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## A DISTANT MIRROR: THE *SHEPPARD* CASE FROM THE NEXT MILLENNIUM

JAMES ROBERTSON<sup>1</sup>

The title of these remarks is homage to the great popular historian Barbara Tuchman. Her book entitled *A Distant Mirror* may not have been as successful as *The Guns Of August*, which won the Pulitzer Prize, but I think it is her most ambitious and fascinating work. *A Distant Mirror* is about the 14th century—a tumultuous time when the world (meaning Europe) was rebuilding itself and its institutions after the Black Death killed one-third of the people living between India and Iceland. Tuchman knew that by drawing analogies to our own time she could make us pay attention to the stories that history tells. Her analogy, as she looked into a six hundred year-old mirror in 1978, was to a world trying to put itself together after a nuclear holocaust. Today, when we are beginning to be able to imagine a world decimated or double-decimated by AIDS,<sup>2</sup> her book seems even more relevant.

The *Sam Sheppard* case is a mirror, too—a mirror with many facets. Indeed, as I think we will discover in this conference, the mirror of the *Sheppard* case has much in common with the Mirror of Erised, where Harry Potter found his parents<sup>3</sup>: what we see depends on who we are and what we are looking for. The criminal law faculty has convened a diverse and distinguished group of journalists, lawyers, and academics. When they look into the fifty year-old mirror of Cleveland's famous *Sheppard* case, they see many different questions and problems. How does, or how should, the media deal with the high profile criminal trial today? What responsibility, if any, rests upon those who report and comment in the media? What is, and what will be, the role of forensic science?

My own vantage point is that of a trial judge, and for me, revisiting the *Sheppard* case is a chance to ruminate on the relationship between judges and the media and how judges deal with high profile cases. I will consider that subject this evening, and then meander a little farther along and share a few thoughts about what I call hermetically sealed justice—our modern insistence that judges say nothing and juries know nothing. Finally, if I have time, I will have a few words to say about DNA evidence and the “reliable verdict” ideal that appears to be one of the propositions to which this conference is dedicated.

The *Sam Sheppard* case produced three verdicts. The first one was unreliable because the United States Supreme Court said so. The second one was reliable for its obedience to the presumption of innocence. The third one was inevitable because it is harder to prove innocence than to presume it.

Because I am the first speaker, and because some of you may be a bit fuzzy about the *Sheppard* case or confused about what I just said, let me review some of the basic facts.

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<sup>2</sup>Or, since September 11, 2001, worse.

<sup>3</sup>J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 207 (1998).

## THE SHEPPARD CASE

Marilyn Sheppard was bludgeoned to death in the upstairs bedroom of her lakefront home in Bay Village in the early morning hours of July 4, 1954. Her son Chip, who is now Samuel Reece Sheppard and will address us tomorrow morning, was asleep in an adjoining bedroom. Her husband Samuel, a young osteopath from a prominent family, told the police that he had fallen asleep on the couch downstairs; that he heard his wife cry out; that he ran upstairs and saw a “form” standing next to his wife’s bed; that he struggled with the form but was struck unconscious; that he regained his senses, looked at his wife, took her pulse, and thought she was dead; that he then heard a noise, ran downstairs, chased the form to the shore of the lake, struggled again, and lost consciousness again; that he awoke lying half in the water, returned home, checked his wife’s pulse again, and called his neighbor, who was the mayor of Bay Village.

The Sheppard murder would probably not make the front page today. We have seen too many thousands of TV murders and too many hundreds of real ones, and we are jaded. Give us a strangled six-year old beauty queen or a Hall of Fame running back contemplating suicide on a Los Angeles freeway and we might pay attention. But, in 1954, the world was young. There was no freeway here; the Ohio Turnpike wasn’t even open. Travel by jet plane was a novelty. Cleveland, and most American cities the size of Cleveland, still had morning and afternoon daily newspapers, but they were locked in a struggle for survival with one another and with the new media kid on the block, television. If you believe, as I do, that Alan Freed invented rock ‘n’ roll on WJW, that art form was barely three years old. Dwight Eisenhower was president. Earl Warren had been Chief Justice for only a year. *Brown v. Board of Education of Topeka*<sup>4</sup>, the school desegregation decision, was only a few weeks old. The Warren Court had not yet begun to coalesce around its great criminal law decisions of *Mapp v. Ohio* (exclusionary rule, 1961)<sup>5</sup>, *Gideon v. Wainwright* (right to counsel, 1963)<sup>6</sup>, *Brady v. Maryland* (disclosure of exculpatory evidence, 1963)<sup>7</sup>, and, of course, *Miranda v. Arizona* (1966)<sup>8</sup>.

