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# Sheppard v. Maxwell - The Sufficiency of Probability

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# SHEPPARD V. MAXWELL
# THE SUFFICIENCY OF PROBABILITY

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*This article continues our dialogue on Fair Trial v Free Press. The first issue of Volume 41 opened the case in our Review with arguments presented by Frank Stanton for the Press and Judge Bernard S. Meyer for the Bar The next issue of that Volume continued the discussion with contributions by Jerome Barron and Donald Gillmor Since then, Mr Gillmor has published a book on the subject entitled, appropriately: FAIR TRIAL V FREE PRESS. We would further refer the reader to the controversial guidelines recently promulgated by the American Bar Association.*

On June 6 of this year the United States Supreme Court held that Dr Samuel Sheppard was deprived of a fair trial in his conviction by an Ohio court for the second-degree murder of his wife.[1] The case was remanded to the District Court of the Southern District of Ohio "with instructions to issue the [writ of habeas corpus] and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time."[2] Mr. Justice Clark, writing for the Court, indicated that the decision rested on the failure of the trial court to insure sufficient protection of the accused from the "massive, pervasive and prejudicial publicity that attended his prosecution."[3]

With its decision in *Sheppard* the Court has taken yet another step in attempting to resolve the continuing conflict between constitutional principles of fair trial and free press. The Court is not, of course, alone in its concern with one of the most perplexing problems of our constitutional order. Legal literature, as well as the trade and house organs of the communications media, have in recent years been increasingly concerned with the fair trial—free

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1. Sheppard v. Maxwell, 384 U.S. 333 (1966).
2. *Id.*, at 363.
3. *Id.*, at 335.

press dilemma. Book length treatments of the issue have appeared and symposia of various sorts have been conducted in several parts of the country in an effort to come to some agreeable terms on how the rights of the press and the criminal defendant may be balanced in a way disadvantageous to neither Governmental units from local trial courts to the Senate Subcommittee on Constitutional Rights have also examined the problem. And associations of those professionally involved—prosecutors, judges, newspapermen—have formulated the inevitable "guidelines" to channel their members' behavior.

Yet the dispute continued. Perhaps the conflict is not subject to resolution in our open society; perhaps those who ranged themselves somewhere along or between various proposed solutions were simply talking past each other; and perhaps most may have simply been waiting for the authority of a Supreme Court decision.

For all the conflict associated with it, and for all the difficulty in the arrangement of a solution, the issue itself is fairly simple. Federal and state governments are forbidden by the First and Fourteenth Amendments, respectively, to curtail the freedom of the nation's communication media. The same Constitution that sets such limits on governments also requires, however, that an accused be provided with "an impartial jury of the State and district wherein the crime shall have been committed . . ."[4] There also exists, moreover, the requirement that the accused shall have a "speedy and public trial."[5] The conflict that results from the effects of these various provisions is seen most clearly in the instance of the commission of particularly heinous crimes of violence. For whatever reasons, a community's interest in such crimes seems particularly easy to arouse. And once the interest is present, generally whetted by the publication of photographic or other accounts of what details of the crime police investigation may have accumulated, there appears to develop a corollary interest in apprehension and punishment of the wrongdoer. In time, as the rite proceeds, someone is arrested. Something of his biography is generally made available to the public and reasons that link him to the crime are published. The suspect's confession, if he made one, might also have been fed into the public's collection of facts. Shortly afterward, the prosecutor might on occasion be so generous as to provide the by now slightly less interested public with some outline of his case against the suspect and his plans for securing a conviction. Later, the public is informed of the process of the trial, its more sensational highlights—its clashes

4. U.S. Const., amend. VI
5. *Ibid.*

in combat of articulate counsel—and its ultimate outcome. Justice has been done and the community, assured that it lives again under a rule of law, may return to its more mundane activities.

