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Constitutional Law - Freedom of the Press - The Continuing Problem of Prior Restraints

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CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—THE CONTINUING PROBLEM OF PRIOR RESTRAINTS

In the fall of 1970, a trial by jury was about to commence in the Snohomish County Superior Court, Everett, Washington, for two young men charged with the crime of murder in the first degree. Pursuant to the procedure authorized by a provision of the Revised Code of Washington,[1] the defendants, the prosecuting attorney and the court agreed that the jury need not be sequestered during the trial. Since extensive press coverage of the proceedings was anticipated, the trial judge found it necessary to issue a pre-trial order which, among other things, limited reports of the proceedings by the news media to those events which transpired in open court and in the presence of the judge, jury, court reporter, defendants and counsel for all parties.[2] Sam Sperry and Dee Norton, two newspaper reporters assigned to cover the trial, wrote an article summarizing the events of an evidence hearing that was conducted in the absence of the jury, including therein portions of testimony ruled inadmissible at the hearing by the court.[3] The trial judge determined that the article, which had appeared in two editions of the Seattle Times,[4] constituted a violation of his pre-trial order, and found the reporters in contempt of court. The reporters took an appeal to the Washington Supreme Court on the ground that the pre-trial order was an unconstitutional infringement upon their first amendment rights.[5] The judgment of contempt was vacated unanimously by that court on

1. WASH. REV. CODE ANN. § 10.49.110 (1961) provides: "Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county."

2. State *ex rel.* Superior Court of Snohomish County v. Sperry, 79 Wash. 2d 69, —, 483 P.2d 608, 609 (1971). That part of the pre-trial order referred to in the text reads as follows: "2. No court proceedings shall be reported upon or disseminated to the public by any form of news media, including, but not limited to newspaper, magazine, radio and television coverage, except those proceedings occurring in open Court in the presence of the Judge, jury, court reporter, defendants and counsel for all parties. No report shall be made by such news media in any event of matters of testimony ruled inadmissible or stricken by the trial judge at the time of the offer of the matter or testimony."

3. *Id.* at —, 483 P.2d at 609-11, where the article in question is reprinted in its entirety.

4. Seattle Times, Oct. 29, 1970, at col. 4 (4th and 5th ed.).

5. Brief for Appellants at 9.

April 8, 1971. *State ex rel. Superior Court of Snohomish County v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608 (1971), *cert. denied*, No. 71-324 (U.S., Nov. 9, 1971).

It is the objective of this note to present a brief historical outline of the overall constitutional problem involved in *Sperry*, to familiarize the reader with the legal reasoning used by the Washington Supreme Court in arriving at its decision, and to survey the recent major decisions which have dealt with various aspects of the constitutional problem involved. Ultimately, detailed consideration will be given to *Sperry's* future implications.

Mr. Justice Black, speaking for the majority in a case before the United States Supreme Court in 1941,[6] noted that "[f]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[7] The factual pattern in *Sperry*, as it relates to the newspaper article reporting on excluded evidence while the jury was being allowed to separate, reveals a classic example of conflict between these two constitutional concepts. The Washington court was faced with the "trying task" of having to choose between them. A better understanding of the *Sperry* decision may be had if one has some historical perspective of the constitutional problems that are involved in the case.

Freedom of speech and of the press are two of the rights guaranteed by the first amendment of the United States Constitution.[8] The right to a fair trial for one accused of a criminal offense is guaranteed by the sixth amendment.[9] Since these rights became a part of the Constitution upon the adoption of the Bill of Rights,[10] they have always

6. Bridges v. California, 314 U.S. 252 (1941).

7. *Id.* at 260.

8. U.S. Const. amend. I reads in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

9. U.S. Const. amend. VI reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

Technically, the popular description of the sixth amendment guarantees as the right of an accused to a "fair" trial is a misnomer. Nowhere in the Constitution or in its amendments is found a provision which entitles one accused of a crime to a "fair" trial. Rather, the sixth amendment speaks in terms of a "speedy" and "public" trial by an "impartial jury." For a more detailed discussion of this point and for an exhaustive survey of the rights guaranteed by both the first and the sixth amendments, see Dale, *First and Sixth Amendments: Can They Co-Exist?*, 37 TENN. L. REV. 209 (1969).

10. The Bill of Rights is the term used to describe the first ten amendments to the U.S. Constitution.

been protected from federal abuse under our dual system of law. The Supreme Court of the United States has, through the due process clause, gradually incorporated these rights into the fourteenth amendment;[11] as a result, they are now protected from state abuse as well.[12]

The constitutional conflict outlined in *Sperry*, today most commonly referred to as the "fair trial-free speech controversy" or the "trial by newspaper dilemma,"[13] has presented a continuing problem,[14] which

11. U.S. Const. amend. XIV reads in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

12. The first amendment freedoms were initially applied to the states by way of dictum in Gitlow v. New York, 268 U.S. 652 (1925), where, although affirming a conviction for violation of a state statute prohibiting the advocacy of criminal anarchy, the Court declared at 666: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." This dictum became accepted doctrine as to freedom of speech when, two years later, in Fiske v. Kansas, 274 U.S. 380 (1927), the Court invalidated a state law on the ground that it abridged freedom of speech contrary to the due process clause of the fourteenth amendment.