All of those decisions, but especially *Miranda*, might have been of considerable help to Dr. Sheppard. He was interrogated by Cleveland police the day of the murder while he was under sedation in his hospital room. He was interrogated again later the same day by the chief of police and two other officers who confronted him with evidence and demanded explanations. He made himself available thereafter for frequent and extended questioning, but his willingness to talk (unimaginable today) did not keep the *Cleveland Press* and the *Cleveland Plain Dealer* from running page-one stories reporting his lack of co-operation. The *Press* was indignant that he refused to submit to a polygraph test, and it complained with all the subtlety of a meat axe that someone was “getting away with murder.” On July 21, a coroner’s inquest was convened in a school gymnasium. It was broadcast live. Sheppard,

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<sup>4</sup>349 U.S. 294 (1954).

<sup>5</sup>367 U.S. 643.

<sup>6</sup>372 U.S. 335.

<sup>7</sup>373 U.S. 83.

<sup>8</sup>384 U.S. 436.

although not yet under arrest, was brought in by policemen who searched him in full view of several hundred spectators. “Sheppard’s counsel were present during the three-day inquest but were not permitted to participate. When Sheppard’s chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the coroner, who received cheers, hugs and kisses from ladies in the audience. Sheppard was questioned for five and one half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes.”<sup>9</sup>

Believe it or not, things went downhill from there. The *Press* and the *Plain Dealer* ran front page editorials demanding that Sheppard be arrested and charged. Within days, he was indeed arrested, bound over to the grand jury, and indicted. The case was assigned to Cuyahoga County Common Pleas Judge Edward Blythin, who was running for re-election that year, and who set the trial to begin two weeks before election day. The names and addresses of all seventy-five members of the jury venire were printed on the front page. The judge virtually turned his courtroom over to the media, apparently in the sincere belief that freedom of the press was paramount and that he had no choice.

I could go on and on about this. The first seven or eight pages of the Supreme Court’s opinion in *Sheppard v. Maxwell* make extremely entertaining reading and could occupy all the time I have been given for these remarks. But I need to hurry along with my precis of the case before sharing with you what I see in the mirror.

Sam Sheppard was convicted of second-degree murder and sentenced to prison for life. His conviction was affirmed by the Court of Appeals of Cuyahoga County<sup>10</sup> and by the Ohio State Supreme Court.<sup>11</sup> In 1956, the United States Supreme Court denied his application for a writ of *certiorari*.<sup>12</sup> Eight years later, a young lawyer named F. Lee Bailey brought a federal *habeas corpus* petition before Chief Judge Carl A. Weinman in the Southern District of Ohio (where Dr. Sam was in prison). Judge Weinman granted the writ, principally because of Judge Blythin’s failure to grant a change of venue or a continuance in view of the newspaper publicity, and he ordered Sheppard released from prison.<sup>13</sup> The United States Court of Appeals for the Sixth Circuit, in a 2-1 panel decision, reversed.<sup>14</sup> Then, in its 1966 landmark decision, the United States Supreme Court reversed the Sixth Circuit and ordered a new trial. Bailey defended Dr. Sam in the second trial, and the jury found him not guilty. More than twenty years later, long after his father’s death, Sam Reese Sheppard went public with his theory that the “bushy haired man” who murdered his mother was really Richard George Eberling, a window washer who had worked in the Sheppard house in 1954 and whose own life had been surrounded by sudden and unexplained deaths. DNA tests indicated that blood found at the scene was neither Sam Sheppard’s nor Marilyn’s. Sam Reese Sheppard sued for wrongful imprisonment, a suit he could not win without a jury verdict that Dr. Sam was innocent. In 1998, a Cuyahoga County jury refused to return that verdict.

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<sup>9</sup>Sheppard v. Maxwell, 384 U.S. 333, 339-40 (1966).

<sup>10</sup>State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955).

<sup>11</sup>Sheppard, 135 N.E.2d 340 (1956).

<sup>12</sup>Sheppard v. State of Ohio, 352 U.S. 910 (1956).

<sup>13</sup>Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio E.D. 1964).

<sup>14</sup>Sheppard v. Maxwell, 346 F.2d 707 (1965).

So, here is what I see in the mirror of this case.

