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DIRECT RESTRAINT ON THE PRESS

Thomas L. Shaffer*

If I were to suggest that the public force be used to silence and hide sources of information about government as Mr. Cooper's committee,¹ the Supreme Court of New Jersey,² the United States Attorney General,³ and United States Senator Morse⁴ have suggested, I could begin with impressive authority. If I were to suggest nothing at all, as the organized press has done,⁵ I could begin with swelling rhetoric on the nature of man. But for my suggestion, direct restraint on the press, the only thing at hand⁶ is a fable, the story of a crisis that nearly prevented the marriage of the Princess of Ap and the Prince of Upi.

I

It was an arranged marriage, in that the two kingdoms stood to benefit mutually from the joinder of their royal houses. It was an affair of the heart, in that the princess was demonstrably fond of the prince and the prince at least cautiously indifferent. It was a popular marriage; the people of Ap, in whose land the wedding took place, were sentimental about it. The businessmen among

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1 ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft 1966) [hereinafter cited as ABA REP.]; *The A.B.A.—Free Press & Fair Trial*, Time, Oct. 7, 1966, p. 96.

2 State v. Van Dwyne, 43 N.J. 369, 204 A.2d 841 (1964).

3 Address by Attorney General Katzenbach to the American Society of Newspaper Editors, April 16, 1965, reprinted at *Hearings on Fair Trial and Free Press Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 400 (1966) [hereinafter cited as *Hearings*].

4 Senator Morse's proposal, S. 290, 89th Cong., 1st Sess., would have added the following as 18 U.S.C. § 1512:

It shall constitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial. Such contempt shall be punished by a fine of not more than \$1,000. *Hearings* 1.

5 The reaction to the ABA's Report by the American Soc'y of Newspaper Editors is reported in Time, *supra* note 1, at 98; that of the National Newspaper Ass'n in FoI Digest (published by the Freedom of Information Center, University of Missouri), Nov.-Dec., 1966, p. 1, and in Saturday Review, Dec. 10, 1966, p. 79; and that of the American Newspaper Publishers Ass'n in Saturday Review, Jan. 14, 1967, p. 109, and in a United Press International dispatch dated Jan. 5, 1967, The South Bend Tribune, Jan. 5, 1967, p. 12, col. 1. See Stanton, *Justice and the News Media*, Trial, Dec.-Jan., 1966-67, p. 40. Cf. American Civil Liberties Union, News Release, Dec. 8, 1966, which gives cautious approval to those parts of the Report that do not involve direct sanctions on the press. But see the opinions of two prominent ACLU lawyers, Edward J. Ennis and Melvin L. Wulf, who expressed approval of direct restraint. *Hearings* 347-59, 392-94.

6 Not really the only thing. The Ennis and Wulf statements speak encouragingly about direct restraint, as do Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 IND. L.J. 69 (1965); Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting in Criminal Cases*, 56 J. CRIM. L., C. & P.S. 1, 158 (1965); Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A.J. 301 (1935); Will, *Free Press v. Fair Trial*, 12 DE PAUL L. REV. 197 (1963); Note, *The Case Against Trial by Newspaper: Analysis and Proposal*, 57 NW. U.L. REV. 217 (1962); address of Justice Abraham N. Geller, April 30, 1964, reprinted in *Hearings* 394-400.

them even hoped for favorable trade arrangements with their more prosperous counterparts in the Kingdom of Upi.

Everyone was in favor of the union of the two ruling houses. And everyone was secretly anxious that the prince, who had never fastened his affections on any young lady for more than a day and a half, might decide against marriage at the last minute.

Into this benign tension there came the Ap town crier, a diligent, thorough, and effective reporter of the news. His objective was information. His inspiration was the right of the people of Ap to know what the wedding gown of the princess looked like, a piece of information that was more crucial than you might think. It was an important tradition in Ap — a tradition not without some religious significance — that brides appear on their wedding days in dramatic, uninspected, and astonishing finery.

Traditional values aside, there was pragmatic importance centering on the Prince of Upi. If he learned what the princess was to wear and the state of her nerves as the wedding approached, he might leave Ap and abandon the princess. No one in creation was less tolerant of nervous young ladies, and no one liked less being deprived of a happy surprise.

The union of the two kingdoms was threatened by the town crier's words out of church as much as — even more than — it would have been threatened by his trying to convince the prince to jilt the princess.⁷ It was a crisis, and to meet it the King of Ap summoned his council for advice on the problem of Fair Marriage and Free Crier.⁸

The king explained to the council that the crier got his information by climbing a tree (a public tree) and looking into the windows of the palace. Because of his agility in reaching the window he was able to learn what the gown looked like and then, the king said, to broadcast throughout the kingdom this information and that the hands of the princess trembled as she tried on the gown.

The crier, who was present, told the king there was no crisis. Reporting the news, he said, was a matter of responsibility and restraint.⁹ There could

7 Professor Kurland, testifying, quoted Judge Rifkind:

If you or I wrote a little memorandum, I think witness X is a liar and you should not believe a word he says, and if you or I handed that memorandum on the courthouse steps to a juror, we may be sure that whoever was trying that case would send for the bailiff to fetch us forthwith before the court where we would be dealt with summarily. Why should it make a difference that I have a big machine which multiplies that memorandum into a million copies and that I have a newsboy deliver it to the jury for me? I don't know, but apparently it does make a difference. *Hearings*

334.

8 This was a summary conference compared to modern American discussion on a similar subject, which the Attorney General called "a topic on which lawyers and editors have done more talking, for a longer time, with less result, than perhaps any other. . . ." *Hearings* 400.

9 For who responds to whom, see: Editorial, San Bernardino The Daily Sun, Dec. 16, 1964, reprinted in *Hearings* 293: "When these two principles clash, it is up to the judgment of news executives as to what course of action to take." Dr. Paul Fisher's reference to the Columbia Broadcasting System statement to employees, which permits news directors to ignore network fair-trial guidelines when there are "overriding public policy considerations." *Hearings* 303. Letter from Everett H. Erlick, American Broadcasting Co., Inc., to Senators Irvin and Tydings, Aug. 11, 1965, *Hearings* 452: "[I]t has always been the policy of the American Broadcasting Co. to limit comment on or discussion of pending litigation within the bounds of fairness and objectivity. . . ." ABA REP. 180, 241: Every newspaper responding to the ABA ques-

never be a conflict between Free Crier and Fair Marriage if the problem were left in his hands. He said he could be trusted to respect the attitudes of the prince and the ideals of the people, that he would only tell a few unprovocative things about the gown,¹⁰ and that the first step to decadence in any kingdom was always taken against town criers.¹¹ Any restriction on a free crier,¹² he said, including an attempt to restrict the crier's access to information, limited the right of the people to know.¹³

