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Free Press and Fair Trial--A Conflict

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NOTE

FREE PRESS AND FAIR TRIAL—A CONFLICT

In the attempt to preserve two basic rights granted by the Constitution of the United States, the freedom of speech and press[1] and the guarantee of a fair trial,[2] a conflict has developed between the Bench and Bar on the one hand and the press and other news media on the other. The legal profession insists that over-publicity often tends to undermine the right to a fair trial. On the other hand the news media, being understandably jealous of their freedom of publication, are quick to resist suggestions that would tend to limit the scope of their operations. It is only by a complete understanding of the basic desires and purposes of each party to the conflict that the real problem can be discovered. The purpose of this Note is to outline the respective interests, examine the present treatment of this conflict, and attempt to discover how the conflict might be resolved or at least lessened.

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U. S. Const. Amend. I.

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U. S. Const. Amend. VI.

THE NEWS MEDIA'S CASE

In a democratic society, where accurate information is a prerequisite to intelligent decision-making by the public, the news media serve a vital role. Their primary functions are "the dissemination of news, the editorial guidance of public opinion, and the conduct of a commercial business."[3] With its continued existence, the press soon finds that it has created a duty for itself to keep the public informed. In fulfilling its role as public disseminator of the news, the news media realize that:

> "One of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."[4]

Public scrutiny of the judicial process serves a two-fold purpose. It can be a benefit to the public and a benefit to the accused.[5] Familiarity with court procedures can instil in the public a respect for the law, confidence in judicial remedies, and intelligent acquaintance with the methods of our government.[6] So far as the accused is concerned, he is safeguarded by the presence of a critical press and public whose purpose is to keep the judicial tribunals conscientious in the performance of their duties.[7] In general, a public trial is said to help secure trustworthiness and completeness of testimony.[8]

Thus the existence of the public and the free press are an important if not an indispensible element in the concept of a fair trial. The press is able to bring into the court room those of the public who could not attend and, through intelligent reporting, educate the reading public in judicial affairs. This freedom of the fourth estate to watch over the administration of our judicial system is said to have been one of the factors that has freed the American system of justice from the abuses of the Spanish Inquisition, the English

3. See 62 A. B. A. Rep. 851, 855 (1937).
4. Maryland v. Baltimore Radio Show, Inc., 338 U. S. 912, 920 (1950).
5. See 6 Wigmore, Evidence § 1834 (3d ed. 1940).
6. *Ibid.*
7. "The greatest safety that a defendant has in our courts is the openness of his trial; the fact that the newspapers send reporters to the court; that they often unearth evidence which lawyers try to hide or even miss; that judges are constantly under the kleig lights of their scrutiny." White, *Newspaper and Radio Coverage of Criminal Trials: A Modern Dilemma,* 41 J. Crim. L. & Criminology 306, 307 (1950).
8. It is claimed that the presence of the public stimulates in a witness the "instinctive responsibility to public opinion . . . [which is] . . . ready to scorn a demonstrated liar" and induces "the fear of exposure of subsequent falsities," thereby improving the quality of the testimony. 6 Wigmore, Evidence § 1834. Nevertheless, the presence of a large public in the court room might disturb or intimidate an already frightened witness to the point where his testimony would be of little value.

Court of Star Chambers, and the French *lettre de cachet.*[9]

What the press and other news media object to are attempts by the Bench and Bar to curtail free news coverage of judicial activity, thereby interfering with the performance by the news disseminators of their duty to the public. One bitter objection was recently put forth by a past president of the Society of American Newspaper Editors to a proposed New York law which would curtail the press from obtaining certain facts pertaining to the issues to be tried prior to the commencement of a criminal proceeding.[10] This law, proposed by the Committee on Civil Rights of the New York State Bar Association, would place a restriction on attorneys and other public officials, but not the press, as to what information might be given out before the time of trial. In his attack on the proposed legislation, the past president stated that ". . . if this [proposed legislation] had come up 15 years ago, I would guess the author to be Goebels . . .",[11] and claimed that the committee was attempting to place a "gag" on the press.[12] Such is the feeling of some newsmen when it is suggested that one means of insuring fair trials is to curtail their free coverage of events leading up to the legal proceedings.