#### JUDGES AND THE MEDIA

First, as to the relationship between judges and the press: Let's have a little sympathy for Judge Blythin—and for trial judges everywhere! He was an old fashioned judge confronted by a situation not unprecedented, but very rare. He thought that freedom of the press was absolute. The Supreme Court's criticism of his management of the trial twelve years after the fact was a classic exercise in appellate hindsight. The Court knew about its own decisions in *Marshall v. United States*<sup>15</sup> (jurors exposed through news accounts to information not admitted at trial) and *Irvin v. Dowd*<sup>16</sup> (atmosphere disturbed by huge wave of public passion) and *Estes v. State of Texas*<sup>17</sup> (procedure giving rise to probability of prejudice inherently lacking in due process), but Judge Blythin couldn't have known about them: they had not been decided in 1954. Justice Clark's opinion offered helpful hints for judges who might face similar situations in the future: try limiting press access; insulating witnesses; issuing gag orders. Those were great ideas, but they were unsupported by citations to cases that Judge Blythin could have read.

Today, a trial judge dropped into the center of a press maelstrom has plenty of precedents and resources to draw upon. The National Center for State Courts and the Federal Judicial Center publish booklets of advice, some of it instantly available on the Internet.<sup>18</sup> We all have within short term memory the vivid yin and yang examples of Judge Lance Ito, of the *O.J. Simpson* case, and Judge Richard Matsch, of the Oklahoma City bombing cases. (It is generally accepted among trial judges, I believe, that the Simpson case set back efforts to bring television cameras into the courtroom by a decade, if not a generation.)

What a trial judge does not have today is an objective or even an accepted test for deciding if and when media coverage has unconstitutionally infected a jury pool. If O.J. Simpson had been convicted of murdering his wife, would a habeas petition based on prejudicial pretrial publicity have succeeded? *Sheppard v. Maxwell* provides no answers. Judge Blythin and the Ohio Supreme Court thought they had a litmus test for media-induced prejudice: they found the Sheppard venire untainted because fifty-eight of the seventy-two prospective jurors examined, stated that they had not prejudged Sheppard's guilt or innocence.<sup>19</sup> Judge Weinman and the United States Supreme Court simply blew past that point. Weinman, quoting Justice Frankfurter's concurrence in *Irvin v. Dowd*, concluded that "the assurances of the jurors must be disregarded for . . . 'before they entered the jury box, their minds were

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<sup>15</sup>360 U.S. 310 (1959).

<sup>16</sup>366 U.S. 717 (1961).

<sup>17</sup>381 U.S. 532 (1965).

<sup>18</sup>See <http://www.fjc.gov> (last visited April 10, 2002); <http://www.ncsconline.org> (last visited April 10, 2002); <http://www.judges.org> (last visited April 10, 2002).

<sup>19</sup>*Sheppard*, 231 F. Supp at 59.

saturated by press and radio . . . designed to establish the guilt of the accused.”<sup>20</sup> The Supreme Court did not even mention the *voir dire*.<sup>21</sup>

Not only do we have no test for determining when a community is infected by prejudice, but it is not clear that Justice Clark’s tips and tricks would have any effect at all in today’s world of instant messaging, wireless Internet access, no privacy, and no recognizable news cycle. Gag orders on trial participants might help, but the last time I looked, the Sixth Circuit had found them to be unconstitutional prior restraints on speech.

The Supreme Court’s thinking in *Sheppard v. Maxwell*, and the prescriptive remedies it offers, proceed I believe from the major premise that judges and the press are natural adversaries. The label—the cliché—most commonly pasted on the kind of discussion we are having in Cleveland this weekend is “free press v. fair trial.” That, indeed, was the title of my college thesis, written in 1959 about the Sheppard case. My thinking then, and my conclusion, conformed to the adversarial paradigm: I thought American judges could get a leg up on the press by following the British model and using the contempt power.