A cranky legal scholar named Nilgloss spoke after the crier, taking advantage of the silence that follows references to the freedoms of the people. Nilgloss began with a question: "Isn't it true, King, that it is a good thing to have our people fully informed on the marriage of the princess, both because it is uniquely important to them and because our marriage customs rest ultimately on an informed public opinion?" The king agreed, and Nilgloss said he thought it would be best to allow the crier to learn as much as possible about the preparations for the wedding, so that, after it was over, the people could learn the details from him and make an informed decision on whether marriage customs should be changed.

tionnaire said it would seek information from counsel and from police officers even if the proposed restrictions were adopted. FoI Digest, Nov.-Dec., 1966, p. 3: A four-station radio code in New York permits nonobservance of fair-trial standards for "overriding public need." See also Address by Ambassador Goldberg, American Society of Newspaper Editors, April 16, 1964, reprinted at *Hearings* 383-85; statement of Theodore Pierson, General-Counsel of Radio-Television News Directors Ass'n, to the effect that journalists are without professional discipline, *Hearings* 237; Stanton, *supra* note 5.

10 A homicide case is analyzed in Freedom of Information Center, *Fair Trial-Free Press Case Study*, April, 1966; the case involved the death of a student at the University of Missouri. Consider these quotations:

The Columbia *Tribune*, the older and larger in circulation of the two papers, bannered the story eight columns with a large two-line headline reading: "M.U. Freshman Shot to Death; Faculty Member Charged With Murder." . . . [T]he *Tribune* ran six pictures all related to the murder and arraignment on its front page The *Tribune's* story was about one and one-half columns

Larry Graebner, managing editor of the *Tribune*, has said, "I know of nothing available that we did not use, and I know of nothing in the story that we would consider prejudicial to Smith's chance of getting a fair trial." *Id.* at 3.

It is standard for the organized press to attack the "lawyers' fiction" that pretrial publicity is prejudicial. See Richard I. Tobin's discussion of the ANPA Report, *Saturday Review*, Jan. 14, 1967, p. 109. But see the testimony of Dr. Paul Fisher, *Hearings* 306-09, reporting that the Freedom of Information Center found, between January 1963 and March 1965, sixty-nine appeals based on prejudicial pretrial publicity. Three of them had resulted in reversals at the time of his report.

11 *Saturday Review*, Dec. 10, 1966, p. 79.

12 See Lyle Wilson's United Press International story on the Kennedy-Manchester book controversy: "[Y]ou or members of your family, could never challenge a free press so boldly as to make it pause, revise and bow low to a demand for editorial change." *South Bend Tribune*, Dec. 28, 1966, p. 24, col. 3.

13 Monroe, *A Radio and Television Newsmen's View*, 11 VILL. L. REV. 687 (1966), part of *Symposium on a Free Press and a Fair Trial*, *id.* 677-741 [hereinafter cited as VILLANOVA SYMPOSIUM]. The legal basis for the "right to know" is apparently found in the dominant rationale for the first amendment, EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966), rather than in the "public trial" provisions of the sixth amendment. *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954); Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810 (1961); Note, *The Accused's Right to a Public Trial*, 42 NOTRE DAME LAWYER 499 (1967). One gets the impression that the legal basis is sometimes ignored in favor of the platitudinous. See FELSHER & ROSEN, *THE PRESS IN THE JURY BOX* (1966); Louis Nizer says the Press's "Right to Know" takes second place to the "Rights of the Accused," FoI Digest, Nov.-Dec., 1966, p. 4; Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962). The theme is central to the statement of the ANPA, *supra* notes 5 and 10.

"Time is the key to that question," the king said. He agreed that the people had a right to know about the wedding preparations of their princess, but not if it meant ruining the marriage itself. Nilgloss, who well remembered the days when weddings in the kingdom were secret,¹⁴ insisted that the health of the kingdom required open discussion of weddings, and that open discussion assumed adequate and accurate information. Agreeing with the king that the only question was time, he suggested a two-step solution. First, the crier should be given access to the wedding preparations. Second, he should be required to desist from reporting them until the princess had appeared in public on the day of the wedding.¹⁵

The king's other councilors gasped. They could hardly believe that a free subject of the Kingdom of Ap — and a legal scholar at that — was able so quickly to forget the lessons of history. One of them reminded the king that the Nilgloss suggestion was the practice in the Kingdom of Upi, where, as everyone knew, there was no protection of free expression.¹⁶ In Upi, he said, royal officials summarily removed the tongues of criers who prejudiced weddings.¹⁷ There were even cases in which criticism of the officiating priest resulted in punishment,¹⁸ even for chance slips of the tongue.¹⁹ Another objector agreed: "This has never been a part of our law,²⁰ and besides it has taken us 165 years to remove it."²¹

14 The immediate response of the American Soc'y of Newspaper Editors was that the ABA Report threatened "secret law enforcement," *Time*, *supra* note 5, at 98. Stanton, *supra* note 5, makes that point at length. Similar response was reported from several law enforcement officers, a prosecutor, and at least two United States circuit judges. *Time*, Oct. 14, 1966, pp. 72, 74.

15 The reported response of Lewis F. Powell, Jr., past president of the ABA, to the objections noted *ibid.*, was: "There would not be suppression of news but merely deferment." *Ibid.* There is however, an enormous difference between "deferring" access to news sources, which usually means eliminating them, and deferring publication of a contemporaneously documented report. See note 39 *infra*.

16 Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125, 1126 (1964): "[U]nlike the situation in England, freedom of the press is constitutionally protected here"; Associated Press Guide on Free Press-Fair Trial Debate, March, 1965, quoted in *Hearings* 422. Compare these statements with *DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND* 79, 116-21, 134 (1958), and Cowen, *supra* note 6. See generally *MACDERMOTT, PROTECTION FROM POWER UNDER ENGLISH LAW* (1957). *Cf.* *People v. Ogilvie*, 222 N.E.2d 496 (Ill. 1966).

17 *DEVLIN, op. cit. supra* note 16. Compare the restrictions imposed on the contempt power of federal courts in the United States by *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *United States v. Barnett*, 376 U.S. 681 (1964).

18 *Rex v. Editor of the New Statesman*, 44 T.L.R. 301 (K.B. 1928); *Rex v. Colsey*, *THE TIMES* (London), May 9, 1931, 47 L.Q. Rev. 315 (1931). Both are discussed in *GOLDFARB, THE CONTEMPT POWER* 84-85 (1963).

