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court properly acted within its discretion in regulating the admission of opinion based on direct knowledge and the premises underlying this opinion.

Although defense counsel was attempting to convey to the jury the impression that its expert had actual knowledge of defendant's alleged intoxication by his question after the hypothetical problem, there appears no valid reason for the Court to hold as a matter of law that the question should have been answered and that no objection should have been made. The position of the question immediately following the hypothetical, although misleading, could have been posed in another form, alerting the jury to the fact that the question was being asked with regard to the expert's personal observation. Indeed, since the court has discretion in regulating whether a medical expert should prefix his opinion with reasons, perhaps it should also instruct the person posing the question on the desired procedure, so as not to confuse the jury. Reversal, nonetheless, was warranted, since the immaterial testimony of the prosecution's witness tended to cloud the question of insanity. Testimony elicited by a psychiatrist, appointed by the court to determine defendant's ability to understand the charge, is a humanitarian gesture at most. Reports by such psychiatrists are not admissible by statute,[6] and testimony, by the same token, should not be introduced. Information obtained by such an investigation may amount to testimonial compulsion.[7] Moreover, capacity to understand the charge and to defend it at the time of trial involve different norms than insanity at the time of the commission of the act.[8] Although a person may be deemed guilty beyond a reasonable doubt, our society has recognized that a criminal act may be excused if the defendant was legally insane. Since the defendant in the instant case predicated his entire defense on the ground of insanity, he should be allowed to present this defense without being hampered by evidence which is not in issue.

L. H. S.

READING OF INFLAMMATORY ARTICLES BY JURORS HELD NOT ENOUGH TO WARRANT MISTRIAL

In *People v. Genovese*[1] the Court of Appeals affirmed defendant's conviction on the charge that he acted as a fight manager without having procured the required license.[2] The Court was concerned with the question of whether the defendant had been denied federal as well as state due process. After the jurors had been sworn but prior to the introduction of evidence, four articles appeared in three New York newspapers which reflected unfavorably on the defendant's character.[3] Defendant's motion for a mistrial based on the publica-

6. N.Y. Code Crim. Proc. § 662.
7. People v. Roth, supra note 5, at 83, 181 N.E.2d at 441, 226 N.Y.S.2d at 422.
8. Ibid.

1. 10 N.Y.S.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962).
2. N.Y. Unconsol. Laws § 8907, 8933 (McKinney 1961).
3. One of the articles referred to the defendant as a convicted narcotics boss. The

tion of these articles was denied. The trial judge then conducted a voir dire examination of the jurors which disclosed that eight of them had read some of these articles. Six of these jurors were allowed to remain when they declared that they had not been influenced by the articles and that they could arrive at a verdict based solely on the evidence presented in court. *Held*: one justice dissenting, the defendant was not prejudiced when the trial judge in the exercise of his discretion dismissed defendant's motion for a mistrial.

The defendant relied on *Irvin v. Doud*[4] in urging a violation of due process. However, the majority correctly pointed out that the situation in *Irvin* was clearly distinguishable. There, the community was aroused by six murders. After the defendant's arrest there followed months of radio and press comments highly unfavorable to the defendant. Hundreds of prospective jurors had to be excused because they had fixed opinions as to the defendant's guilt. Of the twelve jurors who were finally selected, eight stated that they believed the defendant to be guilty but that they thought they could render an impartial verdict. The defendant was convicted, and the U.S. Supreme Court reversed, stating that "where so many so many times admitted prejudice such a statement of impartiality can be given little weight."[5] Mr. Justice Frankfurter, concurring, stated the true basis of the decision: "How can fallible men and women reach a disinterested verdict based exclusively on what they hear in court when before they entered the jury box their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused? A conviction so secured constitutes a denial of due process of law in its most rudimentary conception."[6] It is clear that *Irvin v. Doud* is an extreme case and represents only a minimal standard for due process. In *Marshall v. United States*[7] cited in defendant's brief,[8] it was held that a federal judge had abused his discretion in refusing defendant's motion for a mistrial where material which he had previously ruled too prejudicial to be admitted as evidence reached some of the jurors through the medium of the press. The Court so held despite the fact that the jurors in question assured the judge that they could decide the case solely on the evidence presented at the trial. The Court went on by way of dictum to say that a trial judge has great discretion in areas such as this and that each case must turn on its own facts. It thus appears that *Marshall v. United States* does not represent the beginning of a standard in the area of federal abuse of discretion. The majority in the instant case, remarking that prejudice is a matter of degree, dismissed the *Marshall* case with a footnote.[9]

article further stated that the defendant was the chief lieutenant of an underworld boxing commissioner. Another article declared that the defendant would have been indicted on eighteen rather than two counts had it not been for the statute of limitations.

4. 366 U.S. 717 (1960).
5. Id. at 728.
6. Supra note 4, at 729-730.
7. 360 U.S. 310 (1959).
8. Brief for Appellant p. 30.
9. People v. Genovese, supra note 1, at 483, 180 N.E.2d at 422, 225 N.Y.S.2d at 30.

