Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law, Addison C. Harris Memorial Lecture

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More than two hundred years ago an English judge declared that "nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard." It is apparent that the blaze of publicity which surrounds *causes celebres*, and particularly criminal trials, does involve a very real danger, to quote from the same opinion, of "prejudicing mankind against persons, before the cause is heard." Of course, there are things that we cannot know for certain; we do not know precisely what effects the publication in mass media of matter prejudicial to the trial of an accused person may have; the use of the word "prejudicial" itself prejudges the issue. But judges in many jurisdictions, in the United States and in various British Commonwealth countries, which found their jurisprudence on the common law, have assumed that the publication of such matter does prejudice the fair trial of accused persons and have shaped various legal doctrines and principles in light of this assumption.

In the United States, this matter has been widely discussed. The discussion waxes and wanes; it becomes more urgent because of extraordinary publicity surrounding a case or particular event. In the 1930's, the *Hauptmann* case, concerning the kidnapping of the Lindbergh baby, made many lawyers and the American Bar Association very anxious about the effect and impact on the legal process of a torrent of publicity. To quote from one contemporary report:

There never was a case that lent itself to greater temptation to lurid or excessive publicity, never a case more provocative of trial out of court, never a case beset with greater menace of disorderly procedure. On the other hand, there never was a case

† Address delivered on January 21, 1965 at Indianapolis, Indiana as an Addison C. Harris Memorial Lecture.
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2. *Id.* at 472.
which offered such an opportunity for charting out a course for the proper conduct of difficult criminal trials, for the greater the difficulty, the greater the opportunity. In fact, there never was a case in which publicity agencies and commentators and public argufiers were more unrestrained, never a case which furnishes a better example of things that ought not to have been done. In all, it was a case which was well characterized by the language penned by the Honorable Newton D. Baker in the report of the so-called Baker Committee... as exhibiting 'perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial.'

A quarter century later, the events which occurred in the immediate aftermath of the assassination of President Kennedy gave rise to great concern on the part of lawyers. In December, 1963, the American Bar Association issued a statement saying that what had taken place struck at the heart of a fundamental rule of law with its guarantees of a fair trial for everyone, however heinous the crime involved. The widespread publicizing of Oswald's alleged guilt, involving statements by officials and public disclosures of the details of 'evidence' would have made it extremely difficult to empanel an unprejudiced jury and afford the accused a fair trial. It conceivably could have prevented any lawful trial of Oswald due to the difficulty of finding jurors who had not been prejudiced by these public statements.

The Warren Commission in its Report gave a detailed account of these events and recommended that

the representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.

To an English or a British Commonwealth lawyer, such a proposal, couched in voluntary and hortatory terms, seems very strange. We think in compulsive terms; even if we do not go all the way with the late H. L.

Mencken in saying that "journalistic codes of ethics are all moonshine," we say that it is for the law to shape rules to deal with these problems, and the English-Commonwealth law deals with these problems by resort to the law of criminal contempt of court. In the United States, considerable difficulty has been experienced in formulating a constitutionally viable law of contempt to deal with these problems. In the United States, too, there are very strong doubts about the propriety of compulsory restriction of freedom of the press, even in this area. As the author of the most recent American text on contempt of court expresses it,

The latitude of American courts in dealing with the press is a cause both of the gauche sensationalistic press—all too frequent in this country—and for, on the other hand, some of the social reforms, the great informational interchanges and the general enlightenment of the population in matters of public interest. For this latter reason primarily, the use of constructive contempt against the press by American courts has been sporadic and unsuccessful.7

There are important and contending values, and the wise resolution of conflicts may not always be as clear as some of the English and Commonwealth cases suggest. Moreover, as I shall attempt to show, there is some incoherence in English doctrine, and the sensational English press does in fact build up an atmosphere of prejudice. And recent events and events surrounding trials leave one with the strong impression that the English contempt rules do not always effectively protect an accused person in a cause célèbre from grave prejudice.8

I. THE AMERICAN RULE

In Delaney v. United States9 the Court of Appeals for the First Circuit said

How best to protect accused persons from the prejudicial effect of newspaper publicity has been a matter of immense concern. In England, such publicity is largely curbed by the free use of the power of the courts to punish for contempt. . . . In this country the course of treatment has been difficult. So far as the federal courts are concerned there are important limitations upon the power to punish summarily for contempt. See 18 U.S.C. § 401. . . . More fundamentally, it has been thought

