North Dakota Law Review

Volume 43 | Number 2 Article 3

1967

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Arthur E. Sutherland

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ARTHUR E. SUTHERLAND*

Most constitutional questions arise from conflicts between two wholesome aspirations, where one or the other must give way Our eighteenth-century devotion to full freedom for criticism of conduct of public business has persisted to the present day, notably illustrated by the Supreme Court's 1964 decision in *New York Times v Sullivan*.[1] The Court there held that even an untrue critical statement concerning a police commissioner's performance of his functions is privileged against a libel action unless the statement is made with "malice"—including willful or reckless misrepresentation. This principle of press immunity runs head-on into another wholesome and rightly cherished tradition—that a judicial proceeding, and particularly a grave criminal prosection, is a solemn matter, in which all questions of fact and law should be decided by a tribunal guided only by admissible evidence of fact and detached judicial learning and wisdom, not influenced by public excitement and clamor This latter principle has most recently been illustrated by the Supreme Court's June 6, 1966 opinion in *Sheppard v Maxwell*.[2] The tribunal adopted the description of Dr Sheppard's trial for murder given by the Ohio Supreme Court:

> Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. In this atmosphere of a "Roman holiday" for the news media, Sam Sheppard stood trial for his life.

The United States Supreme Court held that Ohio had denied Dr Sheppard due process of law by his murder trial and conviction without "the judicial serenity and calm to which [he] was entitled."

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* Bussey Professor of Law, Harvard Law School.

1. 376 U.S. 254 (1964).
2. 384 U.S. 333 (1966).

Sheppard was not a novelty; *Estes v Texas*[3] was a similar case. And in *Rideau v Louisiana*,[4] the Supreme Court reversed a conviction of murder following a televised confession obtained by a sheriff. Press, radio and television publicity, sensational in character, can interfere with fair and orderly trail. The United States Supreme Court, in *Rideau, Estes* and *Sheppard* thus utilized the remedy of upsetting the conviction where the publicity was intolerable. But this remedy does not stop the trouble at its source. Is there any means of punishing instances of intolerable publicity and so deterring it in cases which arise thereafter?

Our newspaper, radio and television friends protest at suggestions of contempt as a remedy, stressing "the public's right to know" The Supreme Court of the United States has gone far toward eliminating contempt by publication in its 1941 decisions of *Bridges v California*[5] and *Times-Mirror v Superior Court*[6] driven home in 1946 in *Pennekamp v Florida*[7] and in 1947 by *Craig v Harney*[8]

But in 1950 Justice Frankfurter in his opinion concerning denial of certiorari in *Maryland v Baltimore Radio Show*[9] carefully pointed out that in England, the country where our doctrine of free press was born, "trial by newspaper" is sharply restricted. Accounts of public courtroom proceedings are admirably full and accurate, as anyone will agree who read the London Times daily stories of Dr Adams' trial for murder in 1956. But England's judges strictly punish newspaper statements of extra-judicial matters which could influence the decisions of the prosecution.

The *Sheppard* opinion seems to suggest that some control of extra-judicial statements made by public officers, including defense counsel, prosecution counsel, and police, is still possible by use of the contempt power And perhaps we can carry this idea still further; if an organ of publicity collaborates with a public officer in making statements for which the officer may be punished in contempt proceedings, perhaps the newspaper or broadcaster, too, may also be similarly disciplined in the interests of fair trial.

The opinion of the Court in *Sheppard* contains the following language:

If publicity during the proceedings threatens the fairness

3. 381 U.S. 532 (1965).
4. 373 U.S. 723 (1963).
5. 314 U.S. 252 (1941).
6. 314 U.S. 252 (1941).
7. 328 U.S. 331 (1946).
8. 331 U.S. 367 (1947).
9. 338 U.S. 912 (1950).

> of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

The *Sheppard* case was not a proceeding against a newspaper but was a *habeas corpus* proceeding by Dr Sheppard based on his contention that his conviction was unfair "because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution." The Court's opinion at one point stated that the justices "do not consider what sanctions might be available against a recalcitrant press. " The remarks first quoted above are *obiter dicta*. But the Court's word concerning available sanctions seems to indicate that the question still remains open as to some discipline "against a recalcitrant press," which collaborates with counsel for either side or with enforcement officers or other public officers to an extent affecting the fairness of a criminal trial.