

2001

## Struck by the Falling Bullet: The Continuing Need for Definitive Standards in Media Coverage of Criminal Proceedings

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### Recommended Citation

John A. Walton, *Struck by the Falling Bullet: The Continuing Need for Definitive Standards in Media Coverage of Criminal Proceedings*, 49 Clev. St. L. Rev. 407 (2001)  
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol49/iss3/6>

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STRUCK BY THE FALLING BULLET: THE CONTINUING  
NEED FOR DEFINITIVE STANDARDS IN MEDIA COVERAGE  
OF CRIMINAL PROCEEDINGS

JOHN A. WALTON<sup>1</sup>

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I. INTRODUCTION

Good morning. It is an honor to speak here today and a special honor to meet Sam Sheppard. I have studied the *Sheppard* case from an academic and a legal perspective but meeting Mr. Sheppard and visiting the Media Room upstairs made me realize that my understanding of the case is only superficial. As lawyers, judges, or law professors or as mere observers of the media events surrounding high publicity trials, we are distant, either by design or by necessity, from some of the most important aspects of a criminal proceeding—that aspect being the real devastation and loss suffered by crime victims and their families. I have been a victim of minor crimes and I suspect most of you have been too. I recall that, after dealing with the initial loss, the frustrating and often debilitating aspects of being a crime victim arise from coping with the prospect that no one will ever answer for the crime or that there will be no justice. But I think we forget that justice is intended for both sides. We forget that the law is designed to protect the accused.

Extensive media coverage of events attempt to bring us closer to the events; help us understand the issues; witness the scene; feel like we were there; perhaps empathize with the victim. The media coverage stirs our passions to follow the story and to vicariously seek justice—staying tuned for the latest updates and a word from the commercial sponsors. In the end, we cannot truly empathize with anybody who is directly involved in a crime because at any given time we can turn off the television and still have everything we had before the coverage started. However, those directly involved in the crime—both as victim and increasingly as suspect—continue to suffer. The incongruity in saturation media coverage of a criminal proceeding is that the coverage can as easily hinder the process as it can promote it.<sup>2</sup>

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<sup>1</sup>Associate Professor of Law, Northern Illinois University—College of Law. Many thanks to the Cleveland-Marshall law faculty who welcomed me as a visitor and welcomed me back as a panelist. Thanks also to my research assistants, Cheryl Lalama and Adam Bunge, for their hard work.

<sup>2</sup>Consider for example the negative impact of media coverage on the Sheppard case compared to the death penalty moratoriums imposed in several states following widespread media attention to reversals of death penalty convictions based on new technology available for examining DNA evidence. See Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure Illinois is First State to Suspend Death Penalty'*, CHI TRIB., Feb. 1, 2000, at 1, available at 2000 WL 3632094 (reporting Illinois Governor George Ryan's announcement of a death penalty moratorium in Illinois). See also, Benjamin Wallace-Wells, *States Follow Illinois Lead on Death Penalty*, BOSTON GLOBE, Feb. 9, 2000, at A3, available at 32000 WL 3311890

When I look at the impact of the media coverage on the *Sheppard* trial with hindsight, I view that type of media circus as similar to firing a gun into the air. It makes a lot of noise and some smoke, and initially everybody takes notice. Hopefully, sometime in the future the bullet falls silently and harmlessly to earth. Similarly, in most cases, media coverage of a crime generates some attention but does not impede the administration of justice. The problem is—when you fire a gun into the air there are no standards; there are no parameters. It is hard to know where the bullet will fall. And the real problem is a bullet falling to earth falls with the deadly velocity it had when it left the gun. Occasionally, somebody gets struck by that falling bullet. Similarly, media coverage of criminal court proceedings has no definite standards and parameters.<sup>3</sup> It is difficult to predict when that coverage will expand into a media circus and even more difficult to know, prospectively, what impact the circus will have on the defendant's trial. When I was visiting the media room yesterday I felt like the Sheppard family is a free press casualty, struck by the falling bullet of a media circus.

