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DePaul Law Review

Volume 16
Issue 1 *Fall-Winter 1966*

Article 13

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Recommended Citation

Robert Kopple, *Constitutional Law - Balancing of Free Press and Fair Trial - Inherent Prejudice from Mass Publicity*, 16 DePaul L. Rev. 203 (1966)
Available at: https://via.library.depaul.edu/law-review/vol16/iss1/13

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probably entirely eliminate the distribution system. In conclusion it is hoped that in the future that the instant case will be treated as sui generis and the Court's comprehensive language will not be sweepingly applied to categorize attempts at restricted distribution as per se violations of the Sherman Act.

Bruce Bauer

CONSTITUTIONAL LAW–BALANCING OF FREE PRESS AND FAIR TRIAL–INHERENT PREJUDICE FROM MASS PUBLICITY

In 1954, Dr. Samuel Sheppard was convicted of murdering his wife. Sensational publicity attended the murder investigation and trial, saturating the community with prejudice. In addition, it was alleged that the trial judge's permissive attitude toward the press resulted in disorder in the courtroom.[1] In 1964 the United States District Court of Ohio, upon a writ of habeas corpus, held that Sheppard was not afforded a fair trial. The Court of Appeals reversed by a divided vote, and the Supreme Court granted certiorari. Upon review, the Supreme Court held that the failure of the trial judge to protect the trial from inherent prejudicial publicity deprived Sheppard of a fair trial consistent with due process. The courtroom lacked the "judicial serenity and calm to which he was entitled."[2] *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

The *Sheppard* case represents a classic example of publicity interfering with the trial process. There has been a prevalence of such interference in recent years, due to the development of mass communication media. Possibly in response to this, the High Court in the *Sheppard* case sets forth suggestions for the prevention of prejudice in future trials. This note will

[1] Sheppard was convicted in 1954 in the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955), and the Ohio Supreme Court, 165 Ohio St. 293, 135 N.E.2d 340 (1956). The United States Supreme Court denied certiorari on the original appeal. 352 U.S. 910 (1956).

Examples of the prejudicial publicity and the trial judge's errors may be enumerated: a three day televised inquest in which Sheppard's counsel were not allowed to participate; articles in all three Cleveland newspapers stressing Sheppard's alleged extramarital affairs as a murder motive; repeated criminating statements by law enforcement personnel; publication in all three Cleveland newspapers of the veniremen and their addresses, resulting in letters and calls to all of them; the trial judge's permitting a news table to be set up within the bar and directly in back of counsel table; his failure to question jurors as to their exposure to news publicity; his failure to sequester the jury.

[2] Sheppard v. Maxwell, 384 U.S. 333,334 (1966). *Accord,* Estes v. Texas, 381 U.S. 532 *passim* (1965).

consider the restraints made available to the trial court, and how effective they can be in light of the constitutional guaranty to a free press. However, the atmosphere in the trial court and the impartiality of jurors cannot be polluted with prejudicial publicity. Thus, the court must weigh its restraints on the press against the defendant's right to a fair trial.

Freedom of speech and press, secured by the first amendment against abridgment by the Federal Government, is secured by the fourteenth amendment against abridgment by a state.[3] However, in *Pennekamp v. Florida*,[4] the Supreme Court pointed out that freedom of speech is not absolute, and that a balance must be struck between freedom of speech and a defendant's right to a fair trial.[5] In *Toledo Newspaper Company v. United States*,[6] the Supreme Court adopted the reasonable tendency test to determine when prejudicial publications could be punished by contempt. Accordingly, publications tending to obstruct justice could be punished. This limitation on freedom of press afforded the judiciary a workable tool to prevent or impugn prejudicial publicity.

The Supreme Court, however, discarded the reasonable tendency test in the case of *Bridges v. California*,[7] and reversed a contempt conviction on the grounds that only a clear and present danger to the orderly administration of justice is sufficient for a court to find contempt.[8] Today, freedom of press cannot be restricted unless the publications are "a serious and imminent threat to the administration of justice."[9]

This liberal interpretation of freedom of press is based on the theory that "a trial is a public event [and] what transpires in the courtroom is public property."[10] However, this would seem to be somewhat inaccurate for the right to a public trial is really for the benefit of the accused, and it is not intended to benefit the public.[11] Historically, public trials were

[3] Schneider v. State, 308 U.S. 147 (1939). *Accord*, Bridges v. California, 314 U.S. 252 (1941).

