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PROBLEMS POSED BY PUBLICITY TO CRIME AND CRIMINAL PROCEEDINGS *

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The impact of publicity upon criminal activities and criminal law enforcement has been the subject of a vast literature during the last few decades. Much of this literature is inspiring, patriotic, and intelligent. More of it is trite, nearsighted, and useless. Nearly every writer approaches this topic with a preconceived notion of a clash of two fundamental principles: the free press and the fair trial. This, unfortunately, is too narrow a frame within which to treat the wide

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* This Article is based on the American Report to the Eighth Quadrennial Congress of the Association Internationale de Droit Penal, at Lisbon, Portugal, September 1961. A memorandum of law, prepared on behalf of the Comparative Criminal Law Project of New York University by Mr. Robert Force, Instructor of Law at Temple University, was appended to the original report for the benefit of foreign readers. Portions of Mr. Force's memorandum have been incorporated into this Article.

A shorter and a longer version of the report on which this Article is based have been published in French, under the title *Problèmes Soulevés Par la Publicité Donnée Aux Poursuites Criminelles* (with memorandum of law) by the Association Internationale de Droit Penal, Paris, France (1961), and under the title *Les Problèmes Posés Par la Publicité Donnée Aux Procédure Pénale* (without memorandum of law), by the Centro Nazionale di Prevenzione e Difesa Sociale, Milan, Italy (1961).

This Article is dedicated to the memory of the late Professor Edwin R. Keedy of the University of Pennsylvania, who was a member of the International Advisory Committee of the Comparative Criminal Law Project of New York University, in recognition of his pioneering efforts, antedating World War I, to seek American participation in the activities of the international community of criminal law scholars. It is regrettable that Professor Keedy could not live long enough to see his dream come true.

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range of problems encompassed by this topic. If, indeed, there is any clash of principles, it is between the right of the citizen—the employer of all government—to intelligent and complete information on all goings-on everywhere,¹ and his equally great right to be free from detriment through crime. The right to know is limited by the ability of the individual to gather and absorb information and by the right of other individuals to keep their affairs from public view. Both the right to know and the right of privacy are recognized and protected in orderly societies. This holds true in the United States.

In the context of this Article, it is not necessary to define the area of the knowable which is subject to some privilege against publicity, since, by long usage, crime—in common with other calamities—and criminal procedure are largely within the range of the unprivileged knowable. Obviously, it cannot be ascertained that a certain calamity is a crime and that those involved are criminal perpetrators and victims until a court has spoken. Thus, not only criminal elements, but non-criminals as well, if cruelly treated by nature, cannot help becoming the subject of public knowledge. Normally, considerations of pity and decency, rather than law, must be relied on to protect them from a conceivably merciless public scrutiny. For, apart from the social good which an unfettered right to know and to make known produces,² it is not at all the government's business to ascertain whether any given publicity will produce any specific social good. On principle, government simply has no authority to interfere with the right to know, whether the effect be good, bad, or indifferent. But there is an obvious natural limitation of the rights to disseminate and to receive knowledge: when there is a "clear and present danger"³ that the protected interests of our society—including the very right to know—will be destroyed, we have reached the limits of permissible publicity.

We must, then, consider the second of the two basic rights mentioned at the outset: the citizens' right to be free from criminal depredations. This right can be likened to the right to be protected against the enemy without, which requires a considerable amount of secrecy about the nation's defense measures and military plans and intentions. The same holds true for protection against the enemy within; if disclosure of police information will aid the criminal, or if

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¹ The right to know must not be thought to imply a positive governmental duty to provide information; it is merely a right (in the Hohfeldian sense) to be free from interference therewith, and, as such, implies a governmental "no-right" to interfere with the acquisition of information.

² The greater the *de facto* participation of the citizenry in government, the greater must be the citizens' right and actual opportunity to know, for government requires the informed judgments of those of whom it is composed.

³ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

publicity given to crime and criminal proceedings will increase the danger of loss to the citizenry through crime, secrecy must be imposed. This secrecy is a matter of self-discipline of a mature society, a self-imposed restraint upon the right to know. The danger potential can never be determined exactly, and one difference between democratic societies and those of opposite persuasion is that democratic societies tend to strike the balance in favor of the right to know, while nondemocratic societies fearfully restrict that right.⁴

So much on the matter of principle. Now to the details.

I. LEGAL AND FACTUAL BASES OF THE RIGHT TO KNOW

Contrary to the system prevailing in several other nations, in the United States, the government itself participates little in gathering and disseminating information to the general public, but, as with so many activities elsewhere carried on by government, leaves this function largely to private enterprise and initiative.

There has been a long development from the travelling minstrel and the town crier to the roving radio reporter with his walkie-talkie and the roving television reporter with his creepy-peepy. Just as the law of libel could not exist until after Gutenberg's invention of the press, so the legal conflict over the right to know about crime and criminal proceedings could not become acute until after technological development had made for an enormous distribution of all mass communications media, and for a wide dispersion of the facilities of dissemination. The problem of the impact of publicity on crime and criminal proceedings cannot possibly be acute where either the receipt of information is limited to a few or the distribution lies in but one paternalistic hand. What marks the American scene is the widest conceivable distribution of both dissemination and receipt. It is particularly noteworthy that dissemination is frequently carried on by opposing interests, such as labor and management or liberals and conservatives. Thus, whatever bias may be interwoven with the information disseminated is likely to be offset by the opposing bias of another source, and governmental bias is limited and constantly scrutinized by all the mass communications media. It is this which we call the freedom of the press.⁵

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⁴ The factual basis of this argument may be seen by comparing the amount and extent of military and police information printed in the American and in the Soviet press.

⁵ "While it is true that certain differences do exist between the [mass communications] media, the important basic similarities must be stressed. All of the media may be viewed as economic structures, each possessing its owners, producers, transmitters, and consumers. More important, the same basic principles of communication apply to all of them, again, with some differences expected." Orlow & Francis, *Mass Communication and Crime*, in *SOCIOLOGY OF CRIME* 239 (Roucek ed. 1961).

Freedom of the press is subject to nonlegal and legal restraints,⁶ and that is no paradox, for a freedom without restraint is a contradiction in terms—it would be anarchy.

The nonlegal restrictions are bureaucratic self-restraint of governments and personal restraint and secrecy. There are also economic restraints, foremost among which are sponsors' and advertisers' inclinations,⁷ and the economic pressure of interest groups, which are necessarily composed largely of consumers.⁸

The legal restraints are to be found in the laws of obscenity,⁹ libel,¹⁰ contempt,¹¹ treason, and espionage, and, in an incidental way, in other rules of tort and criminal law¹² as well as in some local morals censorship.¹³

The right freely to disseminate information has been called the most preferred right of the federal constitution, binding both federal and state governments.¹⁴ This should not amaze anyone, for the freedom to disseminate information was one of the paramount issues of the American Revolution.¹⁵ I know of no other nation in which there is so little restraint on the freedom of publicity, and such a luscious use of this freedom.

This Article will concentrate on the impact of publicity upon two vital aspects of criminal law: the administration of criminal justice, in both its judicial and investigative phases, and the phenomenon of crime itself.

⁶ See generally THAYER, *LEGAL CONTROL OF THE PRESS* (3d ed. 1956).

