
Friendly and Goldfarb: Crime and 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. 335 pages. \$5.00.

Other than taking you where you want to go, the single greatest benefit of flying is the opportunity it affords to alter one's perspective of reality. The familiar and oft-jaded landscape of city and suburb, field and farm, and man himself all fall into sublime dimension at 18,000 feet. Likewise, the principal accomplishment of *Crime and Publicity* is to place the acrimonious Free Press-Fair Trial dialogue in a meaningful and realistic perspective. Ultimately the book, which is the jointly executed effort of a libertarian and literate lawyer and an experienced and candid newspaperman, is much too pro-press. But this bias does not diminish its value. It is an entirely sensible, redeemingly fair, and exceptionally well written attempt to negotiate a reasonable détente between the media's right of unfettered publication and the joint right of the State and the accused to an untainted jury. *Crime and Publicity* was created under the sponsorship of the Twentieth Century Fund which permitted Ronald Goldfarb, a practicing attorney who authored two previous books (*Ransom: A Critique of the American Bail System* and *The Contempt Power*) and Alfred Friendly, an associate editor of the *Washington Post* and a director of the American Society of Newspaper Editors, to collaborate on an analytical venture into a maelstrom scarred by the presence of emotion and the absence of logic.

The fist to fist confrontation between the twin desiderata of free press and fair trial has been stimulated by several recent events. Most notably, the public awareness has been ensnared by the reversal of Dr. Sam Shepperd's conviction, a case most Americans followed, for better or worse, from beginning to end, and the sharp criticism of the news media voiced by the Warren Commission. Media Associations and Bar Associations have gnashed their teeth and unleashed a barrage of invectives and a plethora of recommendations. The controversy reached a symbolic culmination in the Richard Franklin Speck case when a Chicago newspaper filed a mandamus action against the trial judge in the midst of one of the most serious homicide prosecutions in the history of Illinois.¹ The issue, then, is very much with us.

One of the most endearing qualities of *Crime and Publicity* is that it persuasively establishes that the problem of prejudicial publicity is more qualitative than quantitative—it affects only a fractional segment of all criminal cases. The cases it does affect are *ex necessitate* and by definition the ones most people follow. The problem ordinarily arises only when the case is tried before a jury. According to statistics in *The American Jury*, only 15% of state felony indictments and 8% of federal criminal charges reach jury verdict. Translating these trial figures into newspaper coverage, we find most crimes and their resulting prosecutions go unreported. In one typical month, there were 11,724 felony arrests in New York City. *The New York Daily News*, a tabloid not noted for its bashfulness in crime coverage or coverage of anything else, mentioned 41 of these cases. As part of their research for *Crime and Publicity*, Goldfarb and Friendly compared all crime stories in the *Washington Post* in 1963 with the felony docket for the United States District Court for the District of Columbia. They found that of 1509 indicted defendants, only 312 achieved the distinction of getting their names in the paper—80% of the Felon Class of 1963 basked in anonymity. Judge J. Skelly

¹ People *ex rel.* The Tribune Co. v. Paschen, No. 40507, Illinois Supreme Court.

Wright has offered the opinion that less than 1% of all criminal cases in the United States receive a line of newspaper recognition and 75-90% of the reported 1% end up in guilty pleas. Professor Kalven believes prejudicial publicity is "enormously less of a problem than it was thought to be." And most often the publicity which does occur is *not* prejudicial but is straight reporting of neutral facts.

Though exceptionally surprising, these statistics are not altogether comforting. The recurring theme of *Crime and Publicity* is that the Press is the community's most effective instrument for detecting the real enemies of a fair trial—official corruption, police excesses, prosecutorial and judicial incompetence, and political favoritism. The folklore of newspaperdom is that crime news is reported for the noble purpose of informing the body politic of what is awry in its streets and in the judicial body. But if the overwhelming majority of criminal activity and criminal trials go unpublished, the scimitar must be rusting in its scabbard. The cases which routinely go unreported in metropolitan dailies would rock the foundations of a small town. These facts go a long way toward demolishing the press inspired concept that it is the ever-alert conscience of the community.