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that this modern phenomenon of 'trial by newspaper' is protected to a considerable degree by the constitutional right of freedom of the press. . . . On this view there has been some fatalistic acceptance of 'trial by newspaper,' however unfortunate, 'as an unavoidable course of metropolitan living (like, I suppose, crowded subways).'. . . The courts are then limited to doing what they can to insulate jurors from the prejudicial effect of such publicity, as by cautionary instructions or by the granting of continuances, or in some cases granting a change of venue. Perhaps the Supreme Court has not spoken its last word upon this vexing problem.10

Whether or not the Supreme Court has spoken its last word, it has certainly indicated in cases coming to it from state courts that the prospects of fashioning controls of prejudicial publicity through the law of contempt are dim and obscure. Over a twenty year period in Bridges v. California,11 Pennekamp v. Florida,12 Craig v. Harney13 and Woods v. Georgia,14 the Supreme Court reversed contempt convictions by state courts. In all these cases, the convictions were held to be constitutionally unsupportable. By way of the fourteenth amendment they were said to be violations of first amendment freedoms. It was said that English doctrine was not controlling, that a conviction for contempt for prejudicial publication could only be sustained on a showing of "clear and present danger," and that such a showing was very difficult to make.

In each of these cases, except Woods v. Georgia, the state courts involved were composed of judges without juries. In Woods v. Georgia, there was a grand jury and Warren C. J. expressly left open "the variant factors that would be present in a case involving a petit jury."15 What is to be spelled out of this reservation is very uncertain; in one of the earlier cases the Court said that jurors are "men of fortitude, able to thrive in a hardy climate,"16 and in Woods v. Georgia, Harlan J., dissenting, found it difficult to distinguish between the cases of prejudice to grand and petit juries.

Throughout these cases, and the companion case of Maryland v. Bal-

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10. Id. at 113.
15. Id. at 389.
timore Radio Show Inc.,\textsuperscript{17} there was a persistent theme of caution or dissent from the sweeping propositions of majorities asserting a very narrow constitutional ambit for the application of contempt penalties. Frankfurter J. persistently argued for a wider control through contempt proceedings, pointing to English doctrines and authorities, and since his retirement from the Court, the torch has been passed to Harlan J. who sharply and trenchantly dissented in Woods \emph{v.} Georgia. Frankfurter J. stated his view very clearly in \emph{Irvin v. Dowd,}\textsuperscript{18} where the court was not directly concerned with the issue of contempt, but with an application to reverse a conviction for murder on the ground that prejudicial publicity surrounding the events and trial had denied to the accused a trial satisfying the requirements of due process.

Not a term passes without this Court being importuned to review convictions had in States throughout the country in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of the trial, thereby making it difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced to forego trial by jury. . . . For one reason or another this Court does not undertake to review all such envenomed state prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. . . . This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. 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.\textsuperscript{19}

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\textsuperscript{17} 338 U.S. 912 (1950). \textit{Certiorari} denied when state court of appeals reversed lower court conviction for contempt where there had been an unrelenting barrage of prejudicial publicity directed against a man arrested, tried and convicted of murder. \\
\textsuperscript{18} 366 U.S. 717 (1961). \\
\textsuperscript{19} \textit{Id.} at 729.
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Such discourse evokes a warm response in the breast and mind of an English or Commonwealth lawyer. But even though the Supreme Court has not altogether, and in terms, shut the door on the possibility of using the contempt weapon to punish prejudicial publication, and even though other federal and state courts have at least expressed the hope that in petty jury cases the door may still be open, the opinion is widely held that the contempt power is a frail reed in the United States to control prejudicial publicity. It has been said that the cases show the contempt power to be a "... negligible device for protecting a defendant's right to a fair trial." Another commentator describes himself as "relatively pessimistic about our ability to improve materially the existing legal machinery for the protection of criminal defendants against virtually un fettered publicity." Certainly television, the press and the media generally, in their dealing with Oswald after his arrest for the murder of President Kennedy, acted in apparent confidence that they were subject to no legal restraints. Speaking as an English and Commonwealth lawyer, and as a witness to the conduct of the media during those terrible days, I found the performance incredible. In this particular respect we are a long way apart.

