AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Criminal Justice/Juries and Lawyers/Juries

Sheppard v. Maxwell, 384 U.S. 333 (1966)

Samuel Sheppard was leading a charmed life. He was a prominent doctor in the Cleveland area with a beautiful spouse and mistress on the side. On July 4, 1954, his wife Marilyn was murdered. Sheppard claimed he was dozing downstairs when an intruder entered, killed his wife, and knocked him to the ground. Few believed his story.[1] *The killing created a media firestorm, partly described in the opinion below. The media in Cleveland focused obsessively on the investigation. Editorial demanding that Sheppard be prosecuted were made on what seemed a daily basis. The courtroom where the trial took place was saturated with representatives of the media. Both the prosecution and defense sought to plant stories in the media that might result in favorable publicity. The trial judge made little or no effort to prevent jurors from reading such stories. Many reports described evidence of guilt that was not offered in the courtroom. After a lengthy trial, Sheppard was found guilty of second degree murder and sentenced to life in prison. Sheppard spent the next decade proclaiming his innocence and appealing his conviction. In 1964, a federal district court in a habeas corpus proceeding ordered Ohio to retry Sheppard on the ground that his first trial was not fair. When that decision was reversed by Court of Appeals for the Sixth Circuit, Sheppard appealed to the Supreme Court of the United States. The American Civil Liberties Union filed an amicus brief on his behalf. That brief contended,*

> *[i]t remains for this Court to announce a rule of conduct for law enforcement authorities which will make costly their participation in trial by newspaper. Reversal of convictions where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court as a deterrent to such conduct. A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participated in the inflammatory press releases would assist materially in eliminating the practice of "anticipatory trial by newspapers" which currently impairs our administration of criminal justice.*

A "trial of the century" occurs every decade in the United States. From the treason trial of Aaron Burr in 1807 to the O.J. Simpson murder trial in 1995, Americans have been riveted by the alleged criminal escapades of the high and mighty. These events create different challenges for trial by jury than the race prejudice questions at issue in such cases as Norris v. Alabama *(1935) and* Swain v. Alabama *(1935). An all-white jury may be too willing to make inferences about criminal defendants without supporting information. When a trial of the century takes place, jurors may have too much information before the trial even begins. Significantly, some of that information may be accurate. In* Estes v. Texas *(1965), the Supreme Court declared that a defendant had been unconstitutionally convicted because of the massive publicity that took place when a pretrial hearing was televised. Jurors, however, are supposed to decide only on the basis of evidence admitted at trial.*

The Supreme Court by an 8-1 vote ruled that Sheppard was unconstitutionally convicted. Justice Clark's opinion ruled that the trial judge failed to take constitutionally mandated steps to ensure that Sheppard was tried by an impartial jury. What steps could the trial judge have taken in Clark's view? Why did he think those steps would have been constitutionally adequate? In your opinion, when a "trial of the century" occurs, is there anything that can actually be done to secure a constitutionally impartial jury? The Warren Court confronted the "trial of the century" issues in the television age. Is television simply another fact that courts must consider when thinking

[1] The Sheppard murder inspired the television show and movie, *The Fugitive*.

about what constitutes a fair trial, or does television and even newer media present unique challenges to the constitutional commitment to impartial juries?

JUSTICE CLARK delivered the opinion of the Court.

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> "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." . . . But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."

Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States* . . . (1959), we set aside a federal conviction where the jurors were exposed, "through news accounts," to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence, "for it is then not tempered by protective procedures." . . . Likewise, in *Irvin v. Dowd* . . . (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction, holding:

> "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. . . ."

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Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," . . . *need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged."* Rideau v. Louisiana . . . (1963). *In Turner v. Louisiana* . . . (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,

> "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association. . . ."

Only last Term, in *Estes v. Texas* . . . (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

> "It is true that, in most cases involving claims of due process deprivations, we require a showing of identifiable prejudice to the accused. Nevertheless, at times, a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

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It is clear that the totality of circumstances in this case also warrants such an approach. . . . Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. The *Estes* jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio, and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. . . . Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. . . . The numerous pictures of the jurors, with their addresses, which

appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

. . . Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months, the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.

. . . [W]e believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." . . . The fact is 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. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters, staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media, the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gauntlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for 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 pre-indictment 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."

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Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation, and must be guilty, since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense

counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. . . .

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The carnival atmosphere at trial could easily have been avoided, since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes,* the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested.

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Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial, the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. . . .

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. . . .

. . . The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. . . .

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. . . .

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From the cases coming here, we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* [on his initiative] with counsel. If publicity during the proceedings threatens the fairness 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.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

JUSTICE BLACK dissents.