⁷ Conservative advertisers, for example, do not advertise in scandalous publications, and advertisers and sponsors as a whole often prefer to restrict a publication's emphasis on crime and criminal proceedings.

⁸ See, e.g., Note, *Extralegal Censorship of Literature*, 33 N.Y.U.L. REV. 989 (1958).

⁹ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957); KRONHAUSEN & KRONHAUSEN, *PORNOGRAPHY AND THE LAW* (1959) (which citation does not indicate any endorsement of the authors' work); ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956).

¹⁰ See generally HICKSON & CARTER-RUCK, *LIBEL AND SLANDER* (1953); PERKINS, *CRIMINAL LAW* 351-65 (1957); YANKWICH, *IT'S LIBEL OR CONTEMPT IF YOU PRINT IT* (1950).

¹¹ See generally PERKINS, *op. cit. supra* note 10, at 456-69 (1957); YANKWICH, *op. cit. supra* note 10, at 469-528; Donnelly & Goldfarb, *Contempt by Publication in the United States*, 24 MOD. L. REV. 239 (1961); Goldfarb, *The History of the Contempt Power*, 1961 WASH. U.L.Q. 1.

¹² But the extent of criminal law restraints on publications is extremely limited. That this is a mixed blessing was emphasized by the television quiz scandals and other wrongs committed directly by members of the mass communications industry. See generally Orlow & Francis, *supra* note 5, at 243-44.

¹³ Local motion picture morals censorship recently survived a broad attack on its constitutionality—to the shock of all civil libertarians—in *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

¹⁴ See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); see also *Smith v. California*, 361 U.S. 147 (1959), 35 N.Y.U.L. REV. 1086, 1090 (1960).

¹⁵ On the history, see Lewis, *The Right to Complain: The Trial of John Peter Zenger*, 46 A.B.A.J. 27 (1960).

II. PUBLICITY TO THE ADMINISTRATION OF CRIMINAL JUSTICE

A. Purpose

Earlier I have pointed out that the confinement of this topic to the issue of free press *v.* fair trial is too narrow. Now I shall hasten to add that the seeming opposition even lacks an historical basis in fact.

It should be remembered that the principal purpose of the oral, open, and immediate criminal procedure which is traditional with American courts and which was introduced in Europe during the revolutions of the 18th and 19th centuries is to guarantee truth (and thus justice), something which a secret procedure is not as capable of attaining. In other words, publicity and the fair trial are not opposites, but correlatives, the purpose of trial publicity being to insure truth, justice, and fairness.¹⁶ But the traditional American public trial has a character all its own, and that shall be explained shortly.

B. Law and Constitution

The public trial is an old American and common-law tradition. The Charter of Fundamental Laws of 1676 of the colony of West Jersey guaranteed a trial in "publick" court,¹⁷ as did the "Laws agreed upon in England" in 1682 for Sir William Penn's Dominion,¹⁸ and an "open court" was guaranteed by the North Carolina Declaration of Rights.¹⁹ The laws of all other colonies were to the same effect, as are the laws of the various states now.²⁰

The sixth amendment of the United States Constitution begins with the words: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," making it the right of the defendant in any federal criminal proceeding to benefit from the scrutiny and protection which a public trial may entail. Obviously, prelim-

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¹⁶ BENTHAM, JUDICIAL EVIDENCE 68 (Dumont ed. 1825); 3 BLACKSTONE, COMMENTARIES *373; 6 WIGMORE, EVIDENCE § 1834, at 332-35 (3d ed. 1949) (discussing cases); see *People v. Jelke*, 284 App. Div. 211, 230, 130 N.Y.S.2d 662, 680 (1954).

¹⁷ Ch. 23, in *HELLER, THE SIXTH AMENDMENT* 17 n.26 (1951).

¹⁸ Ch. V, in *HELLER, op. cit. supra* note 17, at 18 n.29.

¹⁹ Arts. VII and IX, in *HELLER, op. cit. supra* note 17, at 22 n.57.

²⁰ See FELLMAN, THE DEFENDANT'S RIGHTS 55 (1958). In addition, the guarantees of the sixth amendment of the United States Constitution are to a certain extent obligatory upon the states through the fourteenth amendment. *In re Oliver*, 333 U.S. 257 (1948). And they may be protected not only by direct review of state court convictions but also in federal courts by means of the writ of habeas corpus. As recently as the closing weeks of the 1960-61 term, the Supreme Court reversed a conviction where a change of venue in a state court had been insufficient to counteract prejudice resulting from widespread publicity of the crime. *Irvin v. Dowd*, 366 U.S. 717 (1961).

inary investigation of crime is not public;²¹ the right to publicity begins with arraignment.²² This pretrial secrecy is an example of the exercise of communal self-restraint of the right to know, of which I spoke earlier.

C. Sociological Explanation—Trial Publicity and the Mass Media

1. Direct Publicity

In early frontier America, when no motion pictures, no television, and no radio provided entertainment, trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and *spectaculum* of old rural America. Applause and cat calls were not infrequent. All too easily lawyers and judges became part-time actors at the bar, and American lawyers still have some of that demeanor typical of stage folk, and they are still very active participants in the trial process. But it would be false to assume that American lawyers still act—or, for that matter, ever did act—for the sole pleasure of the audience. Nor is, or ever was, the American criminal trial a theater play. The right of the public to spur the participants by applause and to acclaim the proceedings has long ceased. Today when manifestations of approval of a witness' testimony are made by spectators, the court may feel impelled to grant a new trial, and such has been the rule for a long time.²³ A guilty verdict has been reversed when it appeared that the trial judge permitted spectators to make constant and open hostile demonstrations toward the accused so as to jeopardize the fairness of the trial.²⁴

Even in frontier days it would have been wrong and rather superficial to regard the audience in the courtroom as nothing but a crowd of entertainment-seekers. It was felt to be the business of everyone in the county to be present when in their name justice was dispensed. The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operated to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent "urge to punish" which Professor Weihofen has so aptly described.²⁵

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²¹ But despite secrecy of investigative proceedings, incommunicado imprisonment before trial is strictly forbidden and punishable. See generally Mueller, *The Law Relating to Police Interrogation Privileges and Limitations*, 52 J. CRIM. L., C. & P.S. 2 (1961).

²² See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 87 (1947).

²³ See, e.g., *Hickox v. State*, 95 Tex. Crim. 365, 253 S.W. 823 (1923); *Pendergrass v. State*, 157 Ark. 173, 248 S.W. 914 (1923) (dictum).

²⁴ See *Commonwealth v. Hoover*, 227 Pa. 116, 75 Atl. 1023 (1910).

²⁵ WEIHOFFEN, *THE URGE TO PUNISH* (1956).

The public wanted to be directly and personally convinced that justice was done. It still is the people's trial, although they no longer may officially acclaim the judgment as did the *Umstand* of our Germanic past²⁶ or the spectators of frontier days. Popular justice is public justice—it is play with popular emotions while doing or restoring right. A secret trial entails no such popular satisfaction. But it cannot be emphasized strongly enough that Anglo-American criminal procedure has always shunned the purge or show trial whose principal function is to give vent to popular indignation, to arouse political emotions, and to rally partisan solidarity—a method so frequently resorted to by revolutionary systems.²⁷

The outcry of a woman spectator in a recent New Jersey rape trial demonstrates the American attitude. This simple woman was completely absorbed in the proceedings at the bar. The seventeen-year-old victim related the shocking events with utmost reluctance. The questioner dug deeper and deeper into her memory, trying to destroy the unconscious defense of her psyche. "We can't go on like this!" was the cry of the woman spectator.²⁸ In this "we" is revealed the feeling of active participation common to American trial spectators.