## II. THE HISTORY OF STANDARDS APPLIED TO CRIMINAL PRETRIAL MEDIA COVERAGE

For over 100 years, the courts have struggled to find the appropriate balance between the first amendment rights of the press and the risk that press coverage may compromise fair criminal trials.<sup>4</sup> As Judge Robertson stated yesterday, it is hard to find any specific standard for determining in advance when the media coverage of a trial is going too far. Over time the courts have applied a number of different tests or standards to determine if media coverage of a trial affected the outcome. But those test are applied during the appellate process with the benefit of hindsight.<sup>5</sup> In the interim, the parties directly affected by that coverage languish. Absent definitive standards for the media at the outset of a criminal proceeding, the obligation to protect a criminal suspect from the potentially adverse impact of a media circus rests with the judges, lawyers, police, and court personnel charged with the administration of justice. Both history and current events demonstrate that these individuals are not always prepared to shoulder that burden, especially when they are thrust into a case amidst a barrage of media attention.<sup>6</sup>

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(reporting that 5 other states were considering similar moratoriums in the wake of Governor Ryan's action in Illinois).

<sup>3</sup>See *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Interestingly, the Court noted in *Sheppard* that courts need to take a more proactive approach with respect to setting trial coverage parameters for the media, rather than relying on the post-trial reversal of convictions that were tainted by media extravaganzas. See *id.* at 358.

*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) (noting that none of the Court's previous cases addressing prior restraint involved orders restricting publicity in an effort to protect a defendant's right to an unbiased jury); see also Sheldon Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 383, 405 (1977) (noting that Supreme Court decisions for the twelve years preceding *Sheppard* made no suggestions as to how prejudicial pretrial publicity could be prevented).

<sup>4</sup>See *infra* note 6.

<sup>5</sup>See *Nebraska Press Ass'n*, 427 U.S. at 556, *supra* note 3.

<sup>6</sup>See, e.g., *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (referring to the trial in *Estes v. Texas*, 381 U.S. 532 (1965) as being conducted in a "circus atmosphere"); *Sheppard*, 384 U.S.

Long before the *Sheppard* trial, we can see a trend in American case law wherein judges began to express concern over the possible impact of the media on criminal trials.<sup>7</sup> In 1807, Chief Justice Marshall faced an acute problem of finding a jury for the Burr trial.<sup>8</sup> Burr was charged with planning to invade Mexico. The problem with finding an unbiased jury resulted from the fact that details of his alleged plot had already been published in the local newspapers in Virginia.<sup>9</sup>

In 1907, the Supreme Court said, in *Patterson v. Colorado*, that statements by the press which interfere with the administration of justice are subject to contempt citations.<sup>10</sup> Simultaneously, the Court struggled to find a way to determine when those statements were sufficiently intrusive to warrant a contempt citation.<sup>11</sup>

In 1918, the Supreme Court issued the opinion in the *Toledo Newspaper Company v. United States*.<sup>12</sup> The Supreme Court held that a court's authority to find a publication in contempt could be upheld if the publication had "a reasonable tendency to impact the judge's decision."<sup>13</sup> A year later in *Schenck v. United States*, the Court applied a much stricter test saying that there had to be a clear and present danger that the publication would impede the process of justice.<sup>14</sup> However, the Court did not strike down the reasonable tendency test until 1941, when the Supreme Court held that the test expanded the court's contempt authority too far.<sup>15</sup> In other

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at 358 (referring to the "carnival atmosphere at trial" created by the presence of the press); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (referring to the proceedings in the case as "kangaroo court proceedings"). See also Nina Burleigh, *Preliminary Judgments*, A.B.A. J., Oct. 1994, at 55, 56, 60 (discussing the O.J. Simpson trial).

<sup>7</sup>See, e.g., *Patterson v. Colorado* [*ex rel*] Attorney General, 205 U.S. 454, 460 (1907) (stating that publications about matters pending before a court that tended toward interference with the court's administration of the law were punishable by contempt); *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918) (overruling the trial court's contempt authority when publication had a reasonable tendency to impact the judge's decision), *overruled in part by Nye v. United States*, 313 U.S. 33, 52 (1941); *Bridges v. California*, 314 U.S. 252, 261-62 (1941) (stating, with respect to prejudicial pretrial publicity, that "there must be a determination of whether or not 'the words . . . used in such circumstances. . . are of such a nature as to create a clear and present danger that they will bring about the substantive evils.'"). See also *Estes v. Texas*, 381 U.S. 532, 541-43 (1965) (addressing the State's contention that televising portions of a criminal trial does not constitute a denial of due process).

