Michigan Law Review

Volume 66 | Issue 3

1968

Advisory Committee on Fair Trial and Free Press: American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Fair Trial and Free Press (Tentative Draft)

George Edwards
Judge of the United States Court of Appeals for the Sixth Circuit

Robert M. Cipes

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Courts Commons, and the Legal Profession Commons

Recommended Citation

George Edwards & Robert M. Cipes, *Advisory Committee on Fair Trial and Free Press: American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Fair Trial and Free Press (Tentative Draft)*, 66 MICH. L. REV. 570 (1968).
Available at: https://repository.law.umich.edu/mlr/vol66/iss3/12

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RECENT BOOKS

BOOK REVIEWS

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (TENTATIVE DRAFT). Recommended by the *Advisory Committee on Fair Trial and Free Press.* Chicago: American Bar Association. Pp. xii, 265. Paper, $2.

Review I

Whether the Reardon Report[1] will be remembered as an historic contribution to increased fairness of criminal trials or as a heavy-handed attack on freedom of speech and press is very much in doubt. The answer will depend on how intelligently and realistically the American Bar Association (ABA) reacts to criticism of the original report. A substantial modification already adopted by the Reardon Committee seems to indicate a willingness to face and adjust to the serious problems raised by the report.[2]

In the wake of criticism of press abuses following the Supreme Court reversal of the *Sheppard* case[3] and the police handling of President Kennedy's accused assassin, the ABA gave a distinguished panel of judges and lawyers[4] carte blanche to draft proposed solutions. No one can say that the panel members did not take their assignment seriously. Nor can anyone deny that they have exhibited genuine concern for the impact of press abuse on the criminal trial process.

Their proposals can be summarized under five headings:

(1) Controls *during trial* upon statements to the press media by police, prosecutors, defense counsel, or court personnel, "where there is a reasonable likelihood that . . . dissemination will interefere with a fair trial."

(2) Similar controls on the same personnel *prior to trail.*

(3) Similar controls on the same personnel *after trial and prior to final appellate decision.*

(4) Secret hearings upon defense motions prior to or during trial.

(5) Controls on the press during trial which prohibit publication of anything beyond the court proceedings, "if the statement is reasonably calculated to affect the outcome of the trial."

The principal mechanisms proposed to enforce such controls are an

1. Justice Paul C. Reardon, of the Supreme Judicial Court of Massachusetts, was Chairman of the Advisory Committee which prepared the present work.

2. *See* note 4 *infra* and accompanying text.

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

4. ABA Advisory Committee on Fair Trial and Free Press: Paul C. Reardon, Chairman, Grant Cooper, Edward J. Devitt, Robert McC. Figg, Jr., Abe Fortas (1964-65), Ross L. Malone, Wade H. McCree, Jr., Bernard S. Meyer, Robert G. Storey, Lawrence E. Walsh, Daniel P. Ward.

amended Canon of Legal Ethics, disbarment proceedings thereunder, and the use of greatly expanded judicial contempt powers.

On first reading of these proposals, I called the last four the most serious threat to freedom of speech since the days of Joe McCarthy. While I have seen nothing to change my mind on this score, I do now have considerable hope that the ABA—and the Reardon Committee itself[5]—will go very slowly about actually attempting to put them into effect. For, however beneficial to some defendants some of these measures might prove in some cases, the impact of such restraints on freedom of speech would, I fear, prove disastrous to our democratic society.

There is, I believe, much merit to the ABA proposals for judicial prohibition of out-of-court statements by prosecutors, defense counsel, police, and court personnel *during trial*. Limitations upon prosecutors' or lawyers' out-of-court speech from the beginning of the impaneling of a jury to its verdict are limitations which all people of good will should accept with alacrity. The trial of a case is a relatively short period of time. Any abusive practices during the trial can be subsequently brought to light in its immediate aftermath. And, if the *Sheppard* case stands for anything, it stands particularly for the proposition that no one should be convicted except by evidence lawfully presented in court.