At the same time, this outburst raises the possible need for limiting public access to the courtroom and the publicity which may be given to criminal proceedings, in the interest both of the parties immediately concerned and of the general public.

2. Indirect Publicity

In the America of a more leisurely age, the agents of publicity produced little danger to the ordinary conduct of a trial. Rarely was a trial of more than local interest. The citizenry was personally assembled at the trial, at least in part, and the press reporter, equipped with paper and pencil, was hardly noticeable.

In urbanized America the public can no longer participate as before, although, especially in small county seats, the courtroom still harbors that ever-present congregation of senior citizens, retired from busy lives, who follow every trial and participate as silent sages of popular justice. Long after the close of the trial, the discussion of the proceedings will continue on the courthouse steps or on the benches on courthouse square. In the big cities the curious are always present

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²⁶ See MUELLER, LAYMEN AS JUDGES AND JURORS IN GERMANY AND AUSTRIA 9-13 (1954).

²⁷ This happened during the French Revolution, the Cuban Revolution, and under the Soviet system, for the latest example of which see Berman, *Introduction to THE TRIAL OF THE U2* (1960). While this was being written, the Eichmann trial was in progress in Israel. It, too, had all the trappings of a show trial.

²⁸ *State v. Riley*, 28 N.J. 188, 202, 145 A.2d 601, 609 (1958).

in the courtroom, as are friends and relatives of victim and defendant, and for every dramatic trial the courtroom is packed with sensation-seekers. But the general public has, for practical reasons, no longer the time nor the opportunity to attend the criminal court. It is for this reason that press coverage of criminal trials has assumed a significance which it did not have prior to the present century. At the same time, due to an enormous distribution of mass media, the impact of publicity is far out of proportion to its influence in the 19th century.

The press is present whenever any case is slightly more than routine, and murder cases receive enormous publicity.²⁹ We feel that this is a substitute for the type of public participation at the trial itself which was possible a century ago. There is even a movement under way to admit newspaper photographers and television crews to the courtroom. In most states, however, Canon 35 of the Canons of Judicial Ethics³⁰ is strictly interpreted to preserve the dignity of judicial proceedings and to prohibit a "show" from being made of the trial, an occasional exception to the contrary notwithstanding.³¹ In all but a few courts picture taking is prohibited, and violation of the rule may result in conviction for contempt of court.³² Recent experiments have shown, however, that television and press photography

²⁹ While I was writing this, the first Finch-Tregoff trial was in progress in Los Angeles. Probably more than half of the daily papers in America devoted every second headline to this affair. Mystery writer Eric Ambler, writing for the 6½ million readers of *Life*, reported as follows:

The Finch-Tregoff trial is in the rich, rococo tradition of great American court room dramas. It has everything which that tradition demands. It has love, lust, passion, hate, greed, adultery, plots, counterplots, sensational disclosures. It has a cast of characters which includes beautiful blondes, beautiful brunettes, Hollywood "personalities," hired "killers," private eyes and Perry-Mason-like attorneys—and is now making the most of it. The last murder trial this writer attended was held in London's Old Bailey, as greasy and evocative as a hangman's rope. The Finch trial courtroom is a pleasant contrast: spacious, air conditioned and well lit. To the easy informality of Western justice, however, there has now been added a carnival atmosphere which even experienced newspapermen find disconcerting. One local bugle is running a series of "impressions" written by a series of Hollywood actresses. The sight of these ladies, pad and pencil in hand and skirts hitched up becomingly, being photographed while they interview the eagerly cooperative Miss Tregoff, is troubling. Are a man and a woman *really* on trial here for their lives? The actresses' observations fail to provide an answer. Jayne Meadows found Dr. Finch "fascinating". Patricia Owens announced after an interview that Carole Tregoff "was being very sensible about the whole thing." That, at least, is good to know.

Life, Feb. 15, 1960, p. 24. If such is the behavior and attitude of the press, one must doubt the sincerity of their motives.

³⁰ *Improper Publicizing of Court Proceedings*. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted. . . .

³¹ *E.g.*, *Lyles v. State*, 330 P.2d 734 (Okla. Crim. Ct. App. 1958).

³² See Note, 19 LA. L. REV. 694, 696 & n.11 (1959).

can be employed without the least disturbance of the proceedings and even without the notice of those engaged in the trial.³³

Apart from giving the general public the satisfaction of vicarious participation in the trial and of supplying the judicial information which no longer can be gathered personally, such publicity given to trials permits the widest scrutiny of the proceedings. Judicial or administrative irregularities can be uncovered by the skilled reporter-observer. A few examples may demonstrate the point. When years ago it became apparent that in Chicago not all was well with the criminal trial judiciary, the Chicago Crime Commission, a private citizens' organization which seeks to improve criminal justice by publicizing abuses, stationed lawyer-detectives in every criminal courtroom and publicized the findings of these observers. Irregularities quickly ceased. Later a public complaint was heard that Chicago criminal judges followed too much their own philosophies and idiosyncrasies in imposing sentences, that some were too soft and others too tough, that some were too lazy and others too eager, in short, that great inequalities abounded in the Chicago criminal courts. Again the Crime Commission entered the picture and compiled and publicized statistics, showing for every judge how many hours he spent on the bench during a given period, how many cases he tried, how many motions he heard, and how many dismissals, acquittals, and convictions were rendered in his court, as well as the length of the sentences he imposed. Again the situation improved under the pressure of public opinion aroused through publicity.

What is true of publicity given to the administration of justice at the trial stage is also largely true for the stage of police proceedings. The press keeps the police in check. The watchdog task of the press proved of particular value in uncovering abuses which marked many urban American police forces during the 1920's. The relative humanness of American police today is in no small part due to the publicity which the daily press gave to abuses.³⁴ And such public scrutiny continues unabated.

Now, obviously, it was never envisaged to be the function of the press and other mass communications media to supervise the organization and functioning of American police forces, and to the European observer any such mere suggestion sounds absurd. But American police forces still are, to a large extent, lay agencies, and even where

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³³ Comment, *The New Star Chamber—TV in the Courtroom*, 32 So. CAL. L. REV. 281 (1959). Even these studies cannot account for the possible effects which mere knowledge that a trial is being broadcast—whether or not cameras or microphones are visible—might have on the participants.

³⁴ See HOPKINS, *OUR LAWLESS POLICE* 34-44 (1931).

they have been professionalized, they still retain some of the characteristics of lay or popular police forces. They are, indeed, frequently under popularly elected supervision. But this supervision is not all-seeing or omnipresent. Here the watchful eye of publicity takes over. The press maintains the nexus between the police and their employers, the taxpaying public. And where the employers' elected agents fail, the press frequently succeeds through the power of the pen or the waves of the air.³⁵

D. Direct Limits of Trial and Pretrial Publicity

Nothing could be clearer than the mandate to limit the fairness-insuring device of publicity when it tends to frustrate rather than insure fairness of the proceedings to any one or all of the participants. Restriction of publicity has been widely achieved in America with respect to certain categories of proceedings, among them juvenile court proceedings,³⁶ criminal-sexual psychopath proceedings, and others of similar nature.³⁷ There have been instances of partial restriction, often limited to juvenile spectators but occasionally extending to the public as such. Such restrictions often cause a storm of indignation. In general, the public is excluded only when state secrets or morality-endangering testimony is received into evidence.³⁸ And even in the espionage trial of the Rosenbergs the press was admitted throughout, but pledged to secrecy as to all confidential matters; spectators were entirely excluded during the reception into evidence of government secrets. Indeed, a diligent researcher was unable to find a single case on record, in either England or the United States, from 1641 to date, in which a trial took place in complete secrecy.³⁹ Pretrial publicity is limited, to the extent possible, by the internal regulations of the enforcement agencies and by the secrecy of grand jury proceedings.