Thus, the public has been alerted to some disturbance in the social order and its fears raised accordingly for personal safety or social morality Fears engendered are then normally settled as assurances are given that the police are at work and, later, that the culprit has been taken into custody Eventually the judicial process is placed in public view and whatever additional assurances that are needed to settle fears still remaining are communicated as the trial proceeds toward conclusion.

It is proper, of course, that the community be fully informed that violence has occurred. It is also proper that its fears of additional violence be allayed by announcement of the capture of someone whose responsibility for the initial deed can reasonably be ascertained. And to accomplish the latter, it is necessary that some evidence be provided to establish the link. Our concern for a peaceful social order would seem to warrant dissemination of at least that much information. Certainly, if words can be taken to mean what they say, the Constitution would seem to allow no interference with the publication of material of the sort described here.

Yet, the Constitution requires trial by an *impartial* jury As a minimum one would expect that impartiality refers to the lack of conviction about the guilt of an accused for crimes charged. As Mr Justice Holmes explained it, "the 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 of private talk or public print."[6] But how do we guarantee such impartiality when the community, from which the jury is to be chosen, has already been presented with a case against the accused? Or, assuming that we could assemble twelve impartial jurors, how do we manage to help them to retain any insulation from out-of-court comment (or "evidence" presented in the press but inadmissible in court) while the case proceeds?

Answers are found wanting as soon as they are given. The First Amendment—and the extension of its protections through the Fourteenth—is alone a sufficient bar to the supression of information. It is butressed by a simple consideration of public policy that respects the public's legitimate concern with crime and punishment. And there is, finally, the Constitution's charge that the trial be *public*, to the end, presumably, that convictions made in the absence of the community's knowledge not be allowed.

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6. Patterson v. Colorado, 205 U.S. 454, at 462 (1907).

At the Forum on the Mass Media, held on October 31, 1964, at the University of North Dakota, a number of speakers presented a variety of points of view on the fair trial-free press dilemma. The remarks of one speaker, New York Supreme Court Justice Bernard S. Meyer, were subsequently carried in the North Dakota Law Review [7] In the same issue, Dr Frank Stanton, President of the Columbia Broadcasting System, presented "the broadcaster's view"[8] The following issue offered two additional treatments of the subject, one by Dr Donald M. Gillmor, UND Professor of Journalism, and the other by Mr Jerome A. Barron,[10] Visiting Associate Professor of Law at the University

Justice Meyer, stressing that neither right is absolute, wrote that a balance must prevail and that "to the extent necessary to protect the individual's right to fair trial, specific limitations of the free press right are constitutionally permissible."[11] He proposed, accordingly, that serious thought be given by state legislatures to enactment of a statute that would delay publication of certain material prejudicial to an accused. Justice Meyer has no wish, of course, to prevent the disclosure of information to which the public may have a right, nor is he attempting to hide the work of the courts from the eyes of the press. Pointing up the unsatisfactory nature of alternative means of limiting the effects of pre-trial publicity (e.g., change of venue, continuance, sequestration of jurors, and the like), Justice Meyer suggests that the proposed statute is an effective way of securing the balance he feels is necessary

The statute, applicable only to jury trials, would proscribe publication beginning "with the commission of a crime or the commencement of a civil suit"[12] and would continue in effect "until trial by jury is waived, or in a jury case, until the particular material is admitted in evidence, or, if it is never admitted, until the verdict is rendered."[13] The kinds of reportage proscribed as posing "a serious and imminent danger of substantial prejudice" would include, first, such material as the fact that an accused had confessed, the details of his prior criminal record, if any, and statements by officials respecting the probable guilt of the accused. A second category of information would be prohibited only if a jury found that its publication "created such a danger of substantial prejudice." In this category would fall such items as interviews with a victim's family,

