TRIAL BY NEWSPAPER

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THE United States has for these many years tolerated, perhaps we might rather say revelled in "trial by newspaper." But now, though not for the first time, a chorus of sober, authoritative voices are denouncing it. They seek to ride the great wave of emotion evoked by the President's murder, to rush as it were into the vacuum created by the stunned response to Oswald's execution following his "trial by newspaper." The Warren Report criticized the public authorities of Dallas for releasing to the press the evidence against Oswald.[1] It criticized the news media for exerting intense pressure for disclosure. Ironically, the situation was one in which, if ever, trial by newspaper was, if not justified, at least inevitable. It is perhaps unfair to ridicule the Commission's conclusion that "to prevent a recurrence of the unfortunate events which followed the assassination" the promulgation of a code of ethics by the newspapers "would be welcome evidence that the press had profited by the lesson of Dallas."[2] Since such an eventuality is most unlikely, it might be thought either that the Commission was not so terribly concerned to prevent a recurrence, or that in its opinion our Constitution and system of law were without resources to deal with the problem. It is more likely, however, that the Commission did not regard this matter as one of its primary concerns. Furthermore, since some of the suggested solutions could be thought to raise constitutional queries, the presence of the Chief Justice made serious consideration of the problem impossible.

We use the term "trial by newspaper" as a shorthand for the variety of means whereby all sorts of information germane to a criminal case is published prior to or pending the trial. The information may come from the police or the prosecution; it may be uncovered by reportorial diligence. Confessions, which may or may not be admissible at the trial, other evidence bearing directly on guilt, prior convictions, disreputable associations and activities, comment and opinion: these will be fed to the casual public from which the trial jury is to be drawn. The English judiciary

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1. Report of the President's Commission on the Assassination of President Kennedy, ch. V (1964) [hereinafter Report].

2. Report at 242. "Journalistic codes of ethics are all moonshine." H. L. Mencken, quoted by Mr. Justice Frankfurter, concurring, in Pennekamp v. Florida, 328 U.S. 331, 365, n.13 (1946).

has long since characterized any such publication after arrest as criminal contempt.[3] A wall of silence is thrown up around the accused. The motivation is not solely protection of the accused. The exclusive sovereignty of the judicial trial itself, whether criminal or civil, is protected from any competing attempt to canvass the merits in another forum. In so far as the purpose is protection of the accused, there is one serious breach in this wall of silence. A statute entitles the press to report but not to comment upon the preliminary proceedings before the committing magistrate.[4] In this way the prosecution is able to reach the public's ear prior to the trial by the publication of evidence both admissible and inadmissible. There are currently proposals for closing this breach in the wall and thus reestablishing the pre-existing judge-made rule which excluded all reporting except of the trial itself.

I

The Contempt Cases

What accounts for the striking difference between the English and American law? It is usual to fasten responsibility upon the Supreme Court. There is some justification for this, but I suggest that the Court's decisions are themselves an effect of antecedent causes, an effect of popular notions of the trial and the judicial process which differ substantially from those prevalent in England. The Supreme Court, in a series of cases beginning with *Bridges v. California* and *Times-Mirror Co. v. Superior Court*,[5] has licensed the press to criticize and abuse judges engaged in the decision of lawsuits. In the *Los Angeles Times* case a judge had pending a motion to grant probation to two convicted labor union members. In an editorial captioned, "Probation for Gorillas?" the *Times* said: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill." In *Bridges*, Harry Bridges, president of the Longshoremen's Union, published a telegram which he had sent to the Secretary of Labor giving notice that if the judge in a pending suit against the Union decided it unfavorably to the Union there would be a coastwide strike. The later cases of *Pennekamp v. Florida*[6] and *Craig v. Harney*[7] drove home by word and deed the lesson of the earlier cases. In *Craig* a plaintiff

3. King v. Parke, [1903] 2 K.B. 432.
4. Law of Libel Amendment Act of 1888, 51 & 52 Vict., c. 64, § 3.
5. 314 U.S. 252 (1941).
6. 328 U.S. 331 (1946).
7. 331 U.S. 367 (1947).

landowner sought to recover from his tenant (a soldier away on service) premises being operated as the "Playboy Cafe." The case was being tried before an elected lay judge. The judge had forced the jury to return a directed verdict for the plaintiff. A motion for new trial was pending. A newspaper owned in common with the other two newspapers in the area ran an editorial characterizing the judge's conduct as "high handed," a "travesty of justice." The serviceman "seems to be getting a raw deal"; public opinion was rightly "outraged." In each of these cases the writer was punished for contempt and in each case a majority of the Supreme Court held that the defendants had suffered a deprivation of their right to free speech.

The premises of *Bridges* and its progeny are not entirely clear. None of the judges in *Bridges* appears to deny that, at least in a general way, a fair trial requires a determination free from extra-record influence but the later cases and much that is said in all of the cases may, despite assertions to the contrary, imply an acceptance, even an encouragement, of trial by public opinion. Much of the emphasis of Mr. Justice Black's opinion in *Bridges* is on the illegitimacy of the contempt power as a means of control:

> It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v. Connecticut*, . . . such a "declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature."[8]

The Justice seems at one point to concede that the contempt power could be used were it demonstrable that the utterance constituted a "clear and present danger";[9] in neither *Bridges* nor *Los Angeles Times* does the publication "threaten to change the nature of legal trials." But in his query whether "to preserve judicial impartiality, it is necessary for judges to have a contempt power . . ."[10] there is the suggestion that the contempt power (because of the generality of its threat to free speech) may never be used to protect the trial from the pressures of extra-record publication. Were a statute to prohibit certain classes of utterance presumably the vice—at least of generality—would be cured.

