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COMMENTARY

THE SUPREME COURT AND PRESS FASHIONS

ROBERT MASON*

INTRODUCTION

The press might borrow from baseball to summarize its case record in the United States Supreme Court under Chief Justice Burger: some you win, some you lose, and some days it rains. But the law's nuances being less fastidious than a game's scores, the sum of the press' victories, defeats, and denials of certiorari sags, inevitably, in the loss column. Reflecting upon the relatively brief history of litigation testing the reach of the first amendment, Alexander Bickel¹ wrote:

Those freedoms which are neither challenged nor defined are the most secure. In this sense, for example, it is true that the American press was freer before it won its battle with the government in *New York Times Company v. United States* (Pentagon Papers case) in 1971 than after its victory. . . .

. . . We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real.²

Even the Supreme Court's seven-to-one decision of July 1980 in *Richmond Newspapers, Inc. v. Virginia*,³ for all its extension of press freedom's actuality, bore a price tag. Chief Justice Burger's opinion,⁴ while certifying open trials of criminal cases and thus easing some frightening implications of the still-wet order of *Gan-*

* A.B., University of North Carolina, Retired Editor of *The Virginian-Pilot*, Norfolk, Va. (1962-1978).

1. Professor Bickel was chief counsel for the petitioner, the New York Times Co., in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

2. A. BICKEL, *THE MORALITY OF CONSENT* 60-61 (1975).

3. 100 S. Ct. 2814 (1980).

4. *Id.* at 2818. Justices White and Stevens joined in the Chief Justice's opinion. Three concurring opinions were filed along with Justice Rehnquist's dissent.

nett Co. v. DePasquale,⁵ echoed a 1976 caveat⁶ in indicating that an "overriding interest articulated in findings" may yet put skids under the courtroom press table.⁷

The Burger opinion may relieve reporters of a catch Joseph Heller⁸ might have invented—that courts could deny them access to news they had a court-assured right to publish. "Until today," enthused Justice Stevens, concurring, "the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."⁹ Any modification of the catch is welcome. Still, the suggestion that judges may say what is newsworthy is worrisome.

Chief Justice Burger based his opinion on history, psychology, and philosophy as well as the Constitution.¹⁰ He found scant reason to explore press license, inasmuch as press conduct, or a reputation for it, hardly figured in *Richmond Newspapers*. *Gannett*, then, remains the Supreme Court's rule for measuring press threats to justice. The "overriding interest" loophole in *Richmond Newspapers* may prove to be wide enough to accommodate a canon aimed down the press' throat.

As a venerable newspaper's reputation may outlast its editorial quality, so it appears that old impressions of journalistic practices resist press experiments, innovations, and transformations. The Supreme Court majority in *Gannett* failed to recognize that court coverage by newspapers has forgone most of its recklessness and much of its volume in the last twenty-five years, although the trial record amply suggested as much.¹¹ The courthouse reporter has been nudged out of prominence by the investigative man. Court reporting by no means has kept up with court activity; even violent crime has lost news value, as editors gauge it, on becoming com-

5. 443 U.S. 368 (1979). Here the Supreme Court authorized the closing of pretrial criminal proceedings and implied that judges might close trials as well, as a safeguard against prejudicial news reporting. *Id.* at 391.

6. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

7. 100 S. Ct. at 2830.

8. Author of the best-selling novel *CATCH-22* (1955).

9. 100 S. Ct. at 2830.

10. *Id.* at 2823-2827.

11. 443 U.S. 368, 407-09 (1979) (Blackmun, J. dissenting).

monplace.¹² Press attention to courts and their administration today is hardly sufficient to satisfy either the public's interest in justice or the need for an informed citizenry.¹³

"CARNIVAL ATMOSPHERE" IN THE COURTROOM

Law and disorder used to be the press' bread and butter. Of the fifty newspaper stories dating from the turn of the century to the outbreak of World War II that comprise a section of the comprehensive *A Treasury of Great Reporting*,¹⁴ a dozen describe bloody crimes or criminal trial proceedings. Included are a sample of Irvin S. Cobb's 600,000-plus words of slobber over the Harry K. Thaw murder trial in 1907 for the New York *Evening World*;¹⁵ Herbert Bayard Swope's 1912 exposé in the same newspaper of police corruption behind the Rosenthal-Becker murder case;¹⁶ Damon Runyon's 1927 verdict for the International News Service in the Ruth Snyder-Judd Gray "murder in the worst degree";¹⁷ and Royce Brier's Pulitzer Prize-winning 1933 story from San Jose in the *San Francisco Chronicle*¹⁸ that began:

Lynch law wrote the last grim chapter in the Brooke Hart kidnapping here tonight

Swift, and terrible to behold, was the retribution meted out to the confessed kidnapers and slayers. As the pair were drawn up, threshing in the throes of death, a mob of thousands of men and women and children screamed anathemas at them.¹⁹

Upon this, Westbrook Pegler, who was shifting his energies from the sports department to a crusading column, commented, "Fine, that is swell!"²⁰

12. The first three months of 1979 showed an 11% increase in crime in Norfolk, Virginia Beach, Portsmouth, and Chesapeake, according to preliminary statistics gathered by the FBI. The Ledger-Star, July 11, 1979, at B-11, col. 1.

13. See NATIONAL CENTER FOR STATE COURTS, *THE PUBLIC IMAGE OF THE COURTS* (1978) [hereinafter cited as *PUBLIC IMAGE*].

14. L. SNYDER & R. MORRIS, *A TREASURY OF GREAT REPORTING* (1949).

15. *Id.* at 283.