7. Meyer, *Free Press v. Fair Trial· The Judge's View*, 41 N.D.L. REV. 14 (1964).
8. Stanton, *Free Press v. Fair Trail The Broadcaster's View*, 41 N.D.L. REV. 7 (1964).
9. Gillmor, *Trail by Newspaper and the Social Sciences*, 41 N.D.L. REV. 157 (1964).
10. Barron, *A Constitutional Impasse*, 41 N.D.L. REV. 177 (1964).
11. *Op. cit., supra* note 7 at 15.
12. *Id.*, at 21.
13. *Ibid.*

disclosures of the probable testimony of particular witnesses, and material appealing to "racial, political, economic or other bias." The statute would, in addition, prohibit attorneys and prosecutors, their respective employees, and employees of the police department and the courts from providing information whose publication the statute otherwise forbids.[14]

As might be expected, Dr Stanton would resist the enactment of any such statute. While believing that "such practices as publication of alleged confessions, declarations of guilt made by police, and attempts to try cases in the press, away from the safeguards of the courtroom, ought to be eliminated in a just society,"[15] he does not feel that a statute enforcing delay of publication is the answer He finds it difficult to determine how a "safe" period of delay could be established when one is confronted with retrials and appeals. Dr Stanton also is fearful of the hostility between the press and the courts "constant judicial inspection" might bring. He finds that "a residue of bitterness could be highly hazardous when the public looks for information and guidance to the news and discussion media" for treatment of judicial elections and appointments and reporting of "cases and judgments."[16]

Dr Stanton suggests instead that efforts might be made to control the behavior more strictly of those police officials, prosecutors, and defenders who are the sources of the prejudicial matter the press may report. Principally, though, he is most concerned that more study be given to the entire issue and that a chance be given to responsible men to effect responsible solutions. The whole area of relationships between the press and government is subject to continuing scrutiny, he feels. He proposes that the Brookings Institution might undertake a thorough study of the extent and justification of government's already existing closed door policies toward the press, as well as of the journalists' methodologies and practices in covering the behavior of the institutions of government. So far from agreeing with the necessity for a statute delaying publication, Dr Stanton suggests in his concluding remarks that the rights of free "press" even be extended to permit television coverage of appellate proceedings, particularly the decision day sessions of the Supreme Court.[17]

Professor Barron, in rejecting "easy conclusions that free press should be in some sense subordinate to fair trial,"[18] is fully aware

14. *Id.*, at 21-22 (Description of proposed statute).
15. *Supra* note 8 at 9.
16. *Id.*, at 9-10.
17. *Id.*, at 11-12.
18. *Supra* note 10 at 179.

of the potential of the press, including television, to serve as a means to link citizenry and government. Yet, he also points to the serious damage the press may do to the cause of an accused, and as the circumstances surrounding President Kennedy's assassination demonstrated, how the press may actually become a party to the events it purports only to describe. As Professor Barron perceives the problem, then, "the task is one of reconciliation and accommodation rather than one of choice or subordination."[19]

Justice Meyer's proposed statute, as a means to reconciliation and accommodation, receives some support from Professor Barron. He finds, in particular, that to the extent that the statute reaches not only representatives of the press but policemen and attorneys as well, it provides "a most stimulating deterrent" to the dissemination of prejudicial publicity He adds that, "inasmuch as judges may be equally liable to the effects of such publicity, the statute should extend in its coverage to non-jury trials." Despite his general support for Justice Meyer's proposal, however, Professor Barron advises against excessive reliance on a statute. Though he does not say so explicitly, he seems to feel that the possibilities of the contempt power may be open to further exploration. He suggests at one point that the narrow holding in *Bridges v California*,[20] limiting use of the contempt power to those situations in which published material poses a "clear and present danger" of obstructing justice, might be reconsidered. He closes with an admonition that we reflect on Justice Frankfurter's dissent in *Bridges*: "The need is great that courts be criticized, but just as great that they be allowed to do their duty "[21]

