Prejudicial Publicity: Search for a Civil Remedy

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PREJUDICIAL PUBLICITY: SEARCH FOR A CIVIL REMEDY

I. Introduction

The saga of Dr. Sam Sheppard is well known. His conviction, the ensuing ten years of appeal, and his ultimate acquittal constitute a blemish on the legal and journalistic professions alike. Soon after Sheppard's release, his renowned lawyer, F. Lee Bailey, pointedly remarked, "somebody owes Sam something." As far as Sheppard is concerned, that "somebody" is clearly the Scripps-Howard Company, publishers of the Cleveland Press. Sheppard and Bailey have announced plans to sue Scripps-Howard for $122 million. Indeed, it is difficult for even the staunchest advocate of a free press to deny that some of the articles that appeared in the Press could have prejudiced the jury that convicted Sheppard. Unfortunately, however, the common law has never developed a civil remedy for a private party whose right to a fair and impartial jury trial was infringed upon by prejudicial pretrial and trial publicity.

In an attempt to solve this problem, this note first investigates the possibility of finding relief for a victim of prejudicial publicity in one of the civil remedies presently afforded by the law. Next, the need for the creation of a remedy of this type is fully explored. Finally, a model statute, designed to meet this need and to fill the void in the existing law, is proposed.

II. The Inadequacy of Existing Remedies

A. Tort: Libel and Invasion of Privacy

It is generally accepted that a newspaper publication falsely charging one with criminal conduct is libelous per se. Money damages may be recovered in a civil suit from the responsible party even without a showing of actual damage. In all but ten states, however, truth is an absolute defense to a civil libel action. Obviously, it will be a rare case when such inherently prejudicial

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NOTES

1 Time, Dec. 9, 1966, p. 52.
5 RESTATEMENT, TORTS § 621 (1938).
6 In the following ten states truth is a defense only when it is published for good motives, a justifiable purpose, or both. DEL. CODE ANN. tit. 10, § 3920 (1953); FLA. CONST. DECLARATION OF RIGHTS, § 13; ILL. CONST. art. II, § 4; ME. REV. STAT. ANN. tit. 14, § 152 (1964); MASS. ANN. LAWS ch. 231, § 92 (1956); NEB. CONST. art. I, § 5; PA. STAT. ANN. tit. 12, § 1582 (1953); R.I. GEN. LAWS ANN. § 9-6-9 (Supp. 1966); W. VA. CONST. art. III, § 8; WYO. CONST. art. I, § 20.
7 E.g., OHIO REV. CODE ANN. § 2739.02 (Page 1953) provides:
   In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages.
information as the accused’s prior criminal record, his inadmissible confession, or the results of his lie detector test will not be true, at least in part. Of course, editorials accusing the defendant of a crime or an article quoting the prosecutor as saying that the defendant is guilty of the crime charged can only be justified by proving that the defendant is guilty. It is not a sufficient defense for a newspaper to show that the prosecutor did in fact make such a statement. But even in these situations, a newspaper’s burden of proof will ordinarily not be insurmountable. When the plaintiff in a libel suit has been convicted at a criminal trial, the newspaper might be able to introduce this conviction into the civil proceeding. When the defendant has been acquitted at the criminal trial, the paper is still not precluded from raising truth as a defense. None of the principles of collateral estoppel would apply in this latter case since the newspaper was not a party to the criminal proceeding. Hence, the Cleveland Press would be perfectly free to offer proof to a new jury that Sam Sheppard killed his wife. Significantly, since this would be a civil case, the Press would not have to prove Sheppard’s guilt beyond a reasonable doubt but only by a preponderance of the evidence.

The unlikelihood of a libel suit providing recovery for an aggrieved criminal defendant was well summed up in a recent article written by Judge Meyer of the New York Supreme Court.

[Existing correctives “at best only circumvent some consequences of an achieved obstruction of justice.” The right to sue for libel is not a solution, for it can reach only defamatory publications and may be defended on the ground of truth or privilege ...] (Emphasis added.)