Goldfarb and Friendly concede that much of the crime news which lands in print is commercialized and vulgar. They maintain, however, that such sensationalism, albeit lamentable, is irrelevant to the Free Press—Fair Trial issue because it seldom affects the selection of a jury at the locus of the crime. However, we may profitably consider such matters as widespread coverage of an out-of-State crime involving sex-wealth-violence (preferably with a doctor) as material evidence of the reason for the publication of much crime news. It is less than candid and more than naive to ignore the economic fact that the news media are not eleemosynary institutions. The first rule of the Press, like the politician and all other forms of organic life, is to survive. We might get further if the Press would candidly admit that much crime coverage is published for the legitimate and primary purpose of making money instead of the usual lofty utterings about being the conscience of the community. The commercial motives of the media are honest, but to cloak them with self-righteous trappings is pharisaical. And when we worry about political favoritism in the courts, let us not forget it can occur in the composition of the front page. The idealistic claims of the Press will be enhanced when it makes a concerted effort to supplement juicy crime stories with high caliber interpretative reporting of the daily and unglamorous administration of criminal justice.

Although the well publicized case may be of no great legal moment in itself, neither the news media nor the legal profession can afford to neglect the fact that the sensational case is the average citizen's spectacular civics lesson. The *cause célèbre* tests to the quick the community's basic faith in the judicial system. It is urgent that the operators of the system do not burden it with ritual and mystique to the extent that it fails to fairly convict the obviously guilty and to see that they stay convicted. Since the *cause célèbre* is a public microscope for observing the machinery of justice, it is important that the Press, which serves as the magnifying instrument, does not itself jeopardize the system by indulging in conduct (either in or out of court) which interferes with a fair trial.

The limited available empirical data tends to suggest that pre-trial news may make everyone aware of a case but it does not have a significant effect in corrupting the ability of jurors to be fair. However, no precision tool exists which can probe the recesses of the human mind to determine precisely what effect pre-trial publicity has on the twelve persons who ultimately sit in judgment of a given case. *Crime and Publicity* assumes that pre-trial news reporting of a case *does*

influence jurors to an *unknown* extent—less than defense lawyers claim and more than newspaper editors admit.

This being true, what techniques may be safely utilized to insulate prospective jurors from the possibility of contamination by a pre-formed fixed opinion of guilt or innocence? Many critics maintain we should adopt the English doctrine of contempt by publication, a doctrine which Lord Devlin has summarized in these terms: Under pain of contempt the English Press is prohibited from uttering any comment about a matter before a court that might tend to influence a jury in any way, whether done with good or bad intent, or with or without knowledge. Goldfarb and Friendly find this stricture intolerable, and they believe it could not survive an Atlantic crossing let alone flourish on American soil. Why? To begin with, the absence of a protective constitutional cloak and the presence of strict libel laws renders the British Press substantially less free *ab initio* than the American Press. We are not comparing apples with apples. Moreover, the subject matter covered by the two media varies so greatly in quantity as to amount to a difference in kind. To wit, London's 1965 homicide rate was 37 deaths while New York City had 631 murders in the same year. The authors believe the quality of English justice is preserved by the absolute separation of courts and politics, the superior caliber of its judiciary, the highly ethical standards of its Bar, and the fact that the average criminal case is tried within one month of the arrest and the appeal is concluded two weeks after the trial. Finally, the British Press is not subjected to a total pre-trial news blackout—they may permissibly publish the complete details of the public preliminary hearing which, unlike the sketchy American preliminary hearing, is an extensive mini-trial.

The most effective argument *Crime and Publicity* mounts against the contempt remedy is that it is impractical—the United States Supreme Court has consistently reversed contempt by publication convictions on First Amendment grounds. Instead, the Court has substituted the remedy of reversing the convictions of criminal defendants whose guilty verdicts were possibly tainted by the overexposure of jurors to prejudicial publicity. This is hardly a pleasing solution. All prosecutors are aware of the enormous problems which arise in a retrial several years after the fact, *i.e.*, missing witnesses and missing memories. Justice does not prevail when a guilty defendant is subsequently acquitted because the conduct of an agency extrinsic to the justice machinery—the news media—contaminated an otherwise just verdict.

