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News of Crime: Courts and Press in Conflict

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NEWS OF CRIME: COURTS AND PRESS IN CONFLICT By *J. Edward Gerald*. Westport, Conn.: Greenwood Press. 1983. Pp. x, 227. \$29.95.

When the media seeks unlimited access to court proceedings and trial-related information, the first and sixth amendments come into direct conflict. This conflict has been aptly called the "civil libertarians' nightmare."¹ J. Edward Gerald,² in *News of Crime: Courts and Press in Conflict*, examines this conflict from a sociological and historical

1. *United States v. Dickinson*, 465 F.2d 496, 499 (5th Cir. 1972); *Bridges v. California*, 314

perspective. His approach is a refreshing change from the traditional constitutional analysis of media access and can be appreciated by lawyers and laypersons alike. Gerald's proclaimed purpose is to "dispel misconceptions based on irritation and anger and to encourage peace between the courts and the press" (p. viii). The book clearly and comprehensively³ describes the history of both the media's push for courtroom access and the response of the legal community; however, Gerald falls short in his ability to analyze the conflict critically. Gerald, a journalist himself, is unable to conceal his favoritism for the press over the courts. This personal bias limits the value of this purportedly objective analysis.

In his outline of the historical developments, Gerald concentrates on the ABA standards governing media access,⁴ legislative shield laws protecting reporters' sources, and cameras in the courtroom — and examines the courts' response to these developments. Gerald also discusses the development of gag orders and bench, bar, and press councils in order to show how the press has gradually gained more freedom in its court reporting.

The ABA in 1966 appointed a fair trial/free press committee which proposed fairly restrictive standards. They prescribed, for example, that a judge could restrict comment by the news media if the comment was "reasonably likely" to prejudice the trial. These standards were approved by the Judicial Conference of the United States two years later. In 1978 the standards were made more conciliatory toward the media. The revised standards make clear that the presumption now is "strongly in favor of open judicial proceedings and unsealed records."⁵ The new rules permit judges to close pretrial proceedings only if there is a "clear and present danger" that their reports will prejudice the trial.⁶ In addition, prior restraints are prohibited.

Gerald devotes an entire chapter to the reporters' claimed privilege not to reveal their sources and the legislative shield laws protecting that privilege. The judicial response to the shield laws has been hostile despite increasing legislative receptivity. The Supreme Court, in

U.S. 252, 260 (1941) ("[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.").

2. J. Edward Gerald is an active journalist and one of the founders of the pioneering Minnesota News Council. His books include *SOCIAL RESPONSIBILITY OF THE PRESS* (1963), *THE BRITISH PRESS UNDER GOVERNMENT ECONOMIC CONTROLS* (1956), and *THE PRESS AND THE CONSTITUTION* (1948).

3. *News of Crime* is a highly structured work. Each of the seven chapters is divided and subdivided. While this adds clarity, the format is somewhat dry and resembles a textbook.

4. The ABA in 1966 appointed a fair trial/free press committee which proposed a draft of standards for criminal justice known as the Reardon Report. The committee is ongoing and proposes revised drafts of the standards, which are contained in *STANDARDS FOR CRIMINAL JUSTICE* ch. 8 (1982).

5. P. 43 (citing *STANDARDS FOR CRIMINAL JUSTICE* §§ 8-3.1 through 8-3.7 (1982)).

6. P. 44 (citing *STANDARDS FOR CRIMINAL JUSTICE* § 8-3.2 (1982)).

Branzburg v. Hayes,⁷ placed clear limits on the scope of this special testamentary privilege. It required reporters "to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of a crime."⁸ Despite this seeming setback to reporters, this case has been interpreted narrowly,⁹ and many courts have developed a qualified first amendment privilege based on the three-pronged test suggested by Justice Stewart in his dissent in *Branzburg*.¹⁰

Gerald's pro-media bias is revealed in his discussion of the legislative shield. He presents numerous cases in which "journalistic martyrs" have gone to jail rather than reveal their sources (pp. 115, 150). He states that shield laws are necessary to provide the "legal protection [that] is needed for the journalists' watchdog role" (p. 115) — to keep leaders competent and honest. But he neglects to present the opposing position, that granting writers the special privilege of not having to account for the source or veracity of their published information may threaten a fair trial where specific rules of evidence and burdens of proof must be followed. In addition, some commentators criticize the singling out of journalists for this special privilege, noting both the resulting public resentment toward journalists and the negative consequences for journalists of allowing the government to identify and regulate them as a profession.¹¹

