Discretionary Power to Grant Additional Peremptory Challenges in Highly Publicized Criminal Trials: Securing a Fair and Impartial Trial

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THE DISCRETIONARY POWER TO GRANT ADDITIONAL PEREMPTORY CHALLENGES IN HIGHLY PUBLICIZED CRIMINAL TRIALS: SECURING A FAIR AND IMPARTIAL TRIAL

INTRODUCTION

The New York Court of Appeals has stated that “[t]he matter of peremptory challenge rests entirely with the Legislature.”¹ Section 270.25 of the Criminal Procedure Law is the present statement of legislative policy on the matter of peremptory challenges.² This section prescribes both the number of peremptory challenges available to the parties in a criminal trial, and the manner in which these challenges must be exercised.³ CPL 270.25 neither expressly nor implicitly gives a trial-court judge the authority to grant additional peremptory challenges to criminal defendants. However, recent judicial interpretation of this statute indicates that trial-court judges may, at their discretion, increase the number of peremptory challenges available to defendants under CPL 270.25.⁴ It is the purpose of this Comment to analyze the possible rationale behind this expansionary trend and to support its continuation.

¹ People v. Doran, 246 N.Y. 409, 426, 159 N.E. 379, 385 (1927) (citations omitted).
² N.Y. CRIM. PRO. LAW § 270.25 (McKinney 1971) [hereinafter cited and referred to in the text as CPL 270.25].
³ CPL 270.25 reads in full:
1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.
2. Each party must be allowed the following number of peremptory challenges:
   (a) Twenty for regular jurors if the highest crime charged is a Class A felony, and two for each alternate juror to be selected.
   (b) Fifteen for the regular juror if the highest crime charged is a Class B or Class C felony, and two for each alternate juror to be selected.
   (c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.
3. When two or more defendants are tried jointly, the number of peremptory challenges prescribed in subdivision two is not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed.
I. THE GENESIS OF STATE v. KING

The seminal case supporting the grant of additional peremptory challenges to criminal defendants is State v. King.\(^5\) The King proceeding was initiated during jury selection in People v. Hill & Pernasilice\(^6\) in order to prohibit supreme court Justice Gilbert King from exceeding his statutory authority.

The underlying trial involved John Hill and Charles Pernasilice, who were among those former inmates of the State Correctional Facility in Attica, New York, involved in the Attica prisoner rebellion of September, 1971.\(^7\) Hill and Pernasilice were charged by a single indictment with the murder of William Quinn, a prison guard who was killed during the siege.\(^8\)

In 1974, John Hill, as representative party in a multidefendant motion, secured a change of venue, due in part to the limited facilities and lack of qualified veniremen in Wyoming County.\(^9\) The underlying Attica indictments were transferred to the Supreme Court of Erie County in Buffalo, New York.\(^10\)

With supreme court Justice King presiding, jury selection in the Hill-Pernasilice trial commenced on January 6, 1975—three and one-quarter years after the Attica rebellion. Prior to the pretrial questioning of the prospective jurors, defense counsel requested Justice King to grant the defendants forty additional peremptory challenges.\(^11\)

5. Id.
6. People v. Hill & Pernasilice resulted from indictments brought by a Special Wyoming Grand Jury which investigated the Attica prisoner rebellion of 1971. See N.Y. Times, Dec. 19, 1972, at 1, col. 2. Consequently, the case was originally docketed as Indictment #1, Supreme Court, Wyoming County, Dec. 1972. However, pursuant to a change of venue granted in 1973 (see note 9 infra), the docket entry was changed to Indictment #1, Supreme Court, Erie County, Dec. 1972. The defendants were convicted on separate offenses on April 5, 1975. See note 26 infra. Appeals were filed on May 9, 1975, in the Appellate Division, Fourth Department.
7. See generally ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972).
8. See note 6 supra. See also N.Y. Times, Dec. 15, 1972, at 1, col. 4.
9. People v. Hill, 42 App. Div. 2d 679, 345 N.Y.S.2d 237 (4th Dep't 1973). (It was also noted that many potential jurors were directly or indirectly associated with the Attica Correctional Facility.)
10. Id. All of the 42 Attica-related indictments brought by the Wyoming County grand jury were transferred as a result of this motion.

Hill and Pernasilice were both charged with murder, a Class A Felony, N.Y. PENAL LAW § 120.25 (McKinney 1970). Under CPL 270.25(2)(a) each “party” was entitled to 20 peremptory challenges. It would seem that both Hill and Pernasilice should each be given 20 peremptory challenges for a total of 40 defense peremptories. However, by virtue of CPL 270.25(3), “[w]hen two or more defendants are tried jointly, the number...
PEREMPTORY CHALLENGES

Justice King granted the defense request to the extent of 10 additional peremptory challenges, even though CPL 270.25 does not expressly condone this novel practice. No objections to this action were made by the prosecutors at that time.

On the morning of January 8th, after the prosecutors had concluded their voir dire examination of the first group of potential jurors, they unexpectedly voiced their objection to Justice King's earlier ruling, but their request for a concomitant increase in peremptory challenges was denied. Unsuccessful in their attempt to persuade Justice King that his granting of additional peremptories was unauthorized and violative of precedent, the prosecutors instituted an Article 78 proceeding in the appellate division to attempt to prohibit Justice King from exceeding his statutory authority.

A majority of the appellate division analyzed the merits of Justice King's action. Strictly construing the language of CPL 270.25, the court concluded that "[t]he respondent [Justice King] not only violated the express provisions of the section as to the number of peremptory challenges allowed upon trial but acted in violation of the statutory scheme which allows each party an equal number of peremptory challenges."14 Reaffirming the principle that the "matter of peremptory challenges . . . rests entirely with the legislature,"15 the appellate court found that the trial ruling "was made in excess of the court's powers authorized by the Legislature."16 Noting that a direct appeal of Justice King's ruling was precluded by statute,17 and finding that the ruling was prejudicial to the rights of the petitioner, the appellate division concluded that relief was available under the

12. King, 36 N.Y.2d at 61, 324 N.E.2d at 353, 364 N.Y.S.2d at 881.
13. Id. at 61, 62, 324 N.E.2d at 881, 364 N.Y.S.2d at 353. See also N.Y. Civ. Prac. Law §§ 7801-06 (McKinney 1963) which detail, inter alia, the procedures for the initiation of prohibition proceedings.
14 King I, 47 App. Div. 2d at 595, 363 N.Y.S.2d at 683.
15. Id. See also note 1 supra & accompanying text.
17. N.Y. Crim. Pro. Law §§ 450.20, .40, .50, .80 (McKinney 1971), delineate those instances in which the People may seek appellate review of a trial ruling. Justice King's order was not embraced by these sections.
Article 78 proceeding. Accordingly, the appellate court vacated Justice King's ruling, over the dissent of two justices.

Upon immediate appeal to the New York Court of Appeals, the appellate division's finding was reversed after only four days of deliberation. The unanimous court, agreeing with the dissenters below, determined that the prohibition action was procedurally infirm. Justice Breitel, speaking for the court, stated that "[t]he court may not entertain a collateral proceeding to review an error of law in a pending criminal action, however egregious and however unreviewable." Although Justice King's ruling was not subject to direct appeal, the court asserted that "nonreviewability by way of appeal alone, does not provide a basis for reviewing error by collateral proceeding in the nature either of prohibition or mandamus."