Among the many states that recognize the right to privacy, truth is usually not a defense to a common law action for invasion of privacy. The fact that the publication contains information of a “public interest,” however, is generally recognized as a complete bar to recovery, and the law considers an accused defendant, charged with the commission of a crime, to be a newsworthy person. The California Supreme Court has stated: “The facts concerning the arrest and prosecution of those charged with violation of the law are matters of

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8 PROSSER, LAW OF TORTS 825 (3d ed. 1964).
9 Although a minority view, there is a recognized trend toward allowing a prior criminal conviction to be used as evidence in a civil trial based on the same facts. See UNIFORM RULES OF EVIDENCE rule 63(20) (1953); MODEL CODE OF EVIDENCE rule 521 (1942) (prior conviction must be for a felony). Also if the criminal defendant takes the stand in the civil trial, the conviction can be introduced to impeach his character as a witness. McCormick, EVIDENCE 618 (1954).
10 No similar trend exists toward allowing criminal acquittals to be introduced into the civil trial. Note, Admissibility and Weight of a Criminal Conviction in a Subsequent Civil Action, 39 Va. L. Rev. 995 (1953). This seems perfectly sensible considering the greater burden of proof required in the criminal case.
11 RESTATEMENT, TORTS § 613, comment h.
general public interest. Therefore the publication of details of such official actions cannot, in the absence of defamatory statements, be actionable.\textsuperscript{23,24}

Two recent Supreme Court decisions have narrowed the scope of these two torts even further. In New York Times Co. v. Sullivan,\textsuperscript{25} the Court held that the first amendment limits a state's power to award damages for libel in an action brought by a public official against those who falsely criticize his official conduct. Such statements, under Sullivan, are actionable only if made with "actual malice" — with knowledge that the statements were false or in reckless disregard of whether they were true or false.\textsuperscript{26} Commentators have suggested that the Sullivan rule would not remain limited to public officials.\textsuperscript{27} This prediction is borne out by the recent decision of the Court in Time, Inc. v. Hill.\textsuperscript{28} In Hill the Court applied the Sullivan rule to defeat an action brought under a New York privacy statute by a private individual against Life magazine. The plaintiff claimed that Life had falsely portrayed his family's ordeal at the hands of a group of escaped convicts. While remanding, the Court stated that a finding of malice was a necessary prerequisite for recovery under the New York statute. It is interesting to note that the Court expressly left open the important question of whether the Sullivan rule would apply to a libel suit brought by a private individual.\textsuperscript{29} Even if the rule were not so extended, these two cases certainly preclude any possibility of expanding either of these torts to encompass prejudiced criminal defendants.

B. The Civil Rights Statutes

F. Lee Bailey has also mentioned the possibility of bringing suit against Scripps-Howard under one of the old Federal Civil Rights Statutes.\textsuperscript{30} Generally speaking, these statutes allow a person whose civil rights have been violated to have a civil damage action against the violator. The actual wording of these statutes and their judicial interpretation, however, make recovery from a newspaper for violating an accused's right to a fair trial extremely doubtful. Section 1979 of the Revised Statutes does grant an action at law to a person deprived of any "rights, privileges, or immunities secured by the Constitution ..." but it clearly demands that the person responsible for such a deprivation be acting "under color of" state law.\textsuperscript{31}

In terms of actual language, section 1980 would seem to offer the best opportunity for relief. The second part of it reads:

\textsuperscript{17} 376 U.S. 254 (1964).
\textsuperscript{18} Id. at 286.
\textsuperscript{20} 87 Sup. Ct. 534 (1967).
\textsuperscript{21} Id. at 543-44. The answer may soon come. See Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965), cert. granted, 385 U.S. 811 (1966) (Sullivan rule not applied in a successful libel suit by a football coach against the Saturday Evening Post).
\textsuperscript{22} Seminar, supra note 2, at 172.
If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, ... or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court ....