16. *Id.* at 303.

17. *Id.* at 439.

18. *Id.* at 495.

19. *Id.*

20. *Id.*

Runyon also was to make a career adjustment—from courtroom to Broadway fiction.²¹ If his journalistic style of half a century ago was distinctive, his subjectivity typified his era:

[Mrs. Ruth Snyder and Henry Judd Gray killed Albert] Snyder as he slumbered, so they both admitted in confessions—Mrs. Snyder has since repudiated hers—first whacking him on the head with a sash weight, then giving him a few whiffs of chloroform, and finally tightening a strand of picture wire around his throat so he wouldn't revive.

This matter disposed of, they went into an adjoining room and had a few drinks of whisky used by some Long Islanders, which is very bad, and talked things over. They thought they had committed "the perfect crime," whatever that may be. It was probably the most imperfect crime on record. It was cruel, atrocious, and unspeakably dumb.²²

Cobb was among about eighty reporters, special writers, and artists covering the Thaw trial.²³ A generation later, 150 jammed themselves before pine boards, squared off into eighteen-inch spaces, that served as writing tables in the rear gallery of the Flemington, N.J., courtroom where Bruno Richard Hauptmann was on trial for the Lindbergh baby kidnap-murder.²⁴ Another 150, including popular novelists recruited by newspapers and feature syndicates, scrounged for note-taking space elsewhere in the courtroom.²⁵ Among the 300 were the ubiquitous Damon Runyon, Walter Winchell, Edna Ferber, Alexander Woolcott, Adela Rogers St. John, and correspondents sent across the Atlantic by the *Paris-Soir*, the *London Daily Mail*, and the *London Daily Express*.²⁶ A famous criminal lawyer, Samuel Leibowitz, was engaged by a radio network to comment on the trial's progress.²⁷ Cabel Phillips wrote

21. A collection of Runyon short stories featuring Broadway characters, originally appearing in magazines, was published in book form as *GUYS AND DOLLS* (1935). A musical comedy of the book's name, based on a Runyon story called "The Idyll of Miss Sarah Brown," opened in New York in 1950. See Burrows, *The Making of Guys and Dolls*, *ATLANTIC MONTHLY*, Jan. 1980, at 40.

22. L. SNYDER & R. MORRIS, *supra* note 14, at 441.

23. *Id.* at 284.

24. G. WALLER, *KIDNAP* 255 (1961).

25. *See id.* at 254-55.

26. *Id.* at 252-53.

27. *Id.* Leibowitz subsequently became judge of Kings County Circuit Court in Brooklyn

that

the trial was made grotesque by the stridency of its coverage by much of the press and radio and by the unrestrained theatrics of many of the lawyers, witnesses, and self-proclaimed experts drawn to the little court house. For six weeks the country was awash in the steamy tide of bathos and sensationalism such as has rarely been endured in all its history.²⁸

George Waller in *Kidnap* would note that in the third week, when the prosecution completed its case and Hauptmann was scheduled to testify, Flemington street throngs thickened.²⁹

Returning from his lunch, Judge Trenchard surveyed the courtroom without pleasure. More than once its atmosphere had reminded him of a carnival; or, rather, that of the main tent of a circus. All Flemington was a carnival; its atmosphere seeped into the courtroom, the scene of the chief attraction. He had done his utmost to keep it in check; and now again he spoke sternly to the jammed rows of gigglers and chatterers.³⁰

This assemblage struck Miss Ferber³¹ as being enough of "an affront to civilization" to tempt her to resign from the human race and cable Adolf Hitler in Nazi Germany, "Well, Butch, you win."³²

Judge Trenchard's example of 1935 was lost upon Judge Blythin when presiding over the trial of Dr. Samuel H. Sheppard in 1954.³³ "The carnival atmosphere of the [latter] trial," together with "the massive pretrial publicity," was cited by Justice Clark in the eight

and, in 1961, a justice of the New York Supreme Court.

28. C. PHILLIPS, *FROM THE CRASH TO THE BLITZ* 1929-1939, at 203 (1969).

29. G. WALLER, *supra* note 24, at 380.

30. *Id.*

31. Edna Ferber, a prolific novelist and playwright famed for her wit, reported on the Hauptmann trial for *The New York Times* and the North American Newspaper Alliance. *Id.* at 378.

32. *Id.*

33. Sheppard, 30, an osteopathic surgeon, was found guilty of second-degree murder in the July 4 murder of his wife Marilyn, 31. The mandatory sentence of life imprisonment was pronounced by Judge Blythin of the Common Pleas Court of Cuyahoga County, Ohio. The jury, which had deliberated for 42 hours since December 17, returned its verdict on December 21, 1954. Sheppard had been on trial since October 18. *Sheppard v. Maxwell*, 231 F. Supp. 37, 39, 64 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

to one Supreme Court decision, *Sheppard v. Maxwell*,³⁴ of June 1966 overturning Sheppard's conviction of murdering his pregnant wife in an upstairs bedroom of their fashionable lakeside home in Bay Village, Ohio, a Cleveland suburb. "[T]he state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom"³⁵

But as blatant as was the pretrial coverage, which included a front-page editorial in a Cleveland newspaper captioned "Why Isn't Sam Sheppard in Jail?" and newspaper feature articles by Sheppard asserting his innocence,³⁶ the courtroom press arrangements and activity that Justice Clark described were tame in comparison to the Thaw and Lindbergh trial scenes:

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRs was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

. . . .

