

Pretrial Publicity Prevents a Fair Trial in the USA

Copyright 2003, 2004 by Ronald B. Standler

Keywords

admonish, admonitions, Amendment, attorney, bar, bias, biased, constitutional, due, ethics, extrajudicial, fair, fairly, First, free, freedom, gag, guidelines, impartial, Irvin, journalist, journalists, jury, juror, jurors, law, lawyer, lawyers, legal, media, news, newspaper, newspapers, order, orders, Pennekamp, prejudice, prejudicial, press, pretrial, pre-trial, process, professional, publicity, radio, Rideau, reporter, reporters, responsibility, Sheppard, speech, television, trial, trials, unbiased, unfair, unfairly, USA

Table of Contents

| | |
|---|--------|
| Introduction | 2 |
| nationwide media worsens problem | 3 |
| publicity before vs. during a trial | 3 |
| scope and disclaimer | 4 |
| Historical Overview | 5 |
| Examples of Recent Troublesome Publicity | 7 |
| Court Opinions on Publicity in Criminal Trials | 10 |
| No Immunity for Fame or Notoriety | 12 |
| Is Ignorance of Facts Required? | 12 |
| Presumed vs. Actual Prejudice | 15 |
| Remedies for Prejudicial Publicity | 16 |
| routine methods for trial judges | 17 |
| voluntary restraint by media | 19 |
| involuntary restraint of news media by judges | 19 |
| gag orders | 23 |
| close courtroom ? | 25 |
| Admonitions to jury to ignore prejudicial information | 27 |
| Professional Ethics | 32 |
| Bar-Press Guidelines | 41 |
| Public Statements of Guilt by Politicians | 43 |
| Freedom of Press | 44 |
| conflict between First and Sixth Amendments | 44 |
| larger problem | 48 |
| Conclusion | 50 |

Introduction

This essay is about the conflict between three fundamental legal rights in the USA:

- (1) “freedom of speech”, which is mentioned in the First Amendment to the U.S. Constitution,
- (2) “freedom ... of the press”, which is also mentioned in the First Amendment to the U.S. Constitution and
- (3) a criminal defendant’s right to a fair trial, specifically the right to a trial “by an impartial jury”, which is mentioned in the Sixth Amendment to the U.S. Constitution.

The rules of evidence have been very carefully designed to exclude irrelevant, unreliable, or “unfairly prejudicial”¹ evidence, so that jurors can give the defendant a fair trial. Each juror in a trial takes an oath to make his/her decision *only* on the basis of evidence presented in court during the trial. When a juror has been exposed to pretrial publicity about the case in which he/she is a juror, and that juror has an initial opinion about the guilt of a defendant, then that juror is prejudiced. The word *prejudice* in this technical legal usage means that a juror has an opinion about the guilt of the defendant *before* the trial begins. As a matter of law, such prejudiced jurors are *not acceptable* and they must be dismissed before the trial begins. One must wonder about the acceptability of a juror who has an initial opinion about either the reliability of a witness or the significance of a fact, or who has knowledge of a “fact” about the defendant that will not be admitted in evidence during the trial.

In contrast to the rules of evidence in court, pretrial publicity in newspapers and television commentary routinely includes information that is sensational or inflammatory, in order to sell more newspapers or attract more viewers, which increases advertising revenue of the media. In particular, much of the allegedly factual information presented in such commentary will *not* be admitted into evidence during the trial because such information is either *unreliable* (e.g., gossip by neighbors or “friends” of the victim or defendant, leaks from anonymous sources in law enforcement, etc.), *irrelevant* to issues to be determined in court, or false.

Having potential jurors listen to such unreliable, irrelevant, or false information makes these potential jurors biased or prejudiced, because they have been exposed to “facts” that will not be admitted into evidence during the trial, perhaps *repeatedly* exposed. The effect is worse for “facts” that taint the character of the defendant, victim, or witness in ways that may prevent a fair trial. Because of the dearth of genuinely novel news, some of these legal commentary programs on television recycle topics of previous discussions — and this repetition may cause potential jurors to memorize these “facts” that will *not* be evidence in the trial.

¹ Federal Rule of Evidence 403 says that relevant evidence may be excluded at trial “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury”.

nationwide media worsens problem

Before about 1990, the danger of pretrial publicity was largely confined to local newspapers. Such prejudice could be avoided simply by a change of venue: moving the trial to another town in the same state, far from the reach of the offending newspaper(s).

After about 1990, with nationwide television news channels (e.g., CNN and its subsequent imitators), it is much more difficult to find intelligent people anywhere in the USA who have not heard pretrial “facts” on high-profile cases.

After about 1995, with the debut of programs on cable television that devoted five hours/week to legal commentary (much of it pretrial commentary), the problem of finding jurors who are both intelligent and *unbiased* was made significantly worse.² Even if only a small percentage of Americans regularly watch such legal commentary programs, snippets from those legal programs are rebroadcast as part of regular news programming.

It is possible to find jurors who have not been exposed to pretrial publicity in newspapers, television, or the Internet. But will such *uninformed*, possibly illiterate, people be good jurors?³ It takes a considerable amount of education and sophistication to see through the propaganda in an attorney’s closing remarks, and to resolve inconsistencies in testimony of witnesses. I am *not* confident that someone who consistently ignores the news would make a good juror, even if they are initially *unbiased* about the particular case. Hence, my concern that pretrial publicity in newspapers and television may prevent a fair trial.

publicity *before* vs. *during* a trial

Let me make clear that my concern is *only* with the commentary *before* a trial, which raises serious concerns about prejudicing potential jurors. In contrast, commentary in newspapers and television *during* a trial can be kept from contaminating jurors by sequestering the entire jury during the duration of the trial without access to newspapers, television, or news magazines. This inconvenience of sequestering twelve jurors and a few alternate jurors is outweighed by the utility of the coverage in the news media that informs citizens of how courts actually work, identifies problems with the criminal justice system, and reminds everyone that criminals get punished. Further, having public trials, as guaranteed by the Sixth Amendment, with reporting by a free

² See discussion below, beginning at page 7.

³ In the current egalitarian environment in the USA, it is rare for a judge to express a belief that some jurors are more intelligent or better educated than other jurors. One exception was Judge Thornberry in *U.S. v. Williams*, 568 F.2d 464, 467 (5th Cir. 1978), who quoted some books and cases from the 1800s to make this point.

press, as guaranteed by the First Amendment, is an important safeguard against judicial or prosecutorial misconduct, and may also deter perjury by witnesses. For these reasons, I believe that commentary during trials is highly desirable.

Elsewhere, I have advocated increased coverage of trials, verdicts, and sentences for cases involving computer crime, to inform people that computer crime is wrong and to deter future crimes.⁴

One possible disadvantage of commentary during trials is that, if the defendant is convicted, files a habeas corpus petition, and gets a new trial, then it *could* be difficult to find jurors for the second trial who have not been prejudiced by published information during the first trial. Such second trials are rare, and there is generally at least a few years between the first and second trial, so that most potential jurors would forget the details of the first trial. In my opinion, the *possibility* of a second trial is *not* a good reason to oppose publicity during trials.

scope and disclaimer

I am *not* a criminal defense attorney. My interest in this subject is from the perspective of First Amendment law, professional ethics, privacy law, and the general desirability of having fair trials by an impartial jury. Because of the large amount of information on pretrial publicity in law review articles and court opinions, I have concentrated only on opinions of the U.S. Supreme Court and a few selected cases from the U.S. Courts of Appeal. After I posted the first public version of this essay, I spent several hours in a law library looking at law review articles that had been cited in court opinions, but I have not made my own search for such articles.

This essay is primarily intended as a resource for journalism students and for attorneys who are fighting pretrial publicity, as well as legislators who are considering the effect of pretrial publicity on fair trials. Journalists, publishers, and broadcasters should consult with an attorney who is licensed to practice in their state and who is familiar with First Amendment law.

The scope of this essay is only publicity *before* a trial begins. Related issues, such as allowing television cameras inside a courtroom, are *not* included in this essay. I have included cases involving publicity during trials, because those cases raise issues that are also relevant to considerations of pretrial publicity.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

⁴ Ronald B. Standler, *Computer Crime*, (1999) <http://www.rbs2.com/ccrime.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Historical Overview

There have been a few highly publicized trials in the USA during the 1900s in which there was later significant doubt about the guilt of a convicted defendant:

- Leo M. Frank, convicted of murder,⁵
- Nicola Sacco and Bartholomeo Vanzetti, convicted of murder,⁶
- Scopes, a schoolteacher, convicted of teaching evolution in a Tennessee public school,⁷
- Bruno Hauptmann convicted of kidnapping and killing the young son of Charles Lindbergh,⁸ and
- Sam Sheppard convicted of murdering his wife.⁹

In the *Sheppard* case, the defendant's lawyer appealed to the U.S. Supreme Court and obtained a new trial as a result of pretrial publicity by the local newspapers. Sheppard was acquitted at his second trial and the murder of his wife currently remains unsolved.

The problem of "trial by newspaper", instead of a trial by initially impartial jurors in a calm and dignified courtroom, has vexed the U.S.A. for more than a century. A former attorney and then newspaper publisher said in 1931:

Beginning with the commission of a murder, we read that suspicion points to so-and-so. The sheriff or the police are going to arrest him. He is put in jail, and babbling officers tell the papers of the supposed evidence against him; they repeat what they call his admissions; perhaps they say that they expect him to confess. A babbling prosecuting attorney tells the papers that he has an air-tight case against the prisoner and that he will ask for a verdict of murder in the first degree. The defense lawyer tells how he expects to prove his client innocent.

⁵ *Frank v. State*, 80 S.E. 1016 (Ga. 1914), 83 S.E. 645 (Ga. 1914), *aff'd sub nom. Frank v. Mangum*, 237 U.S. 309 (1915).

⁶ *Commonwealth v. Sacco*, 156 N.E. 57 (Mass. 1927), 158 N.E. 167 (Mass. 1927), *cert. den.*, 275 U.S. 574 (1927).

⁷ *Scopes v. State*, 278 S.W. 57 (Tenn. 1925), 289 S.W. 363 (Tenn. 1927).

⁸ *State v. Hauptmann*, 180 A. 809 (N.J.Err. & App. 1935), *cert. den.*, 296 U.S. 649 (1935). Oscar Hallam, et al., "Report of [ABA] Special Committee on Publicity in Criminal Trials," 24 Minnesota Law Review 477 (1940).

⁹ See citations in my document at <http://www.rbs2.com/pretrial2.pdf>.

The trial itself is treated like a great sporting event. The papers tell how the state introduced damaging evidence; how the defense scored heavily; how this or that witness' story was unshaken; how the jury seemed to react.

The effect of such news on the administration of justice is direct and infinitely serious. Obviously, the exploitation of evidence in a criminal case before trial — and still more, the exploitation of rumor, suspicion and inference, the distortion of the picture through sensational treatment, and the dragging in of countless irrelevancies — make it much more difficult to get a proper jury. They make a just verdict much less likely, even if a fairly good jury is obtained; for inevitably a jury is affected by the mental atmosphere of the court room and of the community.

Stuart H. Perry, "The Courts, The Press, And The Public," 30 Michigan Law Review 228, 230-31 (December 1931). This old speech by Perry continues to accurately describe reporting of crimes and criminal trials more than seventy years later, in what is an embarrassment to justice in the USA.

In response to the U.S. Supreme Court's opinion in *Sheppard*, reputable journalists made an effort to write technically correct sentences that were less inflammatory, by using phrases like "alleged murderer", "suspect", or "accused", instead of the conclusory word "murderer". Furthermore, reputable journalists occasionally reminded their reader that the defendant's guilt would be determined in a future trial. In my opinion, such responses by reputable journalists, while helpful, are *not* adequate to preserve the right to a fair trial by impartial jurors, because most readers (i.e., potential jurors) probably ignore such precise language.

In 1991, Court TV, a cable television channel devoted to covering trials and providing legal commentary, was begun in the USA. This television channel has a website at <http://www.courtstv.com/>. Court TV significantly expanded the amount of commentary on trials available to residents of the USA. In November 2003, the Court TV website stated that all of their on-air anchors were lawyers.

coverage of O.J. Simpson case

In 1994, O.J. Simpson, a famous former football player, was arrested for the murder of his ex-wife and her boyfriend. There was an excruciatingly long trial that began in January 1995 and was given to the jury on 29 September 1995. This case is particularly noteworthy because of its intense exposure on nationwide television networks in the USA. Geraldo Rivera, a former labor lawyer and then host of a one-hour program every weekday night on the CNBC cable television network, assembled a panel of attorneys who discussed the case nearly every night during the pretrial phase and then every night during the trial itself. The trial itself was broadcast live on CNN, with commentary by Greta van Susteren, then a criminal defense attorney and adjunct professor at the Georgetown University Law Center, and Roger Cossack, then assistant dean of the University of California at Los Angeles law school. Because of the intense coverage by journalists, the judge sequestered the jury during the entire trial (264 days!), which was burdensome on the jurors. Incidentally, the jurors deliberated for less than four hours before

reaching their decision.

The *Simpson* murder trial spawned a new type of television program devoted to legal commentary and analysis, which, in my opinion, significantly worsened the problem of pretrial publicity in the USA. After the Simpson trial, van Susteren and Cossack hosted a half-hour program weekdays on CNN called “Burden of Proof”, in which they and a panel of attorneys discussed current legal issues and cases. In February 2002, van Susteren began hosting an hour-long program weekdays on the Fox News Channel called “On the Record”. A similar hour-long program weekdays on the MSNBC channel is hosted by attorney Dan Abrams.

post-*Simpson* era

In the few years since the Simpson trial in 1995, there have been many other high-profile trials that have had intensive, nationwide media coverage:

- trial of William Kennedy Smith in Florida for alleged rape
- trial of Timothy McVeigh for the bombing of the federal building in Oklahoma City
- immigration and child custody dispute involving Elian Gonzalez in Miami, Florida
- trials of John Allen Muhammad and Lee Malvo, snipers who killed ten people in the Washington, DC area
- trial of Kobe Bryant, a famous basketball player, for rape in Eagle, Colorado
- trial of Scott Peterson in California for the murders of his wife, Laci, and his unborn son
- child molestation allegations against Michael Jackson
- trial of Robert Blake, a former actor, in Los Angeles for the murder of his wife

Because the publicity was nationwide, there was no place in the USA where the pool of potential jurors would be free of pretrial publicity.