This part of the statute would have the obvious limitation of applying only to conspiracies to influence a jury sitting in a federal court. But it further provides:

[O]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws ....

The remedy is provided at the end of the third part.

[1]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Although the express language does not require it, a vast majority of courts have construed the conspiracy statutes as requiring that at least one of the conspirators be acting "under color of" state law. The second part of section 1980 has never been before the Supreme Court, but in Collins v. Hardyman, the Court considered the similarly worded third part. The plaintiff in Collins was ultimately denied relief because he did not show that he had actually been deprived of the equal protection of the laws. The Court emphasized, however, that if such a showing had been made, serious constitutional questions would have arisen since the complaint had not alleged the defendants to be acting under color of state law. Justice Jackson emphasized that a criminal statute "in language indistinguishable from that used to describe civil conspiracies" had earlier been declared unconstitutional.

The most recent Supreme Court case dealing with the problem of state action in statutes of this type is United States v. Guest. Herbert Guest was indicted under section 241 of title 18 of the United States Code, which provides fines and imprisonment for "two or more persons [who] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States from attending such court, ... or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court ...."
States . . . ." No state action had been alleged in the complaint, but again the Court avoided direct confrontation with the issue by holding that state action was present and by remanding the case. Mr. Justice Stewart, however, speaking for the Court, went on to say "that § 241 by its clear language incorporates no more than the Equal Protection Clause itself," which he had previously acknowledged as speaking "to the State or to those acting under the color of its authority." Mr. Justice Brennan, speaking for himself and two others, was of the opinion that section 241 does reach private conspiracies and is a valid exercise of congressional power under the fourteenth amendment.

Assuming then that a suit against a newspaper under the second part of section 1980 would have to allege state action, one possible theory of recovery under the statute might still be raised. This is the situation where the published prejudicial information is released to the press by the police or the prosecutor. Such a showing might satisfy the state action requirement. Nevertheless, it would not in itself prove a conspiracy between the newspaper and the prosecutor or police. Nor would it show the required intent to deny the accused the equal protection of the laws. "Subsection (2) [of section 1980] requires, inter alia, that the conspiracy to impede justice be with the purposeful intent to deny a citizen the equal protection of the laws." It has been held that a conspiracy to violate due process will not suffice. One final obstacle to this theory is that most courts have held that the common law immunity of judges and prosecutors is left intact by these statutes.

III. The Need For a Civil Remedy

A. The Individual Defendant

Among the recently suggested solutions to the "free press v. fair trial" conflict, a civil remedy stands as a somewhat novel proposal. One reason may be that the impact of many of these remedies on the individual criminal defendant has been overlooked. New trials, mistrials, changes of venue, and continuances are recognized as means for protecting the fairness and integrity of the judicial process. Yet it is the defendant himself who must bear much of the substantial and extra expense involved in the use of these remedies. When it is prejudicial publicity that necessitates the use of these procedural safeguards, it is an unjustly misplaced financial burden to require the defendant to pay for their use.

34 Ibid.
35 Id. at 777 (Brennan, J., concurring in part and dissenting in part). Significantly, six members of the Court agreed that § 5 of the fourteenth amendment empowers Congress to pass laws aimed at private conspiracies. Id. at 782. As regards the actual construction of § 241, it is not clear whether Justice Clark's concurring opinion, joined by Justices Black and Fortas, would require state action to be present in any action brought under the statute, Id. at 761-62.
37 Lewis v. Brautigam, 227 F.2d 124, 127-28 (5th Cir. 1955); Dunn v. Gazzola, 216 F.2d 709, 711 (1st Cir. 1954).
Judge Meyer, quoted previously, made the following point concerning the shortcomings of reversal as a solution to the problem.