8. 314 U.S. at 260.
9. Id. at 261, 271.
10. Id. at 271.

What classes of utterance might be thus prohibited we shall consider at a later point.

But the tone and verbiage of later pronouncements by Justices Reed and Douglas may go beyond *Bridges* to assert the inevitability, even the positive democratic values in trial by public opinion. In *Pennekamp v. Florida* Justice Reed tells us:

> The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. . . . Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage . . . .
>
> The desire to placate the accusing newspaper to retain public esteem [assumes] . . . . a judge of less than ordinary fortitude.[11]

The assumptions, some stated, some unspoken, of these remarks are clear, startlingly clear. The judges are elected officials; as such they are to be criticized. If a judge has "less than ordinary fortitude," less than adequate "moral courage," is "sensitive" to pressure, he cannot complain of the law's refusal to protect him. So much is stated. What clearly follows though unstated, is that neither can the litigant who must put up with the "sensitive" judge complain; he must get his justice as best he can from his fellow citizens.

In *Craig v. Harney* Mr. Justice Douglas intensifies the thrust of *Pennekamp*:

> [The attack on the judge] must . . . be appraised in light of the community environment which prevailed at that time. The fact that the jury was recalcitrant and balked, the fact that it acted under coercion and contrary to its conscience and said so were some index of popular opinion. A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for *the protection of judges* who may be sensitive to the winds of public opinion [nor, it would seem, for the protection of litigants whose rights are in the hands of such a judge].[12]

And referring to the editorials he concludes:

"That is legitimate comment; and its relevancy could hardly be denied *at least where the judges are elected.*"[13]

These remarks can be parsed as not necessarily endorsing trial by public opinion. The relevancy of the editorials can be taken as going not to the judge's decision but to his selection. If

11. 328 U.S. at 348-49.
12. 331 U.S. at 376. (Emphasis added.)
13. 331 U.S. at 376-77. (Emphasis added.)

the judge has the requisite fortitude he will resist the pressure; if not? That no doubt is the price we—the litigants?—pay for a democratically elected or politically appointed judiciary. The words seem to imply that the price will not be great because elected judges, even lay judges will for the most part be men of courage and fortitude not "sensitive to the winds of public opinion" [even "relevant" opinion?]. But as Mr. Justice Frankfurter notes in dissent[14] this assumption goes sharply contrary to the current—the fashionable, perhaps even too fashionable—notion which emphasizes sensitivity to opinion and criticism. Even the subtle need to make a show of resisting criticism, the Justice shrewdly notes, may embarrass the judge and block free reconsideration—as where in *Craig v. Harney* there is a motion for a new trial. Let it be supposed that a Southern judge has under consideration in a case of rape by a negro of a white woman a motion to exclude a confession, and the local newspaper cries out for the protection of Southern womanhood from negro pollution. Would the Supreme Court indulge the assumption on which *Craig v. Harney* pretends to rest? Might not the Court be found citing the sardonic comments of Mr. Justice Jackson in *Craig v. Harney*:

> I do not know whether it is the view of the Court that a judge must be thickskinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame—a good public name—is, as Milton said, the "last infirmity of noble mind," it is frequently the first infirmity of a mediocre one.[15]

But if I question the psychological assumptions on which *Craig v. Harney* purports to rest, I do not thereby mean ipso facto to reject the decision. It seems to me that we must postulate the case and evaluate it, as sanctioning at least within limits trial by public opinion. In my reading, the Court is saying that the English concept of the judiciary—a judiciary untouchable by public opinion, an untouchability to be vigorously asserted—is inapplicable to our politically oriented judiciary. The English judiciary originally was a facet of the King's Majesty. Criticism was lese majesty. Something of that history may still inform one of the rigor with which the English courts suppress extra-judicial influences. On the other hand the stress of the later independence of the English judiciary was on freedom from executive pressure. The very heart of England's famed justice was the subject's guar-

14. 331 U.S. at 384.
15. Id. at 396 (Jackson, J., dissenting).

antee of a trial by judges whose sole allegiance was to the law. Both to protect and to symbolize this majestic insulation of the Chamber of Justice the judges were permitted to use their well-developed powers of contempt.[16] And because the judges of the High Court were so invested with sanctity it became accepted that only lawyers of the highest learning and of unimpeachable character were to be chosen as judges.

How different are the premises expressed by our judiciary! And the difference is capped when as in *Craig v. Harney* the judge is not even a lawyer! The judge may be in office as a consequence of political forces which have prevailed over other forces competing in an American election. One must not, of course, overstate the coherence of the forces and interests competing in an American election. Characteristically they are loose, shifting federations of groups whose interests are not basically divergent. But there are differences of degree. There will be cliques, alliances, interests which may seek to overreach through the processes of the law.

Furthermore, American lawyers in the schools and on the bench, at least those of a "liberal" persuasion are more and more committed to an "activist," progressive role for the judge. Arguably the acceptance or rejection of this role by judges may align them with the political forces in the community when candidates for election or reelection or for appointment. In *Craig v. Harney* Mr. Justice Douglas would appear to be saying that when an elected judge defies an aroused public opinion, at least an opinion plausibly speaking in the name of justice, its voice should be heard in the judicial process.[17] The cure for politics is more politics! Where does the theory lead? In the society of the South riven by deep social cleavage, with the organs of opinion controlled by a dominant group insensately committed to the maintenance of ancient injustice it would be appropriate, would it not, for dominant opinion to warn the judge who is wavering? If, as we suspect, the authors of the theory would instinctively recoil

16. See Regina v. Balfour, 11 T.L.R. 492, 493 (Q.B. 1895): "It was not because the comments might damage the accused person that the Court would interfere, but on a broader and higher ground—namely, that it was the province of the tribunal before whom the charge was tried to determine as to his guilt or innocence."

