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Book Reviews

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BOOK REVIEWS

FREE PRESS AND FAIR TRIAL. By Donald M. Gillmor, University of Minnesota. Washington, D. C.: Public Affairs Press. 1966. Pp. 254. $7.50.

The author is a teacher of journalism at the University of Minnesota. His book is a timely review of the serious problems and possible solutions of the centuries-old antagonism between the Bar and the Newspaper Profession. It should be of particular interest to both students and practitioners of law

Free Press and Fair Trial is not just a review of many and conflicting decisions over the constitutional issues of the public's right to know what is going on in our courts and the accused's right to an unbiased treatment of the charges against him. It is an in depth analysis of what might and could be done to protect those rights.

Professor Gillmor has included in his appendix the full opinion of the Supreme Court of the United States in the case of *Sheppard v Maxwell.* Perhaps no prosecution in modern times has so pointed up the terrible and terrifying consequences of trial by newspaper than Sheppard. Accused in 1954 of slaying his first wife, Dr. Sheppard was tried and convicted in a bizarre atmosphere of publicity fed by prosecutors and defense counsel alike. He served nine years in prison. Soon after the jury returned the guilty verdict Sheppard's mother killed herself, and his father died a week later The slain wife's father committed suicide. Then a dozen years later a new trial found this man innocent of the crime. What brought all this to pass? Gillmor cites a brief filed by the American Civil Liberties Union, which had joined in Sheppard's appeal to the Supreme Court, urging " 'the constitutional invalidation of the conviction . because the trial court failed to protect the accused from the inherently prejudicial publicity which saturated the community.' " The brief attempted to demonstrate " (1) damaging publicity describing prosecution evidence which varied materially from that introduced

by the prosecution at the trial, (2) damaging publicity describing prosecution evidence which would have been inadmissible in court, (3) publicity which made celebrities of the trial jurors, and (4) the accusatory publicity which charged the guilt or attacked the character of the accused. Sheppard's appeal, the brief concluded, gave the Supreme Court an opportunity 'to correct at last an egregious denial of criminal due process.' "

Again the problem was posed in stark reality with the assassination of President Kennedy and the case against Lee Harvey Oswald. Hand-fed by police investigators and prosecuting attorneys, the mass media convicted Oswald almost from the very time of his arrest. Completely ignored was another of our proud boasts that here in this country one is presumed innocent until proved guilty Where, the question is asked, could the murdered Oswald have received a fair trial in Dallas? Or for that matter, anywhere in the country? Where indeed? In their frantic haste to project an image and satisfy a demanding public, men charged with enforcement of the law on the one hand, and the gatherers of news on the other, combined to make an impartial judgment of the accused impossible.

What happened in the Sheppard and Oswald cases could not have taken place in Great Britain. Doubtless the newspapers and television stations, reporters and commentators, would have been held in contempt for publishing and commenting upon the guilt or innocence of the men accused. And, one suspects, the prosecuting attorneys at least would have been disbarred. But is the British system necessarily the answer? Emphatically not, according to Professor Gillmor He sees in Britain a loss of freedom and a kind of false image of those who parcel out justice because, "The courts are the people's business; they are not the private preserve of either press or bar." Theirs is just not our way. Freedom of press and speech is too intimately woven into the fabric of American life to be replaced by a rigid system so alien to American tradition. The public's right to know must somehow be balanced against the accused's right to a fair trial.

And yet the impact of the injustices detailed by the cases cited is frightening. While the British system may not be for us or even the best, yet in the context of Sheppard and Oswald and the dozens of others discussed, the reader comes away convinced that something ought to be done to correct the injustices. In the end it will have to be left to the courts to discipline their own and since all attorneys are officers of the court, this course should not be too far removed from reality Obviously, this will mean difficulties. Crimes may go undetected for lack of detailed publicity, newspaper

hawks may be frustrated in their efforts to protect the public's right to know, criminals may be freed or never prosecuted at all. But we have given lip service for so long to the ancient American principle that it is better to let ten guilty men go free than to condemn an innocent one, that perhaps now is the time to face up to the implications of that principle to give it meaning.