Many members of the press are not as vehement, however.[13] While seeking to avoid censorship of their activities as well as any legislation which would have the effect of drying up helpful news sources, they realize the interests that must be protected. The members of the press as well as the members of the legal profession are interested in seeing an accused's right to a fair trial protected. They have no intention of undermining justice. It is any all-inclusive rule curtailing their activity and laid down without exceptions that the news industry objects to and cannot understand. A prohibition against photography and broadcasting in court rooms similar to that set out in Canon 35 of the Code of Judicial Ethics is thought to be such a rule.[14]

It must not be forgotten that the task of disseminating the news is a legitimate exercise of free enterprise, kept alive only by the

9. See *In re* Oliver, 333 U. S. 257, 268-269 (1948). But see Radin, *The Right to a Public Trial,* 6 Tem. L. Q. 381, 386-387 (1932), who maintains that the real grievance against the Star Chamber was not its secrecy but the power of the court and the arbitrary manner in which the Star Chamber exercised this power.

10. See *Fair Trial—Free Press: A Panel Discussion,* 26 N. Y. S. Bar Bull. 202 (1954).

11. *Id.* at 206.

12. *Ibid.*

13. For example see White, *supra* note 7.

14. See Charnley, *Should Courtroom Proceedings Be Broadcast?,* 11 Fed. Comm. B. J. 64 (1950).

volume of sales. Such a business should not be curtailed by rules which have no immediate effect in facilitating a fair trial.

THE BENCH AND BAR'S CASE

It is not the desire of the legal profession to restrict arbitrarily the freedom of the press and other news media, but the courts have a grave concern over the rights of an accused. Many precautions have been taken to protect the rights of an accused. Among these is the right of an accused to a public trial in the federal courts[15] as well as in the state courts.[16] But by the term, public trial,

> ". . . it is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials. . . . The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."[17]

Thus a judge may clear the court room to "secure the administration of justice and to facilitate the proper conduct of the trial. . . ."[18] Individuals may also be excluded from the court because of tender years.[19] The fact that the public feature of a trial is primarily for the benefit of the accused was brought out recently in a New York case in which members of the press, having been excluded from the court room during the People's case in a prosecution for conspiracy to commit acts injurious to public morals, were found not to have a legally enforceable right to attend the trial.[20] Basing their argument

15. U. S. Const. Amend. VI.

16. A secret proceeding in a state court for criminal contempt was held to violate the Due Process clause of the 14th Amendment. *In re* Oliver, 333 U. S. 257 (1948). Nearly all State Constitutions grant the right of a public trial to an accused. See, *e.g.*, Minn. Const. Art. I, § 6.

17. 1 Cooley, Constitutional Limitations 647 (8th ed. 1927).

18. *E.g.*, Hogan v. State, 191 Ark. 437, 86 S. W. 2d 931 (1935). (The judge expelled all members of the public from the courtroom for ten minutes during the testimony of a small girl who was too frightened to testify in a rape case).

19. "No person under the age of 17 years, not a party to, witness in or directly interested in a criminal prosecution or trial . . . shall attend or be present at such trial. . . ." Minn. Stat. § 631.04 (1953).

20. United Press Ass'ns v. Valente, 281 App. Div. 395, 120 N. Y. S. 2d 174 (1st Dep't 1953).

on the New York Judiciary Law,[21] the United Press Association claimed that as members of the public they have a free right to attend all proceedings from which they were not expressly excluded by the law. The court dismissed the argument by stating that the direction in the law providing for public trials and free attendance by all citizens was

> ". . . given to judges concerning how they should conduct their courts in the interest of parties before the court, and not designed to create causes of action in outsiders to meddle in the administration of justice between litigants while trials are in progress."[22]