Crime and Publicity does not praise contempt but buries it. The authors, having accomplished this burial, then turn their attention to the "filtering procedures" developed by the law itself to screen out any harmful particles of prejudice which lie in the aftermath of pre-trial publicity. Like most of the law's artifacts, the machinery is not perfect, but the cases in which it does not work are exceedingly few. *Crime and Publicity* cites four of these tools: Change of Venue, Continuance, *Voir Dire*, and Jury Instructions. We shall consider each in turn.

CHANGE OF VENUE. If the case is a *cause célèbre* in only one geographical area of a State, a change of venue to virgin territory may effect a total solution to the problem. But the virgin territory may not long endure in that optimal condition. Whether the Constitution follows the Flag is disputable, but it is not disputable that the media pack up and travel with a sensational case and may well infect a previously uncontaminated area before jury selection commences. The local *cause célèbre* is somewhat of a rarity anyway. The ubiquity of the mass media permits it to permeate every nook and cranny in the nation. News of a sensational crime is transmitted across wide perimeters with the transcending force of Hertz and Coca-

Cola ads. Despite the pervasiveness of modern communication, a change of venue may offer some relief. Although the same facts may be reported throughout a State, the emotional involvement of the citizenry diminishes as the distance from the scene of the crime increases.

CONTINUANCE. Most of the slings and arrows of outrageous fortune are healed by time. This is no less true of the remembrance of publicity past. Some defense attorneys reduce this palliative to an absurdity by requesting an indefinite continuance or an outright dismissal. A period of time should elapse between the excitement of the arrest and the trial, but the passage of a few months is sufficient to erase whatever memories are erasable.

VOIR DIRE. Most of us concede the weakness of *voir dire* is that veniremen who want to sit on a sensational case badly enough will lie about their exposure to prejudice while others are too embarrassed to admit their true feelings. Nonetheless, a meaningful *voir dire* is a potent means for the prosecution and defense to lay bare prejudice of any kind.²

Goldfarb and Friendly suggest that the defense is handicapped in probing a venireman about his exposure to prejudicial publicity because questions like: "Did you read anything concerning whether or not the accused has a previous conviction?" can create prejudice where none previously existed. A shrewd defense lawyer can avert this disaster by asking open-ended questions like: "What do you remember from your reading about the defendant's background?"

Voir dire in a publicity case can be carried off much more safely if it is conducted in accord with the recommendation of the Reardon Committee that each prospective juror be interrogated out of the presence of all other prospective jurors. Judge Herbert C. Paschen implemented this recommendation very effectively in the *Speck* case. Each day 50 prospective jurors were summoned to the courtroom and given preliminary instructions about the case by the court. Then 12 jurors would be placed in the jury room while the remainder were sent to another room on the same floor. Judge Paschen called each one of the first 12 into the courtroom alone and initiated the *voir dire*. Not only did this procedure prevent one juror from tainting other jurors if a prejudicial remark were made, but it produced much more candid responses from the jurors. Gone was the threat of social pressure which inhibits jurors from answering honestly and at length when they are selected *en masse*.

INSTRUCTIONS. Instructions are neither as valuable as appellate courts pretend nor as worthless as trial lawyers believe. For nullifying the effects of pre-trial publicity, a judge's oral and informal directives to the entire venire can often be more important in creating the proper atmosphere than the written instructions at the close of the case. Judge Paschen accomplished this most ably in *Speck* by telling prospective jurors that the element of human error was inherently present in news stories since they were the product of many hands—from source to reporter to rewrite man to copy editor to news editor to linotype operator. More-

² It is popularly misconceived that the prosecution in a criminal case seeks jurors who have a recollection of pre-trial publicity because they assuredly will be more prone to convict. This is not so. A prosecutor prepares a case for presentation as a logical, cohesive entity which is entirely self-sufficient. It is perhaps more dangerous for him than it is for the defense if jurors attempt to interstitch this fabric with vague recollections of inaccurate news accounts of irrelevant events. If they have any sense, both sides will select jurors who will honestly decide the case based upon the evidence adduced in open court and nothing else.

over, news stories contained hearsay and were neither subject to cross-examination nor given under oath. These judicial comments gave the jurors a sensible understanding of the reasonable requirement that they judge the case solely upon the evidence. The written instructions at the end of the trial served as a reminder of the analytical pre-trial admonitions.