[4] 328 U.S. 331 (1946).

[5] *Id.* at 354–355; See Patterson v. Colorado, 205 U.S. 454 (1907). See generally, LeWine, *What Constitutes Prejudicial Publicity in Pending Cases*, 51 A.B.A.J. 942 (1965); COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 604 (1903).

[6] 247 U.S. 402 (1918).

[7] *Supra* note 3. The discussion of contempt in this case note is limited to contempt due to out of court publications, and not contempt committed within the presence of the court, which is subject to summary punishment by the judge.

[8] *E.g.*, Pennekamp v. Florida, *supra* note 4; Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 730 U.S. 375 (1962). See generally, Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919).

[9] Craig v. Harney, *supra* note 8, at 373.

[10] *Id.* at 374.

[11] In re Oliver, 333 U.S. 57 (1948). Will, *Free Press vs. Fair Trial*, DEPAUL L. REV. 197 (1963).

adopted for criminal defendants as a safeguard against their persecution by the courts through secret trials.[12] Therefore, access of the press to the courtroom was "not based on any inherent right which it enjoys, but stems from the right of the accused to a fair trial and the assumption that the press will further this end."[13] Thus, it would seem that the right of the press to be present at trials and to report proceedings is subordinate to the defendant's right to a fair trial.

Massive prejudicial publicity, like that in the *Sheppard* case, deprives a defendant of a fair trial by creating impressions which may cause the jurors to become partial. One basic element of a fair trial is that the defendant's case be tried in the "calmness and solemnity of the courtroom according to legal procedures."[14] Even more important, however, is that fundamental fairness be present in these legal procedures. The Supreme Court has reversed numerous convictions because fundamental fairness was lacking even though the formalities of trial were observed.[15] In *Moore v. Dempsey*,[16] the Court held that the atmosphere in and around the courtroom may be so hostile as to interfere with the trial process although the record would disclose no procedural error.

Impartiality of the jurors is another prerequisite to a fair trial. Where the press saturates a community with prejudicial publicity, the greatest threat to a fair trial is that the jurors may "be torn from their moorings of impartiality by the undertow of extraneous influence."[17] A jury's verdict must be based only upon the evidence developed at the trial, "[t]his is true regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies."[18]

In the *Sheppard* case, the presence of a news table within the bar, a three day televised inquest without benefit of counsel and the access of newsmen to witnesses, were a few of the facts which gave rise to the

[12] In re Oliver, *supra* note 11. See also, Chambers v. Florida, 309 U.S. 227 (1940), which contains a good discussion of the historical development of the right to a public trial.

[13] Will, *supra* note 11, at 203; Brief for the National Association of Broadcasters and Radio-Television News Directors Association as Amicus Curiae, p. 7, Estes v. Texas, *supra* note 2, to the effect that the Constitution gave broadcasters no unlimited right of access to the courtroom. See generally, 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940) on what spectators may be excluded from a criminal trial.

[14] Cox v. Louisiana, 379 U.S. 559, 583 (1965).

[15] Estes v. Texas, *supra* note 2; Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J. dissenting). See Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959).

[16] 261 U.S. 86 (1923).

[17] Pennekamp v. Florida, *supra* note 4, at 366.

[18] Irvin v. Dowd, 366 U.S. 717, 722 (1961). For the proper development of evidence, Patterson v. Colorado, *supra* note 5.

court's finding of inherent prejudice.[19] The Supreme Court made such a finding without requiring the defense counsel to illustrate a causal relationship between any allegedly prejudicial fact and resulting jury prejudice.

