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Free Press and Fair Trial by Donald M. Gillmor

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eminently discerning eyes, the United States Supreme Court *without* having espoused a distinctive legal or political philosophy, *without* having written formidable treatises on the nature of law, *without* having been an incomparably brilliant opinion writer, they will have understood the mid-Twentieth Century United States better than we do ourselves.

Such, in my opinion, is the most enduring link between Justice Frankfurter and Legal History. Perhaps this gives us a clue to his true greatness. Who but a crown prince of gadflies could leave a conundrum, such a superbly significant conundrum as a legacy?

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FREE PRESS AND FAIR TRIAL. By Donald M. Gillmor. Washington, D. C.: Public Affairs Press, 1966. Pp. 254. $6.00.

For many years the conflict between free press and fair trial has been a fundamental issue in our society. The urgency of the problem has increased greatly in the last few decades due to technological improvements increasing the speed and impact of the communications media. Newspapers, with photographers and reporters working quietly inside the courtroom, can reach a nationwide audience within a few hours of a trial. Television and radio can broadcast the highlights of a trial into homes all over the country. Through these means the entire population of an area can feel intimately involved in courtroom dramas. Thus, the possibilities of both a "quick" and "public" trial are at the same time enhanced and enormously complicated.

Through short, readable, and fairly graphic chapters, Gillmor develops the various aspects of the problem. In dramatic recapitulations of the Sheppard, Oswald, "Mad Dog" Irvin and similar episodes, the author sets the stage and roughly defines the issues to be explored. In a broad sense these are two:

1. To what extent does pre-trial publicity prejudice the entire population making it impossible to draw an impartial jury?
2. To what extent does trial publicity filter back to members of the jury and so corrupt the verdict?

Justice often can be subverted by men on all sides who are simply

trying to do their duty. The author quotes Norman Isaacs, Executive Editor of the Louisville Courier-Journal and Times, on this problem.

> What has grown up in this country of ours has been a vast unwitting conspiracy on the part of good men. The policeman wants to do his job well. He wants to be regarded as able and efficient. So does the prosecuting attorney. And the judge. And the newspaper editor. All good men, all wanting to be successful in what they do—and all bound in a system which does violence to the right of Americans to be considered innocent until proven guilty.[1]

Under our system, all participants can easily overstep the bounds of responsibility and fair play.

Free Press and Fair Trial is predominantly concerned with the alternatives available for keeping all participants functioning in their proper sphere. Canons Twenty and Thirty-Five of the American Bar Association Canons of Professional Ethics, typical press codes, and various legislative enactments are reviewed as possible solutions to the problem. The author devotes a chapter to the English system but concludes that it is not appropriate to the American concept of democracy.

Gillmor also examines the use of the contempt procedure, but finds that this has not been a major deterrent to overblown press coverage of trials. Forbidding attorneys to make statements to the press would make it more difficult for issues to be publicized before the trial, but this, too, can lead to abuses. No one desires secret trials. Frank Stanton of the Columbia Broadcasting System is quoted this way:

> Silencing of the accused and his spokesman in cases involving oppressive police tactics, improper detention, unsubstantiated charge and whimsical arrests might compound rather than relieve the violation of his rights . . . The bill is an oversimplified way of solving a complex problem. It offers to cure human failings in a form that may carry more potential for injury to both individuals and to the Nation than an ailment that has not yet been fully diagnosed.[2]

Despite these drawbacks, severe restriction on pre-trial statements by attorneys for both sides might impose an effective damper on some of the abuses. The author discusses a number of decisions in the Supreme Court and elsewhere which make the assumption that, because jurors have heard certain kinds of inadmissible evidence, they have been unduly influenced. This assumption is usually unsubstantiated and has been occasionally contradicted by the little systematic information available.

One chapter is devoted to the limited contribution made by social scientists in the systematic evaluation of the jury process by experi-

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[1] D. GILLMOR, FREE PRESS AND FAIR TRIAL 112 (1966).
[2] *Id.* at 192.

mental studies. These studies are so few as to be inconclusive, but they are sufficient to indicate that the jury system and the entire judicial system might be considerably improved if wider studies were possible and if jurists were to ponder the findings.

Two particularly disturbing questions incidentally come to attention toward the end of the book. These are:

1. Whether the jury system itself is compatible with justice.
2. Whether the so-called "combat" system is effective in producing truth and equitable decisions.

The first question may lend itself to experimentation, since, in some jurisdictions, the accused may waive his right to a jury trial and allow questions of fact as well as law to be decided by a panel of judges. The second question appears to present a deeper impasse. Questioning the efficacy of the adversary system in trial procedure seems to be more than the legal profession is willing to consider at present.

Gillmor points out that persons in high public office have occasionally "unoffically tried" individuals by issuing "official publicity." A historical example was the statement by President Jefferson to Congress in 1807 that Aaron Burr was guilty of high treason. A similar "trial" occurred in 1965, according to the author, when President Johnson announced to a nation-wide television audience the arrest of four men in connection with the murder of a Detroit housewife, who was shot in Alabama while engaging in civil rights activities. Such jury-influencing tactics, Gillmor reminds the reader, are not limited to the Chief Executive, but include statements by congressional committees, attorney generals, and other persons of high public position.

Free Press and Fair Trial is not a handbook for a lawyer or a journalist but an idea-book for all interested in preserving our basic civil rights. Gillmor poses the issues in an interesting and fairly comprehensive way, and explores the efforts made to solve them.

Unfortunately, the net effect of this procedure inspires gloom. However, it is not the author's fault that ready solutions are not apparent. At least he presents the issues and offers some suggestions for avenues of exploration. Meanwhile, Gillmor urges all parties involved in our judicial system to strive to attain the goals of fairness and responsibility.

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