The authors of *Crime and Publicity* arrive at the conclusion that the remedy for all but a small portion of the publicity problem is reasonable silence by the official sources of prejudicial news. They make the embarrassing discovery that there is no known case of an attorney being punished for a violation of Canon 20 which forbids any comment on litigation except quotation from filed public documents and which discourages all *ex parte* statements. Goldfarb and Friendly believe disclosure should be made of (1) the circumstances of the crime, (2) details of the pursuit of the defendant, and (3) events surrounding the arrest; conclusions of guilt or prejudicial characterizations of the accused should not be made. This brief rule is not without infirmity. Often occasions arise where law enforcement officials should not relate the details of the pursuit of the defendant or the events surrounding his arrest. To do so would be to deliberately release a barrage of inherently prejudicial pre-trial publicity.

A disturbing facet of *Crime and Publicity* is its disagreement with the recommendation of the Reardon Committee that defense counsel only may "announce without further comment that the client denies the charges against him." The authors contend that a naked denial is no rejoinder to the arrest and indictment announcement which the Reardon Committee permits the prosecution to make. They miss the mark. What we seek is trial by jury, not by combat, ordeal, or newspaper. Any attempt to adjudicate the matter in the media sabotages the entire system of deciding cases upon the evidence introduced in open court. Goldfarb and Friendly argue that the prohibition is unworkable because an articulate defendant can advocate his innocence to the press while his attorney cannot. This is a weak objection. The Court before whom the case is pending can and should issue an order forbidding the parties as well as the attorneys from making any extra-judicial statements concerning the merits of the cause.

The authors ultimately conclude that the statistically minimal problem of prejudicial publicity is subject to correction by reasonable official silence before trial coupled with the use of meaningful *voir dire*, adequate trial and post-trial instructions, and the granting of changes of venue and continuances where indicated. This is a sensible but incomplete conclusion. The maximum publicity case may require further steps which the authors are not willing to take. The Reardon Committee recommendation that pre-trial hearings be held *in camera* can be exceptionally useful in preventing the release of the prejudicial publicity which normally attends the hearing of motions to suppress evidence. The several and lengthy pre-trial evidentiary motions in the *Speck* case were heard *in camera* with the agreement of all parties. Moreover, almost all the official documents in *Speck*, such as the list of witnesses and descriptions of fingerprint and other scientific evidence submitted in response to discovery motions by the defense, were filed with Judge Paschen himself *in camera* and were not released to the Clerk's Office for the public until the conclusion of the trial. Goldfarb and Friendly are troubled by any postponement in the publication of the news of judicial proceedings. They fear that silence can be a mask for mischief. They allege that delayed publication is in effect no publication because the stories lose their news value once the trial is ended. But if the danger is official skulduggery, the Press can uncover it with unfettered post-trial use of the transcript of the pre-trial hearings. If the fear

boils down to a desire not to lose newsworthy copy, then this legitimate need must be weighed against the necessity of preserving an impartial atmosphere prior to trial. The scale must tip in favor of the latter and not in favor of serving an honest but harmful need to satisfy public curiosity. The emphasis again must be that such steps are taken not only to protect an individual defendant, but to guarantee the integrity of the system, and to protect society's legitimate concern that a just conviction not be disturbed by forces extrinsic to the trial.

A further step, this one at trial, is virtually dictated by the terms of *Shepperd v. Maxwell*³—the issuance of a comprehensive set of rules governing press conduct at the trial. The press order in *Speck* was entered by the Court with the agreement of the parties. An agreed order is a reasonable undertaking. It affords the defense an opportunity to advise the Court of what restrictions it believes are necessary to protect the accused. The paramount interest of the prosecution in a press order is to guarantee the integrity of a conviction from the taint of reversible error which can occur if trial judges fail to follow the mandate of *Shepperd*. Lawyers for either side in a criminal case have no interest in decreasing or increasing the circulation of the news media—their interest lies solely in protecting their respective clients from disruptive influences in the courtroom.