[But for a number of reasons reversal is not an adequate corrective. Cardinal among those reasons is that all of the expenses of the abortive trial and of the appeal necessary to upset it must be borne by the litigant or the accused, and in cases likely to attract substantial publicity, such expenses are apt to be in the tens of thousands of dollars.]\(^{39}\)

This reasoning can certainly be validly applied to the expenses of a new trial and in a lesser, but significant degree, to the sums spent in moving witnesses and attorneys to another venue or in postponing the trial for an indefinite period. A recent report by the American Bar Association reveals that the average lawyer charges $150 per day spent in court and $20 an hour spent in preparation.\(^{40}\)

Considering the months of preparation and weeks of trial attending most significant criminal cases, Judge Meyer's "tens of thousands of dollars" is by no means an extravagant estimate. It is truly an anomaly in the existing law that the defendant should bear these expenses in situations where the news media are responsible for resort to these remedies. Mr. Bailey has stated the argument: "Let the courts be highly sensitive to prejudicial publicity from obvious abuse [and] poor judgment. Let the courts protect the defendants, grant mistrials [and] continuances such as may be necessary, and let the press, for its abuses, pay the bill."\(^{41}\)

Nor should it make any difference that the defendant was actually found guilty of the crime charged. His factual guilt does not give the news media any more of a right to necessitate the defendant's going through two trials instead of one.

The need in this situation for imposing upon the press the duty of reimbursing the defendant for these additional expenditures has not gone completely unrecognized. The American Bar Association's recent proposals include the following recommendation.

4.2 Reimbursement of defendant.

In the event that a mistrial or change of venue is granted or a conviction set aside, as a result of an extrajudicial statement held to be in contempt of court, it is recommended that the court have the authority to require that all or part of the proceeds of any fine be used to reimburse the defendant for the additional legal fees and other expenses fairly attributable to the order that the case be tried in a different venue or tried again in the same venue.\(^{42}\)

This solution might be ideal if its exercise were not dependent on the use of the contempt power. The problem lies in the questionable constitutionality of sec-

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39 Meyer, supra note 12, at 17.
40 ABA STANDING COMM. ON ECONOMICS OF LAW PRACTICE, STATISTICAL ANALYSIS OF RECOMMENDED MINIMUM FEES FOR SELECTED LEGAL SERVICES 4 (1966).
41 Seminar, supra note 2, at 163.
42 ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 15 (Tent. Draft 1966) [hereinafter cited as ABA REP.].
tion 4.1 which authorizes the limited use of such power against the news media. At the Notre Dame Law School Symposium on Free Press And Fair Trial, Mr. John de J. Pemberton, Jr., the executive director of the American Civil Liberties Union, argued that section 4.1 would definitely carve a new exception out of the first amendment protections. The rule has been well established in a line of cases beginning with Bridges v. California that a newspaper may not be held in contempt of court unless its out-of-court publication presents a "clear and present danger" to the administration of justice. The Court has yet to find a publication presenting such a clear and present danger or to apply the test to a case involving a jury trial.

The draftsmen of sections 4.1 and 4.2 definitely have attempted to bring these sections within the purview of the clear and present danger test. While Mr. Pemberton would argue that they have not succeeded, it is apparent that their attempt to do so has seriously limited the practical value of these sections. Both the language of section 4.1 and the accompanying commentary illustrate that this section is designed to reach only prejudicial publicity published during the trial. Also, a reckless or actual intent to "affect the outcome" of the trial would have to be shown. Indeed, the commentary recognizes that "such statements would not, of course, be common, but when they did occur, they would be worthy of punishment." But even with such limitations, section 4.2 stands as strong evidence of the need for placing the burden of these extra expenses upon the press rather than the defendant. The commentary accompanying section 4.2 is even more to the point.

In such instances, [mistrial, reversal] it will normally be necessary to retry the case, and the defendant (or whoever is bearing the cost of the defense) may incur substantial additional expenses attributable to the necessity for an additional trial. When this does occur, it seems only just that the

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43 Section 4.1 provides in pertinent part:

The use of the contempt power against persons who disseminate information by means of public communication . . . can in certain circumstances raise grave constitutional questions . . . . It is therefore recommended that the contempt power should be used only with considerable caution but should be exercised in at least the following instances . . . .