All of these arrangements with the news media and their mas-

34. 384 U.S. 333, 358 (1966).

35. *Id.* at 363.

36. *Id.* at 340-41.

sive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard.³⁷

Although Walter Winchell, Bob Considine, and Dorothy Kilgallen were among the media luminaries who contributed to the Sheppard hoorah,³⁸ at least there was no Irvin S. Cobb to vouch for a pretty witness' veracity and no Damon Runyon to invent testimony. However the difference might be measured, Justice Clark was moved to recall that the Supreme Court had "consistently required that the press have a free hand" and had "been unwilling to place any direct limitation on the freedom traditionally exercised by the news media," while at the same time insisting that

[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.³⁹

EMPTY CHAIRS AT THE PRESS TABLE

The effect of *Sheppard* upon the press was profound. Out of it grew, more than from any other source, the state press-bar councils chartered to resolve first and sixth amendment conflicts.⁴⁰ *Sheppard* helped to draw fervor from newspaper criminal-trial coverage. (Other influences, besides increases in major crimes reducing their newsworthiness, were heightened interest in social and politi-

37. *Id.* at 342-44.

38. Justice Clark mentioned these three in his opinion for the Court, referring to Considine as "Robert." *Id.* at 347-48, 358 n.11. Kilgallen was a television and newspaper personality; Winchell and Considine were popular newspaper columnists and radio reporters.

39. *Id.* at 350, 363.

40. Eighteen or nineteen such councils, of uneven effectiveness, now exist. Estimate by Jack C. Landau, Editor of *THE NEWS MEDIA & THE LAW*.

cal topics, a wave of newspaper mergers that depressed big-story competition and circulation battles, and the maturing of television with its ability to project quick reports blunting what newspapers formerly called "scoops.") The trial of Dr. Jeffrey R. MacDonald⁴¹ in Raleigh, N.C. from July to August 1979 provides a fascinating contrast to the news-media excesses in the Sam Sheppard case.

Like Sheppard, MacDonald was a physician suspected of killing his pregnant wife. Charges against MacDonald were multiple; his 2- and 5-year old daughters as well as their mother were fatally stabbed,⁴² whereas the lone Sheppard child, a boy, was unmolested. Sheppard vowed that a "bushy-haired" intruder, a "form" with which he grappled in his house and on the beach beyond it, bludgeoned his wife.⁴³ MacDonald blamed the slaughter of

41. See *The Virginian-Pilot*, August 30, 1979, at A-1, col. 3. Various acquittals and appeal proceedings preceded the trial. MacDonald was an Army Medical Corps captain when his pregnant wife Collette, 26, and their two small daughters were killed on February 17, 1970, in the MacDonald quarters in Fort Bragg, North Carolina. *Id.* Following an investigation by the Army's Criminal Investigation Division (CID), MacDonald was charged with the murders by the Army. The appointed investigatory officer decided against referring the case to a general court-martial, however, and recommended a dismissal of charges. In December 1970, the Army granted MacDonald an honorable discharge "for hardship reasons," freeing him from any further military proceedings. Nevertheless, because the crimes were committed on a federal reservation, federal jurisdiction lay, and the Department of Justice asked the CID to extend its investigation. Twice in 1972 and again in 1973 the CID issued extensive, but inconclusive reports. In August of 1974, the government presented the MacDonald case to a grand jury of the United States District Court for the Eastern District of North Carolina. On January 24, 1975, the grand jury indicted MacDonald on three counts of first-degree murder. On July 29, the district court denied MacDonald a series of pretrial motions, including one to dismiss the indictment on double jeopardy grounds and another to dismiss on the basis of the sixth amendment guarantee to a speedy trial. The defense appealed to the United States Court of Appeals for the Fourth Circuit, which reversed the district court's denial of MacDonald's motion to dismiss on speedy trial grounds. The government then appealed the circuit court decision, and the United States Supreme Court unanimously ruled for the government on May 1, 1978, holding that a defendant may not obtain interlocutory appellate review before trial of a court order denying his motion to dismiss an indictment because of an alleged violation of his sixth amendment right to a speedy trial. *United States v. MacDonald*, 435 U.S. 850, 851-53, 863 (1978). But upon his conviction in Raleigh, N.C., on August 29, 1979, MacDonald appealed again to the United States Court of Appeals for the Fourth Circuit. Overturning the conviction, the court held that "unwarranted bureaucratic delay" from June 1972, when the prosecution had enough information to proceed against the accused, until August 1974, when a grand jury was convened, violated MacDonald's right to a speedy trial. *United States v. MacDonald*, No. 79-5253, slip op. at 6 (4th Cir. July 29, 1980).

42. *The Virginian-Pilot*, August 30, 1979, at A-1, col. 3.

43. 384 U.S. at 336.

his family and his own wounding on four "drug-crazed" hippies who broke into his quarters at Fort Bragg, an Army reservation near Fayetteville, N.C., where he was stationed as a Green Beret medical officer.⁴⁴

MacDonald was not tried in the period of his crime, as was Sheppard, but nine years later, after he had overcome a court-martial investigation and resisted the Supreme Court initiatives by federal agents and prosecutors to indict and try him.⁴⁵ It would seem reasonable to suppose that suspense sustained, if not intensified, interest in his case.⁴⁶ Nevertheless, MacDonald's seven-and-a-half week trial before U.S. District Court Judge Dupree⁴⁷ attracted but a fraction of the press attention that Justice Clark deplored in the Sheppard trial.

