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UNFAIR COMMENT: A WARNING TO NEWS MEDIA

LUIS KUTNER*

INTRODUCTION

A matter of increasing concern to defense counsel is the impact of television, radio and newspaper publicity reflecting on the defendant and its effect on jurors. The issue is of current and vital importance. It was one of the main, but unsuccessful, contentions of Dave Beck, whose embezzlement conviction was sustained by the United States Supreme Court, May 14, 1962, that the press coverage made it impossible for him to have a fair trial in King County, Washington.¹

The balancing of the constitutionally protected right of freedom of the press and the equally fundamental right guaranteed by the sixth amendment that “in all criminal prosecutions, 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 . . . .” is a vital problem.

Very recently, on May 3-5, 1962, Northwestern University's Medill School of Journalism and the Law School sponsored a three day “Conference on Prejudicial News Reporting in Criminal Cases.” The Conference was subsidized in part by a Ford Foundation grant and was said to be the first of its kind. There will be increasing discussion throughout the country of this problem by members of the press and the bar. There have been many advocates of an adoption of controls on the press, as exist in England, in the reporting of criminal news and criminal trials.

The entire topic of safeguarding the individual’s freedom and his right to a fair and impartial trial has been one of the writer’s major interests for years.² This article, however, proposes to delineate the steps to be taken in the light of existing case law to insure the defendant’s right to a fair trial where unfavorable publicity may have reached and clouded the impartial judgment of the jurors.

“A defendant, however, is on trial for a specific crime, and is not to be condemned, imprisoned, or executed for what laymen would call his bad character or reputation.”³ The Court of Appeals for the Seventh Circuit applied this fundamental principle of American justice earlier this

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year in reversing the case of Tony Accardo, convicted on three counts of violations of the Internal Revenue Code pertaining to false and fraudulent statements. The defense contended that the trial court erred in denying various motions for mistrial and a jury poll, based on prejudicial newspaper publicity, and the reviewing court agreed. There were also evidentiary grounds for remanding the case for a new trial; however, it was the ground of prejudicial publicity which most caught the public eye and provoked the comments.

There is no question but that Anthony Joseph Accardo was newsworthy. For a number of years prior to his indictment in this case, he had been widely publicized by all of the newspapers in Chicago and elsewhere as the reputed leader of the “Syndicate,” said to be the power behind numerous legitimate and illegitimate enterprises, the principals of which are said to be hoodlums or members of the “Mafia.” The charges against Accardo and his trial in this instance occasioned widespread repetition of these rumors, as well as news of the trial, which was covered extensively by all of the local papers. The articles complained of, more often than not, mentioned or alluded to defendant’s reputed background, likened him to Capone, and combed through his arrest record and background of prior skirmishes with the law. Judge Duffy in his concurring opinion said: “The sensational nature of the news stories made it extremely difficult for the defendant to have a fair trial in the Chicago area, unless the jury were sequestered.”

Indeed, the decision in the Accardo case caused such a stir, that it is interesting to note that in a trial of an ex-prosecutor of an adjoining county in Indiana for income tax evasion, immediately subsequent to the Accardo decision, a newspaper story stated:

U.S. Judge Robert A. Grant has virtually isolated the jury of eight men and four women hearing the trial, which is expected to last at least two more weeks. Federal marshals late Saturday will escort the jurors to a hotel and keep them from all news media reporting the case. Outsiders are not allowed to talk to the jury.

The defendant was convicted. It would seem that the judge wished to take no chances that his procedure might be held invalid by the court of appeals under the rigid standards derived from the Accardo case and the other cases which have evolved through the federal courts in the past few years.

The prosecution in the Accardo case, however, did not feel bound by the decision to the same extent as did Judge Grant. Indeed, the prosecu-

4. United States v. Accardo, 298 F.2d 133 (7th Cir. 1962).
5. Id. at 139.
tion petitioned for a rehearing in view of the fact that three separate opinions were written in the decision, but the rehearing was denied by the court sitting en banc. The prosecution's brief contended that there was no precedent for the court's holding that this particular fact situation, relative to prejudicial newspaper publicity, constituted denial of a fair trial.

It is true that although a number of cases have been decided in the federal courts on this issue, there is none "on all fours" factually with the Accardo matter. Nevertheless, a precedent was set by the Supreme Court in Marshall v. United States in 1959. In Marshall the defendant was found guilty by a jury of unlawfully dispensing certain drugs without a prescription from licensed physicians. The defendant did not take the stand, nor did he offer any evidence. His sole defense was that of entrapment. The judge refused the government's offer to prove that the defendant had previously practiced medicine without a license as tending to refute the defense. During the trial several jurors actually read newspaper accounts containing this information and also stating that the defendant had a record of conviction on two previous felonies. The Supreme Court reversed a divided court of appeals and ordered a new trial. Since that time, from the cases coming down under the Marshall doctrine, it is possible for the lawyer to detect a trend which, in effect, revolutionizes the requirements which must be met to insure the accused of a fair trial under the sixth amendment. Of course, the Marshall case stated that each case turns on "its special facts" and did not touch on the question of "judicial discretion." Nevertheless, if the decisions do delineate rules whereby in the face of prejudicial publicity, a mistrial will be declared when the trial judge does not observe certain precautions, then, the failure of a judge to take these precautions may very well amount to an "abuse of discretion" and some of the recent cases have so held. Other recent decisions, including the Accardo case, evade the question of judicial discretion.

In the cases prior to Marshall, the general rule was established that the burden of proof was on the defendant to show the fact of the jurors' exposure to prejudicial matters, and to show that their verdict was actually influenced by that knowledge. It has been pointed out that the actual showing of influence was a burden almost impossible to meet. The Marshall case held, that on the special facts of the case, the publicity complained of was so highly prejudicial that the mere showing of reading

7. Supra note 4.
these articles by a juror was grounds for a new trial. But the Accardo case went a step farther. It held, in effect, that if the defense shows that prejudicial publicity has been published, the burden is upon the judge to ascertain whether in fact this publicity has been read by any of the jurors and the extent of influence of such reading, if any. Other cases delineate the proper manner for so ascertaining and this will be discussed later. In the Accardo case, the judge refused to make this inquiry upon motion of the defense counsel.

