadequate was made, it was advanced not to state that these means are inherently inadequate, but, rather, with the qualification that they are inadequate as currently practiced by American courts. Perhaps presently existing methods could be utilized in such a way as to solve the problem without resort to more radical and severe means which might represent the beginning of a trend that could result in gradual but eventual erosion of freedom of the press. However, this is not to say that the existing means will in fact be so utilized; rather it is suggested as a possible solution short of, and, perhaps preferable to, more drastic means.

To speak of preventing conduct—here, the publication prior to termination of a criminal case of

material which might prejudice the jury against the defendant—is to speak either of actually punishing someone or of putting him in fear of possible consequences which may harm him at some future time, unless he is willing to cease that conduct without external compulsion or persuasion.

It has been suggested that the news media are capable of voluntarily refraining from publishing prejudicial material, particularly if the Bar were to prescribe and itself adhere to reasonable standards to be followed.¹²⁰ Voluntary action has in fact

¹²⁰ Daly, *Ensuring Fair Trials and a Free Press: A Task for the Press and the Bar Alike*, 50 A.B.A.J. 1037 (1964); Current Events, 22 A.B.A.J. 79, 80 (1936) (quoting from an editorial in the Jan. 18, 1936 issue of the Toledo News-Bee). See LIEBLING, *THE PRESS* 159-60 (1960); Editorial, *Publicity Scandals Demand Exercise of Authority*, 20 J. AM. JUD. SOC'Y 82, 83 (1936). A proposed code of ethics for newsmen regarding publicity of trials is presented at 22 A.B.A.J. 79 (1936). See Brownell, *Freedom and Responsibility of the Press in a Free Country*, 24 FORDHAM L. REV. 178, 182, 186 (1955). See Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 213 n.58 (1963), for a description of some voluntary action.

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been taken in Rhode Island, where the two Providence dailies and many other newspapers do not print any matter regarding a trial which takes place outside the presence of the jury.¹²¹ However, failure of the legal profession to enforce its own Canon 20¹²² breeds disrespect on the part of the

press and tends to inhibit press self-control.¹²³ Such strong forces as competition and the desire to sell newspapers, moreover, would most likely prevent effective internal control,¹²⁴ despite the fact that this solution in ideology represents the best of all possible worlds in this area of the law.

Since radio and television serve to inform the public in brief of all important news events, newspaper editors and publishers are prone to believe, and perhaps rightly so, that they must give the public intricate details of morbid and shocking crime news in order to continue to prosper. This is not to say that radio and television are not also guilty of exposing jurors to prejudicial publicity;¹²⁵

The Oregon State Bar, the Oregon Newspaper Publishers Association, and the Oregon Association of Broadcasters have adopted a Joint Statement of Principles to keep the public fully informed without violating the rights of any individual. While it fails specifically to enumerate those kinds of material which may be prejudicial, the Statement does spell out certain guidelines (e.g., good taste, presumption of innocence, fact that readers and listeners are potential jurors, exploitation of news media by any lawyer considered unprofessional conduct) which both Bar and news media should follow. The Statement concludes that the members of the participating associations "testify to their continuing desire to achieve the best possible accommodation of the rights of the individual and the rights of the public when these two fundamental precepts appear to be in conflict in the administration of justice." The author is indebted to William F. Frye, District Attorney of Lane County, Ore., for a copy of the Joint Statement.

A subcommittee of the Committee on Jurisprudence of the State Bar of Michigan is investigating the problem, and early indications are that the Committee will probably recommend the promulgation of rules by the Michigan Supreme Court laying down guidelines and covering all law enforcing agencies, attorneys, and members of the judiciary, to the effect that no pre-trial statements be made. Letter from Larry S. Davidow, Chairman of a Subcommittee of the Committee on Jurisprudence of the State Bar of Michigan, April 21, 1964.

See also News Article, *Suggests "Voluntary Restraint" on Pretrial News Coverage*, Chicago Daily Law Bulletin, Feb. 24, 1964, p. 1, quoting from Edward L. Wright, Chairman, ABA House of Delegates, and Donald K. Gillmor, Associate Professor of Journalism, Univ. of North Dakota.

Cf. the practice of the Psychiatric Institute of the Municipal Court of Chicago, wherein reports of results of mental examinations are given only to the referring judge and the prosecutor only on trial date, and also before trial to defense counsel on request. Letter from E. J. Kelliher, M.D., Director, Psychiatric Institute of the Municipal Court of Chicago, March 24, 1964.

54.03% of the persons responding to the writer's poll agree with the statement in the text. See Table I.

¹²¹ Address by Judge Joseph Weisberger Before the National Conference of State Trial Judges, San Francisco, Aug. 4, 1962. See Will, *supra* note 120.

¹²² Canon 20 of the ABA's Canons of Professional Ethics condemns statements for publication by lawyers *re* pending litigation. See Daly, *supra* note 120; Sowle, *A Free Press Vs. Fair Trial*, Chicago Sun-Times, July 5, 1964, sec. 2, p. 2.

In a significant recent opinion, a unanimous Supreme Court of New Jersey stated, by way of dictum:

"[Canon 20 prohibits] statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests. Such

statements have the capacity to interfere with a fair trial and cannot be countenanced. . . .

"The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the state to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue, and comments before or during the trial which have the capacity to influence potential or actual jurors . . . are impermissible.

" . . . Nothing is suggested herein which proscribes the reporting of the evidence as it is introduced . . . during the course of the trial."

State v. Van Dwyne, 204 A.2d 841,852 (N.J. 1964).

The court thus is warning attorneys of disciplinary action which is likely to be imposed in the future under Canon 20.

¹²³ Letter from Brooks W. Hamilton, Head of the Dep't of Journalism, Univ. of Maine, March 23, 1964.

"If the Bar Association of America can state a code of ethics covering the publicity of trials, which are sensible and which do not violate decent practices of free publication, and if they can discipline the members of their own profession to abide by that code, they will be met more than half way . . . by the great majority of newspapers."

Current Events, *supra* note 120, at 80. See also Goldfarb, *Ensuring Fair Trials: The Impropriety of Publicity*, The New Republic, Feb. 29, 1964, p. 11.

¹²⁴ 11.29% of the persons responding to the writer's poll mentioned competition and commercialism when indicating that voluntary, internal control by the press appears unlikely. See Table I. See, e.g., Colegrove, *Attitudes Toward Crime News—A Newspaperman's Viewpoint*, 4 NAT'L PROB. & PAROLE ASS'N J. 313 (1958); Editorial, *supra* note 120; *cf.* White, *Newspaper and Radio Coverage of Criminal Trials: A Modern Dilemma*, 41 J. CRIM. L., C. & P.S. 306 (1950). *Contra*, Gallup, *What Is Public Opinion?*, 4 NAT'L PROB. & PAROLE ASS'N J. 305 (1958).

Another view is that "trial by newspaper" is justified because it serves the purpose of an important obligation of the journalistic profession: to attempt to reduce crime. Brown, *A Newspaperman's Obligations*, 4 NAT'L PROB. & PAROLE ASS'N J. 307, 310 (1958); Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 15-17 (1961). *But see* Deland, *Crime News Encourages Delinquency and Crime*, 32 J. AM. JUD. SOC'Y 10 (1948).

¹²⁵ See, e.g., Rideau v. Louisiana, 373 U.S. 723 (1963); Latham v. Crouse, 320 F.2d 120 (10th Cir. 1963); Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d

but it does appear that the greatest culpability lies with the newspapers.