Newsday, the Long Island tabloid that circulates in the neighborhood of MacDonald's boyhood, sent a reporter to Raleigh. *The New York Times-Washington Star* News Service retained a local free lance for coverage, as did *The Washington Post*. *The Chicago Tribune* had a staff member on hand for the verdict—guilty on one count of first-degree murder and two of second-degree murder. Crews from all three television networks were also in Raleigh for the trial's climax. Otherwise, Raleigh reporters had the company only of colleagues from two or three other North Carolina newspapers, the Associated Press, and United Press International. And while trial news consistently made the front pages of the Raleigh

44. *The Virginian-Pilot*, August 29, 1979, § C (North Carolina), at 1, col. 5.

45. *The Virginian-Pilot* and *The Ledger Star*, July 15, 1979, at A-1, col. 1.

46. Alfred E. Kassab, a former Canadian military intelligence officer and stepfather of MacDonald's slain wife, doggedly pursued prosecution after the U.S. Army dropped its charges against MacDonald. He publicly sought the assistance of congressmen, the FBI, and the U.S. Attorney General's office. He regularly held press conferences to publicize his accusations against MacDonald. Mr. Kassab ultimately swore out a criminal complaint before a federal judge in North Carolina, thus instigating the impaneling of a grand jury and the appointment of a special prosecutor. See *The Ledger-Star*, May 3, 1978, at A-9, col. 1; *The Virginian-Pilot*, Feb. 13, 1975, at B-1, col. 1. See also *The Virginian-Pilot* and *The Ledger-Star*, July 15, 1979, at A-1, col. 1.

47. *The Virginian-Pilot*, August 30, 1979, at A-1, col. 3. MacDonald was successfully practicing medicine in Long Beach, California, when brought to Judge Dupree's court to begin trial on July 14, 1979. The defense issued a press kit to reporters containing testimonials from Long Beach civic and professional figures concerning MacDonald, including one from the chief of staff of St. Mary's Hospital, where MacDonald was employed as director of the emergency room service at the time the trial commenced. *The Virginian-Pilot* and *The Ledger-Star*, July 15, 1979, at A-3, col. 2.

News and Observer and *The Raleigh Times*, neither paper put a premium on titillation.⁴⁸

Raleigh is not Cleveland, where three newspapers vied for Sheppard muck,⁴⁹ nor is it journalistically or jurisprudentially in the boondocks. It has been host at a criminal trial to two-thirds as many news people, and from distances as great, as descended upon Flemington for the Hauptmann trial, and within the past half-dozen years. The State Superior Court received 200 applications for press credentials to the Joan Little murder trial in July to August 1975, and, depending on the caliber of testimony, 75 to 150 reporters from throughout the country and over the world were in Judge Hobgood's courtroom each day throughout the four-week trial.⁵⁰ Press decorum was exemplary, surely a tribute to the force and wisdom of the Supreme Court's order in *Sheppard*.⁵¹ It remained, alas, for lawyers to supply the shenanigans; Judge Hobgood expelled one member of the defense team and jailed another for contempt of court, and the North Carolina State Bar Association subsequently moved to discipline the chief defense counsel and a privately retained prosecutor's assistant.⁵²

But the Joan Little affair was not in the Sheppard and MacDonald category. Little, a black woman, was behind bars in Washington, N.C., awaiting trial for theft when she fatally applied an ice pick to the disrobed flesh of her white jailer in wardenship of what her lawyers said was her honor. The Poverty Law Center raised \$200,000 for her defense. The American Civil Liberties Union lent a hand. Black yearnings and women's rights were involved, and they prevailed: Joan Little was acquitted. The Ohio Supreme Court, diagnosing the Sheppard phenomenon with language that

48. Interview with Ginny Carroll, Reporter for *The News and Observer*, Raleigh, N.C. Ms. Carroll covered the MacDonald trial for *The News and Observer* and commented upon the relative scarcity of reporters.

49. *Sheppard v. Maxwell*, 384 U.S. at 342.

50. Interview with Ginny Carroll, *supra* note 48. Ms. Carroll also covered the Joan Little trial.

51. Interview with Claude Sitton, Editor of *The News and Observer*. Mr. Sitton discussed a meeting held with Judge Hobgood to establish press guidelines for the Little trial coverage, mindful of the admonition in *Sheppard* that "courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." 384 U.S. at 363.

52. *The Virginian-Pilot*, April 23, 1976, at A-12, col. 2.

Justice Clark would endorse, opined that "[m]urder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals."⁵³ To attract maximum press attention in the post-*Sheppard* period, violence needs a hefty sociological bent.⁵⁴

THE RISE OF INVESTIGATIVE REPORTING

The press has become far busier sniffing out crime, especially political evil and governmental fraud, than parroting what is revealed in a courtroom. Watergate is the ultimate example. Others are endless—major and minor, national and state and local. In recent years the *Norfolk Ledger-Star* uncovered a scandal in Virginia's printing and purchasing contracts⁵⁵ and, for an encore, cast its eye upon union-related racketeering on the Hampton Roads waterfronts.⁵⁶ The *Norfolk Virginian-Pilot* documented much of the Norfolk Savings & Loan Corp.'s infamy⁵⁷ long before the Commonwealth Attorney's office and a court-appointed receiver applied the law to it. Myron Farber of *The New York Times* in 1978 lent his name to a striking first amendment case⁵⁸ through his investigation of thirteen deaths in a New Jersey hospital under strange circumstances, which a decade earlier had stumped local police. His stories provoked a new prosecutor to reopen the case with the result that Dr. Mario E. Jascalevich was charged with killing five, later

53. *State v. Sheppard*, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956), cited in *Sheppard v. Maxwell*, 384 U.S. 333, 356 (1966).