19 *Regina v. Odham's Press, Ltd.* [1957] 1 Q.B. 73; *Rex v. Griffiths*, [1957] 2 Q.B. 192. The rule — if that is what it is — was criticized in 73 L.Q. Rev. 8, 9 (1957) and 20 *MODERN L. REV.* 275 (1957). *Cf. Contempt of Court*, 207 L.T. 225, 227 (1949). Absolute liability was eliminated by § 11, Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65; *GOLDFARB, op. cit. supra* note 18, at 88. Goodhart, *Newspapers and Contempt of Court in English Law*, 48 *HARV. L. REV.* 885, 906-08 (1935), finds very few instances of punishment for innocent contempt.

20 Wright, *supra* note 16, at 1126; Monroe, *supra* note 13, at 691; Lewis F. Powell, Jr., *Hearings* 386-92. ABA REP. 186 indicates that American newspapers rarely face contempt citations now, but Nelles and King, *Contempt by Publication in the United States*, 28 *COLUM. L. REV.* 401, 525 (1928), reported 58 American cases, 15 of them involving jury trial. See Beale, *Contempt of Court, Criminal and Civil*, 21 *HARV. L. REV.* 161 (1908); Jaffe, *supra* note 6.

21 *Hearings* 411-12 (statement of Professor Donald W. Gillmor). PA. STAT. ANN. tit. 17, § 2045 (Purdon 1962), dating from 1836, provides for direct criminal punishment — as well as a civil remedy — for publications that "tend to bias the minds . . . of the court . . . jurors,

Nilgloss answered that things had never been that bad in Upi.²² Furthermore, he said he did not propose adoption of the Upi practice.²³ He did not propose summary punishment for anything;²⁴ he did not propose closing anything to criers;²⁵ he did not propose punishment for innocent slips of the tongue;²⁶ and he did not propose ever punishing anybody for criticism of priests or of the institution of marriage.²⁷ He was interested in only one thing, and that was keeping the prince on the hook. The question was whether the prince was to decide on his bride or the town crier was to decide for him.²⁸

On the other hand, Nilgloss said, the people could hardly be expected

witnesses" A bill to provide criminal sanctions in Massachusetts is discussed and reproduced in Sigourney, *Fair Trial and Free Press—A Proposed Solution*, 51 MASS. L.Q. 117 (1966). See *Weston v. Commonwealth*, 195 Va. 175, 77 S.E.2d 405 (1953); Trescher, *A Bar Association View*, VILLANOVA SYMPOSIUM 709, 713 n.13; GOLDFARB, *op. cit. supra* note 18, at 91.

22 Freedom of Information Center, British Press Council 1 (1963), reported that "the British people are the most avid newspaper readers on earth," and attributed restrictions on freedom of the press more to monopoly than to the law. See also Mr. Justice Frankfurter's survey of the English cases in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 921 (1950); Cowen, *supra* note 6. Monroe, *supra* note 13, at 691, quoted with approval the editor of the Washington Evening Star, who found restrictions on the English press "not easily apparent." The English rarely complain about restrictions. Goodhart, *supra* note 19, at 909 n.99; Note, *Free Press; Fair Trial—Rights in Collision*, 34 N.Y.U.L. Rev. 1278 (1959). Even Professor Gillmor thinks most vocal critics in England have been appeased by the enactment of the Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11. Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 1 (1965).

23 GOLDFARB, *op. cit. supra* note 18, at 88-89, believes the most obnoxious aspects of the British practice are that it is summary, is final, reaches innocent publications, and is used to protect judicial dignity as well as to keep trials fair. None of these features is necessary to direct restraint on the press. See the proposals in Jaffe, Will, and Note, all *supra* note 6, none of which contains any of these objectionable features.

24 Cowen, *supra* note 6, argued against it in English practice, as did Beale, *supra* note 20, half a century ago. Fox, *The Summary Process to Punish Contempt*, 25 L.Q. Rev. 238 (1909), demonstrated that jury trial was originally used in indirect contempt cases, citing several cases in the reign of King Edward III. The testimony of Morris A. Shenker, immediate past president, Nat'l Ass'n of Defense Lawyers in Criminal Cases, *Hearings* 329, of Professor Kurland, *Hearings* 339, and of Mr. Ennis, *Hearings* 355, and Note, *Controlling Press and Radio Influence in Trials*, 63 HARVARD L. REV. 840 (1950), discuss jury trials in criminal contempt cases.

25 See Address by Judge Sobeloff, Nieman Fellows Annual Dinner, Nov. 29, 1955, reprinted in *Hearings* 378.

26 Note, *Contempt by Publication: The Limitation on Indirect Contempt of Court*, 48 VA. L. REV. 556 (1962), and notes 18 and 19 *supra*.

27 This seems the most onerous part of the English practice. See note 19 *supra*; Donnelly & Goldfarb, *Contempt by Publication in the United States*, 24 MODERN L. REV. 239 (1961). A distinction drawn by Mr. Justice Black in *Bridges v. California*, 314 U.S. 252, 272-73 (1941), indicates that a contempt citation which is based on insulting a judge in the press is probably unconstitutional. *In re Jameson*, 139 Colo. 171, 340 P.2d 423 (1959), 35 NOTRE DAME LAWYER 165 (1959), so held. Goodhart *supra* note 19 at 900, 901, believed the "scandal of the court" branch of indirect contempt has rarely been punished in England, the most notable examples being two cases arising out of the Tichborne affair: *Onslow and Whalley's Case*, L.R. 9 Q.B. 219 (1873), and *Skipworth and Castro's Case*, L.R. 9 Q.B. 230 (1873).

Use of the contempt power to protect judges from criticism is no part of the present discussion, except for the time-honored observation that the Supreme Court of the United States has yet to pass on jury cases. Some writers, however, talk about the two sides of contempt by publication as if they were Siamese twins. *E.g.*, Barron, Book Review, 1966 DUKE L.J. 1182.

28 Report of the Advancement Freedom of Information Comm. of Sigma Delta Chi:

American courts of justice belong to the American people, . . . all lawyers are servants of the court and thereby are servants of the people, and . . . all of their actions and the actions of the court should be open to the restraint of public opinion at the time. *Hearings* 444.

To me this seems to say that the voting public should determine judicial questions any time it wants to. *Estes v. Texas*, 381 U.S. 532, 583 (1965) (Warren, C. J., concurring), and Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1 (1951),

to decide issues involving marriage if they knew nothing about weddings.²⁹ For that reason, the crier should be allowed to learn more, not less, about the wedding of the princess.³⁰

The other councilors, however, disagreed. The only way to assure proper and traditional respect for freedom of the crier, they all said, and at the same time protect the princess from her bridegroom's reluctance was to arrange that the crier see nothing before the wedding.

