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FAIR TRIAL AND FREE PRESS

HERBERT M. ANDERSON*

IN 1961 JUSTICE FRANKFURTER REMARKED IN IRVIN V. DOWD:¹

Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts . . .²

But jury prejudice resulting from inflammatory newspaper accounts is not of recent origin. In connection with sensational crimes it has long been with us. An early case illustrates the problem.³ In 1807 the United States charged with treason one of its most prominent citizens, Aaron Burr. He was brought to trial in Virginia with Chief Justice John Marshall sitting as trial judge. Of the first venire of 42 jurors, all but one indicated an unfavorable opinion of the defendant. Opinions of the defendant’s guilt were based on “newspaper publication.”

Justice Marshall clearly perceived the danger of prejudice to impartiality:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. Is there less reason to suspect him who has prejudged the case and has deliberately formed and delivered an opinion upon it? Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms

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² Id. at 730.
than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.  

Marshall's analysis of the effect of prejudice was lucid but his decision seems more influenced by a desire for prompt disposition of the case:

The opinion which has been avowed by the Court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule.  

Which prejudices of the mind are such that they will yield to the testimony and which will resist and combat the testimony? Justice Marshall does not enlighten us. May not a juror with any preconceived opinion of guilt "believe that he will be regulated by testimony," but "listen with more favor to that testimony which confirms, than to that which would change his opinion"? Such was the opinion of one juror in the Burr case where the following occurred during examination of Miles Bott, a prospective juror:

Mr. Bott—I have gone as far as to declare that Colonel Burr ought to be hanged.

Mr. Burr—Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion? Answer—Human nature is very frail. I know that the evidence ought, but it might or might not influence me. . . .

The courts continued to apply Marshall's doctrine that prejudice does not disqualify a juror if it can be supposed to yield to the testimony offered. The burden was placed on the challenger to show "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." No test was devised to determine whether an opinion was a "light impression" or "strong and deep," but by statute and rule of court it was prescribed that opinions based on newspaper publications were not ground for challenge if the juror swore that he would be fair and impartial. In Hopt v. Utah, a juror had an opinion "which it would take evidence to remove" based on newspaper reports. The Supreme Court held the juror competent on the basis of a territorial statute that no person shall be disqualified as a juror by reason of an opinion founded upon rumor or newspaper statements provided the juror states that notwithstanding such opinion he will act impartially and fairly.

The constitutionality of the statute was not challenged in Hopt, but in Spies v. Illinois, it was claimed that a similar Illinois statute was repugnant to the sixth amendment guarantee of "trial by an impartial

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5 Id. at 51.
8 120 U.S. 430 (1886).
9 123 U.S. 131 (1887).
jury.” There defendants were sentenced to death after conviction for murder resulting from a bomb thrown in the Haymarket in Chicago. The Court noted that New York, Michigan, Nebraska and Ohio had similar statutes and that the courts in many states had adopted a similar rule. Juror Denker’s examination included this testimony:

Q. You believe what you read and what you heard? A. I believe it; yes.

Q. Is that opinion such as to prevent you from rendering an impartial verdict in the case, sitting as a juror, under the testimony and the law? A. I think it is.10

Subsequently, he said that he could render an impartial verdict based on the evidence presented in court and the challenges for cause were overruled. The Supreme Court held that the statute was constitutional and that its application did not violate any constitutional rights of defendants.

The decisions in the above mentioned cases placed the burden on the challenger to show that the preconceived opinion of the juror prevented him from being impartial. Regardless of the strength of his prejudice he was not disqualified if he swore that he would lay aside his opinions or prejudice and try the case fairly and impartially upon the evidence presented in court. Similar to the question of prejudice based upon pretrial publicity is the problem created by inadmissible evidence which reaches the jury during the trial from newspaper reports or otherwise. In Holt v. United States,11 members of the jury read the Seattle daily papers with articles about the case while the trial was going on. Defendant was convicted of murder. A new trial was denied. Justice Holmes held that the granting of a new trial based on prejudice of jurors from reading news articles was within the discretion of the trial judge “except in very plain circumstances” which “the mere opportunity for prejudice” did not present.