54. Interview with Arthur Everett, Reporter for the Associated Press. Mr. Everett has covered most of the country's important criminal trials since Alger Hiss' trial on perjury charges in 1950, including Dr. Sheppard's and the notorious Manson Family's. He noted that the potentially sensational murder trials of James Earl Ray and "Son of Sam," among others of recent years, were aborted by guilty pleas. Mr. Everett contends, incidentally, that Justice Clark exaggerated the press' disorder at the Sheppard trial.

55. See *The Ledger-Star*, Oct. 12-14, 1978, at A-1, col. 1.

56. See *The Ledger-Star*, Oct. 8-9, 16-19, 1979, at A-1, col. 1.

57. Norfolk Savings & Loan Corp., a misnamed and uninsured industrial loan association, was exposed by the Virginia State Banking Commission in January 1973 as being, in the words of one examiner, "hopelessly insolvent," its depositors victimized by conniving officers who in time were convicted in state and federal courts. *The Virginian-Pilot*, May 6, 1973, at B-1, col. 6.

58. *State v. Jascalevich*, 158 N.J. Super. 488, 386 A.2d 466, *aff'd*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

reduced to three, patients by injecting them with curare.⁵⁹

As *Sheppard* focused judicial attention on free press/fair trial rivalry,⁶⁰ the subsequent journalistic stress on investigative reporting raised the constitutional question of a journalist's status as a reluctant witness in legal action he may—or may not—have inspired. Dr. Jascavich was found innocent after a trial lasting thirty-four weeks.⁶¹ But before his acquittal the presiding judge issued a sweeping subpoena ordering reporter Farber to deliver to the court all the "documents" on which he had based his stories, among them "statements, pictures, memoranda, recordings and notes of interviews of witnesses."⁶² Farber balked. In consequence he was jailed on charges of criminal and civil contempt of court and his newspaper was fined outrageously.⁶³ In November 1979 the Supreme Court let stand a New Jersey Supreme Court decision⁶⁴ upholding the contempt citations.

59. White, *Why the Jailing of Farber "Terrifies Me,"* N.Y. Times, Nov. 26, 1978, § 6 (Magazine), at 27, 70.

60. The sixth amendment guarantees to the accused "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. Citation to the sixth amendment is common in moves by courts and court officers to limit press coverage of trials as a guard against the prejudicing of juries, despite the first amendment prohibition of any law "abridging the freedom . . . of the press," U.S. CONST. amend. I.

61. White, *supra* note 59, at 70.

62. *Id.*

63. Upon conviction of both civil and criminal contempt on July 24, 1978, Farber was sentenced to six months in jail and a \$1,000 fine was imposed. The *Times* was fined \$100,000 for criminal contempt. The court sentenced Farber to a further indeterminate jail term pending his production of information demanded by the court, and the *Times* was fined \$5,000 a day pending its production. After his requests for a stay of the contempt orders to the New Jersey Supreme Court and the United States Supreme Court were denied, Farber went to jail in early August and the *Times'* fines went into effect. Farber spent a total of 40 days in jail; the *Times* paid \$285,000. Farber was released and the *Times'* fines were stopped when, after the 34-week trial of Dr. Jascavich, the jury took three hours to acquit him. *THE NEWS MEDIA & THE LAW*, Jan. 1979, at 4-5.

64. The New Jersey Supreme Court ruled that a newspaper and its reporter have no first amendment privilege to refuse compliance with the issuance of a subpoena seeking in camera production of documents and other material relating to a murder prosecution. The court further stated that the defendant's sixth amendment right of access to documents material to his defense, in conjunction with the New Jersey constitutional equivalent of "compulsory process for obtaining witnesses in his favor," overshadows the reporter's rights under New Jersey's "shield law," which protects source confidentiality. *State v. Jascavich*, 78 N.J. 259, 294 A.2d 330, cert. denied, 439 U.S. 997 (1978); N.J. CONST. art. 1, ¶ 10; *THE NEWS MEDIA & THE LAW*, Jan. 1979, at 4-5.

As if paving the way for its refusal to review the Farber case, the Supreme Court in May 1978 ruled in *Zurcher v. Stanford Daily*⁶⁵ that police may conduct surprise search-warrant raids on news offices and look through filing cabinets and desks for information about crimes.⁶⁶ In a still more telling decision in April 1979, the Court held in *Herbert v. Lando*⁶⁷ that the first amendment does not bar a libel plaintiff's inquiry into the thoughts and editorial processes of news people when discovery is likely to produce relevant evidence⁶⁸—relying, ironically, on the “malice” loophole it left when awarding the press an otherwise thumping victory over “public-figure” libel plaintiffs in *New York Times Co. v. Sullivan*.⁶⁹

Consistent with the steady crimping of traditional press prerogatives that these decisions indicate, against which publishers, editors, and columnists have thundered in concert as an infringement on the public's “right to know” and a blight on societal enlightenment, the *Ledger-Star* reporter who ran down bribery in Virginia's purchasing department temporarily found himself facing an indeterminate jail term and a \$100-a-day fine for refusing to disclose the sources of his articles to a grand jury.⁷⁰ *The News Media & The Law*, the journal of the Washington-based Reporters Committee for Freedom of the Press, routinely reports similar incidents; in the August-September 1979 issue, it summarized seventy-eight federal and state actions affecting the press, the vast majority of them adversely.⁷¹ Had many of the Court's latter-day decisions been in effect during *The Washington Post's* celebrated investigation of Watergate, “that chapter of history might have been very different.”⁷²

Writing in *The New York Times Magazine*, Sidney Zion⁷³ ex-

65. 436 U.S. 547 (1978).