There is, however, a substantial body of Supreme Court authority, reversing, on due process grounds, convictions of accused persons which have been obtained in a pre-trial and trial process perverted by prejudicial publicity. *Irvin v. Dowd* was such a case. There, for months before the trial began, a barrage of newspaper publicity was directed against the accused; radio and television recited his personal history, his record of juvenile crimes and other convictions, and he was described as a "confessed slayer," a parole violator and a fraudulent check artist. More recently in *Rideau v. Louisiana*, the Supreme Court reversed a murder conviction, after a local television station had thrice shown a film of an interrogation of Rideau in which the prisoner had confessed his guilt. It was said that due process in this case required a trial by a jury drawn from a community of people who had not seen or heard Rideau's televised interrogation.

Some judges, notably Black J., of the Supreme Court, have regularly

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joined with majorities in reversing contempt convictions for prejudicial publication, while they have vigorously asserted that convictions of accused persons should be reversed on due process grounds where the trials were perverted by prejudicial publicity. In *Beck v. Washington*,\(^2\) the Supreme Court refused to reverse the conviction of Beck who complained of prejudice. Black J. dissented, declaring that a "fair trial under fair procedures is a basic element in our government. Zealous partisans filled with bias and prejudice have no place among those whom government selects to play important parts in trials designed to lead to fair determination of guilt or innocence."\(^{26}\) But reversals of convictions do not operate as a control or sanction upon the activities of the media. Such reversals are "all in the nature of after thoughts or after-effects,"\(^{27}\) and may well produce the result that guilty men will go free because the courts deny to themselves power to control publicity which tends to prejudice the conduct of trials, the verdict in which they will subsequently nullify because, and only because, of that prejudicial publicity. As Judge Will put it, "[i]t can be either the public or the accused who suffers as the result of the publicity, to say nothing of the ill-effects on the fair and efficient administration of justice."\(^{28}\)

**II. THE ENGLISH AND BRITISH COMMONWEALTH RULE**

The English rule, which is also the general British Commonwealth rule with respect to the publication of matter which may prejudice the fair conduct of a trial, is very different. Any act which tends to interfere with the due course of justice constitutes a contempt of court, and is summarily punishable as such. The reason for the rule was expounded sixty years ago in an English case:

> The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely to administer justice duly, impartially and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice is concerned.\(^{29}\)

26. *Id.* at 569.
28. *Id.* at 205.
This does not mean that the values in a free press are ignored or disregarded; the question is seen as one of balance. As a Canadian judge has well said:

In many cases the press renders great public service by the publication of reports or events surrounding the commission of a crime or an alleged crime and it is no function of the courts to act as censors of the press, but it is the function of the courts scrupulously to preserve the right of an individual to have a fair trial and to see that there shall not be any trespass on this right by the publication of reports that are calculated to interfere with it.\(^{30}\)

The English exercise of this contempt power has been described by an American writer as "frightening to one who is reared in the climate of a free-wheeling press"\(^{31}\) and as a "Draconian control over press coverage of trials to keep the 'stream of justice' pure."\(^{32}\) There has certainly been no hesitation on the part of the courts to use the contempt power in cases which they regard as being clear and to impose severe punishments. One of the most celebrated of comparatively recent cases was \textit{R. v. Bolam}.\(^{33}\) An English newspaper published statements referring to a man who had been arrested for murder. It was said that he was a human vampire, and supporting descriptions were furnished. It was also said that he had committed other murders, and the names of the alleged victims were supplied. Upon conviction the newspaper company was heavily fined and the editor was sent to prison. Lord Chief Justice Goddard said:

In the long history of the present class of cases there has never, in the opinion of the court, been one of such gravity as this, or one of such a scandalous and wicked character. It was of the utmost importance that the court should vindicate the common principles of justice, and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct.\(^{34}\)

There is abundant authority in English and Commonwealth case law which shows that the media will find themselves in contempt if they comment on existing proceedings, and the ambit of "comment" is very