But advocacy of contempt charges against the press for publication of anything other than that which constitutes the court record raises grave constitutional and practical considerations. One of the worst news media abuses during the *Sheppard* trial was committed by Walter Winchell in a broadcast originating in New York City. Whom should the Cleveland Common Pleas Judge have cited for contempt? And how? And even if he could have gained jurisdiction, what about the first amendment? In Chicago the key witness in a conspiracy trial against a number of police officers was maimed by a bomb when he tried to start his car just outside the court building. Would newspaper reports on such an occurrence be the subject for contempt citation? If so, should not such an event be reported to the public?

As to the proposal for secret hearings on defense motions, the objections are both legion and substantial. The sixth amendment provides for "public trials." To hear a motion to quash possibly vital evidence in secret creates many possibilities for political favoritism or outright corruption.

But, to me, the most dangerous proposal of all is that which seeks to control lawyers' speech for an indefinite and potentially extensive period of time prior to a criminal trial. Lawyers, traditionally the

5. A partial realization of the countervailing considerations has already led the Reardon Committee to drop its advocacy of post trial speech controls.

most useful controversialists in our nation's history, could be muzzled in advance by the proposed amendment of the Canons of Ethics.[6] For the bar, this amendment would operate as a prior re-

---

6. PART I. RECOMMENDATIONS RELATING TO THE CONDUCT OF ATTORNEYS IN CRIMINAL CASES

1.1 Revision of the Canons of Professional Ethics.

It is recommended that the Canons of Professional Ethics be revised to contain the following standards relating to public discussion of pending or imminent criminal litigation:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the defendant, except that the lawyer may make a factual statement of the defendant's name, age, residence, occupation, and family status, and if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;

(3) The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) The defendant's guilt or innocence or other matters relating to the merits of the case or the evidence in the case, except that the lawyer may announce the circumstances of arrest, including time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announce the scheduling or result of any stage in the judicial process; may request assistance in obtaining evidence; and, on behalf of his client, may announce without further comment that the client denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and while the matter is still pending in any court, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication

straint upon speech. Many a lawyer would prefer to face a criminal charge than to be cited for unethical conduct and have his professional reputation and career put at stake; and, if lawyers are muzzled, a mighty factor would be removed from what Holmes called our "free marketplace of ideas."

The public exposure of corruption (private or governmental) and the public denunciation of dictatorial use of power have been two of the major contributions of lawyers throughout our history. Public discussion of major problems in the court of public opinion has proved historically to be a far more potent method of correction of inbred evil or of advocating needed change than legal processes limited to the courtroom alone. We should go slowly about adopting rules that would have prevented Attorney General Richmond Flowers of Alabama from commenting on the hand-picked Liuzzo murder jury, Estes Kefauver from exposing the violent crimes and corrupting influence of the Mafia, or Senator Walsh from denouncing the Teapot Dome Scandal. Nor do I think that Clarence Darrow's great debate on freedom of education in the period preceding the *Scopes* trial should have been stricken from our history.

Part of my concern for this problem stems from the defense of the current proposals as having been caused by the views on press abuse expressed in the *Sheppard* case. Since I wrote in dissent in my court for a new trial for Dr. Sheppard, I feel some responsibility to point out that no judge who participated in review of that case advocated the strictures which are currently being contemplated.

Justice Clark's opinion for the United States Supreme Court did *not* rule that Dr. Sheppard was denied due process because of pretrial publicity. His opinion did *not* suggest that secret court hearings must be afforded defendants in criminal cases. His opinion did *not* call for sanctions against a free press. His opinion did *not* suggest silencing lawyers for months or years prior to a criminal trial.

Justice Clark's opinion was grounded upon a famous, and to me undebatable, statement of Justice Holmes: "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

---

if there is a reasonable likelihood that such dissemination will affect judgment or sentence or otherwise prejudice the due administration of justice.

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

1.2 Rule of court.

In any jurisdiction in which Canons of Professional Ethics have not been adopted by statute or court rule, it is recommended that the substance of the foregoing be adopted as a rule of court governing the conduct of attorneys.