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

(i) disseminates by any means of public communication an extra-judicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, if the statement is reasonably calculated to affect the outcome of the trial and seriously threatens to have such an effect; or

(ii) makes such a statement with the expectation that it will be so disseminated.

(b) Against a person who knowingly violates a valid judicial order not to disseminate until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing from which the public is excluded under sections 3.1 or 3.5(d) of these recommendations.


46 ABA Rep. 151.

47 Id. at 152.

48 Ibid.
person responsible for these additional expenses be required to reimburse the defendant. 49

B. The Necessity of an Effective Sanction

A statute allowing individual criminal defendants to bring an action against the news media for the price of a second trial, change of venue, or continuance would provide just compensation for the accused. In addition, such legislation would provide an effective, yet constitutional, sanction against the media itself.

Admittedly, the Supreme Court in Sheppard v. Maxwell 50 did not advocate any sanctions against the "recalcitrant" press, although the question was expressly left open. 51 The Court outlined three steps that the trial judge should have taken to insure that Sheppard received a fair trial. First, he should have exercised more control over the activities of the reporters in the courtroom. Secondly, he should have taken steps to insulate the witnesses from the prejudicial influences surrounding the trial. Finally, he should have made a strong effort to control the release of leads, information, and gossip by the police, witnesses, and counsel for both sides. 52

Improving courtroom demeanor and insulating the witnesses is sound policy for any trial court, but neither will have much effect on prejudicial pretrial or trial publicity. Controlling the divulgence of information to the press by those persons within the trial court’s control is, however, a more serious attempt to eradicate prejudicial publicity. This third mandate from the Sheppard Court obviously played a large role in forming the American Bar Association’s recommendations. With the exception of sections 4.1 and 4.2, none of the American Bar Association’s proposals are aimed at the press itself. Rather, lawyers, police, jurors, witnesses, and court officers are forbidden, under threat of contempt, to divulge certain types of prejudicial material to the press. 53

These recommendations are quite sensible, but it seems unrealistic to consider them an ultimate solution to the problem. As the proposals now stand, any information that can be culled from sources outside of the trial court’s control may be published. Past criminal records can be compiled from the newspaper’s own files. Statements and other damaging evidence concerning the accused can be obtained from friends and relatives not subpoenaed as witnesses. No doubt these recommendations would make the press work much harder for their information, but the plain fact is that they could still obtain most of it. Dr. Frank Stanton, President of the Columbia Broadcasting System, had this to say about the effectiveness of the American Bar Association recommendations:

Strictures leading to wide contempt threats would drive information underground, but there will be information—from anonymous sources, from leaks, from backdoor handouts, from payoff agreements. All that sweeping and inclusive use of the contempt charge can achieve, no matter

49 Id. at 154.
51 Id. at 358.
52 Id. at 359-59.
53 ABA Rep. §§ 1-2, at 2-8. For other attempts to solve this problem in a similar manner, see 28 C.F.R. § 50.2 (1967) (divulgence of certain information by Justice Department personnel forbidden); S. 290, 89th Cong., 1st Sess. (1965).
how much caution is urged, is to promote unaccountability—the assurance
by the press that the police, prosecutor, or defense attorney will never be
revealed as the source of information.54

It should also be noted that ten states have statutes granting newsmen the
privilege of not revealing their sources of information.55 It has already been
pointed out that the American Bar Association committee did realize that some-
thing more was needed—a sanction that would reach the press itself. Unfortu-
ately, they chose the limited and troublesome contempt power.56