Examples of Recent Troublesome Publicity

Courts have been particularly concerned with publications that inform potential or actual jurors about prejudicial information that is *inadmissible* at trial. Such information commonly includes the record of the suspect’s previous arrests or prior convictions, an *inadmissible* confession, and – when a new trial is granted – the result of the previous trial. In addition to sharing those concerns, I am also particularly concerned about journalists who commission and report the results of an opinion poll about a suspect’s guilt *before* the trial begins. Such opinion polls are objectionable for several reasons:

- Hearing the results of such polls could influence jurors to conform their opinions to agree with the reported majority of the community.
- The process of deciding guilt uniquely belongs to a jury, *after* hearing admissible evidence in court. An opinion poll usurps the function of the jury. The reputation of a person deserves more than a superficial and informal decision about his/her guilt.

- The information used by the public to form their opinions is *not* complete, specifically it does *not* include all of the evidence that the prosecutor and defendant's attorney are entitled to present in court. Thus these opinions are not significant, except to show bias.
- Such opinion polls may not be a scientific sampling of people eligible to be jurors in the trial. Further, different people participating in the poll will have made their decision based on different information, instead of all considering the same evidence, so there is mixing of apples and oranges.

In a quick search of the Westlaw databases in late December 2003, I could not find any court opinions that specifically discussed news reports of opinion polls as making it difficult to find an impartial jury. I did find a discussion that incidentally mentioned the pretrial publicity in the O.J. Simpson case and how publicity about the victim's 911 telephone calls changed the public perception of Simpson's guilt:

On Wednesday, June 22 [1994], two days after Simpson's arraignment, the airwaves were filled with explosive excerpts from 911 emergency telephone calls made to police by Nicole Brown Simpson in both the 1989 incident and an October 1993 incident in which Simpson broke down a door. Every television news broadcast in America led off with audio recordings of the calls, with a rolling transcript and photos and video clips of Nicole Brown Simpson. Her sobbing voice was heard saying, "he's back," "I think you know his record," and "he's crazy." The 911 tapes had the desired effect. Before they were aired, public opinion polls were reporting that more than 60 percent of the American population thought Simpson was probably innocent. After the 911 tapes, the polls showed that 60 percent thought that he was probably guilty. The only problem, of course, was that the admissibility of the tapes as evidence was yet to be determined, and the only potential jurors who hadn't heard the tapes at least a half dozen times were those who lived in caves or trees. *State v. Williams*, 623 N.W.2d 106, 127, ¶ 88 (Wis. 2001), *cert. den.*, 534 U.S. 949 (2001) (Prosser, J., concurring, quoting Gerald Uelman, *Lessons From The Trial* 21 (1996)).

In recent history, there have been two disturbing instances of outrageous pretrial publicity. One instance involves the bomb in the park during the Olympic Games in Atlanta on 27 July 1996. For three days, journalists treated as a hero Richard Jewell, the security guard who initially found the backpack containing the bomb, reported it to police, and moved people away from the bomb before it exploded. On 30 July 1996, the FBI disclosed that they were investigating Jewell as their prime suspect. For the following 12 weeks, journalists engaged in a barrage of disparaging comments about Richard Jewell that ruined his reputation: specifically ridiculing Jewell's prior work experience and suggesting that Jewell was the bomber. Then, on 26 October 1996 — Oops! — the FBI and U.S. Attorney said, in effect, that Jewell was innocent. The FBI later accused someone else (Eric Robert Rudolph) of the bombing. Jewell retaliated by suing several publishers and broadcasters for libel.¹⁰ CNN and NBC quickly settled by paying an undisclosed amount of money to Jewell. A law professor who is an expert on legal ethics wrote:

¹⁰ See, e.g., *Jewell v. New York Post*, 23 F.Supp.2d 348 (S.D.N.Y. 1998); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga.App. 2001), *cert. den.*, 537 U.S. 814 (2002).

... ever-ready “experts” on criminal investigations were quoted in the media speculating about Jewell’s past as a loner who lived with his mother and as a wannabe police officer who had lost several security guard jobs because of over-zealousness. The American media, like sharks to blood in the sea, went into a feeding frenzy of coverage. Jewell could not leave his house without a crush of media. periodic “unidentified investigators with the FBI” announced new indications that Jewell was their man. [Finally, Jewell had] an irreparably tarnished reputation.¹¹

The other instance involves the arrest of Dr. Theodore Kaczynski, a former mathematics professor who became a hermit in Montana and was the Unabomber who killed three people and maimed other people with a series of mail bombs beginning in 1978. After his arrest on 3 April 1996, there was a flood of prejudicial publicity.¹² I was particularly troubled by interviews with former neighbors when he was a college student that disclosed that Kaczynski lived in a messy apartment: information that was surely *irrelevant* to whether he was the Unabomber and a possible violation of his privacy. Reputable newspapers published detailed articles on Kaczynski’s psychological problems, again not only prejudicial to his future trial, but also a violation of his privacy. And Kaczynski was repeatedly identified as the Unabomber in both newspaper articles and television news broadcasts that destroyed his presumption of innocence. On 22 January 1998, when his trial was to begin, Dr. Kaczynski accepted an agreement in which he pled guilty and the government agreed not to seek the death penalty. A judge sentenced Kaczynski to four consecutive life terms in prison without the possibility of parole. Because of the plea agreement, there was no trial, and the pretrial publicity did not affect the jury’s decision. There are only a few reported court opinions in this case.¹³

About one month after I finished writing and revising this essay, Carlie Brucia, an 11 y-old girl in Sarasota, Florida, was kidnapped and murdered. I have posted a separate document at <http://www.rbs2.com/jsmith.pdf> that contains quotations from some inflammatory or prejudicial newspaper articles about the man accused of this crime, as a way of showing journalism students and law students real examples of how such prejudice occurs in a contemporary case.

¹¹ Charles W. Wolfram, “Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States,” 19 *Dalhousie Law Journal* 373, 385 (Fall 1996).

¹² See, e.g., Cynthia Hubert, “Kaczynski lawyers want changes in jury selection,” *Sacramento Bee*, 15 August 1997, <http://www.unabombertrial.com/archive/1997/081597.html> .

¹³ See, e.g., *U.S. v. Kaczynski*, 923 F.Supp. 161 (D.Mont. 1996)(no dismissal of complaint because of pretrial publicity); *U.S. v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001) (guilty plea was voluntary), *rehearing en banc denied*, 262 F.3d 1034 (9th Cir. 2001), *cert. den.*, 535 U.S. 933 (2002).

Court Opinions on Publicity in Criminal Trials

To shorten this essay I have posted a separate document at <http://www.rbs2.com/pretrial2.pdf> that contains long quotations from opinions of the U.S. Supreme Court and the U.S. Courts of Appeals in cases about publicity affecting the right of a criminal defendant to a fair trial by impartial jurors. Specifically, that separate document contains long quotations from:

1. *Reynolds v. U.S.*, 98 U.S. 145 (1878), which explained what was meant by “impartial jury” in the context of pretrial publicity in newspapers.
 2. *Shepherd v. Florida*, 341 U.S. 50 (1951)(Jackson, J., concurring).
 3. *Marshall v. U.S.*, 258 F.2d 94 (10thCir. 1958), *rev'd*, 360 U.S. 310 (1959).
 4. *Irvin v. Dowd*, 271 F.2d 552 (7thCir. 1959), *rev'd*, 366 U.S. 717 (1961).
 5. *U.S. ex rel. Bloeth v. Denno*, 313 F.2d 364 (2dCir. 1963).
 6. *Rideau v. Louisiana*, 373 U.S. 723 (1963).
 7. The leading case in the U.S.A. on pretrial publicity involved the accusation of Sam Sheppard for the murder of his wife in 1954. I include long quotations from *Sheppard v. Maxwell*, 231 F.Supp. 37 (S.D.Ohio 1964), *aff'd*, 384 U.S. 333 (1966) and my discussion of the U.S. Supreme Court’s opinion. So that readers can see what caused the problem, I have also posted a collection of quotations from newspapers about Sam Sheppard’s case at <http://www.rbs2.com/shepp.htm> .
 8. *Yount v. Patton*, 710 F.2d 956 (3dCir. 1983), *rev'd*, 467 U.S. 1025 (1984). I include quotations from the concurring opinion of Judge Herbert J. Stern at the U.S. Court of Appeals, which opinion has been ignored, despite containing good suggestions.
 9. *Mu’Min v. Virginia*, 500 U.S. 415 (1991).
 10. *U.S. v. McVeigh*, 918 F.Supp. 1467 (W.D.Okla. 1996), *aff'd*, 153 F.3d 1166 (10thCir. 1998).
- For each of these cases, I provide a terse description of the facts and the subsequent history of the case, with citations to court opinions.

While the most important cases on pretrial publicity are those from the U.S. Supreme Court mentioned in the previous paragraph, there are earlier cases scattered through thousands of volumes of old state and federal cases before the year 1950. The following are some of the old reported cases in which a new trial was ordered because of publicity during the trial that was prejudicial to a criminal defendant:

- *State v. Webster*, 13 N.H. 491, 492-3, 1843 WL 2092 (N.H. 1843)(“The question is, is he [i.e., the juror] impartial, or is he not? He will be unfitted to do justice to the parties, whether he derive his impressions from reading the newspapers, from common report, from casual conversations with his neighbors, or from hearing witnesses testify in a court of justice.”);
- *Walker v. State*, 37 Tex. 366, 1873 WL 7278 at *13 (Tex. 1873) (Allowing “jurors to have, during the progress of the trial, daily access to newspapers containing imperfect or incorrect accounts of the trial being had before them, together with comments upon the person and characters of those connected with the trial, was certainly erroneous and improper, and of itself sufficient to vitiate the verdict rendered by them.”);

- *Commonwealth v. Johnson*, 5 Pa.C.C. 236, 1888 WL 3805 (Pa.O. & T. 1888)(Jurors read newspaper article containing: “We hope that strict justice will be accorded him, and that, if innocent, which few believe, he may be able to prove it, and thus save his neck from the gallows.”);
- *Meyer v. Cadwalader*, 49 F. 32, 36 (C.C.E.D.Pa. 1891)(Philadelphia newspapers published articles during trial that judge found “were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial”.);
- *Mattox v. U. S.*, 146 U.S. 140, 150-51 (1892)(Bailiff read newspaper article about trial to jurors during their deliberations. “It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, — could have no other tendency. Nor can it be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial.”)
- *Cartwright v. State*, 14 So. 526 (Miss. 1893)(Newspaper article read by jurors interpreted evidence in a way prejudicial to defendant.);
- *People v. Stokes*, 137 P. 207, 208-210 (Calif. 1894) (Jury had newspaper article containing facts that had been declared *inadmissible* as evidence during the trial.);
- *U.S. v. Ogden*, 105 F. 371 (E.D.Pa. 1900);
- *Griffin v. U S*, 295 F. 437 (3dCir. 1924)(Newspaper in Philadelphia published during trial that prosecutor said several defendants wanted to testify for the state, but were refused.).

There are also rare instances of a court finding prejudicial publicity in a *civil* case and ordering a new trial:

- *West Chicago St. R. Co. v. Grenell*, 90 Ill.App. 30, 1899 WL 4555 at *13 (Ill.App. 1899) (Articles in Chicago newspapers mentions that railroad bribed jurors during previous trial and railroad was paying witnesses to testify. “That the reading by jurors of newspaper articles prejudicial to one of the parties is cause for a new trial, we regard as well settled.” [citations omitted]);
- *Morse v. Montana Ore-Purchasing Co.*, 105 F. 337 (C.C.D.Mont. 1900)(Articles and editorials published in Helena, Montana newspaper during trial were prejudicial to plaintiff.).

From doing searches on publicity affecting fair trials in Westlaw, I have the impression, perhaps not accurate, that it was more common to grant a new trial because of prejudicial publicity during the years 1890-1910, than during 1930-55. If this impression is accurate, I have no explanation for it. It also appears that new trials are not being granted commonly after the U.S. Supreme Court’s decision in *Sheppard* in 1966, perhaps because that decision instructed judges to control their courtroom to obtain a fair trial, despite extensive publicity.

No Immunity for Fame or Notoriety

If someone willfully committed a heinous criminal act, and obtained immunity because of news coverage of their crime, then they would benefit from their heinous crime, which is unacceptable. On the other hand, an innocent person who is accused of a criminal act needs a fair trial, not immunity, to clear his/her name. Therefore, extensive pretrial publicity should *not* give immunity to a famous or notorious defendant. The U.S. Supreme Court has stated that:

- We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. E.g., *Beck v. Washington*, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98 (1962). To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

Murphy v. Florida, 421 U.S. 794, 801, n. 4 (1975).

And a dissenting opinion at the U.S. Supreme Court said:

- In an age when a national press has the capacity to saturate the news with information about any given trial, I am dubious of a proposed rule that a juror must be disqualified per se because of exposure to a certain level of publicity, without the added pressure of a 'huge ... wave of public passion,' *Irvin v. Dowd*, supra, 366 U.S., at 728, 81 S.Ct., at 1645. If that rule were adopted, suspects in many celebrated cases might be able to claim virtual immunity from trial.

Mu'Min v. Virginia, 500 U.S. 415, 450(1991)(Kennedy, J., dissenting).

My interpretation of the cases mentioned above at page 10 is that the U.S. Supreme Court recognizes the necessity of having trials, even when the defendant is famous or the crime particularly notorious. The methods that a trial judge can routinely use to help ensure a fair trial are discussed below, beginning at page 17.

Is Ignorance of Facts Required?

Remarks in several opinions of the U.S. Supreme Court and the U.S. Courts of Appeals have stated that it is permissible for veniremen to know something about the facts of a case, provided they have not yet formed an opinion about the defendant's guilt.¹⁴ For example, see:

- The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear,

¹⁴ *Patton v. Yount*, 467 U.S. 1025, 1037, n. 12 (1984) ("The constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law," [citations omitted]).

therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial.