It seems that these decisions and others on the same point are cumulatively giving to us a body of rules for the counsel for defense, the prosecution and the trial judge, which if followed should assure the defendant a fair trial in the face of unhampered newspaper prejudice. It is not the intent of this article to represent that if these rules are followed, or not followed, as the case may be, a mistrial will not, or will be declared. That is impossible to do, under the "special facts" doctrine of Marshall. Rather this article will gather together a set of rules, gleaned from the cases coming down subsequent to the Marshall decision, which can be of help to the judges and attorneys in these cases. In other words, what we are saying is this:

(1) If the prosecution engages in certain conduct, to be discussed further, that in itself, or in conjunction with other circumstances, may be grounds for a mistrial. If the prosecution does not engage in this conduct, then a mistrial will not be declared on this basis alone, although it might be declared in a case where there are other factors present, although not traceable to the prosecutor.

(2) If the defense counsel does certain things during the course of the trial, he may be assured that if grounds for mistrial exist or might exist, they will not be waived by his actions. If in fact, the defense counsel does not do certain things, he may deprive his client of a mistrial even though the jury has, in fact, been exposed to prejudicial publicity.

(3) The trial judge may be assured that if he follows certain procedures, a mistrial will not be declared because of his actions, whether or not a juror has been exposed. In other words, it is suggested that cautious judges and counsel will lay the groundwork for assuring fair trials by taking certain steps as a matter of course when prejudicial publicity is present so that the case can be determined on the merits alone rather than on observance or failure to observe some precautionary procedure.

This is the purpose of this article—to discuss those factors which the federal courts have considered material when the issue of mistrial in

the face of prejudicial publicity arises and to try to establish some working trial court rules.

PUBLICITY ALONE DOES NOT THREATEN A FAIR TRIAL

First, it should be said as a preface to this discussion that the fact of publicity does not per se threaten the right to a fair trial. It has been held that exposure of jurors to a truthful account of trial proceedings in a newspaper is not grounds for a mistrial. Nor is volume of publicity alone a criterion. Thus, it is the nature of the publicity and not the publicity itself that is under attack. As a matter of fact, it has not been suggested that newspapers be barred from covering trials. In a recent case it was held for the first time that the right to a public trial belonged to the accused and could be waived, but even in that case and in others like it, the press was not barred from covering the proceedings. The prejudicial publicity under consideration here is those statements about the defendant disseminated by public communications, which if offered into evidence, would not be admissible because prejudicial to the defendant.

Secondly, before we get into the rules, one should bear in mind that this entire “house” is based upon a flimsy foundation—a presumption, not scientific, that jurors’ minds are in fact influenced adversely by exposure to prejudicial publicity. One case pointed out that voir dire is a clumsy and imperfect way to detect suppressed emotions in the minds of the jury and that in order to determine thoroughly the matter of predisposition and prejudice in the mind of a juror, each juror would have to be interrogated for a period of weeks by experts, and even after that determination no one would be sure. Of course, practically, we have to operate on presumptions in order to maintain the jury system. The recent cases hold with the proposition that the weight of probability rests with the contention that jurors cannot “disabuse their minds of a perhaps unconscious prejudice or predisposition against the defendant.” It has often been stated that there is a great need for the legal profession to look to the sciences (or arts, if you will), of psychology and psychiatry in order to examine, among other things, the true effect of prejudicial publicity on the mind of a juror as to his ability to disregard its influence.

12. Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1936).
14. United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949). Public trials are for the protection of the public generally and the privilege of those individual members of society who are accused. Public trials, like jury trials, the right to be represented by counsel, etc., may be waived.
17. Id. at 664.
and render a decision solely on the evidence. For one thing, psychiatry recognizes that some people's minds, upon exposure to derogatory information about a defendant, tend to side with him as an underdog. 18 This sort of partial and incomplete knowledge about the operation of the human mind, if taken into consideration in these cases, would make it absolutely impossible to lay out any rules for determining when prejudice in the mind of a juror exists. So we must turn to the non-psychological, and speak of "prejudicial" as being analogous to "not-admissible in evidence."

The recent cases would seem to discard the old maxim that inadmissible evidence, whether in or out of the court-room, can be cured by instructions. There are many cases, as all lawyers know, where highly inflammatory matters, non-admissible otherwise, are purposely brought up in court, and it is naive to think that the effect can be erased by instructions. This also seems to be the case with regard to actual exposure to these matters appearing out of court. "The naive assumption that prejudicial facts can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction." 19 It is no "verbal magic wand" says the court, or perhaps eraser would be a better term.

As a third point, in many of the cases examined there were other grounds besides that of the influence of prejudicial publicity considered by the courts in granting or denying a mistrial. Whether the publicity aspects themselves would have sustained the courts' holdings, is not the subject of this article. It is to be noted, however, that in at least two of the Supreme Court decisions, significantly, Marshall v. United States 20 and Ianko v. United States, 21 the issue of prejudicial publicity and its influence seem to be the sole ground for the court's holding, although other grounds were urged in the lower courts. So stated Justice Frankfurter in Maryland v. Baltimore Radio Show Inc., 22 in 1950:

Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication . . . .

The Supreme Court justices are well aware of the fact that "freedom of the press" is frequently abused. Justice Frankfurter in the opening of his concurring opinion in Irvin v. Dowle 23 stated that the case was

20. Supra note 11.
21. 281 F.2d 156 (8th Cir. 1960).
not an "isolated case . . . nor an atypical miscarriage of justice due to
anticipatory trial by newspapers . . . ." The Supreme Court has petitions
before it frequently which are based on substantial claims that jury trials
are distorted because of inflammatory newspaper accounts. Nevertheless,
there has been scarce evidence of recent years that the remedy to this
reprehensible situation lies in sanctioning or muzzling the press. Quite
to the contrary, most of the recent decisions have, if anything, more than
ever widened the scope of what constitutes freedom of the press.

It has been well established that anything smacking of "prior censor-
ship" is unconstitutional, as illustrated by the many municipal ordinance
licensing cases which have gone to the Supreme Court. The contempt
power of the federal and the state courts has been definitely limited by
the Supreme Court and by statute in recent years. Nye v. United States,24
Bridges v. California25 and Times Mirror v. Superior Court;26 nicely dis-
posed of prior holdings based upon Toledo Newspaper Co. v. United
States,27 by asserting that the contempt power of the courts extends only
to obstructions to a fair trial in the courts or so near thereto as to obstruct
the fair administration of justice—which nicely excludes newspaper pub-
lishers. This expression has been codified by Congress28 in 1958. In
Maryland v. Baltimore Radio Show Inc.,29 the Supreme Court declined
to reconsider a decision of the Maryland Supreme Court which overruled
a trial court holding that a radio broadcaster was in contempt for preju-
dicial statements prior to a criminal trial. There is an appendix attached
to Justice Frankfurter's comments on denial of certiorari, delineating the
contempt power in the English courts which is much greater than the
contempt power of American courts. He stated that he attached the ap-
pendix thereto merely to indicate the kind of problem the Supreme
Court would have had to consider had they granted certiorari. Said he:
"It is not to be supposed that by implication [the Court] means to ad-
judicate them by refusing to adjudicate."30 This comment seemed to
end any thoughts lawyers and jurists may have had with regard to future
extensions of the contempt power as a means of attacking the evil of
prejudicial publicity.

