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TOWARD MORE RELIABLE JURY VERDICTS?: LAW, TECHNOLOGY, AND MEDIA DEVELOPMENTS SINCE THE TRIALS OF DR. SAM SHEPPARD

INTRODUCTION

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As the Ohio Supreme Court noted almost one-half century ago, the *Sheppard* case had it all--"Murder, 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."² But apart from the tantalizingly lurid details of the murder of Marilyn Sheppard and the curious way the case became a national cause celebre, the *Sheppard* case is of historical significance³ and academic interest

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²*State v. Sheppard*, 135 N.E.2d 340, 342 (1956); see also JOHN LOFTON, JUSTICE AND THE PRESS 182 (1966) ("The formula which motivates editors in the choice of cases to be headlined was probably well expressed by Ed Murray, managing editor of the *Los Angeles Mirror*, when he said of the Marilyn Sheppard murder: 'The case has mystery, society, sex[,] and glamour.'").

³The fascination with the Sheppard case continues unabated. Numerous television documentaries and programs have been done on the case. See, e.g., *Sam Sheppard: The Real Story* (Learning Channel television broadcast 1997); *American Justice: The Sam Sheppard Story* (A&E television broadcast 1998); *Crime Stories: The Sam Sheppard Story* (Court TV television broadcast 1999); *Nova: The Killer's Trail: Murder Mystery of the Century* (PBS television broadcast 1999); *Inside Story: The Fugitive—The Final Chapter* (BBC television broadcast 2000); *Free Press vs Fair Trial by Jury: The Sheppard Case* (1969); *Just Images: Television News Coverage of High-Profile Criminal Trials* (ABA television broadcast 1995); *Dateline: Body of Evidence* (NBC television broadcast September 26, 1997), *Feagler and Friends, Special Report: Sheppard Reexamined* (WVIZ television broadcast 1999); *Understanding the Power of Genes, Part 1* (Discovery Channel television broadcast 1999). In addition, two made-for-television movies have been made about the case: *GUILTY OR INNOCENT: THE SAM SHEPPARD MURDER CASE* (1975) and *MY FATHER'S SHADOW: THE SAM SHEPPARD STORY* (CBS 1998).

More than a dozen books have been written (exclusively or in part) about the case. See, e.g., F. LEE BAILEY, *THE DEFENSE NEVER RESTS* § II (1971); SUSANNA BARBER, *NEWS CAMERAS IN THE COURTROOM: A FREE PRESS—FAIR TRIAL DEBATE* 37-44 (1987); BERNARD F. CONNORS, *TAILSPIN: THE STRANGE CASE OF MAJOR CALL* (2002); CYNTHIA L. COOPER, & SAM REESE SHEPPARD, *MOCKERY OF JUSTICE: THE TRUE STORY OF THE SHEPPARD MURDER CASE* (1997); DONALD M. GILLMOR, *FREE PRESS AND FAIR TRIAL* 1-9 (1966); WALTER L. HIXSON, *MURDER, CULTURE, AND INJUSTICE: FOUR SENSATIONAL CASES IN AMERICAN HISTORY* § II (2000); PAUL HOLMES, *THE SHEPPARD MURDER CASE* (1961); PAUL HOLMES, *RETRIAL: MURDER AND DR. SAM SHEPPARD* (1966); PETER E. KANE, *MURDER, COURTS, AND THE PRESS:*

because of the many important and ground-breaking aspects of the case. In actuality, there have been three (and perhaps four) *Sheppard* cases—the original prosecution of Dr. Sheppard for the murder of his wife resulting in his conviction,⁴ and the related federal habeas corpus action, which led to the United States Supreme Court overturning Sheppard's conviction because of the extensive pretrial publicity surrounding the case.⁵ The second case was Sheppard's retrial for murder in which he was acquitted. The third trial was the suit by Dr. Sheppard's son, Sam Reese Sheppard, against the state of Ohio for wrongful conviction and seeking reparations for the time that his father spent in prison before the United State Supreme Court overturned his conviction. The third case resulted in a verdict for the state. In February 2002, the Ohio Court of Appeals denied an appeal;⁶ in August, 2002, the Ohio Supreme Court refused to hear an appeal from the appellate court's decision.⁷ U.S. District Court Judge Robertson provides a valuable summary of the three cases in the first portion of his remarks, which are entitled *A Distant Mirror: The Sheppard Case from the Next Millennium*.⁸

Perhaps the most obvious legacy of the *Sheppard* cases is the new law the case made when it was heard by the United States Supreme Court on a federal habeas corpus appeal. In *Sheppard v. Maxwell*, the Court created a new legal standard regarding the effects of pretrial publicity, noting that the atmosphere surrounding Dr. Sam Sheppard's original trial was like a Roman holiday.⁹ In a community in which politics played heavily in local news reporting, the *Sheppard* case was a perfect