Reynolds v. U.S., 98 U.S. 145, 155-56 (1878),

Sentence about “newspaper enterprise and universal education” quoted with approval in *U.S. v. Titus*, 210 F.2d 210, 214 (2nd Cir. 1954), *Juelich v. U.S.*, 214 F.2d 950, 955 (5th Cir. 1954), and *Patton v. Yount*, 467 U.S. 1025, 1051 (1984) (Stevens, J., dissenting);

- It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961);

- Qualified jurors need not, however, be totally ignorant of the facts and issues involved. *Murphy v. U.S.*, 421 U.S. 794, 799-800 (1975);

- To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Irvin*, 366 U.S. at 723, 81 S.Ct. at 1642-43 (citations omitted). In other words, the Constitution does not require ignorant jurors, only impartial ones. See *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975).

Knapp v. Leonardo, 46 F.3d 170, 176 (2nd Cir. 1995), *cert. den.*, 515 U.S. 1136 (1995).

Cited with approval in *U.S. v. Stevens*, 83 F.3d 60, 66 (2nd Cir. 1996), *cert. den.*, 519 U.S. 902 (1996);

- There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case. The Constitution does not require ignorant or uninformed jurors; it requires impartial jurors. While it may be sound trial strategy for an attorney to exclude anyone with knowledge of the facts or the parties, such a result is not mandated by the Constitution.

McQueen v. Scroggy, 99 F.3d 1302, 1320 (6th Cir. 1996), *cert. den. sub nom. McQueen v. Parker*, 520 U.S. 1257 (1997);

- The Sixth Amendment requires an ‘impartial’ jury, not an ignorant one. *U.S. v. Nomee*, 2000 WL 353131 at *2 (9th Cir. 2000).

On the other hand, consider remarks of the U.S. Supreme Court about the foundation of the criminal justice system in the USA:

The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado, 205 U.S. 454, 462 (1907). Quoted with approval in *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) (calling this quotation “the undeviating rule of this Court”).

In 1991 the U.S. Supreme Court said:

The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1070 (1991).

And in 1975, the U.S. Supreme Court held, but only for trials in federal courts, that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced.

Murphy v. Florida, 421 U.S. 794, 798 (1975).

The U.S. Court of Appeals in Atlanta extended this presumed prejudice to include “information about a defendant’s conviction in a former trial”, and also held that such prejudice could *not* be cured by the judge’s “standard admonition to disregard everything not heard in court.”

U.S. v. Williams, 568 F.2d 464, 470-71 (5thCir. 1978) .

In 1924, the U.S. Court of Appeals in Philadelphia said:

It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial.

Griffin v. U. S., 295 F. 437, 439 (3dCir. 1924).

To hold otherwise would defeat the rules of evidence and rules of procedure that are carefully designed to give a fair trial.

Unfortunately, the only thing that is clear is that the federal courts are muddled about whether it is acceptable for jurors to know prejudicial information about the defendant that will *not* be admitted at trial. Most people probably begin to form opinions when they hear “facts” about a crime and the suspect(s), as such preliminary opinions are a way of organizing information. Below, beginning at page 27, this essay explains that jurors can ignore a judge’s instruction to ignore prejudicial information, or can ignore a judge’s instruction to use that information only for a specific purpose. Jurors make only a guilty/not guilty determination, without any formal written analysis that clearly states the reason(s) for their decision. Because of this lack of formal analysis, and a lack of explanation that could guide appellate courts that consider the fairness of the jury’s

decision, I believe that it is especially important that jurors have minimal knowledge of the case from sources of information outside the trial courtroom.

The *ideal* would be for jurors to know *only* the information presented as evidence in court, so that those jurors could not possibly make a decision based on unfairly prejudicial information, *inadmissible* information, or *unreliable* information. That ideal is not possible in cases with intensive publicity. Ultimately, courts can not guarantee a *perfect* trial, but I think we should try harder to get fair trials, by limiting pretrial publicity.

Presumed vs. Actual Prejudice

After the U.S. Supreme Court's decision in *Sheppard*, judges began to divide prejudicial publicity into two kinds: (1) presumed or inherent prejudice and (2) actual prejudice.

Authority for this distinction includes:

- *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975)(In *Irvin v. Dowd*, “the Court readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible. Prejudice was presumed in the circumstances under which the trials in *Rideau*, *Estes*, and *Sheppard* were held.”);
- *Dobbert v. Florida*, 432 U.S. 282, 302 (1977)(In summarizing *Murphy*, “We concluded that the petitioner in *Murphy* had failed to show that the trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. ”);
- *McWilliams v. U.S.*, 394 F.2d 41, 44 (8th Cir. 1968)(“Absent inherently prejudicial publicity which has so saturated the community as to have a probable impact upon the prospective jurors, there must be some showing of a connection between the publicity generated by the news articles, radio and television broadcasts and the existence of actual jury prejudice.”), *cert. den.*, 393 U.S. 1044 (1969);
- *U.S. v. Capo*, 595 F.2d 1086, 1090-91 (5th Cir. 1979), *cert. den. sub nom. Lukefahr v. U.S.*, 444 U.S. 1012 (1980);
- *Coleman v. Kemp*, 778 F.2d 1487, 1489-90, 1537-38 (11th Cir. 1985), *cert. den.*, 476 U.S. 1164 (1986);
- *U.S. v. Abello-Silva*, 948 F.2d 1168, 1176-78 (10th Cir. 1991), *cert. den.*, 506 U.S. 835 (1992);
- *U.S. v. McVeigh*, 153 F.3d 1166, 1181-84 (10th Cir. 1998), *cert. den.*, 526 U.S. 1007 (1999);
- *Nevers v. Killinger*, 169 F.3d 352, 362-63 (6th Cir. 1999), *cert. den.*, 527 U.S. 1004 (1999), *overruled on other grounds in Williams v. Taylor*, 529 U.S. 362 (2000).

In **presumed/inherent prejudice**, there is inflammatory publicity that saturates the entire community and makes it either “highly likely or almost unavoidable”¹⁵ that pretrial publicity caused jurors to be prejudiced. A common result of such pervasive publicity is that the trial

¹⁵ *Calley v. Callaway*, 519 F.2d 184, 204 (5th Cir. 1975), *cert. den.*, 425 U.S. 911 (1976).

becomes a farce: “the kangaroo court proceedings” in *Rideau*, 373 U.S. at 726, the disruption of the trial by television cameras in the courtroom in *Estes v. State of Texas*, 381 U.S. 532 (1965), or “the carnival atmosphere” in *Sheppard*, 384 U.S. at 358. *Presumed prejudice* is extraordinarily rarely found by appellate courts in the USA: indeed the U.S. Supreme Court has found presumed prejudice *only* in these three cases, all from the 1960s.

In **actual prejudice**, the appellate court needs to review the transcript of voir dire or read affidavits from jurors, and then find or infer that at least one juror was not impartial, because of the pretrial publicity. The leading case of this kind is *Irvin v. Dowd*.

As *Yount*, *Mu’Min*, and *McVeigh* make clear, extensive pretrial publicity will *not* automatically require a new trial. In fact, despite all of the words written by judges about the pernicious effects of pretrial publicity, it is rare in the USA that a defendant receives a new trial as a result of such publicity. Perhaps even more alarming, the U.S. Supreme Court opinions that found prejudicial publicity are mostly from the years 1951-66. The modern view, with few exceptions, seems to be for judges to accept intensive pretrial publicity as a fact of life in the USA.

Remedies for Prejudicial Publicity

In 1950, anonymous law student(s) at Harvard Law School published a terse note that discussed six possible remedies for prejudicial publicity: (1) voluntary action by press and radio, (2) [tort] cause of action, (3) change of venue, (4) new trial, (5) punishing the publication as contempt, and (6) preventing disclosure to the press.¹⁶ This note remains one of the most thoughtful discussions of solutions to the problem of publicity. The U.S. Supreme Court’s decision in *Sheppard* instructed trial judges to control their courtroom and thereby avoid prejudicial publicity.¹⁷ *Sheppard* added two methods to those mentioned in the Harvard Note 16 years earlier: sequester the jurors and grant a continuance until the publicity abates. However, *Sheppard* ignored the possibility of torts and contempt.

¹⁶ Anonymous, Note, “Controlling Press and Radio Influence on Trials,” 63 Harvard Law Review 840-853 (March 1950).

¹⁷ *Sheppard v. Maxwell*, 384 U.S. 333, 357-363 (1966).

routine methods for trial judges

There are several measures that trial judges should routinely use to ensure a fair trial, despite pretrial publicity :

- searching voir dire¹⁸ to find impartial jurors: ask each potential juror if he/she can set aside any prejudicial information learned from journalists before the trial began (but juror's assurances are *not* necessarily believable when pretrial publicity is intense and widespread¹⁹)
- “continue the case until the threat abates,”²⁰
- change venue to a location “not so permeated with publicity”²¹
- admonish the jurors not to watch television or read newspapers during the trial
- if intensive publicity continues during the trial, then the jury should be sequestered.²²

There is also the possibility that a trial judges can issue what is now called a “gag order” that prohibits:

- all witnesses,
- law enforcement officers,
- attorneys for both the prosecution and defense,
- the defendant, and
- court officials

from making public comments (called “extrajudicial statements”) on the case that include “prejudicial matters”.²³ Gag orders are discussed in more detail below, beginning at page 23.

¹⁸ See, e.g., *U.S. v. Yousef*, 327 F.3d 56, 155 (2nd Cir. 2003), *cert. den.*, 124 S.Ct. 353 (2003), citing *U.S. v. Gaggi*, 811 F.2d 47, 51 (2nd Cir. 1987), *cert. den.*, 482 U.S. 929 (1987).

¹⁹ *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961); see also *Marshall v. U.S.*, 360 U.S. 310, 312-13 (1959) (Giving defendant a new trial despite fact that each of the jurors told the judge that “he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.”).

²⁰ *Sheppard*, 384 U.S. at 363.

²¹ *Sheppard*, 384 U.S. at 363.

The Federal Rules of Criminal Procedure specifically provide for such a change in venue:

Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Federal Rules of Criminal Procedure, Rule 21(a), enacted in 1944, as revised in 2002.

²² *Sheppard*, 384 U.S. at 363.

²³ *Sheppard*, 384 U.S. at 359 and at 361-62.

Judges repeatedly express their *belief* that the above-mentioned measures are adequate to ensure a fair trial, but there is little scientific evidence to suggest that such measures are actually adequate. As mentioned above at page 3, with nationwide cable television channels and the Internet, a change of venue may now be *inadequate* to escape prejudicial pretrial publicity. As explained below, beginning at page 27, admonitions to jurors not to read newspapers and not to watch television have doubtful efficacy in avoiding an improper decision by the jury.

Appellate judges sometimes suggest granting a continuance in a criminal case, in the hope that pretrial publicity will abate. Publicity might abate during the continuance, but publicity will probably increase again when the judicial process resumes, so it is *uncertain* whether a continuance is useful in the context of avoiding prejudice from pretrial publicity. Another disadvantage of delay is that the memories of witnesses will fade with time. Furthermore, continuances delay Justice: even if the defendant is free on bail, there is a cloud of suspicion over defendant's head until the trial is completed.

Prof. Whitebread, a well-known expert on criminal procedure, who wrote with a law student, have recognized the "shortcomings" and "inadequacies" of voir dire, sequestration, change of venue, and continuance.²⁴ They recommend trusting jurors to respond truthfully to the question during voir dire about whether they have an initial opinion about the guilt of the defendant, trusting jurors to make their decision *only* on the basis of evidence presented in court, and issuing a gag order against participants in the trial immediately after the arrest of a suspect.²⁵ While it is easy and more efficient to simply trust jurors, I doubt that jurors can ignore prejudicial information that they read in newspapers or saw/heard on television. Indeed, as explained below, beginning at page 27, many judges believe their admonishments to jurors are *not* effective.

The U.S. Supreme Court has emphasized that ordering new trials are "palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."²⁶ New trials are expensive for the taxpayer, expensive for defendants who can afford to pay their defense attorney, and delay Justice. The U.S. Supreme Court appears to believe that a new trial is necessary only when the judge at the first trial failed to do his/her job. In my opinion, this conclusion blames the judge alone for a problem that is *also* the responsibility of journalists, publishers, and broadcasters.

²⁴ Charles H. Whitebread and Darrell W. Contreras, "Free Press v. Fair Trial: Protecting The Criminal Defendant's Rights in a Highly Publicized Trial by Applying the *Sheppard - MuMin* Remedy," 69 Southern California Law Review 1587, 1588, 1610-19 (May 1996).

²⁵ 69 Southern Calif. L. Rev. at 1620, 1623.

²⁶ *Sheppard*, 384 U.S. at 363.

voluntary restraint by media

The Harvard Law students were properly skeptical that journalists, publishers, and broadcasters would voluntarily accept limitations on crime reporting. They quoted H.L. Mencken: “Journalistic codes of ethics are all moonshine.”²⁷

In 1954, at the time of the murder of Sheppard’s wife, there were *three* newspapers in Cleveland. One newspaper, *The Cleveland Press* published more sensational coverage than the other two newspapers.²⁸ One wonders about the competitive pressure on the reputable newspaper, *The Cleveland Plain Dealer*, to also publish sensational material, in order to avoid losing sales to other newspapers. Because of this competitive pressure, the problem of pretrial publicity can only be solved by a statute or judicial order that applies equally to *all* journalists. However, the next section of this essay shows that judicial orders to journalists are *not* currently acceptable to the U.S. Supreme Court.

The futility of voluntary restraint by the media is shown by the fact that some organizations of newspaper publishers oppose *any* code of conduct.²⁹ Since the year 1940, the U.S. Supreme Court apparently considers freedom of the press to be higher than the rights of other people or other institutions, although the Court has never explicitly said such words.

involuntary restraint of news media by judges

Some judges in the USA have attempted to prevent prejudicial publicity by either (1) holding journalists or publishers in contempt of court or (2) issuing an injunction prohibiting publication of certain information. While it would be desirable to have less pretrial publicity on criminal cases, the end result does *not* justify the means. As tersely shown in the following paragraphs, opinions of the U.S. Supreme Court have put limits on contempt citations and injunctions.