However, it is interesting to note that in Irwin v. Dowd31 the same
justice ends his comments in the concurring opinion thus:

This Court has not yet decided that the fair administration of
criminal justice must be subordinated to another safeguard of

24. 313 U.S. 33 (1941).
26. Ibid.
27. 247 U.S. 402 (1918).
30. Id. at 920.
our constitutional system—freedom of the press, properly con-
ceived. The Court has not yet decided that, while convictions
must be reversed and miscarriages of justice result because the
minds of jurors or potential jurors were poisoned, the poisoner
is constitutionally protected in plying his trade.32

Could this be a later and veiled treat to those very publications which
have had an even wider span of freedom in recent years? That remains
to be seen. Perhaps the day will come when we will no longer accept
fatalistically that trial by newspaper is an unavoidable curse of metro-
politan living.33

As a matter of fact, in one case, United States v. Powell,34 a federal
district judge granted a new trial based solely upon the conduct of the
press. The judge commented out of the presence of the jury with regard
to the question of admission of certain evidence, that the evidence in
question was a prima facie showing of treason and as such was not the
charge, it was too prejudicial for admission. The defendant was accused
of violating a statute prohibiting certain activities affecting the Army
during the war. The newspapers printed misleading headlines, and, al-
though they were not disparaging of the court, the story read as though
the defendant was guilty of treason although he was indicted on another
count. The defense counsel made his motion for a mistrial solely on the
grounds of the prejudicial statements; there was no question of admonish-
ments, no inquiry as to who, if any, of the jury had read the stories or
as to the extent of the influence. Said the court:

The doctrine of freedom of the press is not for the benefit of the
press but for the benefit of the people. Newspaper publishers,
therefore, have a high degree of responsibility to preserve the
doctrine of freedom of the press for the benefit of the people,
and not for their own benefit.35

Regarding the application of this rule to the case, the judge commented:

It needs no argument to show that a defendant in a criminal
case could not have a fair trial in the face of newspaper publica-
tions such as in this case .... Nevertheless, the press ... pub-
lished and disseminated that which the court had kept from
the ears of the jury.36

The prosecution did not object to the motion. The court expressed the
hope that the mistrial ordered in this case might point the way to better
understanding on the part of the press as to the importance of coopera-

32. Id. at 730.
33. Judge Frank's dissent in United States v. Leviton, 193 F.2d 848, 865 (2d Cir. 1951).
35. Id. at 205.
36. Ibid.
tion between the court and the press in the administration of justice, and the court said it would gladly participate in any effort to further that purpose. The reviewing court upheld the trial judge's ruling of a mistrial on just that ground alone. Perhaps we can conclude from this and other cases that it is within a judge's discretion to order a mistrial at the trial level regardless of actual exposure or inquiry into actual exposure. Failure to inquire, or not to grant mistrial upon actual exposure, may be an abuse of discretion and subject the trial to a mistrial ruling by the higher court. It appears from reading this opinion that the judge was strongly enlisting the cooperation of the press to assure a fair trial, and when that cooperation was obviously not forthcoming, he started all over again.

Publicity Initiated by the Prosecution

It is bad enough when newspapers, commercial ventures that they are, use their own resources to concoct their stories consisting of prejudicial statements of alleged facts which jurors cannot be exposed to. But there are cases where the prosecution aids in this practice and the courts have consistently commented on the reprehensibility of this action on the part of the overeager prosecution.

In *Meyer v. Cadwalader,*\(^37\) which was an action by the government to recover excess duties, a government official discussed the merits of the case with the newspaper which printed repeatedly, prejudicial stories. The court stated that these statements were calculated to bias the minds of the jury and to prevent them from rendering a fair decision. No inquiry was made as to whether jurors had actually been exposed. Said the court "it is incredible that going out into the community, they did not see and read these newspaper publications."\(^38\) Subsequent articles were even more objectionable than the first, but no further motions were made by the defense. The court there held that once counsel made the objection by asking for a continuance because of the pre-trial publicity, he was under no obligation to make further objections (a rule that is certainly changed by recent decisions\(^39\)) and declared a mistrial. The tenor of the opinion strongly suggests that the fact of the prosecution "feeding" the newspapers was per se the basis for the mistrial.

In *Paschen v. United States,*\(^40\) an internal revenue matter, government men and their agents revealed information to the press in advance of the trial. The defendant moved before impanelment to continue the case, and, even in the government's briefs upon appeal, it was admitted that the press accounts were reprehensible. Said the court:

Government men and agents have no more right in advance of trials to reveal such information than have newspapers to pub-

\(38\) Id. at 36.
\(40\) 70 F.2d 491 (7th Cir. 1934).
lish it. . . . In times of actual warfare such revelations of the Government's plans would be deemed treasonable conduct; and why not equally so, at least morally, in the Government's continuous war upon crime? 41

The court then referred to the great frequency of similar infractions of individual and public rights and interest, but held that disposition of the motion for a continuance was within the discretion of the trial judge. The court added: "The record here does not disclose whether any of the jurors had read or heard of these particular articles . . . ." 42 No inquiry into that was requested or made. This case, based on judicial discretion, seems to be at odds with the Cadwalader decision.

