

***The Press in the Jury Box.* Howard Felsher and Michael Rosen. (New York: The Macmillan Company, 1966. 239 pp., \$5.95 (also now in paperback, retitled *Justice, U.S.A.?*, New York: Collier Books, 1966. 207 pp., 95¢).**

***Free Press and Fair Trial.* Donald M. Gilmor. (Washington, D.C.: Public Affairs Press, 1966. 254 pp., \$6.00.)**

***Justice and the Press.* John Lofton. (Boston: Beacon Press, 1966. 462 pp., \$5.95.)**

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Attention to the fair trial-free press controversy in recent months has changed from a trickle of words to a flood. Besides the three books reviewed here, there have been lengthy, often-conflicting special reports issued by such groups as the American Bar Association, the Association of the Bar of the City of New York and the American Newspaper Publishers' Association. Perhaps even more significant has been the exploratory flow of scholarly articles attempting to measure the effects of pre-trial publicity in the mass news media.

Other behavioral science-oriented research is already in progress and expected to increase rapidly in quantity. In addition, at least two more fair trial-free press books have just appeared or will appear soon—one by Washington Post associate editor Alfred Friendly with lawyer Ronald Goldfarb is now available and another by journalism educator-political scientist J. Edward Gerald of the University of Minnesota is enroute.

All such efforts are welcome additions to the dialogue about one of democratic society's most troublesome legal dilemmas: how to protect the Constitutional guarantees of both press freedom and fair trial and yet, concurrently, how to resolve obvious elements of conflict and incompatibility between these two rights. While progress in the debate has been made in recent years (at least those involved are now willing to discuss the problem), the struggle continues in many ways to be fair trial *versus* free press.

It seems ironic indeed that, while long-overdue books are now easily available, the basic problem does not appear much closer to definite,

long-term solution. If anything, the debate has become sometimes hardened and unproductive, repetitious and circular. This situation, of course, should not be blamed on those authors who have tried to analyze and resolve the controversy; it is most traceable, seemingly, to the inherent complexities of the problem, the inherent tensions and role conflicts between journalist and lawyer, and the inherent limitations of social science research in getting answers to some of the most basic fair trial-free press questions. Thus, while two of the three books reviewed here are especially helpful in providing the needed outline and overview of issues, dramatically new research attacks and insights will eventually be needed if the problem is ever to be understood fully and resolved.

What definitely is not needed are more books with the "semi-hysterical" slant of Howard Felsher's and Michael Rosen's *The Press in the Jury Box*. For the serious scholar—and for purposes of this review—the Felsher and Rosen volume can be passed off quickly as too superficial and anti-press to be of any likely lasting value. Such a sweeping assessment does not deny merits in the book, especially for the layman interested in potent documentation of past press sins in pretrial publicity. Some of these attacks on news media responsibility are worth considering; but, obviously, there are more balanced, systematic and thorough ways of presenting the debate. Based on academic criteria, both Donald M. Gillmor's *Free Press and Fair Trial* and John Lofton's *Justice and the Press* do just this. Their two efforts, already a bit dated by the deluge of recent developments and special reports, but they will have lasting significance for students of law, journalism, and the social sciences and for future researchers.

Conscious comparison between two pieces of research has obvious limitations, but such linkage here seems especially appropriate. Gillmor's and Lofton's end products are in many ways similar: generally careful and thoughtful analytical discussions of the main historical and contemporary legal and sociological issues involved. Also, while sharing certain weaknesses, Gillmore is often strong exactly where Lofton is less effective—and vice versa. The two books simply tend to complement each other; both stand well enough alone but when combined offer an even more effective research package. While it could be argued that it is too bad the authors did not team up in the first place, the better argument is that by working independently they have probably contributed more diversity and depth to the dialogue.

Both books are usually effective in showing the main arguments that can be used against the press, citing such well-publicized murder trials as Jack Ruby in Dallas, Dr. Sam Sheppard in Cleveland, or Richard Speck in Chicago. (The June, 1966, U.S. Supreme Court decision in the Sheppard case is included in both volumes; the Speck case, involving the murder of eight student nurses, occurred too late in the summer to be cited.) But, at the same time, both authors are effective in touching sensitive points of fair trial responsibility for the judge, lawyer, policeman, or other officials. Indeed, the reader may well be left with the conclusion that all sides involved should exercise more self-restraint and should carefully re-assess existing policies and practices. While serving as “watchdogs for society,” some journalists must stop reacting so automatically and defensively in the name of First Amendment rights; and public prosecutors, as one group, must stop trying on occasion to use the press to get convictions (or for political gain). Gillmor and Lofton certainly suggest that “out-of-courtroom commentary,” such as on prior criminal record or supposed confessions, could be more restricted without necessarily impairing press freedom. No matter what the reader may feel about the authors’ conclusions and interpretations, they have made a forceful case that modern-day jury trial injustice from publicity is a problem needing modern-day re-examination.

The different merits of each book seem traceable not so much to the authors’ frames of reference as to their defined scope of the writing task. Gillmor (a journalism Ph.D. and associate professor at the University of Minnesota with political science and law school approaches to his topic) has kept the focus narrowed to his title: *Free Press and Fair Trial*. Such emphasis has enabled considerable depth on his main theme. By contrast, Lofton (a lawyer by background who is an associate editor of the Pittsburgh Post-Gazette) has interpreted his *Justice and the Press* in the broader context of not only fair trial but also crime news, in general. The positive result here is that he is often able to fit the fair trial issue into perspective with broader questions about rights of the accused.