Dr Gillmor, contrary to the tack taken by the other writers, is little concerned with the efficacy of one solution of the fair trial—free press problem as against some other He asks whether we know enough yet to posit *any* relationship between published accounts of a case and the reactions and decisions of jurors who must eventually sit in judgement. "What *is* the effect of trial and pre-trial publicity on jurors?"[22] he asks. After reviewing the available research on what nexus there may be between press accounts and jury decisions, Professor Gillmor writes that "if a tentative conclusion may be ventured at this point, it is that there is no empirical evidence to support the view that extensive, or even irresponsible, press coverage of a court case destroys the ability of jurors to decide the issue fairly "[23] Nevertheless, Dr Gillmor advises self-

19. *Ibid.*
20. 314 U.S. 252 (1941).
21. *Id.*, at 284 quoted in Barron, *supra*, at 184.
22. Gillmor, *Trial by Newspaper and the Social Sciences*, 41 N.D.L. REV. (1964).
23. *Id.*, at 172.

restraint on the part of the press in those instances in which already existing community bias toward an accused might be reinforced by press comment or reporting adverse to the accused. In any event, because of the scanty knowledge we have of the news media's influence on jury deliberations, Dr Gillmor asks that there be "systematic study of the free press—fair trial complex before either legislation or any angry revival of the contempt power is imposed upon it."[24]

Responsible men, then, may disagree. The dilemma posed by equally precious rights in head-on collision is clearly recognized by all, yet proposed solutions, for a variety of reasons, gain little assent. Has the Supreme Court done any better?

There are, it would appear, three separate sorts of situations involving free press and fair trial with which the Court has dealt. One of these concerns the extent to which the press may comment critically or report critical comments on the conduct of a trial and thereby seek to influence the behavior of a judge. A second set of cases has treated the permissible degree to which press coverage—as well as other forms of expression—may affect the physical conditions of trial. The third situation is, of course, that of trial and pre-trial publicity

Critical comment directed at a court seems now to have a wider permissible range than formerly Arguing that influences extraneous to the courtroom are to be minimized, the Supreme Court upheld in 1907 a contempt conviction based on publication of articles and a cartoon critical of the Colorado Supreme Court.[25] "When a case is finished," Mr Justice Holmes wrote for the Court, "courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."[26]

In *Toledo Newspaper Co. v United States*,[27] decided in 1918, the Court upheld a summary contempt for publications critical of a federal district court. And here the Court spelled out more clearly than it had in *Patterson* how it would determine whether a given publication could be held to obstruct justice: "the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject."[28] The Court said further: "In other words, having regard to the powers conferred, to the protection of society, to the honest and

24. *Ibid.*
25. Patterson v. Colorado, 205 U.S. 454, at 462 (1907).
26. *Id.*, at 463.
27. 247 U.S. 402 (1918).
28. *Id.*, at 421.

fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case."[29]

The test of reasonable tendency was not to last however [30] In 1941, in *Bridges v California*,[31] the Court determined that Bridges had been improperly convicted for contempt since the published comments he had made pertaining to pending litigation did not present a "clear and present danger" of obstructing justice. Applying standards developed in other cases[32] having to do with freedom of speech and press, the Court held that, "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression."[33]

The *Bridges* rule was affirmed in two later cases, *Pennekamp v Florida*[34] and *Craig v Harney*.[35] The opinions in both cases stressed the necessity for the danger posed by press comment to be imminent and not merely "likely" Further, both opinions drew a distinction between juries and judges and suggested that judges, as men of strength, ought to be able to take adverse comment in their stride. As the Court said in *Craig*, "but the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in hardy climate."[36]

In the most recent episode involving use of the contempt power to punish critical comment, the *Bridges* rule appears to remain intact. Wood, a Georgia county sheriff, had published articles highly critical of county judges who had convened a grand jury to investigate charges of Negro "bloc voting." It was indicated explicitly by Wood, moreover, that he intended that his comments would influence the deliberations of the grand jury The Supreme Court found, however, no clear and present danger to the administration of justice in Wood's comments and ordered his contempt conviction reversed.[37]

It appears, then, that though use of the contempt power is not barred to judges confronted with a hostile or aggressive press, its