Freedom of the press was the next to be incorporated into the fourteenth amendment by the Court in Near v. Minnesota, 283 U.S. 697 (1931); subsequent decisions brought the other first amendment freedoms within its protection. De Jonge v. Oregon, 299 U.S. 353 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940) (peaceable assembly and religion, respectively).

The Court incorporated the sixth amendment guarantees into the fourteenth amendment, thus making them applicable to the states, in the following decisions: *In re* Oliver, 333 U.S. 257 (1948) (right to a "public" trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to "assistance of counsel"); Pointer v. Texas, 380 U.S. 400 (1965) (right to "confront opposing witnesses"); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a "speedy" trial); Washington v. Texas, 388 U.S. 14 (1967) (right to "compulsory process for obtaining witnesses"); and Duncan v. Louisiana, 391 U.S. 145 (1968) (right to "trial by jury").

13. Citation of authority on this point is hardly necessary. The use of these terms by courts reviewing criminal convictions on the basis of prejudicial publicity, as well as by legal writers who subsequently comment on these decisions, is most commonplace today. One need only leaf through the advance sheets to state or federal reports or any recent index to legal periodicals under "constitutional law" to see these terms used again and again.

14. Mr. Justice Frankfurter, in a concurring opinion, commented on the frequency and magnitude of this problem in Irvin v. Dowd, 366 U.S. 717 (1961) at 730: "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts . . . exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced as a practical matter, to forego trial by jury."

has understandably increased in direct correlation to the rapid expansion and modernization of the communications industry in the United States.[15]

In earlier times, the magnitude of the problem was negligible simply because means of communication were scarce, transportation at best was tedious, and the literacy rate among the general population was minute. In addition, problems of this nature arose in earlier days only with trials involving matters of serious and widespread national concern.[16] The twentieth century has seen such rapid advances in all these areas that this type of problem is greatly intensified.[17]

The *Sperry* court, in ruling that a trial judge may not protect the right of an accused to a fair trial by limiting press coverage in advance to only those events which occur in open court and in the presence of the jury, provided only one answer to a problem that poses many questions. An analysis of the reasoning used by the majority to arrive at their decision seems to indicate that the court side-stepped several additional questions which the case, on its face, appears to raise. This is confirmed by the concurring opinion which represents the views of three of the justices on the court.

The state's major argument for affirmance of the contempt conviction was disposed of early in the decision[18]—the court agreed with appellants

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15. *See generally* Note, *Procedural Compromise and Contempt: Feasible Alternatives In the Fair Trial Versus Free Press Controversy*, 22 U. FLA. L. REV. 650 (1970).

16. *Id.* at 651, n.6, where the author refers to such cases as the conspiracy trial of Aaron Burr and the trial for the assassination of President Lincoln. *See*, Burr's Trial, 8 U.S. (4 Cranch) 470 (1807). *See also* J. BINGHAM, ARGUMENT OF J.A. BINGHAM SPECIAL JUDGE ADVOCATE IN REPLY TO DEFENSE OF MARY E. SURRATT (1865).

17. Consider for a moment the size of the television audience that witnessed the slaying of Lee Harvey Oswald, President Kennedy's accused assassin, in Dallas, November, 1963. Add to this the fact that real national concern is no longer a prerequisite for extensive national coverage of a crime, and one can easily see how serious legal problems can and do arise.

18. 79 Wash. 2d —, 483 P.2d 608, 611. The state's major contention was that the reporters were precluded from attacking the constitutionality of the trial court's pre-trial order because the instant appeal constituted a collateral attack on that order. As authority for that proposition it cited the case of Walker v. Birmingham, 388 U.S. 307 (1967). The court, however, said that *Walker* did not apply here because the order being appealed from in that case was not patently invalid, whereas the order challenged here was void on its face.

At 611, the court cited the following cases as holding that a void order, as distinguished from a merely erroneous one, may be attacked in a collateral proceeding: State *ex rel.* Ewing v. Morris, 120 Wash. 146, 207 P. 18 (1922); State v. Lew, 25 Wash. 2d 854, 172 P.2d 289 (1946); State *ex rel.* Sowers v. Olwell, 64

that the precise legal issue raised was "[w]hether a newspaper may constitutionally be proscribed from reporting to the public those events which occur during an open and public court proceeding."[19] Since the court had earlier in the decision decided that violation of an order void on its face could not support a judgment of contempt,[20] a negative response to this question could only result in a reversal of the contempt convictions. Limiting its decision to the facts of the case, the court found that the pre-trial order by the trial judge was patently void because it imposed unjustified limitations on the reporters' constitutional rights of freedom of speech.

The court premised its decision on a state constitutional provision providing for the following: "Administration of Justice. Justice in all cases shall be administered openly, and without unnecessary delay."[21] This provision, the court noted, mandated an open hearing in the murder trial, and immediately put into effect another state constitutional provision which reads: "Freedom of Speech. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[22] The court also relied on the first amendment to the United States Constitution which provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[23]

The court next considered the validity of prior restraints on the exercise of the first amendment freedom of speech,[24] and noted that such restraints carry with them a presumption of constitutional invalidity, which can only be overcome by a showing that the limitations imposed are supported by a different constitutional right which requires the limitation.[25] The state argued that because the jurors were allowed to separate, the pre-trial order was necessary to prevent them from being

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Wash. 2d 828, 394 P.2d 681 (1964). For the proposition that the violation of an order patently in excess of the issuing court cannot produce a valid judgment of contempt, the court cited at 611: *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

19. 79 Wash. 2d —, 483 P.2d 608, 612.