Reardon Report 2-4.

influence, whether of private talk or public print."[7] Justice Clark's opinion emphasized the following facts:

> Unlike Estes, Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered.
>
> . . . .
>
> In light of this background, we 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." *Estes v. Texas* [381 U.S. 326 (1965)]. 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. . . . 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.[8]

The principal due process violations were cited thus:

> 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.[9]

The Court stated its fundamental holding as follows:

> The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means

7. Patterson v. Colorado, 205 U.S. 454, 462 (1907) [quoted in *Sheppard* at 384 U.S. 333, 351 (1966)].

8. 384 U.S. at 352-53, 355.

9. *Id.* at 356-57.

that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.[10]

What the *Sheppard* case actually held is that a criminal trial, in order to be fair, needs judicial protection from press abuse. The Supreme Court did not cite as constitutionally evil any single news media item which preceded the Sheppard trial by more than eight days. It may be that the *Cleveland Press* (as it boasted!) "produced" the *Sheppard* trial. But it is worth noting that no court or judge has held that Dr. Sheppard should not have been tried.

Our forefathers elected to put freedom of speech and press first among the amendments which constitute the bill of rights. From the concept of freedom of speech, press, criticism, and debate has come most of the inventiveness, richness, and power of our present society. In my judgment, however, we do not have to choose between freedom of speech and press and the right of fair trial. The judiciary of our country can protect the latter through the use of well-known tools which have been fashioned by our legal history. In my dissenting opinion in *Sheppard*, I noted seven principal measures available to a trial judge assigned to try a controversial criminal case in the midst of great public excitement:

(1) On defendant's motion he can grant a change of venue to a distant locale in his same state which is less concerned with the crime. [Citations omitted.]

(2) He can adjourn the trial, at least briefly, until a peak of public excitement (or a judicial election!) has passed. [Citations omitted.]

(3) He can lock up the jury during trial so that it is guarded from outside contact. [Citations omitted.]

(4) Absent these precautions he has increased responsibilities in screening the jury from extra-judicial influences. [Citations omitted.]

He has the duty to prohibit news media contact with the jury. [Citations omitted.] He has the power to exclude photographers from his courtroom. [Citations omitted.] He has the power to warn the news media that if communications prejudicial to either side in the trial and not derived from in-court testimony are widely disseminated, that this may cause a mistrial. [Citations omitted.]

(5) He has the duty to *order* the jury not to read or listen to any newspaper, radio or television material bearing on the trial. [Citations omitted.]

(6) He has the duty if it is called to his attention that highly prejudicial material is widely disseminated in the open community

10. *Id.* at 357-58.

> wherein a jury is living at home, to inquire as to whether the jury has actually heard or read it; and if so, to determine whether prejudice resulted; and if so, to grant a new trial. [Citations omitted.]
>
> (7) He has the duty to be particularly alert to guard the jury against any outside communication during its deliberations or verdict, and if unauthorized communications are shown, prejudice is presumed, and absent effective rebuttal of such prejudice, he has the duty to grant a new trial. [Citations omitted.][11]

None of these judicial tools was utilized by the trial judge in *Sheppard.*

Much has been said about press abuses at the time of the Kennedy assassination. There certainly were some. But should the country have been kept completely in the dark about the evidence which tended to indicate that Oswald was the assassin? I was Police Commissioner of Detroit on the day of the assassination. Until news of the arrest of the assassin came in with many confirming details, we had our entire day shift on emergency orders to stay on duty, and police details had been dispatched to guard key government installations and personnel. No one knew until informed, not by courts or government agencies but by the press, that the crime was individual rather than the work of conspirators seeking still further ranging objectives. The disturbing speculations which led us to fear that the latter might be the case were indulged in many places other than Detroit. Pierre Salinger's books on Kennedy details similar concerns among the members of the President's cabinet who had to reverse the course of their Japan-bound jet plane in mid-Pacific on that fateful day.