I think that Gillmor writes very well indeed. He is never pedantic or boring or dogmatic. And while the reader is left to make up his own mind concerning these extremely grave issues, Professor Gillmor expresses his view, too, unhesitatingly and clearly. I would perhaps have liked him to have gone further. What, for example, is meant by the statement, "When free press preempts fair trial in America, balance must be restored within an American value system"? Or, after Sheppard and Oswald and all the other cases, why does Professor Gillmor call for scientific studies to show or deny a "causal relationship between pre-verdict information and impaired jury verdicts"? Prejudice may always be implied from what took place. But, no matter; his is a thoughful and provocative work, well organized and documented. It should be required reading for those self-styled patriots who proclaim the American way and then denounce those who believe that injustices do exist and improvements can be made.

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1965 RELIGION AND THE PUBLIC ORDER. Edited by Donald Giannella. Chicago: University of Chicago Press. 1966. Pp. 367 $6.95.

Shall public funds be used to support shared-time programs in which parochial school students attend certain classes provided in the public schools? Is traditional separation of church and state being trespassed? Shall the sale of contraceptive devices be legal in all states? Shall birth control services as part of public health and welfare programs be offered? As a source of added tax revenue, shall states institute state lotteries as well as to increase other forms of legalized gambling? Does a medical doctor have the legal right to prescribe medicine or other therapy for a patient whose religious profession opposes such medicine or other therapy? These varied questions and more are considered in the collection of articles

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for which Donald A. Giannella, Villanova University School of Law, serves as editor

The lawyer will find in this volume an excellent synopsis of the present position of church-state relationships as currently being interpreted in state and federal courts. The layman will discover a comprehensive description of complex but vitally important issues which reflects the diversity and dynamics of American social living. Equally impressive to the layman is the willingness of our legal system to attempt to cope with problems affecting the rights and freedoms of individuals and groups as regards their expression of religious conviction.

In the first article, Harvard Law School Professor, John H. Mansfield, writes concerning conscientious objection. In *United States v Seeger*, the Supreme Court was asked to rule on whether or not Daniel Andrew Seeger was justified in claiming exemption from military service on the grounds of conscientious objection. The conclusion of the Court was that Seeger was entitled to exemption, and the Court's decision was based on section 6(j) of the Universal Military Training and Service Act of 1948. Section 6(j) provides for the exemption of any person "who, by religious training and belief, is conscientiously opposed to participation in war in any form." Further, the section defines religious training and belief as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Was the Court justified in its conclusion, considering that Daniel Seeger admitted to no belief in a Supreme Being? Professor Mansfield asserts that the Supreme Court rested its decision on the Selective Training and Service Act of 1940, the predecessor of the 1948 act, which omits any reference to a Supreme Being. By the 1940 act, any person is entitled to exemption "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," Mansfield concludes his essay with the following:

> It is very unlikely that with the *Seeger* decision we have heard the last of the legal and constitutional problems of conscientious objection. The test for exemption set forth in that case is too vague and unsatisfactory to avoid the need for further elucidation by the Court. Furthermore, still left open is the question of the non-religious conscientious objector, whether under the Court's decision he still exists, and if he does exist, whether the denial of exemption to him is constitutionally justified. When further aspects of the problem of conscientious objection are presented to the Court, it will

> be against a background of constantly changing public attitudes toward conscience and religion, and radical changes in the character of war and the moral questions it presents.[1]

Titles of other articles appearing in this volume include "Religion in American Public Schools," "The Church-State Settlement in the Federal Aid to Education Act," "Standing to Sue in Establishment Cases," "Organized Religion and Political Affairs," "Birth Control: the Issue and the Reality," and "Maximum and Minimum Theories of Natural Law"

The reviewer would now sample another of the above selections in the contribution of Albert C. Saunders whose article discusses conflicting Christian ethical approaches to the issue of birth control. Mr Saunders' main objective is to help the reader to understand the American Roman Catholic position on this subject. There is no simple or single Church point of view as may have been the case in former times. There is, as John Leo describes it, a threefold division: "Those who feel that no contraceptive is inherently immoral, those who argue that all contraceptives are immoral, and those, who, for various reasons, believe the pill but not other contraceptives can be reconciled with traditional Catholic teaching on marriage."[2]

The Catholic conservative bases his stance on *natural law* To frustrate the natural purpose of the act of generation, by this interpretation, is immoral, and immorality is bound up with sexual pleasure sans offspring. In contrast, Protestants tend to reject this premise and conclude instead that human sexual expression includes both procreation and love fulfillment.