20. *See In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

21. Wash. Const. art. I, § 10.

22. Wash. Const. art. I, § 5.

23. 79 Wash. 2d —, 483 P.2d 608, 612.

24. *Id.*, where the court cited Schneider v. Town of Irvington, 308 U.S. 147 (1939) and Murdock v. Pennsylvania, 319 U.S. 105 (1943) as authority for the proposition that injunctions which constitute prior restraints on speech violate the principles of the first amendment and are applicable to the states by virtue of the fourteenth amendment.

25. 79 Wash. 2d —, 483 P.2d 608, 612.

prejudiced while outside the courtroom. This contention was based on the due process clause of the fourteenth amendment,[26] which incorporates the sixth amendment's guarantee of a fair trial to one accused of a criminal offense.[27] The court rejected this argument and pointed out that it was not necessary for the trial judge to allow the jury to separate in the first place;[28] but, this having been done, an appropriate and adequate instruction had been issued by the judge warning the jurors of the dangers inherent in allowing them to separate during the course of the murder trial.[29]

The court summarized the discussion on prior restraints with short references to two United States Supreme Court decisions which dealt with the problem,[30] and determined that the judiciary cannot edit, suppress, or censor from the public events which occur in open court proceedings under circumstances such as those found in *Sperry*.[31] The court concluded with the following:

> If restraints upon the exercise of First Amendment rights are necessary to preserve the integrity of the judicial process, then those restraints must be narrowly drawn. The limitations imposed cannot be greater than is necessary to accomplish the desired constitutional purpose. *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970). That is not what occurred here. To sustain this judgment of contempt would be to say that the mere possibility of prejudicial matter reaching a juror outside the courtroom is more important in the eyes of the law than is a constitutionally guaranteed freedom of expression. This we cannot say.[32]

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26. *Supra* note 11.

27. *Supra* notes 9 and 11.

28. 79 Wash. 2d —, 483 P.2d 608, 612. Here the court explained in the following manner the provision in the Revised Code of Washington allowing a jury to separate: "[I]t was not necessary to allow the jury to separate. R.C.W. 10.49.110 provides that the court may not allow the jury to separate in a criminal case without the consent of the defendant and the prosecuting attorney. Under that statute the parties to a criminal case cannot create the right to a jury separation. By refusing to consent, the parties prohibit separation; by consenting, they permit the court to grant a separation. The ultimate decision following the consent of the parties to a jury separation still rests with the trial court. The fact that the parties here consented to a jury separation did not therefore necessitate a separation."

29. The judge's instruction to the jury is set out in its entirety in the opinion. *Id.* —, 483 P.2d at 612-13.

30. *Id.* at —, 483 P.2d at 613. The references were to: Craig v. Harney, 331 U.S. 367 (1947) where the Court said at 374: "A trial is a public event. . . . Those who see and hear what transpire[s] can report it with impunity;" and to the decision in Estes v. Texas, 381 U.S. 532 (1965), where the Court said at 541-2: "[R]eporters of all media, including television . . . are plainly free to report whatever occurs in open court through their respective media."

31. 79 Wash. 2d —, 483 P.2d 608, 613.

32. *Id.*

This resulted, of course, in the vacating of the judgment of contempt of the two reporters.

It is interesting to note that the landmark decision of *Sheppard v. Maxwell*[33] was not even referred to in the majority decision, and that the *Estes v. Texas* decision was only mentioned in passing,[34] even though these two decisions dealt extensively with the fair trial-free speech controversy. This fact moved one of the justices to submit an exhaustive concurring opinion in which the same result was obtained using a different route.[35]

Prior to *Sperry* in *Marshall v. United States*,[36] petitioner had been convicted in a federal district court for unlawfully dispensing certain drugs without a prescription from a licensed physician in violation of a federal statute.[37] His appeal was based on the fact that seven jurors had been exposed to two prejudicial newspaper articles which discussed matters that the trial judge had not allowed the government to offer in evidence. The article disclosed the fact that petitioner had two prior felony convictions and that he had once testified before a state legislative committee that although he only had a high school diploma, which he received through the mails for twenty-five dollars, he practiced medicine and easily wrote and passed prescriptions for dangerous drugs.

The trial judge learned that seven jurors had seen and read at least one of the articles, but denied petitioner's motion for a mistrial on the grounds that each of the seven had told the judge individually that he would not be influenced by the articles, that he felt no prejudice towards the defendant, and that he could decide the case only on the evidence in the record.

In reversing the conviction and granting a new trial, the Supreme Court said:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures.[38]

The significance of *Marshall* lies in the fact that a criminal convic-

33. 384 U.S. 333 (1966).

34. 381 U.S. 532 (1965).

35. The concurring opinion of Finley, J., begins at —, 483 P.2d at 614.

36. 360 U.S. 310 (1959).

37. The provision under which Marshall was convicted was 21 U.S.C. § 331 (k) (1970), which prohibits the misbranding of drugs.