For further protection of the accused, society has set up the court and jury system as a tribunal to determine the guilt or innocence of the accused on the basis of evidence presented in court. Many procedural and evidentiary rules have been established to facilitate the conduct of an impartial and unprejudiced trial. It would seem an anomaly if such careful measures to preserve this unbiased atmosphere were being taken by the judiciary while no attention was being given to the effect that outside influences, such as newspaper comments, might have on what is going on inside the court room.[23]

> "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the press."[24]

The problem of prejudice is most acute in jury trials where sensational treatment of a case may tend to prejudice the thinking of

21. N. Y. Judiciary Law § 4. "The sittings of every court within this state shall be public, and every citizen may freely attend the same except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy, or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses and officers of the court."

22. United Press Ass'ns v. Valente, 281 App. Div. 395, 404-405, 120 N. Y. S. 2d 174, 184 (1st Dep't 1954). The defendant in the trial from which the press was excluded later won a new trial on the grounds that such exclusion denied him his statutory right to a public trial. People v. Jelke, 284 App. Div. 211, 130 N. Y. S. 2d 662 (1st Dep't 1954). The *Valente* case, which had reserved the question as to whether or not there was a deprivation of the right to a public trial until such time as the defendant raised the matter on appeal, was not overruled. While the *Jelke* case serves notice on New York trial courts that they should not readily exclude the press or public from trials, apparently those so removed still do not have legal standing to challenge such exclusions.

23. One writer stated that a court's ignoring of external prejudicial factors in the trying of a case would be comparable to a surgeon spending much time sterilizing his instruments and preparing for a clean operation, and then ordering the windows thrown open for the dust and dirt to come in just as he is to make his incision. Rifkind, *When the Press Collides with Justice*, 34 J. Am. Jud. Soc'y 46, 49 (1950).

24. Bridges v. California, 314 U. S. 252, 271 (1941).

the community and even the jury members if objectionable material finds its way into their hands. In the case of an especially brutal crime, where the pre-trial publicity has been quite extensive, a community could be so incensed that a jury might be afraid to render any other verdict except one of "guilty." If this were the case, counsel for an accused might have no other choice but to waive a jury trial and have the case tried before the court. The problem of jury influence by the press is very serious, because data not admissible in court because of the rules of evidence will often be found in news reports. If steps can be taken against attempts to influence a juror by means of a note handed directly to him,[25] should the courts ignore communication with the jurors of a similar nature, merely because the views of the author are in the form of a printed column?

A study made of the Hauptman trial[26] brought out many of the abuses by the press which affect an accused's right to a fair trial. But the report of the Hauptman trial revealed an even more prevalent evil of the free press—namely, publications which tend to place the American judicial system in a disrespected light. During the Hauptman trial, newspapermen came from all over the world, the court house was jammed, and there were cameras and sound projectors in the court room.[27] Newspaper headlines read, "It's a Sideshow, a Jamboree," and "It's a Holiday, a Freak Show."[28] In fact the Hauptman trial was made into a judicial circus by the press and by other instrumentalities of communication.

The evils of a sensationalistic approach to the news have long been a problem. It was Thomas Jefferson who said:

> "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste. It is however an evil for which there is no remedy, for our liberty depends on the freedom of the press, and that cannot be limited without being lost."[29]

Perhaps a certain amount of abuse of the judicial system by a critical press can be tolerated. But when the free comment goes so far as to jeopardize an accused's right to a fair trial, freedom of the press must be limited.

25. See *Ex parte* Smith, 40 Tex. Crim. Rep. 179, 49 S. W. 396 (1899).
26. A report of the special committee appointed by the American Bar Association to study the Hauptman trial appears in Hallam, *Some Object Lessons on Publicity in Criminal Trials,* 24 Minn. L. Rev. 453, 477 (1940).
27. See *id.* at 454-461. Both cameras and sound pictures were forbidden from the courtroom during the trial, but the order was surreptitiously violated many times. *Id.* at 461.
28. *Id.* at 460.
29. See Bridges v. California, 314 U. S. 252, 270 n. 16 (1941).