17. "Judges who stand for re-election must run on their records. That may be a rugged environment. Criticism is expected." 331 U.S. at 377. Cf. Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.): "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." Mr. Justice Douglas is careful to claim the newspaper made no threat to oppose the trial judge if he did not reverse his decision on the merits and only attacked the court's procedures.

from this application of it, let us not forget that the theory would equally license warnings from newspapers in the North. It might indeed sanction a public announcement by the President, our Chief Magistrate, that certain members of the Ku Klux Klan should be promptly brought to justice.[18]

Is this then on balance The Way? Do the very facts: deep social divisions, aroused passions, judges intensely committed, inexorably bring the trial into the public arena?[19] If we would honestly face this question, let us not state the alternatives too absolutely. There are devices for mitigating excess. Even Douglas appears to admit the possibility that some publications may be penalized[20] (though what they would be, or whether in any case punishable as contempt is not clear). More important is the possibility of setting aside a verdict in a trial overawed by public opinion. This device would become difficult to work if in deciding the legality of a publication we presumed that it did not overawe the judge or jury and in deciding whether a verdict should stand we presumed that it did. That dilemma must somehow be faced and resolved.

Finally we must reckon with the startling and disturbing action of the Court in *Maryland v. Baltimore Radio Show*.[21] A Maryland trial court had adjudged a radio station in contempt for broadcasting news of the arrest, confession and past criminal record of a negro accused of the sensational murder of an eleven year old white girl. The broadcast contained a confession to a prior rape of a white woman.[22] Because of the broadcast, counsel for the accused felt compelled to waive a jury trial. The Maryland Court of Appeals held that the broadcast was protected by *Bridges*, *Pennekamp* and *Harney*. The Supreme Court refused to take certiorari! Mr. Justice Frankfurter's shock was so great

18. Transcript of Statement by President Johnson on Television, Friday, March 26, 1965, in N.Y. Times, March 27, 1965, p. 11, col. 5: "Arrests were made a few minutes ago of four Ku Klux Klan members in Birmingham, Alabama, charging them with conspiring to violate the civil rights of the murdered woman. . . . The identities of the men charged with this heinous crime are as follows . . . ." The President, after further identifying the accused as members of the Klan, called on other members to get out and classed the remaining members as enemies of justice who attacked at night and were not loyal to the United States. He ended by calling for a congressional investigation and legislation outlawing the Klan.

To be sure, this statement was made prior to indictment or trial, but in England this could be contempt.

19. Dean Griswold, in response to this passage, says that one way to reduce the political character of judges is precisely to forbid or discourage newspaper pressure.

20. 331 U.S. at 373.

21. 338 U.S. 912 (1950).

22. 193 Md. 300, 67 A.2d 497 (1949).

that he wrote an opinion carefully pointing out that a refusal to grant certiorari was not equivalent to an affirmance.

To the argument that the earlier authorities assumed that a judge of normal caliber could resist influence whereas no such assumption was valid for a jury, the majority of the Maryland court, with a reverse twist replied: "The distinction is hardly tenable. Judges are not so 'angelic' as to render them immune to human influences calculated to affect the rest of mankind."[23] The court could find no "clear and present danger." There was no direct evidence of prejudice, or of a deliberate attempt to influence the outcome. The court assumed that the publication was not so prejudicial as to have required setting aside the verdict whether tried by a jury or, as it was tried, by a judge. If it were not prejudicial then a fortiori it was not contempt. Under the English law, of course, it would have been contempt regardless of its actual effect on the outcome.[24] But the Maryland court correctly reads, I think, the decisions to require less to set aside a verdict than to convict of contempt (assuming any scope at all for contempt). It is indeed this possibility of the vulnerability of a verdict to conduct that may not itself be subject to direct control by law which constitutes the prime problem of *Baltimore Radio Show*.

But must we accept the Maryland court's position that *Baltimore Radio Show* is compelled by *Bridges* et al.? The doctrine of those cases, as we have seen, may rest on the purposes served by licensing speech in that type of situation. The most obvious distinction is the one rejected by the Maryland court, that the jury is less able than the judge to resist extra-record influences.[25] The Maryland court doubted that this was so. Paradoxically *Craig v. Harney* seems to license the publication precisely because it was directed to the judge and was intended to affect his action![26] The opinions underlined the value of criticism of an

23. Id. at 325, 67 A.2d at 508.

24. See Regina v. Odhams Press, Ltd., [1957] 1 Q.B. 73.

25. In Wood v. Georgia, 370 U.S. 375 (1962) (5-2 decision), a sheriff violently criticized a judge (who held him in contempt) for empanelling a grand jury to investigate whether the Negro vote had been bought. The sheriff, who was a candidate in a coming election, distributed his criticism in the form of an open letter to the Grand Jury. In holding that the sheriff's right of free speech was infringed the Court said: "we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither Bridges, Pennekamp, nor Harney involved a trial by jury." Id. at 389. The Court emphasized the political character of a grand jury investigation "into a matter touching each member of the community." Id. at 390.