E. Dangers to the Administration of Criminal Justice

1. Dangers to the Defendant

Our prime concern should be over the protection of the interests of the defendant. And, indeed, the right to an open and public trial

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³⁵ For a newspaperman's conceptions, see Hoskins, *The Press and the Administration of Justice*, Fed. Prob., June 1958, p. 31.

³⁶ Even in this area there is a movement to restore publicity as a deterrent upon parents who, it is surmised, may thus be induced to exercise greater supervision over their children. Scientific evaluations of the conflicting theories are wanting.

³⁷ 6 WIGMORE, EVIDENCE §§ 1835-36 (3d ed. 1949).

³⁸ See, e.g., *People v. Hall*, 51 App. Div. 57, 64 N.Y. Supp. 433 (1900) (extortion for sodomy).

³⁹ FELLMAN, *op. cit. supra* note 20, at 56.

has been held to be solely his right.⁴⁰ The defendant may insist on an open trial, but, unfortunately, the reverse is not necessarily true; he may *not*—in most jurisdictions—insist on a secret trial, however much the open proceedings may harm him in the public eye.⁴¹ Thus, when prejudice to the defendant has to be feared from openness and publicity of the criminal proceedings, we have relied chiefly on means other than exclusion of the public and the press from trial. It is unfortunate that the dangers inherent in a possible waiver policy have been held to be greater than the possible benefits of waiver.

The worst possible form which trial and pretrial publicity may take is the so-called "trial by newspaper." This is the highly emotional and often fact-unrelated newspaper suggestion as to a defendant's guilt or innocence, elaborately arrived at by questioning everybody concerned and following clues (sometimes with a more costly apparatus than that available to the public prosecution) and publicized in lengthy illustrated articles, sold in millions of copies all over the country. Recently even maps and graphs, showing the position of every participant at the scene of the crime, are being included. Puttkammer and Barnes and Teeters have given us vivid descriptions of American actualities,⁴² which compare unfavorably with the relatively restrained British practice, though recent press behavior in Britain has given rise to increasing complaints and calls for wider employment of criminal sanctions to curb undesirable practices.⁴³

Excessive publicity jeopardizes the fairness of the trial which is guaranteed to every defendant under federal and state constitutional provisions.⁴⁴ There are limitations to the devices available to ameliorate the possible ill effects of publicity. Censorship of published reports is limited to obscenity, exclusion of the public is rarely permitted, and the common-law power to punish for contempt is relatively limited and in need of reform.⁴⁵ But, as evidenced by Canon 35, disturbance-creating mass media may be and usually are excluded under

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⁴⁰ *United Press Ass'n v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954). *Contra*, *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1955). See generally Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932).

⁴¹ See *E. W. Scripps Co. v. Fulton*, *supra* note 40. See generally Note, 36 ORE. L. REV. 345 (1957).

⁴² PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 52-58 (1953); BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 192-98 (2d ed. 1951).

⁴³ See Coutts, *Press Behavior and the Criminal Law*, 22 J. CRIM. L. 145 (1958).

⁴⁴ For a factual account of the impact of publicity upon the Lindbergh kidnapping case and similar trials, see Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940). The effect of pretrial publicity on the reliability of witnesses is discussed in Note, 4 STAN. L. REV. 101, 103-04 (1951); see also Bird, *The Influence of the Press Upon the Accuracy of Report*, 22 J. ABNORMAL & SOCIAL PSYCH. 123, 129 (1927).

⁴⁵ See generally Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 824-31 (1961).

the contempt power, principally in order to preserve courtroom decorum. Due to these shortcomings, we have to rely mainly on a number of ancient methods to guarantee a defendant his constitutional right to a fair trial:⁴⁶

Change of venue or of venire. Upon a showing of general prejudice in the county of trial, the defendant may have his case removed to another county, or may have his case tried locally by a jury drawn from a neighboring county.

Continuance. Upon a showing of grave current bias and danger in the county, trial may be postponed until calm has been restored.

Voir dire. Upon the impanelling of the petit jury, the defendant may (1) challenge the entire panel as drawn in violation of the law, (2) challenge individual jurors for specific causes, such as bias or prejudice, whether created by publicity or otherwise, and (3) challenge a certain number of jurors peremptorily, that is, without any assigned cause. Similarly, he may object to judge and prosecutor on grounds of personal bias, conflict of interests, and the like.

Isolation of the jury. The jury is isolated from any publicity influence for the length of the trial, if not by physical segregation, then by instructions not to discuss the case with anyone and not to receive any public or private information about the case except what is presented in open court.

Instructions. At the close of the trial, the jury is warned to decide only upon the facts introduced at the trial.

By these means, a trial is had before a relatively openminded jury—which is sometimes hard to find when nationwide publicity has preceded the trial—and this jury is isolated from the influence of publicity during trial. But dangers to the fairness of the trial remain, and interested criminologists concur in believing that the balance is presently struck in favor of freedom of the press.

2. Dangers to Others

I deem it entirely proper that through the press the public is permitted to participate at least vicariously in the administration of criminal justice, much as it could do so more personally a century or so ago. On the other hand, Canon 35 is entirely right in its stand against making a mockery and circus out of criminal trials by the use of cameras and other devices. The truth can be found best where calm

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⁴⁶ See generally *id.* at 818-22, where the efficacy of these devices is pointedly questioned.

prevails. When life and liberty are at stake, the right to entertainment must take a second billing. There is a real danger in excessive reportage, especially picture reportage, of criminal trials: Judges and lawyers may become publicity-hungry actors catering to the camera rather than to justice, particularly if they will have to face reelection. Newspaper and television should not dictate policy within a courtroom. I fear that they are already dictating too much judicial policy from without it.

Excessive publicity also constitutes a danger to the safety or reputation of innocent witnesses. Presently, unless they are children, little can be done to keep their identity confidential. Witnesses cannot very well be hooded or kept entirely concealed, as happens occasionally in congressional investigations, for in a criminal trial the defendant is entitled to be confronted by his accusers and witnesses.

3. Direct Dangers to Law Enforcement

There is a grave danger inherent in excessive publicity during the investigation stage. As soon as a crime has been committed, the papers splash headlines across the front page and newscasters interview all conceivable sources of information, thereby possibly impeding the police in their attempt to solve the crime.⁴⁷ Even strategic secrets of police work, such as stakeouts, suspects, and missing clues, often are revealed.

