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Book Review

Charles S. Desmond

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BOOK REVIEW


As long as there are crimes and courts, the bar and the press will dispute the relative priorities of the right to publicize crime as against a defendant’s right to a fair trial unaffected by prior disclosures.

The Supreme Court’s reversals in the Estes1 and Sheppard2 cases as a stage in the continuing efforts to civilize American prosecution procedures have stirred up new interest in the old, old “free speech versus fair trial” debate. Each of the four publications here under review adds to or at least points up the general picture, but little emerges in the way of solutions. Let us first peruse the two City Bar Association reports presented by the Committee chaired by the timeless and tireless Judge Medina. The first Committee report, which appeared in 1965, monitored and described a number of newscasts dealing with crime, most of the newscasts having been based on information furnished by prosecutors and police; also described were some “special programs” purporting to expose some particular forms of wrongdoing. The most offensive (but atypical) of these newscasts included interviews with, and pictures of, suspects. In some instances radio and television personnel themselves set out to investigate crimes; and in these cases, their discoveries received, of course, maximum and most dramatic coverage. Taken as a whole, the Committee’s well-written report attempted little in the way of conclusions or suggestions, but described some current radio and television practices and cited and quoted court decisions, canons of ethics, and federal and state court rules and statutes.

In 1967, Judge Medina’s City Bar Committee produced its “Final Report,” which unlike the interim product covered newspapers as well as the other media and added conclusions and suggestions. Pointing out that the abusive practices resulting from the publicity given court proceedings have increased with modern improvements in communications, the Committee recommends generally that there be “appropriate controls of the lawyers and the law enforce-

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ment officials, under the auspices of the lawyers and the police themselves, more positive and effective action by the courts and the judges, and a larger measure of self-restraint by the news media. The Committee shows up the weakness of present Canon 20 and lists the unsuccessful efforts made nationally and in several states to clarify and strengthen it. The Committee's own preference is for a revision of Canon 20 to label as unprofessional conduct practically all pre-trial statements by any lawyer as to any pending litigation, civil or criminal, particularly any disclosure regarding the alleged merits, confessions, or the names of probable witnesses and their expected testimony, etc. Similarly as to the police, the report proposes a code forbidding any release before trial of any information about a defendant's prior record or statements made by him, and forbids any photographing or interviewing of a suspect by the media. Turning to the courts, the Medina Committee gives us an instructive description of efforts (some obviously unconstitutional) made by some judges to control the police and the newsmen. Apparently disagreeing with the American Bar Association's Reardon Report, this City Bar group, while recognizing the need for restricting prior statements that affect the fairness of trials, nonetheless concludes that court rules and contempt procedures are of dubious value and often beyond the powers of the courts. Conceding the truth of the news media's assertions that most prejudicial publicity emanates from law enforcement agencies, this second report of Judge Medina's able and distinguished Committee expresses optimism and finds a growing awareness among judges, lawyers, police, and news gatherers, as well as in the general community, of the real danger and unfairness of pre-trial publicity.

The report of the ABA's "Reardon Committee," released in late 1966, recommends a prohibition by professional Canon, against a lawyer's releasing to the press any information reasonably likely to interfere with a fair trial, especially information about a defendant's character, reputation, or prior criminal record, or relating to any confession or refusal to take any test. The lawyers would be able to comment during the trial only on matters of public record. Violations would be punished by reprimand, suspension, disbarment, or contempt proceedings. The police, too, would be subjected to similar limitations by court order or departmental rules. Contempt powers should be used, the ABA Committee recommends, against anyone, including a reporter who disseminates during a trial anything beyond the public court record of the trial, if the statement is calculated to and likely to affect the outcome of the trial. The constitutionality of such a use of contempt jurisdiction is doubtful.

