

being Thomas Jefferson and John Adams. The talent of the time is dramatically illustrated by Rossiter's exercise in composing a different list of delegates who might have comprised the Convention. It is only slightly less illustrious than the actual assembly. If the Convention was not, as Jefferson called it, "an assembly of demi-gods," it was by any relevant standard a remarkable group, the like of which we certainly could not muster today. The 1780s were, to use Edmund S. Morgan's perceptive phrase, "the brief period when America's intellectual leaders were her political leaders."

It is disheartening, for me at least, to compare the period of our national origins with the America of today. In his summary of the political consensus of that day, Rossiter states:

Finally, it takes more than a perfect plan of government to preserve that state of ordered liberty which is the mark of the good society. Something else is needed, some quality of mind and heart diffused among the people to strengthen the urge to peaceful obedience and among their governors to keep them from sliding into corruption. In a republic that 'something else' is, quite simply, public and private morality. Free government rests at bottom on the moral basis of decent, brave, honest, liberty-loving, industrious, patriotic men. Such men are the raw materials of free government, and there must be enough of them in every society to overcome the obstinate forces of dishonor, unreason, sloth and cruelty.⁶

At the beginning of the Republic, America had the "something else." Can the same be said for today?

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THE PRESS IN THE JURY BOX. By *Howard Felsher* and *Michael Rosen*. New York: Macmillan, 1966. Pp. 239. \$4.95.

The coverage of criminal trials by mass news media is a subject which continues to capture attention and yet persistently defies illuminating analysis. It is also the subject of a recent book by Howard Felsher and Michael Rosen.¹ The authors, as the title indicates, have put the press in the jury box and found it "Guilty." Guilty

⁶ *Id.* at 63.

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¹ FELSHER & ROSEN, *THE PRESS IN THE JURY BOX* (1966).

of what they are not sure, but they propose a solution nevertheless: there ought to be a law. Perhaps there should be, for there are few, if any, legal inhibitions in most American jurisdictions regarding press coverage of criminal trials; but whatever the merits of their cause, this book fails to provide insights sufficiently persuasive to send legislatures into night session to resolve the problem.

There is no doubt that both Mr. Felsher, a TV producer, and Mr. Rosen, a lawyer, are deeply concerned with the spectre of biased and pervasive media coverage of pending criminal proceedings, and there is apparent throughout the book the public spirit that must have prompted their undertaking. However, an awareness of the problem, or even indignation, cannot substitute for careful research and dispassionate discussion, if the objective is to speed the process of reform. The absence of these qualities cannot be excused by maintaining that the authors are addressing the general reader, for in all likelihood the so-called general reader is similar to Thurber's unicorn: You may say you have seen one, but no one will believe you since no one else has. A book must meet professional standards to be worth anyone's attention, and this one fails to meet the standards of either accurate, objective journalism or careful, well-reasoned, analytical legal writing.

The book is in the main a haphazard collection of anecdotally-recited criminal cases, which are unaccompanied by citation, casually referred to, frequently unidentified and occasionally even misread.² The research reflected thereby is, to state the matter as mildly as possible, impressionistic. The research technique is disclosed with disarming frankness. Mr. Felsher states: "I had no fear that I would overlook a pertinent example. From all across the country stories illustrating *The Press in the Jury Box* were mailed to me."³ What can one say? The skeptic is struck dumb by such honest faith.

Even where there are no blatant errors, there is an amateurish quality about the writing, relieved only occasionally by a spritely

² Compare the following interpretation of what most probably is *New York Times v. Sullivan*, 376 U.S. 254 (1964): "A U.S. Supreme Court decision . . . stated that in a libel suit brought against a newspaper, proof of the libel itself is not enough to win the case. The aggrieved party must also prove that the newspaper intended the libel maliciously. This decision, obviously, grants great freedom to Newspapers, since it is very nearly impossible to prove intent." FELSHER & ROSEN, *op. cit. supra* note 1, at 238.

