keep them, and turn me out of office if I don't." It was on the basis of such a contract, or better still, on a *bet*, that Mendès-France came to power in 1954, when he was the most popular man in France and perhaps in Europe. He had wagered that he would finish off the Indochinese war. As soon as he had won his wager, the men who felt humiliated at having had to appeal to this implacable and redoubtable critic of the Fourth Republic's weaknesses threw him out of office.

On the subject of Europe and especially the integration of the various European armies into a single European force, Pierre Mendès-France has in the past taken positions which might well pass as Gaullist today. Nevertheless, these views would never have led him to espouse a Franco-German bloc or to establish a national *force de frappe*. On the subject of relations with the United States, we may rest assured that he is not motivated by chauvinism of any sort. He has always held that democrats anywhere in the world who want to maintain world balance and peace should wish the United States to keep its present military force intact.

De Gaulle has an aesthetic and to some extent a Nietzschean concept of authority. He has written that a leader must be a strategist, a tactician, oracular and proud. If destiny has chosen him, and in order to carry out the noblest objectives, he has the right and even the duty to refrain from using the straightforward ways of ordinary men. For Mendès-France, on the other hand, all men are equally "ordinary." No one is chosen by destiny. Thus, even if de Gaulle and Mendès-France have the same objectives, they differ so widely on means that, in the last analysis, they are more radically opposed to each other than real enemies.

JEAN DANIEL

Ensuring Fair Trials

The Impropriety of Publicity

by Ronald Goldfarb

The Constitution says that in all criminal prosecutions the accused shall have "a speedy and public trial by an impartial jury." How public need a "public" trial be? Must all people be allowed to attend? Does this include newspapermen? TV cameras? How can we balance the right of the press to inform, and of the defendant to have a fair, impartial jury?

Consider the accused. He has been put to a tremendous and avoidable ordeal and expense if in fact he has been convicted as a result of unfair publicity. A later reversal is a moral victory only.

Consider the government and the public. When the prosecutor is instrumental in fomenting prejudicial publicity, he can only blame himself if a reversal follows on this ground. The case of *Stroble v California* involved a particularly horrible murder of a six-year-old girl by Stroble, a man old enough to be her grandfather. He had made advances upon her, and when she resisted he choked her, hit her on the head with a hammer and an axe, stabbed her with an ice pick and a knife and then ran away.

Following the crime, the killer was described in the local newspapers as the "werewolf," "fiend" and "sex-mad killer." Then Stroble was arrested. At periodic intervals the district attorney released to the press excerpts from Stroble's confession. These were printed. Later, the DA made public pronouncements that in his opinion Stroble was guilty and sane. Stroble was at last tried and convicted. His conviction was upheld by the Supreme Courts of California and the United States. One of his claims on appeal was that prejudicial publicity deprived him of a fundamentally fair trial as guaranteed by the due process clause of the 14th Amendment. At least some of the extraordinary publicity which accompanied this trial was avoidable. The bar cannot blame the press for its mischief when it is an accessory to the publicity.

Not long ago, a colorful Chicago personality, Tony Accardo, was convicted in a criminal tax case. In contrast to *Stroble*, there was no claim that the prosecutors leaked information, or that they made any comments about the case at any time – but there *was* heavy press coverage. An appellate court reversed the con-

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viction, giving as one reason that prejudicial publicity deprived Accardo of a fair trial. On retrial, Accardo was acquitted. One might argue that it was wise to reverse the original conviction because without the prejudicial publicity Accardo could not have been convicted. However, it might as well be true that the imponderable vicissitudes of the trial system worked in Accardo's favor the second time around. We can't know because we don't really know what effect even extreme press coverage of trials actually has on juries.

H. L. Mencken long ago challenged the courts to exercise some control over the problem of publicity. "The courts must set the standards," he said. "The better journals will follow joyously and the gumchewers' sheets must be whipped into line." But what the courts are doing is often inadequate.

American courts use several procedural techniques to try and filter out the prejudices of publicity. A defendant can move for a continuance or a change of venue when he feels he cannot get a fair trial at a particular time or place. But this claim is hard to prove and can be futile when provable: the flames of interest can be rekindled by the press at any time. Also, the pervasive coverage of the news by national TV renders techniques like changing the venue obsolete. Where in the United States, for example, would Billie Sol Estes and his exploits not have suffered from overexposure?

Voir Dire, the examination of prospective jurors under oath by both sides (and often by the court) before they are empanelled, is another procedure for sifting away the prejudices caused by pretrial publicity. Both sides may challenge jurors for cause unlimitedly, and may exercise a limited number of challenges peremptorily. The trouble is that the key question is left to the juror himself, or to the intuition of the attorneys. And the jurors most guilty of prejudice may be those least likely to admit it, while the juror who could act judiciously might, out of an excess of caution and impartiality, excuse himself. Furthermore, the questioner runs the risk of antagonizing the jury by questioning its impartiality, or of calling to its attention that which it might have otherwise missed. I have always felt in conducting *voir dire* examinations that I was flying by the seat of my pants.