I object to attempts at control of pretrial publicity both on grounds of principle and of practicality. The considerations which have led me to take my present position are thus both of the "high" and "low" variety. An example of the "high":

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an

11. 346 F.2d 707, 739-40 (1965).

> experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they do imminently threaten immediate interference with the lawful and pressing "purposes of the law that an immediate check is required to save the country.[12]

My own experience attests to the existence of practical considerations. When I first went into city government in 1939, I joined the cabinet of the newly elected, young reform mayor of the City of Detroit. In the subsequent three years I had a ringside seat while a vigorous grand jury proceeding lifted the lid on the impact of organized crime in corrupting municipal officials in my hometown. During that period the grand jury indicted and jury trials convicted the former mayor, the prosecuting attorney, the sheriff, the superintendent of police, and a host of minor officials, including dozens of policemen. In such a setting, could we safely place restrictions on freedom of speech and press?

I feel the drafters of the ABA proposals simply do not know the ingenuity of reporters, or their stubborn (and admirable!) devotion to the first amendment. Under the proposed rules I can foresee these leads in some hypothetical situations:

(1) "A high police source today revealed . . . ."

(2) "A case-hardened detective (who wisely refused to be quoted) confirmed that the strangler had admitted two more killings."

(3) "Habitues of the courthouse were giving one hundred-to-one odds that the Dallas County district attorney would ask the death penalty for Oswald."

Thus, the ABA Committee's proposals for pretrial controls would stifle the scrupulous lawyer or law-enforcement official and would leave the unscrupulous free.

In conclusion, I suggest adherence to the following means of keeping our great first amendment rights unhampered while protecting an accused's right to a fair jury trial:

(1) Let us insist that our trial judges make full use of the tools which legal tradition has given them to guarantee a fair trial.

(2) When these are inadequately employed, let us accept the fact that due process may require an occasional retrial of a highly newsworthy case because of prejudicial influences.

(3) Let us seek the voluntary co-operation of the press in withholding publication of material directly related to a criminal trial in progress which is not offered or admitted in the trial until after the verdict has been rendered.

12. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

(4) Let us use the administrative sanctions advocated by the ABA to control press statements by lawyers, prosecutors, or law enforcement officials *during the trial period.* I would consider defining this period as extending from the assignment of a case to a particular judge on a particular trial date up to the announcement of the jury verdict.

(5) Let us not attempt to muzzle prosecutors, defense lawyers, or police by amending current law or canons of ethics as to any time prior to the trial period.

(6) Let us leave the first amendment unabridged.

Older even than the first amendment is the admonition, "Know the truth and the truth will make you free."

George Edwards,
Judge of the United States
Court of Appeals for
the Sixth Circuit

Review II, or "The Real Story Behind the Sheppard Case"

A distinguished federal judge has suggested that the Reardon proposal may well be "the most dangerous threat to the American ideal of free speech and press since the days of Joe McCarthy."[1] This analysis, I think, misses the point. If there is any connection between the Reardon Report and the late Senator, it is a much more direct one. Indeed, it is the thesis of this review that Senator McCarthy was in fact responsible for the issuance of the Reardon Report. Although this thesis is not an easy one to develop, involving as it does several intermediate premises, its logic seems to me incontestable.

Senator McCarthy's link to the Reardon Report, which is traceable through the *Sheppard* case,[2] shall be explained presently. But first it will be useful to focus on the *Sheppard* case itself since it probably represents the best argument in favor of adopting the Reardon proposals. The trouble with the *Sheppard* opinion is the same as with any attempt to achieve a broad consensus: in trying to please everyone, it pleased no one. The decision was not a month old when a Harvard constitutional law professor, Arthur Sutherland, interpreted it to mean that the Supreme Court advocated a liberal use of the contempt power to keep the sensationalist press in line. This interpretation, which supported what the press had been claiming about *Sheppard,* appeared not in an obscure law review article but

1. Edwards, BULL. OF THE AM. SOC'Y OF NEWSPAPER EDITORS, Nov. 1, 1966, at 14.
2. Sheppard v. Maxwell, 384 U.S. 333 (1966).