38. 360 U.S. 310, 312-13.

tion was reversed for the first time on the basis of prejudice to the jury without any showing of *actual* prejudice. The new rule that emerged was that since evidence of a prior conviction was inadmissible at trial, a showing that such information *reached* the jury from extrajudicial sources was prejudicial *per se*, and no actual prejudice need be shown to upset a conviction under such circumstances. Statements by jurors that they read but would not be influenced by out-of-court prejudicial information were no longer considered to be a conclusive indication of impartiality. At this point, however, the *Marshall* rule was only binding on federal courts.[39]

In *Janko v. United States*,[40] the Supreme Court, without comment, reversed Janko's conviction for tax evasion and reaffirmed the *Marshall* rule to the extent that the burden is not on the defendant to show actual prejudice when it is shown that matter of a prejudicial nature did in fact reach the jury before rendering of the verdict.[41] This appears to be the rule today.

Irvin v. Dowd represents the first time the Supreme Court overturned a state conviction on the premise that the defendant had been denied a fair trial by reason of prejudicial pre-trial publicity.[42] In *Irvin*, defendant was charged with committing six murders in Vanderburgh County. Shortly after defendant's arrest, press releases were issued by law enforcement officials which stated that defendant had confessed to all six murders. The press releases were given such intensive publicity that the counsel appointed to defend the alleged murderer asked for and was granted a change of venue to Gibson County. Alleging that the widespread and inflammatory publicity against the defendant had infected the residents of Gibson County as well, defense counsel asked for a second change of venue. The motion was denied, the trial conducted, and the defendant was found guilty of murder and sentenced to death.

39. *Id.* at 313. The Court indicated that they were granting a new trial in the exercise of their supervisory power to formulate and apply proper standards for enforcement of criminal law in federal courts. The cases of Bruno v. United States, 308 U.S. 287 (1939) and McNabb v. United States, 318 U.S. 332 (1942) were cited as giving them the authority to do so.

40. 366 U.S. 716 (1961).

41. *See, e.g.*, United States v. Milanovich, 303 F.2d 626, 629-30 (1962), for a discussion of who has the burden of showing prejudice in such situations.

42. 366 U.S. 717 (1961). The Court was faced with a classic case of jury prejudice in a state criminal trial in the case of Shephard v. Florida, 341 U.S. 5 (1951), but chose to reverse the conviction on other grounds. In a concurring opinion, Mr. Justice Jackson seemed disdained that the Court passed up such a golden opportunity to lay down the rule that where a jury trial in a state court is so permeated with hostility toward the accused, no actual prejudice need be

The Indiana Supreme Court upheld the conviction,[43] and a writ of habeas corpus was denied by the federal district court[44] and affirmed by the federal court of appeals.[45] The Supreme Court of the United States reversed the conviction, vacated the denial of the writ, and remanded the case for further proceedings to the district court, affording the state a reasonable time to retry the defendant.[46]

A primary issue in the case was whether statements by the jurors that they would be fair and impartial to the defendant in spite of having knowledge of facts which tended to show his guilt were conclusive evidence of impartiality. The Court's comments on this point are noteworthy:

> The [jury] panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds. . . .
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> . . . Eight out of 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . . No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see."[47]

Mr. Justice Frankfurter, in a concurring opinion,[48] made reference to the frequency and magnitude of this type of problem,[49] and seemed disturbed that the Court would not undertake a review of all state prosecutions achieved in this manner.[50] In concluding he stated:

> This Court has not yet decided that the fair admission of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be

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shown to upset any conviction obtained under those circumstances. Evidently, the Court was just not ready at that time to take such a big step, so they used discrimination in selection of the jury as a grounds for reversal.

43. Irvin v. State, 236 Ind. 384, 139 N.E.2d 898 (1957).
44. Irvin v. Dowd, 153 F. Supp. 531 (N.D. Ind., 1957).
45. Irvin v. Dowd, 271 F.2d 552 (7th Cir., 1959).
46. Irvin v. Dowd, 366 U.S. 717, 730 (1961).
47. *Id.* at 727-28.
48. *Id.* at 729.
49. *Supra* note 14.
50. 366 U.S. 717, 730.

reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.[51]

In *Rideau v. Louisiana*,[52] petitioner was arrested for armed robbery of a bank, kidnapping of three employees as hostages and the subsequent murder of one of the hostages. After his arrest, a motion picture film with sound track was made of an interview between petitioner and a law enforcement official in the jail. The "interview" was twenty minutes in length and consisted of interrogation of the suspect and his admission to the crimes. The taped interview was shown over the local television station that same day, and on the two succeeding days.

Subsequently, petitioner was arraigned for the crimes and the trial commenced nearly two months later. A motion for a change of venue was denied, and the trial which followed resulted in a conviction of petitioner and a sentence of death on the murder charge. The filmed "confession" was not admitted into evidence at the trial, but it was shown that at least three members of the jury had seen and heard the televised "interview," and that two members of the jury were deputy sheriffs of the parish.

The Supreme Court reversed the conviction on the grounds that petitioner's constitutional guarantee of due process had been violated. The Court said that:

> Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom before a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a "trial" of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute.[53]

It should be pointed out that no actual prejudice on the part of the jurors was shown.

In a dissenting opinion,[54] Mr. Justice Clark indicated that if the case had been tried in a federal court, over which the Supreme Court exercises supervisory powers, he would have voted to reverse the conviction on the ground that it is not within the province of law enforcement officers to actively cooperate in activities which tend to make more difficult the achievement of impartial justice. He agreed with the majority that one is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be "but

51. *Id.*
52. 377 U.S. 723 (1963).
53. *Id.* at 726-27.
54. *Id.* at 727 (Mr. Justice Harlan joined in the dissent).

a hollow formality."[55] But in view of the fact that the trial was conducted nearly two months after the "interview" was broadcast, he did not feel that the record showed the trial to have been infected by the adverse publicity. He emphasized that the conviction in *Irvin* was overturned with the caveat that:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.[56]

In *Estes v. Texas*,[57] petitioner had been indicted by a Texas grand jury for swindling. On the trial date, a hearing was held to consider a motion by petitioner to prevent telecasting, radio broadcasting, and news photography at the trial. The motion was denied, but a continuance of one month was allowed. The hearing itself, conducted in the presence of some witnesses and veniremen later released, was carried live on television and radio, and photography was allowed.