While not expressly departing from prior rules, the Court began to take a different approach in 1959. In Marshall v. United States,12 defendant was charged with unlawfully dispensing dextro amphetamine sulfate tablets without a prescription. During defendant’s trial, reports were published in two newspapers reporting defendant’s previous felony convictions. The Court said:

We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution’s evidence.13

The case was reversed and a new trial ordered although each of the seven jurors who read the article stated he would not be influenced by the article, that he could decide the case only on the evidence of record and that he felt no prejudice against defendant as a result of the articles.

In Janko v. United States,14 a new trial

10 Id. at 170.
11 218 U.S. 245 (1910).
13 Id. at 312.
was granted when four members of the jury admitted that they had read prejudicial news articles. During the second trial a local newspaper referred to defendant as a former employee of eastside racketeer Frank (Buster) Wortman and as a former convict found guilty in the same case. After the verdict none of the jurors responded to the court's question as to whether any had been influenced by anything other than by testimony in the courtroom. In 1961 the Supreme Court reversed the conviction in a memorandum decision without opinion, apparently considering the case similar to *Marshall*.

Within a week after the *Janko* decision the Court decided *Irvin v. Dowd*,\(^{15}\) in which the court cited *Spies, Holt, and Reynolds*, for the presumption that

\[\text{It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.}\]\(^{16}\)

But the Court said that such a rule cannot foreclose inquiry as to whether in a given case the application of that rule works a deprivation of life or liberty without due process of law. Six murders had been committed in the vicinity of Evansville, Indiana between December, 1954 and March, 1955. The crimes were extensively covered by the news media in the locality and aroused great excitement and indignation throughout that county and the adjoining county. A change of venue was granted but only to the adjoining county. A second change of venue was denied. Each juror challenged indicated that notwithstanding his opinion he could render an impartial verdict. Indiana had a statute similar to the one held constitutional in *Spies v. Illinois*.\(^{17}\) Under earlier decisions the Court would have looked no further. But the earlier rules which had been undermined by *Marshall* and *Janko* were finally abandoned. The Court said

\[\text{[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. * * * With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members, admit, before hearing any testimony, to possessing a belief in his guilt.}\]\(^{18}\)

*Irvin* marked the end of the doctrine that a juror could purge himself of the effect of prejudice by declaring that despite his opinion he would try the case fairly and impartially based only upon evidence in court. Two years later in *Rideau v. Louisiana*,\(^{19}\) the Court held that in some cases denial of due process may result from prejudicial publicity even though no actual prejudice by any particular juror is shown. Rideau was arrested following a robbery and murder. The day following his arrest and for three consecutive days local television broadcast an interview between the Sheriff and Rideau which in the Supreme Court was characterized as "kangaroo court proceedings . . . presided over by a sheriff,

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\(^{16}\) *Id.* at 723.

\(^{17}\) 123 U.S. 131 (1887).

\(^{18}\) 366 U.S. at 728.

\(^{19}\) 373 U.S. 723 (1963).
where there was no lawyer to advise Rideau of his right to stand mute. The record did not indicate the effect of the publicity two months before trial. Two justices thought the defendant had not sustained the burden of showing essential unfairness. But the majority held that it was not even necessary to examine the voir dire examination of the jury to hold "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.'"

Rideau and subsequent cases established the doctrine that, at least in cases of massive and pervasive prejudicial publicity, defendant does not have the burden to show any actual prejudice as a result of such publicity. Two years later in *Estes v. Texas*, defendant's conviction for swindling was reversed as a result of televising the preliminary hearing and part of the trial. Although "no isolatable prejudice" was shown the Court held that in such a case the showing of actual prejudice is not a prerequisite to reversal.

*Sheppard v. Maxwell* likewise held that the circumstances of that case required reversal of a conviction despite the absence of any showing of actual prejudice. Finally, in that case the Supreme Court made specific suggestions designed to avoid reversals based on prejudicial publicity. The Supreme Court said that the trial court should have made some effort to control the release or leads, information, and gossip to the press by police officers, witnesses, and counsel for both sides.

The Supreme Court also said that the trial judge should have warned the newspapers to check the accuracy of their accounts, should have proscribed extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial matters; the court should have requested city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.

