

**Constitutional Law—Due Process—Failure to Insulate Criminal Trial
from Prejudicial Publicity Deemed a Denial of Due Process
(*Sheppard v. Maxwell*, 384 U.S. 333 (1966))**

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session-to-session. In this way, the effectiveness of the Committee can be immediately established without the necessity of further judicial decisions. Such a procedure would also eliminate any controversy between the judiciary and the legislature. With the power of contempt firmly restored, HUAC would then be able effectively to fulfill its designated purpose, *i.e.*, to conduct investigations essential to the formulation of laws.



CONSTITUTIONAL LAW — DUE PROCESS — FAILURE TO INSULATE CRIMINAL TRIAL FROM PREJUDICIAL PUBLICITY DEEMED A DENIAL OF DUE PROCESS. — Petitioner Sheppard was tried and convicted in an Ohio court of second degree murder. Prior to and throughout the course of the trial petitioner was the subject of extensive publicity which focused heavily on matters unfavorable to him. No evidence concerning these matters was ever introduced at the trial. The trial court refused to take steps to restrict the activities of the news media in gathering material during the course of the trial, and denied petitioner's request to poll the jury to determine its exposure to such publicity. On certiorari, the Supreme Court of the United States voided petitioner's conviction and *held* that the failure of the trial court to insulate petitioner's trial from pervasive and prejudicial publicity together with a disruptive courtroom environment deprived him of the fair and impartial trial guaranteed by the due process clause of the fourteenth amendment. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

It has long been a principle of Anglo-American criminal justice that a person accused of a crime be afforded a public trial.¹ In the United States, this guarantee is embodied in the sixth amendment of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." ² This guarantee has been made applicable to state courts through the due process clause of the fourteenth amendment.³ Its purpose has been stated to be that of serving "as a safeguard against any attempt to employ our courts as instruments of persecution," ⁴ by insuring that the accused's trial will be open to members of the family and other interested parties rather than merely to

¹ See Note, *Televising Judicial Proceedings—A Denial of Due Process?*, 11 CATHOLIC LAW. 331 (1965).

² U.S. CONST. amend. VI.

³ See *In re Oliver*, 333 U.S. 257 (1948).

⁴ *Id.* at 270.

"officials."⁵ Likewise, the first amendment guarantee that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." is regarded as one of the most fundamental rights guaranteed by the Constitution.⁷ It is subject to limitation only to prevent evils, the potential consequences of which present such a "clear and present danger" that they outweigh the maintenance of this freedom.⁸ This practice of "balancing" apparently conflicting interests is indicated in the Supreme Court's statement that "freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."⁹

The emphatic recognition of freedom of the press, and the equally important protection afforded an accused under the sixth amendment provide the environment for the current controversy concerning publicity and criminal trials. In the past, the Supreme Court has been reluctant to restrain the freedom of the news media in publicizing judicial proceedings, and even more reluctant to impose penalties for alleged excesses in the exercise of this freedom. In *Bridges v. California*,¹⁰ the petitioners had been convicted of contempt for the publication of newspaper stories and editorials concerning pending criminal trials. The trial court had found that such publications "tended" to interfere with the orderly administration of justice.¹¹ The Court rejected the application of the "tendency" test and asserted that the contempt penalty should be imposed only within the guidelines of the "clear and present danger" test.¹² Under the latter test, freedom of the press is to be given the widest possible scope, and restraint is permissible only in the face of an unmistakably serious probability that the substantive evil legitimately sought to be prevented will occur.¹³

This freedom, however, does not exist in a vacuum. The Court has pointed out that there are strong countervailing interests which must be recognized, especially in criminal trials: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by . . . a wave of public passion"¹⁴ which may be occasioned by extensive publicity. While the Court

⁵ Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1, 5 (1960).

⁶ U.S. CONST. amend. I.

⁷ See Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 874 (1960).

⁸ See, e.g., *Roth v. United States*, 354 U.S. 476 (1956); *Dennis v. United States*, 341 U.S. 494 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁹ *Pennekamp v. Florida*, 328 U.S. 331, 347 (1945).