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  \item 31. \textit{Goldfarb, op. cit. supra} note 7, at 88.
  \item 34. 93 Sol. J. 220 (1949).
\end{itemize}
And the definition of “proceedings” is also very broad. It is settled law that the power to punish for contempt can and will attach at a point of time at which a person has been arrested even though charges have not yet been laid and a trial has not yet begun. As Wills J. said, sixty years ago, in \textit{R. v. Parke}, “it is possible very effectually to poison the fountain of justice before it begins to flow.” In a recent Scottish case, a newspaper company was heavily fined for contempt for publishing an article at a time when a man was merely detained by police in England in connection with inquiries into two murders which had been committed in Scotland. He was not charged until a date subsequent to the publication. The court said that the prisoner was under police arrest and declined to fix the time of committal as the first point at which the power to punish for contempt arose. “The test must necessarily in both cases be the same—will the steps that have been taken by the newspaper be such as to prejudice the impartiality of the ultimate trial if a trial takes place?” The only unresolved question in the Commonwealth case law is how far back it is possible to go; specifically, is it possible to go back beyond arrest to a point where arrest may be imminent and the police are in hot pursuit? It is apparent that the prejudice to the person subsequently brought to trial may be just as great. The Commonwealth cases are not consistent on this point; some assert a power, while the Australian High Court denies it on the ground that there must be \textit{proceedings} already initiated by an arrest to attract power to punish for contempt.

Apart from these special problems, Commonwealth courts have punished as contempt statements by the media which are or may be damaging to a person charged with crime, review his prior record or express opinions as to his guilt or innocence. It has been held to be a contempt to publish a photograph of an accused man where it is reasonably clear that a question of identity may arise and where the publication is calculated to prejudice a fair trial. Of particular note in the United States context, is the English rule that it is contempt for a newspaper to conduct

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  \item \textit{Id.} at 438.
\end{itemize}
an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation.\textsuperscript{42} Indeed, recent English cases have formulated such a far reaching and drastic power to punish for contempt for the prejudicial publication of these investigations that the legislature has intervened to furnish statutory defenses in appropriate cases.\textsuperscript{43}

It is not surprising then that an American commentator would describe this English contempt doctrine as "a Draconian control"\textsuperscript{44} over the press. Mr. Justice Douglas has pointed to the differences in English and American doctrine and has observed that, "We have made our choice, refusing to sacrifice freedom of the press to the whims of judges. We know that judges as well as editors can be tyrants."\textsuperscript{45} And the English judges have announced quite plainly what they are doing. As Darling J. put it in the \textit{Crippen} case,\textsuperscript{46} "We say that we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury, and those who attempt to introduce that system into his country, even in its first beginnings, must be prepared to suffer for it."\textsuperscript{47}

Notwithstanding the severity with which English and Commonwealth courts visit by summary punishment for contempt the publication of matter which may prejudice the conduct of fair trials, the cases continue to arise. There is a substantial and increasing corpus of authority in the books. If a newspaper of wide circulation publishes highly prejudicial matter and is severely punished for contempt before the trial of the person prejudiced, a question arises as to the standing on appeal of a conviction in the subsequent criminal proceedings which may have been tainted by the publication. The prejudicial matter may consist of details of an accused person's prior convictions or may contain other charges of crime which would plainly be inadmissible on his trial on a plea of not guilty. If such matter was wrongly admitted in evidence, there can be little doubt that this would be held reversible error. But does it follow, if it can be shown that the publication had a wide and pervasive distribution, that a conviction would be reversed on the ground that there was a miscarriage of justice? There is no English or Australian case that I have been able to discover which suggests that the conviction would be

\textsuperscript{42} R. v. Evening Standard (Editor), 40 T.L.R. 833 (1924).
\textsuperscript{43} See, Reg v. Odhams Press, [1957] 1 Q.B. 73; Reg v. Griffiths [1957] 2 Q.B. 192; \textit{Administration of Justice Act} 1960, section 11 (U.K.), this section provides for a defense of innocent publication and distribution similar to the defense of innocent dissemination in the case of libel.
\textsuperscript{44} \textit{Goldfab}, \textit{op. cit. supra} note 32.
\textsuperscript{47} \textit{Id.} at 636.
reversed. After reviewing English decisions on contempt by publication, the most recent American text writer on contempt writes:

The greatest failure of English contempt law is its disrelation with its most valuable object—protection of fair trials. It is of little service to an accused person who is written into jail by a prejudiced press that the publisher or editor is fined or imprisoned. His victory is a hollow one unless the conviction is reversed. The contempt vehicle is only indirectly curative of unfair trials, if at all, though this is its most valuable purpose.\(^4\)

If this is so, we have a further interesting contrast between English and American law in this field. The American authorities expose the difficulty of sustaining contempt convictions for the publication of matter prejudicial to the conduct of a fair trial, but they also point to the very real possibility of reversing a conviction tainted by such prejudicial publicity. The English cases show that the courts are ever ready to punish such publication as contempt, but there is no suggestion that the publication of such matter would provide ground for the reversal of a conviction.

There is another unsatisfactory aspect of the English law on this matter. Alongside the rule that publication of matter which is calculated to prejudice the conduct of a fair trial is punishable as contempt, there has to be set the rule current in English and some Commonwealth jurisdictions that publication of the details of committal or like preliminary proceedings in criminal cases is not subject to restriction. Such proceedings are, in effect, preliminary enquiries by magistrates into more serious charges of crime to determine whether the accused should be discharged there and then, or whether he should be sent for trial by the appropriate court. In England, until the 1880's, it was not clear whether newspapers could freely and lawfully publish the details of such proceedings, but the Law of Libel Amendment Act 1888 has been construed as giving authority for such publication. The consequences of this have been noted by a distinguished Scottish lawyer:

As regards publication of the prosecution's evidence before trial, English law is as lax as its rules regarding comment are strict. After arrest an accused may be remanded in custody by a magistrate and later committed for trial by a panel of justices if they find that the prosecution has made out a prima facie case. Widespread publicity is often given to the evidence against the accused at the pre-trial hearing, including evidence of al-

\(^4\) Goldfarb, op. cit. supra note 7, at 88.
leged confessions and other evidence which may actually be excluded at the trial itself. As a rule, only the evidence for the prosecution is heard at the proceedings for committal, and, although the magistrates have a discretion to exclude publicity, they have rarely done so.\(^4\)

The discretion to exclude publicity may be exercised by holding proceedings \textit{in camera}.\(^5\) In committal proceedings, the defense will often, though not invariably, reserve its case. There have been occasions where the publication of the details of committal proceedings have given rise to the greatest anxiety about the dangers of prejudice to the accused at his subsequent trial. A recent and frequently cited English case is that of Dr. John Bodkin Adams,\(^6\) who was charged with murder. In the course of the committal proceedings, prosecution evidence was given that other patients of the doctor had died in mysterious circumstances under his care, and this evidence was not and could not have been given at his trial. In the event, Adams was acquitted, but the blaze of publicity given to the details of the prosecution evidence at the committal proceedings made the burden of the defense counsel and of the trial judge truly formidable, though they discharged it superbly well. At the trial, the judge, Devlin J., urged magistrates to use their power to hear such cases \textit{in camera}.

The \textit{Adams} case is only one among many. Another celebrated recent English case was the trial of Stephen Ward. That trial was one of the chapters in the unhappy and spectacular Profumo-Keeler story. Ward was convicted and committed suicide. Ludovic Kennedy in his account of the trial writes

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\ldots there were other reasons too, many over-lapping and all accumulative, which led the jury to their verdict. The first was something that happened long before they had been either called or chosen. This was the very wide publicity given to the proceedings at the lower court at the end of June and beginning of July. It is impossible to overestimate the harm that this publicity must have done to Ward's defence. The prosecution's case was \textit{prima facie} more damaging to him than it was at the Old Bailey; for it contained not only Ronna Ricardo's lying evidence, which must have seemed to those who read it (and who didn't) as general confirmation of what Mandy and Christine
\end{quote}

\(^{49}\) T. B. Smith, \textit{Studies Critical and Comparative} 288 (1962).

\(^{50}\) A cause is said to be heard \textit{in camera} either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom. \textit{Black, Law Dictionary} (4th ed. 1951).