PRESENT POWERS OF THE AMERICAN COURTS

In America free publication has been curtailed in the interest of fair trials by the use of the contempt powers of the federal and state courts.[30] An early statute gave the federal courts very broad powers to punish summarily for contempt at their own discretion.[31] This power was later limited to "misbehavior in its [the court's] presence" or "so near thereto as to obstruct the administration of justice."[32] This statute was further limited in interpretation by a decision holding "near" to be a geographical limitation so that "misbehavior," to be construed as contempt, must occur in the vicinity of the court.[33]

There are also two federal criminal provisions which deal with punishment for the obstruction of justice by means of communication. One punishes

> "Whoever corruptly . . . or by any threatening letter of communication, endeavors to influence or intimidate, or impede . . . any grand or petit juror . . . in the discharge of his duty . . . or . . . influences, or impedes . . . the due administration of justice. . . ."[34]

The other punishes

> "Whoever attempts to influence . . . any grand or petit juror . . . by writing or sending to him any written communication in relation to such matter [pending before him]. . . ."[35]

Neither one of these sections, however, has been used to punish the news media for publications affecting a pending case.

Certain Constitutional limitations have arisen on the judicial power to hold publications to be contemptuous, and to punish accordingly. During the pendency of a probation matter a Los Angeles newspaper published an editorial entitled "Probation for Gorillas," which stated that the judge who was to decide the probation matter would make a serious mistake if he granted probation to the parties concerned. The California Supreme Court found the editorial to show disrespect for the judiciary, to have a reasonable tendency to influence the proceedings and to interfere with the proper administration of justice.[36] In still another California case where litigation was not at an end, a labor leader was held in contempt for causing

30. For a critical analysis of the history of the use of these powers see Deutsch, *Liberty of Expression and Contempt of Court,* 27 Minn. L. Rev. 296 (1943).
31. 1 Stat. 83 (1789).
32. 18 U. S. C. § 401 (1952).
33. Nye v. United States, 313 U. S. 33 (1941).
34. 18 U. S. C. § 1503 (1952).
35. 18 U. S. C. § 1504 (1952).
36. Times-Mirror Co. v. Superior Court, 15 Cal. 2d 99, 98 P. 2d 1029 (1940).

the publication of a telegram, the contents of which criticized the decision of a court in a labor dispute, and menacingly predicted that attempted enforcement of the decision would result in widespread labor strife.[37]

However in 1941 on appeals to the Supreme Court of the United States it was held that the California court could not punish for contempt either the newspaper or the labor leader.[38] In so holding, the Court for the first time applied the "clear and present danger" rule to the contempt powers of the states. The Supreme Court rejected the California test that the publications, to be contemptuous, need only have a reasonable or inherent tendency to obstruct justice.[39] The working principle that the court sought to establish in this case was that the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[40] Justice Frankfurter criticized this distinction between "clear and present danger" and "reasonable tendency" as too fine a point on which to alter California's policy in protecting its own judicial system.[41]

Two other Supreme Court cases have strengthened the "clear and present danger" limitation on the imposition of sanctions for contemptuous publications. The first arose out of a conviction in a Florida court[42] of a newspaper and its editor for editorial and cartoon criticism which implied that a certain judge, out of sinister motives, was using procedural technicalities to slow down the prosecution of certain crimes in the state. The United States Supreme Court reversed the conviction by applying the clear and present danger rule, finding that the potentiality that evil consequences would flow from the newspaper commentary was not very likely.[43] The other decision[44] was the reversal of a contempt conviction in a Texas court of a reporter for delivering a blistering editorial attack on a lay judge, who had twice refused to accept a jury verdict until finally the jury brought in a verdict in compliance with his instructions.[45] At the time of the editorial the case was up on motion for a new trial.