Conferences between newsmen, members of the legal profession, and law enforcement officials may serve to enlighten some members of the journalistic profession as to the possible deleterious consequences of injudicious coverage of criminal cases.¹²⁶ For example, a conference on the subject in which newsmen, police officials, prosecutors, defense attorneys, and judges participated, was held at Northwestern University School of Law under auspices of the Ford Foundation in May 1962.¹²⁷ Although no proposed solution was unanimously arrived at, and though newsmen almost uniformly demanded empirical evidence that publication of what defense attorneys call prejudicial publicity in fact causes juries to be prejudiced against defendants,¹²⁸ one shining light did emanate from that conference.

Shortly after it was held, Professor Fred E. Inbau, co-chairman of the conference, received from a Florida assistant managing editor who had participated in the conference a copy of a recommendation which he had sent to the members of his

staff and to managing editors of other Florida newspapers, to the effect that alleged confessions and prior criminal records should not be alluded to in publications prior to termination of the trial.¹²⁹

But editors so enlightened are few and far between. It is doubtful whether such programs will substantially affect enough journalists to come close to solving the problem. Therefore, we must speak either in terms of actually punishing someone, or of somehow scaring him into prodded, but not whipped, compliance with the desired standard of conduct.

Expansion of the available tools of reversing convictions and granting the appropriate motions available at the trial level might well serve to scare the press into the desired moderation in covering crime news. If it were impossible to obtain an impartial jury and hence a valid conviction because of exposure to publicity, the press would not be slow to realize that public indignation might eventually lead to the imposition of external sanctions, and would therefore choose self-control in anticipatory self-defense, since external standards would doubtless be more stringent and circulation-cutting than what could voluntarily be adopted by the press and approved by the judiciary. Mere liberalization of currently prevailing tests of juror impartiality and standard of proof of prejudice would tend toward this result.

The recent case of *United States v. Accardo*¹³⁰ is illustrative. The defendant was convicted of making false statements on his income tax returns. Before and during his trial, his reputation for being involved in Chicago's underworld and the nationwide crime syndicate was widely publicized by local newspapers and news broadcasts. Presuming prejudice from the circumstances, the Seventh Circuit reversed on prejudicial publicity grounds. Inasmuch as the reversal and its basis also received much publicity,¹³¹ the public might well have inferred that, by publishing such articles as caused Accardo's conviction to be overturned, Chicago news media were in fact, albeit unintentionally, aiding organized crime.

In connection with the general problem, a leading Chicago editorial writer recently stated:

"As a result of prejudicial reporting and com-

¹²⁹ See *FREE PRESS-FAIR TRIAL*, *op. cit. supra* note 127, at 202.

¹³⁰ *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962).

¹³¹ See, e.g., News Article, Chicago Daily News, Jan. 6, 1962, p. 12, col. 1, published the day after the reversal.

497 (1949), *cert. denied*, 338 U.S. 912 (1950); *Hagans v. State*, 372 S.W.2d 946 (Tex. Ct. Crim. App. 1962); *cf. United States v. Rees*, 193 F. Supp. 861 (D. Md. 1961).

¹²⁶ The annual Short Course for Newsmen in Crime News Analysis and Reporting at Northwestern Univ. School of Law, very favorably mentioned in Mueller, *supra* note 124, at 25 n.78, attempts to inform members of the news profession of the possible consequences—e.g., reversal of otherwise valid convictions—of extensive coverage of criminal cases. See also *Prejudicial News Reporting in Criminal Cases*, 1962 OHIO ST. BAR ASS'N REP. 773, 774, where lawyers are urged to explain the legal problems involved to newsmen.

In Maine a voluntary code of conduct has been developed between the news media, State Police, and private general hospitals, and a similar code encompassing State hospitals is being prepared. No punishment is provided, other than that unofficial censure which is expected to flow from failure to adhere to the standards established. A jointly drafted code of advisory standards for Massachusetts is being written by news and Bar groups. Letter from Brooks W. Hamilton, Head of the Dep't of Journalism, Univ. of Maine, March 23, 1964.

¹²⁷ See *FREE PRESS-FAIR TRIAL: A REPORT OF THE PROCEEDINGS OF A CONFERENCE IN PREJUDICIAL NEWS REPORTING IN CRIMINAL CASES* (Inbau ed. 1964). This publication contains a verbatim transcription of the Conference, which was conducted by Northwestern Univ. School of Law and the Medill School of Journalism (Northwestern Univ.) under the direction of co-chairmen Fred E. Inbau, Professor of Law at Northwestern, and David R. Botter, Professor of Journalism at Medill (deceased).

¹²⁸ For the contrary view—that the press should prove that it does *not* cause prejudice—see Will, *supra* note 120, at 206–09. See also note 157 *infra* and accompanying text.

ment, courts often grant changes of venue, continuances, and mistrials. Reporting and comment have often been the ground on which appellate courts have reversed convictions.

"Editors and publishers have little to fear from the contempt procedure for prejudicial reporting or comment. But if they are not careful, they may be aiding a guilty man to escape punishment so long as reviewing courts are so sensitive to the presumed effect of what is printed."¹³²

Moreover, in the great majority of cases, liberalization of the standard of challengeability of jurors for cause would result in the selection of a panel of jurors impartial by federal constitutional criteria; inability to obtain a jury would result only in the most highly publicized cases. Trial courts in two recent cases entered what appear to be valid judgments of conviction after having excused all potential jurors who might possibly have been prejudiced against defendant by reason of publicity.¹³³

In the absence of effective, freely-chosen voluntary action, then, extension of the existing remedies of reversal and trial level remedies may result in the desired goal through the "scare" technique. But if those who publish prejudicial information prove either to be unaware of the possible threat to their seemingly invulnerable position or to be unbelieving that such a threat could ever materialize, then actual punishment will remain the only means of preventing publication of prejudicial material.

The existing contempt power can be invoked more frequently than at present to constitutionally punish constructive contempt by the press, so long as the information published constitutes a clear and present danger to the sovereign's right to secure the orderly administration of justice—i.e., in context, to the right of the particular defendant to a fair trial.¹³⁴ As has been demonstrated, use of the contempt power in this manner does no violence to freedom of the press. Presumably, punishment of past misconduct will deter that contemnor and those similarly situated from publishing like information in the future. Of course, the "punish-

ment" must actually punish, rather than merely slap the offender on the wrist. In light of the economic compulsion to publish detailed crime news, most newspapers would merely write off a moderate fine as a business expense. For the contempt conviction to constitute punishment which would reasonably deter future misconduct by the news media, really stiff fines against the publishing corporation and imprisonment of persons directly responsible for publication, as are imposed under the successful English system, would seem necessary.¹³⁵

If either the persuasion by fright or punishment by contempt technique is sought to be employed, it is equally important that the news media be informed of the standards formulated—of what conduct is disapproved. If the fright method derived from expansion of the test of juror impartiality and standard of proof of prejudice is to be used, one responsible for news coverage of criminal cases will be hesitant to publish material he knows may occasion reversal or impossibility of trial, which in turn, he apprehends, may lead to the external controls he abhors. If punishment is to be imposed for constructive contempt, the publisher's awareness of what specific information must not be published and when it must not be published will apprise him, as required by due process,¹³⁶ of what he must refrain from doing on pain of contempt, and will permit him to act accordingly.

Standards of Conduct

As discussed above, six kinds of material were categorized as "prejudicial," within the general criterion that the material might not be admissible as evidence, and if jurors read or heard the material, they might reasonably use it in deciding the question whether a defendant is guilty. Since the information might never be admitted in evidence, the test of prejudice for purposes of punishment

¹³² A. T. Burch, *Press Coverage of Trials—Is Cause of Justice Hindered?*, Chicago Daily News, May 30, 1964, p. 17, col. 8.

