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A Newspaperman's View

Fred Graham

A NEWSPAPERMAN'S VIEW

By FRED GRAHAM†

LAST YEAR, when I was assigned by the *New York Times* to cover the Supreme Court, I discovered a surprising thing — somebody had neglected to list the Court in the Washington telephone book. There were pages of governmental bureaus, departments and commissions — the Central Intelligence Agency was even listed — but the Supreme Court had been inadvertently left out.

I soon learned that this was a very significant oversight.

The three branches of the Government are undoubtedly equal under the Constitution, but this incident suggests how different the judicial branch is in its relations with the public. To appreciate the extent of this difference, it is only necessary to imagine what would have happened if the White House had been omitted from the telephone book.

Of course, the courts should maintain basically different relations with the public than the other branches of the Government. The aloof dignity of the Supreme Court reflects this relationship, and a reporter who is exposed to it for any period of time tends to forget that the press is not always held at arms length from justice in other courts.

This was brought home to me recently when I arrived in Chicago and saw this headline in the *Chicago Tribune:*[1]

NEW SLAYING CLUE FOUND

MATCH GIRL'S BOOT PRINT IN COACH'S CAR
WIFE BARS POLICE FROM HOME

The first few paragraphs read:

> State's Atty. William Hopf of Du Page county disclosed yesterday a muddy foot print that matches up with the boots worn by slain Debbie Fijan, 10, had been found in the car of Loren Schofield, 27, her accused slayer.
>
> Hopf said the car had been impounded by Sheriff Stanley Lynch and has been examined for possible evidence. No finger prints of Debbie's have been found in the car.
>
> 'He says his wife wears boots like Debbie wore,' said Hopf. 'That remains to be determined. We do know that the boot print matches up with Debbie's boots.'[2]

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† B.A., 1953, Yale University; LL.B., 1959, Vanderbilt University; Diploma in Law, Oxford, 1960; Supreme Court Correspondent for the *New York Times*.

1. Chicago Tribune, Feb. 17, 1966, p. 1, col. 8.
2. *Ibid.*

This statement by a member of the bar caused me to wonder if I had accurately remembered the ethical Canons' prohibitions against press statements by lawyers. Since I was in Chicago to cover an American Bar Association meeting, I picked up a copy of the Canons of Professional Ethics.

Canon 20 said:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid an *ex parte* statement.

This deep involvement of a lawyer in a prejudicial press story was reminiscent of a case involving prejudicial publicity that had just been argued in the Supreme Court. It was the sensational case[3] involving Dr. Sam Sheppard, an osteopathic surgeon from a stylish Cleveland suburb. Dr. Sheppard had been convicted in 1954 of second degree murder in the slaying of his pregnant wife, Marilyn. Almost ten years later he was released in habeas corpus proceedings by a Federal District Judge.[4] The Judge ruled that Dr. Sheppard had been denied due process because of "the insidious, prejudicial newspaper reporting, the refusal of the trial judge to question jurors regarding an alleged prejudicial radio broadcast and the carnival atmosphere which continued throughout the trial. . . ."[5]

The Court of Appeals for the Sixth Circuit disagreed.[6] It reviewed the same record and found the newspaper publicity within reasonable bounds and the actions of the trial judge within its proper discretion.

Sheppard's theory before the Supreme Court was that the *Cleveland Press,* a crusading newspaper with an aggressive editor, had used inflammatory articles and editorials to force law enforcement officials to proceed against him, even though there was insufficient proof to justify a trial. Having precipitated a trial, Dr. Sheppard said, the *Press* then pushed for a conviction to avoid the libel suits that would have followed an acquittal.

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3. Sheppard v. Maxwell, *cert. granted,* 382 U.S. 916 (1965).
4. Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964).
5. *Id.* at 63.
6. Sheppard v. Maxwell, 346 F.2d 707 (6th Cir. 1965).

Unfortunately for Dr. Sheppard, the circumstances of his wife's murder lent themselves to vivid coverage in the press. His story — that he grappled with a "bushy-haired intruder" of uncertain sex, was knocked unconscious and regained consciousness to find his wife bludgeoned to death — was an intriguing one by any standard. Beyond that, the fact that he was immediately hospitalized by his physician brothers, and was thereafter shielded from the police by his lawyers, provided grist for the *Cleveland Press* claim that the matter was being covered up.