26. "If the point had been made in a petition for rehearing, and reduced to lawyer's language, it would be of trifling consequence. The fact that it was put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to elevate it to the criminal level." 331 U.S. at 377.

elected officialdom of which the judges were a part. Are similar or related values involved in publishing a confession, the accused's record of prior criminality, and other matters bearing on the defendant's guilt and his general merit? The intention of the publication may be no more than to provide news, and if the intention is to create opinion adverse to the accused this objective, it can be argued, has less bearing on the conduct of affairs than does criticism of elected officials. Thus (a) the function served by the publication is not as politically significant and (b) the publication is potentially more prejudicial because of its character and because it is addressed to the jury, a body arguably less sophisticated than the judge. There is, however, at least an argument that pre-trial and particularly, though not exclusively, pre-arrest publication may have a legitimate political value (even though on balance we may not think the value sufficient to overcome the potential of prejudice). The publication may provide a basis, even though not designed for that purpose, on which to build up pressure against prosecutory and judicial officials who are failing to enforce the law by procuring indictments or by zealously prosecuting indicted persons.[27] The point is exemplified by the present reluctance of Southern authorities to prosecute persons suspected of or held for the killing of civil rights demonstrators. Northern newspapers, even the President as we have noted—and some southerners—have demanded prosecution. The situation is one that provides an argument for those who would license publication. The general occasion is one in which the public has a legitimate concern, and the threat to a fair trial in this particular situation (*i.e.* in the South) is probably zero, given the judges and juries which will try the defendants. This instance exemplifies one more relevant distinction between the English and American situation as it affects notions both of contempt and of permissible publication. Not only does the English law assume an independent, learned judiciary of impeccable prestige, but a disinterested, honest, well-trained police and prosecutory force. These conditions reflect, in turn, a society so constituted as not to put excessive strain on the due and regular administration of justice.

If we, as lawyers, are shocked or at least distressed by the refusal of the Supreme Court to take certiorari in *Baltimore Radio Show,* it is because of the confusion in our law which it exemplifies, and the abdication of responsibility in the face of that confusion. On the other hand, if we are to excuse the Court's

27. This seems to have been the purpose in Pennekamp. The long delay in arresting Dr. Shepard may also justify some of the publicity in that case. See Shepard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), rev'd, No. 16077, 6th Cir., May 5, 1965.

performance we can point to the difficulty of the problem. It had become clear that there was no ready-made solution. Mr. Justice Frankfurter might have come nearest to accepting the English solution.[28] He would allow the judges to punish as contempt, publications which presumptively would suffice to imperil a verdict, thus establishing a symmetry in the standard for contempt and the standard for a fair trial.[29] This test would give somewhat greater freedom to publication than did the English solution with its nearly complete suppression of publication. What Mr. Justice Black would permit to be published was less clear than was his hostility to the use of the contempt process as an instrument of control.[30] Mr. Justice Douglas had gone furthest in presenting positive arguments for freedom of publication, arguments based on the political involvement of the sitting judge. Once one embraces the proposition that some aspects of a specific legal controversy, civil or criminal, are legitimate subjects of public discussion, he must decide where to draw the line or whether to draw any line whatever. With judges so devoted as Justices Black and Douglas to unlimited freedom of speech and, at the same time to traditional notions of a fair trial, that task may be singularly difficult and unpleasant. They might hope that time would further mature their views or create circumstances which would simplify the task. In the meantime publication would continue to enjoy the freedom which had become traditional in this country, and other ways to assure fair trial would be explored.

II

Fairness of Trial by Publication

In the year following *Baltimore Radio Show* the Court had before it *Shepherd v. Florida*,[31] a verdict against negroes for rape of a white girl. A newspaper had published a confession which was not introduced at the trial. The defendants had been threatened with lynching; it had been necessary to call on the National Guard to protect other negroes whose homes had been burned and who had been forced to flee. Jackson, joined by Frankfurter, would have reversed for lack of a fair trial: "the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."[32] But the Court

28. See his appendix of English cases bearing on the subject in Maryland v. Baltimore Radio Show, 338 U.S. 912, 921 (1950).

29. Irwin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring).

30. This was also the position of Mr. Justice Murphy. Craig v. Harney, 331 U.S. 367, 383 (1947) (concurring opinion).

31. 341 U.S. 50 (1951).

32. Id. at 51 (Jackson, J., concurring).

reversed for discrimination in the selection of the jury. Next year the Court, this time affirming a death penalty, again refused to hold that pre-trial publicity had unconstitutionally prejudiced the defendant.[33] Considerable publicity had surrounded a widespread manhunt for the killer of a six year old girl. Upon arrest the defendant was stated to have confessed to the killing and to sexual activities with other children. He was called by the press a "werewolf," a "sex-mad killer." The confession became public when it was introduced four days later at the preliminary hearing. The trial began six weeks after the arrest with only occasional publicity in the interim. Mr. Justice Frankfurter dissented because of the active participation of the prosecutor in releasing the confession even while it was still being made.[34] Once again, in 1956, a claim of unfair trial failed.[35] The issue was raised by a habeas corpus proceeding three years after conviction. There had been no motions either for continuance or change of venue. The mere fact of some community prejudice was held not to be fatal: "There is nothing in the record to show, as a 'demonstrable reality,' that petitioner was denied due process of law because of community hysteria and prejudice."[36]

Marshall v. United States,[37] in 1959, may herald a shift in view, but since it was a federal trial, the holding was attributed to federal criminal law concepts under the Court's supervisory powers.[38] Seven jurors during the trial saw newspapers containing news of prior convictions which the judge had excluded. The judge after interviewing jurors concluded that there was no prejudice. The Court reversed per curiam:

> 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 part of the prosecution's evidence. . . . It may indeed be greater for it is then not tempered by protective procedures.[39]

In 1961 we have the important case of *Irwin v. Dowd*.[40] The

33. Strable v. California, 343 U.S. 181 (1952).

34. Id. at 201; see Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). The case was a prosecution of a Collector of Internal Revenue for corruption. There had been extensive publicity from congressional hearings. It was held an error to refuse continuance because of the Government's participation, even though it was not foreseeable that publicity would die down before the election nine months thereafter.