¹³³ *United States v. Kline*, 221 F. Supp. 776 (D. Minn. 1963) (court excused every potential juror who had formed an opinion as to defendant's guilt or innocence); *State v. St. Peter*, 63 Wash. 2d 495, 387 P. 2d 937 (1963) (court excused all potential jurors who had read or heard of defendant).

¹³⁴ See notes 46-64 *supra* and accompanying text, in Part I of this article.

¹³⁵ See SULLIVAN, *TRIAL BY NEWSPAPER* 218-30 (1961), for the view that those in high managerial positions, rather than reporters, should be held in contempt because of their policy-making power and financial interest in the newspaper. A further suggestion is that those responsible for miscarriages of justice occasioned by trial by newspaper be made liable to the prosecuting government for expenses incurred, e.g., cost of a new trial after reversal and remand. *Id.* at 217-18. One of the persons participating in the writer's poll suggested that the newspaper be made liable in civil damages to a vindicated defendant.

¹³⁶ "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." *United States v. Brewer*, 139 U.S. 278, 288 (1891).

must be whether, looking at the publication at the time of publication, it is reasonably certain that the defendant will be prejudiced if the jury is exposed to the publicity. A publication meeting this test constitutes *at the time of publication* a clear and present danger that the defendant will be prejudiced thereby—*i.e.*, that the sovereign's right to prosecute and conduct a fair criminal trial will be endangered—and can therefore be punished without violating freedom of the press even if the danger never materializes—*i.e.*, even if the information is subsequently admitted as evidence. Of course, subsequent admission would prevent the granting of trial level remedies or reversal.

Since we are seeking to formulate explicit standards, perhaps at the outset we must eliminate the sixth category of prejudicial material—miscellaneous material which may inflame the jury against defendant. Although such material can have the prejudicial effect sought to be eliminated, it is not likely to have this effect in so many cases as will material in the first five categories. Moreover, whereas the first five kinds of material are susceptible of rather precise definition, this last type is not. Thus, while recognizing that such miscellaneous material can in some cases be prejudicial, it would be wise not to include it for present purposes.

Applying the time element aspect of the test of prejudice developed above, publication of material in any of the first four categories (confessions, criminal activities, tangible evidence, and statements of possible non-witnesses) prior to its actual use as evidence at the trial (or, if never admitted, prior to termination of the trial) would constitute conduct so prejudicial as to warrant holding the publisher in contempt. Publication of material in the fifth category (proceedings out of jury's presence) would constitute such conduct if it occurred before the jury was allowed to consider the object of dispute in the proceeding (or, if never so allowed, before termination of the trial). If the jury is extrajudicially exposed to material in any of the five categories and the material is not later admitted as evidence, the defendant should obtain relief by trial level remedies or reversal.

The next logical question is how these standards, for purposes of securing "voluntary" adherence thereto by the fear-of-possible-future-consequences method, or for purposes of putting a potential contemnor on notice of what conduct is prohibited, are to be conveyed to those affected by them.

Presentation of the Standards

It has been suggested that the Bar advance standards for the press to follow.¹³⁷ Such a standard would be merely advisory as to those not members of that Bar, however, and probably could not command respect from a substantial portion of the press. A standard presented by the Bar would not necessarily conform to the treatment, by courts in its locality, of claims of prejudicial publicity or invocation of constructive contempt, unless those courts first formulated the standards in a judicial opinion. If the highest court of a state did formulate a standard, however, subsequent dissemination thereof to the press by the local Bar would aid in achieving the desired result and would constitute a valuable public service. So long as the organized Bar fails to enforce its Canon 20 as against its members, however, it would seem unrealistic to expect more from the press vis-à-vis a Bar-promulgated standard of conduct for the press in the absence of exercise of active external sanctions.

If, as has been argued, publication of the enumerated kinds of material can constitutionally be punished as contempt, any state court authorized to promulgate rules of court could constitutionally promulgate a rule specifying these categories and announcing that publication prior to admission as evidence, or termination of trial if not admitted, of categorized material concerning criminal cases pending before or being tried by jury in that court will be dealt with as a contempt of court.

Should a court decide to expand the existing methods of reversal and trial remedies rather than to enlarge its current use of the contempt power, it could, if so authorized by local law, render an advisory opinion that the enumerated kinds of material would, in the future, occasion reversal and granting of trial level remedies which might make trial in effect impossible. Or, perhaps, a State Attorney General could issue a similar statement as to his interpretation of what the law now requires.

Evaluation of Expansion of Existing Methods

Unfortunately, it seems unlikely that either of the possible expansions here suggested will be generally adopted, at least at the present time.

Although a few courts have begun to liberalize the tests of juror impartiality and proof of prejudice, it is doubtful that this will cause such fear on the part of a substantial segment of the press as to make any significant inroads on the present scheme

¹³⁷ See note 120 *supra* and accompanying text.

of crime news reporting. Courts still adhering to the stricter tests are loath to amend their stand for fear that jury trials will thereby be rendered impossible in the context of our modern society with its extensive news coverage of criminal cases. What these courts do not realize is that, by temporarily rendering effective criminal jury trials next to impossible in cases extensively covered by an immoderate press,¹³³ they may well insure that the judicial system shortly thereafter will no longer be plagued by the problem of prejudicial publicity.

And since most state judges are elected, and federal judges, though appointed for life, are bound by a Supreme Court decision ruling against their possession of statutory power to punish constructive contempts,¹³⁹ the possibility of punishing enough constructive contempts to deter news media from publishing material here deemed prejudicial seems remote.

Before considering the use of more stringent means against the press, however, it would perhaps be advantageous to consider the possibility of preventing publication of the enumerated prejudicial information by the indirect method of preventing the information from ever reaching the news media for publication.

V: PUNISHING DIVULGENCE

Effective prohibition of divulgence to the press of prejudicial material for purposes of publication by the press¹⁴⁰ would render unnecessary the imposition of any positive external sanctions against the news media, thus avoiding the argument that the latter would run afoul of freedom of the press.¹⁴¹ However, punishing those who divulge prejudicial material for publication may not be practicable in light of the newsman's statutory privilege, recognized in a minority of the states, against being compelled to reveal the source of his information.¹⁴²

¹³³ See note 133 *supra* and accompanying text.

¹³⁹ See note 40 *supra*, in Part I of this article.

¹⁴⁰ See Note, 50 J. CRIM. L., C. & P.S. 374, 381-82 (1960).

¹⁴¹ It may be that freedom of speech can more easily be regulated than freedom of the press, since, although the "clear and present danger" test applies to both, perhaps a clearer, more present, greater danger is required to restrict freedom of the press than freedom of speech, due to the particularly high reverence and regard in which freedom of the press is held.

¹⁴² While neither the first amendment nor the common law operates to grant this privilege, *Garland v. Torres*, 259 F.2d 545, 550-51 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963), some 10 states grant the privilege by statute.

Certain policy considerations may also dictate against the adoption of a non-divulgence statute.

Three general types of persons contribute to the press most, if not all, of the crime news deemed prejudicial in the preceding discussion. They represent (1) persons occupying the status of agents of the government, (2) persons independent of both the government and the news media, and (3) persons who are agents or employees of the news media.