29. *Ibid.*
30. Nye v. U.S., 313 U.S. 33 (1941) (Court had already corrected what it considered an improper enlargement in Toledo Newspaper Co., Inc. v. U.S. of the area within which summary punishment for contempt would be exercised. See 4 Stat. 487 (1831).
31. 314 U.S. 252 (1941).
32. Schenck v. U.S., 249 U.S. 47 (1919) Gitlow v. New York, 268 U.S. 652 (1925), Abrams v. U.S., 250 U.S. 616 (1919), Whitney v. California, 274 U.S. 357 (1927) Herndon v. Lowry, 301 U.S. 242 (1937), Cantwell v. Connecticut, 310 U.S. 296 (1940).
33. Bridges v. California, 314 U.S. 252, at 273 (1941).
34. 328 U.S. 331 (1946).
35. 331 U.S. 367 (1947).
36. *Id.*, at 376.
37. Wood v. Georgia, 370 U.S. 375 (1962).

use is very narrowly restricted to those situations in which the press constitutes an immediate and obvious peril to the proper workings of the court. One may very properly question, though, whether the printed word can ever present such a peril, especially if the Supreme Court's reasoning on the fortitude of trial judges is accepted.

Aside from the influence that trial and pre-trial publicity may have on jurors, then, the only threat posed by the press lies in its efforts to cover trial proceedings. If the printed word is held to be without serious adverse effect on judges there is simply no other activity of the press that can operate to interfere with the processes of justice.

That judges have an obligation to keep the courtroom free of tumult and indecorum has long been settled.[38] That considerations of free speech do not override that obligation, moreover, seems clear from a recent case[39] involving picketing outside a courthouse. Appellants had been convicted of violating a state statute prohibiting picketing or parading near a courthouse and had challenged their conviction on grounds, *inter alia*, that the statute on its face interfered with rights of free speech. They also contended that as applied the statute deprived them of free speech since there was no showing that their acts produced a clear and present danger of obstructing justice. With respect to the statute itself, the Court replied:

> A state may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. A narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate to vindicate the State's interest in assuring justice under law.[40]

Regarding clear and present danger the Court said:

> Even assuming the applicability of a general clear and present danger test, it is one thing to conclude that the mere publication of a newspaper editorial or a telegram to a Secretary of Labor, however critical of a court, presents no clear and present danger to the administration of justice and quite another thing to conclude that crowds, such as this, demonstrating before a courthouse may not be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process. We therefore reject the clear and present danger argument of appellant.[41]

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38. See, *e.g.*, Moore v. Dempsey, 261 U.S. 86 (1923).
39. Cox v. Louisiana, 379 U.S. 559 (1965).
40. *Id.*, at 562.

Though neither press comment nor coverage is involved here, it would not be difficult for the Court to extend its holding in *Cox* to cover the behavior of newsmen at a trial. One might contend, indeed, that such an extension *was* made in the Court's reversal of Texas financier Billie Sol Estes' conviction for swindling.[42] Here the Court found that the intrusion of television cameras into the courtroom—even though *permitted* by state law—was prejudicial to the accused. Moreover, the opinion indicates that the Court is not disposed to require any actual showing of prejudice. That a possibility of injury to the accused is present seems sufficient to bar cameras from the courtroom.[43]

Taken together with *Cox*, the *Estes* decision suggests that the Court is concerned to guarantee trials antiseptically free of unwelcome influences and that its decisions here are not likely to be tempered by free speech considerations. A demonstration of prejudice is not necessary—as both cases seem to indicate—nor is a prior legislative determination essential as was present in *Cox* (and heavily relied upon there) but missing in *Estes*. Indeed, if anything, *Estes* would seem to hold that legislative determinations authorizing what the Court perceives to be prejudicial may simply be overlooked.