Ironically, Judge Paschen's press order in *Speck*, which *Newsweek* called "the strictest ever laid down for a major criminal trial," was no obstacle to the working press covering the case, most of whom believed the rules were reasonable restraints designed to prevent activity which would hamper a fair trial or which would lead to the reversal of a just conviction. One of the very few gaps in *Crime and Publicity* is its failure to discuss the merits of orders governing media conduct at a trial.

But the book treats another subject most other commentators ignore by suggesting a fresh approach to the question of whether or not trials should be televised. Statistically relevant to this question is the overwhelming fact that 130 million Americans watch our 72 million television sets. Half of the American public receives most of its news from television. In submitting that we should experiment with televised trials instead of reacting viscerally to them, the authors write:

Maintenance of the dignity and posture of the court is a legitimate concern. The court must be a "quiet place." Its singleminded purpose, to find the truth and administer justice, dares not be diminished, much less changed. For the legal profession and for us all to worry about television on this score is to do no less than is proper.

But is this worry, this sense of possible danger, enough to warrant incursions on an institution protected by the First Amendment? Is it enough on which to base a far-reaching legal discrimination?

We confess to our own uncertainty about this central question.

But we believe that before it is finally answered more consideration should be given to the argument that television also has as great a potential to enhance the public view of the administration of justice as to degrade it. Television could report trials fairly and exactly and with solemnity, just as it has presented other events without any loss of decorum—the British coronation, royal weddings, the Kennedy and Churchill funerals, state visits, medical and scientific accomplishments, serious legislative debates, and the sessions of the United Nations.

Certain events are basically dignified, and all communications media can preserve their special quality. If a trial is dignified, there is no intrinsic reason why television cannot report it with dignity.⁴

³ *Shepperd v. Maxwell*, 16 L. Ed. 2d 600.

⁴ A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY*, at 232-233 (1967).

Or, as one federal judge put it, if a lawyer is a ham, he will be a ham no more to national television than he is to an empty courtroom.

Crime and Publicity ends with the final theme that a determination by the courts and law enforcement agencies to protect defendants from potentially prejudicial news is more important than the exact words of any program. This conclusion regrettably forces the path to run in only one direction. If we are to succeed, the press must sincerely join in this determination. Perhaps the starting point is for both sides to sit together at the conference table without recrimination and discuss the issues with the same candor that permeates this book.

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Criminal Interrogation and Confessions, 2nd Ed. BY FRED E. INBAU AND JOHN E. REID. Baltimore: The Williams & Wilkins Company, 1967. Pp. 224. \$8.00.

An interrogator's "work is, so to speak, a kind of free-form of art . . ." spoke one of Dostoevsky's characters in *Crime and Punishment*. Inbau and Reid have achieved a remarkable degree of success in demonstrating that the art of the interrogator is subject to systematic, almost mechanical, application.

One hundred and one years after the Russian novelist wrote that the criminal himself morally demands punishment and public penances, the police investigator is shown how to most effectively accommodate him. One is tempted to ask the authors whether their theories evolved during their years of experience or whether the years of experience merely confirmed for them Dostoevsky's genius in evaluating human nature.

In *Crime and Punishment* we find the suspect being told: "You were very upset over something. Even now, you seem a bit on the pale side," and, "You can't write—the pen drops out of your hand." Inbau advises pointing out to the suspect "pulsations of the carotid artery, excessive activity of the Adam's apple, foot-wiggling, wringing of the hands, and dryness of the mouth."

Dostoevsky's inquisitor seems to excuse crime by stating that it is due to environment. Inbau advises an interrogator to "sympathize with the subject by telling him that anyone else under similar conditions or circumstances might have done the same thing,"¹ and, "Reduce the subject's guilt feeling by minimizing the moral seriousness of his offense."²

Inbau suggests that it is a sign of guilt (though not conclusive) when a subject tries to explain away non-existing incriminating evidence which the investigator has told him *does* exist. Dostoevsky has his character state the criminal will try to admit all the superficial and unavoidable facts; "only he will try to find different reasons for them . . ."

Inbau explains the use of what he calls "the friendly-unfriendly act" with two interrogators, one of whom intercedes on behalf of the subject against the unfriendly investigator. Dostoevsky has a similar "Mutt and Jeff" routine operate

¹ INBAU AND REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 38 (2d ed. 1967).

² *Id.* at 40.