But while Dr. Sheppard's attorney had many critical things to say about the *Cleveland Press* before the Supreme Court, his basic legal attack was directed against the judge and the prosecutor.

He contended that the trial judge had means at his disposal to protect Dr. Sheppard from the effects of the publicity before and during the trial. As he saw it, the judge did not employ them because he enjoyed the publicity and profited politically from it. Specifically, he contended that the judge should have granted a change of venue or a continuance, that he should not have allowed the large press contingent to mar the decorum of the courtroom, that he should not have allowed the jurors to be made press celebrities during the trial, and that he should have excused himself because of prejudice against the defendant.

In an amicus curiae brief, the American Civil Liberities Union asked the Supreme Court to declare that the following types of publicity are inherently prejudicial, and that the presence of any of them, without a further showing of actual prejudice, amounts to a denial of due process:

> I. Damaging publicity procured or cooperated in by state law enforcement authorities.
>
> II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.
>
> III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.
>
> IV. Publicity which makes well-known personalities of the trial jurors.
>
> V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.[7]

7. Brief for American Civil Liberties Union and Ohio Civil Liberties Union as amici curiae, p. 16, Sheppard v. Maxwell, 382 U.S. 916 (1965).

The ACLU argued that if the Court should announce that this type of publicity will henceforth automatically vitiate a conviction, then the press will voluntarily stop printing it, and policemen, prosecutors and judges will see to it that prejudicial information does not reach the press.

In effect, the Sheppard argument to the Supreme Court was posed in the same terms as this symposium — it was "a free press *and* a fair trial", not "free press *vs.* fair trial."

This is a crucial difference, because the problem can be resolved — or at least greatly ameliorated — through an approach that preserves both free press and fair trials. From the standpoint of the legal profession, it means achieving this ideal the hard way. But it is by far the best way for the country as a whole, and it is the only approach that the legal profession can honestly afford to take.

The method is simple. If the legal profession and the judiciary would put their own houses in order, the remaining problems — if any — could surely be worked out with the fourth estate. If the bar would begin to enforce its own ethical rules concerning statements to the press, and if the judiciary would censure publicity-happy judges and silence prosecutors and police officials (as has been done in the federal system), much of the prejudicial matter would disappear from the press.

The result would not be merely that news sources would be cut off; if the people who have responsibility for justice would demonstrate enough concern about prejudicial publicity to discipline themselves, the press would realize the seriousness of the situation, and take steps of its own.

It is unfortunate that this is not the only possible way to approach this problem. If it were irrevocably established that the Constitution would not permit any other approach, the bench and bar might resolve the problem by internal measures.

Of course, most lawyers would read our constitutional history as prohibiting any attempt to prevent prejudicial publicity by direct judicial regulation of the press. The Supreme Court clearly stated a quarter of a century ago that the first amendment prevents our judges from employing the English system of using the contempt power to punish newspapers for publishing statements that the judges do not like about pending litigation.[8] In the briefs and arguments in the *Sheppard* case, counsel and Court alike seemed to assume that the

8. Bridges v. California, 314 U.S. 252 (1941). See Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946). *Cf.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

same would be true if the publicity was not aimed at the judge, but was instead prejudicial to the defendant's case.[9]

The Supreme Court has never ruled squarely on this point, however, and those of us who wrote smug articles assuming that Ralph Ginzburg would never go to jail for violating Federal obscenity laws have learned to our sorrow that the first amendment can be much more flexible than we had been led to believe.[10]

This is especially unsettling in view of an apparent let-the-Supreme-Court-handle-it tendency in our society. With the Court riding an impressive winning streak, this is probably only natural. Legislative apportionment, race relations and criminal justice were stagnant, festering problems until the Supreme Court stepped in (and here, too, there were constitutional precedents to the contrary) and jolted the nation into progressive movement. After some grumbling, Congress became so impressed that it passed to the Justices the whole problem of poll taxes in state elections, thereby saving itself the bother of abolishing them by statute or constitutional amendment.[11]

But a judicial answer is not always the ideal solution to every problem, and it would be a sad matter if the legal profession became convinced that all that is really needed to resolve this one is five votes on the Supreme Court.

This could only result in direct restrictions on press freedom, and it would invariably reach beyond pure criminal trial questions to other aspects of news reporting. The fact that judicial interference with the press is tolerated in England is no indication that it would not infect our free press system in America. English judges and prosecutors are not elected. They are not beholding to political machines. By tradition and practice, they are isolated from partisan affairs.