²⁷ 63 Harvard Law Review at 843-44, n. 28. The quotation from Mencken also appears in *Pennekamp v. State of Fla.*, 328 U.S. 331, 366, n. 13 (1946)(Frankfurter, J., concurring).

²⁸ 231 F.Supp. at 63 (“If ever there was a trial by newspaper, this is a perfect example. And the most insidious violator was the Cleveland Press.”).

²⁹ Paul C. Reardon, “The Fair Trial – Free Press Standards,” 54 American Bar Association Journal 343, 346 (April 1968).

Judges in England can use the contempt power to punish journalists who wrote articles that might interfere with the impartial decision of a case in trial court and its subsequent appeal.³⁰ It is clear that the law of England considers a fair trial as more important than freedom of the press. In the early part of the 20th Century there were a few cases in the U.S.A. in which judges found publishers of newspapers in contempt for attempting to influence jurors.³¹

Also in the early part of the 20th Century, there were a few cases in the U.S.A. in which judges found publishers of newspapers in contempt for insulting a *judge* or attempting to influence a *judge's* decision. The most famous of these cases involved Judge Killits in Ohio, who was offended by newspaper editorial cartoons, ordered the district attorney to file a complaint, and then Killits tried the case summarily without a jury and found the publisher guilty.³² This use of contempt power was overruled by the U.S. Supreme Court's decisions in *Nye v. U.S.*, 313 U.S. 33, 51-52 (1941) and *Bridges v. State of California*, 314 U.S. 252, 267 (1941). A few years later, there were additional cases at the U.S. Supreme Court that rejected the use of contempt power to punish publishers for attempting to influence a judge: *Pennekamp v. State of Florida*, 328 U.S. 331 (1946) and *Craig v. Harney*, 331 U.S. 367 (1947). *Nye* did not involve a newspaper publisher, but did limit the power of judges to hold people in contempt. The other three cases (i.e., *Bridges*, *Pennekamp*, and *Craig*) are conventionally understood to forbid a judge from holding a newspaper publisher in contempt for conduct outside the courtroom. However, a careful reading of these three cases shows that they actually *only* forbade judges for punishing publishers

³⁰ Arthur L. Goodhart, "Newspapers and Contempt of Court in English Law," 48 Harvard Law Review 885 (April 1935); *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 921-936 (1950) (Appendix to Opinion of Justice Frankfurter, dissenting to denial of certiorari, titled: "English decisions concerning contempt of court for comments prejudicial to the fair administration of criminal justice."); Donald M. Gillmor, "Free Press and Fair Trial in English Law," 22 Washington & Lee Law Review 17 (1965).

³¹ See, e.g., *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445 (Mass. 1899)(publication of inadmissible evidence about a settlement offer); *Globe Newspaper Co. v. Commonwealth*, 74 N.E. 682 (Mass. 1905)(pretrial publicity about murder case); *In re Independent Pub. Co.*, 228 F. 787 (D.Mont. 1915), *aff'd*, 240 F. 849 (9thCir. 1917)(publication of inadmissible evidence caused a mistrial, attempt to influence jurors was a contempt); *Bee Pub. Co. v. State of Nebraska*, 185 N.W. 339, 341 (Neb. 1921) ("It plainly appears that the article seriously reflected upon the integrity of the witnesses who appeared before the grand jury and who would in all probability testify in the district court. It took sides as between the state and the defendant, and opinions in respect of the merits were expressed. Violent comment was indulged in respecting the evidence, and the innocence of the accused was declared. Upon its face it is apparent that a bold attempt was made to mold public opinion favorable to Moore in advance of his trial, the Bee having an extensive circulation, not only throughout the state, but in the city and in Douglas county as well, the vicinity from which the jurors would be drawn and before whom Moore would be subsequently tried. Clearly an inflammatory harangue, in the locality where the trial was to be had, so worded, would tend to hinder the due administration of justice. That a publication so worded and so circulated, under the circumstances that prevailed at the place of its publication, constitutes constructive contempt of court is well settled.").

³² *U.S. v. Toledo Newspaper Co.*, 220 F. 458 (N.D. Ohio 1915), *aff'd*, 237 F. 986 (6thCir. 1916), *aff'd*, 247 U.S. 402 (1918) (Justices Holmes and Brandeis dissented).

with contempt when the publisher either attempted to influence a *judge* or insulted a *judge*. None of these three cases mention the Sixth Amendment guarantee of a trial by impartial jurors. None of these three cases involved influences on either potential jurors or actual jurors.³³ Instead, these three cases were decided on First Amendment grounds, with additional concern about the power of a judge to summarily punish without a jury trial.³⁴ Therefore, it may be an open question whether the U.S. Supreme Court would permit a judge to hold a publisher or broadcaster in contempt for attempting to influence either potential jurors or actual jurors.³⁵ On the other hand, in 1966, if the U.S. Supreme Court had wanted judges to use contempt orders to punish publishers and broadcasters of prejudicial information, the Court should have mentioned contempt orders in *Sheppard*, but the Court did not.

If contempt orders against journalists were allowed, we must be very careful that such contempt orders punish *only* publications or broadcasts that likely influenced either potential jurors, actual jurors, or witnesses. In contrast, journalists who criticize judges must be protected by freedoms of speech and press, because these freedoms certainly extend to reporting of *both* government operations (including the courts) *and* criticism of government officials (including judges). It would be an abuse of judicial power for a judge who was stung by criticism to retaliate with a contempt citation. In my search of Westlaw for cases on use of contempt power against newspapers, I incidentally found several opinions of state supreme courts in which newspapers in

³³ “The comments were made about judges of courts of general jurisdiction [and] concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion.” *Pennekamp*, 328 U.S. at 348.

³⁴ See, e.g., “The problem presented is only a narrow, albeit important, phase of that problem — the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition. The history of the power to punish for contempt (see *Nye v. United States*, supra; *Bridges v. State of California*, supra) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.” *Craig v. Harney*, 331 U.S. at 373.

³⁵ “... an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.” *Pennekamp*, 328 U.S. at 346-47.

See also the holding of Illinois Supreme Court that these three U.S. Supreme Court cases do not apply to attempts of a broadcaster to influence or to intimidate either a party or witnesses in a trial. *People v. Goss*, 141 N.E.2d 385, 389 (Ill. 1957), *aff'd after change of venue*, 170 N.E.2d 113 (Ill. 1960), *cert. den.*, 365 U.S. 881 (1961); *Goss v. State of Ill.*, 204 F.Supp. 268, 272 (N.D.Ill. 1962), *rev'd on jurisdictional grounds*, 312 F.2d 257 (7th Cir. 1963).

the U.S.A. were held in contempt for publishing an article about an opinion of an appellate court,³⁶ where there could be no influence on either a jury or witnesses. It is important to distinguish news articles involving only judges from news articles that may prejudice either potential jurors, actual jurors, or witnesses. A more difficult question, which I will not discuss here, arises when journalists attempt to influence a judge (e.g., perhaps by threatening to oppose the re-election of the judge) if the judge does not make a particular decision favored by the journalist.

The other possible means for a judge to punish prejudicial publicity by journalists is a contempt citation for violation of a judicial order (e.g., an injunction) that attempted to prevent a journalist from publishing information about a crime or criminal defendant. Such judicial orders are almost certainly *not* valid, as such an order is a prior restraint on speech, which is especially disfavored by judges in the USA and bears a heavy presumption against its validity. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The U.S. Court of Appeals for the District of Columbia remarked in 1979:

- Under the standards laid down by the Court, the press may be restrained only when
- (1) pretrial publicity is likely to be so pervasive that it probably will have an effect on jurors;
 - (2) there are no alternative methods of dealing with the problem through
 - (a) change of venue,
 - (b) postponement of the trial,
 - (c) questioning jurors closely during voir dire,
 - (d) clear instructions at trial, or
 - (e) sequestration of the jury; and
 - (3) the prior restraint will be effective.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562, 563-64, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). As one commentator has noted, "the practical impact of the rule announced by Chief Justice Burger is to outlaw all prior restraints in fair trial/free press cases." Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan.L.Rev. 497, 498 (1977). *In re Halkin*, 598 F.2d 176, 183, n. 14 (D.C.Cir. 1979), *overruled on other grounds in Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Similar sentiments are expressed in *Matter of Providence Journal Co.*, 820 F.2d 1342, 1349, n. 42 (1st Cir. 1986).

³⁶ *In re Providence Journal Co.*, 68 A. 428 (R.I. 1907)(misstatement about Rhode Island Supreme Court's conclusions); *In re San Francisco Chronicle*, 36 P.2d 369 (Calif. 1934)(publication of a false or grossly inaccurate report of the proceedings in California Supreme Court).

gag orders

In contrast to restrictions on, or punishment of, journalists, it is permissible for a judge to restrict freedom of speech of participants in a trial in the judge's courtroom. It is increasingly common for a judge in a high-profile criminal case to issue a so-called "gag order" that prohibits

- the defendant and victim,
- attorneys for both the prosecution and defense,
- all potential witnesses, and
- law enforcement officers involved in investigating the case

from making public comments on the case. Gag orders appear to have been first suggested in a New Jersey Supreme Court case, *van Duyne*.³⁷ Nineteen months after *van Duyne*, the U.S. Supreme Court endorsed gag orders in *Sheppard*, 384 U.S. at 359 and at 361-62 (1966).

However, there are two reasons why such gag orders fail to prevent the publication of all information that would prejudice a jury pool:

1. The gag order has no effect on people not before the court, such as attorneys who are not employed by a law firm that is involved the case. For example, nationwide television programs that offer news and commentary by attorneys generate tremendous pretrial publicity, yet are beyond the reach of gag orders. Therefore, a gag order has limited effectiveness. Ironically, a gag order prohibits public statements from those most knowledgeable about the case, so journalists will need to find less knowledgeable sources of information, which increases the probability that pretrial publicity will include false information.
2. If a party to such a gag order violates the order, the journalist who receives the illicit information will probably refuse to reveal his/her sources, thus frustrating the judge's attempt to enforce the gag order.

One could easily write a long book about court cases interpreting gag orders, so I only mention here a few leading cases about gag orders.

In 1967, a federal trial judge in New Mexico issued a gag order that applied to "attorneys, the defendants, and the witnesses and forbade them to 'make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court.' "

The defendants spoke at a convention open to the public, and defendants were convicted of contempt of court and sentenced to 30 days in jail plus a fine of US\$ 500. The gag order and contempt sentence was affirmed on appeal.

³⁷ *State v. Van Duyne*, 204 A.2d 841, 852 (N.J. 1964), *cert. den.*, 380 U.S. 987 (1965).

U.S. v. Tijerina, 412 F.2d 661, 663 (10th Cir. 1969), *cert. den.* 396 U.S. 990 (1969).

In 1982 a state trial judge in Arizona ordered “court personnel, counsel, witnesses, and jurors not to speak directly with the press” during a murder trial with “extensive publicity”. One Justice of the U.S. Supreme Court refused to stay the trial judge’s order. *KPNX Broadcasting Co. v. Arizona Superior Court*, 459 U.S. 1302 (1982). The Arizona Supreme Court subsequently upheld the constitutionality of the gag order. *KPNX Broadcasting v. Superior Court In and For Maricopa County*, 678 P.2d 431, 439-442 (Ariz. 1984).

In 1983, a federal trial judge in North Carolina, in a criminal trial of alleged members of the Ku Klux Klan and the Nazi Party, issued a gag order preventing witnesses from communicating their proposed testimony to journalists. This gag order was upheld on appeal as constitutional. *In re Russell*, 726 F.2d 1007 (4th Cir. 1984), *cert. den. sub nom. Russell v. Flannery*, 469 U.S. 837 (1984).

In 1987 a New York City politician was indicted on six counts of extortion, obstruction of justice, perjury and tax evasion. To reduce pretrial publicity that might deny defendant a fair trial, the federal trial judge ordered:

defendants, their counsel, the United States Attorney and his representatives to respond to inquiries from the public communications media with the statement "No comment," or "Whatever we have to say will be said or has been said in court."

This gag order was upheld on appeal as constitutional.

U.S. v. Simon, 664 F.Supp. 780, 783 (S.D.N.Y. 1987), *aff'd sub nom. Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2nd Cir. 1988), *cert. den. sub nom., Dow Jones & Co., Inc. v. Simon*, 488 U.S. 946 (1988).

This case is also notable for a remark by the trial judge:

The argument that most jurors ultimately selected in highly publicized cases have little recollection of pretrial news reports concerning the case does not persuade the Court that judicial vigilance over the dissemination of prejudicial extrajudicial statements should be relaxed. In the Court's view, absence from the jury of individuals who read daily newspapers and keep abreast of newsworthy developments is simply not the best of all possible worlds, especially in a lengthy and complex criminal case where decisions regarding guilt or innocence will often require painstaking attention to evidentiary detail.

Simon, 664 F.Supp. at 793. Quoted with approval by *Seattle Times Co. v. U.S. Dist. Court for Western Dist. of Washington*, 845 F.2d 1513, 1524-25 (9th Cir. 1988).³⁸

³⁸ Similar words appear in the unpublished opinion of a federal trial court in California: “It is not in the parties’ interest or in the interest of justice to exclude from the jury all citizens who read the Los Angeles Times or who otherwise keep abreast of current events.” Quoted in *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 600 (9th Cir. 1985).

In 1995 a federal trial judge issued a gag order affecting parties and their attorneys in a case involving alleged criminal misconduct by nine New Orleans policemen. This gag order was upheld as constitutional. *U.S. v. Davis*, 902 F.Supp. 98 (E.D.La. 1995), *aff'd*, 132 F.3d 1454 (5th Cir. 1997), *cert. den.*, 523 U.S. 1034 (1998).

A trial judge in South Dakota state court in 1999 issued a gag order prohibiting trial participants from discussing the case with journalists. The order was upheld by the state Supreme Court, which cited many cases in its opinion. *Sioux Falls Argus Leader v. Miller*, 610 N.W.2d 76 (S.D. 2000).

A trial judge in federal court in Louisiana, in a criminal case involving prominent politicians as defendants, issued “a gag order that prohibits attorneys, parties, or witnesses from discussing with ‘any public communications media’ anything about the case ‘which could interfere with a fair trial,’ including statements ‘intended to influence public opinion regarding the merits of this case,’ with exceptions for matters of public record and matters such as assertions of innocence.” The order was affirmed. *U.S. v. Brown*, 218 F.3d 415, 418 (5th Cir. 2000), *cert. den.*, 531 U.S. 1111 (2001).