(1) *Government agents.* The most obvious reason for divulging to the press material with may prejudice a jury against a prospective or present criminal defendant is to secure his arrest and conviction. While this end serves the individual interests of prosecutors and law enforcement officers, whose duty it is to protect the public from crime and to alleviate public anxiety concerning unsolved crimes, and who may release prejudicial material to the press in order to gain favorable publicity for themselves,¹⁴³ agents of executive and legislative branches of government may also contribute such material for similar considerations.¹⁴⁴ Since all these persons are officers of the state, their behavior as it affects the governmental process of conducting trials can be regulated by the state.¹⁴⁵ Moreover, since members of the Bar and police officers hold positions of privilege rather than of right, the local Bar Association and Police Depart-

See Comment, *Compulsory Disclosure of a Newsman's Source: A Compromise Proposal*, 54 NW. U.L. REV. 243 (1959). See also *Beecroft v. Point Pleasant Printing & Publishing Co.*, 82 N.J. Super. 269, 197 A.2d 416 (L. 1964). Although the privilege presently exists in but a small number of states, it would appear that any concerted effort to punish divulgence may provide impetus for enactment of newsmen's-privilege statutes in other states, the legislatures of which would, no doubt, be influenced by press interests.

¹⁴³ See Wessel, *Controlling Prejudicial Publicity in Criminal Trials*, 48 J. AM. JUD. SOC'Y 105 (1964). For examples of publicity emanating from the prosecution, see *Ciucci v. Illinois*, 356 U.S. 571 (1958), *affirming per curiam* 8 Ill. 2d 619, 137 N.E.2d 40 (1956); *Stroble v. California*, 343 U.S. 181 (1952); *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951); *People v. Brommel*, 56 Cal. 2d 629, 636, 15 Cal. Rptr. 909, 913, 364 P.2d 845, 849 (1961). See Sowle, *A Free Press Vs. Fair Trial*, Chicago Sun-Times, July 5, 1964, sec. 2, p. 2. Perhaps in a jurisdiction which is liberal in reversing convictions on prejudicial publicity grounds, a defense attorney might be inclined secretly to release information prejudicial to his client in hopes of subsequent reversal. See Note, 63 HARV. L. REV. 840, 852-53 (1950).

¹⁴⁴ Such persons may include local politicians, members of government agencies, and legislators. See, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923) (governor's committee); *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952) (congressional committee).

¹⁴⁵ Cf. *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

ment, respectively, could prescribe standards of non-divulgence with internal disciplinary action for non-compliance. Enforcement and observance of ABA Canon 20 alone would substantially aid the problem.¹⁴⁶ The argument that preventing divulgence to the press will harm society by keeping relevant information from the proper authorities simply does not apply, since the source of information here consists of those authorities.

(2) *Private Individuals.* Private individuals, independent of both the government and the news media, who may make statements for publication which might be prejudicial include witnesses, victims, family or friends of the victim or of the accused, accomplices, and suspects. Although it could constitutionally be effected, punishing such private individuals for making disclosures to the press in order to prevent similar disclosures in the future may be inadvisable. Here, the argument that prevention of disclosure would be against the public interest inasmuch as pertinent information may be made unavailable to the authorities does apply, since persons possessing otherwise inaccessible information relevant to the solution of a crime, may, for various reasons, fear going to the authorities.

In such cases, a criminal might go free but for the individual's willingness to tell his story to a newsman. Furthermore, since such private persons are not likely to repeatedly be in possession of information *re* crime and probably would lack actual knowledge of a sanction invocable against them, punishing them would serve no substantial deterrent purpose.

(3) *Employees of News Media.* While employees of news media can be treated as private individuals insofar as their function of supplying the media with information for publication is concerned, the arguments against the punishment of divulgence by private individuals do not apply to reporters and "informers." Unlike members of the Bar and police officials, newspaper employees are not subject to effective disciplinary action of any organized group. Although the American Society of Newspaper Editors has adopted a set of ethical canons, no disciplinary machinery exists for its enforce-

ment.¹⁴⁷ Thus, the only possible sanction against these persons is by state action. If a statute were to punish acts of divulging prejudicial material only when committed by employees of news media, however, it would likely be held invalid as violative of the equal protection clause of the fourteenth amendment.¹⁴⁸ The policy reasons favoring disclosure by private persons not affiliated with the press dictate against the universally applicable nondivulgence statute which would comply with the equal protection clause. Consequently, although press employees constitute an important source of prejudicial information, only those persons subject to government regulation by virtue of their status as officers of the state should be made subject to sanctions for divulgence of prejudicial material to the press.

In a state with a newsman's-privilege statute, a statute or internal regulation against divulgence would be totally ineffective unless the privilege statute were either repealed or amended to permit compulsion of disclosure of a newsman's source in cases where application of the nondivulgence statute or regulation is the reason for attempting to discover the source.¹⁴⁹

Although non-criminal punishment could probably be imposed by local Bar Associations and Police Departments in such a way as effectively to prevent divulgence of prejudicial information to the press, imposition of criminal penalties by the state would probably be a better method. Uniformity of incidence and substance throughout the state, essential for the purpose of securing that uniform compliance which is necessary to insure that every criminal defendant within the jurisdiction can exercise his right to a fair trial, is attainable only by a state-wide statute. Moreover, since a state legislature could emasculate non-divulgence regulations by enacting an unqualified newsman's-privilege statute, provisions to punish divulgence should ideally be promulgated by the legislature.

Even if the proposed non-divulgence statute would effectively prevent the press from obtaining

¹⁴⁷ See Will, *supra* note 120, at 212.

¹⁴⁸ As an unreasonable classification. It is arguable, though, that the classification is reasonable because it is based upon the policy favoring disclosure by private individuals not affiliated with the press.

¹⁴⁹ Such amendment would render the statute similar to the Arkansas statute, ARK. ANN. STAT. §43-917 (Supp. 1961), which, unlike other newsmen's-privilege statutes granting an absolute privilege, excepts from its operation communications made in bad faith and not in the interest of public welfare.

¹⁴⁶ See Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125, 1126 (1964). Canon 20 of the American Bar Association's Canons of Professional Ethics, of course, applies to prosecuting and defense attorneys alike. See *State v. Van Dyne*, 204 A.2d 841 (N.J. 1964), more fully discussed in note 122 *supra*, for an analysis of the Canon's scope, and for one court's method of putting attorneys on notice that the Canon will be enforced.

prejudicial material from those to whom the statute would apply, still some would reach the press from those to whom it would not. The question remains whether, if the non-divulgence statute is not adopted, or is adopted but is ineffective since much prejudicial material still reaches the press from sources which are immune because of a newsman's-privilege statute or because a prosecutor consistently exercises his discretion not to prosecute under the non-divulgence statute, sanctions more drastic than those already discussed and dismissed as ineffective or improbable of exercise should be invoked.

VI: PUNISHING PUBLICATION

Since the earlier discussed "solutions" apparently fail effectively to protect the criminal defendant's right to a fair trial, and thus necessarily fail to protect sovereign rights as well, I believe that the answer to this remaining question must be an emphatic "Yes."

The justification for making the right to a fair trial apparently supersede freedom of the press is that here, as in the obscenity and sedition cases, what is essentially being safeguarded is the public.¹⁵⁰ Just as the public is benefited by reasonable restrictions on offensive and dangerous material, so would it be benefited by reasonable restrictions on prejudicial material—for the government is the losing party when a miscarriage of justice occurs as a result of the publication of prejudicial material, and what is the government if not the public?