Evident in the court's opinion was its overriding concern to uphold the statutory policy limiting appeals in criminal actions. The court was cognizant of and demonstrated sensitivity to the problems of delay associated with special proceedings initiated for the purpose of reviewing "a plausible error of law, of 'magnitude' in the view of one side or the other . . . ." While the court acknowledged that appellate intervention is warranted in certain extraordinary situations, it could not find that Justice King's ruling was within "the several categories of excesses of jurisdiction and power arising in criminal actions which merit the abrupt intervention of prohibition or mandamus." The court rejected what was referred to as an "unsound

19. Id. The dissenters felt that no harm or prejudice to the state was shown. Moreover, they were of the belief that the remedy of prohibition was inappropriate. Id. (Cardamone & Del Vecchio, JJ., dissenting).
20. King, 36 N.Y.2d at 62, 324 N.E.2d at 353, 364 N.Y.S.2d at 882. The court assumed for the purposes of review that Justice King’s action was "an egregious error of law . . . prejudicial to the rights of the people." Id. at 61, 324 N.E.2d at 353, 364 N.Y.S.2d at 881. Since the merits of Justice King’s ruling were not reached, this assumption should not be considered to be of precedential value.
22. See note 17 supra. See also N.Y. CRIM. PRO. LAW §§ 450.10, 15, 70 (McKinney 1971) (defendants' right to appeal).
23. King, 36 N.Y.2d at 64-65, 324 N.E.2d at 355, 364 N.Y.S.2d at 884.
24. See, e.g., Proskin v. County Court of Albany County, 30 N.Y.2d 15, 260 N.E.2d 875, 330 N.Y.S.2d 44 (1972) (prohibition granted). In King, the court described Proskin as a case which "involved a perversion of a criminal action to allow a wholly unauthorized disclosure of an entire extensive Grand Jury investigation . . . in which the issues related to the pending criminal action were only a small part." King, 36 N.Y.2d at 64, 324 N.E.2d at 355, 364 N.Y.S.2d at 883 (emphasis added). See also 36 ALBANY L. REV. 804 (1973).
25. King, 36 N.Y.2d at 64, 324 N.E.2d at 354, 364 N.Y.S.2d at 883.
and novel extension of the . . . [remedy] of prohibition," and dismissed the state's petition.26

By dismissing the petition for prohibition on procedural rather than substantive grounds, the court of appeals has left undefined the acceptable parameters of CPL 270.25. However, for the present time, at least, it does appear that trial-court judges may increase defendants' statutory allocation of peremptory challenges and remain immune from the sanctions of an Article 78 proceeding.27 Since CPL 270.25 does not authorize the granting of additional peremptories, it appears that the judicially created power to engage in such a practice illustrates the dilution of the well-established principle that the matter of peremptory challenges rests entirely with the legislature.28 The reasons for Justice King's innovative ruling are not readily apparent. Moreover, neither the court of appeals nor the appellate division found it necessary to consider the soundness of the rationale for the ruling. However, there is some evidence of the motivating factors underlying Justice King's interpretation of CPL 270.25.


27. Since appeals are pending in People v. Hill & Pernasilice, there remains the possibility that Justice King's ruling may be reversed on the merits by the court of appeals. This Comment assumes that this result will not eventuate. If it should be reversed, however, the need for legislative revision of CPL 270.25 would be greater. See text at 574 for a suggested revision.

28. See note 1 supra & accompanying text.
It was reported that defense counsel for Hill and Pernasilice felt that additional peremptories were necessary because of the "strong currents" against the defendants in the Buffalo area. This argument was developed by the defendants in briefs submitted in King. Commenting upon the propriety of Justice King's ruling, the defendants asserted that:

[The practice throughout the State, as indicated by affidavits submitted below, has been to grant additional peremptory challenges to single and multiple criminal defendants in unusual and/or extraordinary cases. That the trial of the underlying indictment, stemming from the climactic and highly publicized events at the Attica Correctional Facility between September 9 and 13, 1971, is an unusual and extraordinary case, can hardly be questioned. . . . Respondent's granting of additional peremptories to the defense . . . serves as a remedial force in an attempt to secure a fair and impartial jury.30]

The affidavits referred to by the defendants were annexed to their brief submitted in the appellate division.31 The affiants were four practicing attorneys of New York who attested that they either had heard of or had been counsel in cases in which the trial-court judge gave additional peremptory challenges to single or multiple defendants because of a high degree of pretrial publicity.32

Thus, the desire to mitigate the potential deleterious effects of

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29. See N.Y. Times, Jan. 19, 1975, at 49, col. 1. It cannot be determined with any degree of certainty what psychological effect the extensive news coverage given to the Attica rebellion and related criminal proceedings had upon the potential jurors in Erie County. However, a statistical study conducted by the Attica Brothers Legal Defense in connection with a request for a change of venue in September, 1974, revealed that almost 23 percent of those people interviewed in Erie County felt "that they could not be impartial and follow a Judge's instructions as to applicable legal principles." People v. Sekou, 45 App. Div. 2d 982, 983, appeal dismissed, 35 N.Y.2d 844, 321 N.E.2d 786, 362 N.Y.S.2d 866 (1974). Although the request for a change of venue was denied, the study demonstrated that an unusual potential for prejudice existed in the prospective jury pool for the Attica-related trials. Erie County residents' ostensible lack of direct personal or economic relations with the Attica Correctional Facility, coupled with their geographic isolation from it, suggests that the publicity surrounding the Attica revolt may have shaped the attitudes revealed in the study.


32. One affiant stated that additional peremptories may be warranted in multiple-defendant cases where the defendants may have adverse defenses. While this problem apparently was not raised by Hill and Pernasilice, it does demonstrate a deficiency of CPL 270.25 in its treatment of multiple defendants as a single party. A suggested revision to the single party treatment is discussed at note 173 infra and presented in the text at 574.
the extensive publicity given the Attica rebellion and related events by the news media was the basis of the request for, and apparently the grant of, additional peremptory challenges. An examination of the function of the peremptory challenge and the serious difficulties encountered by defendants in cases imbued with unusually extensive pretrial publicity reveals that the discretionary power of a trial court to grant defendants additional peremptories may well "serve as a remedial force in an attempt to secure a fair and impartial jury."

II. THE JURY SELECTION PROCESS: STRIVING FOR IMPARTIALITY

In order to fully comprehend the impact of Justice King's ruling, the peremptory challenge must be viewed in the context of the jury selection process as a whole. The right to be tried by a jury is reduced to an empty promise if the jury impaneled to decide the guilt or innocence of the accused is less than impartial. In light of this consideration, several procedural safeguards are available to the accused to insure that the jury selection process is not tainted by partiality. Potential threats to the integrity of the jury-trial system can theoretically be alleviated in a number of ways. The most fundamental and general remedy is the change of venue which, if granted, permits the accused to be tried in an area in which the potential jurors are further removed from the facts and emotional effects of the underlying offense. For example, a major reason for granting the Attica defendants a change of venue was that a significant number of potential jurors in Wyoming County were directly or indirectly associated with the Attica Correctional Facility.

Additionally or alternatively, a general challenge to the entire jury panel may be made as a result of alleged irregularities in the manner in which the panel was chosen from the general population.