¹⁰ 314 U.S. 252 (1941).

¹¹ *Id.* at 272.

¹² *Id.* at 263.

¹³ *Ibid.*

¹⁴ *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

has given recognition to the conflicting values of free press and fair trial, it has chosen to deal with the conflict by remedying the ill effects of publicity on the accused through the use of procedural safeguards, rather than through direct restraints on the press.¹⁵ By implication, it seems that the Court has found procedures such as the granting of new trials¹⁶ and the use of motions for continuances and changes of venue¹⁷ preferable to restraints upon the source of the information which gives rise to the prejudicial atmosphere involved.

As a result of the Court's reluctance to place restraints on freedom of the press, petitioners who claim they have been denied due process have generally been required to shoulder a heavy burden in demonstrating the actual prejudicial effect of such publicity. To uphold such a claim, a petitioner must show that his trial "was 'fatally infected' with an absence of 'that fundamental fairness essential to the very concept of justice'";¹⁸ that such matters "aroused against him such prejudice in the community as to 'necessarily prevent a fair trial'";¹⁹ or that there existed in the trial community a "pattern of deep and bitter prejudice."²⁰ The Court has stated the above tests to be generally applicable to cases involving claims of due process violation.²¹

Nevertheless, the Court has indicated that there are instances in which the generally applied tests should give way to a less stringent method of determining denial of due process, *i.e.*, the totality of circumstances may be a sufficient foundation for a finding of prejudice despite an inability to pinpoint the specific source or impact of such prejudice.²² For example, in *Marshall v. United States*,²³ the Court reversed a conviction in a narcotics case because of the jury's exposure to newspaper articles which focused on matters in petitioner's past which were prejudicial to him. The conviction was reversed even though the jurors, when examined, assured the trial court of their ability to discount such publicity and maintain their impartiality.²⁴ In *Rideau v. Louisiana*,²⁵ petitioner's interrogation and confession were repeatedly televised throughout the locale of his trial. The Court reversed his con-

¹⁵ For a critical evaluation of the efficacy of these devices, see Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. Rev. 810, 818-24 (1961).

¹⁶ *Marshall v. United States*, 360 U.S. 310 (1959).

¹⁷ *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁸ *Stroble v. California*, 343 U.S. 181, 191-92 (1952).

¹⁹ *Id.* at 193.

²⁰ *Supra* note 17, at 727.

²¹ *Estes v. Texas*, 381 U.S. 532, 541-44 (1965).

²² *Id.* at 544.

²³ *Supra* note 16.

²⁴ *Id.* at 312.

²⁵ 373 U.S. 723 (1963).

viction and stated that, even without examining the voir dire, they could decide that the publicity involved was prejudicial per se.²⁶ Thus, the petitioner was not obliged to show that a single juror was actually influenced by such publicity in a manner adverse to petitioner's right to a fair trial. The very circumstances of the publicity, apart from any demonstrable effect, were sufficient to support a claim of denial of due process.²⁷

Soon after the decision in *Rideau*, the Court reviewed the conviction of Billie Sol Estes, whose activities were extremely well-publicized, and restated this less stringent "probability of prejudice" or "inherently prejudicial" test.²⁸ In that case, over his objection, the petitioner's pretrial hearing on a motion for a change of venue and his later trial were televised. The Court held that the widespread notoriety attendant upon such coverage was inherently unfair to petitioner because of its potential prejudicial effect on jurors, witnesses and judges, without any showing that such potential effects became actualities at the trial.²⁹

In the instant case,³⁰ Dr. Sheppard was convicted of murder in the second degree. During the period between his arrest and the beginning of his trial a great volume of virulent and accusatory publicity was given the case by local and national news media.³¹ A three-day inquest into the circumstances surrounding the murder was held in a gymnasium before several hundred spectators and was viewed on television by countless others.³² Prior to the trial the names and addresses of prospective jurors were published and, as a result, they received numerous letters and telephone calls concerning the case.³³ The prosecutor made pretrial statements concerning petitioner's family's alleged lack of cooperation with the investigating authorities.³⁴ The press was assigned space not only throughout the gallery but even within the bar of the court, in such proximity to petitioner and his counsel that confidential conversation was hampered.³⁵ The verbatim record

²⁶ *Id.* at 727.