The third, and for present purposes most important, of the strains in the fair trial—free press cases is that having to do with prejudicial trial and pre-trial publicity In this area, as will be seen, the Court has moved a full one hundred eighty degrees in its thinking. In an early case, *Holt* v *United States*,[44] the Court held that even though during the course of trial jurors had seen newspaper articles adverse to the interests of the accused, the trial was not on that account unjust and that the conviction of the accused for murder would stand. Mr Justice Holmes, speaking for the Court, wrote, "if the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day "[45] A similar result was reached some forty-two years later in *Stroble v California*.[46] Here the Court indicated that, concerning the publication of petitioner's confession, he had "not shown how the publication of a portion of that confession four days earlier prejudiced the jury in arriving at their verdict two months thereafter "[47] Beyond this, though, and with respect to newspaper accounts which described

41. *Id.*, at 566.
42. Estes v. Texas, 381 U.S. 532 (1965).
43. *Id.*, at 545-549 (See discussion).
44. 218 U.S. 245 (1910).
45. *Id.*, at 251.
46. 343 U.S. 181 (1952).
47. *Id.*, at 193.

Stroble as a "werewolf," a "fiend," and a "sex-mad killer,"[48] the Court found itself unable to say that petitioner was deprived of due process of law, "at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."[49]

In these cases the Court admitted that publicity could be prejudicial to an accused, yet it found nothing in the facts to warrant a conclusion that newspaper accounts had aroused "such prejudice in the community that petitioner's trial was 'fatally infected' with an absence of 'that fundamental fairness essential to the very concept of justice.'"[50] Within a decade, however, the Court was able to discover at both the federal and state levels prejudice to an accused in newspaper accounts. In *Marshall* v *United States*,[51] the Court reversed a conviction for unlawful dispensing of drugs on grounds that four jurors had read newspaper reports of government evidence indicating that petitioner had previously practiced medicine without a license—evidence that had already been excluded from the trial as both immaterial and prejudicial. As the Court said in its *per curiam* opinion, "the prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."[52]

The first reversal of a state conviction attended by prejudicial publicity occurred in *Irwin* v *Dowd*,[53] decided in 1961. Here eight of the twelve jurors had indicated before the trial began that they thought Irwin was guilty but that nevertheless they could render an impartial hearing. Their views concerning Irwin's guilt were based, apparently, on extensive radio, television, and press accounts of and commentary on the details of the case. The prosecutor and police officials had also issued releases to the press saying that the accused had confessed to six other murders.

The Court, stressing that the "right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors,"[54] determined that since two-thirds of the jury possessed a belief in the accused's guilt, he had not been given a fair trial. The court added, though, that:

> [T]o hold that the mere existence of any preconceived

48. *Id.*, at 192.
49. *Id.*, at 195.
50. *Id.*, at 191-192, quoting Lisenba v. California, 314 U.S. 219, at 236 (1941).
51. 360 U.S. 210 (1959).
52. *Id.*, at 312-313.
53. 366 U.S. 717 (1961).
54. *Id.*, at 722.

> 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.[55]

But with respect only to the present case, the Court expressed its belief that "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."[56]

In the following year the Supreme Court declined to reverse a grand larceny conviction for reasons of prejudicial publicity.[57] Acknowledging that much adverse reportage and commentary had accompanied Teamster president Dave Beck's various confrontations with the law, the Court found that jurors had lain aside whatever prejudice they may have had and that, in the language of *Irwin*, this was "sufficient."[58]

Taken by themselves, these cases would seem to point to the Court's realization of a probability of prejudice to an accused in the publication of adverse information or commentary but allowing that probability to be discounted in the event that some showing could be made that jurors were without prejudice. The Court seems to have been disposed, in other words, to posit a link between prejudice and publicity as an assumption to be overcome. Yet, that the assumption *could* be overcome, as in *Beck*, suggests that the Court had not hardened its views in this area to the extent that it would later in the matter of television in the courtroom. Unlike its decision in *Estes*, in which the possibility of prejudice appears sufficient to reverse a conviction, the Court was still willing, at least as late as *Beck*, to admit some distinction between possibility and high probability or certainty

That willingness was seriously weakened in 1963 in the Court's reversal of a murder conviction in *Rideau* v *Louisiana*.[59] An "interview" of Rideau by the county sheriff, in which Rideau admitted robbery, kidnapping, and murder, had been recorded on video tape and then televised several times in the locality within which Rideau was to be tried. At least three of the jurors had seen this televised "interview."