Beyond the instructions to the trial court, the Sheppard Court also gave a
strong vote of approval to the use of the continuance and change of venue. “But
where there is a reasonable likelihood that prejudicial news prior to trial will
prevent a fair trial, the judge should continue the case until the threat abates,
or transfer it to another county not so permeated with publicity.”57 For years,
commentators have criticized the inability of these procedural remedies, includ-
ing mistrials and reversals, to insulate criminal trials effectively from the effects
of harmful publicity.58 The main criticism leveled at these remedies is that they
in no way deter the press from continuing to publish harmful and prejudicial
information. District Judge Hubert Will has written:

[W]hen a conviction is reversed for reasons of publicity, it has no effect
whatsoever as a sanction against the press, and there is consequently nothing
in the reversal which prevents prejudicial press treatment of the case before
or during any retrial or similar treatment of future trials of other defen-
dants.59 (Emphasis added.)

Even in Sheppard the Court remarked that “reversals are but palliatives.”560
Legislation, allowing defendants to sue the press for the additional expense of
these procedural devices, would enable these remedies to have the needed de-
terrent effect on the press itself. No unwritten law compels a newspaper to
print all the information that it receives. If an editor sees an article that appears
to be libelous under the existing law, he will ordinarily delete it. It might sell
more newspapers if printed, but it would also expose the paper to the threat
of a serious damage suit. At present, there is no necessity for editors to have a
similar concern about publishing information likely to be harmful to the accused
in a criminal case. The model statute proposed in the next section would allow
prejudicial materials to be accompanied by the same threat of a damage suit
and thereby lead to the deletion of such information before publication.

It can be argued that the full deterrent potential of such a statute could
never be realized until both state and federal courts reassess their policy of
reluctantly and infrequently granting new trials, changes of venue, or even con-

55 For a list of those states having such statutes, see Comment, The Case Against Trial
56 See text accompanying notes 43-49 supra.
58 See, e.g., Meyer, supra note 12, at 17-19; Trescher, A Bar Association View, 11 VILL.
L. Rev. 709, 710-11 (1966); Will, Free Press vs. Fair Trial, 12 DEPAUL L. Rev. 197, 209-
211 (1963); Comment, supra note 55, at 235.
59 Will, supra note 58, at 210.
tinuances. Mainly responsible for this attitude is the requirement of many courts that the defendant make a showing of actual prejudice at his trial before one of these remedies is granted. Making this burden almost impossible is the great weight these same courts give to the jurors’ declarations of impartiality at the *voir dire*. Recent decisions of the Supreme Court indicate that a showing of actual prejudice will no longer be necessary.

In *Marshall v. United States*, the Court, acting under its supervisory power, reversed the federal conviction of an unlicensed drug seller. Two accounts of the defendant’s previous felony convictions had appeared in the newspapers. Seven of the jurors admitted seeing at least one of the articles, but each juror assured the trial judge that it would not influence his verdict. While reversing, the Court noted that evidence too prejudicial for admission at trial will not be any less prejudicial if it reaches the jury through a news account.

Four years later, in *Rideau v. Louisiana*, the Court gave strong indication that the federal standard, set out in *Marshall*, may also be the constitutional standard applicable to state courts. The publicity causing a reversal of Rideau’s state court conviction was extremely prejudicial since the accused’s inadmissible confession had been televised. But as the dissent strongly pointed out, there was no showing of actual prejudice from which to infer that the appellant’s trial was a “meaningless formality.” In two cases following *Rideau*, the Court overturned state court convictions in analogous factual situations without requiring any showing of actual prejudice. Finally, in *Sheppard*, no showing of actual prejudice was ever offered or required.

A change of venue or a continuance contains the additional difficulty of being completely within the discretion of the trial judge. Hence, reviewing courts are loath to reverse a conviction for his failure to afford these remedies. Hopefully, the Court’s admonition, in *Sheppard*, to employ these remedies “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial” will make these remedies much more available to future criminal defendants.