37. Bridges v. Superior Court, 14 Cal. 2d 464, 94 P. 2d 983 (1939).
38. Bridges v. California, 314 U. S. 252 (1941).
39. *Id.* at 272-273.
40. *Id.* at 263.
41. *See id.* at 295-297 (dissenting opinion).
42. Pennekamp v. State, 156 Fla. 227, 22 So. 2d 875 (1945).
43. Pennekamp v. Florida, 323 U. S. 331 (1946).
44. Craig v. Harney, 331 U. S. 367 (1947).
45. See *id.* at 375. The editorial labeled the judge's conduct at the trial as "high handed" and a "travesty on justice," deploring the fact that the judge was a layman and not a "competent attorney."

All of the three above cases involved either an attack on the court or a prejudicial statement by the press where only a judge was sitting. There has been no Supreme Court of the United States decision dealing with prejudicial publication affecting a jury case. Few cases of this nature would ever come up before the Supreme Court simply because after the community-poisoning publications have been made, an attorney often dares not risk a jury trial for his client, but instead chooses trial before the court. Such a decision to waive a jury trial because of prejudice was made by counsel in a Baltimore murder case. After the community had become enraged over the brutal slayings of two young girls, a Baltimore radio announcer went on the air and stated that a man had been apprehended and charged with murder, after giving a complete confession. The announcer went on to tell about the man's long criminal record. The Criminal Court of Baltimore fined the broadcaster for contempt, but the Maryland Supreme Court reversed the conviction, saying that notwithstanding the broadcast, there was no provable "clear and present danger" that the defendant's rights to a fair trial had been jeopardized.[46] The court found no direct evidence of prejudice in the community and considered the attorney's testimony that he felt the broadcast precluded him from getting an impartial jury to be "only conclusions" and "not statements of fact."[47] The Supreme Court of the United States refused to grant *certiorari.*

Present Powers of the English Courts

It has been said that "[o]ne of the objects of the Revolution was to get rid of the English Common Law on liberty of speech and of the press."[48] Nevertheless, no study of free press and fair trial would be complete without mention of the presently existing English views on the subject, not only for comparative purposes, but perhaps with the idea that some of their well-used concepts might aid us in solving our dilemma.

The English judicial system is notably more strict than the American system in dealing with published comments on pending litigation. We have seen that American courts have established the test that a publication to be contemptuous must be one which poses a clear and present danger of a substantive evil of extreme serious-

46. Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A. 2d 497 (1949), *cert. denied,* 338 U. S. 912 (1950).
47. *Id.* at 330, 67 A. 2d at 511.
48. Schofield, *Freedom of the Press in the United States,* 9 Publications Amer. Sociol. Soc., 67, 76 (1914).

ness and of an extremely high degree of imminence.[49] The English on the other hand label as contemptuous any publication "reasonably calculated" to interfere with the administration of justice, and no actual interference need be shown.[50] Also, "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority, is a contempt of Court."[51] These tests leave ample room for judicial construction. In cases where the publication is not obviously contemptuous, or intentionally calculated to obstruct justice, a court need only find that a publication might conceivably prejudice a pending trial.[52] In order for a court to ascertain this,

> ". . . the circumstances of the case must be taken into account. The nature of the proceedings which were pending, the conduct of the parties, the time, the manner and locality of the publication in relation to the time, the mode, and the locality of the trial are all to be considered. . . ."[53]

This tight English restriction on the press takes effect as soon as the first legal action is taken on a case.[54] During the trial the English take great care that the tribunal delivers a verdict which has been reached only by deliberation on the evidence given in court by the parties.[55] Publications are punishable which damagingly allude to potentially admissible evidence,[56] or which contain prejudicial, inadmissible evidence,[57] or which consist of comments on the merits of the case "planted" by counsel.[58]

After the litigation is over any comment on the proceedings is permitted. There is one seldom-invoked limitation, however, to this post-trial comment found in the English system—namely, comments involving "scurrilous abuse" of the judiciary in connection with the conduct of the case.[59] This further English power to punish for contempt does not mean that the judge and courts are not open to criticism, but it does mean that the criticism must be reasonable.

49. *E.g.*, Bridges v. California, 314 U. S. 252 (1941).