in a speech to hundreds of trial judges. Here was a crisis: something had to be done to counteract Sutherland's speech before the judges left the three-day conference for their home benches. For the Supreme Court, the predicament was ironic since it had strained in *Sheppard* to avoid censuring, let alone censoring, the press. Indeed, the Court never even mentioned the offending newspaper editor, Louis Seltzer of the *Cleveland Press*.[3]

A meeting was quickly called between representatives of the Court and Professor Sutherland's superior, Dean Erwin Griswold, a leading hawk in the war between the press and the bar[4] (and the one whom some saw as the real inspiration behind Sutherland's speech). A rapid assessment of the relative prestige of the two institutions, Harvard and the Court, was made and it was unanimously agreed that the Court could least afford the damage to its reputation from the incident. It was agreed, therefore, that Sutherland-Griswold would maintain polite silence while the Court debunked their interpretation.[5] Justice Clark, who authored the *Sheppard* opinion, was jetted to Canada where the judges were meeting and assured them that the Court had not intended to recommend that contempt citations be used to curb the news media, had not fixed any guidelines for the press, and indeed had not even meant to set any standards for trial judges to follow in regulating publicity.[6]

The Sutherland incident is by now well known. But there are other more obscure, though no less important, features of the *Sheppard* case which have never been fully revealed. One of the more interesting of these concerns the relationship between *Sheppard* and *Miranda v. Arizona*,[7] which was decided one week later. It has been suggested that the Court hoped to curry favor with the press in *Sheppard* in order to obtain sympathetic coverage of the controversial *Miranda*.[8] This explanation is spurious. The real explanation is more complex. Neither *Sheppard* nor *Miranda* are what they seem. Although this may be hard for black-letter trained lawyers to accept, the truth is that *Sheppard* is actually a police interrogation case and *Miranda* a pretrial publicity case. One of the chief threats to a fair trial is the publicizing of the accused's confession. If all confessions

3. Compare the decision of the district court, granting the writ of habeas corpus. 231 F. Supp. 37 (S.D. Ohio 1964).

4. *See, e.g.*, Griswold, *When Newsmen Become Newsmakers*, THE SATURDAY REVIEW, Oct. 24, 1964, at 21.

5. Whether any consideration flowed to Griswold is not known. Note, however, that a year later Justice Clark resigned to pave the way for Griswold to become Solicitor General.

6. Some of the trial judges came away with the distinct impression that the Court had not written an opinion in the *Sheppard* case.

7. 384 U.S. 436 (1966).

8. The Court anticipated a backlash in public opinion for the way in which *Miranda* contributed to the deification of J. Edgar Hoover. *See, e.g.*, Cipes, *Crime, Confessions, and the Court*, THE ATLANTIC MONTHLY, Aug. 1967, at 47.

could be eliminated, fair trials could be assured.[9] This is precisely what the Court was trying to accomplish in *Miranda*. As for the *Sheppard* case, the very thing which provoked editor Seltzer to convict Dr. Sheppard was the fact that Sheppard was represented by experienced trial counsel who advised him not to talk to the police.[10] It was thus necessary for the Court to reverse Sheppard's conviction in order to give the wealthy, counseled defendant the same status as the indigent one.[11]

There was one unfortunate consequence of the timing of these two decisions. It created considerable confusion in many police departments throughout the country. After *Mapp v. Ohio*, most metropolitan police departments instituted classes in criminal procedure, not simply to enable police officers to shape their testimony in accordance with the new rules, but also to promote more responsible law enforcement. In most cities these classes are held on a monthly basis. Thus, when the Court handed down its two decisions only a week apart, police instructors had to make a choice between covering *Sheppard* or covering *Miranda*. Since the latter *seemed* to deal with interrogation, they covered it and ignored *Sheppard*.