Nilgloss suggested that this would lead the crier to broadcast false information,³¹ which might do more harm to the attitudes of the prince than the truth would.³² The others answered that it was not part of the council's function to tell the crier how to run his business.³³

Nilgloss suggested that in the long run the people would know far less if the crier could see nothing.³⁴ But the others answered that a decent crier would

imply a need to protect judicial decisions from public opinion, even if judges themselves can never be immune from it.

The efforts of trial counsel in the Speck murder case in Chicago to find a city in Illinois that had not had its judicial air poisoned by Chicago new media, is described in *Time*, Jan. 13, 1967, pp. 39, 40. The social price paid for reversed convictions, changes of venue, etc., is rarely weighed against what might be called the right-to-know-*immediately*. *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966), is an example. Cowen, *supra* note 6, expresses this view.

29 Professor Dowd's introduction to VILLANOVA SYMPOSIUM 677, 679:

If the press believes some rule of evidence to be absurd, it has a responsibility to say so. . . . The public's right to know is not the right to be fed sensational "facts," but rather to be informed as to what is really occurring in the criminal process.

The ANPA Report, *supra* note 5, at 2: "It is not enough for the people merely to know the end result of a trial, they need to know the means to that end." Judge Wright, *supra* note 16, makes a persuasive case for broad and deep criminal trial coverage in the press, coverage that, as he emphasizes, involves greater access to information, not less.

30 Cf. Harvard Note, *supra* note 13, and references therein to "antiseccrecy" legislation in several states—the policy behind which seems directly contrary to the policy behind the suppression-of-sources suggestions cited in note 1 *supra*, e.g., Judge Smith's testimony in support of the Morse Bill:

The policy of publicity implicit in the sixth amendment is to protect the accused and insure a fair trial. The right to a fair trial is obviously superior to the right-to-know concept. The guarantee of the first amendment cannot be invoked as a basis for compelling disclosure of information, the publication of which is likely to impair this right. *Hearings* 131.

An example of the subtle danger of poor reporting of the judicial process in criminal cases is that the public, which has read of "evidence" in pretrial reports, feels an injustice is done when that "evidence" is excluded at the trial, even in cases of hearsay, privilege, or constitutional objection. Segal, *Fair Trial and Free Press: What the General Practitioner Should Know*, ABA Law Notes, Oct., 1966 (Criminal Law Sec.).

31 Testimony of Carlton S. Roeser, *Hearings* 459-60, covers a case in which pretrial prejudicial publicity came from a witness whom none of the suggestions for enforced silence would have touched. Mr. Roeser, who was counsel for defendants in the case, seemed to assume that the Morse Bill would have helped the situation, but it would not have. Neither it nor the ABA Report, nor the Attorney General's directive, nor the *Van Duyn* case, keep the witnesses quiet; and information from witnesses is likely to be less reliable than information from lawyers or police officers. The ANPA statement, of course, threatened that newsmen would get "facts" wherever they could be found. The South Bend Tribune, Jan. 5, 1967, p. 12, col. 1.

32 Foreman, *A Defense Attorney's View*, VILLANOVA SYMPOSIUM 704, 707:

It is difficult, however, to see how witnesses, their relatives and others can be kept from discussing the case. . . . In fact, one effect of rules regulating law enforcement officials and lawyers might be that the only information available to the public is the least reliable.

33 Senator Javits raised this question with Judge Smith but got no answer. *Hearings* 147-48.

34 Admiral Dennison of Copley Newspapers said: "[I]ncompetence and dishonesty cerish a mania for secrecy." *Hearings* 241. Other critics sharing this view include Ralph Sewell, president of Sigma Delta Chi, *Hearings* 272, 423; Robert M. Hutchins, *Hearings* 282; Donald

still do his job. They added, without demonstrating what they meant,³⁵ that an uninformed or misinformed crier could still make his contribution to the good of the kingdom.

Nilgloss said that the crier himself would surely prefer postponed publication to loss of information. The crier's profession, Nilgloss said, was the link between people and government,³⁶ the grand department store in the marketplace of ideas. Given a choice between no information and delayed publication, he thought the crier would prefer delay, especially since delay was not unheard of among criers³⁷ and might give an opportunity for fuller, more coherent reporting. Surely, he said, unfettered ability to criticize marriage customs and to report facts, after marriages were beyond the point at which criers could influence them, was the lion's share of what the people's right to know meant, if it meant anything.³⁸

The crier answered that he disliked both alternatives, especially that of Nilgloss. It was, he said, the certain destruction of free criers and the right of the people to know, and therefore much worse than an ignorance that would not interfere with his freedom. He preferred the proposal of the other councilors.

Feeling bound by the decision of the majority of his council, the king reluctantly agreed that the only solution was to arrange matters so the crier could see nothing. He therefore ordered that the town crier's eyes be put out.

Nilgloss shook his head at the soon-to-be-blind crier and said he could not understand what was so objectionable about a few days' delay.³⁹ Another

H. McGannon, president of Westinghouse Broadcasting Co., Inc., *Hearings* 377; and John Knight of the *Miami Herald*, who said: "There can be no 'truth in news' if reporters are . . . forced to accept a bar association's concept of what should and should not be printed," *Hearings* 424. Specter, *A Prosecutor's View*, VILLANOVA SYMPOSIUM 697, itemizes the political utility of thorough news reporting of criminal cases.

35 The ABA Report exhibits an astonishing ambivalence, alternating between reports that the press relies almost entirely on statements of lawyers and police officers (114 of 120 reports in the committee's one-month study of confessions and statements came from police sources, ABA REP. 28) and assurances that the imposition of silence will not seriously affect the press. The effects of silence are at one point described as "minimal and perhaps nonexistent," *id.* at 71; at another the report forswears direct restraint because it would "stifle desirable discussion . . . and discourage needed criticism of official conduct." *Id.* at 151.

36 McKay, *An Academic View*, VILLANOVA SYMPOSIUM 726, 733, citing Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J. 800 (1953).

37 Joseph Nevins, an editor of the *Alhambra Post-Advocate*, Alhambra, Calif., pointed out that newspapers routinely delay news on the basis of available space, local interest, and "editorial or publisher 'policy.'" *Hearings* 255. Senator Ervin said "the rewards and the glory . . . go to the man who can make the scoop," *Hearings* 353, but some newspapers delay crime stories on advice of counsel, who are in turn influenced by bar association guidelines. Testimony of Judge Roszel C. Thomsen, *Hearings* 370-73.

38 Freedom of Information Center, Press Release, Dec. 31, 1966, listed the United States as having a "free press" rating of 2.71, on a scale ranging from 4 to -4. England, where the press is supposed to be oppressed, has a rating of 2.37. The Netherlands (3.25), Switzerland (3.14), Finland (3.05), Norway (2.98), and Sweden (2.77) are all rated higher than the United States. The rating method is explained in Freedom of Information Center, PICA: Measuring World Press Freedom, Aug., 1966.