According to the prevailing view, protection of freedom of the press is so necessary for the preservation of our democratic way of life, that we must pay the price for this freedom—a price measurable in losses through crime. It is sometimes suggested that as a relatively wealthy nation, we can afford to pay this price. One might ask why the police are so nearsighted as to reveal damaging information to the press. The answer is to be found in the pressure and power position of the press: The competitive spirit among newspapers for the retention and enlargement of their reader market drives crime reporters to ever greater competitive efforts in gathering information. Their practices are not always ethical, though outright bribery is probably rare. Their methods are much more subtle than that. The police officer, prosecutor, or attorney who leaks information to a reporter will get a *quid pro quo* in the form of favorable publicity; he who refuses to leak information will get unfavorable or no publicity,

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⁴⁷ Compare TRAIN, *THE PRISONER AT THE BAR* 334-35 (2d ed. 1908), describing one of the author's cases in which the defendant had committed a murder shortly following a highly publicized acquittal of a murder committed under very similar circumstances. When asked why she had murdered, the second defendant replied: "Oh, Nan Patterson did it and got off." See also TAFT, *CRIMINOLOGY* 206 (rev. ed. 1950).

and that may ruin his career.⁴⁸ Efforts at restricting damaging press releases have been singularly unsuccessful.

The unrestrained freedom to publicize what can be found out about preliminary investigations has one further rather detrimental consequence: Since some crime is highly newsworthy, publicity-seeking officers will concentrate their efforts on such crimes to the detriment of the investigation of other, less newsworthy, but equally or more important, criminality.

There are other dangers in excessive trial and pretrial publicity, but of a more indirect or impersonal nature, whether specific or general, short range or long range, though these are even greater in the case of publicity to the phenomenon of crime.

III. PUBLICITY TO THE PHENOMENON OF CRIME

A. Purpose

The phenomenon of crime is publicized either as a news event, in which case the predominant purpose of the publicity is simply to inform, or as an object of historical or fictional writing, in which case the predominant purpose is to entertain. Neither form of publicity can be said to be specifically desired by the government, as is the case with trial publicity. Indeed, if we look beyond information and entertainment, it is rather hard to identify any particular social function which crime publicity may serve. But, as I said before, it is not government's task to ask why, where freedom of publicity is concerned.

Few, however, will doubt that crime is newsworthy and that it is a legitimate object of vicarious entertainment—at least so history teaches us. Such an explanation obviously cannot account for the fact that there might be socially more desirable news events than crime, such as milking or plowing championships, spelling bees, and the patent registry. Why, one might ask, does crime rank so high, when its understanding and treatment are matters of such high expertise, on a par, perhaps, with brain surgery? "Can it be lawful for details and descriptions that ought to be reserved to the scientific, police and law courts to be thrown to the lust of curiosity?" asked Pope John XXIII.⁴⁹

Nevertheless, the mass communications media attribute a social purpose to their efforts. These claims will be investigated shortly.

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⁴⁸ TART, *op. cit. supra* note 47, at 210.

⁴⁹ N.Y. Times, Dec. 9, 1959, p. 22, col. 6.

B. Law and Constitution

Just as the American press is free to report on criminal trials or the activity or inactivity of the police, it is equally free to uncover and publish information on the commission of crime. Of course, the press has no greater rights to obtain entry to enclosures or to compel answers to its questions than do ordinary citizens. Nor, in most American jurisdictions, does the press enjoy any particular right, like that given to priests, lawyers, and doctors, to keep its informants secret.⁵⁰ But their mere prestige puts the mass communications media in a preferred position.

C. Sociological Explanation

No reasoning known to me can adequately explain the inordinate amount of attention given to crime by American journalism. It is true that we are a nation of rebels for whom the rough adventures of outlaws are a greater entertainment than a royal ball at court. It is true also that early experience of excitement requires greater excitement at later stages to provide equal entertainment satisfaction. There may even be cases in which the vicarious experience of crime ameliorates latent urges to experience crime directly. Certainly crime is easy entertainment, and perhaps it is more pleasing after a hard day's work than is the symphony, the opera, or a romantic novel. But even the most common explanation offered by the purveyors of crime news and entertainment—that their commercial polls show that this is what the public wants—falls short of satisfying the curious inquirer. One thing is certain: As long as peddling crime news and entertainment remains profitable, our mass communications media will continue to emphasize crime. For better or for worse, then, we are bound to live with this phenomenon and must make the best of it by all lawful means at our command.

Naturally, the mass communications media claim for themselves a variety of noble justifications. Several are rather plausible, some unquestionably are of incidental social significance. These are the major claims:

Crime publicity serves as a direct deterrent. The underworld hates publicity. This was discovered by Americans during the famed investigations of organized crime and police practices under Wickersham and Dewey in the late 1920's and 1930's and under Kefauver in

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⁵⁰ Bunks, *Newspaperman's Privilege as to Sources*, 13 N.Y.U. INTRA. L. REV. 170 (1958).

the 1950's.⁵¹ In addition, publicity of crime alerts the citizenry against the enemy within.

Crime publicity serves as an indirect deterrent. It is obviously true that deterrence relies on the publicity given to successes in crime detection and to impositions of punishment after convictions. Although the principle does not seem open to refutation, the details are very much in doubt. A recent study found that the phases of greatest publicity given to murder cases are trial and conviction and sentencing;⁵² ergo, following such great publicity, the murder rate should drop for a limited time. Phases of lesser publicity, investigated in the same study, included the commission of the offense, the beginning of detection, and the execution of the offender. The author then investigated all murder convictions in Philadelphia for a ten-year period, comparing homicide rates for eight-week periods before and after the respective publicity. He concluded that "there was no significant decrease or increase in the murder rate following the imposition of the death penalty . . . ." ⁵³ This study must be accepted with great care, and so the author himself warns, as the material at hand was extremely limited. For the time being, however, it is interesting at least to note that in one big American city for one ten-year period the sensational newspaper publicity given to murder convictions seems to have had neither a detrimental nor a beneficial influence on the crime rate. Perhaps all we can say about Philadelphia murder publicity (in lieu of more space allotted to political and cultural news) is that it portrays a poor taste on the part of the newspaper-reading public.

Why did the Philadelphia study fail to prove any deterrent effect? In the first place, the quest was limited to short range effects. But might not the publicity have a long range deterrent effect, one which is not qualitatively or quantitatively measurable? It might be suggested that indeed there is no deterrent effect because of the nature of the reporting. As a matter of fact, all too frequently, despite an avowed purpose to the contrary, the reporter adorns the criminal with at least a glimmer of heroism. Might not such portrayals help to formulate a wrong conception of criminals in the minds of the most impressionable? All of these arguments add up to this: While the discussion of the effects of publicity given to criminal activities may well rely on

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⁵¹ Note that these experiences are not contradicted by occasional remarks, originating especially with forensic psychiatrists, that some crime stems from an urge to gain publicity. See also VON HENTIG, *CRIME CAUSES AND CONDITIONS* 324-25 (1947).

⁵² Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L., C. & P.S. 338 (1958).

⁵³ *Id.* at 341.

what is believed to be the accumulated experience of the ages, scientific foundation is wanting in practically every respect.⁵⁴

Crime publicity serves to build a healthy conscience, to strengthen community and individual superego by publicly tracing every crime to its just reward. Suffice it to note that news coverage given to conviction and penal disposition of any given offender is infinitely smaller and much more succinct than that given to a description of the crime itself and the trial. Perhaps crime publicity could help build a healthy conscience, but it is an exceptional periodical which treats crime in so constructive a manner.