But more thoughtful (and less naïve) people have begun to question whether the adversarial model is a useful one. Since 1999, a partnership of the First Amendment Center of the Freedom Forum in Washington and the Judicial Branch Committee of the U.S. courts has been conducting a series of discussions between federal judges and journalists about access, information and accountability in news media reporting on the federal courts.<sup>22</sup> The goal of the program is to encourage and assist in more accurate reporting to the public of what happens in federal courts, to help educate reporters about the courts’ operations, and to help educate judges about the manner in which reporters and newspapers gather and present information about the justice system. Circuit Judge Stephen Reinhardt has called for judges to speak out directly to the public about issues of importance to them.<sup>23</sup> For Judge Reinhardt, those issues include judicial appointments, the death penalty, and the subversion of the Fourth Amendment that has been a consequence of the war on drugs. Judge Reinhardt is especially critical of the provisions of the Code of Judicial Conduct that permit judges to speak to audiences like this one but not to appear in “less erudite fora.”<sup>24</sup> He writes that “Many judges are afraid that, by speaking openly and honestly about their concerns and beliefs, they will leave themselves vulnerable to criticism and censure; the myth of the judge as the detached, neutral decision maker can only be

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<sup>20</sup>*Id.* (quoting 366 U.S. 717, 730).

<sup>21</sup>*Mu’Min v. Virginia*, 500 U.S. 415 (1991), probably vindicates Judge Blythin and the Ohio Supreme Court. See Whitebread & Contreras, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System*, 69 S. CAL. L. REV. 1587 (1996).

<sup>22</sup>See <http://www.freedomforum.org> (last visited April 10, 2002).

<sup>23</sup>Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805 (1995).

<sup>24</sup>“A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge’s direction and control. This proscription does not extend to public statements made in the course of the judge’s official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.” CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, Canon 3A(6).

maintained from afar.”<sup>25</sup> Veteran *Los Angeles Times* reporter Jack Nelson urges judges and journalists to establish relations based on trust and respect and then talk on background. Why? He quotes Griffin Bell—former judge and former Attorney General—as saying that the modern judiciary is so powerful that “it’s anti-democratic not to explain proceedings to the press.”<sup>26</sup>

#### HERMETICALLY SEALED JUSTICE

Flashback again to poor Judge Blythin. On the first day of the Sheppard trial, he spotted Dorothy Kilgallen in the courtroom. Most of you will not remember Dorothy Kilgallen. She was a New York print journalist who found her calling in the new medium of television. Judge Blythin, curious about the publicity the trial had generated, asked her to visit him in chambers. Ms. Kilgallen never wrote about their meeting at the time of the trial, but ten years later she gave an affidavit to F. Lee Bailey, recounting their conversation. Judge Blythin expressed interest in why she had come to Cleveland. She said it was the trial, which had all the ingredients of what the newspaper business calls a good murder: an attractive victim who was pregnant, an important member of the community as the accused, and a mystery as to who did it. Judge Blythin responded, “Mystery? It’s an open and shut case. . . . [H]e is guilty as hell. There’s no question about it.”<sup>27</sup>

Judge Weinman, the federal district judge who granted Sheppard’s *habeas* petition, was a perceptive and courageous judge, but on this point he went astray. He found that the Kilgallen story demonstrated Judge Blythin’s bias, that Blythin should have disqualified himself, and that his failure to do so violated Sheppard’s constitutional rights. His reasoning was that “a judge must have no interest other than the pursuit of justice and when he expresses in emphatic terms the opinion that the person before him is guilty, as was done here, the judge then has a personal interest in *seeing that the defendant is convicted* or the judge may well be embarrassed for having made such an emphatic statement of guilt.”<sup>28</sup> Citing *In Re Murchison*,<sup>29</sup> Judge Weinmann invoked the “appearance of justice” standard and concluded that, once Judge Blythin made emphatic statements of petitioner’s guilt, it could no longer be assumed that he was impartial or that he could exercise “sound discretion” — which, even though the jury would decide Sheppard’s guilt, he would be required to exercise often during trial.

Nobody remembers the Sixth Circuit’s opinion in Sheppard’s *habeas* case because it was reversed. On the question of Judge Weinmann’s finding on disqualification,<sup>30</sup> however, it is worth resurrecting. The court noted, first, that Ms. Kilgallen was never subjected to cross-examination and that the evidence of Judge

<sup>25</sup>See Reinhardt, *supra* note 23, at 807-08.

<sup>26</sup>Remarks to new federal judges, Federal Judicial Center, Nov. 15, 1995 (on file with the author).

<sup>27</sup>*Sheppard*, 231 F. Supp. at 64.

<sup>28</sup>*Id.* at 65.

<sup>29</sup>349 U.S. 133, 136 (1955). Note the transgressions of both Judge Blythin and the *Cleveland Press* came before *Murchison*.

<sup>30</sup>*Sheppard*, 346 F.2d at 725-30.