50. See Ludwig, *Journalism and Justice in Criminal Law*, 28 St. John's L. Rev. 197, 206 (1954).

51. Queen v. Gray, [1900] 2 Q. B. 36, 40.

52. *See* Rex v. Editor of *Daily Mail*, 44 T. L. R. 303, 306 (K.B. 1928).

53. *Ibid.*

54. King v. Parke, [1903] 2 K. B. 432; Rex v. Clarke, 103 L. T. 636 (K.B. 1910). Issuance of a warrant is said to be the first legal action in a criminal proceeding.

55. See Daw v. Eley, L. R. 7 Eq. 49, 59 (1868).

56. Rex v. Clarke, 103 L. T. 636 (K.B. 1910).

57. King v. Tibbits and Windust, [1902] 1 K. B. 77.

58. Daw v. Eley, L. R. 7 Eq. 49 (1868).

59. Queen v. Gray, [1900] 2 Q. B. 36.

RESOLUTION OF THE CONFLICT

The real problem arises in an attempt to resolve the conflict that has arisen out of the practical application of the two Constitutional freedoms. One cynical observation has been that "[i]ts resolution is easy if one interest may be carefully considered and the other happily ignored."[60] But in spite of this outlook perhaps a workable solution can be reached by considering both sides.

The judicial system has the power to take certain procedural steps by which the prejudicial affect of comments already published might be avoided. One of these methods is a change of venue before the jury has been impaneled. This remedy, however, is not as effective today as it might have been in the past due to the existence of widespread radio, television, and newspaper coverage. Thus courts have refused to grant change of venue in well-publicized cases on the ground that there is no guarantee that the site to which the trial may be moved would not be as biased as the original community.[61] Counsel for an accused may also have a difficult time proving that an impartial jury could not be obtained; for the mere fact that newspapers have given widespread publicity to the forthcoming trial is not necessarily regarded as sufficient to establish that a fair trial could not be had in that community.[62] A decision in this vein by the courts does not take into account the underlying prejudice that might be present in jury members drawn from the community most intimately involved. Therefore it seems that changes of venue should be liberally granted where an attorney feels that his client might have a better chance of a fair trial in another community, so long as the opposing party is not prejudiced by the change.

Another method of minimizing the damaging effects of pre-trial publications is by a request for a continuance until the publicity has died down.[63] If the prejudicial material finds its way into the hands of the jury after a trial is in progress, the members might be discharged and a continuance granted until another jury can be impaneled.[64] But it must be borne in mind that a continuance, besides not being able to insure that a fair trial will take place, involves the usual risks attendant to a postponement of trial; for during the

60. Ludwig, *supra* note 50, at 202.
61. *E.g.*, Shockley v. United States, 166 F. 2d 704 (9th Cir.), *cert. denied*, 334 U. S. 850 (1948).
62. Morgan v. State, 84 S. E. 2d 365 (Ga. 1954).
63. Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952) (Denial of a defendant's motion for a continuance for a reasonable time until the prejudical effect of publications wore off was reversible error).
64. *In re* Independent Publishing Co., 240 Fed. 849 (9th Cir. 1917).

lapse of time certain key witnesses might die or forget much of the detailed information that would lead to a conviction or acquittal.[65]

Two other means could be used by the courts in avoiding already published material which might be prejudicial—cautioning jurors not to read the papers or listen to the radio and locking the jurors up during the trial. The first of these methods might prove ineffectual[66] while the second would be quite undesirable.

In addition to finding means to avoid the prejudicial effect of material already published, attempts should be made to prevent the publication of such material in the first instance. Some sort of voluntary agreement restricting publications would appear to be the most desirable means of resolving the conflict since a statutory attempt at resolution not only might breed animosity between the news industry and the legal profession, but also might be in violation of the First Amendment. This type of agreement between the press and Bench and Bar has been recently prepared by a Committee of the New York County Lawyers Association in the form of a code of ethics.[67] The major difficulty with a code of ethics is that it might prove ineffectual. Because of the presence of competition for news in the United States, to be workable the code would have to be subscribed to by all the major news media in the country. And even then, adherence to the code might be doubtful without some coercive threat of legal action for its breach.