33. This conclusion is premised upon the belief that the Attica rebellion and the ensuing criminal proceedings received an extraordinary amount of news coverage by the press, radio and television. It would be a formidable and unnecessary task to document the plethora of articles and newscasts devoted to coverage of Attica-related incidents.
34. See note 30 supra & accompanying text.
35. U.S. Const. amend. VI.
38. See note 9 supra.
Since a fair trial requires that a jury be drawn from a representative cross-section of the community, the elimination of some groups from jury duty may impinge upon an accused's sixth amendment guarantee to a fair and impartial jury.\textsuperscript{39}

A. The Challenge for Cause

Where trial has proceeded to the final stage of jury selection, challenges may be directed to specific jurors who are felt to be unqualified. Under the voir dire procedure in New York\textsuperscript{40} counsel are given the opportunity to question prospective jurors for the purpose of eliciting the necessary information pertaining to the jurors' qualifications. If, on the basis of the information revealed by a juror, it is thought that such a juror is not qualified, counsel initially will challenge the juror for cause.\textsuperscript{41} The mere invocation of such a challenge does not necessarily result in the elimination of the challenged juror. It is within the discretionary powers of the trial court to determine whether the statutory grounds for challenging for cause have been met.\textsuperscript{42}

Section 270.20 of the Criminal Procedure Law sets forth the grounds upon which a challenge for cause may be premised. If it is shown, \textit{inter alia}, that a prospective juror is not qualified under the judiciary law;\textsuperscript{43} or is related within the sixth degree of consanguinity or affinity to the defendant or any other party involved in the trial;\textsuperscript{44} or was a witness at the preliminary hearing or before the grand jury or will be a witness at trial;\textsuperscript{45} or was a member of the grand jury which indicted the defendant;\textsuperscript{46} then the juror is subject to a challenge for

\begin{itemize}
\item \textsuperscript{39} Such a challenge was made in one of the Attica-related cases. As a result of the successful challenge, the names of certain prospective jurors selected at a time when the Erie County selection procedure was discriminatory were struck from the list. \textit{See} People v. Attica Bros., 79 Misc. 2d 492, 359 N.Y.S.2d 699 (Sup. Ct. 1974). \textit{See also} Comment, \textit{Attica Jury Pools and the Intent Requirement of the Equal Protection Clause}, 24 \textit{Buffalo L. Rev.} 347 (1975).
\item \textsuperscript{40} N.Y. \textit{Crim. Pro. Law} § 270.15 (McKinney 1971). \textit{But see} Fed. R. Crim. P. 24(a) (the court may, at its discretion, allow counsel to question potential jurors).
\item \textsuperscript{42} CPL 270.20 (2) states, in part, that “[a]ll issues of fact and law arising on the challenge must be tried and determined by the court.”
\item \textsuperscript{43} CPL 270.20(1)(a).
\item \textsuperscript{44} CPL 270.20(1)(c).
\item \textsuperscript{45} CPL 270.20(1)(d).
\item \textsuperscript{46} CPL 270.20(1)(e).
\end{itemize}
cause. It is presumed that a juror who possesses one of the above-mentioned attributes is biased.\textsuperscript{47}

Challenges for cause premised upon these grounds present few problems since they can be verified and easily substantiated.\textsuperscript{48} However, challenges for cause directed toward the state of mind of a potential juror present more difficult problems of proof.\textsuperscript{49}

Voir dire examination may reveal that a juror has a preconceived opinion relating to the issues at trial, the guilt or innocence of the accused, or in capital cases, the death penalty.\textsuperscript{50} Such a juror is subject to a challenge for cause as the juror would logically appear to be less than impartial.\textsuperscript{51} It becomes necessary for the trial court to determine whether the juror's "state of mind . . . is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial."\textsuperscript{52} The burden is upon the challenging party to demonstrate that the challenged juror has the improper "state of mind." Absent the juror's confession that he cannot be impartial, and in light of the less than cogent definition of impartiality, the challenging party's burden may be a formidable one indeed. When a juror states that he can set aside his opinion or beliefs and render a fair and impartial verdict, the trial court will usually conclude that the juror is qualified.\textsuperscript{53} Moreover, since the trial court is given wide discretion in this area, its decision not to exclude a challenged juror will seldom be reversed on appeal.\textsuperscript{54}

\textsuperscript{47} At common law a challenge based upon one of these grounds was known as a challenge to the principal cause. If such a challenge were substantiated, actual bias was presumed. Thus, there was nothing left for the discretion of the court. See Brown v. Woolverton, 219 Ala. 112, 115, 121 So. 404, 406 (1928).

\textsuperscript{48} In addition to a juror's admission of a cognizable ground for challenge, records can verify a juror's familial relation to a party, or his participation in another stage of the criminal proceeding.

\textsuperscript{49} CPL 270.20(1)(b); CPL 270.20(1)(c).


\textsuperscript{51} However, the nebulous term of impartiality defies cogent definition. As the Supreme Court once observed:

Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.


\textsuperscript{52} CPL 270.20 (1)(b).

\textsuperscript{53} Cf., e.g., People v. Otto, 101 N.Y. 690, 5 N.E. 788 (1885).

B. The Peremptory Challenge

Although the success of a challenge for cause cannot be guaranteed, the constitution requires that the accused be given the opportunity to prove the actual bias of a juror. Failing to sustain a challenge for cause, counsel is not without further recourse. Subject to limitations set forth in CPL 270.25, both the accused and the state are entitled to challenge a certain number of jurors peremptorily, i.e., without stating or proving the grounds for the challenge.

This peculiar form of juror challenge stems from the English common law. In the English and American criminal justice systems which sanctify the right to be tried by an impartial jury, one can easily appreciate the necessity of challenges for cause in the jury selection process. However, the necessity of peremptory challenges is not as readily apparent. William Blackstone described the peremptory challenge as "an arbitrary and capricious species of challenge . . . a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." Thus, it has been observed that the "original purpose of the peremptory challenge was to allow opposing parties an opportunity to pick a sympathetic jury." While this may be a correct statement in both a historical and practical sense, it overlooks the more viable functions of the peremptory challenge.

As noted previously, the challenge for cause is designed to eliminate partial jurors. However, as a result of the difficulties encountered in asserting such a challenge, some arguably biased jurors may escape

55. See note 1 supra.
56. See note 3 supra.
58. It has been said that the necessity of challenge for cause was obviated by the transformation of the role of the jury from a body of witnesses to a body of fact-finders whose duty was to decide the issue on the basis of evidence presented by others. Fair decision-making required that jurors be impartial. Consequently, challenges for cause were the principal means by which partial jurors could be eliminated. See generally 47 Am. JUR. 2d Jury § 213 (1969). For an informative and detailed history of the development of the common law jury, see 1 Holdsworth, A History of the English Law 323-50 (3d ed. 1931).
59. 4 W. Blackstone, Commentaries 353 (15th ed. 1809). This is not an entirely accurate description, however. The Crown was initially entitled to peremptorily challenge an unlimited number of jurors. While this practice was stopped by statute, the courts in England, feeling that peremptories were important to both sides, circumvented the mandate of statute by allowing the Crown to ask jurors to stand aside. If the jury box was not full when the entire panel was exhausted only then did the Crown have to challenge the jurors for cause. See Swain v. Alabama, 380 U.S. at 213.
elimination. Thus, "[w]hile challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstratable." 61 The peremptory challenge, then, is viewed as a supplemental protective device for securing an impartial jury, as the "function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." 62 Moreover, the mere availability of peremptory challenges promotes a more probing voir dire examination of prospective jurors and more efficient use of challenges for cause by "removing the fear of incurring a juror's hostility through examination and [unsuccessful] challenge for cause." 63

When viewed from this perspective, it is patently clear that peremptory challenges play a necessary role in the jury selection process. This is evident from the fact that peremptory challenges exist in every jurisdiction in this country, notwithstanding criticism of their tendency to protract voir dire, to create added expense in requiring the summoning of a great number of veniremen, and to eliminate qualified veniremen. 64 Although all jurisdictions give the prosecution the right to peremptorily challenge, the challenge has been primarily referred to as "one of the most important of the rights secured to the accused." 65 This declaration reasonably follows from the fact that it is the accused's life or liberty which is jeopardized if he is tried by a biased jury. The special importance of peremptory challenges to de-