Therefore, gag orders that prevent people involved in a criminal trial from talking to journalists can be constitutionally valid. To be fair, many appellate judges have vacated gag orders, on grounds that a specific order was overbroad or that the trial judge did not adequately justify his/her order (i.e., inadequate factual findings). Given that the U.S. Supreme Court suggested gag orders in *Sheppard*, it is surprising that Court has apparently not considered when a gag order is lawful.³⁹

close courtroom ?

A judge may *not* hold a trial in closed court, without journalists present. This would seem obvious from the explicit words in the Sixth Amendment to the U.S. Constitution (i.e., “In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial*, by an impartial jury” [emphasis added]), but some judges have attempted to close their courtrooms. For more information, see:

- *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980);
- *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982);
- *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984) (voir dire must be open to press);

³⁹ Charles H. Whitebread and Darrell W. Contreras, “Free Press v. Fair Trial: Protecting The Criminal Defendant’s Rights in a Highly Publicized Trial by Applying the *Sheppard – MuMin* Remedy,” 69 Southern California Law Review 1587, 1608-1610 (May 1996).

- *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1 (1986)(pretrial hearing);
- *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989)(closing hearing on change of venue violated First Amendment).

On the other hand, a judge *may* hold a pretrial *suppression* hearing in closed court, without journalists present. Such a hearing considers whether or not to admit certain items or testimony as evidence in a following trial. If the judge decided an item or testimony was *inadmissible* at trial, and if journalists who attended the hearing published the *inadmissible* information, then the jury pool would be contaminated with the *inadmissible* evidence, thus defeating the purpose of the hearing. An alternative is to first select the jury, sequester them, then hold the pretrial suppression hearing. A few of the relevant cases are:

- *U.S. v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977), *cert. den. sub nom. Miami Herald Pub. Co. v. Krentzman*, 435 U.S. 968 (1978)(Journalists have no right to information that is not available to the public.);
- *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425 (Pa. 1978), *appeal dismissed*, 443 U.S. 913 (1979);
- *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979);
- *Federated Publications, Inc. v. Kurtz*, 615 P.2d 440, 447 (Wash. 1980);
- *State v. Williams*, 459 A.2d 641, 645 (N.J. 1983)(“Accordingly, we hold that all pretrial proceedings in criminal prosecutions shall be open to the public and the press. In the context of these cases, the only exception to this general rule will arise in those instances in which the trial court is clearly satisfied that as a result of adverse pretrial publicity, a realistic likelihood exists that a defendant will be unable to secure a fair trial before an impartial jury if the pretrial proceeding is conducted in open court.”);
- *Waller v. Georgia*, 467 U.S. 39, 43-48 (1984)(conditions for closing part of a suppression hearing).

Admonitions to jury to ignore prejudicial information

One of the most common ways that journalists prejudice the trials of the accused is to mention the past criminal history of the accused person: both the number of arrests⁴⁰ and the details of each prior conviction. Such information is generally *not* admissible at a trial.⁴¹ If the information is admitted for a specific purpose, the defendant's attorney can request the judge to give an instruction to the jury that the information is to be considered *only* for that specific purpose. If *inadmissible* evidence is accidentally mentioned, the judge will give an instruction to the jury to ignore that information in their deliberations about the defendant's guilt. However, some judges have expressed doubts about the effectiveness of such limiting instructions or instructions to ignore *inadmissible* evidence. In what is perhaps the most famous expression of such doubt, Justice Jackson of the U.S. Supreme Court wrote tersely:

The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, 68 S.Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54.

Krulewitch v. U.S., 336 U.S. 440, 453 (1949)(Jackson, J., concurring).

Justice Jackson's remark was quoted with approval in several subsequent U.S. Supreme Court cases. For example, a 1964 U.S. Supreme Court case about the voluntariness of a confession says:

Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession? [FN15]

FN15. See *Rideau v. Louisiana*, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663: "But we do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" See also *Delli Paoli v. United States*, 352 U.S. 232, 248, 77 S.Ct. 294, 303, 1 L.Ed.2d 278: "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (Dissenting opinion of Mr. Justice Frankfurter relating to use of a confession of a codefendant under limiting instructions.) *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 535 (539), 559, 68 S.Ct. 248, 257

⁴⁰ The number of arrests is *not* significant, as it is possible for a person to be arrested, then released without ever being charged with a crime, or without ever being found guilty in a court of law.

⁴¹ Federal Rule of Evidence 404(b) says that "Evidence of other crimes ... is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake" To impeach the testimony of any witness, including the defendant, Federal Rule of Evidence 609 says that "evidence that any witness had been convicted of a crime shall be admitted if it involved dishonesty or false statement" and if the conviction occurred less than 10 years before the trial.

(92 L.Ed. 154), all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54.” (Concurring opinion of Mr. Justice Jackson relating to limiting instructions concerning use of declarations of co-conspirators.) *Sheppard v. United States*, 290 U.S. 96, 104, 54 S.Ct. 22, 25, 78 L.Ed. 196; *United States v. Leviton*, 193 F.2d 848, 865 (C.A.2d Cir.), *certiorari denied*, 343 U.S. 946, 72 S.Ct. 860, 96 L.Ed. 1350; Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv.L.Rev. 165, 168--169 (1929); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317, 326 (1954).

Jackson v. Denno, 378 U.S. 368, 388 (1964).

A 1967 U.S. Supreme Court case permitted enforcing the habitual criminal statute in Texas with evidence at trial of prior convictions:

Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, “(t)he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.” *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (concurring opinion) (1949). *United States ex rel. Scoleri v. Banmiller*, 310 F.2d 720, 725 (C.A.3d Cir. 1962). Mr. Justice Jackson's assessment has received support from the most ambitious empirical study of jury behavior that has been attempted, see Kalven & Zeisel, *The American Jury* 127-130, 177-180.

Spencer v. State of Tex., 385 U.S. 554, 575 (1967).

Another U.S. Supreme Court case in 1967 about the habitual criminal statute in Texas involved a suspect with one previous felony in Texas and three previous felonies in Tennessee:

The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it [FN7] made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

FN7. See, e.g., [citations to six cases deleted here]. What Mr. Justice Jackson said in *Krulewitch v. United States*, 336 U.S. 440, 445, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (concurring opinion), in the sensitive area of conspiracy is equally applicable in this sensitive area of repetitive crimes, “The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.”

Burgett v. Texas, 389 U.S. 109, 115 (1967).

A 1968 U.S. Supreme Court case “held that admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and must be disregarded with respect to defendant”⁴²:

That dissent [in *Delli Paoli*] challenged the basic premise of [the majority opinion in] *Delli Paoli* that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. “The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible

⁴² Quoted from headnote in West's Supreme Court Reporter.

declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.” [*Delli Paoli v. U.S.*,] 352 U.S., at 247, 77 S.Ct., at 302 [(1957)]. The dissent went on to say, as quoted in the cited note in Jackson, 'The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' *Id.*, at 248, 77 S.Ct., at 303. To the same effect, and also cited in the Jackson note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790: “The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. * * *” [FN4]

FN4. Several cases since *Delli Paoli* have refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions. See, e.g., *United States ex rel. Floyd v. Wilkins*, 2 Cir., 367 F.2d 990; *United States v. Bozza*, 2 Cir., 365 F.2d 206; *Greenwell v. United States*, 119 U.S.App.D.C. 43, 336 F.2d 962; *Jones v. United States*, 119 U.S.App.D.C. 284, 342 F.2d 863; *Barton v. United States*, 5 Cir., 263 F.2d 894; *United States ex rel. Hill v. Deegan*, D.C., 268 F.Supp. 580. In *Bozza* the Court of Appeals for the Second Circuit stated:

“It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind.”

365 F.2d, at 215.

State decisions which have rejected *Delli Paoli* include *People v. Aranda*, 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265; *State v. Young*, 46 N.J. 152, 215 A.2d 352. See also *People v. Barbaro*, 395 Ill. 264, 69 N.E.2d 692; *State v. Rosen*, 151 Ohio St. 339, 86 N.E.2d 24.

It has been suggested that the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay. See Broeder, *The University of Chicago Jury Project*, 38 *Neb.L.Rev.* 744, 753-755 (1959).

Bruton v. U.S., 391 U.S. 123, 129 (1968)(overruling *Delli Paoli* in part).

Several decisions of the U.S. Courts of Appeals have made similar observations about the inability of a jury to disregard prejudicial information that they have heard. For example:

My colleagues admit that “trial by newspaper” is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old “ritualistic admonition” to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant. [FN14] Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790, said that, “The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54.” Cf. *People v. Carborano*, 301 N.Y. 39, 42-43, 92 N.E.2d 871; *People v. Robinson*, 273 N.Y. 438, 445-446, 8 N.E.2d 25.

FN14. *United States v. Antonelli Fireworks Co.*, 2 Cir., 155 F.2d 631, 656 (dissenting opinion).

United States v. Leviton, 193 F.2d 848 865-66 (2nd Cir. 1951)(Frank, J., dissenting), *cert. den.*, 343 U.S. 946, 948 (1952)(Frankfurter, J., memorandum).

The U.S. Court of Appeals for the First Circuit wrote in 1952, and quoted with approval in 1987:

No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson, concurring, in *Krulewitch v. United States*, 1949, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction." And see Note, Controlling Press and Radio Influence on Trials, 63 Harv.L.Rev. 840, 842-43 (1950). One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity. This is particularly true in the determination of issues involving the credibility of witnesses.

Delaney v. U.S., 199 F.2d 107, 112-13 (1st Cir. 1952).

entire paragraph quoted with approval in *U.S. v. Moreno Morales*, 815 F.2d 725, 774-75 (1st Cir. 1987), *cert. den.*, 484 U.S. 966 (1987).

The U.S. Court of Appeals for the Third Circuit case in 1976 remarked, and concluded with a memorable metaphor: "a drop of ink cannot be removed from a glass of milk.":

... *Clarke* [343 F.2d 90 (3rd Cir. 1965)] reaffirms this court's tradition of protecting the presumption of innocence that accompanies a defendant throughout the trial. The accused is not only presumed to be innocent of the crime with which he is charged, but our legal tradition protects him from the possibility of guilt by reputation. Evidence received by a jury in a criminal prosecution must pass stringent tests of competency and relevancy. A defendant's previous brushes with the law, in and of themselves, are simply irrelevant to his guilt or innocence of the crime with which he is charged. Evidence of previous convictions may be admitted only under very special circumstances, and subject to stringent instruction at the time of its reception. Such evidence may be received to show intent, plan, scheme, design or modus operandi, see cases collected in *United States v. Klein*, 515 F.2d 751, 755-56 (3d Cir. 1975), and *United States v. Chrzanowski*, 502 F.2d 573, 575 (3d Cir. 1974), and such evidence is admissible to impeach a witness' credibility. Even where such evidence is relevant for these purposes, the trial judge in the exercise of his discretion may exclude it if its probative value is outweighed by its prejudicial effects. But we unerringly refuse to admit evidence of prior criminal acts which has no purpose except to infer a propensity or disposition to commit crime. See *Michelson v. United States*, 335 U.S. 469, 475, 69 S.Ct. 213, 93 L.Ed. 168 (1948). When such evidence inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.

Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3rd Cir. 1976).

The U.S. Court of Appeals for the District of Columbia remarked in 1977:

Admission of the testimony concerning James' arrest may crucially have affected the jury's estimate on that score,[FN55] and that possibility impels us to reverse.

FN55. See *United States v. Henry*, supra note 54, 174 U.S.App.D.C. at 95, 528 F.2d at 668.

Cf. *Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976):

When (prior crime) evidence . . . reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.

See also *United States v. Carter*, 157 U.S.App.D.C. 149, 151, 482 F.2d 738, 740 (1973); R. Traynor, *supra* note 52, at 63-64. This common sense evaluation is supported by such empirical data as are available. See H. Kalven & H. Zeisel, *The American Jury* 145-148, 160 (1966).

U.S. v. James, 555 F.2d 992, 1001 (D.C.Cir. 1977).

The U.S. Court of Appeals for the Eighth Circuit remarked in 1988:

Jenkins' statement regarding appellant's refusal to undergo a polygraph test was a direct reference to appellant's credibility, which was certainly a factual issue that the jury had to consider. "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J. concurring).

Since the credibility of appellant was critical to the outcome, we believe a cautionary instruction was insufficient to cure the defective testimony.

U.S. v. St. Clair, 855 F.2d 518, 523 (8th Cir. 1988).

A judge in federal district court in New Orleans said in 1995:

Emphatic jury instructions to disregard prejudicial publicity is an unsatisfactory solution. It is difficult, if not impossible, to "unring a bell" [FN3].

FN3. When one is told, "Don't think about elephants," the immediate image in the mind is an elephant. So goes the effectiveness of instructions to disregard.

U.S. v. Davis, 904 F.Supp. 564, 569 (E.D.La. 1995).

Most recently, in 1998, the U.S. Court of Appeals for the District of Columbia wrote:

This circuit has long noted that the introduction of evidence of a prior conviction has the potential for grave mischief because of its tendency to "divert[] the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character." *United States v. Jones*, 67 F.3d 320, 322 (D.C.Cir. 1995) (quoting *United States v. James*, 555 F.2d 992, 1000 (D.C.Cir. 1977)) (internal quotation marks omitted); see *Drew v. United States*, 331 F.2d 85, 89-90 (D.C.Cir. 1964); cf. Fed.R.Evid. 404(b). The introduction of such evidence goes against the principle that a criminal trial should turn on the facts of the specific charge, not on who the defendant is or what the defendant may have done in the past. See *Dockery*, 955 F.2d at 53; *Daniels*, 770 F.2d at 1116 (citing *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977)). Trial courts can and should attempt to limit potential prejudice through cautionary instructions, but the court has recognized that such instructions can only do so much. [FN4]

FN4. Specifically, the court has observed:

To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities. In such cases, it becomes particularly unrealistic to expect effective execution of the "mental gymnastic" required by limiting instructions, and "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated fiction."