35. Darcy v. Handy, 351 U.S. 454 (1956).

36. Id. at 464.

37. 360 U.S. 310 (1959).

38. See Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (Clark & Harlan, JJ., dissenting); Shepard v. Maxwell, No. 16077, 6th Cir., May 5, 1965.

39. 360 U.S. at 312-13. Mr. Justice Black dissented in this case.

40. 366 U.S. 717 (1961).

case came up on habeas corpus. The Court first announced the traditional rule that the mere existence of preconceived notions of guilt did not suffice to rebut the presumption of a juror's impartiality. But the Court finds in the voir dire itself clear and convincing evidence of fatal prejudice.[41] The voir dire was 2,783 pages. It took four weeks to select the jury from a panel of 430. Ninety per cent of those examined entertained some opinion as to guilt. Two hundred sixty-eight persons had to be excused because of fixed opinions of guilt and eight of the twelve jurors, although claiming not to have fixed opinions, thought he was guilty. Mr. Justice Frankfurter, concurring, noted once more that the Court had not yet foreclosed the possibility of punishing the newspapers for "poisoning" jurors' minds.[42] In the same year, 1961, in *Janko v. United States*,[43] the Court once more set aside a verdict, this time in a federal trial. This was the second jury trial for income tax evasion, the verdict of the first having been set aside because of publicity. The jurors were warned before, during, and after the trial not to read the newspapers. The newspapers and the radio published accounts of former convictions, including the prior conviction in this case. The judge asked the jurors if they had been influenced by any outside pressure. They said "no," though they were not specifically asked, the court of appeals noted, whether they had heard the offending radio or read the newspapers.

In *Beck v. Washington*[44] the defendant failed to show prejudice in a case where publicity had not been extensive immediately before the trial and on the voir dire only fourteen out of fifty-two veniremen admitted bias or an opinion. But the majority of the Court in *Rideau v. Louisiana*[45] held that the refusal of a change of venue had violated due process. Petitioner was arrested after a bank robbery, kidnapping and murder. He confessed. The next morning he was "interviewed" for twenty minutes by the sheriff and repeated his confession. This interview was filmed and shown on TV three times. The trial was two months later. The confession but not the interview was introduced into evidence. Three members of the jury had seen the interview. Justices Clark and Harlan, dissenting, remarked on the Court's failure to examine the voir dire before concluding that there had been prejudice: "It is an

41. Id. at 727.
42. Id. at 730.
43. 366 U.S. 716 (1961), reversing per curiam, 281 F.2d 156 (8th Cir. 1960). Mr. Justice Frankfurter explains the reversal in Irwin v. Dowd, 366 U.S. 717, 730 (1961).
44. 369 U.S. 541 (1962).
45. 373 U.S. 723 (1963).

impossible standard to require [the] tribunal to be a laboratory completely sterilized and freed from any external factors."[46] They would have reversed if the trial had been a federal one because of police participation but did not think that the error reached constitutional dimensions.

The recent case of *Turner v. Louisiana*[47] is significant, if at all, only for its rationale. Two sheriff's deputies who were the principal witnesses against the defendant in a murder trial were also custodians of the jury and in that capacity associated with them (including taking dinner together) for three days. In reversing the Court said:

> The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . .
>
> [T]he *potentialities* of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality.[48]

I would conclude that the decisions to date have not as yet made clear what lines the Supreme Court will follow, though the evidence may suggest a trend. In the fifteen years since *Baltimore Radio Show* five cases have come up from the States, two from federal trial courts. In three, *Stroble* (1952), *Darcy* (1956), and *Beck* (1962), the claim was rejected; in the two other state cases, *Dowd* (1961) and *Rideau* (1963), and the two federal cases, *Marshall* (1959) and *Janko* (1961), the claim was upheld. Thus, the four cases setting aside the verdict were decided between 1959 and 1963. *Dowd* was a case in which the voir dire demonstrated a massive indoctrination of the panel; in *Rideau* the defendant was shown three times on TV confessing, though the confession was put in evidence; the holding was that refusal to grant a change of venue was error. But whereas in *Dowd* the voir dire was relied on to demonstrate prejudice, in *Rideau* the Court did not consult the voir dire to rebut the evidence of prejudice. *Marshall* and *Janko*, the two federal cases, go furthest. In *Marshall* jurors read accounts of past convictions during the trial

46. Id. at 733. Not only did the Court not examine the voir dire, it said that due process required "a jury drawn from a community of people who had not seen or heard Rideau's televised 'interviews.'" Id. at 727. In Beck no individual juror had been shown to be biased. 369 U.S. at 555. Rideau was a capital case, Beck a conviction for grand larceny from a union.

47. 379 U.S. 466 (1965).

