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BOOK REVIEW

Paul C. Reardon and Clifton Daniel: *Fair Trial and Free Press.* Washington, D. C.: American Enterprise Institute for Public Policy Research, 1968. pp. 181. $4.50

In our on-going efforts to find the proper balance between liberty and authority in our democratic society, we are confronted with the realization that our liberties are relative rather than absolute. This becomes most evident when long cherished rights come into direct conflict. The title of the book reviewed, *Fair Trial and Free Press,* presents such a conflict. The first amendment to the United States Constitution guarantees freedom of the press; the sixth amendment assures the right to a speedy and public trial before an impartial jury. The balancing of these two cherished pledges is a knotty problem which the bar and the press have been trying to resolve. The authors of the book are members of these two professions and their respective positions reveal these sharply conflicting points of view.

Fair Trial and Free Press is a report on one in a series of National Debate Seminars sponsored by the American Enterprise Institute held at George Washington University, Washington, D. C. and the first in the series to be nationally televised. The debate dealt with the conflict of the two fundamental rights and centered around the controversial Reardon Report adopted at the ABA's House of Delegates in February, 1968. The participants in the debate were Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts, who served as chairman of the Advisory Committee on Minimum Standards for Criminal Justice which originated the Reardon Report and E. Clifton Daniel, the Managing Editor of *The New York Times,* who has distinguished himself as a correspondent in the United States and Europe.

In the debate, Justice Reardon reviewed the recommendations of the Reardon Report. Part I recommended a revision of ABA Canon 20 which deals with newspaper discussion of pending litigation whereby lawyers would be barred from releasing information or opinion that would interfere with a fair trial. From the time of arrest until the commencement of a trial, a lawyer would have to refrain from releasing details of the accused's prior criminal record, the existence or content of any confession, the refusal of the accused to make a statement, the performance of any examination or tests, the identity or credibility of prospective witnesses, the possibility of a plea of guilty to the charge, or any opinion on the accused's guilt or innocence. Violations of these standards by lawyers would be grounds for reprimand, suspension, or, in extreme cases, disbarment.

Part II recommended the adoption of similar internal regulations by law enforcement agencies. If this is not done within a reasonable time, the

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standards for such agencies would be made effective by rules of court or by legislative action. Further, judges should refrain from any conduct or the making of any statement with respect to a pending criminal case that might tend to interfere with a fair trial.

Part III recommended that judges could close pre-trial hearings to the public (including the news media) on motion of the defendant on the ground that evidence or argument adduced at the hearing might disclose matters inadmissible at the trial.

Thus the Reardon Report would place restrictions upon attorneys, law enforcement agencies, and trial judges. And, through the limited use of the judicial contempt power, restrictions would be placed upon anyone (including the press) who disseminates information for publication willfully designed to affect the outcome of the trial, or on anyone violating a judicial order made in an effort to ensure a fair trial. These provisions for contempt have created much adverse comment among the media. Justice Reardon, however, defends the adoption of such limitations as providing the necessary accommodation between the first and sixth amendments.

Mr. Daniel takes sharp issue with the Reardon Report, as indicated by his claim that "Justice Reardon and his colleagues are using a sledgehammer to kill a gnat. Their heavy-handedness may wreck freedom of the press as well; it may shatter the very keystone of our democracy." (p. 37) The "gnat" analogy has reference to his assertion that "the problem of prejudicial pre-trial publicity is not of enormous dimensions." He goes on to state that "only a tiny fraction of criminal cases is ever reported in the press, and in only a fraction of this fraction is there any question of doing violence to the rights of defendants." (p. 37) In rebuttal, Justice Reardon argues that the smallness of the percentage of these cases, though not few in number, does not detract from their importance because it is these "that test the very fabric of our judicial system by placing the most stress upon it." (p. 68)

Mr. Daniel further believes that newspapermen have more faith in juries than have lawyers. Serving on a jury often brings out the best in a man in that he takes his civic duty seriously, tries to clear his mind of prejudice, and renders a fair judgment. Displaying a spirit of modesty not commonly witnessed among journalists, he says that "the juror who reads incriminating information about a defendant in his morning newspaper is just as likely to disbelieve the newspaper as he is to disbelieve the defendant—perhaps more likely." (p. 39) He further points out that the sixth amendment uses the word "impartial" in describing the jury, not "ignorant," or "uninformed."

