SMU | Dedman School of Law

SMU Law Review

Volume 23 | Issue 4 Article 14

January 1969

Book Review: Fair Trial and Free Press

Harvey Wingo

BOOK REVIEW

FAIR TRIAL AND FREE PRESS. By Paul C. Reardon & Clifton Daniel. Washington, D. C.: American Enterprise Institute for Public Policy Research. 1968. Pp. 181. $4.50.

If repetition is the key to learning, much should be learned from this transcript of the Rational Debate Seminar (hereinafter referred to as "The Debate") on fair trial-free press. Since each phase of "The Debate" was presented on a different date and apparently to a predominantly different audience, the participants were obliged to "review" their positions rather frequently. Perhaps this type of program is effective in its ability to reach a greater number of persons and to give the participants more time to prepare their rebuttal, but it does not produce the most stimulating written record. This criticism, however, should be qualified by stressing that this book contributes meaningfully to the controversy over the American Bar Association's Reardon Report on fair trial-free press by revealing the gaping chasm which lies between the two poles of opinion on this issue.

"The Debate" opens with a statement by Justice Reardon, delivered at George Washington University, Washington, D.C. Next is Mr. Daniel's lecture which was delivered one week later followed by a one-week interval, after which rebuttal from both sides and a discussion period with each is presented. To this point in "The Debate" no actual confrontation between the two men occurs. This we find has been reserved for a grand and glorious finale which occurred on May 16, 1968, when Reardon and Daniel appeared in a National Press Club Town Meeting televised by the Metromedia network for its program, "Face to Face."[1] For this televised portion of "The Debate" positions were once more reviewed, and the discussion had just begun to get lively when it became time for questions from the audience. Although this portion of "The Debate" is characterized by some interesting dialogue, the shortness of time on this occasion precluded any really significant contribution.

If there is any area of agreement between Justice Reardon and Mr. Daniel, it is delineated by Daniel in his rebuttal remarks. Daniel concedes that some type of "in-service" legal training for reporters of crime is "not a bad idea," noting that the Supreme Court reporter for his newspaper, *The New York Times*, was sent to Harvard Law School in preparation for his assignment.[2] Daniel also appears to agree with Reardon that the new version of canon 20 of the Canons of Professional Ethics—which makes it unethical for lawyers to release certain information concerning a case or an accused person—should, unlike its predecessor, be enforced.[3] This surface agreement, however, obviously springs from Daniel's confidence in the

[1] Broadcast by radio and television "in several cities, including Washington, New York, Pittsburgh, Boston, and San Francisco." *See* P. Reardon & C. Daniel, Fair Trial and Free Press 150 (1968).

[2] *Id.* at 57-58. Daniel is, of course, managing editor of *The New York Times*.

[3] *See id.* at 59.

non-enforceability of the canon,[4] and, as Reardon states, "from an inner desire that no standards in this area be enforced at all."[5]

Indeed, Mr. Daniel, who surely must speak for at least a sizeable portion of the fourth estate, argues that the solution to the problem lies in a more widespread adoption of voluntary press-bar codes. Emphasizing that such codes are not binding, he contends this does not mean that they have no efficacy: "The efficacy . . . is the same as that inherent in a moral standard that you set up in a religious group . . . [n]obody is required to love his neighbor. The fact that he is enjoined to do so is certainly not a bad thing."[6] Justice Reardon recognizes that some newspapers and networks have adopted "laudable" guidelines for themselves[7] and agrees that voluntary codes must "continue to grow in acceptance and strength,"[8] but he sees them primarily as complementing the American Bar Association proposals and vice versa.[9] "The trouble with the codes," he says, "is that almost all of them have an escape hatch. If you cannot catch the notorious case within the web of a press-bar code, then that code, I suggest, is not much good."[10]

The question of how best to handle the "notorious case" is one over which there seems to be hopeless discord. While avoiding outright approval of the proposal, Daniel is obviously delighted with John Hart Ely's conclusion that if a fair trial cannot be guaranteed without stifling freedom of the press in a few "sensational" cases, "the only alternative will be to let the defendant go free."[11] On this point, Reardon is "in complete and utter disagreement. . . . These notorious cases most severely test our fabric, put it to its toughest test."[12]

If Mr. Daniel does not endorse the idea of setting the defendant free in the most notorious cases, it is apparently because he claims more confidence

---

[4] In his opening lecture, Daniel makes the following comments: "I have heard of only one action for disbarment against a lawyer for instigating, aiding and abetting the dissemination of prejudicial publicity. Remarkable!

Will this new canon be more rigidly enforced than the old one?

One wonders!"

Id. at 33.

[5] *Id.* at 66.

[6] *Id.* at 130.

[7] *Id.* at 23. Reardon feels, however, that much of what has been done voluntarily can be attributed to the ABA action: "I . . . suggest, although he doesn't give us credit in his paper, that the conscience of the press has had some assistance from what we have been doing. If the whole debate were to cease right now a great deal of progress has been made. We recognize it, and modestly I claim that we had something to do with it." *Id.* at 69.

[8] *Id.* at 26.

[9] *Id.*

[10] *Id.* at 84.