48. Id. at 472-73. (Emphasis added.) In Shepard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), the petitioner was released on habeas corpus some years after conviction of murder because of enormous publicity prior to trial, indeed much of it prior to arrest.

and upon questioning satisfied the judge that they had not been prejudiced; in *Janko* a second verdict was set aside where jurors during the trial read and heard newspaper and radio accounts of prior convictions, including an account of the setting aside of the first verdict on similar grounds. The jurors had answered generally that they had not been prejudiced, but they were not asked specifically as to their reading and listening.[49] Only *Beck* (1962), of the cases in this period, indicates that publicity will not per se invalidate the trial.

III

The Search for a Solution

We are now in a position to ask to what extent the fairness of trials should be assured by prohibition of publication or by the suppression of information at the source, and to what extent that objective should be achieved by other means. It has already been made clear that the English solution will not be approved by the Supreme Court. I, like many lawyers, was shocked by *Bridges* and its progeny and would initially have contended for the English rule. However, I now see that it may rest on premises concerning the administration of justice very different from those prevailing here, and that freedom to discuss and report pending cases may serve several valid purposes.[50] Therefore, the degree of protection afforded by the completely insulated trial must be foregone, if the State is to be permitted to try accused persons.

Let us first explore the possibilities of protection which do not rely on any suppression of publicity whatever. Where there is publicity prior to trial, we may resort to change of venue. This, however, may involve great inconvenience to both parties and a sacrifice of the traditional right of the accused to trial in the vicinage, and in many cases it may not be possible to find a prejudice-free jury. There is, also, conscientious use of the voir dire. This will not save the verdict in a case like *Dowd* where a wide

49. In Atlanta Newspapers, Inc. v. State, 216 Ga. 399, 116 S.E.2d 580 (1960), a mistrial was declared because of publication by the defendant newspaper during the trial. After the mistrial the defendant's agents were in the court room and interrogated the jurors; of the 150 jurors thereafter drawn, only seventeen remained unexamined and many were disqualified because of bias due to reading the articles. The Court reversed a conviction of contempt because the newspaper was entitled to believe that the jury would be "kept together" during the trial or "otherwise properly instructed upon being permitted to disperse." [!]

50. "[T]he press is now the nervous system of the community. In a modern society the public needs to learn not only the bare facts of important events but also their significance. This need cannot be adequately met if the press is barred from expressing opinions about an outstanding class of important events, namely proceedings in the courts." 1 Chafee, Government and Mass Communication 432-33 (1947).

public had become saturated with a sense of the defendant's guilt—and, of course, Oswald's case would be similar. But it may make possible a successful trial (successful, that is, from the State's point of view) where publicity has been no more than "normal"—if we can assume such a norm. But will it be "fair" to the accused?

In the recent case of *State v. Van Duyne*[51] the newspapers had printed confessions and accounts of prior criminality. Some of the veniremen had read the accounts. Some had not. The New Jersey Supreme Court—a very conscientious, careful and "liberal" court—at the same time that it announced rules forbidding police officers, prosecutory and defendant counsel to release information —upheld the verdict:

> [D]efendant does not point to any facts or inferences appearing in the *voir dire* examination of the jurors respecting the unfavorable and unproved newspaper statements which would justify finding the trial court erred in accepting their disavowal of prejudice against the defendant. But he does express grave doubt that jurors who are subjected to pretrial publicity seriously adverse to a defendant's interests can efface it altogether from their conscious and unconscious minds . . . . The law must be sympathetic to that viewpoint, and must make the sympathy meaningful in a practical world of public trials. . . . If, in spite of the disavowal, the trial court has any lingering doubt about the jurors' capacity for impartiality, he should be excused from service. Moreover, since the demands of due process under the Federal Constitution, as well as Article I, Paragraph 10 of the New Jersey Constitution, require that the defendant in a criminal prosecution be given a fair trial by an impartial jury, an appellate tribunal is likewise under a duty to make an independent evaluation of the facts . . . .[52]

If the Supreme Court of the United States is willing to administer its doctrine in this spirit—whether it is willing it is still too early to say—it might, arguably, be possible to control the effects of publication by case-to-case discrimination without resort to the control of publication. Justice Clark stated (dissenting in *Rideau*): "[I]t is an impossible standard to require . . . [the] tribunal to be a laboratory, completely sterilized and freed from any external factors."[53] The implication is that some amount of "prejudice" or preconception one way or the other depending on the direction of public opinion is inevitable and perhaps not intolerable. *Bridges* seems to teach that in the administration of justice some risk of persuasion by outside influence will be tolerated. But as we have suggested *Bridges* et al. may

51. 43 N.J. 369, 204 A.2d 841 (1964).
52. Id. at 385-86, 204 A.2d at 850.
53. 373 U.S. at 733.

not warrant the rather special risks consequent upon jury awareness of an illegally obtained confession, and the risks—somewhat less in my opinion—of knowledge of the defendant's criminal career. It may be, however, that if a jury is solemnly chosen and solemnly admonished and if the evidence of guilt is *compelling*, the cutting edge of prejudice may be blunted. I am aware that in considering the constitutional propriety of procedure, the strength of the case against the defendant appears to be thought irrelevant. However, where the fairness of a trial depends on the "prejudicial effect" of publication, *i.e.*, depends on *non-official* conduct dehors the trial, the strength of the evidence against the defendant may be relevant.[54] This may appear more convincing if we put it conversely: if the defendant has been convicted on weak or questionable evidence, the conviction may be attributable to preconception based on extra-record knowledge of an incompetent confession or earlier criminal proclivity.

