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Friendly & Goldfarb: Crime an Publicity: The Impact of News on the Administration of Justice

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CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE. By *Alfred Friendly* and *Ronald L. Goldfarb*. New York: Twentieth Century Fund. 1967. Pp. 335. \$5.

Since the Supreme Court's decision on the case of Dr. Samuel Sheppard,¹ we have been subjected to a steady stream of books, magazine articles, and newspaper commentaries dealing with the problem of reconciling the sometimes conflicting rights of fair trial and free press. *Crime and Publicity* is yet another effort to provide, as the publisher's fanfare suggests, a "searching analysis of urgent issues" which is sorely needed in our present efforts to solve the difficult problem of handling prejudicial publicity in criminal cases.

I approached this book with anticipation, since the co-authorship of Alfred Friendly, associate editor of the *Washington Post*, and Ronald L. Goldfarb, a lawyer in Washington, D.C.,² seemed to be a rather impressive pedigree for a book dealing with this subject. Unfortunately, the product fails to live up to its lineage. The collaboration of a working newsman and a practicing lawyer could have been expected to illuminate the issues which never seem to emerge sharply in the continuing and contentious dialogue between associations of the news media and of the bar. I expected a forthright, moderate analysis giving rise to proposals for workable solutions. In fact, my major reaction was one of disappointment. The book has little to recommend it to either a legal or a lay audience. There are no novel or interesting propositions for the lawyer possessing a reasonable degree of familiarity with recent developments in criminal procedure, not to speak of those with particular knowledge of the problems presented by prejudicial publicity in criminal cases. For the lay reader there is only a highly detailed rehash of some of the more sensational recent cases—from *Sheppard* to *Ruby*. And, even this is often hampered by prolix prose and dubious legal explanations and references.

The major effort of the book is to justify the publication of prejudicial publicity by the news media on two grounds. The first is that such publicity occurs in only a small number of cases and thus has only an insignificant total effect. Although the authors admit that there are serious abuses by the news media in this small number of cases, they fail to provide comfort for the unfortunate defendants

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

2. Actually, one might well be surprised to learn that Mr. Goldfarb, billed as an active trial lawyer, was able to devote his full time to the preparation of this book from May 1965 until August 1966. Mr. Goldfarb is also described as a "lawyer who has specialized in writing on legal questions for a lay public." However, at least one of his previous major publication efforts has been the subject of rather harsh comment by reviewers. See Keefe, *Practicing Lawyers' Guide to the Current Law Magazines*, 52 A.B.A.J. 590 (1966); Subin, *Book Review*, 114 U. PA. L. REV. 630 (1966).

involved. Indeed, they seem to consider the unpleasant effects on these persons as but a risk of the game. The second justification is that there are serious evils in our present system of administering criminal justice which should be corrected before any attack is made upon the minor sins of the news media.

All of the usual arguments are mustered in support of these propositions; the keystone, of course, being the absolute nature of the first amendment. Historically and emotionally, this is a persuasive argument, particularly in light of the sympathetic reception of this rationale by the Supreme Court. However, one wonders why this view of the first amendment in the fair trial-free press context is any more fixed than were the recently modified interpretations of the fourth, fifth, and fourteenth amendments. The authors also invoke the press' role as a control upon abuses in the administration of criminal justice; however, they are unconvincing in their assertions that this watchdog function would be seriously impaired by the imposition of reasonable restrictions upon the nature and quantity of the press coverage at criminal proceedings. An impartial observer might well inquire into the frequency of beneficial press exposés of wrongdoing and corruption by law enforcement and judicial officers as compared to the number of instances of harmful and prejudicial publicity, many of which *Crime and Publicity* candidly records.

It is difficult to accept the assertion that, regardless of any evil effects, the public has an absolute right to know *all* the details of crimes, law enforcement activities, and criminal prosecutions. It is even more difficult to believe that the average member of the reading public demands the kind of coverage which has become all too frequent in the news media. If any such demand does exist, it is one that has been carefully cultivated by the news media, inspired not by lofty principles but by profit motives. To the press, "news" is what sells; and, what is news must be printed in order to preserve the freedom of the press and assure the right of the public to be informed. Coupled with an increasingly weak libel law, this serves to place the news media in a uniquely untouchable position: to whom is the press responsible? A true exponent of individual liberties might well doubt the wisdom of such a concentration of power in one institution of our society.

The standard reply to these criticisms, although it is perhaps not completely responsive, is that the press has exercised, and will continue to exercise, a high degree of voluntary restraint in disseminating prejudicial publicity. The record fails to support this pious statement, and Friendly and Goldfarb clearly admit that these "voluntary restraints" are of little value as a means of controlling

prejudicial publicity. Certainly no other conclusion is tenable as long as newspaper editors remain members of the human race.³

In a rather transparent attempt to shift the onus from the news media, the authors focus on the sins of the legal profession and subject the keepers of Professor Kamisar's "gatehouse"—law enforcement officers—to a very harsh treatment indeed. While one cannot honestly deny that these groups are often subject to human frailties, guilty of inaction, and even of misconduct, it is difficult to understand why this should excuse equally culpable conduct by the press. I might also add that this type of argument does not contribute to a solution of the problems with which we are faced. Little progress will be achieved until all of the people in all of the glass houses stop throwing stones at one another.

The authors have also overestimated the effectiveness of the various procedural devices which are presently available to alleviate the adverse effects of prejudicial publicity in criminal trials. Experience teaches us that motions for change of venue and for continuance, *voir dire* examination of jurors, and cautionary instructions by trial judges are rarely resorted to by the trial bar—thus indicating that the practicing bar does not find these remedies particularly effective. The authors' argument that increased use of these procedural devices would solve the problems created by dissemination of prejudicial publicity by the news media also fails to recognize that these devices were not designed to cope with publicity of the magnitude and intensity common today. Once national news media publicize events connected with a criminal proceeding in a prejudicial manner, it is extremely doubtful whether any procedural device could effectively dispel the evil effects.

The authors apparently view appellate reversal as an adequate remedy for any abuses not cured by the above procedures. This is understandable from a layman, but not from a member of the legal profession. Reversal coupled with a new trial is a poor solution, if, indeed, it is any solution at all. Quite apart from the expense to a person who is presumed to be innocent, and all of the other evil effects to both the system of the administration of criminal justice and the individual concerned, there is little reason to expect that the publicity will be any less offensive the second time around. In-

3. See *Pennekamp v. Florida*, 328 U.S. 331, 365 n.13 (1946) (concurring opinion of Frankfurter, J.):

See the skeptical remarks of H. L. Mencken, a stout libertarian, on the efficacy of journalistic self-restraint: "Journalistic codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of streetcar conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted." Quoted by LeViness, in *Law and the Press*, *The Daily Record*, Baltimore, March 11, 1932, p. 3, col. 1, 4.

deed, experience indicates that reversals—particularly those in the Supreme Court—simply make a case more attractive from the point of view of the press.

The authors shed no new light on the problem and offer no new workable solutions. One is forced to wonder whether the final conclusion of the book justifies its publication: "At a minimum frequent meetings between representatives of the press and the bar at the local level would provide useful education to both sides" (p. 256).

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