During the continuance, a booth was constructed in the rear of the courtroom for use by the news media once the trial began. During the actual trial, only the opening and closing arguments of the state and the return of the jury's verdict were broadcast live by the media. Petitioner was convicted of the crimes charged.

In reversing the conviction by a five-to-four vote,[58] the majority felt that the televising over petitioner's objections of the courtroom proceedings, in which there was widespread interest, was inherently invalid as infringing the right to a fair trial guaranteed by the due process clause of the fourteenth amendment. The *Rideau* decision was expressly followed[59] in so far as it held that due process is lacking whether or not isolatable prejudice can be demonstrated whenever the procedure fol-

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55. *Id.* at 729.

56. *Id.* at 730-31.

57. 381 U.S. 532 (1965).

58. Mr. Justice Clark wrote the majority opinion (at 534). Mr. Chief Justice Warren wrote a concurring opinion and was joined by JJ. Douglas and Goldberg (at 552). Mr. Justice Harlan wrote a separate concurring opinion (at 587). Mr. Justice Stewart wrote a dissenting opinion and was joined by JJ. Black, Brennan, and White (at 601). Mr. Justice White wrote his own dissenting opinion as well, and was joined by Mr. Justice Brennan (at 615).

59. 381 U.S. 532, 544.

lowed by a state involves the probability that prejudice to the accused will result.[60]

The Court was careful to emphasize that the decision only limited live broadcasting by the various media, and did not preclude the attendance at trial of representatives of the media who could report on the events later. The Court pointed out that this rule does not discriminate against television and radio and favor the newspaper media. They said:

> Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.[61]

This point was later reaffirmed when the Court said:

> It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be *and are plainly free to report whatever occurs in open court through their respective media.*[62]

In none of the dissenting opinions were televised trials advocated. However, the dissenting justices seemed to feel that the Court was acting too hastily by imposing a blanket constitutional prohibition on television coverage of trials. As Mr. Justice Stewart commented:

> I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional rule.[63]

Sheppard v. Maxwell[64] is considered to be the leading example of the extremes to which the fair trial-free speech controversy can be carried. The principle that identifiable prejudice to the rights of a crim-

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60. *Id.* at 544-50. The Court therein examined the four ways that televising proceedings can result in unfairness in some detail, which can be summarized as: (1) improper influence on jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, detracting their attention, facilitating their viewing of selected parts of the proceedings, and improperly influencing potential jurors thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses as by causing some to be frightened and others to overstate their testimony; (3) distracting judges generally and exerting an adverse psychological effect particularly on judges who are elected; (4) imposing pressures on the defendant and intruding into the confidential attorney-client relationship.

61. *Id.* at 540.

62. *Id.* at 541-42 (emphasis added).

63. *Id.* at 601-02.

64. 384 U.S. 333 (1966).

inally accused need not be shown if the totality of the circumstances raises the probability of prejudice was extended to "trial by newspaper" situations by this decision. In view of the fact that *Sheppard* represents the first real attempt on the part of the Supreme Court to lay down some definite guidelines for lower courts faced with this problem, a closer look at the facts leading to the decision is warranted.

In 1954 Dr. Sam Sheppard's wife was murdered. Sheppard was arrested for the murder three weeks later. Nearly three months elapsed before the commencement of the trial, and during the entire pre-trial period vicious and incriminating publicity about the accused and the murder made the case notorious. The news media during this period frequently aired charges and countercharges against Sheppard which were completey unrelated to the murder charge.

One of the more distressing events which occurred prior to trial was a televised three-day inquest in which Sheppard was examined without the aid of counsel before an audience of several hundred spectators in a local gymnasium. More than three weeks before the trial, newspapers published the names of prospective jurors, causing them to receive letters and telephone calls about the case.

The actual trial began two weeks before a hotly-contested election in which the chief prosecutor and the trial judge were candidates for judgeships. During the trial newsmen were allowed free reign in the small courtroom, in the corridors and elsewhere in and around the courthouse. Twenty reporters were assigned seats in close proximity to the jury and the counsel tables, precluding privacy between Sheppard and his counsel. A broadcasting station was assigned space adjacent to the jury room. Prior to their deliberations, the jury was not sequestered and had access to all news media, though the trial judge on a few occasions suggested that they not expose themselves to extrajudicial comment on the case. Though the jury was sequestered during the five days of their deliberations, they were allowed to make inadequately supervised phone calls during that period.

Much of the publicity given to the case throughout the trial involved incriminating matters not introduced in evidence, and the jurors were thrust into the role of celebrities. The trial judge on more than one occasion announced that neither he nor anyone else could restrict the prejudicial news coverage of the proceedings. For this reason, he took no effective steps to control the massive publicity or even the conduct of the media representatives in the courtroom itself. Under all these circumstances, Sheppard was convicted of murder.