61. 380 U.S. at 220.
62. Id. at 219.
63. Id. at 219-20.
64. Id. at 216. The last-mentioned criticism has been mainly directed toward defendant's use of the challenge. Id. at 216 n.19. However, in Swain it was the defendant who questioned the prosecutor's alleged discriminatory use of the peremptory challenge to eliminate Blacks. The Supreme Court observed that the peremptory may be exercised on the grounds of race or nationality, "[f]or the question a prosecutor or defendant must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." Id. at 220-21. Noting that race or religion have constituted grounds for a challenge for cause, the Court upheld the prosecutor's use of peremptory challenges as a result of the presumption that the state uses peremptories to achieve a fair and impartial jury. Id. at 222. Peremptory challenges based upon race, nationality, or religion may be necessary in some situations to eliminate bias. This is perhaps another reason for the universal acceptance of peremptories because courts are generally not willing to approve a challenge for cause based upon discriminatory grounds. See Comment, The Right of Peremptory Challenge, 24 U. CHI. L. REV. 751, 761-62 (1957).
fendants is also reflected in numerous state statutes which grant the defendant more peremptories than the prosecution. In fact, the present equal distribution scheme of peremptory challenges between the state and the accused contained in CPL 270.25 did not always exist in New York. "When first permitted in this state the [state's] right was greatly restricted, and until the Act of 1873, a much larger number of peremptory challenges was given to an accused person than to the prosecution."67

While the opportunity to peremptorily challenge prospective jurors is especially important to the accused, it must be noted that there is no constitutional requirement for peremptory challenges. Since they are provided as a privilege, rather than a right, peremptory challenges must be exercised with the limitations placed thereon. Thus, the New York Legislature was free to equalize the allocation of peremptory challenges between the state and the accused. Moreover, every jurisdiction has placed various limits upon the exercise of peremptory challenges. The United States Supreme Court once observed, however, that "the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial trial."70 Commenting upon the manner in which proper juries are selected, the Court has noted that "[e]xperience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge."71 Although every state has apparently determined that an impartial trial requires the availability of some peremptory challenges, there is a lack of agreement as to the number of peremptory challenges necessary to achieve that goal.

New York's grant of 20 peremptory challenges in trials involving class A felonies is relatively large. However, some jurisdictions have


67. People v. McQuade, 110 N.Y. 284, 293, 18 N.E. 156, 158 (1886).

68. See note 1 supra. See also Stilson v. United States, 250 U.S. 583, 586-87 (1919).


71. Id. at 70.

72. It is thought that this large number of peremptory challenges compensates multiple defendants for their treatment as a single party under CPL 270.25(3); cf. ABA,
decided that 25 peremptories are essential where the accused is charged with a felony which is punishable by death.\textsuperscript{73} It is apparent that the various jurisdictions, recognizing both the necessity of peremptory challenges and the potential for abuse in granting an unlimited number of them, have attempted to prescribe a sufficient but limited number of peremptories to insure impartiality in most trial situations. However, as Hill and Pernasilice asserted in \textit{King},\textsuperscript{74} the statutory allocation of peremptory challenges may be inadequate in cases which have attracted extensive press coverage. Implicit in this line of reasoning is the notion that other devices designed to insure an impartial trial, \textit{i.e.}, a change of venue or challenges for cause, provide inadequate protection. Therefore, the right to a fair trial is preserved and the interests of justice are served by granting additional peremptory challenges "to eliminate the extremes of partiality"\textsuperscript{75} which are exacerbated by the deleterious effects of pretrial publicity.

\section*{III. Rationale Underlying the Expanded Use of Peremptory Challenges}

\subsection*{A. Effects of Pretrial Publicity — The Judicial Reaction}

The fundamental right of freedom of the press is guaranteed by express constitutional provision.\textsuperscript{76} A well-informed populace is considered to be vital to the stability and continuation of our democratic form of government. Moreover, the reporting and investigative procedures employed by the news media provide the means by which the potential abuses inherent in secretive judicial proceedings are prevented.\textsuperscript{77} Justice Clark, speaking for the Supreme Court in \textit{Sheppard v. Maxwell},\textsuperscript{78} observed that

\begin{quote}
[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish
\end{quote}

\begin{itemize}
\item Standards Relating to Trial By Jury 74 (Tent. Draft 1968). For a suggested change in the New York single-party rule see text at 574. \textit{Compare} CPL 270.25(2) \textit{with Iowa Code Ann.} § 779.11 (Supp. 1975) (the state and the accused receive eight peremptory challenges if the crime charged is punishable with life imprisonment) \textit{and Fla. Stat. Ann.} § 913.08(1)(a) (1973) (10 peremptories are allotted).
\item 74. \textit{See} note 30 \textit{supra} \& accompanying text.
\item 76. \textit{U.S. Const. amend. I}.
\item 78. 384 U.S. 333 (1966).
\end{itemize}
information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.79

As a result, the press generally has been given "a free hand" in reporting or commenting upon criminal judicial proceedings. However, it is clear that an unrestricted and over-zealous press may go beyond its function as a protector of the criminal justice system. It may assume, instead, the role of a prosecutor through its investigative powers, the role of an attorney through its ability to color and present the "facts," or finally, the role of a jury through its promulgation of its opinion on the merits of the case.81 In so doing, the accused's due process guarantee to be tried by an impartial jury may be undermined if, in fact, press coverage has some adverse impact upon the impartiality of potential or actual jurors. Over the years, courts have become increasingly aware of the persuasive power of the press. Since the courts have "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media" and reluctant to undermine the constitutional right to be tried by a fair and impartial jury, a conflict necessarily exists between these two constitutional rights.84 A discussion of the proper function of the jury illustrates the impact of this conflict upon the right to fair trial; an examination of the judicial response to this conflict and an analysis of the psychological effects of prejudicial publicity demonstrate how the granting of additional peremptory challenges can help to preserve this right.

The ideal jury theoretically consists of twelve unbiased jurors, who, under the guidance of a judge, decide the case solely upon the evidence adduced at trial.85 Through the implementation of the rules

79. Id. at 350.
80. Id.
81. Sheppard is perhaps the one case which best illustrates the transformation of the press from a protector of justice to a perpetrator of injustice. The Supreme Court's opinion is replete with references to the inflammatory and conclusionary press comment.
82. U.S. CONST. amend. VI provides, in part, 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 the district wherein the crime shall have been committed . . . ."
of evidence, information which may unduly confuse or prejudice, notwithstanding its probative value, is excluded from the jury. Justice Holmes once observed that “[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether private talk or public print.” However, in a country in which a free press will often publish reports concerning the details of a crime, its alleged perpetrator, or an ongoing criminal trial, potential and actual jurors are likely to be exposed to information which has not been subjected to the exclusionary rules of evidence. Since this information may be inaccurate or prejudicial and have a great impact on the mind of a juror, his impartiality may be questionable. It would be an impossible task, however, to locate jurors completely sheltered from extrajudicial knowledge of a case.

Since restrictions upon the press have never met with overwhelming judicial approval, it became apparent that the potential for unconstitutionally biased jurors in highly publicized criminal cases would increase as the power of the news media to disseminate information expanded. Consequently, it was decided early in the history of this nation that jurors exposed to, but not prejudicially influenced by press coverage of a particular case, could constitute an impartial jury, thus preserving the accused’s sixth amendment guarantee. The press retained full freedom to publish while the appellate courts could rectify any injustice resulting therefrom.

Over the years the Supreme Court has been presented with numerous cases in which defendants have alleged that juror bias resulting from publicity prevented a fair trial. These post-conviction review cases have both reversed convictions when trials were tainted by extraordinary news coverage and have also articulated principles by which the formulation of preventative measures has been guided.