The spokesman for the news media readily concedes that problems do exist in the matter of fair trial versus free press. The conscience of the press was stirred by the accusations of the Warren Commission and of the Supreme Court in the *Sheppard* case.[1] Further, he says, his profession is

1. Sheppard v. Maxwell, 384 U.S. 333 (1966).

paying serious attention to the ethical, legal, and moral questions and is studying them conscientiously. He points out that in twenty-one states the bar and the press have discussed guidelines for crime news coverage, and in nine of those states joint codes have been adopted. Five other states have joint codes under consideration. Some individual newspapers and broadcasting companies have promulgated their own codes. He is convinced that "newspapers are changing in the direction of maturity, seriousness, responsibility and sobriety." (p. 47) However, this should be done by means of voluntary press and bar fair trial codes, with emphasis on the "voluntary."

Justice Reardon does make several recommendations with which Mr. Daniel agrees. These include in-service training for crime news reporters; establishment by news media through their central organizations of pooling arrangements for reporting the "notorious" case that would prevent spectacles such as occurred after the assassination of President Kennedy in Dallas; and more vigorous enforcement of a new canon of ethics for the legal profession, which, when promulgated, would make it unethical for lawyers to release information or voice opinions that might prejudice a fair trial. According to Justice Reardon ABA Canon 20 "has never been enforced."

Mr. Daniel, however, conveys the depth of his feeling when he says, "I deeply resent, and so do my colleagues, the repeated implication by spokesmen of the legal profession that journalism is a shoddy, money-grubbing business with no morals, no scruples, and no ethics. We newspapermen do not believe that a law degree necessarily makes a man more honorable than a degree in journalism, or that elevation to the bench amounts to canonization. I have absolutely no doubt that the free press in America has prevented and corrected far more injustices than it has committed." (p. 60) He urges the press to resist those parts of the Reardon Report that would make legitimate news unavailable to the public, make trials more secret, and allow judges to dictate what the press might publish. Mr. Daniel concludes by firmly stating his belief that "the presumptuous attempt of the American bar to prescribe rules of conduct not only for itself but also for the police and the press is unwise, unhelpful, unlikely to be effective, and is, in all probability, unconstitutional." (p. 61)

In rebuttal, Justice Reardon contends that the bar standards "do not inhibit in any way the ability of the news media to publish all they will about crime, court administration, corruption in public affairs, or in any matter developed by the media through their own investigation and initiative." (p. 65) Rather than make things easier for the criminal defender, Justice Reardon argues his recommendations are an effort to lessen the possibility of reversals of convictions of a "goodly number of crooks who ramble about our society on the grounds that their causes were prejudiced by publicity about them." (p. 69)

The Reardon Report has not had the full support of the bench and bar. A special committee of the Bar Association of the City of New York,

with Judge Harold R. Medina as chairman, presented a report in 1967 expressing disagreement with certain aspects of the Reardon Report. Former Associate Justice of the United States Supreme Court Tom C. Clark expressed doubts as to the necessity of the proposed American Bar Association rules. However, no group has made a more thorough study of the problems associated with the fair trial–free press controversy than has the Reardon Committee, and its recommendations will no doubt serve, with modifications, as the basis for a solution to this extremely important problem in the administration of justice.

This book presents both sides of the controversy with articulate statements by knowledgeable authorities in their respective fields. The book's format–a lecture-rebuttal-discussion approach–enables the participants to explore many facets of the problem and makes available in a relatively short work an interesting and informative treatment of the subject.

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