66. *Id.* at 559. See also *THE NEWS MEDIA & THE LAW*, Jan. 1979, at 3.

67. 441 U.S. 153 (1979).

68. *Id.* at 175.

69. 376 U.S. 254, 288 (1964). This is further support for the assertion by Mr. Bickel that freedom dwindles under challenge. See note 2 *supra* & accompanying text.

70. *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1979, at 26-27.

71. See generally *id.* at 2-60.

72. Address by Fred Graham at Virginia Wesleyan College (Oct. 4, 1979). Mr. Graham is an attorney and author with a national following as CBS's law correspondent.

73. Mr. Zion, a member of the bar in New York and New Jersey and a former Assistant United States Attorney, has written extensively on law over the past 15 years.

plored the same hypothesis, fussing,

[H]ad the full panoply of the Burger Court's press decisions been in play, it is quite possible that the Watergate scandal might not have been uncovered. For example, the whole thing might have been cut off at the pass by closing the original bail hearing to the press. That way, reporters Bob Woodward and Carl Bernstein could hardly have noticed that high-priced lawyers were representing "third-rate burglars."⁷⁴

AS IF THE OLD EVILS PERSISTED

But as sternly as the Supreme Court has monitored the evolution of post-*Sheppard* news fashions, it does not appear to have assayed the changes or to have recognized that change entails abandonment. Despite the press, and judicial, reforms the Court forged with *Sheppard*, it seems to assume that all the old press evils persist—to equate press attention to violent crime with "media saturation," no matter the particulars. That, surely, is a conclusion to be reached from reading Justice Stewart's opinion for the court in *Gannett* and Justice Blackmun's rebuking dissent.⁷⁵ To protect a criminal suspect from "a reasonable probability" that press reports of pretrial proceedings would prejudice his ability to obtain an impartial jury, the Court granted state and federal trial judges broad authority to close the proceedings—and, if sundry of Justice Stewart's sentences had meant what they said, to close the trial itself.⁷⁶

Gannett stemmed from the decision in *Nebraska Press Association v. Stuart*, in which the Supreme Court held that judges constitutionally could not restrain the press from publishing news obtained in open court.⁷⁷ Judges then began to issue orders sealing court proceedings and documents and gagging participants to limit pretrial information, while avoiding the prior restraint prohibition. Two questions developed: (1) whether the sixth amendment guarantee of a public trial served a fundamental public interest or was for the suspect's choosing; and (2) whether a judge had to find a

74. Zion, *High Court vs. the Press*, N.Y. Times, Nov. 18, 1979, § 6 (Magazine), at 145.

75. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

76. *Id.* at 374-79.

77. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

"clear and present danger to the fairness of a trial" before closing a courtroom,⁷⁸ or could automatically seal a pretrial proceeding merely at the request of the suspect.

Justice Stewart built his conclusion in *Gannett* on the proposition that while the sixth amendment encompasses the notion of open trials as the norm,⁷⁹ "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant."⁸⁰ Further, he found it satisfactory that in the case at hand the trial judge had determined, at a hearing following a filing of briefs, that complaining "representatives of the press did have a right of access to constitutional dimension, but . . . under the circumstances of this case, that this right was outweighed by the defendants [sic] right to a fair trial."⁸¹

And what, exactly, were the "circumstances of this case"? What inspired the Supreme Court to tamper with, apparently for the first time ever, the openness feature of the jury idea that Winston Churchill called "the one great contribution of the Franks to the English legal system"⁸² and traced to "far back in the practice of the Carolingian Kings"?⁸³ If no record exists, as Justice Blackmun mused, of "'a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country [other than by a juvenile court or court-martial] . . . [or] of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641,'"⁸⁴ with what monumental truth did Justice Stewart sanctify a lawyer's call for secret court proceedings? Justice Blackmun exposed the absurdity of Justice Stewart's thinking.⁸⁵

The crime in *Gannett* lacked most of the ingredients of *Shep-*

78. See ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 8-3.2: Practical proceedings: Exclusion of public and sealing of records.

79. 443 U.S. at 385.

80. *Id.* at 379.

81. *Id.* at 393.

82. 1 W. CHURCHILL, *THE BIRTH OF BRITAIN* 217 (1956).

83. *Id.*

84. 443 U.S. at 414. (quoting *In re Oliver*, 333 U.S. 257, 266 (1948)).