Judge Desmond in his dissent argued that the newspaper articles in question were inflammatory and that "jurors who would not be influenced by accusations such as those made in the newspapers against this defendant would either be of a kind whose minds for some reason do not react at all to what they read or those whose existing prejudices had already hardened to a point where nothing could worsen them."[10] He went on to say that New York ought to hold to standards no lower than those which would be supported by *Irvin v. Doud* and *Marshall v. United States*.

Prior to 1872 the law in New York was that a fixed opinion as to the guilt or innocence of a defendant held by a prospective juror operated in law to disqualify him on a challenge for cause even though he stated that he could decide the case impartially without regard for his previously formed opinion.[11] This common law was changed by c. 475 section 1 of the act of 1872[12] which declared that:

> The previous expression of an opinion . . . in reference to the guilt or innocence of the prisoner or a present opinion . . . in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person . . . qualified to serve as a juror; provided the person proposed . . . shall declare on oath that he . . . believes he can render an impartial verdict according to the evidence . . . and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.

The facts of the instant case do not fit squarely within the words of the quoted statute. Here the jury had already been sworn, and those jurors who were allowed to remain had not formed any opinion as to the defendant's guilt from what they had read. It thus appears that the instant case presents a situation less serious than that contemplated by the statute. There appears to be no logical reason why the test imposed by the statute ought not to be extended to situations where the jury has been sworn, especially where no evidence has been introduced; therefore, the Court's conclusion in the instant case is not surprising. The question remains, however, whether even a man of good faith can succeed in disregarding impressions and opinions formed from reading or listening to highly charged accounts of a defendant's background. There are many who would agree with Judge Desmond when he stated in his dissent: "I refuse to concede, however . . . that we must be satisfied by the incredible statements of jurors that they can read such stuff and then wipe it off their minds."[13]

Of course, the solution to the difficulty lies not in asking jurors if they can disregard what they have read, but rather in seeing to it that the news

10. Id. at 486, 180 N.E.2d at 424, 225 N.Y.S.2d at 30.
11. Cancemi v. People, 16 N.Y. 501 (1858); Freeman v. People, 4 Denio 9 (1847).
12. Substantially incorporated in N.Y. Code Crim. Proc. § 376(2).
13. People v. Genovese, supra note 1, at 487, 180 N.E.2d at 424, 425, 225 N.Y.S.2d at 33, 34.

media exercise restraint in the printing and broadcasting of material damaging to a defendant. In the past, the press and radio have had great difficulty in exercising self-restraint and ultimately the United States Supreme Court may have to decide the limits which the Fourteenth Amendment places on the power of the states to provide for adequate safeguards concerning interference with the right of fair trial by news media. As yet the Supreme Court has not reached this question, and until it does, a defendant's hope for a fair trial must rest, after the exhaustion of pre-emptory challenges, on the intuitive judgment of the trial judge.

R. J. D.

THIRD DEGREE ASSAULT NOT EXCUSED BY REASONABLE MISTAKE OF FACT

The defendant in a criminal prosecution for third degree assault asserted a defense of a reasonable mistake of fact. He was charged with actively intervening in the lawful arrest of a youth by two plainclothes policemen, who were engaged in a struggle with the boy. Defendant, arriving at the scene, saw two middle-aged men, undistinguished by their dress, fighting with a young boy, who, crying and with his pants half-off, was struggling to escape his tormentors. Without thought of personal risk, defendant went to the rescue. The intermediate court, one judge dissenting, reversed the conviction. On appeal by permission, *held*, reversed, and information reinstated. The intervention regardless of intent amounted to third degree assault, since the statutory offense does not require mens rea. The mistake of fact, in spite of its reasonableness, does not excuse the act specifically charged, because the needs of an orderly society demand that police officers go unhindered in the pursuit of their duties. *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (per curiam).

Third degree assault has generally been regarded as requiring only a general intent,[1] that is, the intent to perform the physical act of the crime, without any malice attendant upon the performance of the act.[2] The mere fact of an unlawful touching is sufficient to support the charge.[3] This statutory concept of assault is far removed from the common law requirement of *mens rea*, an essential element of the crime. The criminal codification in New York, however, omits the specific intent required in the higher gradations of assault.[4] The Court properly held that in the ordinary, simple assault charge the law

1. N.Y. Penal Law § 244:
Assault in third degree
A person who: 1. Commits an assault, or an assault and battery, not such as is specified in sections two hundred and forty and two hundred and forty-two . . .
Is guilty of assault in the third degree.

2. People (Starvis) v. Rogers, 170 Misc. 609, 10 N.Y.S.2d 722 (City Ct. 1939); 1 Wharton, Criminal Law and Procedure § 338 (12th ed. 1957).

3. See People ex rel. Gow v. Bingham, 57 Misc. 66, 107 N.Y. Supp. 1011 (Sup. Ct. 1907), where the photographing and measuring of a person accused of a crime was held to be third degree assault.

4. See N.Y. Penal Law §§ 240, 242.