²⁷ *Ibid.* See *Turner v. Louisiana*, 379 U.S. 466 (1965), wherein the Court reversed a conviction even though the petitioner could show no identifiable, tangible instance of prejudice. The Court admitted that petitioner had shown that no actual prejudice resulted from the association of the jury and two key prosecution witnesses. But, it nevertheless stated that it would be naive to overlook the extreme prejudice inherent in the association.

²⁸ *Estes v. Texas*, 381 U.S. 532 (1965).

²⁹ *Id.* at 544.

³⁰ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

³¹ For a large selection of press clippings concerning the trial, see *Sheppard v. Maxwell*, 231 F.Supp. 37, 44-57 (S.D. Ohio 1965).

³² *Supra* note 30, at 339-40.

³³ *Id.* at 342.

³⁴ *Id.* at 338.

³⁵ *Id.* at 344-45.

of each day's proceedings was available to the press and, through publication, to prospective witnesses.³⁶ The trial court refused, on several occasions, to poll the jury as to its exposure to particular instances of prejudicial publicity during the course of the trial.³⁷ The trial court also refused to grant motions for continuances or a change of venue.³⁸

In its opinion, the Court emphasized that these facts were the basis for determining whether petitioner's claim of due process violations should be sustained. While admitting the general rule that petitioner must demonstrate the presence of "identifiable" prejudice at his trial, the Court, nevertheless, pointed to the precedents of *Rideau* and *Estes* to support the conclusion that the totality of circumstances may warrant the application of the less stringent "probability of prejudice" and "inherently prejudicial" tests.³⁹ Comparing the instant case with *Estes*, the Court declared:

Unlike *Estes*, 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. . . .

The press coverage of the *Estes* trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution.⁴⁰

It was reasoned that the "totality of circumstances" giving rise to a "probability of prejudice," was clearly applicable to the facts in *Sheppard*. Although the trial court's failure to act with regard to pretrial publicity was not considered in itself to be such a denial of due process as to warrant a reversal, nevertheless, such pretrial publicity *was* a major factor against which the trial court's later rulings on defense motions were to be viewed. The Court further found that the trial court had not exercised appropriate physical control over the courtroom. Such control, if exercised, would have been sufficient to guarantee the petitioner a fair trial, and thus, would have made it unnecessary, in the Court's view, to inquire into possible sanctions that could have been imposed directly upon a recalcitrant press. The opinion indicated several steps which the trial court should have taken: (1) strict regulation of the presence and activities of the media representatives in the courtroom, especially their exclusion from within the bar of the court; (2) insulation of witnesses from the news media; (3) strict

³⁶ *Ibid.* The record of the proceedings was published in various newspapers and national magazines, and reported on radio and television.

³⁷ *Id.* at 357.

³⁸ *Id.* at 347, 352.

³⁹ *Supra* note 28, at 542-43.

⁴⁰ *Supra* note 30, at 352-54.

enforcement of a prohibition against court officers and prosecutors divulging non-record information to news media; and (4) the use of procedural safeguards such as continuances and changes of venue if it appeared that, despite the use of the foregoing methods of control, the probability of prejudice still remained.⁴¹ Thus, "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 insure that the balance is never weighed against the accused."⁴²