The defined scopes of the books, of course, have their corollary weaknesses: Gillmor tends to be too narrow and Lofton tends to be too broad—impressions accentuated by seeming occasional organizational weaknesses in both manuscripts. Gillmor has trouble with lack of continuity and disjointedness (for example, “Trial by Newspaper” is used as a heading for one chapter, a sub-heading in another and, also, as the main theme

in several other chapters). Lofton is plagued by wanderings and only semi-relevant analysis (most of his first 132 pages are devoted to interesting but fairly routine history that backs into the subject).

In sum, it might be wished that Gillmor had been able to devote more space to perspective and Lofton more to the central pretrial publicity question.

The impression of wishful thinking on other points and details may depend most on the academic orientation of the reader. Although both books have come up with helpful depth and breadth in bibliographies, "legal purists," for example, may be bothered by the authors' tendency not always to defend fully their conclusions and assessments about judicial reasoning nor to develop extensive legal-type formal footnoting and documentation. (At this point, an anti-publisher aside might be appropriate. Both books have all footnote references placed at the back—certainly an acceptable practice. But use of such references has been made much harder than necessary by heading these back-of-the-book sections with only chapter numbers and without chapter titles or inclusive text pages also marked.)

Among all likely groups of readers, behavioral scientists may be most disappointed by what Gillmor and Lofton have left out or not stressed. Because the fair trial-free press issue is largely a problem in human behavior, it does seem unfortunate that more attention could not have been paid to certain social science literature. Lofton virtually ignores what is known—and not known—about effects of the mass media; he apparently also sees little value in controlled or experimental research on basic pretrial publicity questions. Gillmor does a better job on media effects but fails to develop his discussion fully. Also, while advocating more behavioral research, he leaves out needed discussion of important methodological problems and limitations that will be involved.

Such methodological concerns are going to be essential in any future attempts to understand more clearly and to resolve the fair trial question. How can decisions of whether to limit pretrial publicity be made when the effects of such publicity are not really known? When and how does the press affect jury deliberations? Why? Why not?

Lack of satisfactory answers here can be attributed to several reasons—including the fact that:

Mass media effects, especially over time, are hard to isolate because of the many possible intervening variables that leave uncertain even the most elementary efforts to establish cause-effect relationships;

Direct observation, and thus better understanding, of actual jury deliberations have been severely restricted because of concern over possible interference with the judicial process;

Even when successfully controlled, experimental research studies suffer from serious problems in validity (for instance, one need only compare likely differences between an in-class experiment on media effects with college sophomores and a “real” situation with jurors deciding whether an accused killer will live).

Data collected so far are inconclusive, sometimes contradictory, but indicate that effects of pretrial mass media publicity may have been exaggerated. Such tentativeness and uncertainty can be used, of course, as one strong argument for press restraint and restriction; what we don’t know can hurt us.

But perhaps, even more importantly, the research evidence suggests to U.S. Supreme Court Justices and others that judicial opinions favoring the accused should be based less on assumptions and sweeping generalities about media effects and more on the concept of “reasonable doubt.” Also, the message is clear that the courts should pay increasing attention to sociological research findings—even if the results of such efforts are less than satisfactory.

Besides mass media effects, there are other assumptions in the fair trial debate that have hindered efforts at understanding and problem-solving. For example, the obvious question: Is an arrested person really considered innocent until proven guilty? Does the average citizen—does he care to—distinguish between the individual being brought in for questioning, being arrested, and being convicted? Here even the common news media practice of calling a person a “suspect” or “accused killer” would seem to involve a broad philosophical question under the label of “unintended unfairness by publicity.”

Or, what about such ingrained judicial practices as change of venue or a judge’s instructions to the jury to disregard news media accounts? Are such efforts really effective? Based on fair trial standards, could a Lee Harvey Oswald have received a fair trial anywhere in the United States? Or, within reach of mass communications, anywhere in the world?

Even more basic might be further assessment of the jury system, as attempted in the University of Chicago Jury Project. Specifically: it seems irrational that pretrial publicity should sometimes force selection of “mostly uninformed” jurors who (as research on news media readership, viewing and listening tells us) will come from primarily the lowest

segments of society in education level, socioeconomic status, and participation in the democratic process. In fact, the non-user and infrequent user of the media is often found to be an apathetic, even alienated, member of his community. With such evidence, one might well advocate the merits of the "blue ribbon jury" in sensational-type criminal cases. Although such a concept has obvious drawbacks, it argues realistically that media exposure should be assumed and that criteria for jury selection should stress the individuals anticipated ability to be analytical, objective and introspective in personal decision-making.

Gillmor and Lofton are especially helpful in stimulating these and other provocative questions. And they have provided much of the foundation needed to suggest still further challenges to society and the scholar. At this point in human understanding, not much more could seemingly be expected of any fair trial-free press researcher. What perhaps could be asked is that the evidence be constantly re-assessed. As new developments and research continue to make Gillmor's and Lofton's efforts out of date, there likely will be the need to revise and update these volumes and others. That such an effort would seem desirable is in itself, perhaps, one logical and effective standard by which to judge what is a worthwhile book and significant research.