Daniels, 770 F.2d at 1118 (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), and *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring)). But see *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987)).

U.S. v. Bowie, 142 F.3d 1301, 1305-06 (D.C.Cir. 1998).

Given the widespread, but not unanimous, belief amongst judges that jurors consider prejudicial information, even after the judge specifically instructs the jury to ignore the prejudicial information, it is essential that courts both (1) limit pretrial publicity to avoid contaminating potential jurors with prejudicial information that will make it difficult, if not impossible, to select intelligent *and* impartial jurors and (2) sequester jurors during a trial to prevent contamination with published information that is *not* evidence at trial.

I have an additional concern that laymen on the jury may consider technical rules of evidence and instructions from the judge to be part of legal hocus-pocus that frees “obviously guilty” criminals on a “technicality”. Laymen may believe that considering *all* of the facts, including those “facts” that a lawyer and judge do not want the jury to hear, produces a better decision. Such a belief by laymen is contrary to the careful design of criminal procedure and rules of evidence in court, and makes it possible to find defendants guilty of a specific crime, *not* because of evidence presented in court about that specific crime, but because they are a “bad person” (i.e., they were convicted of a crime in the past or they have a long arrest record) or because they are bizarre, eccentric, member of a minority group, etc.

Professional Ethics

The legal community has a long history of regarding “trial by newspaper” with disdain.⁴³ Since 1908, the American Bar Association has condemned as *unprofessional* the practice of attorneys trying cases in the newspapers. The first statement of professional ethics adopted by the American Bar Association contained:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotations from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

ABA Canons of Professional Ethics, Canon 20 (1908).⁴⁴

These Canons were largely inspirational or hortatory: they said what attorneys *should* do as a matter of ethics and professionalism, without intending to punish attorneys for a violation of a

⁴³ I have been able to trace the pejorative phrase “trial by newspaper” back to *Com. v. House*, 3 Pa.Super. 304, 1897 WL 3994 at *4 (Pa.Super., 1897) and an English case, *Rex v. Clarke*, 27 T.L.R. 32 (K.B. 1910), which was summarized in *State of Maryland. v. Baltimore Radio Show*, 338 U.S. 912, 922-23 (1950)(Frankfurter, J., dissenting to denial of certiorari). The phrase was also the title of an anonymous Note at 28 Harvard Law Review 605 (April 1915).

⁴⁴ Quoted in, e.g., *Niven v. Stoddard*, 231 N.Y.S. 831 (N.Y.A.D. 3 Dept. 1928); *State v. Demko*, 152 A.2d 167, 168 (N.J.Co. 1959); *Hirschkop v. Snead*, 594 F.2d 356, 365, n. 5 (4th Cir. 1979); *Matter of Hinds*, 449 A.2d 483, 492, n. 3 (N.J. 1982); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1066 (1991); Paul C. Reardon, “The Fair Trial – Free Press Standards,” 54 American Bar Association Journal 343, 344 (April 1968).

Canon.

DR7-107 of Model Code

The American Bar Association prepared its second statement of professional ethics in 1969, called the Model Code of Professional Responsibility. This Code was the basis for legally enforceable regulations about conduct of attorneys in most states. Section DR 7-107 of this Code was devoted to pretrial publicity, and was written in response to the U.S. Supreme Court's decision in the *Sheppard* case.⁴⁵

(A)⁴⁶ A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

- (1) Information contained in a public record.
- (2) That the investigation is in progress.
- (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

⁴⁵ A federal district court stated in 1976:

The genesis of DR 7-107 was the mandate laid down by the United States Supreme Court, speaking through Mr. Justice Clark, in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) that:

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors (nor) counsel for defense . . . should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

384 U.S. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620.

Hirschkop v. Virginia State Bar, 421 F.Supp. 1137, 1140-41 (E.D.Va. 1976), *aff'd in part sub nom.*

Hirschkop v. Snead, 594 F.2d 356, 363-67 (4th Cir. 1979).

The Oregon Supreme Court said in 1979:

DR 7-107, ..., had its origin in the recommendations made by the American Bar Association's Advisory Committee on Fair Trial and Free Press after *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The recommendations were concerned with statements and publicity before and during a criminal trial that could prejudice the defendant's right to trial by an impartial jury on the evidence presented in court and, insofar as they were addressed to the professional obligations of counsel, they proscribe comments of a kind designed or highly likely to have such a prejudicial effect on lay factfinders.

In re Richmond, 591 P.2d 728, 731 (Or. 1979).

The New Jersey Supreme Court in 1982 also recognized that DR 7-107 was in response to the *Sheppard* case:

... we accept the notion that by restricting the extrajudicial speech of attorneys, DR 7- 107(D) was adopted in order to "stop ... prejudice at its inception," *Sheppard*, 384 U.S. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620. The rule seeks to prevent attorneys with a special status in the case from making disclosures that are prejudicial to the trial process.

Matter of Hinds, 449 A.2d 483, 495-96 (N.J. 1982).

⁴⁶ DR 7-107 is quoted in, e.g., *Hirschkop v. Snead*, 594 F.2d 356, 374-76 (4th Cir. 1979).

- (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
- (5) A warning to the public of any dangers.

(B)⁴⁷ A lawyer or firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest, until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
- (2) The possibility of a plea of guilty of the offenses charged or to a lesser offense.
- (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
- (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
- (5) The identity, testimony, or credibility of a prospective witness.
- (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

- (1) The name, age, residence, occupation, and family status of the accused.
- (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
- (3) A request for assistance in obtaining evidence.
- (4) The identity of the victim of the crime.
- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
- (8) The nature, substance, or text of the charge.
- (9) Quotations from or references to public records of the court in the case.
- (10) The scheduling or result of any step in the judicial proceedings.
- (11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person

⁴⁷ DR 7-107(B) is quoted in, e.g., *State v. Ross*, 304 N.E.2d 396, 402-03 (Ohio App. 1973); *Hirschkop v. Snead*, 594 F.2d 356, 374 (4th Cir. 1979); *Matter of Rachmiel*, 449 A.2d 505, 510, n. 5 (N.J. 1982); *In re Conduct of Lasswell*, 673 P.2d 855, 856 (Or. 1983).

would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
- (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
- (5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) [concerns administrative proceedings]

....

DR 7-107 (1969).

A law professor who is an expert on legal ethics has remarked that sly attorneys could put clearly *inadmissible* evidence into an appendix to a motion, file the motion with the court, so that the motion became a “public record”, and then release the prejudicial information to the media under the exception(s) in DR 7-107 (A)(1), (C)(9), (D), and (G).⁴⁸

Rule 3.4 of Model Rules

The American Bar Association released its third, and still current, statement of professional ethics in 1983, called the Model Rules of Professional Responsibility. Rule 3.4 requires that litigators limit their speech in court during a trial:

A lawyer shall not ... in trial,

- allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,
- assert personal knowledge of facts in issue except when testifying as a witness, or
- state a personal opinion as to
 - the justness of a cause,
 - the credibility of a witness,
 - the culpability of a civil litigant, or
 - the guilt or innocence of an accused.

American Bar Association Model Code of Professional conduct, Rule 3.4(e) [bullets added].

⁴⁸ Charles W. Wolfram, “Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States,” 19 Dalhousie Law Journal 373, 392-93 (Fall 1996).

Part of the reason for this rule is that an attorney is *not* a neutral person whose only interest is in the Truth — an attorney is a partisan advocate for his/her client. Accordingly, an attorney's statements are *not* evidence. It is important to remember this role of lawyers when considering commentary by lawyers on either crimes or litigation.

Rule 3.6 of Model Rules

The American Bar Association's Model Rule 3.6 is the successor to DR 7-107, which restricts publicity before or during a trial:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation, and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyers' client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

- (d) No lawyer in a firm, or government agency, or otherwise associated with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

American Bar Association, Model Rules of Professional Conduct, Rule 3.6, (1983, revised in year 1994).

The ABA Comment to Rule 3.6 includes part of the previous rule, DR 7-107(B):

There are ... certain subjects which are more likely than not to have a material prejudicial effect on a proceeding,⁴⁹ particularly when they refer to a civil matter triable to a jury, or a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the failure of a person to submit to an examination or test, or the nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

ABA Comment 5 to Rule 3.6 (1994).

Note that this list of presumed prejudicial material includes items that are routinely discussed on television programs devoted to news and analysis of crimes and current criminal trials. A law professor who is an expert on legal ethics remarked in 1996 that punishment for violating Rule 3.6 “appears to be quite rare” and that “there seems to be a widespread professional belief – at least among many segments of the American legal profession – that there is no effective prohibition against improper media comments by lawyers involved in cases.”⁵⁰ My own search of the Westlaw databases in December 2003 for reported cases involving punishment for violations of Rule 3.6 confirms Prof. Wolfram’s observation and should motivate us to find more effective ways of avoiding contamination of the jury pool with unfairly prejudicial information.

Other Rules

Some U.S. Federal District Courts and some state courts have local rules or standing orders restricting pretrial publicity, which is an additional source of regulations that litigators must obey.

⁴⁹ Prior to 1994, this phrase said “would pose a serious and imminent threat to the fairness of a proceeding.”

⁵⁰ Charles W. Wolfram, “Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States,” 19 Dalhousie Law Journal 373, 395 (Fall 1996).

Attorneys and other employees of the U.S. Department of Justice must obey rules published at 28 C.F.R. § 50.2 that limit the information that can be publicly released about suspect or defendant. The introduction to these rules specifically state: "... the release of information for the purpose of influencing a trial is, of course, always improper,"⁵¹ The detailed rules for criminal proceedings include:

- (2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.
- (3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:
 - (i) The defendant's name, age, residence, employment, marital status, and similar background information.
 - (ii) The substance or text of the charge, such as a complaint, indictment, or information.
 - (iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.
 - (iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

- (4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.
- (5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.
- (6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:
 - (i) Observations about a defendant's character.
 - (ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.
 - (iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to

⁵¹ 28 C.F.R. § 50.2(a)(2).

- such tests or examinations.
- (iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.
 - (v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.
 - (vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

28 C.F.R. § 50.2(b) (current in December 2003).

This regulation was introduced in the year 1965.⁵²

apply to *all* attorneys ?

Note that Model Rules 3.4(e) and 3.6 apply *only* to attorneys who are prosecutors, or representing a plaintiff or defendant, in the case being tried. Further, Rule 3.4(e) only limits remarks that these attorneys can make in court during a trial. These rules do *not* apply to attorneys who are not involved with the case — such attorneys *may* make public comments on cases being tried by attorneys at other law firms.

When attorneys who serve as commentators on television remark about either the credibility of witnesses or the significance of evidence, they are giving what trial lawyers consider “opinion evidence”, which is *inadmissible* at trial,⁵³ except in testimony by qualified expert witnesses. Because of their status as attorneys, such opinions may influence potential jurors or actual jurors in a trial, and affect a fair trial.

I conclude that Rule 3.6 should apply to *all* attorneys, regardless of whether they are engaged in a case or merely spectators. In my opinion, any action by attorneys (even attorneys not participating in the case) that interferes with a defendant’s right to a fair trial deserves sanctions by the courts. I find it strange that many litigators believe that their freedom of their speech has a higher societal value than a fair trial for a criminal defendant. Attorneys, as officers of the court, should refrain from commenting on matters awaiting trial.⁵⁴ The rules of professional

⁵² 28 C.F.R. § 50.2 is mentioned in, amongst many other cases, *Sheppard v. Maxwell*, 384 U.S. 333, 362, n. 16 (1966); *U.S. v. Miller*, 381 F.2d 529, 534-35 (2nd Cir. 1967); *U.S. v. Abbott Laboratories*, 369 F.Supp. 1396, 1401-02 (E.D.N.C. 1973); *Stepanian v. Addis*, 699 F.2d 1046, n. 1 (11th Cir. 1983); *U.S. v. Moody*, 762 F.Supp. 1485, 1488 (N.D.Ga. 1991); *U.S. v. Flemmi*, 233 F.Supp.2d 75 (D.Mass. 2000).

⁵³ Anonymous, Note, “Controlling Press and Radio Influence on Trials,” 63 Harvard Law Review 840, 841 (March 1950).

⁵⁴ “Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.” *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), quoted with approval in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072 (1991). However, the U.S. Supreme Court was only speaking in the context of attorneys who either were the prosecutor or who represented defendant or plaintiff,

responsibility already require such restraint from attorneys involved in a case. Pretrial comments by attorneys who are not involved in the case can also be highly prejudicial, and should be prohibited by revised rules of professional responsibility, for two reasons:

1. Avoiding prejudice in the jury pool before the trial begins and avoiding influence of non-sequestered jurors during the trial, in order to make trials fairer. Specifically attorneys should neither comment on “facts” (which might be false or irrelevant), comment on the credibility of a witness, comment on trial strategy, nor give their personal opinion about the guilt or innocence of a defendant.
2. An obligation not to interfere with other attorneys' trials. It is surely unprofessional for attorneys who are not involved in a case to “throw gravel” at attorneys who are trying a case in court. Litigation is difficult enough without gratuitous public comments and criticism from colleagues.

unreliable, irrelevant, or prejudicial “facts”

Law is supposed to be a learned profession. It is *not* a good example of professional conduct for attorneys to be engaging in speculation on television about the legal significance of “facts”. Most of the “facts” reported on legal television programs before trial begins are information obtained from journalists, often either (1) interviews with victims or witnesses, (2) interviews with friends and neighbors of the accused, victims, or witnesses or (3) leaks from law enforcement. Neither kind of “facts” are admissible in a trial. If the situations that routinely arise on television shows were to occur in a courtroom, the same litigators who appear as commentators on television would rise and object on grounds of:

- the source was *not* sworn “to tell the Truth, the whole Truth, and nothing but the Truth” — the witness is not testifying under penalty of perjury
- no opportunity for cross-examination by attorney for opposing party
- assuming facts not in evidence
- hearsay
- lack of personal knowledge⁵⁵
- irrelevant to any issue in this case
- unfairly prejudicial

In my opinion, attorneys should refuse to engage in pretrial speculation about such “facts”. By refusing to engage in speculation, attorneys can teach people how a learned professional analyzes information *and* attorneys can avoid prejudicing the jury pool.

not attorneys who were not participating in a case. *Gentile* at 1073, n. 5.