Mr. Lofton is a journalist. His book is a valuable one, giving us the history of the question all the way from ancient Greece and Rome, through Europe during the Reformation, then through England's experience from the time of the first use of the printing press, and finally to the American record, Colonial and modern. The Zenger case, the Croswell case, the Anti-Sedition Laws, the

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3 Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial.
Civil War hysteria, the repressions of World Wars I and II — all are described accurately and entertainingly. Coming down to modern times and anti-Communism, the author concludes that “even today freedom of speech enjoys no impregnable protection”\(^5\) and that “the verbal guarantee of the First Amendment cannot prevent weapons that still exist from being used to stringently curb the press.”\(^6\) The right of the press is still in danger, he thinks, from official wielders of power who are only restrained by the courts, which, with their juries, are sometimes “swept along by the tide of public opinion.”\(^7\)

Author Lofton, hailing the press as a defender of the embattled right of freedom of the press, concedes that the press itself sometimes exhibits a paradoxical blindness to its own attacks on another and older right, the right of a defendant to a fair trial. This observation serves as an introduction to Mr. Lofton’s able and reasonably thorough examination of the history of criminal trials and the emergence and application of constitutional guarantees as to arrest, seizure, confessions, right to counsel, bail, preliminary hearing, speedy and public jury trial, confrontation of witnesses, and protection against illegal evidence, self-incrimination, double jeopardy, etc.

The rest of the book treats of press influence and press injustice and the responsibility of press, bar, and bench for preserving the fair trial. American press practices, old and new, are described, including some as old as 1833 and as recent as Jack Ruby’s trial in Dallas. Many, many instances of prejudicial reporting are cited; but this reviewer, from long if limited experience, refuses to believe that they are typical. Finally, the author expresses optimism, sees a slow rise in standards of journalism and a belated elevation of standards of criminal justice, and calls for more civilized treatment of crime victims as well as convicted defendants, and a more real application of the presumption of innocence, especially when the accused is poor. There are several appendices, including joint statements of bar and press; guides for bar and media; policy statements by bar associations; statements by newspaper, radio, and television spokesmen; the FBI’s rules for its personnel; a copy of Justice Black’s *Sheppard* opinion; numerous footnotes; and an adequate index.

The last of our publications, the pamphlet *Free Press and Fair Trial* issued earlier this year by the American Newspaper Publishers Association, takes, as one might expect, a totally different position. Essentially it is a comparatively short report of a special committee of the Association plus a historical survey of the problem with a good list of court decisions; discussions of the *Estes* and *Sheppard* decisions; and a review of proposed codes, guidelines, etc. This Committee concluded that there was no real conflict between the first amendment, which guarantees a free press, and the sixth amendment, which guarantees a speedy and public trial by an impartial jury. It was the Committee’s opinion that the bar’s charge that defendants are prejudiced by publicity is based on conjecture and not on fact, and that the rights of the public and the right of freedom of the press forbid prior restraint and demand the un-

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6 Ibid.

7 Ibid.
inhibited access of the public to information. The publishers are of the opinion that there is great danger to the public in the restriction or censorship of news, that the press is a positive influence in assuring a fair trial, that rare and isolated cases of unfairness should not call for censorship, and that rules and orders of courts and codes usually amount to a cutting down or bargaining away of the public's fundamental right to a free press.

This reviewer is bound to say that he thinks the publishers have somewhat the better of the argument. Any agreement by bar representatives and media representatives that limits the flow of information to the people is an unjustifiable and harmful restriction of the public's rights. This does not leave us without remedy for the occasional glaring incidents of improper and possibly prejudicial pretrial publicity in criminal cases. The bar should be more vigorous in enforcing against its own members' standards of conduct, particularly as to pretrial announcements. The press, and radio and television too, should exercise self-restraint. There has been an improvement all along the line, and decisions like Estes and Sheppard will certainly help. But it is inconsistent with one of the central American ideas of government that news of public affairs like court proceedings should be precensored either by press-bar agreements or by court orders or rules. Particularly obnoxious is the use of the court's contempt powers for these purposes.