An analogy can be drawn from the recent case of *United States v. Fuller*,¹⁵¹ where the district court rejected defendant's argument that freedom of the press prohibited the federal government from prosecuting him for violating section 605 of the Federal Communications Act.¹⁵² Defendant, a newsman, had intercepted police radio messages and divulged newsworthy portions to a radio station. The court refused to grant defendant's motion to dismiss the information, holding, *inter alia*, that since freedom of the press is not absolute, the first amendment did not prohibit application of section 605 to defendant. In *Fuller*, the congressional right, embodied in a criminal statute, to keep the lanes of interstate commerce free and untrammelled was held to supersede freedom of the press. Proposed legislation to punish publica-

tion of prejudicial material would be passed by the state for the purpose of maintaining its sovereign right to preserve a fairly administered judicial system. If the one can supersede freedom of the press, why cannot the other?

A statute punishing the publication of prejudicial material would be analogous to a statutory or inherent contempt power under which acts interfering with the orderly administration of justice are punishable, to the extent that the former would enumerate and specify acts which fall within the more general terms of the latter. The same constitutional criteria should therefore apply to both processes. Since publication of such material constitutes a clear and present danger to the government's right to fairly administer criminal justice, a statute punishing publication should not offend the first amendment.¹⁵³ Moreover, enactment of such a statute clearly delineating the five kinds of prejudicial material outlined above¹⁵⁴ and providing for indictment and trial as for any other statutory offense would be perhaps even more palatable than use of the contempt power, inasmuch as the standards required would be unmistakable and available to all persons covered, and since a valid objection to the contempt power—that the judge whose courtroom was affected by the contemptuous act summarily tries the contempt action—is absent.¹⁵⁵

VII: PROPOSAL

A comprehensive statute encompassing both divulgence and publication would be the best possible solution, short, of course, of voluntary restraint by the press. Since the non-divulgence and prevention of publication sought is with regard to exactly the same material, a single statute should be utilized.¹⁵⁶

Since the legislature will be considering a bill which its members, as elected officials, will invariably find repugnant, it seems provident to be willing to settle for legislation covering less than all of the kinds of material deemed prejudicial in the earlier discussion. Although each of the five categories of information can properly be called prejudicial in the sense that a clear and present danger is presented, and although a bill covering all five

¹⁵³ See notes 46-64 *supra* and accompanying text, in Part I of this article.

¹⁵⁴ See notes 25-37 *supra* and accompanying text, in Part I of this article.

¹⁵⁵ See, e.g., Will, *supra* note 120, at 214.

¹⁵⁶ See *id.* at 215.

¹⁵⁰ See notes 62-64 *supra* and accompanying text, in Part I of this article.

¹⁵¹ 202 F. Supp. 356 (N.D. Cal. 1962).

¹⁵² 48 Stat. 1103 (1934), 47 U.S.C. §605 (1958).

categories can constitutionally be drafted and should initially be advocated, one has yet accomplished much if coverage of the most harmful of the items is attained. Punishing divulgence or publication of information relating to confessions and to previous criminal activity would seem to prevent the publication of that material which is most likely to be highly prejudicial in the most circumstances. Moreover, if material regarding confessions and previous criminal activities cannot be published, much of the material in the remaining categories will be less prejudicial or perhaps even devoid of the capacity to interest the public.

In order to increase the likelihood of enactment into law of this or a similar proposal, a scientific study should be conducted in order to establish a causal connection between exposure to prejudicial publicity and partiality.¹⁵⁷ In light of press influence on legislation, at least some endorsement of, or, at the very least, acquiescence in the proposal by the press probably would, as a practical matter, be necessary in order to have it enacted; tangible evidence of a causal connection would likely lead to endorsement by the more enlightened members of the press. The foregoing should not be construed to imply that there is a doubt as to causal connection—only that this proof would increase the chances of enactment of the proposed statute.¹⁵⁸

In drafting a proposed statute, the time during which divulgence or publication of the material shall be punishable must be delineated. It has been demonstrated that publication of prejudicial material is in fact prejudicial, as that term has herein been defined, if it occurs prior to admission of the contents of the material as evidence in court. The acts of divulgence or publication should be punishable if committed at any time after a criminal act has been committed and before the material is

admitted in evidence, or if not admitted, until termination of the trial.

What was said earlier concerning expansion of the constructive contempt power with regard to the punishment to be imposed¹⁵⁹ is equally applicable here. While a usual misdemeanor penalty would probably deter the individual from divulging prejudicial material, only a substantial fine and possible prison sentence will deter actual publication.

VIII: MODEL STATUTE

For implementation of the desired prohibitions, it is necessary to embody the above proposals into a definite structure. The statute which follows is designed as a guide to any state¹⁶⁰ which desires to impose reasonable restrictions upon the divulgence and publication of specified prejudicial material in order to assure that the constitutional right to trial by an impartial jury will more often be fact than fiction. The entire statute is intended to represent the broadest possible measure which could constitutionally be promulgated. However, adoption only of the unbracketed portions will strongly be advocated, since the more specific and less restrictive the statute, the greater its deterrent force, probability of enactment, and likelihood of being found constitutional.¹⁶¹

*An Act to Prevent the Dissemination of Prejudicial Publicity*¹⁶²

§1. Subject to the exceptions set forth in §§2 ¶1(c), 2 ¶2(b), 2 ¶3(b), 2 ¶4(c), 2 ¶5(b), and §3,

¹⁵⁷ See note 135 *supra* and preceding and accompanying text.

¹⁶⁰ The substantive provisions of the statute could be incorporated into the Code of a Bar Association or of an association of newsmen, and could also be used as a guide for possible police department regulations regarding divulgence.

¹⁶¹ Part or all of the bracketed portions could be used by local associations of lawyers, or of newsmen, or by police departments if these groups desire to adopt measures more stringent than those in the narrowest statute. For these purposes, or for a state in favor of a statute somewhat broader than that contained in the unbracketed portions, the author would recommend §2, ¶4(b)(1) in whole or in part, and §2, ¶5. The part of §2, ¶4(b)(1) which could most advantageously be included is that regarding the results of scientific tests.

¹⁶² Note to Model Statute

§1. "Criminal act" as used herein means an act which constitutes a crime under the laws of the state; "trial" is a state trial. The nature of the offense and its punishment are to be determined by the state. See Tables VI & VII for the results as to this last matter.

§2. Note that if material deemed prejudicial is divulged or published during the specified time period, the

¹⁵⁷ Cf. Roper, *Public Opinion Surveys in Legal Proceedings*, 51 A.B.A.J. 44 (1965); Sherman, *The Use of Public Opinion Polls in Continuance and Venue Hearings*, 50 A.B.A.J. 357 (1964). Contrary to the notion that such a study would or could not prove fruitful is the Second Circuit's use of public opinion polls as evidence to show that the defendant in *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963), did not receive a fair trial. See *FREE PRESS-FAIR TRIAL*, *op. cit. supra* note 127, at 183-201. 66.13% of the persons responding to the writer's poll agree that reliable statistics would make enactment of a statute or regulatory measure more likely, but 12.10% of those responding do not believe that reliable statistics could be obtained. See Tables I & VIII.