May not legitimate conviction take the place of random preconception? How many of us indeed who read the newspapers read with attention to detail or remember with any circumstantiality the daily grist of crime news? If some weeks or months later we were to become a sworn juror sitting in solemn trial might not the precision, the vividness of viva voce evidence blot out vague memories of earlier newspaper reading? In short, goes the argument at this point, in the "run of the mill" case, the adverse effects of *pre-trial* publicity can be substantially countered by the procedures and verities of the trial itself. Only the *Irwin v. Dowd* verdict will not stand. Thus, arguably, the "problem" could be solved without any suppression of publication. There is, I think, strength in this argument with the possible exception of the suppressed confession. Where the evidence admits of a reasonable doubt, knowledge of a suppressed confession is likely to remove the doubt.

The currently favored solution, officially proclaimed by the New Jersey Supreme Court in the *Van Duyne* case, adopted by the Philadelphia Bar Association,[55] proposed in a bill introduced by Senator Morse,[56] and endorsed by Dean Griswold[57]—is to shut the mouths of the police, the prosecutor and the defendant's attorney. Such conduct by attorneys in the formula of the New Jersey Court would constitute a violation of the Canons of Pro-

54. See Kamisar, The Right to Counsel, 61 Mich. L. Rev. 219, 238 (1962); Fahy v. Connecticut, 375 U.S. 85 (1963).

55. Broadcasting, Jan. 4, 1965, p. 49.

56. S. 290, 89th Cong., 1st Sess. (1965).

57. Griswold, Responsibility of the Legal Profession, Harvard Today, Jan. 1965, p. 9.

fessional Ethics. Such conduct by police officers would "constitute conduct unbecoming a public officer." As such, it warrants "discipline at the hands of the proper authorities." Under the Morse Bill all such conduct would constitute a "contempt of court."

These proposals are obviously designed to avoid both the constitutional and policy objections to direct interference with the freedom of the press. It is thought that the attorneys on both sides are subject to control as "officers of the court."[58] As to police officers we know that government officials—at least civil servants if not elected officers—may be muzzled where the citizen cannot be. But will his superiors discipline a police officer for leaking to the press? Some may, some may not. Would Mr. Justice Black tolerate the use of the contempt power against him? Possibly, since the object of the power and the conduct prohibited is at least well defined, and even if Justice Black would not, a majority of the Justices might. However, it is not clear that defense attorneys can be prevented from appealing to public opinion. "The right of the State to a fair trial," says the New Jersey court, "cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue . . . ."[59] But *In re Sawyer*[60] at least raises a doubt whether this is so. Sawyer was defense counsel in a Smith Act case. During the trial she addressed a large left-wing rally. She attacked the entire Smith Act apparatus including the impartiality of its judicial administration. The trial judge found that she had "impugned" him. A majority of the Court with mystifying myopia found no evidence of an attack on the particular judge. But, of course, the predominant use of these devices is to muzzle not defense counsel but police and prosecutor. There is strong professional support for this solution. However, in addition to the police, prosecutors and newspapers a few others have protested. Chief Justice Bell of Pennsylvania warned that "the public would be unaware of crime conditions" and "would be unprepared to defend themselves or compel officials to take appropriate measures to correct the appalling situation."[61] And Justice Musmanno of the same court

58. Compare Wood v. Georgia, 370 U.S. 375 (1962), with United Public Workers v. Mitchell, 330 U.S. 75 (1947).

59. 43 N.J. at 389, 204 A.2d at 852.

60. 360 U.S. 602 (1959) (5-4 decision). See also Cammer v. United States, 350 U.S. 399 (1956), which, while rightly holding as a matter of statutory interpretation that an attorney is not an "officer of the court" subject to punishment for contempt under 18 U.S.C. § 401, for conduct not in the presence of the court, contains broad language that such control left in a judge's discretion would be undesirable.

61. Broadcasting, Jan. 4, 1965, p. 49.

said: "Curbing crime news is like recommending that no one will talk about cancer on the theory that silence will cause cancer somehow to disappear."[62] We have argued that pre-trial or at least pre-arrest publicity may serve valid purposes, particularly where the prosecutory officials are failing to enforce the law. Where, however, the police themselves release material, the uses of publicity are questionable. In some situations—perhaps the Oswald case could be a prime example—the public's interest and concern may warrant publicity even at the risk of prejudice; in any case the pressure there for publicity was and again would be nearly irresistible. But the usual motivations for the release of information weigh less in the scale than the prejudice inflicted on the accused. These are: (a) to procure a favorable press generally and in the particular case, (b) to assure the public that the police are "on the job," (c) to influence opinion against the accused and finally (d) the compulsive itch—very strong in Americans—to "tell."

The predominant view is that the ends of law enforcement would not be seriously impaired by muzzling the law enforcement authorities. The proponents of this proposal believe that this remedy will cut off the source of the publication most damaging to accused persons. It would make it more difficult for the press to discover the fact and the details of a confession. There would be, it is true, pressure for putting in a confession at the preliminary hearing. The particular outrage of the *Rideau* case—televising a police interview including a confession—would be effectively outlawed. Whether, in the "big case," leaks could be prevented, we cannot know without experience. At present the newspaper relies on the police to learn the past record of the accused. If it seemed worth it, they might develop their own sources. Thus as to the record and associations of the accused the device might be more useful in the "run of the mill" case than in the notorious case (where, sadly enough, the chance of prejudice is greater).[63] One might conclude, however, that the probable gains would exceed the probable losses. In so far as the press is still free to publish what it can get, it would seem that we must rely on careful

62. Ibid.

63. Attorney General Katzenbach has issued an order forbidding employees of the Department of Justice to volunteer a defendant's past criminal record, but not prior federal convictions on request. The order also forbids observations about a defendant's character, statements, confessions, alibis, etc., reference to investigative procedures, identity, credibility or testimony of prospective witnesses, evidence, or argument. Information may be released as to circumstances immediately surrounding arrest, including time, place, resistance, pursuit, possession and use of weapons, and description of items seized. 30 Fed. Reg. 5510, adding 28 C.F.R. § 350.2 (1965).

administration of the voir dire. It might be possible to secure legislation prohibiting publication, at least, of confessions, and such legislation would probably be sustained. I would hazard the guess that a general prohibition of publicity concerning cases *sub judice* would not be.