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55. *Id.*, at 723.
56. *Id.*, at 727.
57. Beck v. Washington, 369 U.S. 541 (1962).
58. *Id.*, at 557.
59. 373 U.S. 723 (1963).

The trial court's denial of a request for change of venue led to reversal by the Supreme Court. Noting that Rideau's trial was the televised interview—without benefit of counsel or judge—the Court concluded that the accused had been deprived of due process.[60] Due process, the Court stated, requires "trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview' "[61]

This case could, of course, fit well within the bounds set by the opinions in *Marshall, Irwin,* and *Beck.* An association of prejudice and publicity could be assumed to exist until some satisfaction is given that the jurors were able to set aside whatever ideas they had formed relative to the case being tried. In the present instance one would imagine that no such satisfaction was even sought. Yet, precisely the opposite is true. As Justices Clark and Harlan point out in their vigorous dissent, the jurors who had seen the interview testified that they would not be affected by it.[62] The dissenters also challenged the Court's characterization of Rideau's interview as a trial:

> Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity epitomized by the televised interview, called up some informal and illicit analogy to *res judicata,* making petitioner's trial a meaningless formality [63]

With *Rideau,* the link between prejudice and publicity has been made stronger and to break it requires a good deal more, apparently, than the mere assurances of jurors to the contrary The Court itself, as *Rideau* considered with the other cases seems to make clear, is finally the judge of what prejudice there may be in a given case. And there would appear to be less inclination now than earlier actually to search out the empirical bases for tying publicity and prejudice together; the Court seems to have been willing here, as it was two years later in *Estes,* merely to assume a necessary relationship rather than asking for some demonstration of that relationship. The possibility of prejudice, initially an assumption to be overcome, is raised to high probability in circumstances which only the Court, ultimately, may determine to exist or not to exist.

What then of *Sheppard v Maxwell*?

Fully half of Justice Clark's opinion for the majority is given

60. *Id.,* at 726.
61. *Id.,* at 727.
62. *Id.,* at 732.
63. *Id.,* at 729.

over to a recounting of details of the crime, Sheppard's trial, and coverage both of the pre-trial events and the trial itself by the local news media. Through this recounting we are given a view of an intensely hostile and aggressive press, operating at its sensational worst. Through disclosure of material adverse to Sheppard—some of it never introduced at the trial, through innuendo, and eventually, through demands for Sheppard's prosecution—the news media built their case. At the trial, representatives of the press crowded into virtually all available space in and around the courtroom, constituting at the very least a physical nuisance. Meanwhile their reports continued to appear in an ever tighter case against Sheppard—in the press. When the role of the news media was challenged by defense counsel—as it was frequently—the court simply admonished the jury to confine its understanding to matters raised in the courtroom. Motions for change of venue, continuance, and mistrial were all denied.

In the Supreme Court's view, the "totality of circumstances in this case" clearly warranted reversal. Citing the "virulent publicity" that appeared before the trial but unable to rely on that alone, the Court was most disturbed by the conditions of the trial and its attendant publicity "The fact is," the Court wrote, "that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."[64] The Court went on to point up the prejudicial nature of the news reports emanating from the trial and expressed its view that "this deluge of publicity reached at least some of the jury"[65] Accordingly, the Court "concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse[d] the judgement."[66]

To this point the opinion does not appear particularly exceptional. Jurors may be prejudiced by the press, and if they are due process has been denied. The weight of circumstances in this case indicates a high probability that jurors were so prejudiced, therefor reversal is in order The Court neither required nor was given any empirical demonstration that prejudice did exist or that, if it existed, it was occasioned by the press. Circumstances and probabilistic determinations from those circumstances are sufficient. *Sheppard*, then lies well within the framework set by the rulings in *Rideau* (and prior cases) and *Estes*.