The court will also instruct the jury what to consider and what to ignore. Jerome Frank equated this procedure with Mark Twain's story about the young boy who was told to stand in the corner and not think about a white elephant. "The futility of that sort of exorcism is notorious," Justice Jackson stated in one of his Supreme Court opinions that reliance on court instructions to cure prejudices was a naïveté which "all practicing lawyers know to be an unmitigated fiction." Yet Judge Learned Hand, in commenting upon this problem, said: "Trial by newspaper may be unfortunate, but it is not new and unless the court accepts the standard hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan cities may well prove impossible."

The courts do have the power to punish anyone who obstructs the administration of justice by summarily punishing him for contempt of court, and in England the exercise of this power against the press has been strict and far-reaching. In the United States the contrary has been so.

The English courts apply a Draconian control over press coverage of trials in order to keep the "streams of justice" pure. Contempt punishments have been meted out for such journalistic mischief as the discussion of evidence which was later ruled inadmissible, articles describing a newspaper's private detective work, articles about matters not brought out in open court, and news films of an arrest. Criticism of judges is not usually considered a contemptuous obstruction of justice, but two recent cases indicate that this rule has its dangerous exceptions. The editor of the *New Statesman* was fined for the publication of one such article. Dr. Marie Stopes, an advocate of birth control, had accused the *Morning Post* of refusing to print her advertisements because of Roman Catholic influence. The *Post* sued her for libel and won a verdict. The *New Statesman* then ran an article which said: "The serious point in this case, however, is that an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a court presided over by Mr. Justice Avory – and there are so many Avorys." More recently in England the editor of *Truth* was fined for a criticism which was hardly noticeable, let alone dangerous to the whole administration of justice. About the presiding judge's decision in a certain case, the comment was made: "Lord Justice Slessor, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears." The Lord Justice found this comment sub-

versive of the courts and justice, and hence punishable. Imagine how useful such a power could be to our abused Warren court; how dangerous to a journal such as *The New Republic*.

In the United States, though the contempt power exists, it is usually impotent against the press because of a line of Supreme Court decisions which held that the policies behind the First Amendment outweigh the judicial usefulness of a contempt power in press cases. The Baltimore Radio Show case illustrates the predicament of the current American practice in this regard.

In the summer of 1948, an 11-year-old girl was dragged from her bicycle on a street in Northwest Baltimore and was then stabbed to death. A woman had recently been raped in the same neighborhood. The public was alarmed and tense. Then one evening a Baltimore radio announcer opened his broadcast with the words, "Stand by for a sensation." He told of a man's arrest for this crime and went on to say that the man had confessed, that he had a long criminal record, that he had re-enacted the crime on the scene, and had dug up the death weapon. These facts were true. The reported facts became vital evidence at the subsequent trial. Because of the great public interest in this case, the broadcast had a pervasive impact in the community. In fact, the defense counsel waived jury trial because he felt he could not risk it in a community that had been so aroused.

The Baltimore Criminal Court held three broadcasting companies in contempt of court because of their announcements. When the contempt convictions were appealed, *amicus* briefs were filed for several bar associations, the National Association of Newspaper Publishers, the American Society of Newspaper Editors and the ACLU. The court had to choose between the rock of censorship and the whirlpool of injustice at trial. One has difficulty discerning the good guys from the bad guys in such a conflict of civil liberties. The contempt conviction was reversed.

Whose Right and How Public

About 10 years ago, Mickey Jelke, the playboy heir to the oleomargarine fortune, was prosecuted in New York for what Judge Fuld was later to describe as "widely publicized charges of compulsory prostitution, and other offenses of like character." At the start of the trial, the prosecution and defense made the customary opening statements outlining what they expected to prove. After hearing these statements, the trial judge on his own motion excluded the general public and the press from the courtroom for the duration of the prosecution's case. Jelke objected. The judge allowed Jelke to have present any friends or relatives he deemed necessary to protect his interests. However, characterizing the expected testimony as obscene and sordid the trial judge ruled that the better administration of justice and the interest of good morals warranted his exclusionary order. After the People's case was presented, the courtroom was opened to the press and general public. Jelke was convicted and appealed on several grounds, one being that he was deprived of his right to a public trial. It was on this ground that his conviction was reversed. The appellate court, noting that the publicity issue transcended Jelke's guilt or innocence, stated that a trial is not public if only a limited class of people are allowed to attend, particularly if no member of the press is included in the privileged class.

Interestingly, several press associations and newspaper publishers separately appealed the exclusionary order. They argued that the press and the general public also had a right to insist that Jelke's trial be open to the public. This contention was rejected. With respect to the right to public trial, the press' interest can be no greater than that of the general public and of the defendant. The First Amendment does not prohibit a court from excluding the general public (and that includes the press) under certain reasonable circumstances. Moreover, the public's right in this regard can be no greater than the defendant's. To decide differently would be to give the press the power to overrule a defendant and operate to his disadvantage.