In Delaney v. United States, 43 the court held that a denial by the court of defendant's third motion for a continuance until prejudicial effects of nationwide publicity wore off, was reversible error. The prejudicial publicity was caused not by the prosecutor but by the fact that the government chose to hold a Congressional investigation on the same subject prior to the trial. The chairman of the investigating committee made statements as to the defendant's guilt, and the proceedings and testimony were printed even though the statements were not subject to cross-examination or any of the due process rights of the defendant. The defendant was not even present. In this case the defense did not ask for a change of venue, did not exhaust peremptory challenges, and the judge made many cautioning remarks in his charge to the jury. There was no doubt that the entire area of Boston was inflamed over the matter. It was said that if the Department of Justice had precipitated the stories, the denial of the continuance by the court would have been an abuse of discretion, which seems to overrule the Paschen case nicely. And, pointed out the court, there was no difference between prejudicial publicity released through the legislative or the judicial arm of the United States, and the holding certainly did not impinge upon the freedom of Congress in its legislative function for the committee could have had closed hearings. Although it admitted that judges have a wide area of discretion in granting or denying continuances, and it was in the judge's discretion to determine whether a sufficient time had elapsed since the prejudicial remarks, or that these remarks were not of a type to damage the fairness of the trial, this was an abuse of discretion. The holding clearly seems to indicate that mistrials will be declared in our federal courts when the prejudicial pre-trial stories are largely the result of collaboration with the prosecutor, regardless of admonishments, motions for change of venue or the issue of whether or not any of the jurors had read the stories or inquiry being made of the jurors to that effect.

41. Id. at 495.
42. Ibid.
43. 199 F.2d 107 (1st Cir. 1952).
This decision should help to stamp out one kind of threat to a fair trial. Prosecutors, take warning!

It should be noted that in *Stroble v. California*, one of the grounds for seeking reversal was a statement made to the press by the state district attorney that he believed the defendant guilty and sane, and he released a confession to the press in advance of a determination as to its voluntary character. The court, although it deprecated the action of the district attorney in releasing to the press upon arrest the details of the confession, felt he was merely premature. The press would have had the statement four days later at a preliminary hearing. Six weeks had elapsed from that event until the trial, and the jurors were fully examined as far as the defendant desired to go into it. It is clear, therefore, that this case does not conflict with the *Delaney* principle, and is, in fact, quite in accord with that holding.

On a different tangent, but still related to those situations where the prosecution aids in the dissemination of prejudice, note should be made of the 1960 case of *Holmes v. United States*. This was the defendant's second trial for interstate transportation of stolen automobiles. A court officer was responsible for prejudicial information reaching the jury. After the conviction it was learned that when one juror asked a deputy marshall where one of the defendants was staying, the marshal responded that he brought the defendant back and forth from prison each day. Other jurors stated in a post-trial affidavit that they learned of the defendant's prior conviction from reading newspapers. No mention was made as to any admonitions or motions with regard to unfair publicity made during the trial. Evidently, the factor of the court officer's improper communication was stronger reason for reversing the conviction, when coupled with actual reading of newspapers by the jury, than the inquiry into the precautions taken by the court. The opinion seems to indicate that the communication alone would have been enough for the holding, regardless of the prejudice being bolstered by the fact of the jurors reading newspaper articles.

**Change of Venue and Continuances—The Traditional Devices**

The requirement that the jurors be selected locally is often inconsistent with the requirement of impartial jurors. In the cases under study that have come down to us subsequent to the *Marshall* decision, what is the significance in light of prejudicial publicity of the making or failure to make a motion for change of venue; what is the significance of the trial judge's granting or denying this motion under the facts and circumstances of each case?

44. 343 U.S. 181 (1952).
45. 284 F.2d 716 (4th Cir. 1960).
It is the writer's opinion that a timely motion for change of venue in a case where the issue of unfair trial because of prejudicial publicity arises, is a strong point in proving the defendant's contention; it is not controlling and neither will the failure to make such a timely motion necessarily mean that subsequent opportunities to decry pre-trial publicity are waived—at least there have been no cases under the Marshall holding where this appears to be so. "The right to apply for a change of venue is given for defendant's benefit . . . . He is not obliged to forego his constitutional right to an impartial trial in the district where the offense is allegedly committed." So stated the court in Delaney v. United States. 46

In this case, there was much publicity in the area, indeed, in the entire country and the court soundly reasoned that the defendant had no assurance of less prejudice in another district. It should be remembered that under the Federal Rules of Criminal Procedure, a change of venue is discretionary, unlike the criminal procedure rules of many states wherein it is mandatory. In the Delaney case the court stated that the defendant's appeal did not stand any worse for failure to apply for a change of venue. The judge reminded the defendant, after denying his third motion for a continuance, that he might still ask for a change of venue.

In the Accardo case, only passing mention was made of the fact that the defendant did not make a motion for change of venue; a motion for continuance based on the illness of the principal counsel was made and denied. In Stroble v. California, 47 it was considered that failure to make a motion for change of venue was significant. But the Stroble case is quite different from the Accardo case. First of all, the trial was in a state court and the state laws with regard to change of venue govern—Accardo's case was a federal charge. Secondly, as has been mentioned heretofore, the inflammatory publicity in Stroble occurred six weeks prior to the trial and the public temper had largely subsided. The court in Stroble used the fact that the public defender did not make the motion to buttress its reasoning that the climate for trial had cooled. It would seem in the Accardo case that there must have been a different reason, political perhaps, more subtle, for the failure of defense counsel to make this motion, for the interest of the newspapers certainly had not subsided. There is nothing in the Accardo opinion to indicate the nature of the newspaper publicity preceding the trial—but the area of Chicago being what it is, and the Chicago newspapers being competitive, it is more than a calculated guess to say that there was a pretty warm climate of public opinion being stirred up by the papers prior to the trial.

The matter of change of venue is not mentioned in many of the cases considered here. In light of the decisions in Marshall, Coppedge and

46. 199 F.2d 107, 116 (1st Cir. 1952).
47. 343 U.S. 181 (1952).
Alker, it was definitely established that prejudicial publicity was actually read by jurors. In the Alker case, the fact of reading was brought up as "newly discovered evidence" after verdict on a motion for a new trial—and new trial granted after investigation by the court. The issue was not brought up in any way whatsoever during the actual trial and the question of change of venue was not mentioned. We can conclude, therefore, that motions for change of venue and for continuances are not necessary to preserve the question of unfair trial because of prejudicial publicity:

1. When the jurors have read these articles, the existence of this motion, denied or not, is not in the least significant.48

2. In cases when there is no proof of actual reading (Accardo, Coduto), the existence or non-existence of this motion is one of many factors the court will consider in determining the climate for trial, and certainly failure to make the motion will not bar raising the question if defense counsel has indicated in other ways that there is a possibility of prejudice due to publicity. Indeed, the courts recognize that "a court has a right to conduct a public trial of a criminal case in the community where the defendant resides, even though the public character of the trial makes the proceedings therein accessible and subject to report and comment in newspapers, and over the television and radio."49