Crime publicity is an aid to the police. It is a fact that the American mass communications media continue to demonstrate that they can be quite helpful to the police in the solution of individual cases. They may go along with the police in publishing misleading information in order to trap a suspect; they may publish the description of a suspect, leading to his arrest; they may create a favorable atmosphere in which the police can operate successfully. In short, they do have the power to foster law enforcement and thus to contribute to the general weal, and they do occasionally use this power properly, but so far it has served only a minor function.

D. Direct Limits of Crime Publicity

Apart from the general restraints which govern all publications, there are no direct restraints on crime publicity comparable to those against excessive trial publicity. A direct restraint could only be in the nature of censorship, and apart from the limited permissibility of local morals censorship of motion pictures and import restrictions on obscene publications,⁵⁵ both of which are quite peripheral to the main areas of publicity concerning criminal activity, government has no power to prohibit the dissemination of information about the commission of crime.

E. Dangers Inherent in Crime Publicity

1. Extent of Crime Publicity

Necessarily, whatever general dangers there are in the publicity given to criminal proceedings also inhere in crime publicity. But

⁵⁴ For a case which relied on public opinion polls to support a motion for a change of venue, see Record, pp. 105-41, *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950). See also Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court*, 66 HARV. L. REV. 498 (1953).

⁵⁵ As to the limits, see *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D. N.Y. 1957).

beyond these there is a danger in unfettered crime publicity which is of an even greater intensity than that of trial publicity.

A sensationalistic, profit-minded, mass communication medium knows how to exploit the bestseller crime for its own business purposes. An analysis of the daily press must indicate to even the most staunch supporter of freedom of the press that there has been an increasing tendency to devote considerably more coverage to crime in relation to other facets of life than the relative significance of crime in the total picture of local, national, and international events warrants. In 1930 it was reported for a typical American newspaper that 3.77 per cent of content and headlines had been devoted to crime news.⁵⁶ It is my estimate that now, one generation later, comparable papers have significantly increased their attention to crime. Indeed, one may justifiably entertain the impression that "juvenile delinquency has become a major factor in the American economy. Without it, many American newspapers might have to go into receivership."⁵⁷ It has even been reported that newspapers were instrumental in pressing for the repeal of the New York Youth Court Act: "[N]ewspaper publishers were against the bill because it would have thrown a veil of secrecy around the criminal acts of youth."⁵⁸

An appreciable segment of the American newspaper press feeds principally on crime and caters specifically to morbid or melodramatic interests. Of course, one cannot regard all mass communications media, or even all publishers of the same media, as equally motivated. Professor Taft grouped American newspapers in four categories: (1) Conservative papers that generally refrain from publicity to crime, but publicize such developments as crime prevention programs (Taft's example: *The Christian Science Monitor*); (2) other conservative papers that restrict crime news to "brief, unsensational accounts of crime" (my examples: *The New York Times*, *The New York Herald Tribune*); (3) a vast bulk of papers that "print much crime news attempting not to offend average standards of good taste" (my example: *The New York World Telegram and Sun*); (4) "not a few [that] play up crime news because they believe their readers wish sensational thrills" (my examples: papers ranging anywhere from *The National Enquirer* to *The New York Daily News*).⁵⁹

These categories do not include the pulp and slick magazines and comic books which do not report crime at all, but, rather, fabricate

⁵⁶ Caldwell, *Sensational News in the Modern Metropolitan Newspapers*, 23 J. AM. INST. CRIM. L. & C. 190 (1932).

⁵⁷ Mueller, *Criminal Law and Administration*, 34 N.Y.U.L. REV. 83, 113 (1959).

⁵⁸ N.Y. World Telegram & Sun, March 29, 1961, p. 12, col. 2.

⁵⁹ TAFT, *op. cit. supra* note 47, at 205-06, citing CRAWFORD, *THE ETHICS OF JOURNALISM* 114-15 (1924).

crime as well as lust and violence exceeding the imagination of the worst criminal minds, for the purpose of selling "entertainment"—even and especially to children. While one might question the extent of damage done by such publications, few will deny that they have some influence on the creation of crime, especially juvenile crime; for the impact of written argument on attitudes has been impressively demonstrated.⁶⁰

When sensational crime news and such alternative sales items as war, earthquake, or marital scandal are lacking, newspapers are known to have "created" imaginary crime waves, thus conveying the impression that crime is rampant when actually all is well and normal. This can be done rather easily by overemphasizing a few insignificant occurrences and by playing upon emotions.

Overintensive and distorted crime publicity can exert a detrimental influence in two dimensions, one short range and the other long range.

2. The Short Range Effect

It has long been suggested that publicity given to modes of perpetrating crime, especially to the successful examples, invites or at least enables the reader to imitate this criminality.⁶¹ Even the casual observer can affirm the validity of the argument. It is not unusual for criminally disposed individuals to receive their clues for the *modus operandi* of criminal ventures from prominent newspaper accounts of successful exploits of other offenders. When an old lady in New York City robbed a bank by threatening to throw a vial full of acid (it really was water) into the teller's face, the newspapers literally burst with admiration for the lady's ingenuity. Other persons promptly attempted to repeat the performance, but with less success. *Life* recently reported about the perpetrators of the Peugeot kidnapping—à l'*Americaine*—that:

Rolland and Larcher had got it all—lock, stock and getaway car—out of an American crime novel called *The Snatchers*. The book, translated into French as *Rapt* (Abduction), told how a U.S. gang kidnapped a financier's daughter. Larcher, who read the book, had been swindled by a partner and now saw a way to set himself up in business again. Rolland wanted money for the high life which his poor boyhood in Britain and a life of petty crime had denied him.

⁶⁰ See Knowler, *Experimental Studies of Changes in Attitude, II—A Study of the Effect of Printed Argument on Changes in Attitude*, 30 J. ABNORMAL & SOCIAL PSYCH. 522 (1936). See also Note, *Controlling Press and Radio Influence on Trials*, 63 HARV. L. REV. 840 (1950).

⁶¹ See note 47 *supra*.

The Snatchers provided an extra blue print. It said steal a car so no one could trace the registration. So the two stole one. It said to get rid of the car afterward. They burned it. The book printed an intricate ransom note. Larcher and Rolland copied it almost word for word and sent it to Peugeot. Maybe they did not read the book's ending: the kidnappers die à l'Americaine under a hail of bullets.⁶²

Such instances are episodic; there is no indication that any appreciable portion of crime is attributable to imitation of exploits described in print.⁶³ The occasional occurrence of imitations constitutes no reason to delimit the freedom of the press to report and publish on crime, short of actually soliciting it.

Occasionally it is even contended that crime news encourages the continued depredations of the offender whose crimes are publicized. Indeed, it sometimes happens that the police find bundles of newspaper clippings on the person of an arrestee, who treasures these much as an actor treasures his scrap book of critics' appraisals. Among juvenile gangs, the prestige of a member often is assessed in terms of the newspaper coverage which his delinquent acts have received.⁶⁴ But again, there is no reason to believe that all psychological types of offenders share in this vanity. Neither is there evidence or cause to believe that any appreciable portion of crime is attributable to this type of publicity-induced vanity.