The effects of ignoring Sheppard were felt only a few weeks later in the notorious *Speck* case. Ever since June 1964 when ex-Justice Goldberg decided *Escobedo v. Illinios*, holding that the Chicago police had been too effective in interrogating suspects, Police Superintendent O. W. Wilson had been reading the advance sheets looking for suggestions to modify his interrogation practices. He found them in the *Miranda* opinion, which he thoroughly digested, although disagreeing with its premises. When Richard Speck was captured and charged with mass murder, he was not interrogated by the Chicago police. Not only were the officers instructed not to talk to Speck, but Wilson also carried *Miranda* to the extreme length of requiring Speck's guards to wear earplugs so that Speck could not talk to them.

But so intent was Wilson on observing the rules in *Miranda*, that he neglected the other case, *Sheppard*. Indeed, until Sidney Zion of the *New York Times* told him about it, Wilson was not even aware that *Sheppard* had been handed down. The result was that while

9. The American Society of Newspaper Editors disagrees. It feels that there are other sources of unfairness, such as "the tricky house of cards called the adversary system," and "the even trickier chess game called the rules of evidence," and that reporters have a peculiar competence for exposing these deficiencies in the criminal law. 1 CRIM. L. REP. 2032 (April 26, 1967).

10. "[Sheppard] ought to have been subjected instantly to the same third degree to which any other person under similar circumstances is subjected . . . ." Cleveland Press, July 20, 1954, at 1, col. 3.

11. *Cf.* Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L.J. 464, 485 (1966).

there was no interrogation of Speck, there was plenty interrogation of Wilson, and while Speck did not talk, Wilson did.[12]

Unlike Wilson, the trial judge assigned to the *Speck* case, Judge Herbert Paschen, had read the *Sheppard* opinion and thought he understood what Justice Clark was driving at. Part of the problem was that Paschen had attended the trial judges' conference in Canada and had heard the Sutherland interpretation, but unfortunately had to leave for home before the end of the conference and missed the debunking of Sutherland by Justice Clark. It was in this state of mind that Judge Paschen issued his "Fourteen Points" to govern news coverage of the Speck trial. Apart from being denied access to restroom facilities in the courthouse, the "Paschen Point" that angered and confused the reporters most was being denied copies of the trial transcript.[13] Simultaneous motions for pretrial mental examination were made—by the prosecution directed to Speck, and by the *Chicago Tribune* directed to Judge Paschen. Ultimately the *Tribune* prevailed.

To return to the *Sheppard* case itself, it was obvious that the Court had to reverse the conviction, but in doing so it faced an embarrassing situation. Ten years earlier, in 1956, the Court had denied certiorari in Sheppard's direct appeal.[14] No doubt it was consoling to the imprisoned Dr. Sheppard to learn that the Court did not necessarily approve of his conviction,[15] but laymen generally have a difficult time comprehending how the same Court could treat the same case differently at different times.[16] What the Court really needed was some newly discovered evidence, something that was not known in 1956 when it denied certiorari. This is where columnist Dorothy Kilgallen came in. She was newly discovered by F. Lee Bailey, Sheppard's lawyer.[17] She told Bailey a detailed story of her meeting with the trial judge, Edward Blythin, in his chambers before the trial

12. After the *Speck* case Wilson resigned his position and, together with Professor Fred Inbau of Northwestern whom the Supreme Court held accountable for the *Miranda* and *Escobedo* third degrees, formed a new organization called PROVOC—Program for Retaliation of Victims of the Court.

13. This ruling was probably based on Justice Clark's criticism of this practice in *Sheppard*. 384 U.S. at 359.

14. 352 U.S. 910 (1956).

15. *See* Justice Frankfurter's statement explaining the denial of certiorari. *Id.*

16. This is despite the eighty-three page treatment of the subject contained in Anthony Lewis' popular book on the Court. A. LEWIS, GIDEON'S TRUMPET (1964).