39 Criminal trial delays in the United States range from two months to a year, but most cases are apparently tried in about four months. The longer delays are often in major cases, "to allow publicity to dissipate." ABA REP. 238-39. English trials are normally held within two months of arrest. DEVLIN, *op. cit. supra* note 16, at 101-02. The brevity of restriction on news sources is one of the arguments in the ABA Report, see note 15 *supra*, but there is a difference between postponing publication of a full report that is contemporaneously researched and closing the sources of information until color and tension—and even interest—is gone. See ABA REP. 78.

Some of Nilgloss's frustration is mirrored in the opinions of Edward J. Ennis, who privately,

councilor, an erstwhile opponent, suggested that the years Nilgloss had spent in separation from the tensions of life outside the university made it impossible for him to understand the subtleties of an open society. "Our society has expressed a preference for freedom of expression," this councilor said, "recognizing that other sacrifices may be required. . . . [W]e must acknowledge the . . . practical consequences."⁴⁰ And the crier agreed. "I will be blind," said this Oedipus of journalism, "but I will be free, and that is what counts."

II

In reference to fair trials the essence of the Nilgloss suggestion is that the press should see, evaluate, report, and criticize *more*, not less, about the administration of justice. A distinguished federal judge said in 1964:

[T]he public image of justice is distorted because we judges have turned our backs to the news media and have allowed their writers to draw on their imaginations instead of reality, and to report only a tiny part, instead of the rich whole, of the face of justice.⁴¹

Police interrogation should be open to public scrutiny. The press should be able to report what arresting officers *do*, not only what they *say* they do.⁴² It should be able to find out and report what the arrested person knows and how he uses what he knows.⁴³ If the press had been allowed to do that and had done it, the *Miranda* and *Escobedo* decisions⁴⁴ might have seemed justified to the public. On the other hand, they might not have seemed justified, in which case I think we can depend on the Supreme Court's following the election returns.⁴⁵

The same open access to scrutiny by the press might be applied to such matters as selective prosecution,⁴⁶ the exclusionary rules of evidence,⁴⁷ and arraignment practices, especially in cases arising out of the civil rights movement.⁴⁸

Minutes of the Due Process Committee, ACLU, June 8, 1966, p. 3, and publicly, *Hearings* 347-59, has expressed his belief that adoption of the English practice would be less restrictive of the press than other, more popular suggestions.

40 McKay, *supra* note, 36, at 728; Wright, *supra* note 16, at 1129. See note 55 and accompanying text *infra*.

41 Wright, *supra* note 16, at 1129. See also Stanton, *supra* note 5.

42 Mr. Nevin's editorial, reprinted in *Hearings* 283, discussed a case in which newspapermen were the unwitting accomplices of misdealing police officers because they took the officers at their word, which is bad journalism and bad journalism that the law as it stands tends to encourage. Other examples are in FELSHER & ROSEN, *op. cit. supra* note 13, at 79-80; Isaacs, *Free Press and Fair Trial*, Res Gestae, Nov. 1965, p. 7.

43 ACLU News Release, Dec. 8, 1966, favors the opposite. For instance, the ACLU would suppress "observations about a defendant's character"; "statements, admissions, confessions or alibis attributed to a defendant"; "reference to investigative procedures, such as fingerprints, polygraphs, ballistic tests or laboratory tests"; statements about witnesses, evidence, or argument; and the circumstances surrounding an arrest.

44 *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois* 378 U.S. 478 (1964).

45 DUNNE, MR. DOOLEY ON THE CHOICE OF LAW (Bander ed., 1963).

46 Specter, VILLANOVA SYMPOSIUM 700-01, discusses the uses to which information on prosecutions might be put by the voters. Cf. DEVLIN, *op. cit. supra* note 16, on selective prosecution in England.

47 See the interesting account of the concern taken in the popular press in California when a routine modernization of the rules of evidence would have affected the reporter's privilege against disclosing news sources. *Hearings* 291-93.

48 Time, Oct. 14, 1966, pp. 72, 74, reported reactions of two Southern newspaper editors to the effect that the ABA Report would hamper the civil rights movement because it would encourage "secret law enforcement" and protect the "segregationist bully."

None of the established practices in these areas is sacred; none deserves to be free from the pressures of public opinion. A column by Robert M. Hutchins in the *Los Angeles Times* puts this point in a rhetorical question: "Unless the press can demand and obtain all the information there is about an individual case, how can newspapers, television and radio perform the function contemplated by the first amendment?"⁴⁹ Existing administrative and judicial secrecy in carrying out these functions of the Government should be eliminated, not increased. The unhappy side of the ABA Committee's suggestions to eliminate the sources of information is that they would increase secrecy where none is necessary. Almost any secrecy is bad in the processes of criminal justice, which in their way ought to respond to the people as much as political processes do. I agree with the angry response to the Morse Bill by the managing editor of the *Oklahoma City Times*, Ralph Sewell: "The courts are not private playgrounds for attorneys. They are public institutes, designed to protect both the rights of the accused and the rights of each and every citizen."⁵⁰

The press has not been reporting enough about the processes of criminal justice. A principal reason for widespread lack of interest⁵¹ in due process, the problem of organized crime,⁵² and the dilemma of indigent defendants and prisoners⁵³ is that the public has no information about these things. No real libertarian can be very happy, therefore, with suggestions that would cut off existing sources of information.

Those federal judges, lawyers, and prosecutors, as well as leaders of the press,⁵⁴ who have voiced objection to the ABA Report and the Morse Bill usually add that nothing need be done to protect the impartiality of jurors in criminal cases. I think they are wrong. Obviously something has to be done about prejudicial publicity. Those who are more interested in the abstract principle of free expression than the plight of individuals unjustly convicted of crime are simply beyond my understanding.⁵⁵ I feel as Camus did in a similar context: "[I]f anyone, knowing it, still thinks heroically that one's brother must die rather than one's principles, I shall go no further than to admire him from a distance. I am not of his stamp."⁵⁶

The ritual in which lawyer, judge, and town crier condemn direct restraint as a solution to prejudicial publicity because it is "the British system," is simplistic, exaggerated, and thoughtless. We might wonder how it is that the English manage to have a noisy, candid daily press and at the same time preserve a judicial process that is admired by anyone who pauses to comment on it.

49 *Los Angeles Times*, Feb. 8, 1965, reprinted in *Hearings* 282.

50 *Hearings* 423.

51 Consider, by way of analogy, the response to questionnaires sent by the ABA committee: 132 of 200 judges and 146 of 200 defense attorneys did not even reply. ABA REP. 246, 252.