Indeed, all short-term effects of crime publicity, so frequently asserted, are rarely demonstrated and, while plausible, are extremely hard to measure, qualitatively or in any other way.⁶⁵

3. Long Range Effects

If publishers were to argue that their "crime-does-not-pay publicity" has long range morale-building effects which are not empirically ascertainable, they cannot refute the argument that excessive publicity in which the emphasis lies on crime, rather than on "does not pay," has an equally nonmeasurable detrimental effect. But I shall here cautiously speak only of a mere danger. This is the danger that

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⁶² Life, May 17, 1961, pp. 49-51.

⁶³ Brasol's studies confirmed that crime news rarely has a cataclysmic effect, though he attributed a definite, long range, morale-dulling effect to strong crime publicity. BRASOL, *THE ELEMENTS OF CRIME* 165-85 (1927).

⁶⁴ TAFT, *op. cit. supra* note 47, at 207.

⁶⁵ See generally KINGSBURY, HART & ASSOCIATES, *NEWSPAPERS AND THE NEWS* (1937). The same holds true for long range effects. On the whole problem, and on experiments to measure long and short range effects, see BLUMER & HAUSER, *MOVIES, DELINQUENCY AND CRIME* (1933); Orlow & Francis, *Mass Communication and Crime*, in *SOCIOLOGY OF CRIME* 239, 246-51 (Roucek ed. 1961); cf. HOVLAND, LUMSDAINE & SHEFFIELD, *STUDIES IN SOCIAL PSYCHOLOGY IN WORLD WAR II* (1949).

through the constant impact of all modern mass media which, for business reasons, are tempted to cater more to stimulating cheap emotions than to upholding the standards of right and wrong, our sense of injustice may be slowly perverted.

Such warnings come not only from motion picture censors,⁶⁶ but from the clergy,⁶⁷ from distinguished psychiatrists,⁶⁸ and even from newspaper men themselves.⁶⁹ The argument is hard to refute, for the very prestige of psychiatry rests on the theory of the molding of the superego. How else but through frequent intrusions of outside forces can superegos be developed?⁷⁰

Naturally it would be absurd to attribute the oft-mentioned decline of moral ideals in America—a phenomenon yet to be scientifically demonstrated—or even the rising crime rate to the sole force of crime publicity.⁷¹ But a nexus strongly suggests itself. Moreover, the effect may be not merely a blunting of the communal conscience, but an outright perversion. For example, it is conceivable that a certain type of publicity may cause the public to adopt attitudes to criminals which are inimical to crime prevention. Vindictiveness, long the tenor of much of the popular press, could develop to such an extent that our society would actually regress to a period which we hopefully had long passed.

All these dangers could be counteracted by intelligent editorials, rather than editorialized reporting. But relatively few newspaper readers turn to the editorial page when other pages are more exciting. Furthermore, editorials cannot possibly contain that kind of intelligent information about criminal law which can come only from the highly

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⁶⁶ See N.Y. World Telegram & Sun, July 22, 1960, p. 9, cols. 4-5: "The real danger is not obscenity but the continuous and unremitting stream of violence. . . . The stream of violence can have a very serious effect. It can have political consequences. We will come to accept brutality. It will do away with the dignity of man. These films counteract the moral value of education." (statement by Hugh M. Flick, Associate State Education Commissioner of New York).

⁶⁷ Pope John XXIII stated: "It is not permissible to let the press undermine the religious and moral foundations of the Life of the People." N.Y. Times, Dec. 9, 1959, p. 1, col. 5; p. 22, cols. 3-6. A commission of the National Council of Churches reported: "[T]he potential of these media for good is balanced by a disturbing potential for the degradation of man, his manipulation, and his education in false systems of value." More particularly, the commission said:

We speak here not merely of the pathological preoccupation with sex and violence or of revelations of dishonest practices within the industries, but more fundamentally of the assumption in both the content of the media and the policies which govern them that man's end is material advantage, power and pleasure, to be achieved through competing with, manipulating and exploiting his fellow man.

N.Y. Times, June 2, 1960, p. 23, col. 1.

⁶⁸ See note 63 *supra*; WERTHAM, *SEDUCTION OF THE INNOCENT* (1953).

⁶⁹ See Crosby, *We Teach Juvenile Delinquency*, N.Y. Herald Trib., Feb. 20, 1961, p. 19, col. 6; Deland, *Battling Crime Comics to Protect Youth*, Fed. Prob., Sept. 1955, p. 26.

⁷⁰ BRASOL, *op. cit. supra* note 63, at 165-85; WERTHAM, *op. cit. supra* note 68.

⁷¹ See Clinard, *Secondary Community Influences and Juvenile Delinquency*, 261 Annals 42 (1949).

trained criminal scientist. So far, only a few American papers have made a practice of restricting crime news to accurate reporting supplemented by intelligent editorials.⁷² Inasmuch as the administration of criminal justice is a popular matter and rightly commands public interest, it should be made known that popular indignation, especially if improperly aroused, cannot be successful either in meting out justice or in repressing crime in general. Only professional leadership can do that and such leadership, unfortunately, cannot be found in the daily press. A pessimistic long range forecaster might predict that in a matter of decades it will be impossible to muster the popular strength to pass and uphold criminologically sound penal legislation, because of the great impact of the intense and disturbing publicity which is being thrust upon the human psyche with ever-increasing force.

IV. POLICY CONSIDERATIONS AND CONCLUSIONS

In this Article I hope to have demonstrated the issues at stake and the American efforts to reduce the ferocity of the conflict between the right to know, so important for intelligent popular government, which cannot exist without relatively unfettered mass communications media, and the right to be free from criminal depredations, which demands a certain amount of secrecy of strategy against crime, an atmosphere of calm judicial determination undisturbed by the noisomeness of excessive publicity, and possibly even restraint in providing the public with information about crime. We have not succeeded in reconciling the conflict, but merely in alleviating it. If any imbalance there is, it is presently in favor of the public's right to know.

The discussion of this provocative policy clash continues with unabated heat in our country. The press is as adamant as it was in John Peter Zenger's days in maintaining that the right to seek and report news is without restriction—and it has the press in which to make this point to the public. Those of opposite persuasion—many trial lawyers, for example—have no such machinery with which to influence the public. To add to the confusion, there is a noisy minority of trial attorneys who do prefer a completely unfettered press. (Is their real reason the likelihood of reversal of a client's case for reasons of prejudicial publicity?⁷³ Or is it the frustrated stage actor who takes

⁷² For the views of one of the editors of the *Christian Science Monitor*, see Deland, *Crime News Encourages Delinquency and Crime*, 32 J. AM. JUD. Soc'y 10 (1948).

⁷³ See AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS, Canon 20. See also *People v. Fournier*, 77 P.R.R. 208, 277-84 (1954); Brownell, *Freedom and Responsibility of the Press in a Free Country*, 24 FORDHAM L. REV. 178, 182 (1955); Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940); White, *Newspaper and Radio Coverage of Criminal Trials*, 41 J. CRIM. L. & CRIM. 306 (1950).

this position?) Similarly, an appreciable number of prosecutors appear to favor unfettered publicity. Their reason may well be that the prosecutor stands the better chance of receiving favorable publicity than does the defendant or his attorney, and that prosecutors, who are politically appointed or elected, need such publicity for their careers.

A change in attitudes among opponents and proponents can be expected only when scientifically sound evidence is adduced as to the effects which either policy produces.