ISSUES IN FREE PRESS/FAIR TRIAL ch. 2 (1992); DOROTHY KILGALLEN, MURDER ONE (1967) (chapter entitled "When Justice Took the Day Off"); HENRY LEE & JERRY LABRIOLA, FAMOUS CRIMES REVISITED § II, ch. 3 (2001); Lofton, *supra* note 2, at 106-07, 129, 182-83, 327-28; JAMES NEFF, THE WRONG MAN: THE FINAL VERDICT ON THE DR. SAM SHEPPARD MURDER CASE (2001); JACK HARRISON POLLACK, DR. SAM: AN AMERICAN TRAGEDY (1972); LOUIS B. SELTZER, THE YEARS WERE GOOD ch. 26 (1956); SAM SHEPPARD, ENDURE AND CONQUER (1966); STEVEN A. SHEPPARD & PAUL HOLMES, MY BROTHER'S KEEPER (1964); JURGEN THORWALD, CRIME AND SCIENCE ch. 17-21 (1967); LES WHITTEN, F. LEE BAILEY ch. 8 (1971); THEO WILSON, HEADLINE JUSTICE, INSIDE THE COURTROOM: THE COUNTRY'S MOST CONTROVERSIAL TRIALS 74-81 (1996). *See also* JOHN STARK BELLAMY II, THEY DIED CRAWLING AND OTHER TALES OF CLEVELAND WOE ch. 15 (1995); FRED NEFF, MYSTERIOUS PERSONS IN HISTORY: BAFFLING CASES OF UNSOLVED MYSTERIES ch. 5 (1997); MARK WINEGARDNER, CROOKED RIVER BURNING (2001) (fiction).

⁴*Sheppard v. Ohio*, 128 N.E. 2d 471 (Ohio Ct. App. 1955), 128 N.E. 2d 504 (Ohio Ct. App. 1955), 135 N.E.2d 340 (1956), *cert. denied* 352 U.S. 910 (1956).

⁵*Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), 384 U.S. 333 (1966). In *Sheppard v. E.W. Scripps Co.*, 421 F.2d 555 (6th Cir. 1970), the Sixth Circuit affirmed a dismissal of Sheppard's civil complaint against a publisher, an editor, and a coroner for deprivation of his constitutional rights.

⁶*See, e.g., Murray v. State*, 2002 Ohio 664, 2002 Ohio App. LEXIS 70b; John F. Hagan, *Court Rejects Appeal Filed by Sheppard Estate*, PLAIN DEALER, Feb. 22, 2002, at B5.

⁷Karl Turner, *Sheppard Case Closed—48 Years After Slaying*, PLAIN DEALER, Aug. 14, 2002, at B4.

⁸This symposium issue touches on all three of these cases, hence the title—The Trials of Dr. Sam Sheppard.

⁹135 N.E.2d at 342.

vehicle for sustaining political careers and upping circulation of a new paper on the block. Was it this news coverage that launched the case onto the national scene or was the case's national profile the impetus for extensive news coverage?

The first set of papers in this symposium addresses the legacy of the *Sheppard v. Maxwell*¹⁰ opinion in a new era of cable television and almost simultaneous coverage of ongoing events. If the *Sheppard* case marked a high-water mark in news saturation almost fifty years ago, it was just the beginning of what was to follow. What does it mean to have an impartial jury in days when twenty-four-hour news services broadcast events? What does it mean to have a fair trial when the trial itself is nationally telecast? Are we moving toward more reliable jury verdicts on the basis of *Sheppard v. Maxwell* or will changes in the speed and availability of news reporting have just the opposite effect—making it less likely that criminal defendants will have a fair and impartial trial by a jury of their peers?

In his paper, *Struck by the Falling Bullet: The Continuing Need for Definitive Standards in Media Coverage of Criminal Proceedings*, Professor John Walton provides an informative history of the Supreme Court's jurisprudence in balancing the First Amendment's free press rights against a criminal defendant's rights to a fair trial. He places the *Sheppard v. Maxwell* opinion in the context of this line of cases, noting that the Court held that bias might be presumed based on the magnitude of the pretrial publicity. He also notes that *Sheppard* is probably the high point in the Supreme Court's protection of criminal defendant's rights vis-a-vis adverse publicity. Judge Robertson in his paper, *A Distant Mirror*, points out that the significance of the *Sheppard* decision is magnified if it is placed in the context of the 1960s, when the Supreme Court rendered a host of decisions affecting many aspects of the trial and police tactics. For instance, *Miranda v. Arizona*¹¹ was decided in the same year as the *Sheppard* case; other cases from that decade include the landmark decisions of *Mapp v. Ohio*,¹² *Gideon v. Wainwright*,¹³ and *Brady v. Maryland*.¹⁴