<sup>8</sup>See *United States v. Burr*, 25 F. Cas. 49 (C.C. Va. 1807). Chief Justice Marshall faced the acute problem of finding a jury pool that had not formed opinions concerning Burr, whose prosecution for planning to invade Mexico had been detailed in a Virginia newspaper. See *id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Patterson*, 205 U.S. at 461 (stating that publications about matters pending before a court that tended toward interference with the court's administration of the law were punishable by contempt).

<sup>11</sup>*Id.*

<sup>12</sup>247 U.S. at 421.

<sup>13</sup>*Id.*

<sup>14</sup>249 U.S. 47, 52 (1919).

<sup>15</sup>*Nye*, 313 U.S. at 52.

words, the test gave the courts too much authority to find the press in contempt for publications with respect to criminal trials and was, therefore, too restrictive of free press rights.<sup>16</sup>

The demise of the reasonable tendency test indicated a tip in the balance between free press and fair trials toward protecting the press. The “clear and present danger” test emerged as the test for determining when a court could take action against the press to protect fair trial interests.<sup>17</sup> And so we see between 1941 and 1946, *Bridges v. California*<sup>18</sup> and *Pennekamp v. Florida*,<sup>19</sup> in which the Supreme Court held that the contempt citations were inappropriate because the negative publicity did not present a “clear and present danger.”<sup>20</sup> The Court said that the clear and present danger test required that the evil be ever present, that it be there right away, and that it be “clear and present.”<sup>21</sup>

In 1952, the Supreme Court appeared to once again shift its attention toward the rights of the criminally accused.<sup>22</sup> In *Stroble v. California*, the Court did not abandon its position on the clear and present danger standard. However, the Court contemplated the impact of pretrial publicity on the fundamental fairness of a criminal trial.<sup>23</sup> What was contemplation in *Stroble* became action in *Marshall v. United States*.<sup>24</sup> In *Marshall*, the Court ordered a new trial based on the fact that jurors were exposed to inadmissible evidence by pre-trial news reports of events related to the case.<sup>25</sup> The *Marshall* decision indicates the Court’s growing concern with the possible negative implications of pre-trial publicity. But the Court did not order a new trial in that case based specifically on the pre-trial publicity. Rather, the Court ruled under its supervisory role to protect the administration of justice.<sup>26</sup> Justice Frankfurter, however, noted in his dissent that continuing to allow the press to release information about pending criminal trials undercuts the foundational aspect of criminal justice procedures: that determination of guilt or innocence should be based on evidence presented at trial not on evidence presented in the media.<sup>27</sup>

In *Irvin v. Dowd*, we see the beginning of what has become the contemporary test for evaluating pre-trial publicity in order to balance the First Amendment rights of a

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<sup>16</sup>*Id.*

<sup>17</sup>See *Bridges*, 314 U.S. at 261-62 (using the clear and present danger test).

<sup>18</sup>314 U.S. 252 (1919).

<sup>19</sup>328 U.S. 331 (1946).

<sup>20</sup>*Bridges*, 314 U.S. at 260-1; *Pennekamp*, 328 U.S. at 372.

<sup>21</sup>*Bridges*, 314 U.S. at 333.

<sup>22</sup>*Stroble v. California*, 343 U.S. 181 (1952).

<sup>23</sup>*Id.* at 191-92.

<sup>24</sup>360 U.S. 310, 312-13 (1959) (reversing conviction that the Court believed may have been influenced by prejudicial information jurors received through news reports).

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 313.