A restriction on the source of the prejudicial material, as opposed to one on the news media, would not run afoul of the First Amendment. This could be achieved by the simple expedient of having prosecutors and lawyers keeping information to themselves when within earshot of reporters. The American Bar Association has established such a restriction on publicity through Canon 20 of the Code of Legal Ethics.[68] Canon 20 attempts to curtail publica-

65. See Forer, *A Free Press and a Fair Trial,* 39 A. B. A. J. 800, 845 (1953).

66. "To prevent that man [the juror] from reading papers will result in his death from frustration. You might just as well ask Katherine Hepburn not to read her press notices following an opening night." Rifkind, *supra* note 23, at 51.

67. A text of the proposed code appears in an article by Otterbourg, *Fair Trial and Free Press: A Subject Vital to the Existence of Democracy,* 39 A. B. A. J. 978, 980 (1953).

68. Canon 20: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

tions of possibly prejudicial material by condemning lawyers' comments on pending litigation. Amendment of this canon has been recommended so as to make it more strict and effective.[69] In a recent report of the Committee on Civil Rights of the New York Bar Association, this attempted curtailment of prejudicial publications by Canon 20 was sought to be strengthened and broadened by proposed legislation.[70] This legislation would make it unlawful for a prosecuting attorney, defense counsel, or any other person having an official connection with the case from disclosing such things as evidence allegedly existing against the accused, statements or admissions made by him, or other matter pertaining to the trial. Even without mandatory legislation one district attorney's office has refused to release statements or confessions allegedly made by an accused.[71] A practice of similar nature throughout the country would be highly commendable.

Canon 35 of the Code of Judicial Ethics,[72] on the other hand, places the restriction on the news media by in effect prohibiting broadcasts and photography in the courtroom during sessions of the court. Such a restriction might be too severe in the light of modern technical advances in the field.[73] Presently there are studies going on leading to the revision of this canon.[74]

A court rule imposing silence on lawyers only and not on the press, similar in effect to the legislative proposal of the New York State Bar Association Committee[75] has been suggested[76] and might prove quite effective. On the other hand, court rules which attempt to hold the press in contempt for prejudicial publications must be

69. See *Fair Trial—Free Press: A Panel Discussion*, 26 N. Y. S. Bar Bull. 202, 225 (1954).

70. See 77 N. Y. S. Bar Ass'n Rep. 304-308 (1954).

71. See *Fair Trial—Free Press: A Panel Discussion*, 26 N. Y. S. Bar Bull. 202, 220 (1954).

72. Canon 35: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

73. For a discussion of the news media's point of view as to why more liberal access to courtrooms should be given broadcasters, see Charnley, *supra* note 14.

74. See the Report of the Special Decorum in Courts Committee of the Minnesota State Bar Association, 11 Bench & Bar 49 (1954). The American Bar Association has taken steps to set up a bar-press conference committee to consider the controversy which has developed over Canon 35. See 2 Am. Bar Coordinator 24 (Dec. 15, 1954).

75. See note 70 *supra*.

76. See Otterbourg, *Fair Trial and Free Press: A New Look in 1954*, 40 A. B. A. J. 838, 913 (1954).

carefully drawn otherwise they might be of no effect due to the "clear and present" danger rule of the United States Supreme Court.[77]

Before attempting to restrict the activities of the press, the legal profession should put its own house in order by disciplining its members either by court rules, a more effective code of ethics or even by legislation. Self-discipline would probably solve a great part of the problem of preserving a fair trial. After this is done the members of the press, bench and bar could attempt to formulate together workable standards under which each might effectively operate in conscientious fulfillment of their duties.

77. See Busser, *Free Press and Fair Trial*, 27 Temp. L. Q. 178, 190 (1953). A set of court rules defining contempt by publication were in effect nullified by the Maryland Supreme Court's application of the "clear and present danger" rule. See Baltimore Radio Show, Inc., 193 Md. 300, 67 A. 2d 487 (1949), *cert. denied*, 338 U. S. 912 (1950).