52 See the 1963 predecessor to this symposium, *Interstate Organized Crime*, 38 NOTRE DAME LAWYER 626-759 (1963).

53 Apathy on all of these questions is not inevitable, of course, as the popular success of LEWIS, GIDEON'S TRUMPET (1964), seems to prove.

54 See notes 5 and 14 *supra*.

55 See note 40 *supra*. Judge Wright and Professor McKay cannot mean that all of the price paid for no restraint on the press comes in reversed convictions. There are obvious quantitative limits on reversals, even assuming that every convicted person has the means and the stamina to seek them. What they must mean is that an unjust sentence is a necessary price for the preservation of a principle.

56 CAMUS, RESISTANCE, REBELLION AND DEATH 113 (O'Brien transl. 1961).

Those who, in terms of the British system, denounce all direct restraint on the press, also make a fundamental historical mistake. They confuse the gradual reduction of arbitrary judicial power with a very recent constitutional impulse to broaden judicial protection for freedom of the press.⁵⁷

Giving several examples in the reign of Edward III,⁵⁸ Fox demonstrated that interferences with the administration of justice outside the courtroom were punished as crimes and tried by indictment early in the history of the common law. It was in the seventeenth century that out-of-court interferences came to be punished summarily — without jury trial or appeal or even a right to be tried before a new judge.⁵⁹ England has been withdrawing from this excessive use of judicial power at least since the Law of Libel Amendment Act of 1888,⁶⁰ and by 1960 most arbitrary aspects of constructive contempt, with a notable exception in the failure to provide jury trial,⁶¹ had been eliminated.

America also reduced judicial power in this area. In fact, as Professor Chroust has shown,⁶² there was a general fear of judicial power after our revolution, a fear that crippled the legal profession for a generation and resulted in such Jacksonian embellishments as elected judges — even nonlawyer judges — and the fixing of sentences by juries. Nelles and King's celebrated article⁶³ catalogued the effect of this American movement on the contempt power; it all but took the power away. Its effects are echoed in the severe restrictions imposed on criminal contempt during the past few Supreme Court terms.⁶⁴

The effect of this historical strain on contempt as levied against newspapermen is seen in the *Bridges*, *Pennekamp* and *Craig* cases,⁶⁵ and indirectly in *Wood v. Georgia*.⁶⁶ Two conclusions strike me as important for present purposes. One is that the gradual reduction in the contempt power has little to do with freedom of the press as it bears on the administration of justice. That issue was only incidentally in those Supreme Court cases. The specific issue of prejudicial publicity and its effect on jurors was clearly, even expressly, excluded from what the Court had to say in those opinions, which were part of the American anticontempt tradition. They were only incidentally free speech cases, and they were not jury cases at all. Mr. Chief Justice Warren's opinion for the Court in *Wood*, and some pointed dicta in *Sheppard v. Maxwell*,⁶⁷ are explicit to that effect.

The other conclusion is that American appellate courts have given almost no indication of the legitimacy of direct restraint on the press in cases where

57 *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 87 S. Ct. 534 (1967).

58 Fox, *supra* note 24.

59 GOLDFARB, *op. cit.* *supra* note 18.

60 Law of Libel Amendment Act, 1888, 51 & 52 Vict., c. 64, § 3.

61 Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, §§ 11-13.

62 2 CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA*, ch. I (1965).

63 Nelles & King, *supra* note 20.

64 *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *United States v. Barnett*, 376 U.S. 681 (1964).

65 *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). All are discussed in 35 NOTRE DAME LAWYER 165 (1959).

66 *Wood v. Georgia*, 370 U.S. 375 (1962).

67 *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

prejudicial pretrial publicity posed a clear and present danger to the administration of justice. There is literally no indication of the legitimacy where the direct restraint is based, not on the contempt power, but on the general power of the state, and the specific power of its legislative branch, to protect judicial institutions from illegitimate influence.

III

What I propose is a statute that would make the premature publication of certain kinds of prejudicial information a crime. Such a statute has been in force in the Commonwealth of Pennsylvania for 131 years, with parallels in Canada, Australia, and Northern Ireland.⁶⁸ It is an ordinary criminal statute, not dependent upon the contempt power.⁶⁹ Modern and specific proposals have been published by Miss Jaffe of the Illinois Bar,⁷⁰ Mr. Sigourney of the Massachusetts Bar,⁷¹ and United States District Judge Hubert L. Will.⁷²

The statute should be restricted in its operation to criminal cases, during the time between arrest and verdict, and only to those in which a jury trial is either used or would have been used but for the prejudicial publicity.⁷³ Its validity would turn on a finding of clear and present danger to the administration of justice. That finding might be a legislative finding for specific kinds of publicity;⁷⁴ it might be a more general legislative finding, followed by a jury determination on clear and present danger in each case brought under the statute.

Specific offenses that the statute might define include: the premature publication of the defendant's pretrial statements; description of his criminal record; description of tangible evidence seized by the police;⁷⁵ statements of witnesses,⁷⁶ including testimony in preliminary hearings;⁷⁷ and the contents of proceedings held during the trial but out of the presence of the jury.

The legislative findings on which the statute might rest could be general,

68 PA. STAT. ANN. tit. 17, § 2045 (Purdon 1962); Morton, *Prejudicial News Reporting of Criminal Trials in the British Commonwealth*, Hearings 750-58, 754, describes commonwealth legislation. See also SIGOURNEY, *op. cit. supra* note 21; Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 IND. L.J. 69 (1965); Trescher, *op. cit. supra* note 21.

69 Commonwealth v. Conroy, 69 Pitts. Leg. J. 373 (Quart. Sess. Clearfield County 1920).

70 Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting in Criminal Cases*, 56 J. CRIM. L., C. & P.S. 1, 166-69 (1965). See also Note, *The Case Against Trial by Newspaper*, 57 NW. U.L. REV. 217 (1963).

71 SIGOURNEY, *op. cit. supra* note 21.

72 Will, *Free Press v. Fair Trial*, 12 DE PAUL L. REV. 197 (1963).

73 Note, *supra* note 70 at 246, discusses the amendments that might be required to bring such a statute into line with statutes giving reporters a privilege not to disclose their sources.

74 Donnelly & Goldfarb, *supra* note 27, at 255; Will, *supra* note 72, at 214-16.

75 The ABA Report suggests no remedy for this sort of publication, although most commentators do. The committee was obviously led into this gap by its refusal to impose significant direct sanctions for pretrial prejudicial publicity; one reason expressed against a remedy is that evidence is often seized in the presence of reporters. ABA REP. 90.

76 Neither the ABA Report, the Morse Bill, the Attorney General's Address, nor State v. Van Duyn, 43 N.J. 369, 204 A.2d 841 (1964), suggest any way to protect against this sort of prejudice. See notes 31 and 32 *supra*.

