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Book Notes

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NEWS OF CRIME. By *J. Edward Gerald*. Westport, Connecticut: Greenwood Press. 1983. Pp. vii, 227. $29.95.

For the past few decades, the courts and the press have increasingly been at odds. The conflict rests on constitutional grounds, and since the courts are the arbiter of the Constitution, the courts and the bar generally have gained the upper hand. In *News of Crime*,[1] J. Edward Gerald seeks to inject a spirit of conciliation and cooperation into court-media disputes. He analyzes both the nature of the conflict and various means by which it has been and could be settled. Gerald argues that the two groups could arrive at a peaceful solution which would enable courts to function efficiently and still allow the media to offer the public the news it needs to form educated opinions of justice in America.

In the first three chapters of the book, Gerald focuses on the similarities and differences in the goals of the bar and press and how the differences can be harmonized. He notes early on that both the bar and press act as public servants in that they seek truth and justice (pp. 11-14). However, they differ in that the bench often defines justice in terms of fair trial, which requires limiting the evidence presented in court. On the other hand, the press seeks justice by presenting *all* available information to the public, thus ensuring open courts which are a hallmark of democracy. The conflict arises when the court sees the press (and vice versa) as deterring justice by infringing on its means of ascertaining the truth.

After setting up the problem, Gerald briefly reviews the historical relationship of the courts and press. He points out that courts imposed few limits on the press until recently. The limits stem in large part from the Supreme Court's increasing concern, especially during the Warren Court years, for ensuring a defendant's right to fair trial under the sixth amendment. In response to the rising concern for fair trial, the press could have voluntarily followed informal federal and state court requests not to publish certain inflammatory or inadmissible facts. However, while American journalists are a very heterogeneous group, they are often united in their belief that

1 J.E. GERALD, NEWS OF CRIME (1983).

all news should be printed. Once such prejudicial information was disseminated, the courts began to impose restrictions.

Gerald analyzes the conflict on first and sixth amendment grounds. As the courts showed more regard for a defendant's right to a fair trial by an impartial jury under the sixth amendment,[2] Gerald asserts, the press even more vigorously claimed an absolute first amendment privilege. Each group held a different conception of the Constitution, but the press could not enforce its interpretation, whereas the courts, supported by an organized bar, could.

While reviewing the causes of conflict, Gerald simultaneously examines two methods of resolving it. The first is through bench, bar, and press councils which voluntarily settle disputes. When a conflict arises regarding press access to a particular hearing or the right to print certain inadmissable evidence potentially harmful to the defendant, a joint legal-media council meets. Each party explains its viewpoint on how much should be reported and why. The council then negotiates a form of out of court settlement in the matter. Councils, which are usually organized on a statewide basis, can also draft standards of conduct for lawyers and newsmen which, if followed, will reduce future conflicts.[3]

Although Gerald favors using councils, he recognizes that most press-media disputes are resolved by courts applying Supreme Court guidelines or American Bar Association ("ABA") standards. The most influential Supreme Court decision in the area is *Sheppard v. Maxwell*.[4] In *Sheppard*, a doctor was accused of murdering his wife. During the pretrial period, prosecuting attorneys fed a steady diet of incriminating, inflammatory, or inadmissible material to the press, which eagerly printed it. The trial judge failed to filter out the sensational effects on the jury, the Court said, and therefore Sheppard was denied a fair trial. The Court went on to lay down rules to ensure fair trial. This "Sheppard Mandate" restricted lawyers and officials from releasing information to the press, indirectly limiting press access. It also recited steps a trial judge should follow to ensure fair trial in big publicity cases.[5]

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2 *See, e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961).

3 Councils have been formed in 23 states. However, the extent of their activity has not been measured (p. 52).

4 384 U.S. 333 (1966).

5 The remedies the court suggested to diminish the negative effects of community hostility include change of venue, continuance, questioning prospective jurors before seating during voir dire, sequestration of the jury during trial, admonishing the jurors not to read or talk about the case, and granting a new trial in instances of serious error. *Id.* at 360-63.

Gerald reviews how the ambiguous *Sheppard* holding has been narrowly interpreted. Perhaps in anticipation of this narrow judicial interpretation, he notes that the ABA began drafting standards in 1966 (pp. 29-31)[6] to aid courts in applying the Sheppard Mandate.[7] These standards specified what types of information should and should not be released to the press and when. In addition, they recommended closure of some pretrial hearings, a suggestion drawing sharp criticism from the press.