Blythin's statement was far from uncontroverted. It pointed out numerous instances of Judge Blythin's in-court conduct that indicated impartiality. But even if Judge Blythin did say he thought Sheppard was guilty, the court said, a judge is not disqualified to sit in a criminal case merely because he has an opinion as to the guilt of the accused or is convinced of his guilt. The *Murchison* case on which Weinmann had relied was much different, the Sixth Circuit said. That was a due process case in which a judge, acting under Michigan law, first sat as a one-man grand jury under Michigan law and cited a witness for contempt, and then put his robe back on to preside over the contempt hearing. The Sixth Circuit said, "it would come as no surprise to the legal profession and to an informed judiciary that there must be many times when a presiding judge exhibits impeccable fairness and discretion in his conduct of a criminal jury trial notwithstanding his own belief in the guilt of a defendant."

Contrary to the Sixth Circuit's thinking, however, and at variance with what I have characterized as more thoughtful views about the relationship between courts and the press, it has become part of the weaponry of modern litigation (not to mention politics) to accuse judges of bias, or to suggest the "appearance of impropriety" in some judicial statement.<sup>31</sup> The D.C. Circuit reversed a decision of a colleague of mine in a case involving Microsoft Corporation and ordered it assigned to a different judge on remand (at the joint motion of both sides to the litigation), noting that, to do so, it was not necessary to find "actual bias or prejudice, but only that the facts 'might reasonably cause an objective observer to question [the judge's] impartiality.'"<sup>32</sup> Another colleague became the second judicial target of Microsoft Corporation, which wanted him removed for giving interviews about the case to carefully selected, trusted reporters that were embargoed until his decision had been issued. The judge's motive? To explain proceedings to the press. Was there evidence of bias or the "appearance of impropriety?" Those questions are before the Court of Appeals, and of course I may not comment on them.<sup>33</sup> Two non-case

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<sup>31</sup>See *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993); *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001); *In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995); *Judith R. v. Hey*, 405 S.E.2d 447 (West Virginia 1990); *Papa v. New Haven Federation of Teachers*, 444 A.2d 196 (Connecticut 1982). See generally Cynthia Gray, *Disqualification Based on Comments to the Media in a Pending Case*, 23 AM. JUDICATURE SOC'Y JUD. CONDUCT REP. No. 2, (Summer 2001).

<sup>32</sup>*United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)).

<sup>33</sup>On June 28, 2001, after these remarks were presented, the United States Court of Appeals for the District of Columbia, in a righteously indignant opinion, found on the basis of a record no more cross-examined than that of Judge Blythin's chat with Dorothy Kilgallen that my colleague had violated Canons 3A(6), 2, and 3A(4), not to mention 28 U.S.C. § 455(a). The court found no actual bias but easily recognized the "appearance of impropriety" genie when it was called forth (by Microsoft) and directed that, upon remand, the case be assigned to another judge. *United States v. Microsoft Corp.*, 253 F.3d 34, 107 et seq. I am not yet free to comment, since Microsoft, unsatisfied with its success in ousting a second federal judge, has petitioned for certiorari to review the Court of Appeals' conclusion that there was no actual bias. But see Evan P. Schultz, *Behind the Bench: Is the problem with Judge Jackson that he appeared to be biased? Or that he appeared to be human?*, LEGAL TIMES, Apr. 2, 2001, at 50; Paul Rosenzweig, *The Press and the Judge: Abusing the Canons*, LEGAL TIMES, July 30, 2001, at 50. See Josh Gerstein, *Speaking to the Public*, LEGAL TIMES, July 30, 2001, at 51 ("The



related comments appear to be germane, however. One, quoting Judge Jerome Frank, is this: “Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.”<sup>34</sup> The other is that “appearance of impropriety” is a dangerous genie; it can be released from its lamp by anyone who calls its name.

The judiciary is ill-served, in my view, by what Judge Reinhardt calls the “myth of the judge as the detached, neutral decision maker.”<sup>35</sup> Continuing public confidence in the courts depends upon our making ourselves and our decisions accessible and understandable to the people. Citizens want judicial decisions to be rendered by fellow citizens—not by Druids.