[11] *Id.* at 44. See also *id.* at 137-38 where Daniel states:

> I didn't say those things that you attributed to me. I quoted Mr. John Hart Ely, an American lawyer, writing about the English system and comparing it with ours, and I quoted Judge Skelly Wright of the Circuit Court of Appeals.
>
> I think the answer to your question is that it would be for the judge to determine. He would determine it at any point that he concluded that it was just impossible to get a jury that would give the man a fair trial.
>
> I can't imagine this happening very often. I offered it as testimony from two distinguished members of the bar and the bench who seem to feel that maintaining freedom of the press is more important than letting an occasional criminal escape now and then.

[12] *Id.* at 88.

in the ability of a jury in such cases to give the accused a fair trial. He cites with emphasis the controversial *Coppolino* case in New Jersey, pointing out the highly prejudicial publicity against Coppolino, including an article in *The New York Times* praising one of the principal prosecution witnesses.[13] Despite the prejudicial news coverage, Coppolino was acquitted.[14] Daniel's account of this case leads him to remark: "Sometimes I think we newspapermen have more faith in juries than lawyers have. Serving on a jury often brings out the best in a man. It may be the only time in his life when he is solemnly and publicly called upon to do his duty as a citizen. He takes his duty seriously, tries to clear his mind of prejudice, and render a fair judgment."[15]

This brings us to what is perhaps Daniel's most forceful argument. At the time the Reardon Report was adopted by the American Bar Association's House of Delegates, members of the press were urging that action be delayed pending an empirical study sponsored by the American Newspaper Publisher's Association on the issue of whether prejudicial news coverage "really seriously affects the impartiality of juries."[16] Justice Reardon emphasizes the difficulty inherent in assessing jury behavior: "Sometimes a juror will lie, sometimes he will tell you the truth. Sometimes he is moved by things he doesn't recognize himself. He cannot sometimes assess what has happened to his subconscious and what he has heard. And anyone who has worked with large groups of jurors knows this to be so."[17] For this reason, and because it was felt that enough information had been gathered "to warrant [the] conclusion that there was an interference with a fair jury trial by some of the publicity which was getting through to the jurors,"[18] the decision was made to submit the report for adoption without the benefit of an empirical study. Daniel's contention, of course, is that since "it is not a proven fact that publicity actually contaminates juries,"[19] what the American Bar Association has done is "to go ahead and render the verdict before receiving all the evidence."[20]

Space does not permit a discussion of all the issues raised and debated, and "finding a winner"—if indeed there is one—probably depends upon your own view of the problem. Each side is presented forcefully and persuasively. Mr. Daniel's arguments do seem at times to spring less from a reasoned interpretation of the ABA standards than from an emotional opposition to any binding rules affecting the press in this area. The central feature of the Reardon Report is the imposition of restrictions on members of the legal profession in their dealings with the press. The press, of course, is directly affected by these restrictions, but even Mr. Daniel has

[13] *See id.* at 38.

[14] *See id.* at 156, where Daniel again discusses this case, pointing out that Coppolino was later "convicted in Florida on another charge and by another jury and on other evidence."

[15] *Id.* at 39.

[16] *Id.* at 32. *See also id.* at 108, where Daniel was questioned as to the distinction between a "serious" and "plain" prejudicial effect on a jury, to which he responds: "Maybe I chose my adverbs wrongly."

[17] *Id.* at 95.

[18] *Id.* at 155.

[19] *Id.* at 38.

[20] *Id.* at 155.

stated that he has "no objection to whatever the bar wishes to do about disciplining its own members."[21] The use of the contempt power is limited by the report to those instances in which publication of an extra-judicial statement is "*willfully designed* to affect the outcome of the trial and . . . seriously threatens to have such an effect" or to cases in which a person "knowingly violates a judicial order not to disseminate, until completion of the trial, specified information referred to in a hearing closed to the public."[22] Finally, Mr. Daniel's contention that the Reardon Report "very seriously encourages the holding of secret hearings"[23] seems wholly unfounded. The Report merely provides for the closing of certain pre-trial hearings upon request by the defendant "when there will be evidence which may or may not be inadmissible which would prejudice the fair outcome of [the] trial."[24] Furthermore, a "complete record of the preliminary trial hearing" is required and is to be "made public after the trial or disposition of the case without trial."[25]

A nagging doubt remains concerning the actual effect of prejudicial publicity upon juries. Even assuming, however, that the problem is limited to a few "notorious" cases, it is difficult to quarrel with the following comment made by Justice Reardon in his opening lecture:

> I also deem it a mistake to attempt to minimize the danger to the entire system of criminal justice generated by abuses in the notorious case, that is to say, the occasional case. As was stated by a witness several years ago before a Senate subcommittee, 'It is only those cases which are already of a nature calculated to test most severely the fairness of the judicial process that arouse the interest of the press. These cases are numerically small but mirror the best and the worst of our vaunted claim to being a government under law. They are important exactly because they test the very fabric of our judicial system by placing the most stress upon it.'[26]

*Harvey Wingo**

[21] *Id.* at 129.
[22] *Id.* at 17 (emphasis added).
[23] *Id.* at 158. *See also id.* at 40-43.
[24] *Id.* at 161-62.
[25] *Id.* at 16-17.
[26] *Id.* at 7-8.

* B.A., Birmingham-Southern College; M.A., J.D., Vanderbilt University. Assistant Professor of Law, Southern Methodist University.