But what of publication during the trial? In the two federal trials—*Marshall* and *Janko*—such publication was held fatal. The Court would not accept the judge's finding that there had not been prejudice, though in *Janko* perhaps his inquiry was not adequate. Here, of course, the impression on the juror is immediate —evidence of prior criminality may tip the scales in a close case— indeed, in the opinion of some it should be admitted precisely for that purpose,[64] but were it openly admitted into evidence, arguably the accused could find ways to mitigate its effect. *Marshall* and *Janko* can be seen simply as rules of federal criminal law, side rules to reinforce the rule against proof of nonrelevant criminality. But whether or not extended to the states, the problem remains. Can the newspapers bring to nought as many trials as they choose if only they succeed in reaching one or more of the jurors?[65] One remedy is to lock up each juror from the moment he is selected until the conclusion of the trial. This was done by the trial judge in *Van Duyne* after the first day of the voir dire and the choice of one juror because it became apparent that the newspaper meant to keep up a running commentary during the voir dire. The empanelling of the jury took three weeks. "The cost to the public of maintaining the jurors," noted the court, "during that long period before a single bit of evidence could be offered . . . was wholly unnecessary but for the newspaper articles."[66] The court might have also noted the cost and serious inconvenience to the jurors.[67]

No doubt, individually and collectively we can pay for freedom of speech as much as we are prepared to consider it worth. But would it seriously cripple that freedom *once the voir dire had begun*, to forbid the publication (until admitted at the trial) of a

64. Note, Procedural Protection of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426, 449 (1964).

65. Newspapermen suggest that there is sufficient concern on the part of the newspapers for convictions to act as a brake on trial-invalidating publicity.

66. 43 N.J. at 388, 204 A.2d at 851.

67. But in Atlanta Newspapers v. Georgia, 216 Ga. 399, 116 S.E.2d 580 (1960), the court held that locking up the jury was the proper way to cope with the problem. The press might be excluded, surely with and perhaps without the defendants' consent, while the competence of evidence is being decided at the "side bar." But the press may have other sources of information as to confessions, other crimes, etc.

confession,[68] of evidence bearing on the crime, of prior conduct or criminal or disreputable associations of the accused? Such a prohibition could not be said either to impede criticism of the police for failure to perform their prosecutory duties, or seriously to interfere with public awareness.

Will any limitations on the press be tolerated by the Supreme Court? We have seen that at least for Mr. Justice Black a chief obstacle to adoption of the English position is the use of contempt power. His objections are two-fold: its generality and its bypassing of jury trial. He suggested that legislative outlawry of specific classes of utterance might be taken by the court as a finding of a clear and present danger to the administration of justice.[69] He himself has, however, since abandoned the clear and present danger test and appears to hold that any limitation on speech is prohibited. Recently, in *Cox v. Louisiana* he has spoken out against "subjecting the courts to intimidatory practices that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice."[70] The practice in question, however, was patrolling and picketing outside a courthouse and a jail in protest of certain arrests. "Picketing, though it may be utilized to communicate ideas, is not speech and therefore is not of itself protected by the First Amendment."[71] Thus, it is not even now clear that Mr. Justice Black would uphold any prohibition of publication whether by contempt or criminal process. However, there is probably a majority of justices who do not adhere to the Black view that freedom of speech is absolute and who in one form or another would uphold a statute restricted to the prohibition of utterances found by the legislature to be a specific threat to the fair administration of justice;[72] and were the criminal rather than the contempt process used, hostility to the statute might be reduced.

I conclude:

1. That the canons of ethics should be amended or interpreted to forbid attorneys from communicating, except in the performance of their duties, information bearing upon the guilt or innocence or character of an accused;

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68. Including a confession admitted in a preliminary hearing even if it had been published prior to the voir dire.

69. Bridges v. California, 314 U.S. 252, 261 (1941).

70. 379 U.S. 536, 584 (1965) (separate opinion). The majority, though it agreed with Black, reversed the picketing conviction on the ground that the authorities had consented to the demonstration.

71. Id. at 578.

72. Wood v. Georgia, 370 U.S. 375 (1962), continues to speak the language of clear and present danger and once more adverts to the significance of a legislative finding.

2. That police and other public authorities be similarly prohibited, violations of the prohibition to be punishable as contempt;[73]

3. That from the beginning of the voir dire until the rendering of the verdict, it should be made a crime to publish a confession,[74] information bearing upon guilt or innocence or upon the character of the accused, unless and until such matter is admitted into evidence. The prohibition should extend, of course, to publication of the fact that any such evidence has been excluded.

73. Neither the superiors of such officers nor prosecuting officials can be expected to institute punitive action for breach of such a prohibition.

74. Even though the confession had been admitted at the preliminary hearing.