The areas most in need of attention are these:

(A) Since, so we feel, the scales are presently weighted in favor of publicity, and our means of protecting fairness do not prevent many adverse effects of publicity, the right-duty to an open trial should be converted into a clear right, which a defendant may intelligently waive for reasons of possible prejudice. The ability to waive an open trial should include the right to waive trial by a jury and to consent to trial by a judge.⁷⁴

(B) On the question of pretrial publicity and its possible harm to a defendant, no change of present policy can be advocated until scientific studies have been made.

(C) Since, at the moment, despite an overabundance of scholarly attention, scientific information on the areas here discussed is wanting, I would advocate inquiries on the following topics:

(1) The *modus operandi* of newspaper crime reporters in the gathering of crime news;

(2) police department measures to curb unauthorized release of investigation news;

(3) the actual prejudice which a defendant suffers from sensational publicity;

(4) the effect which news about crime, trials, convictions, executions, and releases, has on the general crime rate;

(5) the real effect of newspaper accounts, television demonstrations, and the like, upon offenders who claim or are believed to have been inspired by them.

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⁷⁴ These proposals are supported by Goldfarb, *supra* note 45, at 831-32, 834-35. Goldfarb also suggests that it should be made possible for a judge to take a criminal case from the jury when, in his judgment, "notoriety, public pressure, or press comment causes a situation in which the jury would not be able to decide the case impartially," *id.* at 832; that the federal practice of using three-judge trial courts should be adopted in sensational criminal trials, *id.* at 833; and that the ethical canons dealing with conduct of trial counsel should be more stringently enforced in notorious criminal cases, *ibid.* Goldfarb's excellent paper was published too late for consideration in the report on which this Article was based. However, I wish to note my agreement with most of the views expressed by Mr. Goldfarb.

If demands for a curb on publicity in the interests of trial fairness and public safety find support in these inquiries, then possible legislation should be studied which will reconcile these demands with the constitutional guarantee of a fair trial. Informal restraints designed to minimize publicity which possesses a material potential for long or short range danger should also be explored in the light of the results of the proposed studies.

As for the long and short range effects of our practice of widespread crime publicity on the nation as a whole or on groups or individuals, it seems that all interested observers are convinced of the existence of such effects, and that the vast majority of them attribute a negative, rather than a positive, effect to crime publicity. As two scientific observers put it:

[T]he shortage of . . . studies is seen to be acute. For the most part, the existing studies are inconclusive either by their own admission or through questionable research methods.

If we are to make an overall assessment of the effect of the mass media on crime, it can only be that, at least according to what has been demonstrated by study, the mass media exert no *wide-spread* effects on the occurrence of crime in the short run. The effect of the mass media on our society in the long run is even more uncertain, and remains completely in the realm of speculation.⁷⁵

I hasten to add, however, that this speculation is one of such intensity, frequency, and perseverance that we have almost reached the point at which the burden of proof has shifted to those who assert that mass communications media have no detrimental effect on the incidence of crime in America.

Since I am relatively pessimistic about our ability to improve materially the existing legal machinery for the protection of criminal defendants against virtually unfettered publicity, and since the press cannot, under our constitutional provisions, be subjected to any appreciably greater legal restraint than that existing, I am particularly eager to experiment with informal restraints on publications media, especially through the voluntary cooperation of the bench, the bar, the police, and reporters and publishers. It is quite possible that local standards or codes could be created by people who come into working contact with each other from day to day, where national attempts on a grand scale have failed. Such efforts have been successfully attempted on an *ad hoc* basis in certain cases where a trial by news-

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⁷⁵ Orlow & Francis, *supra* note 65, at 250-51, which also contains an excellent bibliography of sociological works dealing with the problem.

paper was feared. One American author has discussed several cases in which court orders were made for specific cases or in which the trial judge and prosecutor merely spoke to newsmen, explaining the dangers of unbridled publicity, thereby restraining the press and preserving the dignity of the trial in relatively sensational cases:

This much is certain, that the bench and other law enforcement authorities did control situations which presented difficult problems in the cases mentioned and did secure a general co-operation of news distributing agencies and did secure satisfactory results.⁷⁶

Along the same lines it has been suggested that the judiciary assume the leadership in formulating standards. The Supreme Bench of Baltimore issued a series of rules in 1939, rather rigidly circumscribing the type of publicity which could be given to criminal cases from arrest until conviction. These rules were honored for ten years, until the radio industry refused to go along any further. As a result, in the contempt case of *Baltimore Radio Show, Inc., v. State*,⁷⁷ the rules were invalidated by the Supreme Court of Maryland. Yet the Baltimore rules were an interesting and sincere attempt to cope with the problem. Perhaps if they had resulted from cooperation between lawyers and journalists and had been just slightly less rigid, they might still be in effect.⁷⁸ The desired spirit of cooperation cannot be fostered by the kind of antagonistic debates between the legal and journalistic professions which I have experienced in both Europe and America.⁷⁹ A more conciliatory attitude must be adopted so that mutual education can take place.

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⁷⁶ Hallam, *supra* note 73, at 473. For a discussion of cases in which cooperation occurred see *id.* at 466-72.

⁷⁷ 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

⁷⁸ An interesting experiment in furtherance of such a goal was the course in Crime News Analysis and Reporting offered by the Northwestern University Schools of Law and Journalism in March 1959. It was attended by seventy-three newsmen from twenty-one states. According to the pamphlet announcing the course, it was intended "to enrich newsmen's understanding of the crime problem" and "to improve relationships between newsmen, law enforcement officers and the legal profession." Among the matters included in the course were the problem of Canon 35, pretrial news interviews with counsel, the privacy aspect of crime news reporting, the contempt power and newsmen, and professional responsibility and self-restraint. This short course has now become an annual program, and it deserves to be imitated elsewhere.

⁷⁹ The history of Canon 35, see note 30 *supra*, is an excellent example of how lawyer-journalist cooperation should not be handled. Following the Hauptman trial, a notorious case of trial by newspaper, the American Bar Association established a special committee to cooperate with the press in working out acceptable standards for the reporting of criminal trials. On September 27, 1937, portions of the committee's report were approved by the Bar Association, and the committee was continued so that it might resolve certain differences—principally as to the propriety of using cameras in the courtroom—which remained between the lawyers and the newsmen. But three days later, without referring to the work of the special committee, the

What has been said of industrywide self-restraint in connection with publicity given to criminal proceedings ought to hold true for information and entertainment published on crime as such. But industrywide self-restraint in this sphere would require an amount of maturity which, in the face of the laws of economics, our industries do not possess. The responsibility rests on the citizen and his social agencies to counteract whatever ill effect excessive crime publicity may have, especially on the nation's young. They, of course, do enjoy the law's special protection against possibly damaging crime publicity, but such protection is neither certain nor complete. The American adult, however, as much as he may resent crime publicity, refuses to permit the law to reduce his reading level to that of a child. And after giving occasional public voice to his anger against the existing state of affairs he usually returns to the privacy of his home in order to watch the next Western on television. But he does entertain little doubt that the most profitable restraint would be a self-imposed one.

Association passed a recommendation of its Committee on Professional Ethics and Grievances, adding Canon 35 to the Canons of Judicial Ethics. The press felt that it had been betrayed, and, although the joint committee was not immediately dissolved, the adoption of Canon 35 effectively barred further cooperation. Hallam, *supra* note 73, at 462-66.