<sup>27</sup>*Id.*

free press against the fair trial interests of the criminally accused.<sup>28</sup> The test evolved over a period of time, in a series of cases in the 1960s, into what the courts call a totality of circumstances test. In *Irvin*, the Court began to look at a variety of circumstances when evaluating the impact of adverse pre-trial publicity on the trial at issue.<sup>29</sup> In that case, the defendant was charged in a small town where there was a lot of negative media coverage regarding his trial.<sup>30</sup> On review, the Supreme Court found that the voir dire transcripts of the impaneled jurors demonstrated the presence of bias toward the defendant.<sup>31</sup> The Court was not persuaded by the fact that the jurors answered affirmatively when asked by the judge during voir dire, “can you render a fair trial?”<sup>32</sup> The Court noted that a review of their testimony revealed a “pattern of deep and bitter community prejudice” among all the impaneled jurors.<sup>33</sup> The conviction was overturned.<sup>34</sup> Though the Court did not identify the standard it applied as being a totality of circumstances test, the Court did not focus on a single factor, but looked at all the factors which revealed the possible negative impact of the pre-trial publicity.<sup>35</sup>

A couple of years later, in *Rideau v. Louisiana*, the Supreme Court reversed a conviction based on the fact that prior to the defendant’s criminal trial, the media televised the defendant’s confession.<sup>36</sup> The Court said that any criminal proceeding in the community after the televised confession would be but a hollow formality.<sup>37</sup> In *Rideau*, the Court focused predominately on that televised confession, but also considered the tenor of the media coverage.<sup>38</sup>

In *Estes v. Texas*, the court moved closer to embracing a totality of circumstances test.<sup>39</sup> In *Estes*, the Court noted that it is impossible to put a finger on the specific evil of pre-trial publicity that causes injustice.<sup>40</sup> While the *Estes* Court acknowledged the need to consider a variety of different types of circumstances, it

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<sup>28</sup>366 U.S. 717 (1961). The Court found that, despite a change of venue, defendant did not receive a fair trial, since voir dire examination of the final jurors reflected a pattern of deep and bitter community prejudice created by adverse pretrial publicity. *Id.* at 727. The Court relied on a variety of factors to justify its final determination. *See id.* at 722-24.

<sup>29</sup>*Id.* at 722-24.

<sup>30</sup>*Id.* at 719-20.

<sup>31</sup>*Irvin*, 366 U.S. at 726-27.

<sup>32</sup>*Id.* at 727-28.

<sup>33</sup>*Id.* at 727.

<sup>34</sup>*Id.* at 728.

<sup>35</sup>*Id.* at 721, 728.

<sup>36</sup>373 U.S. at 723.

<sup>37</sup>*Id.* at 726.

<sup>38</sup>*Id.* (referring to pretrial media coverage as a “spectacle”).

<sup>39</sup>*Estes v. Texas*, 381 U.S. 532 (1965) (stating that some levels of adverse publicity were sufficient to presume bias to prospective jurors without proving actual bias).

<sup>40</sup>*Id.*

specifically recoiled against the growing media circus coverage of some criminal trials.<sup>41</sup>

The Court finally enunciated a “totality of circumstances test” in *Sheppard v. Maxwell*.<sup>42</sup> Consistent with the *Estes* decision, the Court noted that it was not necessary to find actual bias, as it had in prior cases, through review of jury voir dire transcripts.<sup>43</sup> The Court held that, under certain circumstances, bias to a criminal defendant could be presumed based on the magnitude of adverse pre-trial publicity.<sup>44</sup> The Court also stated that the reversal of an unjust conviction, which resulted from biased pretrial publicity, is not enough.<sup>45</sup> The proper remedy consisted of proactive measures that would prevent the prejudicial coverage at its inception.<sup>46</sup> The Court even suggested rules and regulations that might be imposed to protect the process.<sup>47</sup>

As Mr. Neff noted, the court tightly controlled the media coverage of the second *Sheppard* trial.<sup>48</sup> It appears that the court in the new *Sheppard* trial may have been responding to the Supreme Court’s admonitions.<sup>49</sup>

The *Sheppard* case is probably the high point of the Supreme Court’s position on protecting the rights of the accused from adverse pretrial publicity.<sup>50</sup> In *Sheppard*, the Court’s position was that the rights of the accused needed to be protected against media influence.<sup>51</sup> In discussing the “totality of circumstances test,” the Court focused on the totality of the media coverage—i.e. the type of coverage, the saturation or amount of coverage, and the nature of the statements made to and by

<sup>41</sup>*Id.* at 549 (noting the defendant was “entitled to his day in court, not in a stadium, or a city or nationwide arena”).