77 English magistrates may sit *in camera*, but rarely do unless the accused requests it. The experience there on preliminary hearings is almost exactly as that in America: the press is free to report what occurs, which is often a substantial amount of information, especially when the defense elects to try for a dismissal. See DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 107-11, 116-21 (1958). An interesting study of the tactics involved is in C. P. SNOW, *STRANGERS AND BROTHERS*, chs. 27-29 (1960).

and could be coupled with a general description of the offense. This is the form of the Pennsylvania statute.⁷⁸ The legislature, if the statute took this form, would be finding that conduct within the general formula is capable of prejudicing jurors; it would be up to the jury in the prosecution under the statute to determine whether it had a prejudicial tendency.

Accusations against persons under this statute would be brought under routine local criminal processes, would be triable by a jury, and would be as appealable as any other conviction. Sanctions would have to be available against both corporate employers and natural employees, and should perhaps parallel those that in recent years have promised to be effective in federal antitrust actions.

This statute would be much more effective, and much less drastic, than the proposals of the ABA Committee. It should be accompanied by broadened access to records and hearing in criminal cases; by opportunities for the press to observe arrest and interrogation procedures; and by exposure to parties, counsel, and police officers, unfettered by any official rules.

The use of sanctions against persons who poison jurors with prejudiced publicity is not radical. A good deal of precedent exists for it in the present practice of trial judges,⁷⁹ in the early American cases,⁸⁰ in the Commonwealth nations that deal with the problem by statute,⁸¹ in a recent conviction of a reporter who intercepted and then used police radio transmissions in violation of the Federal Communications Act,⁸² in state contempt citations against reporters that somehow survived despite the predictions that they never would,⁸³ and even in two significant parts of the ABA Report: that imposing contempt sanctions against police employees,⁸⁴ and that employing contempt against reporters who publish accounts of proceedings held out of the jury's presence.⁸⁵

The statute would not invoke prior restraint; it would correct what the Chief Justice, in the last word on the subject from the Supreme Court of the United States, called "a substantive evil actually designed to impede the course of justice."⁸⁶

78 PA. STAT. ANN. tit. 17, § 2045 (Purdon 1962).

79 FoI Digest, Nov.-Dec., 1966, reports current examples in Indiana, p. 2 (press limited to matters presented to jury); Florida, p. 3, (radio broadcasters prohibited from using "background information" during the trial); and North Carolina, p. 3, (restrictions on news sources). Judge Hamilton M. Hobgood of North Carolina is quoted, at *Hearings* 483, as restraining reporters from printing matters not in evidence. Trial-judge practice does not, of course, include restraints the news media impose upon themselves for commercial reasons. See note 37, *supra*.

80 See Nelles and King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 525 (1928).

81 See note 68 *supra*.

82 *United States v. Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962).

83 See *Goss v. Illinois*, 204 F. Supp. 268 (N.D. Ill. 1962), *rev'd*, 312 F.2d 257 (7th Cir. 1963); *Brumfield v. State*, 108 So. 2d 33 (Fla. 1959); *People v. Goss*, 20 Ill. 2d 224, 170 N.E.2d 113 (1960), *cert. den.* 365 U.S. 881 (1961); *People v. Goss*, 10 Ill. 2d 533, 141 N.E.2d 385 (1957); *Weston v. Commonwealth*, 195 Va. 175, 77 S.E.2d 405 (1953). See also *United States ex rel. Bruno v. Herold*, 368 F.2d 187 (2d Cir. 1966). *Contra*, *Phoenix Newspapers v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966).

84 ABA REP. 5-8, which is meant to reach administrative officers, examining physicians, and employees of administrative agencies. *Id.* at 102, 107. The committee finds authority for direct restraint in FED. R. CRIM. P. 5(a), which requires police officers to offer arrested persons for prompt arraignment, and in *United States v. Shipp*, 203 U.S. 563 (1906), where contempt was held to lie against a local sheriff for interference with the federal courts.

85 ABA REP. 14-15, 152-53, justification for which is held to be implied in *Wood v. Georgia*, 370 U.S. 375 (1962).

86 *Wood v. Georgia*, *supra* note 85, at 389. See Foreman, VILLANOVA SYMPOSIUM 704.

The direct restraint part of this proposal is not radical, although the positive part of it is. The idea that news sources should be opened and the press encouraged to probe police and judicial practices, that the press should say more, not less, about the administration of justice is a radical idea.⁸⁷

My proposal is somewhat unusual, too, in the role juries would play in imposing direct restraint. In the first place, the statute would accept Mr. Justice Black's invitation in the *Bridges* opinion for a state legislative finding that certain common reporting practices pose a clear and present danger of interference with the administration of justice in criminal cases tried to juries.⁸⁸ This legislative finding of fact would have significant weight in a constitutional challenge to the statute,⁸⁹ as a similar congressional finding might have in determining the constitutionality of antismuggling legislation.⁹⁰ The Supreme Court, in view of *Estes v. Texas*⁹¹ and the line of cases culminating in *Sheppard v. Maxwell*,⁹² could hardly quibble with its reasonableness.

In the case against the publisher, the statute would leave a general issue of prejudicial impact to the jury. If the statute were divided into two offenses, as Judge Will suggests, the jury's task would be simple where the publisher was accused of violating a specific statutory prohibition, such as publishing a report of the defendant's statement before the trial. In that case the factual finding of prejudice would already have been made by the legislature.

The jury's role would be more crucial where the accusation was under the statute's general prohibition; Judge Will's phrase is "serious and imminent danger of substantial prejudice to the fair administration of criminal justice."⁹³ In this latter category — and perhaps all proceedings ought to be in this category⁹⁴ — the jury's role would be similar to what it is in determining whether publications are obscene.⁹⁵ All the factors involved in the premature publication — the pendency of the proceedings, the probability of impartiality in the jurors who

Chief Justice Warren's opinion suggests that "actually designed" means proof of intent to obstruct justice is required, and the ABA Report obviously took that suggestion at face value. However, intent ought to be a question of impact on the jury, not of an evil heart. Judgment as to impact is a daily part of the trial judge's life. Shaffer, *Bullets, Bad Florins and Old Boots*, 39 NOTRE DAME LAWYER 20 (1963). The constitutional implications of a crime of this nature which does not involve proof of an evil heart are discussed in Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1 (1951).

87 One advantage of contempt that is lost or reduced in a statute is flexibility. Relief from statutory restrictions where justice requires it is easily accomplished in England. E.g., Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885, 893-98 (1935). One answer might be a provision for judicial relief from the statute in some cases. See Haimbaugh, *Free Press Versus Fair Trial: The Contribution of Mr. Justice Frankfurter*, 26 U. PITT. L. REV. 491 (1965).