The courts are quick to recognize that a change of venue may be quite ineffective as insurance of an impartial trial. In Irvin v. Dowd,50 the most recent case of this type originating in a state court, a change of venue had been granted to an adjoining rural community—where ninety-five per cent of the local populace had read the paper. During four weeks of voir dire examinations, four hundred and thirty jurors were questioned, ninety per cent of whom had some opinion as to the defendant's guilt, ranging from mere suspicion to absolute certainty. And in United States v. Dennis51 the court recognized, as it has many times before, that there are some causes which are so unpopular that the prejudice is nation-wide and continuing, and that neither a change of venue nor a continuance would be at all effective as a means of insuring a trial to the defendant that would be any more fair than a trial held in his own community. "The choice was between using the best means available to secure an impartial jury or letting the prosecution lapse"52 said Judge Learned Hand in that case, when the issue of whether the

49. United States v. Accardo, 298 F.2d 133, 142 (7th Cir. 1962).
51. 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
52. Id. at 226.
defendant had been afforded a fair trial was raised. Fair as possible under the facts and circumstances would therefore be a more apt description.

There is no question but that the ideal jury would be composed of persons who had never heard of the defendant prior to trial. But this is a naive hope in this age of mass coverage by the newspapers and the presumption that jurors are literate. It has never been the law that jurors may be excused for cause because they have read or heard of the case and have formed an opinion prior to the trial. A juror is said to be impartial if he has heard of the case, and even may hold an opinion as to guilt, but if the court is satisfied that the juror will try the case on the evidence, he is "impartial." The Constitution lays down no particular tests [as to impartiality] and procedure is not chained to any ancient and artificial formula. Yet, on the other hand, in a case where there has been pre-trial publicity and subsequent publicity during trial is not in issue, it would seem that a particular test has been articulated by the courts for assuring a fair trial. That test is: if there was a possibility of obtaining other jurors before the evidence was introduced, counsel cannot then complain that the chosen jurors were prejudiced.

In United States v. Shaffer the judge gave counsel unlimited peremptory challenges, and the court evidently considered this fact to be controlling in view of the fact that only pre-trial publicity was in issue. It is interesting to note that defense counsel in that case requested, in addition, that all jurors who had heard of the case be excused, which request was denied. He evidently did not want the onus put on the defense for peremptorily excusing jurors. Irvin v. Dowd was decided solely on the basis of pre-trial publicity, but that case was so flagrant an example of community prejudice that it cannot be properly discussed in formulating a federal rule. It was impossible, under the facts of that case, to obtain a jury which even under liberal standards could be considered impartial. In Shepherd v. Florida the court indicated that the composition of the jury is irrelevant when publicity is inflammatory in nature.

DUTY OF COURT TO ADMONISH THE JURY

In all the other cases subsequent to Marshall, there was prejudicial publicity subsequent to trial and none of the cases stood or fell, therefore, on the question of availability of other jurors at the beginning of the trial. However, it can be safely said, that exposure to publicity should be inquired into during voir dire so that if in fact only the question of pre-trial publicity is raised, the impartiality of the jury will not be questioned.

55. United States v. Shaffer, 291 F.2d 689 (7th Cir. 1961).
57. 341 U.S. 50 (1951).
When in fact the jurors, during the trial, have been exposed to prejudicial publicity, the question of whether or not the trial judge admonished them prior to trial not to read the papers is, of course, irrelevant, under the *Marshall* decision. As to the cases in the federal courts prior to the *Marshall* case, in *United States v. Holt*, the judge admonished the jury before trial, and when defense counsel raised the question of prejudice during trial, the judge did not inquire as to actual reading but the affidavit on its face showed that jurors had read the publicity and yet he denied a mistrial. The court held that this was not an abuse of discretion. *Accardo* seems clearly to overrule this decision, placing the duty on the judge to make inquiry when the issue is raised.

In *Ferrari v. United States*, the judge admonished the jury prior to trial and there was no proof of actual exposure to publicity during the trial. The court held that in absence of proof of reading, there was no duty on the part of the judge to admonish prior to the trial. In *United States v. Leviton*, there was no admonishment prior to trial, but there, as in *Marshall*, the jurors had read the material, and the case turned on the manner of questioning jurors after proof of reading.

In *Meyer v. Cadwalader*, one motion was made for a continuance prior to trial on the grounds of prejudicial publicity, and no further motions were made although subsequent articles appeared which were even more damaging. The court held that defense counsel was under no obligation to make further motions to preserve the question of prejudice as it arose each time. But it must be remembered that this case turned on the fact that the prosecution instigated the stories. Thus, it does not seem to be in conflict with *United States v. Coduto* (subsequent to *Marshall*) where counsel did not raise the question of influence during the trial but only upon appeal. The court held that he was precluded from raising the question of prejudice on a motion for a new trial when it was not brought to the attention of the court during the trial. The record did not show any evidence that the jurors had ever read or heard of the case, and counsel merely contended upon appeal that this publicity existed but no proof was offered to show exposure. Therefore, it can be compared with *United States v. Alker*, which differs from the other cases here considered in that this was a motion for a new trial based on "newly discovered evidence." The newly discovered evidence was the information from reliable sources after the trial that the jurors had been exposed. The trial court conducted an independent inquiry, questioning

58. 360 U.S. 310 (1959). There was no admonition not to read newspapers in this case.
60. 244 F.2d 132 (9th Cir. 1957).
61. 193 F.2d 848 (2d Cir. 1951).
63. 284 F.2d 464 (7th Cir. 1960).
all the jurors, except one who was not available, and ascertained the truth
of these charges. A new trial was granted. In the Alker case, the question
of influence during the trial was not even raised. Thus, we can map out
the following rules from these three cases:

1. If the publicity was in fact inspired by the prosecution,
that in itself may be grounds for mistrial, regardless of actual
exposure or of defense counsel's raising the question of publicity
during the trial;

2. In the absence of proof of actual exposure, defense
counsel must bring the prejudicial publicity to the attention of
the court during the trial, or the question will be waived upon
appeal;

3. But if after the trial it appears that jurors were ac-
tually exposed to prejudicial publicity, a mistrial is likely,
whether or not proper motions were made during the trial.

Thus, these cases extend the Marshall rule even further. In cases of
actual exposure, the question may be raised as grounds for a mistrial
either during or after trial, regardless of admonishments and questioning,
the fact of exposure to inflammatory material (the special facts pertain
to the nature of the material exposed to), per se, being the basis of depri-
vation of a "fair trial."