⁵⁵ Federal Rule of Evidence 602.

erroneous statements by attorneys

In watching legal programs on television, I sometimes see ridiculous statements made by attorneys. For example, in August 2003, the Fox News Channel sued Al Franken for trademark infringement over the use on the cover of Mr. Franken's book, of the Fox News trademark "fair and balanced". Anyone familiar with trademark law, and particularly the intersection of trademark law with First Amendment law (especially parody), knows that such litigation is specious.⁵⁶ However, I watched *several* criminal defense attorneys on Greta van Susteren's program solemnly express their opinion that Al Franken was in trouble. In fact, the court quickly dismissed the Complaint of Fox News, noting that the Complaint was "wholly without merit, both factually and legally." Is it a really a public service for attorneys to make comments on cases in which the attorneys are ignorant of the law?

Part of being a respected professional is having the courage to say "I don't know." and then either doing legal research to learn the law, referring to a specialist attorney who already knows the law, or keeping silent. In contrast, many of the participants on television legal programs seem to have an opinion about everything, including law that they do not understand.

Bar-Press Guidelines

In the context of pretrial publicity and publicity during trials, attorneys and journalists in several states have developed what are commonly called Bar-Press Guidelines for journalists who cover crimes, arrests, and pretrial legal proceedings. A quick search of the Internet in early December 2003 shows the following websites devoted to such guidelines:

Missouri <http://www.mobar.org/handbook/>
Nebraska <http://court.nol.org/press/BarPress.htm>
New York www.nysba.org/Content/NavigationMenu/News/Legal_Handbook_for_NYS_Journalists/index.pdf
Oregon http://www.open-oregon.com/New_Pages/Statement_Of_Principles.shtml
Washington <http://www.wsba.org/media/benchbar/default.htm> (Washington State Bar Ass'n.)
<http://www.spjwash.org/access/bbp.htm> (Society Professional Journalists, Wash.)

Such guidelines are advisory, to be followed voluntarily by professional journalists, and are *not* a mandatory prohibition whose violation would be sanctionable by a court. As a general rule, courts may consider any violation of such guidelines to show that there was prejudicial publicity. If the prejudicial publicity was pretrial, then a change of venue may be appropriate. If the prejudicial publicity was during trial and the jury was not sequestered, then a new trial may be appropriate. On the other hand, if there were no violations of such guidelines, then the publicity probably did not interfere with a fair trial.

⁵⁶ See, e.g., cases collected in Ronald B. Standler, *Trademark Law*, <http://www.rbs2.com/tm.htm> (1997).

In addition, the American Bar Association has published *Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press Standard*.⁵⁷ A group of federal judges reviewed the case law on this topic and made numerous recommendations for policy in criminal trials by U.S. District Courts.⁵⁸

When I searched Westlaw on 8 December 2003, such Bar-Press Guidelines have been mentioned in approximately forty reported court opinions in state and federal courts, of which the following cases are particularly noteworthy:

- *People v. Prisco*, 326 N.Y.S.2d 758, 764 (N.Y.Co.Ct. 1970)(Trial court in New York State ordered a change of venue for a criminal trial and remarked: “There has been an increasing awareness on the part of the news media, the Bench and the Bar since the *Sheppard* decision concerning the effect of publicity on a defendant's right to a fair trial, e.g., the American Bar Association's 'standards relating to Fair Trial and Free Press' and the New York Fair Trial Free Press Conferences 'Fair Trial Principles and Guidelines for the State of New York'. Both of these publications set standards which have been violated by the publicity in the present case.”);
- *State ex rel. Superior Court of Snohomish County v. Sperry*, 483 P.2d 608 (Wash. 1971), *cert. den. sub nom. McCrea v. Sperry*, 404 U.S. 939 (1971)(Vacating contempt judgment against newspaper reporter for violation of court order prohibiting publication of testimony when jury was absent from courtroom. Note concurring opinion of Justice Finley at pp. 626-27 agreeing that prior restraint is *impermissible*, but opining that “post-publication accountability” was acceptable.);
- *State v. Stiltner*, 491 P.2d 1043, 1046, n. 1 (Wash. 1971)(“The trial court, in passing upon the motion for change of venue, found that the quoted news releases were contrary to the Guidelines and Principles for the Reporting of Criminal Proceedings compiled and promulgated for all law enforcement officers and news media by the Bench-Bar-Press Committee of the State of Washington, which guidelines discourage the reporting of results of investigative procedures, lie detector tests or handwriting samples. However, in denying change of venue, he based his conclusion on the fact that 'the said guidelines do not have the force of law.' This is correct, insofar as they are voluntary and neither legislatively mandated nor promulgated by rule of court. That is not to say, however, that particular violations may not also be due process violations in certain instances. [FN1. It must be made clear that the ultimate constitutional responsibility for guaranteeing a fair and impartial trial lies primarily with the judiciary, not the press. Here, the astonishing fact is that the prejudicial material publicized was not the result of overzealous news gathering and reporting, but was actually released to the news media by the state.]”). Cited with approval in *State v. Worl*, 794 P.2d 31, 34, n. 2 (Wash.App. 1990);
- *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (20 Nov 1975)(Blackmun grants stay.), *State v. Simants*, 236 N.W.2d 794 (Neb. 1975), *rev'd sub nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Court order incorporating the Nebraska Bar-Press Guidelines was prior restraint and *unconstitutional*.);

⁵⁷ http://www.abanet.org/crimjust/standards/fairtrial_toc.html The published standard is cited in, e.g., *Herald Ass'n, Inc. v. Ellison*, 419 A.2d 323, 331 (Vt. 1980) (Hill, J., concurring in part); *State v. Goodson*, 412 So.2d 1077, 1081 (La. 1982).

⁵⁸ *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the “Free Press – Fair Trial” Issue*, 87 F.R.D. 519 (1980). This Report superseded the earlier Report, 45 F.R.D. 391 (1968), which was amended in 51 F.R.D. 135 (1970).

- *Oklahoma Pub. Co. v. District Court of Oklahoma County*, 555 P.2d 1286, 1294 (Okla. 1976) [Adopting in Oklahoma “Guidelines on the Reporting of Juvenile Court Proceedings,” 35 Ky.St.B.J. 72 (1971).], *rev’d*, 430 U.S. 308 (1977)(Holding that First Amendment permits journalists to publish name and photograph of 11-y-old defendant who appeared in open Juvenile Court, with journalists present and known to both judge, prosecutor, and defense attorney.);
- *Federated Publications, Inc. v. Swedberg*, 633 P.2d 74 (Wash. 1981)(only journalists who had agreed in writing to comply with Washington Bench-Bar-Press Guidelines would be admitted to courtroom during pretrial hearing of reputed girl friend of “Hillside Strangler”), *cert. den.*, 456 U.S. 984 (1982).

Public Statements of Guilt by Politicians

Rarely in the USA, one sees a report by journalists that a prominent politician has made a public statement about the guilt or innocence of a criminal defendant, either before or during the trial of that defendant. Such statements are highly improper. The most famous statement of this kind in recent history was when President Nixon said that Charles Manson was “obviously guilty” during Manson’s trial, on 4 Aug 1970. Because of intensive publicity, the jury was sequestered during Manson’s trial, so the statement would have gone unnoticed by the jury, except that Manson himself held up a copy of that newspaper in open court, so that the jury could see the headline: “NIXON SAYS MANSON GUILTY”. *People v. Manson*, 132 Cal.Rptr. 265, 316, n. 82 (Cal.App. 1976), *cert. den.*, 430 U.S. 986 (1977).

After Sirhan Sirhan assassinated Senator Robert F. Kennedy in Los Angeles in June 1968, the mayor of Los Angeles released some incriminating writing by Sirhan. A judge then issued a gag order that included the usual participants (defendant and his attorney, prosecutor, police, and witnesses) and also included “any public official ... any agent, deputy or employees of such persons”. The district attorney for Los Angeles unsuccessfully fought that gag order, all the way to the U.S. Supreme Court, but none of the appellate courts issued an opinion when affirming (or denying review of) the gag order.⁵⁹

A more complex, and more recent, example occurred when a white police officer in Detroit beat a black man to death. The mayor of Detroit told a nationwide television news program: “A young man who was under arrest was literally murdered by police.” With such a pronouncement of guilt by the mayor, amongst other examples of prejudicial pretrial publicity, it is not surprising that the police officer was subsequently found guilty of second-degree murder in a Michigan state court. Federal courts granted the police officer’s petition for a writ of habeas

⁵⁹ *Younger v. Superior Court of California, County of Los Angeles*, 393 U.S. 1001 (1968). Discussed in *Sun Co. of San Bernardino v. Superior Court*, 105 Cal.Rptr. 873, 880 (Cal.App. 4 Dist. 1973); *Younger v. Smith*, 106 Cal.Rptr. 225, 229, n. 6 (Cal.App. 2 Dist. 1973); Robert S. Warren and Jeffrey M. Abell, “Free Press — Fair Trial: The ‘Gag Order,’ A California Aberration,” 45 Southern California Law Review 51, 61-62, n. 152 (1972).

corpus (which effectively gave him a new trial) because of adverse pretrial publicity. *Nevers v. Killinger*, 990 F.Supp. 844, 859, 862-63 (E.D.Mich. 1997), *aff'd*, 169 F.3d 352, 366 (6th Cir. 1999), *cert. den.*, 527 U.S. 1004 (1999).

Public statements of high government officials about guilt or innocence of criminal defendants raise difficult issues that are beyond the scope of this essay.

Freedom of Press

conflict between First and Sixth Amendments

Most attorneys consider what the U.S. Supreme Court *says*, e.g., by quoting opinions of that Court. In this area of law, it may be more important to consider what the Court has *not said*. The Court has omitted a discussion of the conflict between (1) absolute freedom of the press and (2) the right of criminal defendants to a fair trial by impartial jurors. It is obvious that there is a conflict, because when publishers and broadcasters disseminate information that prejudices the jury pool, they have severely affected the right of criminal defendants to a fair trial by impartial jurors.

Above, at page 21, I remarked that when the U.S. Supreme Court forbade judges to hold journalists in contempt,⁶⁰ none of those three cases mentioned the Sixth Amendment.

Similarly, in the landmark U.S. Supreme Court cases about pretrial publicity affecting a fair trial by impartial jurors,⁶¹ there is no explicit mention of the First Amendment, although *Sheppard* does mention freedom of the press in the following paragraphs:

The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' *In re Oliver*, 333 U.S. 257, 268, 68 S.Ct. 499, 92 L.Ed. 682 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '(w)hat transpires in the court room is public property.' *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press * * * the broadest scope that could be countenanced in an orderly society.' *Bridges v. State of California*, 314 U.S. 252, 265, 62 S.Ct. 190, 195, 86 L.Ed. 192 (1941). And where there was 'no threat or menace to the integrity of the trial,' *Craig v. Harney*, *supra*, 331 U.S. at 377, 67 S.Ct. at 1255, we have consistently required that the press have a free

⁶⁰ *Bridges v. State of California*, 314 U.S. 252, 267 (1941); *Pennkamp v. State of Florida*, 328 U.S. 331 (1946); and *Craig v. Harney*, 331 U.S. 367 (1947).

⁶¹ *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that '(l)egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' *Bridges v. State of California*, supra, 314 U.S. at 271, 62 S.Ct. at 197. And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.' *Chambers v. State of Florida*, 309 U.S. 227, 236--237, 60 S.Ct. 472, 477, 84 L.Ed. 716 (1940). 'freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' *Pennekamp v. State of Florida*, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' *Cox v. State of Louisiana*, 379 U.S. 559, 583, 85 S.Ct. 466, 471, 13 L.Ed.2d 487 (1965) (Black, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S.Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' At 312, 79 S.Ct. at 1173. Likewise, in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion * * *.

At 728, 81 S.Ct., at 1645.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson v. State of Colorado ex rel. Attorney General*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907):

The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Sheppard v. Maxwell, 384 U.S. 333, 349-351 (1966).

What really emerges from the above hodgepodge of citations and terse quotations is that the Court is avoiding honestly recognizing the conflict between the First Amendment's guarantee of a free press and the Sixth Amendment's guarantee of a trial by impartial jurors. And, without first recognizing the conflict, the Court can not resolve this conflict.

Apparently, the only other U.S. Supreme Court cases to address the conflict between the First and Sixth Amendments are *Estes v. State of Texas*, 381 U.S. 532, 539-540 (1965) and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547-558 (1976). *Nebraska Press* essentially prohibited prior restraints on publishers.⁶² In my opinion, the unwillingness of the U.S. Supreme Court to put any restrictions on news media prevents any effective solution to the problem of pretrial publicity that the Court has repeatedly — and properly — castigated.

Justice Felix Frankfurter was a lonely crusader for fair trials, even at the expense of some freedom of the press. In a case from the year 1941, in which a newspaper had published editorials that apparently attempted to influence a judge's decision, a 5-to-4 majority of the U.S. Supreme Court held that the First Amendment protected such editorials. Justice Frankfurter dissented:

The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extrajudicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive mêlée of passion and pressure. The need is great that courts be criticized but just as great that they be allowed to do their duty.

Bridges v. State of Calif., 314 U.S. 252, 283-84 (1941)(Frankfurter, J., dissenting).

Five years later, in a similar case, Justice Frankfurter concurred with the majority decision:

Without a free press there can be no free society. [footnote omitted] Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. The independence of the judiciary is no less a means to the end of a free

⁶² After reviewing the previous cases about pretrial publicity, *Nebraska Press* contains the astounding assertion that "Taken together, these cases demonstrate that pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press*, 427 U.S. at 554. If the Court means that someone who commits a criminal act is found guilty, then I agree. But isn't a fair trial about *more* than a correct result? A fair trial should be concerned with initially impartial jurors who make their decision *only* on the basis of evidence presented in court — a situation that is obviously corrupted by intense pretrial publicity.

society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor. In the noble words, penned by John Adams, of the First Constitution of Massachusetts:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. [footnote: Article XXIX of the Declaration of Rights of the Constitution of Massachusetts, 1780.]

A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

Pennekamp v. State of Florida, 328 U.S. 331, 354-55 (1946)(Frankfurter, J., concurring).