\(^{51}\) See, 1957 Crim. L.R. (Eng.) 365.
had alleged, but also two charges concerning the arranging of abortions and one of keeping a brothel. The last charge was subsequently dropped for lack of evidence, and the two abortion charges were placed on a separate indictment. The evidence for all three charges was flimsy in the extreme, and it is impossible to resist the conclusion that the only reason they were brought was the belief that the more mud that was thrown, the more chance that some of it would stick. The dice were loaded in the prosecution's favour even further by the fact, unknown to the general public, that the defense at the lower court deliberately says little for fear of disclosing its hand. All this combined to make the ordinary reader (including the subsequent Old Bailey Jury) believe that Ward was guilty of a multitude of sexual misdemeanours long before he was tried. It was all very well Mr. Justice Marshall telling the jury to put out of their minds everything they had heard so far; but this was virtually an impossibility.  

These were both causes celebres, but this happens far too frequently. In the Adams and Ward cases, had the newspapers made similar comment without purporting to report committal court proceedings they would certainly have invited heavy punishment for contempt.

The English law which permits the publication of the details of committal proceedings does not apply in all Commonwealth jurisdictions. It is not the law in Scotland where there is no public pre-trial hearing, and there are controls over publication in Canada and Northern Ireland.

In England, in the wake of the Adams case, a committee under the chairmanship of Lord Tucker, a judge, was appointed to consider the matter. The committee unanimously recommended that committal proceedings should be held in public, but proposed that unless the prisoner was discharged at that stage, "the proceedings should not be reported beyond a statement of the name of the prisoner and short details of the charge." The reports at that stage "should not contain anything that may be thought likely to prejudice the trial, provided that there should be no restriction on the publication of the charge and similar factual particulars." The committee was of the opinion that it was undesirable to conduct committal proceedings in camera and preferred to resolve the prob-

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52. KENNEDY, op. cit. supra note 8, at 233.
54. CRIMINAL CODE, section 455 (2).
lem by preventing prejudice through the restriction of publication. These proposals were greeted by a vehement press protest, and the English Press Council issued a statement.\(^57\) To this date the recommendations of the Tucker Committee have regrettably not been implemented. English and Commonwealth law of criminal contempt can only be made sensible by prohibiting the detailed reporting of committal proceedings until such time as the trial is concluded.

III. COMPARISON OF AMERICAN AND BRITISH RULE

Some American judges and writers have looked admiringly at the English law in its dealing with these problems. Certainly, what was done by the media in the immediate aftermath of President Kennedy's death in respect of Lee Harvey Oswald, his background and history, would not have been done in England. The English media know rather well what they cannot do—even though cases continue to arise—and they know that the law of criminal contempt has a wide embrace. To that extent the English law is in a posture superior to its American counterpart. It does not appear that these controls over the English (and Commonwealth) press are bought at too high a price in terms of restriction of valued liberties. It is difficult to understand the "right to know" arguments directed at proposed restrictions of the press.

The unsatisfactory aspects of the English law are its inconsistencies. The English press is given a free hand in reporting committal proceedings. When this is set alongside the restrictions which the law does impose on prejudicial publication, one must conclude that the law has developed in water tight compartments, and that the right hand does not know what the left is doing. It should also be said that a great body of press opinion in England was and is opposed to the adoption of the Tucker Committee's recommendations for the restriction of publication of committal proceedings, and those recommendations have not been enacted into law. Although the press and other media live with their present restrictions, they do not want any more of them.

Even within the existing rules, it is possible to build up a general prejudicial atmosphere against persons on trial; the elaborate reporting of the Profumo-Keeler-Ward scandal made it very difficult—even apart from the Ward committal proceedings—to secure an unprejudiced trial for Ward. As Goldfarb comments, one wonders about the caliber of the English tabloids.\(^58\) While the English law does control prejudicial reporting by the media to a far greater extent than does the American law,

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it remains unsatisfactory in some respects. The English law is unsatisfactory because it apparently loses interest in the prejudicial effect of what is published by the media once the offending publisher has been punished for contempt. But, like John Brown's body, the prejudice goes marching on, and unlike the American law, the English law gives us no ground to believe that this may lead to the reversal of convictions. If an English trial judge wrongly admitted evidence of the prior convictions of an accused person, this would almost certainly be reversible error. But if the convictions came to public attention (and to the attention of the jury) by way of press or like publication (punishable and punished as contempt), there is no indication in the cases that this would constitute reversible error, notwithstanding that the theory which calls for the punishment of the offending medium for contempt is that the publication has prejudiced the fair trial. To the extent that the defect in the English law which arises from the publication of the details of committal proceedings does not occur in the law of some Commonwealth jurisdictions, their law is more coherent than the law of England.