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63 Id. at 312-13.
65 Id. at 729 (dissenting opinion).
66 In *Estes v. Texas*, 381 U.S. 532 (1965), the Court reversed the appellant’s conviction in a trial that was filmed by television cameras present in the courtroom at all times. The Court made explicit reference to the fact that a showing of actual prejudice was not necessary. *Id.* at 543. In *Turner v. Louisiana*, 379 U.S. 466 (1965), the Court reversed appellant’s conviction where the prosecution’s main witness was the deputy sheriff who was also in charge of the sequestered jury. No actual prejudice was shown.


IV. The Solution — A Statutory Remedy

A. Precedent

Only one state has ever enacted legislation granting a civil remedy against the press to a person injured by prejudicial publicity during his trial. In 1836 the Pennsylvania Legislature enacted the following statute:

**Liability of Person Making Publication**

If any such publication shall improperly tend to bias the minds of the public, or of the court, the officers, jurors, witnesses or any of them, on a question depending before the court, it shall be lawful for any person who shall feel himself aggrieved thereby to proceed against the author, printer and publisher thereof, or either of them, by indictment, or he may bring an action at law against them, or either of them, and recover such damages as a jury may think fit to award.

This statute seems to provide the "person aggrieved" with much more than expenses incurred in a second trial, change of venue, or a continuance. But it also seems limited to publicity appearing only during the time the trial was "pending." Unhappily, all comment about this statute is severely limited by the fact that there has not been a single reported civil action brought under it! The two Pennsylvania criminal cases which do consider the meaning of the statute confuse more than clarify it. In a case soon after the statute's enactment, the Pennsylvania Supreme Court decided that a single party could be subjected to both civil and criminal liability for a certain publication. In the course of the opinion, the court construed the statute in such a way as to indicate that the prejudicial publicity would have to be both libelous and in contempt of court before any liability attached.

The entire scope of the revised act shows that [its] purpose was no more than to regulate the trial and punishment of contempt . . . for a libel would not be protected by the Statute unless it were not only a reflection on a minister of justice, but also a contempt of court in a pending cause.

On the other hand, a more recent criminal case gave the statute a much broader interpretation.

It is not necessary to aver that the acts complained of did actually influence the disposition of the cause or interfere with the administration of justice . . . . Nor need it be stated that the minds of any of the classes stated were actually biased thereby, because the offense is complete upon proof of an improper tendency to bias any of them.

By doing away with the necessity of showing any actual damage, this construction would place the constitutionality of the statute in serious jeopardy. The Pennsylvania statute, however, does serve to illustrate some of the drafting errors to be avoided if a civil statutory remedy is to be effective.

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70 Foster v. Commonwealth, 8 W. & S. 77 (Pa. 1844).
71 Id. at 82.
B. A Model Statute

An Act to enable criminal defendants to recover the expenses and attorney's fees from those responsible for prejudicial publicity resulting in a new trial, change of venue, or continuance.

Section 1. Prejudicial Publicity Defined

As used in this Act, prejudicial publicity means the dissemination by any newspaper, magazine, radio station, television station, or other news agency of any of the following matter:

1. the accused's prior criminal record or prior arrests;
2. the existence or content of any confession, admission, or other statement made by the accused;
3. the performance, results, or both, of any tests taken by the accused;
4. the identity or credibility of any of the witnesses or any statements made by them;
5. the possibility that the accused might plead guilty to a lesser offense; or
6. any other statement, editorial, or evidence intimating that the accused committed the crime for which he is or will be on trial.

Section 2. Recovery of the Additional Expenses of a Change of Venue or a Continuance

Whenever a trial court in a criminal case, either on its own motion or the motion of the accused, grants the accused a change of venue or a continuance on the ground that jurors or potential jurors have been or may have been prejudiced against the accused by reason of the prejudicial publicity appearing between the time of the accused's arrest and the granting of the motion, the accused, or whoever is paying the accused's expenses, may bring an action at law for damages against any person responsible for such prejudicial publicity. In this action such damages shall consist of all the additional expenses and attorney's fees sustained by the accused in moving to another venue or postponing the trial, as well as the expenses and attorney's fees sustained in bringing an action under this section.