After a twelve-year battle in the lower courts, during which time Sheppard remained in prison, the case was heard by the Supreme Court of the United States. The conviction was reversed and Sheppard was ordered released from custody unless retried within a reasonable time. After stating the facts in the decision, the Court made the following comments:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court, therefore, has been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for, "[w]hat transpires in the courtroom is public property." The "unqualified prohibitions laid down by the framers were intended to give the liberty of the press . . . the broadest scope that could be countenanced in an orderly society." And where there was "no threat or menace to the integrity of the trial," we have consistently required that the press have a free hand, even though we sometimes deplored the sensationalism . . . . "[L]egal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper." . . .
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> . . . [N]o one [should be] punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power."[65]

Applying all this to the case before the Court, the majority said:

> While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the [trial] court's later ruling must be considered against the setting in which the trial was held. 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." The fact is that bedlam reigned at the courthouse during the trial.[66]

Taking cognizance of the fact that the trial judge had on several occasions said that he was powerless to control the prejudicial publicity during the trial, the Court listed several alternatives that were available which could have been used to avoid the "carnival atmosphere" of the trial:[67] The judge could have adopted stricter rules for the use of the courtroom by newsmen;[68] he could have limited the number of newsmen and more closely supervised their courtroom conduct;[69] he

65. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).
66. *Id.* at 354-55.
67. *Id.* at 358-62.
68. *Id.* at 358.
69. *Id.*

could have insulated the witnesses from extrajudicial influence;[70] he could have controlled the release of leads, information and gossip to the press by police officers, witnesses and counsel;[71] he could have proscribed extrajudicial statements by any *lawyer, witness, party* or *court official* divulging prejudicial matters;[72] and he could have requested the appropriate city and county officials to regulate release of information by their employees.[73]

The Court's final comments included several more safeguards that could have been taken advantage of by the trial judge:

> [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue* the case until the threat abates, or *transfer* it to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a *new trial* should be ordered. But we must remember that reversals are but palliatives; *the cure lies in those remedial measures that will prevent the prejudice at its inception.* The courts must take such steps by *rule* and *regulation* that will protect their processes from prejudicial outside interference. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.[74]

With respect to the *Sperry* opinion, the single most significant point to be gleaned from *Sheppard* is the fact that only the *conduct* of the news media *in the courtroom itself* was sought to be regulated; what the news media published about a pending trial and what a trial judge could do when faced with an uncooperative press were matters specifically excluded by the *Sheppard* decision.[75] Although the news media

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70. *Id.* at 359.

71. *Id.*

72. *Id.* at 361 (emphasis added).

73. *Id.* at 362.

74. *Id.* at 363 (emphasis added).

75. The *Sheppard* Court said at 357-58: "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. . . . Since he viewed the news media as his target, the judge never considered other means 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.*" [emphasis added].

Later at 362-63, the Court said: "Of course, there is nothing that proscribes the press from *reporting events that transpire in the courtroom.*" [emphasis added].

may often be the vehicle of abuse to one's right to a fair trial in any given case (and this was certainly the situtation in *Sheppard*), the trend since *Sheppard* seems to be that the sources of prejudicial information are limited more readily than direct limitations on the news media's right to speak freely and write about what is seen and heard in an open court proceeding.[76] Courts faced with this problem since *Sheppard* seem to be adopting this interpretation.

United States v. Tijerina[77] was a criminal prosecution in a federal district court. Because of the circumstances surrounding the case, the trial judge issued a pre-trial order precluding publicity or comment about the case by counsel, parties and witnesses. Two of the defendants, while still under the pre-trial order, made statements about the pending action, the court and the trial judge at a convention three days before the trial was to begin. They were called in before the court and cited for contempt.

On appeal from the contempt conviction, defendants' primary contention was that their first amendment right of freedom of speech had been abridged by the pre-trial order. The appeals court affirmed the conviction, and cited *Sheppard* as authority for the proposition that a pre-trial order proscribing extra-judicial statements by any lawyer, party, witness or court official was not only valid, but was the responsibility of the trial judge in assuring that a fair trial be enjoyed by all parties involved.[78] The defendants argued that in a conflict between fair trial and free speech the latter has always been given a preferred position. The court denied the validity of that contention, citing the *Estes* decision.[79]

76. One indication that this is a proper interpretation of the *Sheppard* decision is that the final draft of the *Reardon Report*, discussed below, notes 93-98 and accompanying text, which was adopted by the ABA after the rendering of *Sheppard*, devotes three-quarters of its recommendations to control over attorneys, law enforcement officers, judges, judicial employees and the proceedings themselves. Only one section of the report deals with the use of the contempt power, and then only when damaging statements are "willfully designed . . . to affect the outcome of the trial, and seriously (threaten) to have such an effect." For the complete provision *see Reardon Report*, Part IV § 4.1(a)(i), Adopted Draft (1968).

77. 412 F.2d 661 (10th Cir. 1969), *cert. denied* 396 U.S. 990 (1969). *See also* Annot., 5 A.L.R. Fed. 948 (1970).

78. 412 F.2d 661, 667.

79. *Id.* The court reiterated the following which was said by the *Estes* Court, 381 U.S. 532, 540-41: "We have always held that the atmosphere essential to the preservation of a fair trial—*the most essential of all freedoms*—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles

In *Worcester Telegram and Gazette, Inc. v. Commonwealth*[80] a newspaper publisher and a reporter were found in contempt of court for publishing an article which commented on a pending criminal trial. The article appeared the evening of the first day of the trial, and disclosed that one of the four defendants was at that time serving a prison sentence. When the trial commenced the following morning, the defense asked that the jurors be polled to see if any of them had read the article. It was determined that half of the jurors had seen the article, and a motion for a mistrial was granted.