85. See *id.* at 406-07.

pard and all those that generate headlines nowadays. Wayne Clapp, aged 42, a resident of a Rochester, N.Y. suburb, disappeared in July 1976. A boat in which he had been fishing with two companions was found to be "laced with bullet holes." Discovery of Clapp's missing pickup truck in Michigan led to the arrest there on July 21 of 16-year-old Kyle Greathouse, Kyle's 16-year-old wife, and 21-year-old David Jones. All three were indicted by a Seneca County, N.Y. grand jury on August 2. The two Rochester daily papers, the *Democrat & Chronicle* and the *Times-Union*, both owned by the Gannett Co., reported those and subsequent steps of the case.⁸⁶

None of the *Sheppard* coverage whoopeddo that excited Justice Clark's pen enlivened Justice Stewart's casual review of the Clapp case reportage. Yet Justice Stewart found no quarrel with the defense attorney's assertion of prejudicial publicity.⁸⁷ It remained for Justice Blackmun to say how "placid, routine, and innocuous" were the Rochester newspaper stories and to remark about their "comparative infrequency."⁸⁸

The reporting by both newspapers on August 3 of the filing of the indictments was the first time either of the two papers had carried any comment about the case since July 25, nine days before. On August 6, each paper carried a story reporting the arraignments of Greathouse and Jones on the preceding day. Thereafter, no story about the Clapp case appeared in petitioner's papers until the suppression hearing on November 4. Thus, for 90 days preceding that hearing there was no publicity whatsoever. From July 20, when the first story appeared, until August 6, a period of 18 days, 14 different articles were printed in the two papers. Because the evening paper usually reprinted or substantially duplicated the morning story, there were articles on only 7 different days during this 18-day period

Furthermore, there can be no dispute whatsoever that the stories consisted almost entirely of straightforward reporting of the facts surrounding the investigation of Clapp's disappearance, and of the arrests and charges. The stories contained no "editorializing" and nothing that a fair-minded person could de-

86. *Id.* at 371-74.

87. *Id.* at 378.

88. *Id.* at 407.

scribe as sensational journalism.⁸⁹

Shades of Irvin S. Cobb, Damon Runyon, and Dorothy Kilgallen! Shades of Justice Clark, who, horrified as he was over a trial turned carnival, saw as the proper remedy a strong and resourceful hand upon the gavel, and who would not let himself forget "there is nothing that proscribes the press from reporting events that transpire in the courtroom."⁹⁰

CONCLUSION

Happily, the Supreme Court soon agreed to re-review, through a case pressed by Richmond Newspapers, Inc.,⁹¹ the matter of closing courtrooms. Clarification of Justice Stewart's opinion had become imperative. Three of the five Justices in the majority—Chief Justice Burger, Justice Powell, and Justice Rehnquist—wrote separate opinions about what was meant.⁹² Chief Justice Burger and Justices Powell and Blackmun compounded the confusion with off-the-bench interpretations.⁹³ A flood of motions—*The News Media & the Law* counted at least forty-eight in the first six weeks after the decision in *Gannett*—produced conflicting orders.⁹⁴ In *Richmond Newspapers, Inc. v. Virginia*,⁹⁵ the Virginia Supreme Court cited *Gannett* upon upholding Hanover Circuit Court Judge Taylor's ruling, based on little more than the observation that "having people in the courtroom was distracting to the jury,"⁹⁶ closing not just a pretrial hearing but an actual murder trial; it was this astonishing performance that the United States Supreme Court chose to review.⁹⁷

Richmond Newspapers was curiously timid in its petition to the Court, urging a ruling that the press and public are constitution-

89. *Id.* at 407-08.

90. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

91. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

92. 443 U.S. at 394-406.

93. *The Virginian-Pilot and The Ledger-Star*, Oct. 14, 1979, § C (Commentary), at 4, col. 1.

94. *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1979, at 3.

95. No. 78-1598 (July 9, 1979) (order finding no reversible error).

96. Petitioner's Memorandum in Support of Petitions for Writs of Mandamus and Prohibition at 4, *Richmond Newspapers, Inc. v. Virginia*, No. 78-1598 (Va.).

97. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

ally entitled to attend a criminal trial *unless* there exists no alternative to closing it as a guarantee of fairness.⁹⁸ By writing that condition into his opinion, Chief Justice Burger belittled his research into the English and American tradition of open courts, weakened whatever repudiation he intended to levy upon the *Gannett* rationale, and left the press to wonder how creative judges may be in defining "overriding interest."⁹⁹

The accessibility issue is not for compromising. The press ought never relax its claim to the right to report public business, in halls of justice and elsewhere. It should go wherever news is, as it recognizes news to be, and wherever it reckons scrutiny is needed, being stayed only by the unwelcome decree. The press is ill-suited by nature, mission, and peculiar place in the Constitution to take kindly to exclusion from governmental spaces. If the press' interests often parallel officialdom's and justice's, it is an agent of no branch of government, and seldom is it more mistaken than when it forgets as much.

Meanwhile, the press could do with some soul-searching into how dutifully it exercises the rights it embraces—particularly the right to attend court proceedings. It has not beaten upon locked courthouse doors without some cause to blush.

James J. Kilpatrick,¹⁰⁰ a national columnist who frequently expounds on Supreme Court decisions, took up *Gannett* a second time in order to chide Justice Stewart for posing the question "whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding"¹⁰¹ If Justice Stewart had paused over that clause, Mr. Kilpatrick wrote, he would "have realized that members of the public have a right 'to insist' till the cows come home. The issue actually presented was whether the press has a right of access to pretrial proceedings in a criminal case."¹⁰²

98. Petitioner's Memorandum in Support of Petitions for Writs of Mandamus and Prohibition at 7, *Richmond Newspapers, Inc. v. Virginia*, No. 78-1598 (Va.).