¹⁵⁸ See *FREE PRESS-FAIR TRIAL*, *op. cit. supra* note 127, at 183-201, especially remarks of Mr. Harris Steinberg.

any person responsible for the publication policy or broadcasting policy of any newspaper, magazine, radio station, television station, or any other news-disseminating agency which publishes or broadcasts, or any person formally connected with

act of so divulging or publishing is punishable as a violation of the statute *regardless of subsequent events*. ¶¶1, 3, 4(a) & 4(b)(i) are drafted in terms of statements which may be prejudicial to any particular person, inasmuch as the kinds of statements therein described are likely to be publicized at any time after a crime has been committed, including the period before any person has been officially accused of having committed it. On the other hand, since statements described in ¶¶2 and 4(b)(2) are very unlikely, because of the nature of their contents, to be publicized until after someone has been officially accused of having committed a crime, these paragraphs have been drafted in terms of statements which may be prejudicial to any person officially accused of having committed a crime, rather than in terms of any particular person. The reason for making this distinction in the statute is to avoid the possibility of an attack on its constitutionality on the ground that it is an arbitrary and unreasonable exercise of the states' police power, in that it makes punishable an act not reasonably certain to be harmful to the state. See, e.g., *People v. Munoz*, 9 N.Y.2d 51, 211 N.Y.S.2d 146, 172 N.E.2d 535 (1961). For example, if §2, ¶2 applied to a statement concerning the criminal activities of any particular person, a news article inadvertently published after a crime has been committed, perhaps as a part of a study of the rehabilitation of ex-convicts, which concerns the criminal record of someone, would violate the statute. Similarly, if §2, ¶4(b)(ii) applied to a statement reasonably tending to impair the defense of any particular person to any crime, an article in which one person called another a liar would violate the statute.

The time at which statements described in §2, ¶5 become subject to the statute is clearly delineated by their very nature.

"Officially accused," as used herein, means arrested and/or indicted. This definition would therefore include one presently a defendant in a criminal case.

§2, ¶4(b)(1). Statements made by a homicide victim which reasonably tend to incriminate any particular person are inadmissible as evidence in court except under certain circumstances [most commonly as "dying declarations"; see, e.g., *Cannon v. State*, 225 Md. 543, 171 A.2d 699, *cert. denied*, 368 U.S. 906 (1961)], and the prejudice which publication of such statements would cause a defendant if they are not later admitted at the trial is as immeasurable as it is obvious. "Scientific tests" under the statute include those in the fields of ballistics, fingerprints, handwriting identification, polygraphs, blood types, etc.

§2, ¶4(b)(2). The phrase "criminal act" is intentionally used here instead of "crime," with regard to the defense of an accused. This choice was made in order to prevent the possibility that one officially accused of a particular offense for the commission of a criminal act which may constitute more than one statutory offense will be prejudiced with regard to his defense(s) to the offense(s) of which he has not been accused. For example, one who has been accused of manslaughter, but later is tried for murder, may be prejudiced by the publication of statements negating the defense of no premeditation.

the administration of law, including its practice or enforcement, who divulges to any newspaper, magazine, radio station, television station, or any other news-disseminating agency, at any time between the commission of an alleged criminal act and the termination of the trial of any person for that act, any statement deemed in §2 of this Act to be prejudicial, shall be guilty of a _____, punishable by _____.

§2. Any statement, whether of fact or opinion or otherwise, which communicates information of one or more of the following types, is deemed to be prejudicial:

¶1. Confessions

- a. That any person has confessed to any crime, or
- b. The contents of any confession, or any part thereof.
- c. Exception: It shall not be a violation of this statute to divulge or publish the fact or contents of a confession after it has been admitted as evidence at the trial.

¶2. Criminal Activities

- a. That any person officially accused of having committed any crime has ever committed a crime on another occasion, or has been convicted of, acquitted of, arrested for, accused of, or indicted for the commission of any other crime.
- b. Exception: It shall not be a violation of this statute to divulge or publish any statement covered by §2 ¶2(a) after it has been admitted as evidence at the trial.

¶3. Tangible Evidence

- a. That any tangible evidence has been obtained, whereby such evidence reasonably tends to connect any particular person with the commission of any crime.
- b. Exceptions: It shall not be a violation of this statute to divulge or publish (1) any statement covered by §2 ¶3(a) after the evidence has been admitted at the trial, or (2) that tangible evidence has been obtained, provided that the statement does not reasonably tend to connect any particular person with the commission of any crime.

¶4. Statements of Unsworn Witnesses

- a. That any person is of the opinion that

any particular person has committed any crime, or

- b. That any person has made a statement, whether as fact or opinion or otherwise, or the contents of any statement, or any part thereof, which (1) reasonably tends to connect any particular person with the commission of any crime (such statements include, but are not limited to: identifications by any person of a particular person as the perpetrator of any crime; statements attributing to a particular person a motive for the commission of any crime; statements made by a homicide victim; and results or inferences drawn from results of scientific tests); or (2) reasonably tends to discredit or otherwise impair the defense of one officially accused of having committed any criminal act (such statements include, but are not limited to: statements which reasonably tend to impeach the credibility of one who has been officially accused of any criminal act or of any person who has been or is reasonably expected to be called to testify at the present or pending trial of the accused; or to attribute to one who has been officially accused of any criminal act a motive for the commission of any criminal act; or to establish the sanity of one who has been officially accused of any criminal act).

- c. Exception: It shall not be a violation of this statute to divulge or publish any statement covered by §2 ¶4(a) or (b) after it has been admitted as evidence at the trial.

¶5. Closed Court Proceedings.

- a. Transcripts, reports, or summaries of occurrences taking place during the course of proceedings from which the jury has been excluded by the trial court.
- b. Exception: It shall not be a violation of this statute to divulge or publish any statement covered by §2 ¶5(a) concerning a proceeding held to determine admissibility of evidence or of a confession after the evidence or confession has been admitted at the trial.

§3. General Exceptions—This statute shall not apply to:

- ¶1. The divulgence or publication, after a trial has commenced, of statements deemed by §2 to be prejudicial, if
 - a. A defendant has waived his right to trial by jury, or
 - b. A trial court has ordered that the jury be confined during the course of the trial.
- ¶2. The divulgence or publication, at any time after a crime has been committed, of the fact that a particular person has been officially accused of having committed the crime.

IX: SOME PROBLEMS AND SPECULATIONS

Many problems, beyond the scope of this paper, would exist even if the proposed solution were adopted. For example, the statutory scheme above was intended to be promulgated at the state level. What of a defendant who commits an act—such as robbing a federal bank—which constitutes both a state and a federal offense? His federal trial may be conducted after termination of the state statutory period of prohibition on divulgence and publication. And as to an act which violates only federal law, no state statute would apply to punish divulgence or publication. Perhaps the federal government could pass a similar statute applicable to all news media subject to the commerce power. Almost every newspaper and radio or television station would be covered. But to what criminal acts would the divulgence and publication relate? Acts in violation of federal law, or of the laws of one state, or of more than one? Presumably, if an act violated *any* penal law, publication in the lanes of interstate commerce of material herein defined as prejudicial with regard to that act could constitutionally be covered by a federal statute.

Another untreated question relates to proceedings subsequent to termination of an initial criminal trial. What of the defendant who appeals his conviction? Maybe even appellate judges can be unconsciously influenced by material regarding the defendant published after judgment of conviction and before disposition of the appeal. And what will happen to the defendant who succeeds in obtaining reversal and new trial? What if the jury impanelled at his retrial read, after his first conviction and before retrial was ordered, that he confessed, and the confession was coerced and cannot

be introduced? Carrying this line of reasoning to its inevitable conclusion, publication of prejudicial material at any time when a new trial may still be granted—*i.e.*, until a defendant has exhausted his state remedies, failed to get certiorari from the United States Supreme Court, and failed in his petition for federal habeas corpus and in his appeals to the federal Court of Appeals and the United States Supreme Court from its denial—can prejudice a defendant's right to a fair trial.

What if the prosecutor refuses to enforce the statute? Mandamus lies only to compel performance of a clear legal duty; the prosecutor has discretion. Prohibition lies to correct a flagrant abuse of discretion—but try and prove it against our kind-hearted prosecutor.