It makes sense to interpret a constitutional right in such a way as to assure that the one for whom the right exists does not suffer from its application. However, I can imagine an outrageous outgrowth of this rule. Suppose, for example, that Lee Oswald had not been killed, and was brought to trial for killing President Kennedy. Suppose further that he exercised his constitutional right to demand an un-public trial. Suppose further that, as in the Jelke case, the court ordered the record of trial also kept secret. How would the American public have reacted if it was denied access to the facts pertaining to the assassination of its President? Of course, the record could be made public after the trial was over, but until then anxiety would be feverish.

There are other questions which the Jelke case raised. Why shouldn't a trial judge be allowed to protect his court proceedings from sensationalism or vulgar exploitation? Judges have always been allowed to clear a courtroom where delicacy and gentility, or even sanitary conditions warranted the exclusion of spectators. This may sound prudish, but so long as it is an attempt to encourage a dispassionate, judicious, serious trial what is the problem? Was Jelke the John Lilbourne of his day, or was he capitalizing on an outdated or misapplied generality? How was Jelke hurt by Judge Valenta's order? Wasn't the judge acting both reasonably and fairly? Had the trial been public and had it con-

tinued in an open and highly publicized atmosphere, could he have appealed on the ground that this notoriety deprived him of due process of law? If so, there was no way to convict Jelke and make it stick. This is no joking matter because with the ingenuity of the bar, the ubiquity of the modern press, and the insatiable curiosity of the public in those trials, the criminal defendant and the people may never be able to get what was traditionally conceived of as a fair trial.

Television, besides magnifying the pervasiveness of publicity, creates a problem at trial, too. Even if cameras were carefully used at trials to avoid physical intrusion, the likely perversions of the trial process would far outweigh any possible values of public enlightenment. And the public interest, often cited as a reason for trial publicity, is itself questionable. Generally, the public's interest in trials, as well as its interest in the journalism of trials, runs to the macabre, the gory, and the prurient. And TV all too often inclines toward levity (Perry Mason) and sensationalism (Congressional hearings) in its law reporting.

Not long ago I was in Cincinnati preparing to prosecute a case. One evening while relaxing in my hotel room and watching the TV news, a strange event took place before my eyes. I heard the announcer describe a bank robbery that had taken place that day in a nearby city. And as he described it, movies of the robbery were shown. The bank had been equipped with hidden movie cameras which were secretly triggered when the robbers began their loot. As soon as the robbery was over the movies were turned over to the law enforcement authorities, and soon thereafter the criminals were caught. At the time the whole episode seemed unreal to me. It was almost embarrassing to witness publicly what is ordinarily so furtive and private an act as the commission of a crime. Recently, others have described similar feelings to me after having viewed the contemporaneous televising and shooting of Lee Oswald by Jack Ruby. There is something eerie about sitting in one's living room and watching one man actually kill another. As a matter of proof, this is a prosecutor's dream. But it may also turn out to provide Ruby's defense which so far is that, among other things, he couldn't possibly get a fair trial.

Self-control by press and bar would go far to alleviate many of these problems. If the press does not control itself it may find the courts doing so by extending the contempt power. Former Justice Frankfurter and others have recently suggested emulating the English contempt rule. If this is done American courts should draw a careful distinction between editorials and criticisms, and the reporting of "judicial" facts like confessions and criminal records, giving the former an absolute First Amendment protection. It is simpler for the bar to control its members than it is for the press. Lawyers are peculiarly susceptible to the disciplinary control of the bar and the courts. This power ought to be used to control lawyers' complicity in pre-trial publicity. In the case of the district attorney, standard regulations could be drawn to control precisely the public information practices in all prosecutor's offices. This, along with rigid control of the private lawyer by the courts and bars, would go far to soothe this sore spot in the trial system.

Sleepers in the Civil Rights Bill

by Alexander M. Bickel

Much credit has been heaped on the House and its leadership for conducting a dignified and generally sensible debate, and then passing in undamaged form the coalition Civil Rights Bill previously approved by the Judiciary Committee. And much credit is justly due. But if the Judiciary Committee bill may be thought to have emerged largely undamaged, it did not come out unscathed. The wounds it bears were quickly administered, and have virtually escaped public notice.

The single most damaging amendment tacked on in the House is not merely a blow to the bill; it will, unless cured, mark a retrogressive step, leaving us worse off in respect to one very important subject – housing – than we would be without any bill at all. Title VI of the House bill forbids discrimination in programs that receive federal financial assistance, and authorizes the President ultimately to cut off such assistance if the recipient, who may be a private person or a state, cannot be got to stop discriminating. Properly administered, this is a very good and effective thing. The joker is that in the estimation of many lawyers, the President has independent authority, unaided by statute, to do most if not all of what this provision authorizes him to do. Nothing but speculation can be