On appeal, the contempt conviction was reversed on the grounds that even though the article admittedly prejudiced the rights of at least one of the defendants,[81] the declaration of a mistrial did not by itself mandate a finding of contempt for those responsible for the publication of the article since it was shown that the "petitioners . . . had no 'willfull design' to affect the trial."[82]

Although there was no pretrial order involved in *Worcester*, the result does show the extreme to which one post-*Sheppard* court went to avoid a direct restraint on the news media limiting discussion of a pending case by exercise of the contempt power. Here was a case where the article in question was admittedly in gross interference with the defendant's rights to a fair trial,[83] and yet, since the publisher and reporter had no "willfull design" to affect the outcome of the trial, the court refused to allow their contempt conviction to stand.[84]

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that from time immemorial have proven efficacious and necessary to a fair trial" (emphasis added). An identical result was reached in Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969), *cert. denied* 396 U.S. 985 (1969). *See also* Annot., 33 A.L.R.3d 1041 (1970).

80. 354 Mass. 578, 238 N.E.2d 861 (1968). *See also* 33 A.L.R.3d 1116 (1970).

81. 354 Mass. 578, 579-80, 238 N.E.2d 861, 862. The fact that the defendants had been prejudiced by the article was even stipulated to by the assistant district attorney who was prosecuting the case.

82. *Id.* at 582, 238 N.E.2d at 864.

83. "Gross interference" to the rights of the defendants was the phrase used by the court itself, which then reversed the contempt conviction of those who were responsible for this "gross interference." *Id.* at 580, 238 N.E.2d at 863.

84. In the *Worcester* case, the Superior Court of Massachusetts expressly adopted the "willfull design" theory of the *Reardon Report*, which will be discussed below. *But see* Tauro, *Fair Trial-Free Press Revisited*, 55 A.B.A.J. 417 (1969), where the Chief Justice of the Massachusetts Superior Court warns the news media not to abuse this liberality by the courts. To do so, he warned, may cause the Supreme Court of the United States to reverse its past decisions which seem to favor freedom of the press over the right to a fair trial when any attempt has been made to find the press in contempt for interference with the right to a fair trial.

The state of affairs indicated in the cases above has in recent years generated an unprecedented amount of serious discussion on the constitutional, social and even economic ramifications of a single problem; that is, the seemingly inherent conflict which arises whenever an attempt is made to accommodate an accused's right to a fair trial simultaneously with the news media's right to keep the public informed.

As a direct result of the findings of the Warren Commission,[85] several major studies, financed and directed by various legal groups, were undertaken to consider the problem and to come up with some practical solutions therefor.[86] One of the three, the *Reardon Report* is by far the one that has received the most attention. The standards set out in this report, adopted by the American Bar Association's (ABA) House of Delegates in 1968,[87] are merely recommendations which the committee has proposed for adoption by the appropriate authorities in the various jurisdictions.

In light of the *Sperry* decision, it is interesting to note that an entire section of the *Reardon Report* was devoted to the use of the contempt power in a case where extra-judicial information has been disseminated during criminal proceedings.[88] Under the standards, use of the contempt power by a court is severely limited, one of the more stringent requirements for its use being that the extra-judicial statements be wilfully designed to affect the outcome of the trial and that they seriously threaten to have such an effect.[89] Although the *Reardon Report* only represents a set of recommendations and of course has no binding ef-

85. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (U.S. Government Printing Office: Washington, D.C.) 1964. The Commission and the report took their name from then Chief Justice of the Supreme Court, Earl Warren, who was appointed to lead the investigation of J.F.K.'s assassination.

86. The results of these three studies also got their names from judges who directed the studies. They were: (1) ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS—TENTATIVE DRAFT (1966), APPROVED DRAFT (1968) [the *Reardon Report*]; (2) COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE (Sept., 1968) [the *Kaufman Report*]; (3) ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE. FREEDOM OF THE PRESS AND FAIR TRIAL, FINAL REPORT WITH RECOMMENDATIONS (1967) [the *Medina Report*].

87. The *Reardon Report, supra* note 95, Approved Draft (1968).

88. *Reardon Report*, Part IV.

89. *Id. See also* note 93 *supra.*

fect on any of the various courts, it does carry considerable weight in legal circles.[90]

Interest in the fair trial-free speech controversy, however, has by no means been limited to studies conducted by bar association groups or discussions at judicial conferences. There have been Congressional hearings on the matter;[91] several books and numerous articles have considered the problem;[92] model statutes have been proposed by legal writers seeking a solution to the dilemma;[93] and the United States Supreme Court, in little more than a decade has handed down six major decisions each of which dealt with various aspects of the fair trial-free speech controversy.[94]

The majority in the *Sperry* decision did not refer to the *Reardon Report* or its "willfull design" theory. They did not even mention the *Sheppard* decision, in spite of its importance in this area. Instead, they chose to reverse the contempt convictions of the reporters on the ground that a prior restraint (such as the pre-trial order issued by the trial judge) on the right of the news media to report those events which occur in open court is patently invalid. Disobedience of such an order, they said, could not support a judgment of contempt. They went no further.