The Supreme Court in Reynolds v. United States noted that a juror who had formed an opinion as a result of extrajudicial “evidence...
dence" could not be presumed to be biased. Moreover, the burden
was placed upon the defendant to show that the preconceived opinion
was of such a nature as to raise the "presumption of partiality."\textsuperscript{93} This
case established an obviously difficult burden for the defendant es-
pecially where the opinionated juror professes that he will be able
to set aside his opinion.\textsuperscript{94} Ostensibly, Reynolds demonstrated the belief
that a juror's exposure to extrajudicial information only minimally
affected the juror's ability to be impartial. Later cases, however, illus-
trate the Supreme Court’s increased, yet still limited, sensitivity to the

In \textit{Marshall v. United States},\textsuperscript{95} some members of the jury were
exposed to news reports which described the defendant's criminal
record. Notwithstanding the assurances of those jurors that they could
be impartial, the Court determined that the information had a high
potential for prejudice and reversed the conviction. While this case
apparently stood for the proposition that a juror's mere exposure to
inadmissible prejudicial information would raise the presumption of
partiality, its coverage was restricted to federal cases.\textsuperscript{96}

In 1961, the Supreme Court, for the first time, reversed a state-
court conviction on the basis of the defendant's inability to receive
an impartial trial because of intense pretrial publicity. In \textit{Irvin v.
Dowd},\textsuperscript{97} the defendant was tried and convicted in a community which
had been deluged with news accounts of the defendant's prior criminal
behavior.

The Court looked to the voir dire examination and noted that
8 of the 12 actual jurors expressed bias against the accused, yet claimed
that they would be able to set aside their opinions. Since almost 90
percent of the prospective jurors examined expressed a belief in the

\begin{itemize}
\item \textsuperscript{93} \textit{Id.} at 156.
\item \textsuperscript{94} Of course, the trial judge renders the final decision on a juror's impartiality or
lack thereof, as "[i]t is thought that by observing the juror's manner in making such an
assertion [the ability to set aside an opinion] the trial court is able to decide whether
or not the juror is impartial." Comment, \textit{Fair Trial v. Free Press: The Psychological
Effect of Pre-trial Publicity on the Juror's Ability to Be Impartial; A Plea for Reform,
38 S. Cal. L. Rev. 672, 675 (1965)}.
\item \textsuperscript{95} 360 U.S. 310 (1959). Prior to \textit{Marshall}, some members of the Supreme Court,
in several decisions, expressed their displeasure with the requirement that a defendant
prove that extrajudicial influences actually prejudiced the jury. However, a less stringent
requirement did not, in fact, find favor with a majority of the Court until \textit{Marshall}, and
later decisions. \textit{See}, e.g., \textit{Stroble v. California}, 343 U.S. 181 (1952) (Frankfurter, J.,
dissenting); \textit{Leviton v. United States}, 343 U.S. 946 (1952) (Mem. of Frankfurter, J.,
on the denial of certiorari); \textit{Sheppard v. Florida}, 341 U.S. 50 (1951) (Per curiam;
Jackson, J., concurring).
\item \textsuperscript{96} 360 U.S. at 313.
\item \textsuperscript{97} 366 U.S. 717 (1961).
\end{itemize}
defendant's guilt, the Court easily found that the case had become a *cause célèbre* in the community. The sum total of these facts indicated such a "pattern of deep and bitter prejudice" that the jurors who thought they could set aside their opinions could not be believed.

Eight out of the 12 [jurors] thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.99

Thus, for the first time a state-court defendant had met the burden of the test set forth in *Reynolds v. United States* by showing actual prejudice.100 While the Court's dictum concerning the psychological effects of publicity and preconceptions apparently illustrated its recognition of the theories of modern psychology,101 other dicta in the Court's opinion more accurately reflected the tenor of its decision.

Speaking for the court and attempting to set forth the definition of an indifferent juror, Justice Clark stated that:

> It is not required, however, that the jurors be totally ignorant of the facts and the issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.102

Thus, an allegedly biased juror may take a seat in the jury box if he convinces the trial court that he can disregard his bias. Although the Court also noted that the biases created by extensive news coverage are not easily set aside, this principle has been narrowly applied. Some decisions have demonstrated that the presumption of juror impartiality will be rebutted in only the most flagrant cases.103

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98. *Id.* at 727.
99. *Id.* (citation omitted).
100. Comment, *supra* note 60, at 309.
101. See notes 151-60 *infra* & accompanying text.
103. *See*, *Beck v. Washington*, 369 U.S. 541 (1962), where the defendant claimed that he was convicted by a jury influenced by publicity. The Court examined the voir dire but refused to reverse the conviction. The Court distinguished *Beck* from *Dowd* in that only 27 percent of the prospective jurors thought the defendant was guilty; that the actual jurors had expressed no opinion of guilt; that the news stories were factual rather than vindictive; that sufficient time had elapsed between the publicity and
In subsequent cases the Supreme Court reversed several state-court convictions without examining the voir dire. Prejudice was presumed as a result of the extremely virulent pretrial publicity and/or the prejudicial atmosphere created by the press through its presence in the courtroom during the trial.

In *Rideau v. Louisiana*, a film of the defendant's confession was broadcast over the local television station on at least three occasions prior to trial. A request for a change of venue based upon this fact was denied. The Supreme Court found the trial so lacking in due process that it did not feel it was necessary to examine the record on voir dire. Reversal followed as a matter of course.

Three years later the conviction of Billie Sol Estes was before the Supreme Court for review in *Estes v. Texas*. The defendant's trial had received live television coverage which was said to have prevented a fair and impartial trial. The Court reversed the conviction, deciding that the television coverage had created a prejudicial atmosphere totally inimical to a fair trial guarantee.

An important decision on the subject of free press–fair trial is *Sheppard v. Maxwell*. In *Sheppard* the defendant, who was convicted for the murder of his wife, was also the subject of highly inflammatory pretrial publicity. His interrogation at a coroner's inquest, at which he appeared without counsel, was televised locally. In addition, the news media was given free access to the courtroom during the trial.

The Supreme Court reversed the conviction citing, *inter alia*, the numerous instances of prejudicial news reporting and the trial-court judge's failure to adequately control the carnival atmosphere created by the press. The Court indicated that the showing of actual prejudice was not a prerequisite for reversal in every trial prefaced by extensive publicity. However, by relying on the totality of the circumstances to justify its decision, the Court made it clear that ap-

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105. Id. at 727.
107. Id. at 587 (Harlan, J., concurring) (television cameras have no business in the courtroom).
109. Id. at 340-42, 355.
110. Id. at 351-52.
111. Id. at 352.
pellate review of "publicity" cases would be made on a case-by-case basis. It was apparent that there would be no clearly defined standards to judge the impact of publicity upon the right to a fair trial.

The Court noted, with disapproval, the increasing tendency of the press to offer unfair and prejudicial comments about pending trials.\textsuperscript{112} It recognized that "the difficulty in effacing prejudicial publicity from the minds of jurors" placed upon trial courts the duty "to ensure that the balance is never weighed against the accused."\textsuperscript{113} Thus, where the trial court has failed to take "strong measures" to prevent prejudicial publicity from infecting the proceeding, the appellate courts are duty-bound "to make an independent evaluation of the circumstances"\textsuperscript{114} in order to determine whether the trial met constitutional standards.