Section 3. Recovery of the Additional Expenses of a New Trial

Whenever a trial court in a criminal case declares a mistrial, or either the trial court or an appellate court sets aside a criminal conviction and grants the accused a new trial, on the ground that jurors or potential jurors have been or may have been prejudiced against the accused by reason of the prejudicial publicity appearing between the time of the accused's arrest and the granting of a mistrial or the original conviction, the accused, or whoever is paying the accused's expenses, may bring an action at law against any person responsible for such prejudicial publicity. In this action such damages shall consist of all the additional expenses and attorney's fees sustained by the accused at the second trial, as well as the expenses and attorney's fees sustained in bringing an action under this section.
Section 4. The Court in the Criminal Proceeding To Make the Grounds for Its Action a Matter of Record

Any court granting a new trial, mistrial, change of venue, or continuance on grounds of prejudicial publicity, as defined by this Act, shall make such grounds a matter of record. Such record may then be introduced as evidence in any suit brought under this Act.

Section 5. No Liability for Publishing Matter Divulged in Open Court Before the Jury

No person shall be found liable for damages under this Act for disseminating any information disclosed in an open court in the presence of the jury.

Section 6. Amending Any Statute Declaring Prisoners To Be Civilly Dead

Any statute currently in force which declares that prisoners and inmates of city, county, or state prisons are civilly dead for the period of their incarceration is hereby amended to allow any such prisoner or inmate to bring a suit under this Act.

Section 7. Statute Meant to Grant Only a Civil Remedy

This Act is meant to grant only a civil remedy to individual criminal defendants who have been put to the extra expenses enumerated by sections 2 and 3 of this Act. It is not meant to expand the existing grounds on which a new trial, mistrial, change of venue, or a continuance may be obtained.

C. Avoiding the Constitutional Problems

Direct restraints on what the news media can disseminate to the public is dangerously close to the abridgment of speech and press forbidden by the first amendment. It has already been pointed out that the Supreme Court will allow the use of the contempt power to exercise such a restraint only if the publication comes within the limits of the “clear and present danger” test. Those who propose criminal statutes making the publication of certain prejudicial matters a misdemeanor, punishable by fine and imprisonment, have included only matter that is most likely to be highly prejudicial in most circumstances. There is also the danger that any criminal statute containing a severe enough punishment to make it effective would be struck down as a prior restraint.

The model statute avoids these constitutional difficulties in that it is not a direct restraint on the press at all. If this statute were enacted, a newspaper would still be free to lawfully publish any type of information concerning the accused. Only if the disseminated material was shown to be responsible for the use of the remedies set out in sections 2 and 3 of the Act, could the press be held liable for the defendant’s expenses. This is not to say that a civil action can never infringe upon a newspaper’s first amendment rights. New York Times

74 See note 45 supra.
Co. v. Sullivan77 and Time Inc. v. Hill78 have conclusively determined otherwise.79 However the very nature of the rights involved in the “free press v. fair trial” controversy, serves to distinguish these two cases from the model statute. Neither a public official’s right to his reputation nor a family’s right to quiet a sensational incident in their lives approach the stature of the sixth amendment rights embodied in the express grant that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”80 No such constitutional language guarantees the rights sought to be protected in Sullivan and Hill. They are vague and pale in comparison.

V. Conclusion

No one solution can solve every problem to be found in the “free press v. fair trial” debate. For example, this statute would only afford token relief to Sam Sheppard for the ten years he spent in jail. But this legislation would make the press liable for that which they are principally responsible — the new trial, change of venue, or continuance. Moreover, enactment of this statute, plus a widespread adoption of the liberal requirements laid down by the Supreme Court for the use of these traditional procedural remedies, would breathe new life into them and make them effective combatants against prejudicial publicity.

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78 87 Sup. Ct. 534 (1967).
79 See text accompanying notes 17-21 supra.
80 U.S. Const. amend. VI.