The concurring justices in *Sperry*, however, reached the same result (*i.e.*, reversal of the contempt conviction) using a different route. A more sympathetic attitude was taken towards the trial judge who issued the order, on the grounds that he was only making a sincere effort to assure the defendants in the murder trial a hearing free from prejudicial influences. They believed that the directives by the Supreme Court in *Sheppard* influenced the trial judge in his initial decision to

90. For a good objective examination of the *Reardon Report*, *see* Comment, *Legal Aspects of the Fair Trial-Free Press Controversy: The Reardon Report Considered*, 48 NEB. L. REV. 1045 (1969). For a discussion of the *Reardon Report* from the viewpoint of the news media, *see* Ragan, *Fair Trial With A Free Press: The Reardon Report Revisited*, 37 TENN. L. REV. 215 (1969) (address given by newspaper publisher on June 12, 1969, at a seminar on News Media sponsored by the Tenn. Bar Assoc. at its 88th Annual Convention).

91. *Hearings on S. 290 Before a Subcomm. on Const'l. Rights and the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

92. *See, e.g.*, 33 A.L.R.3d 1116, 1118, note 5, for a comprehensive list of recent works on this problem.

93. *See, e.g.*, An Act To Prevent The Dissemination Of Prejudicial Publicity, set out in Comment, *The Case Against Trial By Newspaper: Analysis and Proposal*, 57 Nw. U.L. REV. 217 (1962).

94. *Supra* notes 39-81 and accompanying text.

issue a pre-trial order. They indicated that it was an oversimplification to say that the exercise of the freedom of the press by the news media is absolute once a trial has begun and events occurring in public and in open court are involved. In other words, they could foresee situations where reporters could be found in contempt for reporting on events taking place in an open court proceeding.

Using their approach the prior restraint problem could be avoided because members of the news media could only be found in contempt if it could be clearly shown that what they had written did in fact affect the outcome of the proceedings. This argument is based on the premise that although pre-publication censorship is not constitutionally permissible, post-publication accountability is constitutionally supportable.[95]

The concurring justices would reverse here because it was never shown that the jury even knew the article in question existed, much less that they had read or had been influenced by it in their deliberations. This approach does not conflict with the rule that prejudice need no longer be shown if the totality of the circumstances indicates a prejudicial atmosphere *per se*, since such circumstances did not exist in *Sperry*. The extremely prejudicial circumstances evident in such cases as *Estes* and *Sheppard* just were not there.

Thus, the question of whether or not the article had influenced the jury to such an extent that it could then be said that the reporters had abused their freedom of speech, remained subject to proof. The reporters, however, should not be subjected to a new hearing to determine this question of fact remaining unanswered, since no clear precedent controlled this case and fundamental principles of fairness required that application of this new rule should be reserved for application in future cases.[96]

95. Wash. Const. art. I, § 5. Note that the state constitutional provision indicates that one is guaranteed freedom of speech but is responsible for the abuse of that right.

96. 79 Wash. 2d at —, 483 P.2d at 627, where the concurring justice said: "As to any future cases of this nature, it seems prudent to emphasize that this court should have no reservations in applying the principle or standard relative to post-publication accountability. The comments, the discussion, and guidelines indicated herein should provide notice to all concerned . . . that post-publication accountability . . . will be the applicable principle or standard in future cases of this nature. . . . [T]he standard indicates or provides . . . an appropriate and necessary solution of the sensitive and delicate problem of conflict between the constitutional concepts of free press and fair trial. Namely, the suggested solution would be based upon actual proof of tangible harm rather than upon mere suspicion, speculation, and conjecture. Such a solution avoids the problem of any prior restraint or censorship of the news media."

It is submitted that a thorough examination of the *Sheppard* decision and the decisions which have attempted to interpret it, indicates that both views expressed in *Sperry* are partly correct and partly incorrect. That prior restraints on the rights of the news media are invalid in such situations appears to be the rule today. The Court in *Sheppard* expressly excluded any guidelines as to what a court should do when faced with a recalcitrant press.[97] In the same decision, however, the Court strongly advised that courts faced with the fair trial-free speech problem should by rule and regulation stop the flow of prejudicial information to the press at its source; that is, limit dissemination of such matter to the press *by parties, counsel, court officials and others actively participating in the judicial proceedings.*[98] The *Tijerina* case, decided after *Sheppard* indicates that prior restraints on the first amendment freedom of speech are valid when directed at such persons, if a fair trial will thereby result.

The fact that certiorari was denied in *Sperry* indicates that the Supreme Court was satisfied with the interpretation given *Sheppard.* This would seem to indicate that, while the Court is willing to allow some limitations on the first amendment freedom of speech, it is not yet ready to allow such limitations when the news media is involved. In other words, prior restraints on first amendment freedoms are no longer *per se* unconstitutional when they are directed at parties other than representatives of the news media, if a fair trial is thereby insured to one accused of a crime.

It seems that the Court would like to see all other possible solutions to the fair trial-free speech controversy fully explored before limitations are put on the freedom of the news media to keep the public informed.[99] Whether or not the news media will relinquish this seemingly favored position through abuse and cause the Supreme Court to reverse this apparent trend remains to be seen.

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97. *See* note 82 *supra.*

98. *See* note 81 *supra,* and accompanying text.

99. *See* note 81 *supra,* and accompanying text for the "other possible solutions" as outlined by the *Sheppard* Court.