99. 100 S. Ct. at 2830.

100. Kilpatrick was editor of the *Richmond News Leader* from 1951 until 1967, when he launched a syndicated column. He may be best known as the "conservative" commentator on the television program "60 Minutes."

101. 443 U.S. at 370-71.

102. *The Virginian-Pilot*, Sept. 30, 1979, at C-5, col. 1.

The Kilpatrick quiddity was well taken.¹⁰³ But Mr. Kilpatrick proceeded to join Justice Stewart in a departure from exactitude: "We of the press," he wound up his piece, "must have a right to access all along the way. It is immaterial whether the right is a First Amendment right or a Sixth Amendment right. Whenever a court convenes, we have to be there."¹⁰⁴

Possibly "the right" somehow slipped out of that last sentence. It does not much matter; the point here is that of course the press does not "have to be there." Of all the press' rights, the right to discriminate—editing being the art of discrimination—is the one to which it is most devoted. It chooses which court cases it will cover and which it will ignore. The press is a fixture at neither run-of-the-mill preliminary hearings nor at trials it assumes to be of lesser public interest. Minor courts are usually neglected by the press. When Norfolk General District Court Judge Joseph A. Jordan, Jr. was censured by the Virginia Judicial Inquiry and Review Commission,¹⁰⁵ it was with thanks not to a vigilant press but to trial lawyers who had become incensed by the judge's chronic high-handedness, and especially to one who had chanced to be in the courtroom when Judge Jordan sentenced an 18-year-old woman to thirty days in jail for being on a beach past a dubious curfew.¹⁰⁶

The fashion of the press is to assign its handiest reporter to a court case of obvious importance rather than to spread a special staff over the entire judicial scene of its circulation area. The larger and busier the newspaper, the less likely it is to report, or to keep abreast of, court minutiae. Small newspapers are overly willing to rely on the clerk's records for their court coverage. It is not unusual for a newspaper to manufacture, without apology, the appearance of currency to disguise its tardiness in learning about a

103. Justice Blackmun, however, came closer to the heart of the matter in advising that what the court really had to consider was "whether and to what extent the Constitution prohibits the States from excluding, at the request of a defendant, members of the public from such a hearing." 443 U.S. at 411.

104. *The Virginian-Pilot*, Sept. 30, 1979, at C-5, col. 1.

105. *The Virginian-Pilot*, Aug. 30, 1979, at A-1, col. 3. "Specifically, the five-member commission found substantive evidence that Jordan convicted and jailed suspects in the absence of complaining witnesses, unconstitutionally convicted and jailed witnesses in criminal cases because of their testimony, and punished convicted petty offenders by refusing to set appeal bonds immediately, thus landing them behind bars." *Id.* at col. 4.

106. *The Virginian-Pilot*, Aug. 10, 1978, at A-1, col. 5.

major court decision, perhaps at the appellate level. There may be a certain efficiency in the press' ways. But they mock press claims of providing a sure proxy for members of the public who are unable personally to satisfy their interest in courts and justice¹⁰⁷—claims that the press choruses as often as its access to courts and their business is restricted.

That the public is poorly informed of courts and dissatisfied with press information about them was shown in a report prepared by a research firm for the March 1978 National Conference on the State Judiciary in Williamsburg, Virginia.¹⁰⁸

In view of the considerable weight of media, it is important to note that the public generally feels that media coverage today is not adequate to show how the court system works nor how effective it is. . . . Accordingly, there is widespread opinion that media should play an expanded role in showing how the courts work and how effectively they operate—provided the traditional conditions believed necessary for a fair trial are maintained. For example, 71% believe that media should play an important role in showing if the court system is effective; *but* 72% believe that judges should have the right to restrict lawyers from discussing cases with reporters.¹⁰⁹

To the query, "Besides sensational trials, do you feel media coverage is adequate to: a. Show how the court system really works? b. Show if the court system is effective?,"¹¹⁰ fifty-four percent replied "No" to the first part and forty-nine percent replied "No" to the second.¹¹¹ Fred W. Friendly,¹¹² who headed a committee formed

107. A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (Clark, J.), *quoted in* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1970). These words merit contemplation by today's press.

108. See PUBLIC IMAGE, *supra* note 13, at 16.

109. *Id.* at 5.

110. *Id.* at 16.

111. *Id.*

112. Advisor on Communications at the Ford Foundation and Edward R. Murrow Professor of Broadcast Journalism at Columbia University; former president (1964-66) of CBS News.

"to help provide guidance in the drafting of the survey instruments and other activities related to the conference," observed to Edward B. McConnell, the Director of the National Center for State Courts,¹¹³ that "the expectations of the American people are high; and they want better access to the courts and more efficient management of them."¹¹⁴

The Supreme Court is under no obligation to tailor its orders to public-opinion surveys and polls. And the press may enter what it will in its assignment books. But the American public will suffer if the Supreme Court retreats from *Richmond Newspapers* to its trend of sealing court documents, closing courtroom doors, and denying reporter confidentiality; and it will suffer similarly if the press invests, as it is beginning to seem to, more energy and treasure in proclaiming and defending its rights than in exercising them where surveillance is as valuable a function as filling up news columns.

113. Mr. McConnell has been honored for his contributions to the administration of justice with the Warren E. Burger (1975), Glenn R. Winters (1974), and Herbert Lincoln Harley (1976) awards.

114. PUBLIC IMAGE, *supra* note 13, at 16.