Finally, the Court said that collaboration between counsel and the press as to information affecting the fairness of the criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Following the directions of the last sentence, bar associations and the Judicial Conference of the United States have adopted rules designed to regulate the release of prejudicial information which may influence the outcome of a trial.

During the last decade not only the courts, but also many bar associations were giving attention to this subject. News media and media organizations likewise focused attention on this subject. Some cooperated with bar organizations, but many feared a threat to freedom of the press, and presented varying degrees of opposition. The Judicial Conference of the United States in 1964 approved proposed legislation which would have made it contempt of
court for parties or their attorneys to make available for publication information which was not filed or admitted as evidence in the case.\textsuperscript{26}

The Attorney General of the United States on April 17, 1965, promulgated rules entitled "Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings."\textsuperscript{27}

Many Massachusetts newspapers and the Massachusetts Broadcasters Association adopted the "Massachusetts Guide for the Bar and News Media" in 1963.\textsuperscript{28}


In 1964 the President's Commission on the Assassination of President Kennedy said that Oswald's right to a fair trial was seriously jeopardized by the indiscriminate reporting and recommended that representatives of the bar, law enforcement agencies and the news media work together to establish ethical standards to insure a proper balance between the rights of a free press and the right of individuals to a fair trial.\textsuperscript{30}

Later in 1964 the American Bar Association appointed its Advisory Committee on Fair Trial and Free Press to participate in its project on Minimum Standards for Criminal Justice. In December, 1966, this Committee published its 265-page report on Standards Relating to Fair Trial and Free Press. Its Final Draft was approved by the House of Delegates of the American Bar Association in February, 1968.

In February, 1965, the American Newspaper Publishing Association appointed a Special Committee on Free Press and Fair Trial. In January, 1967, it published its report entitled "Free Press and Fair Trial."

In September, 1966, the Supreme Court of the United States directed the lower courts to adopt rules to control prejudicial publicity. In \textit{Sheppard v. Maxwell}, the Court said:

\begin{quote}
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\end{quote}
The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.\textsuperscript{31}

Following the Supreme Court's directive the Judicial Conference of the United States in September, 1968, recommended that the district courts adopt rules of court to implement \textit{Sheppard v. Maxwell}.\textsuperscript{32} The first rule recommended in the Kaufman Report would prohibit lawyers from releasing information on prior criminal record; confession, admission or statement of the accused, or failure of the accused to make a statement; performance of examinations or tests or the failure to submit to examination or test; identity, testimony or credibility of prospective witnesses; possibility of plea of guilty; or any opinion as to the accused's guilt or innocence. Not precluded from announcement are identity of the accused, requests for assistance in obtaining evidence, assistance in apprehension of the accused or warning to the public of any dangers he may present.\textsuperscript{33}

\textsuperscript{31} 384 U.S. at 363.


\textsuperscript{33} The recommendation is as follows:  
\textit{It is recommended that each United States District Court adopt a rule of court regulating public discussion by attorneys of pending or imminent criminal litigation, and that this rule contain substantially the following:}

\textit{It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.}

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the
marshals, clerks, bailiffs and court reporters, from disclosing information not

victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court.

The third rule proposed would in sensational cases, permit on motion of either party, or on its own motion, a special order governing extrajudicial statements by parties and witnesses.

During the last decade the Supreme Court has viewed in a new light juror prejudice resulting from prejudicial publicity. Attempts of the legal profession to prevent

the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.


It is recommended that each United States District Court adopt a rule of court prohibiting all courthouse personnel, including among others, marshals, deputy marshals, court clerks, bailiffs and court reporters, from disclosing to any person, without authorization by the court, information relating to a pending criminal case that is not part of the public records of the court. Such a rule should specifically forbid the divulgence of information concerning argument and hearings held in chambers or otherwise outside the presence of the public.

Kaufman Report at 29.

It is recommended that each United States District Court adopt a rule of court providing in substance as follows:

In a widely publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

such prejudice at its inception have caused concern among numbers of the news media that the right to a free press may be impaired. Lawyers are well aware that no right guaranteed by the Bill of Rights is paramount. Neither the right to free press nor the right to a fair trial should be allowed to infringe upon the other. While laying down rules to prevent judicial pretrial publicity, the Supreme Court in Sheppard took care to point out that freedom of the press should not be restricted. The Medina Report, the Reardon Report and the Kaufman Report each emphasizes that freedom of the press must not in any way be restricted by the equally important right to a fair trial. Lawyers and judges fully recognize that the right to a free press and the right to a fair trial are conjunctive and not alternative.