But in the Accardo case, where the question of exposure was not
inquired into by the court, the jurors were admonished not to read news-
papers before the trial. That, in itself, together with instructions was
held insufficient, in the face of prejudicial publicity, to assure a fair
trial. The Janko case goes even further than the Accardo decision, so far
as we can surmise, for the Supreme Court granted certiorari and rendered
a memorandum opinion only. But Justice Frankfurter comments in
Irvin v. Dowd, about the Janko decision:

such disregard of fundamental fairness is so flagrant that the
Court is compelled, as it was only one week ago (referring to
Janko) to reverse a conviction in which prejudicial newspaper
intrusion has poisoned the outcome. 68

Therefore, we can infer that the Supreme Court rejected the holding of
the lower court. The main issue there was that defense counsel brought
the prejudicial publicity to the attention of the court during the trial.
The judge was especially cautious during the Janko case as it was the
second trial, the first being declared a mistrial when it was ascertained
that four jurors were actually exposed to prejudicial publicity. So the
judge admonished the jury prior to trial, and upon the publicity being
brought to his attention, asked the defense counsel if he wished further

inquiry. Counsel demurred, stating that in view of the fact that the article complained of mentioned that the first trial had been declared a mistrial because jurors had read prejudicial publicity, it was hardly likely any juror would admit to it in open court, upon inquiry. The judge did in fact poll the jury (as a group) after the verdict and no jurors admitted to being influenced by anything out of court. Evidently the Supreme Court, in upsetting the lower decision, placed a duty on the judge to make inquiry as to actual reading and influence, regardless of the fact that defense counsel declined his offer. In *Coppedge v. United States,*\(^6^8\) where a mistrial was declared, the judge did not mention "newspapers" in his pre-trial admonishments, but said only that the jurors should keep an open mind and not discuss the case with anyone. This was a case of actual exposure, enough for a mistrial under the *Marshall* doctrine, and the court did comment that the group questioning as to the influence of this exposure was improper, but this would seem to be irrelevant since they were actually exposed. The judge also made no reference to "newspapers" in his instructions.

It would seem, therefore, that when jurors are actually exposed, it does not matter how carefully the judge inquires into the possible influence of this exposure, or relies on the juror's statements that he can give a verdict based only on the evidence.

We have established that under the *Marshall* doctrine, when jurors are shown to have actually been exposed to highly prejudicial publicity, a mistrial may be granted. But, absent the actual showing of exposure, the recent cases tell us that a mistrial may be had on the same grounds if certain precautions relative to ascertaining actual exposure are not complied with. As stated in *United States v. B. Goedde & Co.*,\(^6^7\) "such a [jury] trial should be surrounded by every reasonable safeguard to insure the absence of any improper influence operating on the minds of the jurors . . . ." Just what are those reasonable safeguards? We can consider the lack of standards derived from the case prior to the *Marshall* decision, wherein there was no actual reading shown. Needless to say mistrials were not granted in any of these cases and they should be compared with more recent holdings.

The leading case on prejudicial publicity prior to *Marshall* was *Holt v. United States,*\(^6^8\) a murder case where other matters were also in issue. The judge admonished the jury each day about receiving impressions. During the trial the defense made a motion for a mistrial with affidavits to the effect that some of the jurors had read publicity about the trial. The judge denied the motion and made no inquiry into the truth of the affidavits. The court held that the judge did not abuse his discretion in

\(^6^6\) 272 F.2d 504, 506 (D.C. Cir. 1959).
\(^6^7\) 40 F. Supp. 523, 529 (E.D. Ill. 1941).
\(^6^8\) 218 U.S. 245 (1910).
denying a mistrial. The opinion stated that the judge assumed the jurors read the articles, but would not make that assumption had a new trial been granted. This court stated it is obvious that jurors, if allowed to separate, will see something in the public prints, and that for the purpose of passing on permission to separate, it may be assumed that they will do so.69 This case would clearly not be upheld today—for if the judge assumed the jurors read the damaging material, a new trial would be granted under Marshall. And if he did not make this assumption, he would be under an obligation to inquire under the Coppedge and Accardo holdings.

In United States v. Leviton70 no daily admonishments were made and it is not mentioned in the opinion as to what, if anything, the judge said during voir dire. When defense counsel raised the matter the judge questioned the jurors together in open court. It was ascertained that five jurors actually read the prejudicial matter, but the spokesman for the group said there was not much to the article—it just mentioned the case. The judge then admonished the group and instructed them to the same effect. The court held that there was no abuse of discretion, and that group questioning plus proper instructions were appropriate action. This case may be compared to United States v. Carlucci71 where a mistrial was also denied upon almost identical facts. In Carlucci, the judge rendered a careful voir dire and admonished carefully when each piece of publicity was brought to his attention. Eight jurors admitted that they had read accounts and then one said he read the headlines only, scanning the article. "It doesn't mean anything," he said. All the other jurors modified their previous statements to conform. The court held that the judge has the right to believe that no jurors read the articles and that they were questioned by him with dignity and honor.

On its face, this would seem to be a proper rule, but based on the dissenting opinion by Judge Hastie, we find that no inquiry or searching cross-examination was made to explain why seven jurors modified their original admissions. He criticized the questioning of the jurors as a body, pointing out that had the jurors not changed their minds, it would clearly have been ground for a mistrial.72 The Accardo case hints that proper questioning consists of a careful examination of each juror, out of the presence of the others, upon the question of actual influence arising.

In United States v. Coppedge,73 on which this suggested practice is based, there was an actual showing of exposure by some of the jurors,

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69. Id. at 251.
70. 193 F.2d 848 (2d Cir. 1951).
71. 288 F.2d 691 (3d Cir. 1961).
72. Id. at 699.
73. 272 F.2d 504 (D.C. Cir. 1959).
and it was after this ascertainment was made that the court held that not to question those having read privately as to the possible influence of this exposure and to instruct each one reading not to influence other jurors was improper. Since the court in the *Coppedge* case commented upon the method of questioning, even though actual reading of highly prejudicial material was admitted, we think that a bald admission of reading is not in itself grounds for a mistrial, but the judge must inquire, separately and in chambers, as to how deeply the article went. In other words, if upon careful inquiry, the judge is satisfied that the jurors read only the headlines (as was contended in *Carlucci* though there was a distinct possibility that more was read by the jurors), then a mistrial may properly be denied. *Accardo* means that the burden will be on the judge, upon his own or upon motion of the defense, to question each juror separately, and in chambers, as to whether he read or heard (radio or television) the questioned publicity, the extent of his exposure, and to admonish him not to communicate this knowledge to any other jurors.