Historically every effort to curtail freedom of the press has been unsuccessful. The American Constitutional Founders considered this right inviolable; but well before our Bill of Rights went into effect, the states themselves provided for press freedom. In our democracy the people are the sovereigns and it is the moral duty of newspapers to keep them informed. Whatever occurs in the courtroom is public property and should be known. Edmund Burke wrote that where mystery begins, justice ends. In truth this whole matter is one of common sense and decency, not law, since bad taste cannot be controlled by law. It is the right and duty of the courts during the course of criminal proceedings to preserve decorum and prevent the disruption of trials. But among the first of our liberties are the freedoms to know, speak and publish; and however unfortunate and distasteful the excesses of the public media and of lawyers may seem, any judicial censorship of the press or any press-bar agreement to such censorship is intolerable in the free society in which we live.

Charles S. Desmond*

* Retired Chief Judge, Court of Appeals of New York.
BOOKS RECEIVED


CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY. By Donald G. Morgan, Professor of Political Science, Mount Holyoke College. The thesis of the book is that every member of Congress has the responsibility to study the constitutionality as well as the wisdom of legislative proposals before the Congress. Cambridge: Belknap. 1966. Pp. xv, 490. $8.95.

THE COST OF THE AMERICAN JUDICIAL SYSTEM. By James T. Brennan, Assistant Professor of Law, Syracuse University. The author criticizes the expense of our present system and recommends changes. West Haven: Professional Library Press. Pp. vii, 150. 1966. $3.50 (paperback).


Decisions of the United States Supreme Court: 1965-66 Term. By the Editorial Staff, United States Supreme Court Reports, Lawyer’s Edition. Each decision of the Court in which a written opinion was issued is summarized. Rochester: The Lawyer Co-operative Publishing Company. 1966. Pp. xxxii, 338. $6.50.


Examination of Witnesses. Edited by Louis Harolds, Joseph Kelner, and Jacob Fuchsberg. A compilation of the techniques of 25 leading attorneys, demonstrating varying approaches that may be used in the examination of witnesses, primarily from the plaintiff’s point of view, in personal injury cases. Boston: American Trial Lawyers Association. 1965. Pp. 569. $15.00.


Free Press and Fair Trial. By Donald M. Gillmore, Associate Professor at the School of Journalism and Mass Communications, University of Minnesota. Particular attention is given to court decisions that have considered the balance between bar and press. Washington: Public Affairs Press. 1966. Pp. vi, 254. $6.00.


Jurisprudence: Reading and Cases. By Mark R. MacGuigan, Faculty of Law, University of Toronto. The book is composed of five chapters, each containing a series of cases that courts have decided according to a particular jurisprudential insight, followed by a series of readings that present the same insight from a more abstract and general point of view. Toronto: University of Toronto. 1966. Pp. xx, 666. $20.00.

Justices Black and Frankfurter: Conflict in the Court. By Wallace Mendelson. Cases before the Supreme Court generally involve conflicts between highly commendable principles — and yet the Justices must choose between the principles. The book explores this task of the jurist by focusing on two men who represent differing traditions in American jurisprudence. Chicago: University of Chicago Press. 1966. (2d ed.) Pp. x, 153. $5.00.


THE PREVENTION AND CONTROL OF DELINQUENCY. By Robert M. MacIver. The distinguished social scientist offers a new approach to the causation of delinquency and advances an inclusive strategy for coping with the


**The Revised Uniform Principal and Income Act.** By E. James Gamble. The emphasis in this work is upon Michigan law, but the book has been designed for use in any state adopting the Act. Ann Arbor: Institute of Continuing Legal Education. 1966. Pp. 348. $20.00.


TREATISE ON JUSTICE. By Edgar Bodenheimer, Professor of law, University of California, Davis. The many facets of Justice are examined. New York: Philosophical Library. 1967. Pp. 314. $10.00.


YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC — THE CASE OF Fletcher v. Peck. By C. Peter Magrath, Associate Professor of Political Science, Brown University. During our nation's early years, a major fraudulent scheme dealing with the Yazoo River lands in Georgia produced a political and constitutional cause célèbre that was settled only by a Supreme Court ruling. Providence: Brown University Press. 1966. Pp. ix, 243. $6.00.