A rather novel dimension to this problem has to do with a Catholic objection to governmental agencies promoting birth control information and assistance. But objection is non-theological. Basis for this objection relates to a decision of the United States Supreme Court in *Griswold v Connecticut*.[3] The Court ruled as invalid a Connecticut law making the use of contraceptives a criminal offense. But the Court was not holding as invalid an anti-birth control law Rather, the Court asserted that the right of privacy is guaranteed by the Constitution. American Catholic opponents of governmental intrusion into the area of birth control have constructed an entirely new case using the *Griswold* decision as a basis. They interpret the Court's decision to mean that the government should be neutral about the birth control issue. To engage in any aspect of the controversy would be an invasion of marital privacy by the government, and the

1. 1965 RELEGION AND THE PUBLIC ORDER, p.81, hereinafter cited as GIANNELLA.
2. GIANNELLA p.205.
3. 381 U.S. 479 (1965).

complex problem of excessive population cannot be dealt with by birth control methods.

On April 1, 1965, Senator Ernest Gruening introduced a bill in the United States Senate which proposed to coordinate population control research and information programs in the executive branch of the federal government. Offices in both the Department of State and the Department of Health, Education and Welfare were to be established. The former would be concerned with world population problems while the latter would deal with domestic issues of population growth.

Obviously, the same segment of Roman Catholic opinion, already described, expressed strong opposition to the bill of Senator Gruening, and to the knowledge of this reviewer, the bill has not yet been passed.[4] A summary of this opposition includes the following five parts:

> 1. The right to marital privacy has absolute constitutional protection. Government should be neutral with regard to the issue of birth control, which impinges upon this right.
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> 2. Governmental coercion of conscience, particularly that of the "weaker members of society," inevitably results from governmental programs providing birth control information and services.
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> 3. Population "control" is not the only answer to problems of population growth. Indeed, it may reflect an implicit racial eugenicism. (Moreover, "responsible parenthood" does not mean simply fewer children, for this can reflect a selfish motive that is morally wrong.)
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> 4. Both statistics regarding population increase and arguments for the effectiveness of birth control programs should be seriously questioned. More research is needed on the medical and demographic aspects of population growth problems, and governmental programs in this limited area would be proper
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> 5. The principle of respect for human life is an absolute. Thus contraception, abortion, and sterilization are prohibited by the Roman Catholic Church. On the other hand, the church does support the principle of responsible parenthood, understood in a carefully delimited positive sense.[5]

In contrast, while Protestantism has not examined the theological and ethical dimensions of the population growth problem in the depth achieved by Roman Catholicism, still there is a growing

4. S. 1676, 89th Cong. 2d Sess. (1965).
5. GIANNELLA, P 226.

"Protestant concensus in favor of voluntary birth control through the provision of information and assistance on contraceptive devices. This concensus reflects a blend of secular and religious motivations."[6]

Supplemental to the articles already mentioned, Editor Giannella includes a listing and brief synopsis of books on religion, law, and society for the period from September, 1964 to September, 1965. Also, the volume is concluded with a summary of "the year in review" Described, for example, are several court cases which test the 1963 decision prohibiting prayers and Bible reading in the public schools. Quite diverse interpretations are found. Then, too, a number of courts were asked to rule on matters pertaining to religious tax exemptions. Shall religious institutions be exempt from paying the property tax? Here, again, diverse rulings are found.

In summation, it is the opinion of this reviewer that Donald Giannella has brought together a very valuable collection of articles covering contemporary church-state relationships. As a similar volume was published in 1964, it is hoped that a 1966 edition will be forthcoming. Genuine service to law and related professions is being generated in this way

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6. GIANNELLA, p. 236.

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