Gerald next presents a good summary of the development of law concerning the broadcasting of criminal trials. He discusses the sensationalist trial in *Estes v. Texas*,¹² which provoked the ABA ban on televised trials, and the erosion of that ban over the succeeding years. He accurately explains how the media organized and successfully challenged the ban in many states. The review is fairly thorough given the limited coverage the topic must receive in a book examining the broader conflicts of the courts and the press. Typical of the author's style throughout the book, the chapter is enlivened by descriptions of cases in which the conflict over broadcasting of a criminal trial arose. The only shortcoming once again is the pro-media bias. Gerald under-

7. 408 U.S. 665 (1972).

8. P. 130 (quoting *Branzburg*, 408 U.S. at 682).

9. *Branzburg v. Hayes* was a 5-4 decision. Justice Powell's concurrence, which emphasizes the limited nature of the Court's holding, has been cited by circuits narrowly interpreting the decision. Powell states that newsmen still have available protective orders from the courts "where legitimate First Amendment interests require protection." *Branzburg*, 408 U.S. at 710.

10. Pp. 132-33 (citing *Branzburg*, 408 U.S. at 743) (Stewart, J., dissenting) ("I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of the First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.").

11. See, e.g., Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979).

12. 381 U.S. 532 (1965).

states the disruption the cameras caused in *Estes* (a case which is still good law) and does not sufficiently explore the potential psychological distractions caused by cameras that can prejudice a trial.

Gerald's prejudice is most evident in his analyses of the competing groups. He describes the courts as ponderous and inefficient institutions (pp. 6-7, 14-15). He denigrates the sixth amendment by characterizing it as a "rule" constraining judges and putting courts in conflict with the media (pp. 12, 14). The press, on the other hand, is the hero in the book. It is "an underdog in the face of so formidable an opponent" (p. 7); it has as its main goal to seek truth and inform the public. The journalist is, "in effect, an agent of the government in tracking down crime. . . [who] brings controversial allegations into the open" (p. 21). He stands "alert to report corruption, bribery, and flagrant misuse of political power" (p. 115). Gerald never suggests the possibility that the writer, eager for a scoop, may hastily report an unsubstantiated rumor as fact, or distort the truth through editorialized articles. The clearest example of his bias occurs in the introduction:

Persons of high purpose and low tap the journalist's phones and subpoena his long distance phone bill in order to harass his sources, to fence him in. He has to hire a lawyer to keep himself out of jail while he does the day's work. The state, it seems to him, searches not so much for truth as for journalists who know something that will give the district attorney a lead, or to help the defense impeach an adverse witness.

If the journalist succeeds in getting a statute passed for access to official records, so as to make news gathering easier, the opponents attempt to restore the old restrictions by developing an artificially cultured new tort called "invasion of privacy." [P. 13.]

Gerald overstates the reach of this restriction. He neglects to mention that the claim of invasion of privacy has been held by the Supreme Court not to prevent a journalist from truthfully reporting information on public record.¹³

At one point Gerald does criticize the media and contends that it is in part the fault of the journalists that they are petitioners rather than partners in their relationship with the courts. He explains that journalists are organizationally unready to act as partners (p. 5). They lack a coherent organization, self-government, and "a willingness to accept public responsibility for professional standards" (p. 183). Gerald concedes that this is in part a deliberate decision in line with the journalists' desire for absolute freedom, and their belief "that the act of defining freedom means limiting it" (p. 184), but retorts that "[t]his position, while described as one of freedom, is also one of irresponsibility" (p. 183). As a consequence, "as far as reporting of crime news is

13. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (striking down a Massachusetts statute closing criminal trials for sexual offenses involving victims under the age of 18 from the press and general public during testimony of the minor victims).

concerned, the Supreme Court will set the standards, as it has done since 1966, not the professional press. This is not necessarily undesirable but it does confine journalism to an underdog role in determining its own freedom" (p. 184).

Laypersons, lawyers, and journalists seeking a thorough and concise overview of the development of the fair trial/free press controversy will find this book of value. It covers the major areas of the conflict, outlines their historical development, and contains numerous examples from the law. But any reader should be aware that it is written by a journalist who advocates an expanded freedom of the press in reporting about criminal trials without always making his advocacy clear to the reader.