In 1973, the Court of Appeals for the Third Circuit in \textit{United States ex rel. Doggert v. Yeager},\textsuperscript{115} through its independent evaluation of the circumstances and a novel interpretation of previous Supreme Court decisions, reversed a state-court conviction. \textit{Yeager} involved a habeas proceeding brought by a defendant who alleged that the "trial court failed to take appropriate steps to protect the jury from the possible taint"\textsuperscript{116} of several prejudicial news articles published during the course of his trial.\textsuperscript{117} The court noted that \textit{Marshall} was factually analogous\textsuperscript{118} but expressly limited to the federal courts. However, the \textit{Yeager} court reasoned that decisions subsequent to \textit{Marshall} made it applicable to state-court cases. The \textit{Yeager} court interpreted \textit{Dowd, Rideau} and \textit{Estes} to mean that it was "no longer necessary that a defendant show that the jury actually was prejudiced . . . [or] that . . . prejudicial material actually reached the jury. . . ."\textsuperscript{119} Thus, the court concluded that the underlying theory of \textit{Marshall}, that a juror's mere exposure to prejudicial articles would disqualify him notwithstanding

\begin{thebibliography}{9}
\bibitem{112} Id. at 362.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{115} 472 F.2d 229 (3d Cir. 1973).
\bibitem{116} Id. at 230.
\bibitem{117} Two jurors who were ultimately excused admitted to reading news articles concerning the defendant's previously withdrawn guilty plea and purported escape attempt despite the trial court's warning not to do so. These jurors stated that the publicity would not affect their impartiality. However, the trial court refused to ask the other jurors whether or not the articles had been discussed among them. \textit{Id.} at 230-31.
\bibitem{118} On another occasion, after a newspaper containing an article regarding the defendant's withdrawn guilty plea was seen in a luncheonette in which several of the jurors had eaten, the trial court refused to inquire whether or not the jurors had read the story. \textit{Id.} at 231.
\bibitem{119} Id. at 237.
\bibitem{117} Id. at 238.
\end{thebibliography}
his assurances of impartiality, was held to be applicable to state-court defendants.\textsuperscript{120}

Although the extension of \textit{Marshall} to state-court cases more accurately reflects the findings of modern psychological research on the effects of prejudicial publicity,\textsuperscript{121} the Supreme Court in a subsequent decision expressly rejected such an extension.

In \textit{Murphy v. Florida},\textsuperscript{122} the defendant was convicted in 1970 on charges stemming from a 1968 robbery. During the interim, Murphy was indicted for and convicted of an unrelated murder charge in March, 1969. In addition, he pleaded guilty to one count of a federal indictment involving stolen securities. These events were extensively publicized in the county in which the robbery trial took place.\textsuperscript{123} In rejecting Murphy's claim that he was denied a fair trial because some jurors knew about his past convictions, the Court found that \textit{Marshall} could not be applied beyond the federal courts.\textsuperscript{124} Moreover, the Court rejected any notion that \textit{Dowd} and its progeny had dispensed with the requirement that a state-court defendant prove that extrajudicial evidence had actually prejudiced the jury against him. The Court observed that under the circumstances in \textit{Dowd} actual prejudice was readily apparent.\textsuperscript{125} While prejudice was presumed in \textit{Estes}, \textit{Rideau} and \textit{Maxwell} because "the influence of the news media either in the community at large or in the courtroom itself, pervaded the proceedings,"\textsuperscript{126} the Court refused to equate the facts in \textit{Murphy} with those present in the prior cases. In \textit{Murphy}, the Court looked to the totality of the circumstances\textsuperscript{127} in order to determine whether the jury may have been prejudicially affected by extrajudicial knowledge of the case or the defendant's prior criminal record.

Reaffirming the mandate of \textit{Dowd} that the defendant must "raise the presumption of partiality,"\textsuperscript{128} the Court reevaluated the voir dire.

\begin{itemize}
\item \textsuperscript{120} Making its independent evaluation of the circumstances as \textit{Sheppard} required, the court found that a new trial was required "because there was a \textit{substantial likelihood} that the contents of the newspaper accounts making reference to his retracted guilty plea and to an alleged escape attempt came to the attention of the jurors who deliberated." 472 F.2d at 239 (emphasis added).
\item \textsuperscript{121} See notes 153-60 infra & accompanying text.
\item \textsuperscript{122} 95 S. Ct. 2031 (1975).
\item \textsuperscript{123} Murphy first achieved notoriety as a result of his role in the 1964 theft of the Star of India sapphire from a New York museum, and remained a newsworthy figure thereafter. Despite the publicity concerning Murphy and his other convictions, the trial court denied a change of venue. \textit{Id}.
\item \textsuperscript{124} \textit{Id}. at 2035.
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} \textit{Id}.
\item \textsuperscript{127} \textit{Id}. at 2036.
\item \textsuperscript{128} \textit{Id}.
\end{itemize}
Although several jurors knew of Murphy's criminal record, it was found that only one juror exhibited any bias. However, an examination of the entire voir dire transcript enabled the Court to conclude that this juror "had no deep impression of the petitioner at all." The Court noted that under certain conditions assurances of impartiality from jurors who had formed opinions concerning a defendant's guilt could be disregarded. However, the Court stressed that such assurances would not be considered dispositive only if it is found that substantial prejudice existed in the entire group of prospective jurors, i.e., "where most veniremen . . . admit[ed] to a disqualifying prejudice [during voir dire]." Since only 20 of the 78 jurors examined were excused because of their opinion about the defendant's guilt, the Court distinguished Murphy from Dowd. In the latter case, over half of the prospective jurors had admitted to predisposition. This difference, the Court observed, prevented it from holding that the community in which the defendant was tried was so prejudiced against him "as to impeach the indifferences of jurors who displayed no hostile animus of their own." Therefore, since no inherent or actual prejudice was shown to exist in the setting of the trial, the Court denied the habeas relief.

Several trends can be discerned from the preceding cases. First, these decisions illustrate the Supreme Court's awareness of the adverse effects of prejudicial publicity. However, they also demonstrate that different standards of review are applicable depending on the original forum. In federal cases, it has been determined that a juror's mere exposure during trial to inadmissible and prejudicial information necessarily rebuts the presumption of impartiality. However, in state-court trials, the Supreme Court has found that a juror's extrajudicial knowledge of similar information does not alone rebut the presumption of impartiality. Thus, the Supreme Court has put a

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129. Id. at 2037. The length of time between the publication of the bulk of news articles and the trial (seven months) and the factual nature of the news articles, were not seen by the Court as indications of an inflammatory community atmosphere. Id.; see note 103 supra.

130. 95 S. Ct. at 2037 (emphasis added).

131. Id.

132. Id. at 2038.

133. Justice Brennan, in his dissent, found that the transcript of the voir dire illustrated a general feeling of prejudice against the defendant which had been engendered by the news media. Consequently, the trial court's denial of Murphy's motion for a change of venue, Justice Brennan reasoned, was prejudicial error. Id. (Brennan, J., dissenting).


135. See notes 122-32 supra & accompanying text.
state-court defendant who claims his trial was infected by prejudicial publicity at a disadvantage in the appellate courts in relation to his federal-court counterpart.

Second, the Supreme Court, while cognizant of the tendency of the news media to unfairly report and comment upon pending cases, has not mandated the use of prior restraints upon the press. Moreover, various judicial committees have similarly eschewed the placing of direct restraints on the press. While the invocation and enforcement of prior restraints in spectacular or unusual criminal actions would significantly reduce the ill-effects of the free-press-fair-trial conflict, the constitutional questions raised thereby have apparently inhibited the use of such devices to protect a defendant's right to a fair trial. Although it has been suggested that first and sixth amendment guarantees are of equal importance, some commentators have seen the various publicity cases as illustrative of the Supreme Court's preference for freedom of the press. It is true that the many attempts to curb the power of the press have been rejected by the Court. However, more recent developments suggest that the traditional constitutional protections afforded the news media may be diminishing.