This would seem to make sense—it seems just as important to question all the jurors (not only those who admit the exposure) separately and in chambers to ascertain (1) if they read the article; (2) if they did not read it, whether they heard it on radio or television or from another juror who had been exposed to the offending broadcasts or article; and (3) to admonish those jurors admitting exposure not to reveal their knowledge to the others.

The judge's discretion must be invoked in weighing the magnitude of the article or broadcast complained of and its propensity for harm against the realistic extent of exposure. It is doubtful whether actual reading of headlines by one or more jurors would amount to a mistrial per se. It is emphasized, however, that in the *Accardo* case there was no inquiry made as to the fact or extent of exposure. Thus, the case turns on this fact and not the method of questioning. It is important to remember that there are no cases turning on the method of questioning alone where no reading was shown—only those where there was no inquiry, as in *Janko* (even though the judge offered to make inquiry and defense counsel declined) and in *Accardo*. It is also important to remember that in the *Marshall* case, where two newspapers were read by a substantial number of jurors, the judge questioned all the jurors separately in his chambers. Even though those who admitted reading the newspapers said they were able to give a fair trial; the Supreme Court believed that the special facts (the nature of the prejudice) were so great that the defendant could not have a fair trial with these jurors. Proper questioning must be made by the judge, whether or not any reading has been shown; if this were not so, why did *Coppedge* comment on the manner of questioning when, in fact, four jurors and one alternate admitted reading the material? Of course, in the *Coppedge* case the judge did not specifically mention "newspapers" in voir dire or in his instructions to the jury.
In *Ferrari v. United States*\(^\text{74}\) there was no mention of admonishment during voir dire and no mention of whether the defense called the publicity to the attention of the court. In his final instructions, the judge said only "I counsel you to disregard it [extraneous influences]."\(^\text{75}\) The court held that in the absence of showing actual reading, failure of the judge to admonish was not error. This case would clearly be overruled today. From these recent cases, therefore, each one different, we can derive a trial map to take us over the rough road of prejudice to the goal of a fair trial.

The failure to follow one or more of the road signs will not per se mean mistrial, but if counsel and judges follow all of them, we believe that defendants will have the fairest possible trials under the circumstances:

1. **Timely motions for change of venue and continuances.** When there is a realistic possibility of the trial climate being cooler in another district or at another time not too far in the future.

2. **Thorough voir dire.** If the judge does not do it, defense counsel should submit questions designed to elicit preconceptions of guilt, actual exposure to newspaper, radio or television accounts, and endeavor, when there is a possibility of such influence on a prospective juror, to have the juror excused for cause. If the judge does not consider this cause, an attempt should be made to use unlimited peremptory challenges and if denied, counsel should use the maximum peremptory challenges allowed. This procedure, in the event that only pre-trial publicity is complained of, will negate any inferences that other unprejudiced jurors could have been obtained.

3. **Admonishments by the judge.** During voir dire and prior to the introduction of evidence, the judge should admonish the prospective jurors regarding the fact that a fair trial means a trial on the evidence only and that they are not to be exposed to newspapers, radio, television or discuss the case with anyone else. The judge should refer to newspapers specifically and a general admonishment regarding extraneous influences only may be criticized upon appeal.

4. **Timely motions for mistrial** by defense counsel should be made each time prejudicial publicity appears during the trial. Lawyers should call the particular article to the attention of the court and request that jurors be questioned with regard to actual exposure.

5. **Upon such motions being made, the judge should question each juror separately and in chambers as to whether he**

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74. 244 F.2d 132 (9th Cir. 1957).
75. Id. at 139.
read the article and if so, as to the extent of his knowledge of the article; as to whether he has communicated this knowledge to any other juror; as to whether the juror believes he can give a fair trial on the evidence only. If the questioned juror has not read the article, he should be questioned as to whether he has heard about it and to what extent, from any other juror. Each juror should then be admonished further to refrain from reading future articles or from discussing any articles he may have read with any other juror. It is at this point, after questioning each juror privately that the judge exercises his discretion with relation to the inherent damage the article may render as balanced against the extent of exposure of the jurors.

6. The jury should be admonished each day prior to separation.

7. The judge should make a proper instruction in his charge to the jury with regard to ignoring extraneous matters, such as reports read in newspapers, and deciding the case on the evidence.

If these guides are followed, a judge can be reasonably sure that the trial court will not be reversed for failure to admonish or make inquiry into improper influence. Defense counsel, if he uses the issue of prejudicial publicity influencing jurors as a point on appeal, will be sure that the question will not be waived by his not bringing these matters to the attention of the court during the trial, nor his less than diligent efforts to obtain an impartial jury at the commencement of the trial.

The judge's discretion comes into play in his weighing of the kind of publicity and the kind of exposure. Under the doctrine of the Marshall case, evidence so prejudicial it could not be offered into evidence, is ground for a mistrial per se, in light of sufficient exposure. The judge must weigh the extent of exposure and the inherent nature of the publicity complained of. That is where he uses his discretion.

Prejudicial Publicity in State Trials

After examining the evolution of procedural rules in federal cases, what immediately comes to mind are the "full treatment" cases of judicial history—The Hauptman trial, Sacco-Vanzetti, Leo Frank, Scottsboro, Dr. Sam Sheppard, William Heirens, and the Dr. Bernard Finch-Carole Tregoff case. The Supreme Court frequently has before it petitions based on substantial claims that jury trials are distorted because of inflammatory newspaper accounts.

This article does not purport to examine or survey all of the Supreme Court certiorari or habeas corpus cases where the issue has been raised, but only in a general way to afford a basis of comparison as to
what kind of prejudicial exposure or lack of precaution will lead the highest court of the land to reverse a conviction affirmed by a state court. It is properly assumed, at the outset, that the abuse will be much more flagrant in state cases due to the well-known reluctance of the Supreme Court to interfere with state criminal justice or to extend the Bill of Rights to the states through the fourteenth amendment. Yet, there are several cases each year that are upset on just this point. It is an interesting intellectual game to examine some of the more famous cases to see if they would today be overruled in light of the most recent Supreme Court rulings on the effect of prejudicial publicity on the right to a fair trial as guaranteed by the fifth amendment and due process of law.