But justice in America — in the state courts, at least — has ties to the political forces with which the press must often deal on bare-knuckle terms. Experienced American journalists know instinctively how any English-style press control would work in practice here. As E. Clifton Daniel, Managing Editor of the *New York Times,* has put it, it would be unthinkable "to hand over control of the press to political-minded prosecutors and judges who may be running for election and seeking the support of the very newspapers they are empowered to censure and discipline."[12]

9. See Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied,* 338 U.S. 912 (1950).
10. Ginzburg v. United States, 383 U.S. 463 (1966).
11. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).
12. Address by E. Clifton Daniel, National District Attorneys Association Annual Convention, March 17, 1965.

At this time, the leaders of the bar are thinking in much more constrictive terms. The American Bar Association has sponsored an intensive study of the matter by a group of lawyers headed by Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts. Its report will be made public this fall. At the same time, a special committee of the ABA has been overhauling the Canons of Professional Ethics, and there is every reason to expect that the new rules will reflect the conclusions of Judge Reardon's group. In addition, the Philadelphia Bar Association and other groups have pressed for a tightening up of the Canons governing press statements by lawyers.

These are encouraging signs, but unhappily, there are no apparent indications that the bar is any more willing than before to enforce the Canons on prejudicial publicity.

We all realize that our profession has tolerated far too long an unwholesome "live and let live" attitude toward unethical conduct. A study of this aspect of the problem reveals a particularly unsavory picture. There appear to be no statistics on the extent of enforcement, if any, of the ethical rules pertaining to prejudicial statements by lawyers. A check of the activities of the American Bar Association's Committee on Professional Ethics and Grievances reveals reams of opinions concerning the solicitation of business by lawyers, but the Committee has considered Canon 20 on only one occasion — an incident in 1938 when antitrust lawyers complained about press statements issued by the Attorney General of the United States in connection with the Government's antitrust activities.[13] This is a sad fact indeed.

Furthermore, an examination of the books and articles on legal ethics discloses no evidence that any lawyer has ever been disciplined by the legal profession for prejudicial press statements. Dean Erwin N. Griswold, of the Harvard Law School, has summarized the situation in these terms:

> In this country, we have relaxed our professional standards far too much. District Attorneys are generally elected, and defense attorneys are likely to have political ambitions. In most states, judges are elected, and find it difficult to enforce high standards of professional conduct on the lawyers who appear before them. We have no centralized control of the bar, such as exists in England through the Inns of Court for the barristers, and the Law Society for the solicitors — bodies which would not tolerate for a moment conduct by lawyers which has become, alas, commonplace in many parts of the United States. . . .

13. AMERICAN BAR ASSOCIATION, OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, 400-03 (1957).

> Because of this diverse and loose control, standards have generally fallen too low with respect to the conduct of lawyers in making public statements about pending cases and in releasing information to the press.[14]

As Dean Griswold points out, the bench could perform a crucial role in resolving this problem. But to my knowledge, the Supreme Court of New Jersey is the only state high court that has invoked its supervisory powers to prohibit lawyers and law enforcement officers from giving prejudicial information to the press.[15] The Attorney General of the United States has performed this function for the federal system through rules that specify in detail the information that United States law enforcement officers and attorneys may release to the press concerning pending cases.[16] This action was applauded by the press, and it has provided federal officials (who have traditionally been more discreet in these matters than their counterparts in the states) with useful guidelines for dealing with the news media.

This is not to say that the press should be excused for its shortcomings on this score. Some of the headlines and articles that are published about criminal cases are enough to make any thoughtful newsman blush. It does suggest, however, that the press cannot be expected to appreciate the importance of exercising responsibility in trial coverage until the bench and bar care enough to use some self-discipline of their own.

This feeling is not prompted by any defensive reflex of a reporter, rather, by a lawyer's sense of professional responsibility. While I deeply appreciate the invitation to discuss this subject with you, I do disown my billing on the program. This paper is not a newspaperman's view; it is a lawyer's concern. For that is where the initial responsibility lies for maintaining a free press and assuring fair trials.

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14. Griswold, *Responsibility of the Legal Profession,* Harvard Today, Jan. 1965, p. 10.

15. State v. Van Duyne, 43 N.J. 369, 204 A.2d 841, 850 (1964).

16. See *Statement of Policy Concerning the Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings,* 30 Fed. Reg. 5510, 28 C.F.R. § 50.2 (1965).