In the same way, I think, we ill serve the interests of justice by insisting on pure, certifiably ignorant juries in pursuit of what Jeffrey Abramson has called the “impartial justice ideal.”<sup>36</sup> Ignorance is not impartiality, as Abramson reminds us by quoting from something Mark Twain wrote almost 130 years ago: “A noted desperado killed Mr. B, a good citizen, in the most wanton and cold-blooded way. . . . [T]he papers were full of it, and all men capable of reading read about it. And of course all men not deaf and dumb and idiotic talked about it.”<sup>37</sup> When a jury was selected to try the case, “the system rigidly exclude[d] honest men and men of brains. . . . A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity; a quartz-mill owner of excellent standing, were all questioned in the same way, and all set aside. Each said the public talk and the newspaper reports had not so biased his mind but that sworn testimony would . . . enable him to render a verdict without prejudice and in accordance with the facts. But of course such men could not be trusted with the case.”<sup>38</sup>

The presumption of bias the Supreme Court found in *Rideau v. Louisiana*,<sup>39</sup> the probability of prejudice standard in *Estes v. Texas*,<sup>40</sup> and the essentially standardless “we-know-it-when-we-see-it” approach to pretrial publicity in *Sheppard v. Maxwell*, all combine, as Abramson says, to show “how tarnished [is] the once proud reputation of the jury of the vicinage as an informed and deliberative body.”<sup>41</sup>

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problem with most judges is not that they talk to the press too much, but too little. The vitriol the court directed at Jackson . . . may make judges even warier about talking to reporters. The result of that will be less-informed and less-accurate reports about judicial actions, and, ultimately, a more poorly informed public.”).

<sup>34</sup>*Liteky v. United States*, 510 U.S. 540, 549 (1994).

<sup>35</sup>*See Reinhardt, supra* note 23, at 807.

<sup>36</sup>JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994).

<sup>37</sup>*Id.* at 45 (citing MARK TWAIN, *ROUGHING IT* (1877)).

<sup>38</sup>*Id.*

<sup>39</sup>373 U.S. 723 (1963).

<sup>40</sup>381 U.S. 532 (1965).

<sup>41</sup>*See ABRAMSON, supra* note 36, at 48. *Sheppard* may actually represent the high water mark of that tarnish (catch that metaphor), in view of the new standard for voir dire announced in *Mu’Min v. Virginia*. *See Whitebread & Contreras, supra* note 21, at 1601.

## DNA EVIDENCE AND THE “RELIABLE VERDICT”

Justice is not a scientific, perfectable, impersonal, machine process. Anyone seeking evidence of that proposition would do well to visit the District of Columbia, where acquittals and hung juries in gun possession cases are so frequent as to seem normal. Why the conviction rate is so low (approaching one-third) we will never know. What we can infer from anecdotal experience, however, is that some significant part of the community (a) is tired of sending young African American men to jail, (b) believes that having a gun may be necessary for self defense, (c) is prepared to find reasonable doubt in if there is any suggestion that “somebody planted the gun,” or (d) all of the above.

Those who expect the recent development of DNA identification technology to usher in an era of more “reliable” jury verdicts would do well to contemplate our experience with fingerprints in the twilight of that technology. The scientific basis and reliability of fingerprint evidence to prove guilt are now in serious doubt.<sup>42</sup> But the “myth of fingerprints” has been hardwired into the community’s consciousness to the point where the *absence* of fingerprint evidence can be, and often is, fatal to a gun possession case. An hour or more of the routine gun possession trial is now consumed by expert testimony, adduced by the prosecution, to explain how latent fingerprints are left, how they are lifted, how they are analyzed—and why none were found on this particular weapon.

DNA evidence has clearly arrived.<sup>43</sup> Its power to right wrongs and redress injustice is manifest,<sup>44</sup> and the technology can be expected to have a long run. The law of unintended consequences is alive and well in the world, however. If the community becomes as familiar with DNA evidence as it (thinks it) is with fingerprint evidence and juries begin to find reasonable doubt because of its absence, we may all have cause to wonder where the “reliable jury verdict” went.

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<sup>42</sup>At this conference, and in his article *Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069 (1998), Professor Michael J. Saks presented stunning arguments for the proposition that fingerprint evidence is unreliable and, if challenged under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), of questionable admissibility.

<sup>43</sup>A few days before the Conference, Judge Albert Bryan ruled that a prisoner bringing a post-conviction challenge has a due process right to DNA testing because the result could constitute material exculpatory evidence. *Harvey v. Horan*, 2001 WL 419142 (E.D. Va. Apr. 16, 2001), *rev’d* 278 F.3d 370 (4th Cir. 2002).

<sup>44</sup>See <http://www.innocenceproject.org> (last visited May 15, 2002).