But the American law in this area is very unsatisfactory indeed. It seems quite extraordinary that the law says that the Constitution will not, except perhaps in the most extreme cases, permit restraints on the press or other media in respect of the publication of matter which prejudices the conduct of a fair trial, and that the law also says that the publication of that matter denies due process to convicted persons, and for that reason requires the reversal of convictions. That is just what I understand Mr. Justice Black to say is the law, and what I understand Mr. Justice Frankfurter in dissent to say cannot or should not be the law. Certainly the American press and media act as if it were the law. That the law can find itself in a position in which the American Bar Association can conclude that the activities of the media "conceivably could have prevented any lawful trial of Oswald due to the difficulty of finding jurors who had not been prejudiced by these public statements" seems to me quite intolerable, particularly when the Association—or for that matter the Warren Commission—does not propose legally coercive proposals to deal with this problem. It is not enough to say that the killing of a President was an altogether special case which would break the bounds of any normal control; there are numerous illustrations of like behaviour on the part of the media at national, regional and local levels in other cases.

The proposed palliatives which include continuances, changes of venue, jury challenges and directions, are often very ineffective, and in the "big" cases are simply hopeless as solutions to the problem. The more pervasive the publicity, the less effective any or all of these proposed
remedies will be. That the law should confess its failure and incapacity
to come to grips with this very real problem—and the volume of writing
and discussion makes it abundantly clear that it is felt to be a serious
problem—and that it should be proposed that the solution should be found
in self-restraint and voluntary agreement on the part of the media, seems
to me quite wrong. If there is a problem—and this does not seem to be
disputed—it is for the law to deal with it; it is not a case for exhortation
to good behaviour. In a regime of voluntarism, the good will strive to
comply, and the bad and the indifferent and the cynical will not.

The American law should face up to the need to frame properly
articulated legal controls over the act of publication of matter prejudicial
to the conduct of a fair trial. As contempt doctrines have been enunciated
in England and in Commonwealth jurisdictions, there is some reason to
be apprehensive, because of the summary character of the trial procedure
on a contempt charge and because of the want of defined limits of pun-
ishment. The Supreme Court of the United States now finds itself in
some uncertainty as to the constitutional limits of summary trial for con-
tempt, and the Barnett case suggests that those limits are quite narrow.
I agree with an English writer who, more than sixty years ago, expressed
concern at a jurisdiction to commit for criminal contempt ". . . which
enables a judge to commit to prison a subject of the Queen, without the
verdict of a jury and without appeal; to fine him either as an additional
or substitutional punishment, without limit of amount, for an offence
which has never been defined by statutory enactment. . . ." This, he
concluded, "is a jurisdiction which no one will deny requires the closest
scrutiny whenever it is exercised." Appeals against convictions for
criminal contempt were not allowed in England until 1960. As for the
summary character of the jurisdiction, that is trial without jury, it has
a long and unsatisfactory history and has been justified in England on
the ground that a jury trial would be "too dilatory and too inconvenient
to afford any satisfactory remedy." This seems to me quite wrong and
whatever the history to be quite unsound in principle. If the spectre of
summary trial is removed, it seems to me that a major objection to the
exercise of the contempt power to control prejudicial publication will be
removed.

I do not think that a reading of the American cases leads to the con-

60. Hughes, Contempt of Court and the Press, 16 Law Q.R. 292, 293 (1900).
61. Ibid.
63. See, Goldfarb, op. cit. supra note 7.
clusion that the Constitution forecloses any use of contempt or like powers to control prejudicial publication by the media. The media certainly act as though no control exists or is likely to be devised, and no doubt they draw comfort from long practice, the absolutist position of some judges, the present apparent stance of the law, and the seeming hopelessness of many of the commentators. At a time when recent tragic events have rekindled more urgent concern with this problem, we should hearken and respond to the voices and arguments of those who have urged that it is possible and desirable to use the law as an instrument to deal more effectively with this matter.
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