Early cases of prejudice required a specific showing of prejudice by defense counsel.[20] Needless to say, it was not always possible to pinpoint specific instances of prejudice effectively enough to win a reversal. In *Stroble v. California*,[21] the Supreme Court affirmed a murder conviction in spite of some evidence of news prejudice. The Court held that there was not a sufficient finding of prejudice because four days after the defendant released his confession to the press the same confession was admitted into the record. The *Stroble* case represents the early quantitative measure of prejudice, allowing extraneous influence to enter the trial process, so long as no specific instance of prejudice could be shown. In *Marshall v. United States*,[22] however, the Supreme Court ordered a new trial, even though seven of the jurors stated that they could render an impartial judgment, because news articles had reported prior convictions of the defendants. Such information constitutes one of the more serious types of prejudicial news.[23]

In *Irvin v. Dowd*,[24] the Supreme Court first recognized the subtle and damaging manner in which prejudice can pervade the trial atmosphere without always being apparent through specific instances of jury prejudice. The Court found that the defendant's murder conviction was the product of jury partiality due to intensive news coverage of the trial. In granting habeas corpus the Court said that, "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . . ."[25] With this decision the Supreme Court distinguished the evil of prejudicial publicity from the other impediments to a fair trial. "[A]gain and again, such disregard of fundamental fairness is so flagrant that the Court is compelled . . . to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome."[26] Mr. Justice Frankfurter, concurring in the *Irvin* case, noted that, with the prevalence of prejudicial publicity, in some cases "an accused is forced, as a practical matter, to forego trial by jury."[27]

[19] For a more detailed list of instances of prejudicial publicity and error by the trial judge in the Sheppard case see *supra* note 1.

[20] Stroble v. California, 343 U.S. 181 (1952).

[21] *Ibid.*

[22] 360 U.S. 310 (1959).

[23] LeWine, *supra* note 5.

[24] 366 U.S. 717 (1961).

[25] *Id.* at 728; *accord*, Stroble v. California, *supra* note 20; Shepard v. Florida, 341 U.S. 50 (1951) (concurring opinion); Moore v. Dempsey, *supra* note 16.

[26] Irvin v. Dowd, *supra* note 18, at 730.

[27] *Ibid.*

In *Rideau v. Louisiana*,[28] the Supreme Court enunciated the rule that the televising of a defendant confessing to a crime was inherently invalid under the due process clause of the fourteenth amendment even without a showing of prejudice. The requirement of showing actual prejudice, as in the past, was discarded in the *Rideau* case on the theory that the law intended to prevent even the probability of unfairness. More recently, in *Estes v. Texas*,[29] the televising of a criminal trial itself was found to be inherently a denial of due process. The *Sheppard* case extends this rule by holding that any massive and sensational publicity by the press is inherently prejudicial to the trial process.

However, the *Sheppard* decision says something far more important, for the Court has enunciated the need for trial level restraints which will effectively curb the proliferation of prejudice. Mr. Justice Clark, speaking for the Court, stated that present methods of assuring a fair trial "would have been sufficient to guarantee Sheppard a fair trial and so [we] do not consider what sanctions might be available against a recalcitrant press. . . . the carnival atmosphere at trial could have been avoided"[30] by the trial judge. The trial judge must take the initiative to implement present methods and supplement these methods with rules and regulations of his own.

The primary trial court remedy available against a prejudicial atmosphere is change of venue.[31] As an alternative the court may grant a continuance in order to allow community passion to recede.[32] In *Delaney v. United States*,[33] the Court found that where judicial elections are forthcoming it may be necessary to continue a case until after the elections in order to assure a fair trial. In the *Sheppard* case both the judge and chief prosecutor were candidates for judgeships in hotly contested elections. In such a situation the candidates may be tempted to use the trial to add impetus to their election campaign. For this reason a continuance should be granted. However, no continuance was granted in the *Sheppard* case although defense counsel requested it at the commencement of trial. Nevertheless, in instances of extreme prejudice, where a case achieves national notoriety, the above mentioned remedies may prove ineffective in securing a fair trial for the defendant.[34] Thus, two other trial court reme-

[28] 373 U.S. 723 (1963). Defendant's confession to robbery, kidnapping, and murder was televised three times and resulted in prejudice to the defendant's trial.

[29] *Supra* note 2.

[30] Sheppard v. Maxwell, *supra* note 2.

[31] Rideau v. Louisiana, *supra* note 28; Chambers v. Florida, *supra* note 12.

[32] Comment, 33 U. CHI. L. REV. 512 (1966), for a discussion of the defendant centered remedies designed to avoid trial prejudice.

[33] 199 F.2d 107 (1st Cir. 1952).