What if the newsman says, "My experienced attorney advised me that the material I divulged (or published) was not within the statute"? Presumably, the individual states' legal rules regarding mistake of law and mistake of fact as a defense in criminal cases would govern. But these defenses are singularly misunderstood and misapplied due to their inherent conceptual difficulty.

What of the "exceptional case"? In the case of Lee Harvey Oswald, for instance, one who published facts regarding his Communist sympathies and personal background could persuasively argue that this action was necessary, or at least justifiable, to avert national panic.¹⁶³ Oswald did not confess, but had he done so, publishing that fact would probably have been in the national interest. Even in the case of the "Boston Strangler," whose activities have considerably upset a large number of citizens, perhaps publication of a confession, if obtained, could be justified, though not so much as in the Oswald case.¹⁶⁴

If the Oswald-type case should be treated differently from the garden variety case, in what manner should this be accomplished? One might argue that a person who kills a President of the United States waives all rights against having facts about himself published, much as in the right to privacy cases in tort law one may be held to waive that right if he is a public figure. But this argument presumes that, before trial according to established procedures required by the federal constitution,

we have decided that he did commit the act. In an exceptional case the prosecutor's discretion not to prosecute the publisher might be relied upon. Or, perhaps, a declaratory judgment might be obtained permitting publication. A procedure might be devised for obtaining a court order permitting publication which, in absence of the order, would violate the statute. Probably such procedure would have to be incorporated in the statute itself. Any procedure for obtaining immunity from operation of the statute, though, should be strictly dealt with, lest the statute become in effect inoperative.

Another possible problem is that if most official or seemingly sanctioned comment regarding criminal cases ceases, it may be replaced by rumors not carried by the news media which may be even more detrimental to the defendant.

Certain beneficial indirect effects may result if lurid crime news is no longer published. The newspapers may well find they must improve the quality of their product if they are to keep selling papers. Perhaps more important, citizens will tend to view the administration of criminal justice as what it was meant to be within our system of government, rather than as what current journalistic practices may lead them to believe.

CONCLUSION

It is at best a difficult task to propose sanctions designed to achieve a desired result where, by the very nature of the situation, the most effective sanctioners are at the mercy of the sanctionees. Even if a statute such as that proposed cannot be adopted and extensive use of the constructive contempt doctrine cannot be realized for this Machiavellian reason, liberalization of the tests of juror impartiality and standard of proof of prejudice, which would result in fair trials in many cases and in increased difficulty in obtaining valid convictions in those cases receiving flagrant and extensive publicity, may well serve as an indirect sanction that eventually will yield the desired result.

Perhaps in the final analysis, the greatest service an interested lawyer can perform in this area is to observe the ABA Canons of Ethics, to prod his Bar Association toward concern, and to talk loudly and write profusely about promulgating anti-publication statutes, suspecting all along that his goal is not really enactment of a statute, but rather the playing of a personal role in the campaign to coerce the press into enlightened self-restraint.

* * *

¹⁶³ But see Editorial, *Canon 35 Is Not Enough*, 48 J. Am. Jud. Soc'y 83, 84 (1964), quoting from the Report of the Warren Commission.

¹⁶⁴ See generally Wessel, *supra* note 143, for a discussion of weighing the interests for and against disclosure and publication.

EXPLANATORY NOTE

The following material includes a letter (Appendix I) distributed to participants in the Annual Short Course for Defense Attorneys in Criminal Cases and for Prosecuting Attorneys given at Northwestern University School of Law in the Summer of 1963; a letter (Appendix II) mailed in March, 1964 to participants and lecturers in the following Short Courses and Conferences, all held at Northwestern University School of Law: the 1962 and 1963 Short Courses for Defense Attorneys in Criminal Cases and for Prosecuting Attorneys, the 1963 Short Course for Newsmen in Crime News Analysis and Reporting, the 1962 Conference of Police Officials, Prosecuting Attorneys, Defense Counsel, Judges, and Legislators, and the 1962 Conference on Prejudicial News Reporting in Criminal Cases; the Questionnaire (Appendix III) distributed to them; and (Tables I-IX) results of the poll, reflecting the responses of the 124 persons who answered the Questionnaire.

APPENDIX I

*Letter to Participants in Annual Short Course for
Defense Attorneys in Criminal Cases
and Short Course for Prosecuting
Attorneys, Northwestern Law
School, Summer 1963*

Dear Sir:

Since I intend to practice in the field of criminal law, I am particularly interested in and concerned about the problem of prejudicial publicity. I have researched the case law and law review articles on this subject in the preparation of a law review article [Comment, *The Case Against Trial by Newspaper: Analysis and Proposal*, 57 NW. U.L. REV. 217 (1962)], and have formulated therein a proposed solution to the problem. I concluded that a statute, punishing both divulgence to the press and publication by the press of certain specified kinds of information, could be constitutionally promulgated. Such a statute would enable both the sovereign prosecuting the case and the criminal defendant to try that case in a court of law before an impartial jury, rather than before a jury which, because of exposure to the extrajudicial "trial" conducted in the newspapers, cannot possibly be fair and impartial. The harm suffered by the state because of reversals occasioned by prejudicial publicity is no less acute than that suffered by the defendant who is unfairly convicted.

I was graduated from Northwestern University School of Law in June, 1963, and during the coming academic year will be working toward the degree of Master of Laws under a Ford Foundation grant. In expanding my article into a thesis, and with a view toward urging the actual adoption of measures to protect against "trial by newspaper", I would like to go beyond my academic research and ascertain what criminal lawyers, both prosecutors and defense attorneys, think of the proposed plan. For this reason I ask you to read the proposed statute, reproduced on the attached sheets, and answer the questions which follow it. The completed questionnaire will be collected from you at the end of the short course. Results of this survey will be incorporated in the thesis, but identity of the participants will be kept confidential.

Thank you for your co-operation.

Sincerely,

APPENDIX II

*Cover Letter Mailed to Persons Polled,
Winter 1964*

Dear Sir:

Since I intend to practice in the field of criminal law, I am particularly interested in and concerned about the problem of prejudicial publicity. I have researched the case law and law review articles on the subject in the preparation of a law review article [Comment, *The Case Against Trial by Newspaper: Analysis and Proposal*, 57 NW. U.L. REV. 217 (1962)], and have formulated therein a proposed solution to the problem. I concluded that a statute, punishing both divulgence to the press and publication by the press of certain specified kinds of information, could be constitutionally promulgated. Such a statute would enable both the sovereign prosecuting the case and the criminal defendant to try that case in a court of law before an impartial jury, rather than before a jury which, because of exposure to the extra-judicial "trial" conducted in the newspapers and other news media, cannot possibly be fair and impartial. The harm suffered by the government because of reversals occasioned by prejudicial news reporting is no less acute than that suffered by the defendant who is unfairly convicted.

I graduated from Northwestern University School of Law in June, 1963, and am a member of the Illinois Bar. During the current academic year I am working toward the degree of Master of

Laws under a Ford Foundation grant. In expanding my article into a master's thesis, and with a view toward urging the possible adoption of measures to protect against "trial by newspaper," I would like to go beyond my academic research and ascertain what people actually in contact with the problem—prosecuting and defense attorneys, police officials, judges, and journalists—think of the proposed plan. For this reason I ask you to read the proposed statute, reproduced on the attached sheets, and answer the questions which follow it.

Your cooperation in returning the completed questionnaire to me in the enclosed self-addressed, stamped envelope will be deeply appreciated. Results of this survey will be incorporated in the thesis, but identity of the participants will be kept confidential.