Court TV reporter Clara Tuma in her paper, *Open Courts: How Cameras in Courts Help Keep the System Honest*, explores the phenomenon of having cameras in the courtroom, as was done in the first and third *Sheppard* cases. She argues that cameras in the courtroom enhance the public's understanding of the criminal justice system and serve as a safeguard on the system, helping to make certain that the process is conducted fairly. Three of the other participants in the conference had something to say about the role of various participants in the criminal justice system regarding the news media. In his paper *Influence of Media and Technology: Changing Roles and Responsibilities*, criminal defense attorney Terry Gilbert, the attorney for Sam Reese Sheppard in the third trial, discusses the strategy that attorneys may adopt in dealing with the media. Judge Robertson discusses the role of the trial judge vis-a-vis the media in high-profile criminal cases. Finally, Professor Laurie Levenson, in *Witness to History: The Role of Legal Commentators*

¹⁰*Sheppard v. Maxwell*, 384 U.S. 333 (1966).

¹¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

¹²*Mapp v. Ohio*, 367 U.S. 643 (1961).

¹³*Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁴*Brady v. Maryland*, 373 U.S. 83 (1963).

in *High Profile Trials*, discusses the role of attorneys and law professors as media commentators and the ethics involved in serving in that capacity.

The second major legacy of the *Sheppard* case is the use of scientific evidence in criminal cases. Both the original and second *Sheppard* trials were significant because they used a “new” type of scientific evidence—blood spatter and bitemark analyses. Since that time, the field of forensic science has virtually exploded. More and more types of scientific evidence are being used in cases. Will this infusion of science into the courtroom lead to more reliable jury verdicts? A number of questions must be answered in this regard. First, is the science reliable? As a precondition to its admission into a criminal trial, scientific evidence must meet basic evidentiary requirements in terms of reliability. These requirements have changed in the fifty years since the original *Sheppard* case. From the general acceptance standard in *Frye*¹⁵ to the United States Supreme Court’s decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁶ and *Kumho Tire Co. v. Carmichael*,¹⁷ the doctrine governing the admissibility of scientific evidence has been evolving. As Professor Michael Saks argues, in his paper *Scientific Evidence and the Ethical Obligations of Attorneys*, these standards relate to not only new, cutting-edge forensic sciences, but the “old” types of scientific evidence—fingerprinting, handwriting analysis, and the like. How certain of the scientific bases of these sciences must we be before they may be admitted into a court of law?

A second question posed by the introduction of forensic sciences into the courtroom is the issue of whether a jury composed of a cross-section of the community is capable of understanding, evaluating, and making appropriate use of this type of evidence. Questions of inherent reliability aside, the *Sheppard* case along with others like the trial of O.J. Simpson, should cause us to ponder whether jurors can comprehend scientific evidence. Professor Paul Giannelli, in his paper *Scientific Evidence in the Sam Sheppard Case*, discusses the critical role that expert and scientific evidence played in the three cases.

The questions concerning the jury’s comprehension of scientific evidence are also linked to questions of jury functioning in general. Professor Lawrence Solan has pointed out the importance of the wording in various kinds of jury instructions, in particular those relating to the presumption of innocence, reasonable doubt, and circumstantial evidence. In his article, *Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the Sheppard Case*, Professor Solan proposes three criteria in evaluating jury instructions: (1) accuracy, (2) comprehensibility, and (3) consistency with the presumption of innocence. Do juries really understand these instructions? How can instructions be written in ways that make them more comprehensible to lay persons? Will improvements to jury instructions result in more reliable jury verdicts?

Finally, the introduction of forensic evidence is dependent, in large measure, on the qualifications of expert witnesses who present this evidence to the jury. Experts must be qualified in their respective fields before being allowed to testify. The science upon which their testimony depends is also very important. Moreover, their

¹⁵*Frye v. United States*, 293 F.1013 (1923).

¹⁶*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¹⁷*Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

ability to “teach” the jury about their various fields of expertise and to allow the jury to comprehend the intricacies of specialized fields of scientific knowledge will have a profound effect on the outcome of a case. As Professor Giannelli points out, the three *Sheppard* trials were heavily dependent on this type of expert testimony and this continues to be a challenge for courts in the future. Professor Gianelli stresses the importance of skillful investigations, open discovery of scientific evidence, and finally, defense access to experts in today’s scientifically sophisticated legal world.