Silence or gag orders have been issued by trial courts with increasing frequency in order to ensure that prospective jurors are not unduly or unconsciously influenced by extrajudicial knowledge of a pending criminal proceeding. Gag orders which prohibit the parties to

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137. See, e.g., ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 150 (Approved draft 1968) [hereinafter cited as REARDON REPORT]; SPECIAL COMMITTEE ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL, FINAL REPORT WITH RECOMMENDATIONS vii (1967); REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391, 401-02 (1968) [hereinafter cited as KAUFMAN REPORT].
140. See New York Times Co. v. United States, 403 U.S. 713 (1971) (attempted use of prior restraint rejected). See also Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941) (reversals of contempt convictions for publications since there were no clear and present dangers).
141. Cf., e.g., Brazburg v. Hayes, 408 U.S. 665 (1972) (newspaper reporter has no testimonial privilege to conceal sources of, and facts relating to, criminal activity being investigated by the grand jury which subpoenas him). But cf. Cox Broadcasting Corp. v. Cohn, 421 U.S. 997 (1975) (a state cannot restrict a newspaper's publication of a rape victim's name obtained from public judicial records).
a criminal action and court personnel from commenting on the case and eliminate potential sources of prejudicial publicity, have withstood constitutional attack. The constitutionality of gag orders which directly prohibit the news media’s coverage of a criminal trial, however, remains in doubt. In 1974, Mr. Justice Powell, sitting as a circuit justice, granted a stay in a Louisiana trial judge’s order which prohibited, inter alia, the publication of the accused’s criminal record, alleged confessions, or inculpatory statements. In a more recent case, however, Mr. Justice Blackmun, in his capacity as a circuit justice, approved a portion of a Nebraska court’s order which restrained the media from publishing prior to trial, confessions, statements against interest, and the criminal record of the accused in a widely-publicized murder-rape case. Although no generalizations concerning the validity of gag orders can be made at this juncture, guidance in this unsettled area of constitutional law may be forthcoming since the Supreme Court has decided to hear the appeal from the Nebraska Supreme Court’s modification of the gag order ruled upon by Mr. Justice Blackmun.

Since the desirability, effectiveness, and constitutional status of prior restraints upon the media is uncertain, it is suggested that innovative procedures such as granting additional peremptory challenges to defendants, may be employed to mitigate the adverse effects of pretrial publicity without unduly restricting the media’s functions. It is against this background that Justice Gilbert King’s ruling should be viewed.


143. See, e.g., United States v. Dickinson, 465 F.2d 496, 500 (5th Cir. 1972), wherein the court vacated and remanded the contempt convictions of two reporters which were later affirmed, 349 F. Supp. 227 (M.D. La. 1972), aff’d per curiam, 476 F.2d 373 (5th Cir.), cert. denied, 414 U.S. 979 (1973). Although the silence order was held unconstitutional, the contempt conviction was valid because it was only collaterally related to the underlying order, which effectively prevented the appellate court from disturbing the conviction. For illustrations of the difficulty in seeking review of silence orders see Rendleman, Free Press-Fair Trial: Review of Silence Orders, 52 N.C.L. Rsv. 127 (1973).


147. Prior to the time a court obtains jurisdiction in a criminal case and is thus able to issue a gag order, substantial prejudicial publicity may have been released by the press. See note 159 infra & accompanying text.
B. Detecting and Avoiding the Effects of Pretrial Publicity: The Utility of Peremptory Challenges

The Supreme Court in *Sheppard v. Maxwell*, realizing that the press would probably not indulge in self-regulation and that judicially imposed regulations on the press would present grave constitutional issues, delegated the duty of protecting a defendant's fair trial guarantee to the trial courts. Regarding the problems encountered in cases involving pretrial publicity, the Court suggested that a change of venue or a continuance of the trial might help to counteract the prejudicial effects of extensive news coverage.\(^{148}\) Moreover, the Court determined that trial courts might exert control over people under its jurisdiction, such as prosecutors, defense counsel, the accused, witnesses, police officers, and court personnel. These people are likely to provide the press with noteworthy, but sometimes prejudicial, information in the pretrial as well as trial stages of the action.\(^{149}\)

Although these suggestions have been and should continue to be employed in the highly publicized cases, jurists and commentators have found that the voir dire examination "is one of the chief legal remedies available to protect the criminal defendant from the deleterious effects of press comment. . . ."\(^{150}\) An extensive and probing voir dire assumes a most important role in criminal trials preceded by a high degree of publicity. It represents the final procedure for screening out prejudicial jurors. Moreover, as demonstrated by *Dowd* and *Murphy*, the voir dire transcript is meticulously scrutinized by appellate courts in determining whether the defendant received a fair trial.\(^{161}\)

As previously discussed, the challenge for cause is the fundamental device that can be implemented to eliminate partial jurors. Through questions asked on voir dire, counsel seeks to ascertain the extent of

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\(^{148}\) *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Subsequent committee reports approved of the increased use of these devices. *See*, *e.g.*, Reardon Report, supra note 137, at 119-28 (change of venue); Kaufman Report, supra note 137, at 412 (continuance). However, problems arise in the use of both devices. A change of venue, which is within the discretionary powers of the court, may not be effective if publicity is widespread and need not be granted by the Court. *See* Comment, supra note 60, at 312. Although a continuance may be useful, it is difficult to determine how long the continuance should last. Moreover, a prolonged continuance may conflict with a defendant's right to a speedy trial. *See* Comment, supra note 60, at 314-15.

\(^{149}\) 384 U.S. at 363. This would conceivably require the use of special orders which would seek to limit extrajudicial statements of parties, court personnel and witnesses. *See* Kaufman Report, supra note 137, at 407-12.


\(^{151}\) *See* notes 97-100 supra & accompanying text.
prospective jurors’ extrajudicial knowledge of the case gained through his exposure to news reports. If a juror admits to having formed a preconceived opinion about the defendant’s guilt or to having been exposed to prejudicial publicity, the juror would be subject to a challenge for cause because his state of mind is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial. However, if the juror claims he will not be influenced by his opinion or impressions, the juror will generally not be excused. The test for impartiality which was enunciated in Dowd, and recently reaffirmed in Murphy, has been the guiding principle in New York State since 1962. This test, which generally makes a juror’s declaration dispositive of the issue of impartiality, may not adequately protect a defendant in a well-publicized case. “To assert that jurors can set aside initial impressions formed by pretrial press comment is contrary to the findings of modern research. . . .”

Psychological experiments have shown that one’s first impression of another, if it relates to a central personality trait, “will tend to form a belief which refuses to yield or change.” Accordingly, it appears that the public, believing the media to be a reliable source of information, will form strong beliefs about alleged participants in well-publicized cases. Since the published information generally contains incriminating facts relating to the accused, it follows that a belief in the incriminating facts will “result in the formation of a belief in his guilt.”

A potential juror who has been exposed to publicity concerning a pending trial may be subtly biased against the accused without realizing it. Since it appears that it is “psychologically impossible” to set aside this predisposition, it is doubtful that the juror will be able to resolve reasonable doubts in favor of the accused, even if such potentially prejudicial doubts were openly admitted.

Experiments have shown that pretrial publicity tending to show the guilt of the accused, such as the publication of a confession, appears to have a devastating effect on the ability of potential jurors to

152. CPL 270.20(1)(b).
153. See note 102 supra & accompanying text.
154. 95 S. Ct. at 2036.
156. Stanga, supra note 106, at 5.
157. Comment, supra note 94, at 678.
158. Id. at 681.
159. Id.
160. Id. at 682.
161. Id. at 683.
be impartial. Moreover, some news accounts which are totally factual in nature may present vivid descriptions of a brutal and violent offense. Such accounts may prejudice the juror, even though he may not have a conscious opinion about the guilt of the accused.

Psychological data thus make it clear that the latent psychological effects of pretrial publicity on a juror make it difficult for the juror to recognize his own bias. Since the juror's opinion of his impartiality is given great weight in the determination of a challenge for cause, the question of the effect of publicity on the juror is, to a great extent, left to the juror. The juror, who may not be cognizant of his prejudice, thus becomes the primary arbiter of the effect of pretrial publicity. The difficulty with placing this responsibility with the juror has been recognized:

[I]t seems unlikely that a prejudiced juror would recognize his own personal prejudice or knowing it, would admit to it. However, since there are no empirical data to contradict his declaration of detachment, his word is ordinarily the determining factor.