Thanking you for your assistance and cooperation, I am

Very truly yours,

APPENDIX III

Questionnaire

1. Does existing law in this area (*i.e.*, motions for change of venue, continuance, etc.; reversing convictions shown to have been based upon the influence of publicity; cautionary instructions) adequately protect a defendant's right to a fair trial?
2. If not, would a change in the test of impartiality be a satisfactory remedy? Would it be possible to apply, as a practical matter, a test less rigid than the prevailing one (that a prospective juror who has read about the case and has formed an opinion as to the defendant's guilt cannot be discharged for cause if he testifies that he nonetheless can render a fair and impartial verdict based solely on the evidence presented in court)?
3. Could the courts' contempt power, statutory and/or inherent, be utilized to punish newspapers which publish material prejudicial to a criminal defendant, or would such citations always violate the First Amendment? Would exercise of this power help to solve the problem?
4. Does the proposed statute, considered as a whole, violate freedom of speech and/or freedom of the press? Would your answer be different if §§3, 4, & 5 of §2 were omitted?
5. If you think the statute as here presented is unconstitutional, what changes would you make to render it constitutional?
6. (A) Can the state impose restrictions (*i.e.*, deterrence through punishment, *not* prevention through prior restraint) upon public or quasi-public officials which it could not impose upon the general public? (B) If so, are private defense attorneys so classified along with prosecutors and police officials?
7. In light of both policy considerations and the question of constitutionality, should the regulatory measure be in the form of a statute as here presented, or in the form of a regulatory measure adopted by a specific group (*e.g.*, Bar Association, Police Department) to apply only to those subject to its sanctions? If a statute, what should be the nature of the offense, and what punishment should be provided? If an internal regulation, what punishment?
8. Would such a statute (or regulation) be more likely to be enacted if the enacting body were confronted with reliable statistics indicating that there is, in fact, a correlation between exposure to prejudicial publicity and partiality or bias or jurors?
9. (A) Is there any possibility that the problem can be solved through internal control exercised by the newspapers? (B) Would such a solution be encouraged by the preparation of advisory standards to be followed by the press, prepared by a State Bar Association, State Supreme Court, or the like?
10. In your opinion, what kinds of material are the most likely to be harmful to a criminal defendant, if published prior to or during trial?

TABLE I

COMPILATION OF RESPONSES TO QUESTIONNAIRE
PERCENTAGE FIGURES
(N = 124)

Question	Yes	No	Maybe	No Answer
1	32.26	55.65	8.06	4.03
2	25.81*	44.35	7.26	22.58
3	28.23	47.58	13.71	10.48
4	47.58	37.90	8.87	5.65
5†				
6	A & B 57.26	A 11.29	15.32	4.03
7‡				12.10
8	66.13	15.32	7.26	11.29
9§ A	29.84	41.13	24.19	4.84
B	34.68	35.48	16.94	12.90
10				

* 12.44% of those responding "yes" (32 persons) qualified their response by stating that a more liberal test would be impractical to apply.

† See Table IV for responses to Question 5.

‡ See Tables V, VI, & VII for responses to Question 7.

§ 11.29% of all responding mentioned competition and commercialism as a negative factor.

|| See Table IX for responses to Question 10.

TABLE II

RESPONSE TO QUESTION 2
TEST OF IMPARTIALITY SUGGESTED BY PERSONS
RESPONDING "YES" OR "MAYBE"
PERCENTAGE FIGURES
(N = 41)

Read or Heard*	Formed Opinions†	Miscellaneous	No Description
12.20	14.63	9.76	63.41

* Prospective jurors who stated they had read or heard of defendant would be challengeable for cause.

† Prospective jurors who stated they had formed an opinion as to defendant's guilt or innocence would be challengeable for cause even if they also stated that they could lay their opinions aside and decide solely on the evidence presented in court.

TABLE III

REASONS FOR RESPONSE OF "NO" TO QUESTION 3
PERCENTAGE FIGURES
(N = 59)

Unconsti- tutional	Elected Judges	Burden on Judiciary	Miscella- neous	No Reason Given
40.68	23.73	8.48	11.86	15.25

TABLE IV

RESPONSE TO QUESTION 5
CHANGES IN STATUTE SUGGESTED BY PERSONS
RESPONDING "YES" TO QUESTION 4
PERCENTAGE FIGURES
(N = 59)

Response	%
Eliminate §2, ¶¶3 & 4.....	1.69
Eliminate §2, ¶¶2 & 3.....	3.39
Eliminate §2, ¶¶3, 4 & 5.....	5.09
Eliminate §2, ¶¶1, 3 & 4.....	1.69
Eliminate §2, ¶¶2, 3, 4 & 5.....	1.69
Eliminate §2, ¶3, and all of §2, ¶4 except with regard to scientific evidence.....	1.69
Eliminate §3.....	1.69
Narrow scope of §1.....	6.79
Prohibit only editorial interpretation of prejudicial facts.....	3.39
Prohibit everything until admitted in evi- dence.....	8.48
Allow procedure for exposing defects in law enforcement.....	3.39
Make non-penal.....	5.09
Require only equal space and time for de- fense.....	1.69
Require statutory reversal of conviction where prosecution or police is source of prejudicial publicity.....	1.69
No answer.....	52.54

TABLE V
RESPONSE TO QUESTION 7: PERCENTAGE FIGURES
(N = 124)

Statute	Internal Regulation	Both	Other	Neither	No Answer
39.51	28.23	8.07	4.03	10.48	9.68

TABLE VI
NATURE OF OFFENSE INDICATED BY THOSE
RESPONDING "STATUTE" OR "BOTH" TO QUESTION
7: PERCENTAGE FIGURES
(N = 59)

Misdemeanor	Felony	Contempt*
83.06	8.47	8.47

* Persons responding "contempt" described a scheme whereby statutory contempt would be used, with publication of prejudicial material constituting a per se contempt.

TABLE VII
RESPONSE TO QUESTION 7: PENALTIES SUGGESTED:
PERCENTAGE FIGURES
(N = 124)

Penalty	%
Fine and/or Imprisonment.....	44.35
Very Heavy Fine.....	7.26
Increased Punishment*.....	8.06
Fine Only.....	3.23

* Prescribing increased punishment for subsequent offenses and/or where offense with which defendant is charged is very serious.

TABLE VIII
RESPONSE TO QUESTION 8: PERSONS INDICATING
RESERVATIONS RE EFFICACY OF STATISTICS
PERCENTAGE FIGURES
(N = 124)

Response	%
Reliable Statistics Could Not Be Obtained.....	12.10
Statute Would Not Pass For Political Reasons Regardless of Confrontation With Reliable Statistics.....	3.23
No Answer.....	84.67

TABLE IX
RESPONSE TO QUESTION 10: PERCENTAGE OF PERSONS
INDICATING KINDS OF MATERIAL CONSIDERED MOST
LIKELY TO BE HARMFUL TO DEFENDANT
(N = 124)

Material	%
Confessions.....	41.94
Criminal Background.....	32.26
Everything but fact of arrest until after admitted in evidence.....	25.00
Prejudicial conclusions indicating guilt.....	18.55
"Testimony" not yet in evidence.....	14.52
Gory details of offense.....	13.71
Epithets.....	4.03
"Crusades" to get someone convicted..	2.42
Miscellaneous*.....	9.68
No Answer.....	20.16

* Included were sex involvements, political views, nature of offense per se, inaccurate reporting of facts, attributing a motive to defendant, guilt by association, and race.