<sup>42</sup>*Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 352-53.

<sup>45</sup>*Id.* at 362-63.

<sup>46</sup>*Id.*

<sup>47</sup>*Sheppard*, 384 U.S. at 358-63 (suggesting limits on the press, police, lawyers, judges, court personnel, and witnesses through actions such as issuing warnings, sequestration, and reversal).

<sup>48</sup>James Neff, Remarks at Sheppard Symposium; The Media and the Criminal Trial (April 21, 2001) (transcript available in Cleveland-Marshall College of Law Library).

<sup>49</sup>However, the recent history of media coverage of criminal trials and pretrial proceedings is confirmation that most courts have not taken the Supreme Court’s statements to heart with respect to pretrial publicity.

<sup>50</sup>*See Sheppard*, 384 U.S. at 362 (stating that when considering the impact of prejudicial media coverage on jurors, the balance between media coverage and fair trials should never be weighed against the accused). *See also*, John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court’s Totality of Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 DENVER UNIV. L. REV. 549, 565 (1998) (discussing that within ten years of the *Sheppard* decision the Supreme Court had significantly retreated from its strong position favoring protecting the criminal justice process from the intrusions of pretrial media coverage).

<sup>51</sup>*Sheppard*, 384 U.S. at 362.

the press—to determine whether or not prospective jurors would be biased if they encountered or witnessed that coverage.<sup>52</sup>

By 1975, the Court had tipped the balance between free press and fair trials away from its pro-defendant stance of the 1960's, as evidenced by the Court's opinion in *Murphy v. Florida*.<sup>53</sup> In the 1960's cases of *Irvine*, *Rideau*, *Estes* and *Sheppard*, the court focused on media related factors. The factors the Court focused on to evaluate adverse pre-trial publicity were: the media as a source of exposure to inadmissible evidence; pre-trial publicity unifying a community of potential jurors against the defendant; media reports of actual or alleged confessions; the presence of a media circus; and saturation reporting.<sup>54</sup> The common thread in all these factors is the Court's focus on the media.

Beginning with *Murphy v. Florida*,<sup>55</sup> the Court considered not only the totality of media coverage, but also considered non-media factors.<sup>56</sup> In *Murphy*, the Court considered cultural and societal elements that might temper the impact of media coverage.<sup>57</sup> This became the "totality of circumstances test" applied in contemporary cases. Consider for example the 1991 case *Mu'Min v. Virginia*.<sup>58</sup> In addition to looking at the nature, type, and substance of media reporting, the Court also looked at the surrounding community in which the murder and the trial occurred.<sup>59</sup> The Court looked at the number of murders in the metropolitan area and noted that the defendant's case was only one of nine murders in the county that year<sup>60</sup>—the implication being that if you are on trial for murder in a jurisdiction that has a lot of murders and a lot of coverage of murder trials, that people are desensitized. Therefore, they can handle more media coverage without becoming biased.<sup>61</sup>

Beginning in 1975, the Supreme Court apparently recognized the unpredictability of media coverage and backed away from the presumed bias position it advocated in *Sheppard*. Instead, the Court assumed the latitude to consider any circumstances it considered relevant at the time.<sup>62</sup> Thus, under the totality of circumstances test adopted since *Murphy*, the Supreme Court has guarded itself against the scenario we saw in the trial of convicted Oklahoma City bomber, Tim McVeigh. During that proceeding, McVeigh moved to dismiss his entire indictment based on his claim that pre-trial publicity of his alleged confession precluded him from getting a fair trial

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<sup>52</sup>*Id.*

<sup>53</sup>421 U.S. 794 (1975).

<sup>54</sup>See Walton, *supra* note 50, at 566-72.

<sup>55</sup>421 U.S. at 794.

<sup>56</sup>*Id.* at 799.

<sup>57</sup>*Id.* at 802-03.

<sup>58</sup>500 U.S. 415 (1991).

<sup>59</sup>*Id.* at 429-30.

<sup>60</sup>*Id.* (also noting that hundreds of murders had been committed in the metropolitan area.)

<sup>61</sup>This, however, ignores the prospect of severe backlash against murder suspects among citizens in a community that has had several murders.