These psychological factors make a challenge for cause premised upon a juror's bias resulting from prejudicial publicity difficult to substantiate under present judicial doctrines.

As noted previously, peremptory challenges are considered necessary in the jury selection process to supplement challenges for cause. Moreover, the reasons justifying the necessity for peremptory challenges are even more compelling in cases involving extensive pretrial publicity. Obviously, there is a greater potential for bias where the news media has provided the public with numerous and detailed accounts.

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165. In light of this fact, it is felt that the standards for challenges for cause be reduced. If a juror, who has formed an opinion about the defendant's guilt or has read prejudicial news reports, declares that he will be impartial, he will generally qualify as a juror. However, it has been suggested that "[a] prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence of or contents of a confession or other incriminating matters that may be inadmissible as evidence . . . shall be subject to a challenge for cause without regard to his state of mind." REARDON REPORT, supra note 137, at pt. IV, § 3.4(b). Ostensibly, this would extend the underlying rationale of Marshall v. United States, i.e., that a juror's knowledge of inadmissible and prejudicial information necessarily precludes him from being impartial. See notes 95-96 supra & accompanying text.
166. See notes 59-66 supra & accompanying text.
of a criminal offense, the suspected offender or collaterally related issues since "[i]t is now unequivocally established that publicity alone can prevent a fair trial."167 However, the bias caused by publicity is difficult to establish because the psychological phenomena responsible for its existence are not readily demonstrable in a manner cognizable by a court of law. Thus, the use of peremptory challenges to "eliminate the extremes of partiality"168 and to ensure that the jurors try the case on the basis of the evidence presented at trial, becomes especially important in cases which have become causes célébres. The tendency of jurors to be mistaken about their impartiality169 as a result of unconscious biases often created by pretrial publicity and the inherent difficulties in challenging a juror for cause in highly publicized cases combine to make an extensive voir dire and the intelligent exercise of a sufficient number of peremptory challenges necessary in securing impartial juries in such cases.170

It is clear that peremptory challenges serve an important function in the jury selection process inasmuch as they may be employed to eliminate potential jurors who are presumably biased but not subject to a challenge for cause. Since extensive pretrial publicity increases the potential for biased jurors who may effectively avoid being successfully challenged for cause, an increase in the statutory allocation of peremptory challenges in such cases would theoretically provide additional protection for the integrity of the jury selection process. The court of appeals in State v. King refused to explore the possible rationale behind Justice King's decision to grant Hill and Pernasilice 10 additional peremptory challenges. It is submitted, however, that in the case of a criminal trial surrounded by extensive and potentially prejudicial publicity, there is ample justification for the judicial modification of CPL 270.25. Moreover, the theory underlying the granting of additional peremptory challenges in well-publicized cases, which is illustrated by decisions in other jurisdictions, should serve as the basis for the legislative revision of CPL 270.25.

167. Comment, supra note 60, at 327.
169. REARDON REPORT, supra note 137, at 61.
170. For an excellent discussion of the increased awareness of the importance of peremptory challenges in the jury selection process see Note, Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges, 27 STAN. L. REV. 1493 (1975). The direct relation between the use of peremptory challenges and the existence of pretrial publicity was parenthetically noted by the Supreme Court in Swain. 380 U.S. at 218 n.24, citing Howard, Criminal Justice in England 363 (1991) (the use of peremptory challenges in England is negligible because of the courts' greater control over pretrial publicity).
On the federal level, a trial court is expressly given the authority by statute to increase the number of peremptory challenges available to multiple defendants. This power has been invoked repeatedly in highly publicized cases. In United States v. Bonanno, for example, 27 joined defendants requested a change of venue or continuance as a result of pretrial publicity. In denying these motions the trial judge said:

The practice of voir dire examination of prospective jurors is perhaps the most important safeguard against prejudiced jurors in the administration of criminal justice. In order to strengthen its protection I have decided to award the defense 42 peremptory challenges, which is 32 more than is required while the government will be held to its 6 challenges.

The practice of granting additional peremptories has not been limited to multiple-defendant cases. In addition to one of the affidavits submitted by Hill and Pernasilice in King, there is documentation of the extended use of peremptory challenges in single-defendant cases inundated with pretrial publicity. In the 1967 Illinois murder trial of Richard Speck, for example, the lone defendant was permitted to exercise 160 peremptory challenges as a result of the ex-


Presumably, the joint exercise of peremptory challenges under the single-party rule of CPL 270.25 is justified in the interests of time, expense and by the fact that codefendants usually have similar interests. Cf. Comment, supra note 64, at 753-55. However, there are cases in which multiple defendants have adversely related interests. This is apparently recognized in the federal courts (Fed. R. Crim. P. 24(b)) and in Maryland (Md. Ann. Code vol. 9B, rule 746(2)(1971)), for example, since the trial court may allow multiple defendants to separately exercise additional peremptory challenges. Thus, it is submitted that the New York Legislature include in CPL 270.25 a provision similar to that in the federal and Maryland rules in order to adequately protect multiple defendants who have hostile interests as a result of their defenses or adverse publicity. For a suggested revision of CPL 270.25 see text at 574.

174. See note 30 supra & accompanying text.
tensive and prejudicial publicity concerning the case. Under the applicable statute, the defendant was only entitled to 20 such challenges.

Examining Justice King's ruling against this background, it is clear that the granting of additional peremptory challenges in cases which have become causes célèbres has been and should continue to be regarded as a supplementary method for protecting the right to a fair and impartial trial. Although the granting of an additional number of peremptory challenges does not guarantee the impanling of a totally unbiased jury, Justice King's ruling should be seen as an earnest attempt to "prevent even the probability of unfairness" in the fundamentally important jury selection process.

CONCLUSION

A trial before an impartial jury and the existence of a free press are fundamentally desirable and constitutionally required in our society. The overzealous and unbridled exercise of the latter constitutional freedom in relation to pending criminal trials may, however, unconstitutionally impinge upon the former. The apparent undesirability and uncertain constitutional status of the use of prior restraints on the news media has made it incumbent upon trial courts adjudicating highly publicized cases to utilize other devices at their disposal which are capable of ameliorating the free-press–fair-trial conflict. In recognition of the unconscious biases often fostered by pretrial publicity and the limited effectiveness of other methods used in attempting to prevent these biases from tainting a jury trial, the extended use of peremptory challenges is a viable method for protecting defendants' sixth amendment guarantee. This theory was illustrated in practice by Justice King's grant of additional peremptory challenges to the defendants in People v. Hill & Pernasilice.

Hopefully, Justice King's ruling will provide guidance for trial courts in controversial and well-publicized cases in the future. However, since the merits of Justice King's ruling were not reached by the court of appeals in State v. King, and because CPL 270.25 does not expressly authorize the granting of additional peremptory challenges,

175. People v. Speck, 41 Ill. 2d 177, 213, 242 N.E.2d 208, 227 (1968). It should be noted that the state was also given 160 peremptory challenges—the result of a stipulation by the parties. Id.
the effective precedential value of his ruling is limited. Moreover, the possibility of a reversal of the ruling in *People v. Hill & Pernasilice* remains. In order to end the uncertainty regarding the propriety of Justice King's trial order, it is suggested that CPL 270.25 be amended to incorporate an express delegation of discretionary power to trial courts to increase the minimum statutory allocation of peremptory challenges to single and multiple defendants. The following is offered as a possible amendment to CPL 270.25:

4. In the interests of justice, the court may grant additional peremptory challenges to the defendant or defendants. The court may allow the additional peremptory challenges granted to multiple defendants to be exercised jointly or separately.

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