In examining the significance of the instant case, there are several factors which should be noted. First, since the Court chose not to deal with the issue of possible direct restrictions on the press in a case which would seem factually conducive to such treatment, it seems clear that the Court regards such direct restrictions as an undesirable means for solving the problem of press influence on criminal trials. Rather, the *Sheppard* opinion is insistent in its demand that trial courts make full and effective use of their inherent power over officers of the court, witnesses, and jurors, in order to insulate an accused from the effects of extraneous and prejudicial influences in the conduct of his trial. The Court indicated the devices available to the trial court for accomplishing this end. Some of these devices are routine—continuances, changes of venue, sequestration of the jury.⁴³ Of greater significance is the Court's discussion of the trial court's ability to control the *sources* of information. The trial court had direct control over lawyers, witnesses, and court officials, the chief sources from which the press derived its information.⁴⁴ It could have proscribed extrajudicial statements by those persons, and it could have asked for the promulgation of regulations by local authorities prohibiting their employees from making such statements.⁴⁵ The brunt of the Court's decision clearly falls upon the trial court and demands that that court, *sua sponte* if necessary, invoke all of its inherent powers to negate any detrimental influence upon the fair determination of the accused's guilt. Thus, very clearly, the Court insists that the solution to the problem is preventive action at the trial level rather than curative at the appellate level.

⁴¹ *Id.* at 358-63.

⁴² *Id.* at 362.

⁴³ See Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810 (1961).

⁴⁴ *Supra* note 30, at 361.

⁴⁵ For an example of such a regulation at the federal level, see 28 C.F.R. § 50.2 (1966). This regulation prohibits the release by Justice Department personnel of certain specified types of information concerning those charged with crime in the federal courts.

Another aspect of the opinion deserves attention for the light it sheds on the substantive framework within which similar cases will be viewed on the appellate level. Appellate tribunals have the duty to make an independent evaluation of the circumstances to determine whether there is a *reasonable likelihood* that prejudicial news will prevent a fair trial.⁴⁶ This appears to be a significant diminution, in line with *Rideau* and *Estes*, of the quantum of proof necessary to demonstrate a claim of unfair trial. The totality of circumstances, as in *Estes*, may be sufficient to accomplish this purpose even though no demonstrable or identifiable instance of prejudice can be shown. Thus, the petitioner need not prove the fact of prejudice but only a total fact setting from which the appellate court can *infer* the *probability* or *likelihood* of prejudice. This requirement alone should force trial courts to be more perceptive and sensitive to the significance of particular circumstances which by themselves may be insufficient to establish the existence of prejudice, but when viewed in the totality of circumstances, may be sufficient to give rise to the probability of prejudice. As an example, the admission by a juror of his exposure to a particular prejudicial matter, together with his statement of continued impartiality, probably would not give rise to any doubts as to prejudice. But, when this is coupled with the fact that a significant proportion of those examined during the jury selection process likewise indicated exposure and reaction to such matter, it would seem that the trial court, under *Sheppard*, should be readily receptive to motions for the application of remedies such as continuance or change of venue. Where there is doubt as to the fact of prejudice, it would seem that *Sheppard* would call for the application of measures calculated to insure that the balance is never "weighed against the accused."⁴⁷ The main thrust of the decision is that trial courts *do* possess sufficient inherent powers to assure the non-intrusion of extraneous influences and that the time has now arrived when these powers must be exercised fully and effectively for the accused's benefit.

The *Sheppard* opinion very clearly reflects the Court's attitude toward the essential freedoms which were apparently in conflict in that case. The Court decisively chose a course calculated to preserve the strength of both the right to a fair trial and the freedom of the press. While leaving the press generally unfettered in its task of responsibly informing the public, it took great pains to indicate methods, consistent with such freedom, which could nevertheless be utilized to assure each accused of a fair trial. The emphasis upon the powers of the trial court is an answer

⁴⁶ *Supra* note 30, at 362-63.

⁴⁷ *Id.* at 362.

to those critics⁴⁸ who have challenged the efficacy of such powers. The answer supplied by the Court is clear: the weakness in regard to these powers is not the weakness of the powers themselves but the general reluctance and infrequency with which they are employed by trial courts. The Court's position is that the solution to the problem lies precisely in changing this situation. In this regard, the opinion is a welcome and positive statement of judicial concern and responsibility.