_Irvin v. Dowd_" is the very latest state case where a conviction was upset. There the defendant was on trial for murder in a small community in Indiana where there had been six unsolved murders in a short period of time. The pre-trial publicity, gathered with the help and collaboration of the prosecution, asserted, among other things, that the defendant had also confessed to the other five murders. A sheriff stated that if the jury acquitted Irvin this time, he would devote his life to seeing him hanged for another one. This type of publicity, plus references to the defendant's prior record continued for six or seven months prior to the trial. The defendant's second motion for change of venue was granted. Then counsel submitted that the new venue was just as highly charged with prejudice. However, his third motion was denied. Under Indiana law, only one change of venue is mandatory. The court did not consider the propriety of the denial of the third motion, as this was a habeas corpus case under the fourteenth amendment.

Voir dire continued for four weeks. Four hundred and thirty jurors were impanelled and ninety per cent of them had some opinion as to the defendant's guilt, ranging from a mere suspicion to an absolute certainty. The Court agreed with the law of Indiana that it was possible for a juror with a preconceived opinion to be impartial under the federal constitution as well.

The Supreme Court opinion was based upon the quantity of "deep and bitter prejudice throughout the community" and the fact that after four weeks of voir dire, two-thirds of the selected twelve jurors still had preconceptions as to guilt. The atmosphere of prejudice was just too overwhelming. The Court held that whether the nature and strength of opinion formed raises a presumption of partiality is a mixed question of law and fact. Such mixed question or the application of constitutional principles to the facts is for the judge to decide." Therefore, reasoned the Court, it is the duty of the appellate court independently to evaluate the voir dire.

77. Id. at 723.
The Court held that when a life is at stake, it is not requiring too much (under the sixth and fourteenth amendments) that the defendant be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury not possessing a belief in the defendant's guilt.

Another state case where the Supreme Court reversed the conviction of the trial court and declared a mistrial was Shepherd v. Florida. Here witnesses and jurors admitted reading of a confession in the newspapers. No confession was brought out at the trial. The Court commented on the highly inflammatory nature of the publicity, the fact that it was unseen, unsworn, without opportunity to be cross-examined, uncontrollable, and that, coupled with the fact of actual reading, plus the unquestionably inflamed atmosphere of the community as this was a Negro rape case, was sufficient to reverse. No requisites for instructions, motions, etc., were set up by the Court, and in a sense this state case precedes the Marshall doctrine; when the prejudicial publicity is highly inflammatory, and there is actual exposure, a mistrial must be granted.

On the other hand, when we start to search the records of other famous cases (in spite of our pre-conceived notions of the justice or injustice of these decisions) where we are well aware of a great deal of press interest, we find that the abuses are nowhere as flagrant as in Irvin v. Dowd or in Shepherd v. Florida.

Times change, and people change and the make-up of courts change, and we emphasize today points that were not even considered by reviewing courts in the 20's and 30's. On the other hand, we are shocked, perhaps surprised, upon review of the Hauptman case to see how a criminal trial, much in the public interest, to be sure, could be carried on just twenty-three years ago. It seems likely, as David Brinkley pointed out in his Journal on television, January 30, 1962 that "People have more mature tastes today." He reminds us that at that time there was much unemployment, the United States had no world purpose, nor was mass communication anywhere as extensive as today. The Hauptman case received six years of publicity, and seven hundred newsmen were at the trial. After the conviction the jury went on a vaudeville tour, singing songs about the trial! There was no mention of voir dire, admonitions and the like.

So, it is only upon close scrutiny of these so-called "sensational cases" that we might possibly be able to satisfy intellectual curiosity, if we disregard all the other points sought for reversal, and look only to the more recent cases where mention is made of the fine points considered in this article with regard to fair trials in spite of prejudicial publicity.

State v. Sheppard differs from the Irvin case quite radically. The trial took place in a metropolitan area. For one thing, it took two weeks

78. 341 U.S. 50 (1951).
79. 165 Ohio 293, 135 N.E.2d 340 (1956).
to select a jury—but of seventy-five jurors impanelled, only fourteen were excused because of pre-conceptions of guilt. The judge refused to rule on a motion for change of venue until after the jury was selected, and then refused the motion. Defense counsel did not exhaust his peremptory challenges. Although Dr. Sam Sheppard endured a seven weeks trial, and the court acknowledged that this was a full treatment case, it aptly stated that "that [fair trial] question is not to be decided on the volume of the publicity or the tendency such publicity may have had in influencing the public mind generally as to the defendant's guilt or innocence," This view is correct under our analysis of the federal cases. It is the inherent danger in the type of publicity—whether it be one article or fifty, plus exposure sufficient in the opinion of the judge to influence, or inquiry or lack of inquiry on the part of the judge as to the fact of exposure which determines the fair trial question today.

When we examine the William Heirens case, we find that the defendant pleaded guilty, and, therefore, it does not fall into the category of the other cases we are considering.

In Trial by Prejudice, Arthur Garfield Hays, discussing the Scottsboro cases points out that in 1933 the federal courts were very reluctant to intervene in state criminal cases, as ordinarily the question of due process of law is determined by the law of the state; that the Frank case in 1915 was one of the first where an endeavor was made to obtain the intervention of the Supreme Court; that the Supreme Court refused to intervene in Sacco-Vanzetti and in Mooney—famous cases of our history. Prior to the Scottsboro cases, a new trial was ordered in a state case only once—in Moore v. Dempsey, and of course it was granted in the Scottsboro cases.

Today, however, under the ever-changing concept of due process and equal protection of the fourteenth amendment and the fifth amendment operating through the fourteenth, as set forth in Palko v. Connecticut, the Supreme Court has indeed widened its scope of intervention in state criminal cases, and thus it is indeed in the interests of all attorneys and judges concerned with fair trials to follow these procedural rules which are best designed, under all the facts and practicalities of the problem, to uphold some standard of fair trial. The only other alternative, in light of the continuing barrage of prejudicial publicity by the press going unhampered, is the abandonment of jurisdiction in "full treatment cases" and this, indeed, would not solve the problem, since due process also involves consideration of the interests of the community.

80. Id. at 295, 135 N.E.2d at 343.
82. Hays, Trial by Prejudice, 100, 101 (N.Y. Covici, Friede 1933).
83. 261 U.S. 86 (1923).
84. 302 U.S. 319 (1937).