The second half of the book reviews how these conflicts and bargaining patterns play out in certain types of cases. Chapter four discusses the so-called gag rule, that is, a court order not to publish statements heard in open court. If a journalist publishes restricted information, he may be subject to a contempt of court citation including a possible fine or jail term. Gerald distinguishes how the courts apply different closure standards to pretrial and trial situations. In general, he notes that courts require a lesser showing of possible prejudice to close a pretrial hearing than to close any portion of the actual trial (p. 105).[8]

Gerald also devotes significant space to "shield laws" which protect journalists from being forced to reveal in court the identity of news sources. Gerald reviews the arguments for and against shield laws. On one hand, news reports may expose corruption or fraud by means of an unnamed source.[9] Next, a prosecutor or the accused party demands exposition of the source. If his identity is revealed, other sources may refuse to talk in the future, defeating the goal of investigative journalism. On the other hand, shield laws could insulate unscrupulous reporters who knowingly publish falsehoods or half truths.

Recent court decisions provide little protection for reporters called to testify regarding their sources, according to Gerald. He takes a particularly hard look at the Supreme Court opinion in *Branzburg v. Hayes*.[10] *Branzburg* required a reporter to respond to a grand jury subpoena even though it entailed revealing private

6 The ABA standards were adopted in 1968. Revisions were made in 1977. For details of the differences between the original and revised standards, see pp. 41-45.

7 Gerald stresses the fact that the ABA standards are not binding on courts and obviously cannot be employed in the face of any disagreement by the Supreme Court (pp. 41-42).

8 This general conclusion is derived from the author's analysis of Gannet v. De Pasquale, 443 U.S. 368 (1979), and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980).

9 For example, the Committee to Re-elect the President filed a $15 million libel suit against the *Washington Post* when it relied on secret sources and implicated President Nixon in the Watergate conspiracy (p. 118).

10 408 U.S. 665 (1972).

sources of information. Gerald neither endorses nor rejects a journalistic shield, whether judicially developed or embodied in a statute. However, his focus on Justice Stewart's dissent in *Branzburg* indicates that Gerald favors a partial shield, a form of which, he notes, exists by statute in twenty-six states (p. 123).

Gerald concludes the book by assessing press-court relations today.[11] He describes the virtues of a free press. However, he argues that the first amendment right is less than absolute; it must be balanced against society's interest in law enforcement.[12] Gerald claims that both state and federal constitutions integrate the words freedom and responsibility. If the courts and press would follow suit, many conflicts could be avoided.

News of Crime is very well structured. Gerald does a good job of identifying problems, reviewing both sides of the problems, and analyzing conflict resolutions as embodied in case law. His opinions, for the most part, are confined to a brief "comment" at the end of each chapter and to the final pages of the book. His pensive, orderly analysis should appeal to judges, lawyers, and newsmen, and this is consistent with his stated goal of promoting peace among the parties.

The primary drawback stemming from the attention to structure is that it breeds a writing style which is, at times, stilted. However, this dry literary tone appears intentional. It facilitates objective analysis which Gerald seems to perceive as a paramount virtue.

Gerald laudably attempts to reconcile the bar and press by giving each a view from the opposing perspective. In press-court disputes, it is easier to take an absolutist position and criticize than to take a constructive approach. But Gerald is sympathetic to both the press and courts, even as he points out their excesses. His most valuable insight is the interdependency of the courts and press. At one point he borrows from Chief Justice Burger: "Journalists keep their independence as long as there is an independent judiciary to give meaning to the words of the Constitution. A free press is imperative to assure that assaults on judicial independence are explored and an-

11 One short chapter is also devoted to camera usage in the courtroom. Gerald traces how cameras were banned after the Bruno Hauptmann murder trial and how they have gradually made a reemergence under strict court controls and ABA guidelines (pp. 151-65).

12 Gerald draws a distinction between "freedom" and "freedom under law." He asserts that most journalists want freedom to publish, period. However, he believes that freedom must be defined to be legally recognized. Therefore, the freedom journalists seek is better thought of as "freedom under law." Journalists will maximize their first amendment rights if they work within this framework and with an understanding of the law (pp. 182-84).

swered" (p. 121).[13] Although conflicts will continue, *News of Crime* should impress the truth of this statement on members of the bench, bar, and press in equal measure.

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13 Quoting *Chief Justice Says Press Must Obey Invalid Censorship Orders Until They Are Later Reversed*, 8 CENSORSHIP NEWSLETTER 44, 45 (1975).