³ *Id.* at 7

style. The following piece of wide-eyed legal realism bears repeating:

One of the great imponderables, always, is the reaction of a court of appeals. There is no way to predict with accuracy whether it will affirm or reverse a conviction. Precedents that seem to apply suddenly do not apply. Other precedents are suddenly overturned in thoroughly unforeseen fashion.⁴

Not surprisingly, the book concludes with a plea for the enactment of a "legislative statute."⁵

Apart from a need for empirical data, there is obviously lacking the thoughtful analysis which any exposition of the constitutional and other legal problems presented by convergence of press and criminal proceedings requires. A few of the standard United States Supreme Court cases on the subject⁶ are casually and unsystematically discussed.⁷ Attention is focused on a recent judicial declaration that lawyers who divulge information about criminal proceedings, pending or in progress, are in violation of Canons 5 and 20 of the Canons of Professional Ethics.⁸ Although the authors are aware of the difficulty of tracing the sources of such information,⁹ there is no discussion of whether the threat of disciplinary action is so remote as to provide an ineffective deterrent to these undesirable disclosures to the press. The rule of the English courts which prohibits, on pain of a contempt citation, comment by newspapers beyond fair and accurate reporting of criminal proceedings¹⁰ is given uncritical praise,¹¹ but there appears no discussion of the possible danger that the contempt power might be used by a thin-skinned judiciary to protect not the accused, but judges themselves from

⁴ *Id.* at 50.

⁵ *Id.* at 236.

⁶ *E.g.*, *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Stroble v. California*, 343 U.S. 181 (1952).

⁷ For example, *Rideau v. Louisiana*, *supra* note 6, a case involving a televised interview prior to trial between a sheriff and a criminal accused and found in the standard casebooks on constitutional law, is referred to as a "little known" case. FELSHER & ROSEN, *op. cit. supra* note 1, at 140. See DOWLING & GUNTHER, *CASES ON CONSTITUTIONAL LAW* 814 (1965); LOCKHART, KAMISAR & CHOPER, *CASES ON CONSTITUTIONAL LAW* 816-19 (1964).

⁸ *State v. Van Dwyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964).

⁹ FELSHER & ROSEN, *op. cit. supra* note 1, at 95.

¹⁰ Once a warrant has been issued, the case is "pending," and comment by the press beyond what may be characterized as a fair and accurate report is prohibited. *E.g.*, *Rex v. Editor of the Evening Standard*, 40 T.L.R. 833 (K.B. 1924). See Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17 (1965); Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935).

¹¹ FELSHER & ROSEN, *op. cit. supra* note 1, at 208-10.

critical review in the press. The book concludes by supporting the model statute proposed by Judge Meyer of the New York Supreme Court regarding the availability and desirability of a statutory solution to the problem.¹² The authors have selected an interesting standard bearer,¹³ but it is unfortunate that they fail to give any attention to the problems raised by an exclusively statutory solution on the state level.

The complexities of this subject; the competing constitutional considerations; the possible contradiction in terms between the "public" trial and the "fair" trial; the danger of moving to free the accused from publicity only in the end to insulate the judiciary from criticism; and the trojan horse aspect of the contempt power are formidable obstacles to the drafting of adequate solutions. Nevertheless, these obstacles must be analyzed in terms of specific legislative and judicial remedies,¹⁴ rather than in terms of the Pollonius-type pronouncements that dominate the present approaches in this field. While all can join in deploring the prejudice that publicity injects into the concept of a fair trial, we are about to drown in crocodile tears. What we need is thoughtful recommendation, based on sound empirical research. What this book provides, however, is no more than another jeremiad against the press.

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¹² *Id.* at 236-39.

¹³ See address by Judge Meyer, in *Symposium: Fair Trial—Free Press*, *Crim. Law Bull.*, Apr. 1966, 26-37; Meyer, *Free Press v. Fair Trial: The Judge's View*, 41 *N.D.L. Rev.* 14 (1964).

¹⁴ The book was written prior to the decision of the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), in which the Court held that Sheppard's trial for the murder of his wife had been conducted amid such "inherently prejudicial publicity" as to compel the reversal of the conviction as a matter of constitutional law. From the extensive exposition of the circumstances of that case found in this book, FELSHER & ROSEN, *op. cit. supra* note 1, at 69-78, it appears safe to surmise that the authors welcome the decision.

However, the fact that the Court in *Sheppard* failed to make mandatory any procedures for preventing such prejudicial publicity in the future indicates an unwillingness to prescribe immutable constitutional strictures in such a sensitive area at the present time. No single one of the suggestions in *Sheppard* was given any sort of legally binding endorsement, not to speak of constitutional compulsion. This is particularly ironic in light of the fact that the trial judge is reproached by the Court for merely "suggesting" and "requesting" that the jury not "expose themselves to comment upon the case." But the language of command, enforced by well-described sanctions, is what is clearly absent from the Court's own opinion in *Sheppard*.

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