<sup>62</sup>See Walton, *supra* note 48, at 566-72.

anywhere in the country.<sup>63</sup> By broadening the scope of the factors it evaluates, the Court can apply new standards every time there is a new trial of the century. So, for example, the media coverage and other factors existing during the *Simpson* trial set a new level of coverage that society—and prospective jurors—could endure. After all—Simpson was acquitted. The new level of coverage becomes the standard against which the *McVeigh* trial coverage is evaluated.

Using the test as it exist after *Murphy*, the Supreme Court always has a way out of the type of box *McVeigh* tried to build. Clearly, the courts need to have that kind of flexibility to address changing technologies and issues that might arise in the media. Simultaneously, with over 100 years of media coverage in criminal trials, the courts have created no standards or parameters for evaluating the impact of pretrial coverage before limits are exceeded. What tends to happen when there are no standards is people do not know how to pattern their behavior. So, the press doesn't know when it is going too far until it has gone too far. Then it is too late. The defendant has been convicted and is waiting in prison, as Dr. Sam Sheppard did for ten years, for the wrong to be corrected. As the Supreme Court noted in *Sheppard*, it corrects wrongful convictions in hindsight.<sup>64</sup> But reversing wrongful convictions does not attain the goal—which is eliminating wrongful convictions.

Another problem is emerging in that we see lawyers, judges, police, and officers of the court trying to become part of the media circus. The reality is that the law does not, in my opinion, make good TV. Every lawyer knows that when there is a car chase, a shoot out, a stand off, or whatever it happens to be—after the dust settles—judges, prosecutors, and defense attorneys go back to a desk in a room and wade through lots of documents, case law, and procedural rules. They begin a process that usually takes a long time and—to the general public—would be painfully tedious. It is a process that focuses on court deadlines, not news deadlines. It is the process of protecting justice.

By comparison, the media is immediate. When we try to “mediaize” the criminal justice process, there is pressure to have an immediate suspect. There is pressure to immediately have the evidence. There is pressure to make the deadline. There is pressure to have something to say quickly. The law doesn't work that way.

I am not suggesting that the media should be kept out, but simply that we, as officers of the court charged to protect the system, should remember that the media reports the events as they occur. We should concentrate on making sure that justice is protected if it takes a day, a week, or a month for something to happen. We should resist the pressure to come to the courthouse steps and give an update when nothing has happened. When there is no new story, simply say, “we don't have anything for you yet.”

Over time, the Supreme Court developed a test that allows it to evaluate and protect the integrity of the criminal justice system from unexpected or detrimental influences of media attention to, or coverage of, criminal proceedings. The Court,

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<sup>63</sup>See Motion to Dismiss, or in the Alternative, Request for Abatement or Other Relief, with Supporting Memorandum of Law at \*1, *United States v. McVeigh*, No. 96-CR-68-M, 1997 WL 117366 (D. Colo. Mar. 14, 1997) (Motion of Defendant Timothy McVeigh claiming that national media coverage of his alleged confession made it impossible for him to receive a fair trial).

<sup>64</sup>384 U.S. at 363.

however, has the significant advantage of hindsight. It can look at what happened and consider the media's impact on those events as history. When an error has been made and a suspect is wrongfully convicted, the courts can affect that suspect's future. But, it is too late to change the immediate history of post-conviction life for the wrongfully convicted. As I reviewed the news reports of Doctor Sam Sheppard's case, I felt the Court was able to do little to change the future set in motion by his unwarranted conviction.

The media has changed immensely since the day Justice Marshall worried about the impact of newspaper reports on the jury pool in 1897.<sup>65</sup> The process of adjudicating a case, however, is essentially the same now as it was then. In its opinion in the *Sheppard* case, the Supreme Court suggested strict guidelines and limits for the media with respect to criminal case coverage.<sup>66</sup> Those limits have never materialized. Instead, the obligation to set those limits resides with lawyers, judges, police, and the media. Our obligation is to remember that our standards protect the system, the system protects victims, and suspects and our errors are not truly erased by reversals. Thank you.

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<sup>65</sup>See *Burr*, 25 F. Cas. at 49.

<sup>66</sup>*Sheppard*, 384 U.S. at 357-62.