[34] See Jaffe, *The Press and the Oppressed—A Study of Prejudicial Reporting in Criminal Cases*, 56 J. CRIM. L., C. & P. S. 1 (1965); KAPLAN & WALTZ, THE TRIAL OF JACK RUBY, 37, 69–90 (1965), for a treatment of the extraordinary publicity surrounding the Ruby case.

dies are available, the granting of a new trial[35] and the reversal of convictions on appeal.[36] However, reversing convictions is an expedient and not a cure for the problem of trial prejudice, as are all the aforementioned remedies.

Mr. Justice Clark, in the *Sheppard* case, enumerated additional permissible means available to the trial judge to control order in the courtroom and prevent prejudicial publicity from outside: (1) adopting strict rules governing the use of the courtroom by newsmen, and limiting the number of reporters in the courtroom; (2) controlling the release of leads, information and gossip to the press by police officers, witnesses and counsel for both sides; (3) warning the newspapers to check the accuracy and propriety of their accounts; (4) requesting city and county officials to promulgate a regulation with respect to dissemination of information about the case.[37]

A basic question is raised by the Court's suggested controls, whether they are effective and do in fact, strike at the cause of trial prejudice. Controlling newsmen in the courtroom is necessary but it does not effectively hinder the primary cause of prejudice. It is the activity by the press outside the courtroom, in writing and broadcasting prejudicial accounts of the trial and making disclosures of facts, that is the true source of prejudice. Controlling the release of information to the press is necessary, but the news media often conducts its own thorough investigations, sometimes collecting pertinent evidence before law enforcement officials.

A warning to the newspapers to check the accuracy of their accounts and the propriety of their disclosures, as suggested by Justice Clark, strikes more directly at the source of prejudicial publicity. However, the Court is restrained from doing much more than just warn the press. Only a clear and present danger to the orderly administration of justice can be prohibited under the present limitation on freedom of press. If "the trial courts must take strong measures to insure that the balance is never weighed against the accused,"[38] the Supreme Court or Congress may have to initiate these measures.

The *Sheppard* decision is apparently intended to provoke the trial courts to challenge the press and create a new opportunity for the Supreme

[35] On the supervisory power of the court to grant a new trial, Marshall v. United States, *supra* note 22.

[36] Estes v. Texas, *supra* note 2, at 536, where the Court said it had "on numerous occasions reversed convictions . . . because the extreme prejudice inherent in the practice required its condemnation on constitutional grounds." Footnote 22 in the Estes decision cites many such reversals.

[37] Sheppard v. Maxwell, *supra* note 2, the suggestions to the trial court are repeated in numerous instances in the decision.

[38] *Id.* at 362.

Court to pass on what is permissible conduct within freedom of press. By stating "the courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences,"[39] the Supreme Court is giving judicial approval to a trial court initiative in this area. Whether the trial courts will provide an effective deterrent to prejudicial publicity is still conjectural. However, one must remember that there are some desirable effects of criminal publicity. It is the watchdog of the judicial system,[40] and an effective weapon against corruption of police, prosecutors, and other law enforcement personnel.[41] Also, pretrial publicity reduces community anxiety where the arrest of key suspects is made known to the public.[42] Though the Court has opened the door to further restraints on the press, it remains to be seen to what extent a court may actually curtail the dissemination of news.

Robert Kopple

[39] *Ibid.*

[40] *Supra* note 32; See Powell v. Alabama, 287 U.S. 45 (1932), the first of the "Scottsboro Cases," where publicity insured ultimate justice for nine Negroes put on trial in the South.

[41] Jaffe, *Trial by Newspaper,* 40 N.Y.U. L. REV. 504, 512 (1965).

[42] See CAPOTE, IN COLD BLOOD (1966), to illustrate arousal of anxiety in the community where a sensational crime is unsolved.

CONSTITUTIONAL LAW–LOYALTY OATH–SPECIFIC INTENT REQUIRED FOR VALIDITY

Petitioner, a school teacher, refused to take the loyalty oath required of all public officers and employees of the state of Arizona. The oath, together with an accompanying statutory gloss,[1] proscribed knowing

[1] ARIZ. REV. STAT. ANN. § 38-231(e) (Supp. 1965) reads as follows: "Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be