64. Sheppard v. Maxwell, 384 U.S. 333, at 355 (1966).
65. *Id.*, at 357.
66. *Id.*, at 335.

There is, however, at least one distinctive element in *Sheppard.* Though at pains to register its dissatisfaction with sensationalism in the news media, the Court assigns primary responsibility to the trial court for denial to the accused of due process. The press could not, of course, have been reached in this case by the Supreme Court's opinion, and it is not unusual for the high Court to criticize lower court proceedings or to find trial judges lacking in their appreciation for the rights of a criminal defendant. Yet, the very force of language in the Court's opinion is suggestive. There is no mistaking the Court's displeasure with the conduct of the trial, nor is there any attempt to respect the sensibilities of those responsible.

Beyond this, however, the Court goes to considerably greater lengths than formerly to point out just what errors were committed and how they could properly have been avoided. In so doing, the Court has prepared a virtual blueprint for the conduct of trials likely to be attended by extensive publicity [67]

There is, to be sure, some judicial hand-wringing over the necessity for reversals, but the Court has marked, probably as clearly as it can, the extent of its concern for trials free of prejudicial interference by the press and the necessity for that interference to be restricted at the trial court level. Though these considerations should have been apparent in earlier decisions, they evidently were not. As the Court remarks, "from the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent."[68] *Sheppard* may be the *Court's* last patient effort to reverse the trend. To the extent that it is, it should stand as a decision of crucial significance.

*Sheppard* has other implications as well. There is, of course, no mention of the kind of statute proposed by Justice Meyer, but given the clear-cut assignment of responsibility for fair trial to the local level, it is not inconceivable that the Court would look with favor on the efforts of a legislature to assist a judge in doing the job the Court expects. Somewhat the same thing might be said with respect to Professor Barron's suggested re-examination of the contempt power We might, at least, look to some exploration of these alternatives should the Court's views in *Sheppard* be ignored, or acknowledged, found wanting.

As a social scientist, this writer obviously shares Dr Gillmor's position that some further research is essential before the link between publicity and prejudice can finally be forged. Yet, the Court is not of such a mind. Presently probabilities are enough as the

67. *Id.,* at 357-362.
68. *Id.,* at 362.

Court's quotation with approval both in *Estes* and *Sheppard* of language from *In re Murchison* should indicate: "Our system of law has always endeavored to prevent even the probability of unfairness."[69]

And that probability is enough, along with the simple fact of rulings adverse to the press in recent cases, should warrant perhaps one more inference. One must assume from its language in these cases as well as from its decisions in other cases that the Supreme Court is fully cognizant of the values of a free press and as committed as ever to its maintainance within our society But where news media threaten fair trial, one must assume, at least for the present, that the weight of the Court will be thrown against the privilege of free press. Local judges, under the distant supervision of federal courts, are to be the instrument and the criminal defendant is to be the immediate beneficiary

Yet, no one can profit ultimately from this arrangement. Society's interests are hardly well served either through continued reversals or through necessary suppression of information. The "constant judicial inspection" cited by Dr Stanton is certainly contrary to the traditions of an open society Most importantly, however, this scheme is probably as unworkable as it is undesirable. The press is simply and for good reason unlikely to be denied. Economic considerations, intellectual and emotional fidelity to the First Amendment, and the newsman's drive to do the job for which he is trained and paid all work to weaken the range of procedural guarantees courts may erect.

In the end, then, we are all ultimately at the mercy of the press. Is it too much, or too soon, to ask that that high charge be met by editors and publishers with respect not only for the interests of their readers and stockholders but as well for those of the litigant and the judicial office?

69. *In re* Murchison, 349 U.S. 133, at 136 (1955) (quoted in Sheppard v. Maxwell, *supra* note 64 at 357).