88 *Bridges v. California*, 314 U.S. 252, 260-61 (1941); Le Wine, *What Constitutes Prejudicial Publicity in Pending Cases*, 51 A.B.A.J. 942 (1965).

89 Note, *Controlling Press and Radio Influences in Trials*, 63 HARV. L. REV. 840, 851 (1950). See *Gitlow v. New York*, 268 U.S. 652 (1925); Will, *supra* note 72, at 214-16.

90 See Richardson, *supra* note 86, at 32-33, 37.

91 381 U.S. 532 (1965).

92 *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

93 Will, *supra* note 72, at 215.

94 This would limit the legislative finding to a general determination that pretrial publicity posed a possibility of clear and present danger to the administration of justice, and leave it to the jury to determine the necessary causal relation.

95 O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAWYER 1 (1964).

were exposed to prejudice, and the intensity and dissemination of the publicity⁹⁶ — would enter into the jury's determination. Much of the factual determination of whether the publication at issue posed a clear and present danger to the administration of justice would thus become a question for the jury, whose verdict would be open to the same appellate review accorded other verdicts, but no more than that. This would be a case of one jury deciding, concerning another jury, what was prejudicial in effect, and what was not. Prejudice among jurors is usually decided by judges, but they are really not very good at it.⁹⁷ A second jury would be better able to tell what the impact of prejudice was likely to have been. I do not propose to punish publications that are not found to have been prejudicial, either by a general legislative finding of fact or by a jury determination.⁹⁸ I do not propose ever punishing anybody for criticism of judges or publicity in cases where a jury trial is not available, as it would not be, for instance, after the defendant or both the defendant and the state waive jury trial.

Intent of the person making the publication would be relevant only to the extent that it bore on the impact the publication had,⁹⁹ which should take care of any possibility of prosecution for purely innocent publications. An alternative provision, such as England now has,¹⁰⁰ could expressly bar liability for purely innocent publication. Selective prosecution and the well-known propensity of jurors to make their own law might also help in this respect.

IV

I do not believe that direct restraint would seriously limit freedom of the press if it were imposed within these limitations. It depends, I suppose, on what one means by a free press. If that phrase means news media having wide access to the details of what the Government does, and the fullest freedom to report what it learns to the people, as Mr. Hutchins' question suggested, then what I suggest would produce more freedom, not less. It would be better than what Mr. Cooper's committee suggests; by any standard, the ABA Report would produce less freedom, less accuracy, less detail — far less, in other words, that would respond to the people's "right to know."

These temporary restraints, coupled with fuller information than the press has ever had, should play a very minor role in the total assessment of free expression in the news media.¹⁰¹ Certainly in England, where restraints of this nature are more severe than what I am suggesting, and where access to information is more limited than I think it should be, the total effect on a free press is obviously minor. It appears, in fact, that the tendency to monopoly ownership

96 See Haimbaugh, *supra* note 87.

97 Shaffer, *Appellate Courts and Prejudiced Verdicts*, 26 U. PITT L. REV. 1 (1964).

98 See Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE REV. 1 (1965), quoting *Queen v. Payne*, [1896] 1 Q.B. 577; Haimbaugh, *supra* note 87.

99 Richardson, *supra* note 86, at 13-16.

100 Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11, discussed in Goldfarb, *THE CONTEMPT POWER* 88 (1963).

101 See note 38 *supra* on criteria used by the Freedom of Information Center in measuring that elusive value.

of newspapers there — and here too perhaps — is a far more dangerous inhibition on a free press than anything the courts do.¹⁰²

On the whole, it seems to me that the Kingdom of Ap would have been better off if the crier had been allowed to see whatever he wanted to see, within limitations imposed by the modesty of the princess, of course, and then had been told to keep it under his hat for a day or two.

Afterthoughts

The admirable decision to open discussion in this Symposium to the distinguished judges, television and newspaper executives, lawyers, and law professors who were present produced enough constructive reaction to my proposals that a short appendix might be helpful.

Professor Force, Judge Beamer, and Judge Grant — along with such thoughtful observers from the news media as Mr. Mitgang and Mr. Conklin — brought the discussion, again and again, to a single point: some form of direct restraint is probably necessary to any effective protection for the fairness of criminal trials. A principal and recurrent criticism of the ABA proposals was that they do not involve enough direct restraint to make them workable.

In my view, statutory direct restraint makes obvious improvements in the use of the contempt power; they are adequately discussed above. But the greatest obstacle to statutory direct restraint, and this, too, arose repeatedly in the discussion, is practical politics, practical politics on two levels.

The first level is the legislature. Many participants thought it unlikely that legislatures would pass the sort of bill Judge Will, Mr. Sigourney, and Miss Jaffe have proposed. Against that objection one might set the substantial amount of legislation in this country on the contempt power and the serious consideration given Senator Morse's bill in the Senate. But it seems to me that a more sensible response to the objection is that intelligent men making a reasonable suggestion must assume that legislators will take it seriously. And, if one must be brutal, legislators will begin to take this problem seriously as the reversed convictions that turn on prejudicial publicity begin to pile up. And pile up they surely will in the next several years.

The second level of practical politics is enforcement. The suggestion was made that elected prosecutors and elected judges would not enforce this sort of statute. When later I accused the distinguished federal judge who made that point of cynicism, he accused me of youth. But youth or not, I still believe his observation was cynical. Most people in the United States obey the law (the most unpopular statute in the nation — the Internal Revenue Code — is also the statute that depends more than any other on voluntary citizen compliance); I see no reason to believe that citizens who happen to be news reporters will not obey the law. I assume, therefore, that enforcement problems will arise only for an irresponsible minority. From the responsible newspaperman's point of view, a statutory system for calling the irresponsible to book would provide a sanction where now there is literally none; and it would thereby leave the

102 Freedom of Information Center, British Press Council, March, 1963.

responsible newspaperman free of the irritation of irresponsible competition. I do not think that kind of relief would fill him with resentment against judges and prosecutors.

Nor will prosecutors ignore their obligations, nor will judges refuse to apply the statutory remedy when prosecutors seek to have it applied. The legislative finding on which my proposal rests points as much in the direction of the renewed trial-judge control the *Sheppard* opinion demands as it does toward the constitutional requirement the *Bridges* opinion invites.

It is mildly ironic that what is demanded of trial judges in enforcing direct restraint is exactly what the Supreme Court demanded of trial judges in the *Bridges*, *Pennekamp* and *Craig* opinions. The Court there insisted, repeatedly, that elected state trial judges have the courage to resist the press when the press criticizes them. The legislature, imposing a system of direct restraint, would be asking for exactly that sort of judicial courage in providing a criminal remedy against irresponsible news reporters.