In the year 1961, Justice Frankfurter participated in a decision that gave a criminal defendant a new trial as a result of pretrial publicity.

This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system — freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Irvin v. Dowd, 366 U.S. 717, 730 (1961)(Frankfurter, J., concurring).

In honestly recognizing the conflict between the First and Sixth Amendments, Justice Jackson said:

The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit. I think this publisher passed beyond the legitimate use of press freedom and infringed the citizen's right to a calm and impartial trial. I do not think we can say that it is beyond the power of the state to exert safeguards against such interference with the course of trial as we have here.

Craig v. Harney, 331 U.S. 367, 394-95 (1947)(Jackson, J. dissenting).

In addition to Justices Frankfurter and Jackson at the U.S. Supreme Court, several opinions of the U.S. Courts of Appeals have discussed the real conflict between the First and Sixth Amendment.⁶³ At least two U.S. Courts of Appeals have explicitly held that the Sixth Amendment right to fair trial by impartial jurors is more important than the First Amendment

⁶³ See, e.g., *U.S. v. Woodley*, 751 F.2d 1008, n. 15 (9th Cir. 1985)(dicta about *Bridges v. California*); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 97 (3rd Cir. 1988); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 227-28 (7th Cir. 1993)(Judge Posner held that restrictions on speech of judicial candidates for Illinois state courts violated First Amendment).

right of a free press.⁶⁴

larger problem

The great deference that judges in the USA have given to freedom of the press has created a nearly absolute right for journalists to harm people, without the journalists being held accountable in a court. For example:

1. As shown in this essay, pretrial publicity can destroy the integrity of criminal trials.
2. Journalists often give publicity to people's private lives, thereby invading their privacy.⁶⁵ Many of the "facts" presented in pretrial publicity are little more than gossip about the defendant or victim. In my opinion, such gossip invades their right of privacy.
3. After the U.S. Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), it is extraordinarily difficult for a person to sue a journalist, newspaper, or television station for defamation, even though publication of false information truly harmed a person's reputation.
4. And the press even has the freedom to publish classified government secrets.⁶⁶

These are just four examples of how treating freedom of the press as an absolute has given irresponsible journalists a license to harm people, and ultimately to harm society. The most sensational pretrial publicity is *not* motivated by high ideals, it is motivated by money: increasing the sales of newspapers or increasing the number of television viewers, thereby attracting more advertising revenue to the publisher or broadcaster. There are good reasons for freedom of speech and freedom of press that protects journalists. But with such freedoms *should* also come fair trials with impartial jurors, freedom from invasion of privacy, and freedom from defamation.

⁶⁴ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975) ("Since the right of free speech must give way to the right of a fair trial when there is an irreconcilable conflict, the next inquiry relates to the limits of the circumscription on comment that lawyers can be required to observe consistent with their rights under the First Amendment."), *cert. den. sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *In re Globe Newspaper Co.*, 729 F.2d 47, 53 (1st Cir. 1984) ("When the rights of the accused and those of the public come irreconcilably into conflict, the accused's Sixth Amendment right to a fair trial must, as a matter of logic, take precedence over the public's First Amendment right of access to pretrial proceedings. There is little to be gained by admitting the public to pretrial proceedings in order to promote the appearance of fairness if the very presence of the public makes a fair trial impossible.").

⁶⁵ Ronald B. Standler, *Privacy Law in the USA*, (1997) <http://www.rbs2.com/privacy.htm> .

⁶⁶ *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) (U.S. Government could not prevent the *Times* from publishing a classified study of history of Vietnam War policy, commonly called the "Pentagon Papers").

Freedom of the press is declared in the First Amendment to the U.S. Constitution that also declares freedom of speech. In this analogous area of freedom of speech, it is clear that freedom of speech is *not absolute*.⁶⁷ The U.S. Supreme Court gives *political speech* the highest level of legal protection, with other forms of speech receiving either lesser protection or no protection⁶⁸. By analogy, perhaps freedom of the press should be absolute for political speech (i.e., reporting facts, opinions, or criticism about legislators, executives, judges, candidates for political office, government bureaucrats, or reporting facts, opinions, or criticism of government operations). However, perhaps publishers and broadcasters should be legally responsible for harm caused by reporting other subjects, such as creating an environment in which a person can not receive a fair trial by initially impartial jurors, invading the privacy of an individual person's life, or defamation of an individual person. Such responsibility would best be established by a statute.⁶⁹ However, because politicians in the legislature depend on favorable coverage by journalists for re-election, there is little realistic hope that such politicians would vote for legislation to limit the absolute power of publishers and broadcasters.

⁶⁷ See, e.g., Ronald B. Standler, *Information Torts*, (1998) <http://www.rbs2.com/infotort.htm> (See the list of exceptions to freedom of speech at the beginning of this essay.).

⁶⁸ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992)(Stevens, J., concurring in the judgment).

⁶⁹ Such a statute was suggested by anonymous students in Note, "Controlling Press and Radio Influences on Trials," 63 *Harvard Law Review* 840, 851-52 (March 1950). See also the remark in *Bridges v. State of Calif.*, 314 U.S. 252, 260-61 (1941)("It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. [citation omitted] ... such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation.").

Conclusion

Let me make clear that my concern is *only* with the commentary *before* a trial, which raises serious concerns about prejudicing potential jurors. In contrast, commentary in newspapers and television *during* a trial is desirable, for reasons explained above at page 3.

In the long quotations from court case in the separate document that was mentioned above at page 10, it was shown that pretrial publicity can reduce a trial, with its carefully designed rules of procedure and evidence, to a farce:

- Jurors can form opinions of guilt or innocence from reading newspapers or watching television, before the trial begins.
- Jurors can base their verdict on *unreliable*, *irrelevant*, or *unfairly* prejudicial “facts” presented in newspapers or television, instead of evidence presented in court.
- Jurors can find the criminal defendant guilty, in order to avoid scorn and ridicule from their family, friends, and neighbors whose emotions have been inflamed by sensational news coverage.

Trials are *not* a mere *pro forma* exercise. Trials are *not* entertainment for the amusement of a curious public — the result of a criminal trial can determine the remainder of a defendant’s life.

A fair trial is *more* than a correct result. A fair trial should be concerned with initially impartial jurors who make their decision *only* on the basis of evidence presented in court — a situation that is obviously corrupted by intense pretrial publicity.

In my opinion, it would be a mistake to attempt to balance the right of *millions* of people to be informed of the latest news and commentary, versus the right of *one* criminal defendant to find approximately 15 intelligent jurors (including alternate jurors) who are initially *unbiased* in his/her case. This is *not* a balance of millions vs. one. The real issue is whether we want fair trials for criminal defendants. Fair trials affect everyone in society, not just the few criminal defendants.⁷⁰ If we genuinely desire fair trials by impartial jurors, then the pretrial publicity must be limited.

Based on previous cases, one can predict the following sequence of trials and appeals in a high-profile murder case:

1. suspect tried, convicted, sentenced to die, amidst *unfair* publicity that prejudices at least some jurors who returned a unanimous verdict
2. a state Court of Appeals affirms trial court’s verdict and sentence

⁷⁰ For example, many people do not want to live in a society that executes especially heinous criminals, so those people actively urge the legislature (or appellate courts) to abolish the death penalty. Similarly, people who understand the prejudicial effect of pretrial publicity on a fair trial by impartial jurors may wish to urge the legislature or appellate courts to limit pretrial publicity.

3. the state Supreme Court refuses to hear the case
4. U.S. Supreme Court denies writ of certiorari
5. U.S. District Court may grant a writ of habeas corpus, because of pretrial publicity and because of the trial judge's refusal to issue a gag order
6. U.S. Court of Appeals affirms or denies writ of habeas corpus
7. U.S. Supreme Court denies writ of certiorari
8. If the writ of habeas corpus was affirmed, then the suspect is tried again, convicted again, and again sentenced to die by jurors who remember the vividly prejudicial pretrial publicity from the suspect's arrest through the first trial
9. a state Court of Appeals affirms the second trial court's verdict and sentence
10. the state Supreme Court again refuses to hear the case
11. U.S. Supreme Court denies writ of certiorari
12. suspect executed, approximately 12 to 20 years after crime occurred.

There is a lot wrong with this projected sequence of litigation. The USA has become the land of inflammatory pretrial publicity, injustice, and prolonged litigation. These trials and appeals are expensive: remember the taxpayer is paying not only for the judge and court personnel, but also for both the prosecution and defense attorney. Is it better for victims of crime – and their relatives and friends – to wait more than ten years for the resolution of the criminal case? Why do we allow pretrial publicity to poison the minds of potential jurors, then have numerous appeals and a possible second trial to correct avoidable defects in the first trial? I believe that a better way is to limit pretrial publicity, to avoid prejudicing potential jurors, and make the *first* trial fair, as suggested below.

my recommendations

Before the 1990s, it may have been sufficient to grant defendant's motion for a change of venue, in order to find a judge and jurors who had been *unexposed* to prejudicial publicity. Now, with nationwide distribution of news and legal commentary on cable/satellite television, and with worldwide distribution of newspapers via the Internet, such changes of venue are less likely to prevent prejudice in a courtroom. The better answer, in my opinion, is to regulate pretrial publicity *and* then sequester the jury during the entire trial when the trial is newsworthy.

1. restrictions on attorney speech should apply to *all* attorneys

This is a simple recommendation: the restrictions in ABA Model Rule 3.6 about pretrial and trial publicity should apply to *all* attorneys, not just apply to attorneys involved in the case. See the discussion above that begins at page 39.

2. restrictions on journalists, publishers, broadcasters

It is helpful to divide the timeline into three intervals, each with different restrictions on journalists, publishers, and broadcasters.

- A. **Reporting of the crime**, and also reporting requests of law enforcement for assistance from the public, but *before* the arrest of a suspect. I suggest that there should be straight news reporting of the facts, without sensational commentary.
- B. **From the time of the arrest of a suspect to the beginning of the trial**, I suggest that there be restraint by journalists, with reporting only information presented in open court, to avoid pretrial publicity that would make it difficult to find impartial jurors and have a fair trial. I suggest that pretrial suppression hearings be closed to the public and journalists, with a complete transcript made public after a jury has been sequestered or after the trial has ended.⁷¹ This interval of restraint also allows emotions to die down, which may contribute to a fairer trial.
- C. **During trial where all jurors are sequestered**, there should be almost complete freedom of speech/press.

There are already many existing Bar-Press Guidelines, and the recommendations published at 87 F.R.D. 519, that can be used for guidance. Further, the text⁷² in DR 7-107(B) and the rules⁷³ for DoJ attorneys in 28 C.F.R. § 50.2 continue to be useful. There is no need for judges, attorneys, journalists, or legislatures to start with a blank sheet of paper when designing guidelines or statutes — we already have some good guidelines that are neither obeyed nor enforced.

I suggest that state legislatures and the U.S. Congress enact two new criminal statutes:

- A. prohibit publishing or broadcasting specific types of information that is likely to either (1) prejudice the jury pool after the arrest of a suspect and before a trial begins or (2) influence a jury that is not sequestered. (The publisher or broadcaster would be fined, up to reimbursing the government for the cost of a new trial, *not* the individual journalist who writes the article.) Amongst the prohibited topics should be results of opinion polls about the guilt or innocence of a criminal suspect or defendant either (1) prior to the sequestration of the jury or (2) prior to the jury's verdict when the jurors are not sequestered.
- B. prohibit employees of law enforcement, prosecutors, and court personnel from releasing specific kinds of information to journalists or to the public. The specific kinds of information

⁷¹ See discussion above, at page 26.

⁷² Quoted above, at page 34.

⁷³ Quoted above, beginning at page 38.

should also include fruits of searches of a person's home, to protect their privacy. The other prohibited topics can be copied from either DR 7-107(B), 87 F.R.D. 519, or 28 C.F.R. § 50.2. Such statutes might parallel the existing statute that prohibits influencing or intimidating juror(s)⁷⁴ and must specifically and precisely identify which topics are prohibited speech.

3. judges and prosecutors should be appointed

Few voters have the experience and knowledge about the operation of courts and the performance of individual judges to do anything more than follow the recommendations of a local newspaper, which makes election of judges a function of newspapers, not independent thought by voters. Criticism of judges by newspapers and radio/television commentators, and the implied threat to oppose a judge's election gives the press too much influence over a judge, and can affect a fair trial.⁷⁵ To insulate judges from influence by newspapers, radio/television broadcasts, and popular opinion, it would be desirable to appoint judges, instead of elect them. Perhaps appointing judges for a five-year probationary period, followed by tenure until age 70 years, would give judges sufficient independence from popular passions.

The same remarks apply to prosecutors. Having prosecutors be elected encourages them to release pretrial information that prejudices criminal defendants, to show the voters that the prosecutor is "tough on bad criminals". I suggest appointing prosecutors for a three- to five-year term.

The election of judges was called "the greatest single evil in our judicial system."⁷⁶ A judge should ignore popular feelings and hysteria, and rule only on the basis of the law and facts proven in his/her courtroom. Appointing a judge for a long term, instead of electing a judge, insulates the judge from popular feelings.

⁷⁴ 18 U.S.C. § 1503-04.

⁷⁵ Which seems to have happened in the 1954 trial of Sam Sheppard, among many other examples. See the discussion above, beginning at page 20, about the power of judges to hold newspapers in contempt for attempting to influence the judge.

⁷⁶ Stuart H. Perry, "The Courts, The Press, And The Public," 30 Michigan Law Review 228, 235 (December 1931).

final remark

The television networks, as well as the individual attorneys who appear on television to give pretrial legal analysis, would certainly claim that they have a legal right to “freedom of speech” and “freedom of the press”, and will further claim that an enlightened public is a good thing. My personal opinion about the desirability of restricting pretrial publicity is apparently a minority view amongst attorneys. But, even if you disagree with my opinions, pretrial publicity remains a *real* problem that must not be ignored, and I hope that my presentation of the law and discussion of the problem is a useful contribution towards having fairer trials.

This document is at **www.rbs2.com/pretrial.pdf**

My most recent search for court cases on this topic was in December 2003
revised 21 Feb 2004

return to my homepage at <http://www.rbs2.com/>