17. Actually, Kilgallen was offered to Bailey as a substitute for Bob Considine. Bailey originally intended to base his appeal on Considine's prejudicial column during the trial which compared Sheppard to Alger Hiss and his police interrogator to Whitaker Chambers. When it became clear that a reversal for Sheppard might vindicate Hiss and thus damage the political fortune of Richard M. Nixon, who had a personal stake in Hiss' guilt, Bailey was prevailed upon to abandon the Considine argument in favor of Kilgallen.

started. In this meeting Blythin told her the case was "open-and-shut" and other things which clearly indicated his bias. Bailey got the columnist to put this account in an affidavit, an uncontradicted affidavit because Judge Blythin had died during the intervening eight years and the young Ohio Assistant Attorney General, overawed by Miss Kilgallen's celebrity, waived the right to cross-examine her. Later the affiant herself died.

During the oral argument it seemed clear that the decision would turn on the Kilgallen affidavit. The beauty of this ground was that it permitted the Court to avoid all the sticky fair trial-free press questions. The last thing the Court wanted to do was to intervene in the press-bar fight. Besides, there was talk that Bailey would eventually file a huge damage suit against the *Cleveland Press*, and if the Court's opinion in *Sheppard* appeared to take sides in this dispute, it might find itself on the awkward end of an impleader action.

There was one man, however, who was to frustrate the Court's plan—Attorney General Saxbe of Ohio. Saxbe did not endear himself to the Justices from the first: he devoted two hours of his argument to a comparison between Sheppard's defense and Felix Frankfurter's "bleeding-heart" defense of Sacco and Vanzetti. But Saxbe's real offense was to resist the Kilgallen affidavit and retract his subordinate's waiver of cross-examination, a convenient strategem now that the affiant was deceased. This ended the Kilgallen affidavit.[18] It was just as well because now the reputation of the deceased judge would not be marred by an attack from which he could not defend himself. Instead of treating him as biased and prejudiced, the Court in *Sheppard* could now deal with him as an entirely fair, though hopelessly bungling, incompetent.[19]

The real question that remains about the *Sheppard* opinion, I suppose, is whether a great story can be retold without reference to

---

18. This turn of events was fortunate for another reason. The connection between Chief Justice Warren and Miss Kilgallen, which has been suppressed thus far, also made it necessary to abandon the point. John Charles Daley, former moderator of "What's My Line," is the son-in-law of the Chief Justice, and any reflection on Miss Kilgallen's credibility might have given rise to an inference that the panel show was rigged.

19. *See* Cipes, *supra* note 8:

> Bending over backward to avoid offending the press, the Court virtually sat on the trial judge. Rarely has appellate hindsight mustered such a catalogue of "should-have-dones." The judge should have considered locking up the jury during the trial, though Sheppard's counsel advisedly refrained from requesting it. He should have granted the defense motion to change the place of trial, though as one Justice indicated during the oral argument, no county in Ohio was free from the poisonous publicity. The judge should have postponed the trial until after local elections in which he was running to succeed himself. But the election actually took place during jury selection and before the trial began, so the purpose of a short postponement is unclear. Finally, the Court condemned the trial judge for "requesting," rather than "warning," the jury not to read newspapers during the trial.

its main character. Without Seltzer, in other words, is the *Sheppard* opinion digestible? It is a question worth repeating.[20]

*Robert M. Cipes,**
Member of the New York Bar;
Author of Rules of Criminal Procedure
(Moore's Federal Practice, Volume 8)

20. Lest the reader think I have forgotten the connection with Senator McCarthy, suffice it to say that Mrs. Sheppard was murdered exactly one month after McCarthy's debacle in the army hearings. With McCarthy gone the press was starved for sensation and the Sheppard murder filled the void. The connection between the *Sheppard* case and the Reardon Report has been explained.

* For the author's sober views on the Reardon Report, including a critique of the exaggerated attacks on the Report by the press, *see* Cipes, *supra* note 8. The article relies heavily on Wessel, *Controlling Prejudicial Publicity in Criminal Trials*, which illustrates the beneficial effects of rules such as set down in the Reardon Report. For an account of the practices of publicity-hungry prosecutors—which practices the Reardon proposals would hopefully restrain—*see* R. CIPES, THE CRIME WAR, ch. IV ("Headlines and Headhunters") (June 1968).—Ed.