The *Sheppard* cases are illustrative of a third trend—the use of DNA evidence to convict as well as exonerate the falsely accused or convicted. The third *Sheppard* case, the civil suit by Sam Reese Sheppard against the State of Ohio, was dependent on a very specific type of expert testimony—DNA analyses. Not merely relying on the notion that Dr. Sheppard had been falsely convicted as evidenced by his subsequent acquittal, his son sought to prove that another person was responsible for the crime. Luckily, specimens of the forensic evidence from the original *Sheppard* cases remained intact, a circumstance that is not always the case. Thus, it was possible to subject these specimens to DNA analyses which had not been available almost half a century ago.

The Innocence Project’s reliance on this new technology is another manifestation of this trend.¹⁸ A significant number of persons who have been convicted of crimes have been exonerated by DNA evidence. As some commentators have pointed out, DNA evidence has had the effect of raising questions regarding the death penalty that have not been asked with other kinds of evidence.¹⁹ Professor Margaret Raymond, in her paper *The Problem with Innocence*, asks whether the focus on DNA evidence and the Innocence Project is deflecting attention from other serious concerns with the criminal justice system. She posits that the wrongful conviction cases and their reversals may give the false impression that the system really works, when it continues to have significant flaws. Professor Raymond points out that there exist three types of innocence: burden-of-proof innocence, legal innocence, and factual innocence, but that recent attention has focused on factual innocence in derogation of other types of miscarriages of justice.

The *Sheppard* case raises an important fourth issue—the role of the trial attorney in criminal cases. Perhaps the lesson one might learn from the second *Sheppard* case is how important attorneys are in the pursuit of justice for criminal defendants. F. Lee Bailey had just graduated from law school when he went to the United States Supreme Court in the *Sheppard* case. Not only did F. Lee Bailey win a new trial for his client, at which he was acquitted, but he launched himself on the national stage in doing so. In the third *Sheppard* case, Terry Gilbert, a graduate of the Cleveland-Marshall College of Law, attempted to push the envelope of victim’s compensation for errors in the criminal justice system by suing the State of Ohio. These suits are an intriguing proposition. Should those who have been convicted and then acquitted be entitled to compensation for the wrongs done them in the past? Should members of their families be entitled to compensation in cases in which the defendant has died? From a public policy perspective, are suits of these kinds appropriate mechanisms for keeping the criminal justice system from going too badly awry? In

¹⁸See, e.g., BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

¹⁹Sheppard might have been eligible for the death penalty during his first trial.

his paper, *Influence of Media and Technology: Changing Roles and Responsibilities*, Terry Gilbert takes on some of these troubling issues. He argues that the *Sheppard* case was a vehicle for the justice system to “redeem itself” by trying to expand remedies for wrongful convictions and incarcerations.

The fifth enduring legacy of the *Sheppard* case is the lesson it provides for all about the awful human toll that the criminal justice system exacts on persons when it fails to function properly. Dr. Sheppard spent almost 10 years in prison before he was acquitted in the second trial. However, his life was never the same again. He could not reclaim his career, took to odd pursuits including professional wrestling, and ultimately died an untimely death. He was not the only victim of the flaws inherent in the system. His son lost not only his mother on the July morning in 1954, but his father for a significant period of time and then to an early grave. Sam Reese Sheppard’s remarks, *Personal Reflections on the Reliability of Jury Verdicts*, remind us that the criminal justice system is not an abstraction for the countless persons who are falsely accused and convicted, but is a painful reality. Professor Joel Finer’s closing poem, *And Justice for Doc Sam*, also emphasizes the human toll that a dysfunctional criminal justice system has on us all.

A truism in the law is that hard cases make bad law.²⁰ In other words, when courts are confronted with difficult problems they must cope the best they can and this will not necessarily result in good law for the more ordinary or run-of-the-mill cases. The *Sheppard* case is an exception to this rule. The case has enduring value in 2002 simply because it was a difficult case—not only for the mystery that lies at the heart of who killed Marilyn Sheppard, but for the many ways in which this case has been at the forefront of new law or trends in the legal system. Many have argued over which case should be called “Trial of the Century” for the twentieth century. We have many contenders for that title—the *Lindbergh Kidnapping* case, the *O.J. Simpson* case, the *Scopes Monkey Trial*, the *Leopold & Loeb* case, the *Rodney King* case, and the *Sacco & Vanzetti* case. Surely among the contenders must be the *Sheppard* case. The three *Sheppard* cases, spread over almost half a century, serve as a point of departure to explore how the multiple forces of law, science, and the media have interacted in criminal trials and in later challenges to the reliability of those trials.

²⁰See, e.g., D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 137 (2000).