So, too, the Court's treatment of the fundamental freedom of the press reflects its concern for what it terms the sensationalism too often attendant upon the reporting of crime and criminal trials. It appears that the Court, through its espousal of direct control of the flow of information from court officers and witnesses, recognizes that freedom of the press is not unlimited and that such measures of control leave the press free to fulfill its function, *i.e.*, to inform the public of the course and content of judicial proceedings through unvarnished accounts of those proceedings *as they develop in the courtroom*. The implication is that, if the press is acting responsibly, the trial court need take no steps to curb the flow of information. It is to be hoped that the press will recognize its responsibility in this area, both from self-interest and from a regard for the integrity of judicial proceedings, and exercise such self-restraint as is necessary to achieve the ends described by the Court. Fortunately, there are already signs of such self-restraint, one of which arose as a direct result of the newspaper coverage of the Sheppard trial.⁴⁹ *The Toledo Blade* and *The Toledo Times* have adopted a voluntary code dealing with the publication of information regarding criminal trials. They have pledged themselves to limit their pretrial coverage to the following: the name, age, and address of the accused; how, when, and where the arrest was made; the charge and the identity of the complainant; and that a grand jury has returned an indictment and a trial date has been set. They have also agreed that during the course of the case, they will not print information of the following kind: any prior criminal record of the accused; any so-called confession which the accused may have made, except that it will publish the fact that the accused has made a statement; any statement made by officials which is construed as detrimental to the accused; any names of jurors selected for a particular trial; and, any arguments made in court in the absence of the jury or any evidence excluded from the jury. This is a significant indication of precisely the kind of responsible self-restraint which the news media hopefully will exercise. There are, of course, those members of the news distribution industries who would be unwilling to sacrifice the

⁴⁸ See generally *supra* note 43.

⁴⁹ See *N.Y. Times*, Aug. 22, 1966, p. 35, col. 5.

circulation potential of a sensational trial to the interests of responsibility and fundamental fairness. To many commentators on the problem, this fact has been the basis upon which to call for positive restrictions upon the press. This call for action seems, however, to be both futile, in constitutional terms, and unnecessary in practical terms. Where the press is unwilling to exercise such self-restraint, the trial court is inherently able to take steps calculated to neutralize the effects of such press activity. As the Court pointed out in *Sheppard*, criticism is too often mistakenly directed at the lack of remedies available to the trial court, and all too rarely at the real problem, *i.e.*, the failure of courts to insist upon their effective use whenever necessary to preserve an accused's right to a fair trial. Where their protection is effectively employed, the problem of a non-conforming member of the news media can be effectively solved.



INJUNCTIONS — FEDERAL ANTI-INJUNCTION STATUTE — PRIVATE PARTY HELD "EXPRESSLY AUTHORIZED" BY SECURITIES EXCHANGE ACT TO SEEK STAY OF STATE COURT PROCEEDINGS. — In an action brought by a corporation, a federal court enjoined defendant-shareholder from utilizing stockholders' authorizations which he had solicited and obtained in violation of the Securities and Exchange Commission proxy regulations. Defendant was attempting to make use of these authorizations in a New York State court proceeding in which he sought to secure inspection of the corporation's shareholder list. On appeal, defendant contended, *inter alia*, that the injunction was issued in violation of the federal anti-injunction statute. The Court of Appeals for the Second Circuit, in affirming the district court, *held*, that in view of the Securities Exchange Act provisions authorizing the Commission to bring suit to restrain violations of its regulations, injunctive relief sought by a private party for the same purpose was within the "expressly authorized" exception of the anti-injunction statute. *Studebaker v. Gitlin*, 360 F.2d 692 (2d Cir. 1966).

With the exception of the general limitations placed on the federal judicial power by Article III, the federal constitution does not prohibit the federal courts from enjoining actions in state courts. In 1789, the Judiciary Act granted the federal courts a general power to issue all writs.¹ Shortly thereafter, however, Congress limited this power by providing that a writ of injunction shall not be granted "to stay proceedings in any court of a state" ² Although the legislative history of this act is somewhat

¹ 28 U.S.C. § 1651 (1964).

² Act of March 2, 1793, ch. 22, § 5, 1 Stat. 333.