No attempt is being made to restrict reporting of court proceedings for "what transpires in the courtroom is public property." The objective is to prevent the premature release of information which may be inadmissible at the trial and which may cause irreparable injury. While remaining on the alert, the press has by and large been cooperating. The reporting of the tragic death of Senator Robert Kennedy in 1968 is in marked contrast to the news handling at the time of the death of President Kennedy in 1963.

Many media organizations have cooperated with bar associations in formulating guidelines to assist their reporters. Crime news can be fully covered and at the same time the rights of the defendant can be protected. An example of the joint efforts of the legal profession and the news media is contained in the guidelines adopted by the Oregon News Publishers Association, Oregon Association of Broadcasters and Oregon State Bar in 1968. It is as follows:

OREGON GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION ON CRIMINAL PROCEEDINGS

It is generally appropriate to disclose or report the following:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.
2. The charge.
3. The amount of bail.
4. The identity of and biographical information concerning both complaining party and victim.
5. The identity of the investigating and arresting agency and the length of the investigation.
6. The circumstances of arrest, including time, place, resistance, pursuit and weapons used.

It is generally not appropriate to disclose for publication or to report prior to the trial the following:

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86 "This Court has, therefore, been unwilling to place any direct limitations on the freedom exercised by the news media. . . ." 384 U.S. at 350. But in State v. James Earl Ray, No. 16645, Criminal Court of Shelby County, Tennessee (1969), relying on Sheppard the trial court held in contempt a reporter who published statements by defendant's counsel and his investigator on the grounds that they had actual knowledge that the attorneys and their investigators were forbidden by order of court from making extrajudicial statements about the case. The trial court held that "all persons who aid and abet those against whom an injunction has been rendered in disobeying it, are guilty of contempt." (Sept. 30, 1968).

1. The contents of any admission or confession, or the fact that an admission or confession has been made.
2. Opinions about an arrested person’s character, guilt or innocence.
3. Opinions concerning evidence or argument in the case.
4. Statements concerning anticipated testimony or the truthfulness of prospective witnesses.
5. The results of fingerprints, polygraph examinations, ballistic tests or laboratory witnesses.
6. Precise descriptions of items seized or discovered during investigation.
7. Prior criminal charges and convictions.

PHOTOGRAPHY
1. Photographs of a suspect may be released by law enforcement personnel provided a valid law enforcement function is served. It is proper to disclose such information as may be necessary to enlist public assistance in apprehending fugitives from justice. Such disclosure may include photographs as well as records of prior arrests and convictions.
2. Law enforcement and court personnel should not prevent the photographing of defendants when they are in public places outside the courtroom. However, they should not pose the defendant.

Many bar associations throughout the country are presenting seminars for the benefit of the members of the news media to discuss recent court decisions concerning prejudicial publicity. The courts can reverse and direct a new trial if prejudicial publicity has prevented a fair trial but “reversals are but palliatives; the cure lies in our remedial measures that will prevent the prejudice at its inception.”

Knowledge concerning the nature of the material which may result in reversal will cause many members of the news media to voluntarily withhold publication of that material until the accused has had a fair trial free from such prejudicial matter. Lawyers and the bar associations should on a regular and continuing basis carry on dialogues with news media and conduct seminars for the information of reporters.

The American Bar Association’s Legal Advisory Committee on Fair Trial and Free Press under the chairmanship of Judge Edward J. Devitt of St. Paul, Minnesota, is urging bar associations and news media to jointly study the problem and agree upon guidelines which will preserve both the right to a free press and the right to a fair trial. With the cooperation of the legal profession and the news media, crime news may be appropriately reported without infringing the right to a fair trial. As Time magazine put it, “If the press and officials respond as they should, the idle gossip pieces that slur a defendant should be eliminated without real impairment of the public’s right to know.”

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39 Free Press v. Free Trial, 91 Time 64, 67 (March 1, 1968).