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BOOK REVIEWS

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NEWS OF CRIME: COURTS AND PRESS IN CONFLICT. By J. Edward Gerald. Westport, Connecticut: Greenwood Press, 1983. Pp. X, 184. $29.95.

*Reviewed by David E. Kendall**

The "violent human-interest story,"[1] that is, the crime story, has always been a great popular favorite: it is "news which appeals to the average person as the most interesting and exciting in the paper and on television."[2] In the past two decades, reporting on crime and the criminal justice process has ensnarled the press in a number of running battles with the courts. J. Edward Gerald's *News of Crime: Courts and Press in Conflict* recounts some of these conflicts. Gerald, who has taught journalism at a number of different universities,[3] assays a short history of the controversies over prejudicial pretrial publicity, gag orders, courtroom closures, subpoenas to journalists, and cameras in the courtroom.

Professor Gerald's stated purpose in writing is "to help dispel misconceptions based on irritation and anger and to encourage understanding between the courts and the press."[4] While his brief book is refreshingly free of polemics and useful as a thumbnail history of recent struggles between the news media and the courts, it is marred by a superficial approach that finesses or ignores many of the most interesting questions. Gerald's premise, which clearly emerges only in the last few pages of his book, is that the press must become more institutionalized and speak with a more coher-

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* Partner, Williams & Connolly, Washington, D.C.; B.A., 1966, Wabash College; M.A., 1968, Oxford University; J.D., 1971, Yale University.

1. J. GERALD, NEWS OF CRIME: COURTS AND PRESS IN CONFLICT 64 (1983).

2. *Id.*

3. Professor Gerald has taught journalism at the Universities of Missouri and Minnesota; has served as Visiting Teacher at the University of Texas, Indiana University, and the University of Utah; and has been a Visiting scholar at the Brookings Institution. He has also written THE PRESS AND THE CONSTITUTION (1948), THE BRITISH PRESS UNDER GOVERNMENT ECONOMIC CONTROLS (1956), and SOCIAL RESPONSIBILITY OF THE PRESS (1963).

4. J. GERALD, *supra* note 1, at 65.

ent and unified voice if it is to protect its interests. His institutional model is apparently the American Bar Association,[5] and he is critical of the media's failure to organize such a "professional" institution:

> The task of developing an institutional position, of teaching it to others, and of persuading them to respect it, is regarded as too burdensome. Yet this is the heart of professional obligation and function. Without accepting this obligation, no profession can have the tools of destiny in its own hands.
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> Freedom, in order to be expressed in law and protected according to law, must be defined. If it never gets beyond the emotional level it cannot take the form of statute and constitutional decision. It can have neither positive nor negative enforcement in court. Individuals who cannot codify their needs may be doomed to feel frustrated rather than to write constitutions. The journalist, nevertheless, senses that the act of defining freedom means limiting it and that impels him to stick with emotion and to avoid codes.[6]

This predilection helps explain some recurrent motifs in the book, such as the author's recommendation of voluntary press-bar-judiciary councils as a means of resolving crime news disputes. Given the cantankerous diversity of the American news media, however, a prescription for organizational unity has all the utility of Will Rogers' solution to the German submarine menace in World War I: "Boil the oceans—I'll let someone else handle the details." Exactly because the process of "defining freedom means limiting it," many journalists have eschewed any rigid codification of their obligation to act "responsibly" and have avoided binding themselves to a professional body organized to act for them and to impose discipline upon them. While Professor Gerald praises journalism's "idealists," he regrets their inability "to accept public responsibility for professional standards" and "to take on the burden of professional self-government."[7] Precisely what such a superstructure would en-

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5. Gerald notes approvingly that the ABA

> made several important gestures to the media, in an institutional sense, after it began to study and write the [free press, fair trial] standards in 1966. The first, symbolized by the invitation to leaders to present their arguments formally at the 1967 ABA convention in Hawaii, was to recognize the media as an institution organized with a representative leadership qualified to bargain for the whole. The record of contacts over the years shows that law and journalism met in good order on their differences and that constructive negotiation resulted.

Id. at 168. Gerald does not specify who these media "leaders" were or how the ABA selected them. Nor does he describe how this "representative leadership" was authorized or qualified to "bargain for the whole."

6. *Id.* at 184.

7. *Id.* at 183. Gerald asserts that "[t]he way to maximize freedom, as journalists well know, is to organize for its development and protection. But the ideal of journalism, as yet, is not freedom under law but freedom." *Id.* Gerald does not identify these "idealists" or "absolutists," *id.* at 182, but he earlier describes *Washington Post* Managing Editor Howard

tail, however, is difficult to envision. Regrettably Professor Gerald waits until the last paragraphs of his book to set forth these views, for their effective implementation would surely have radical implications for the profession of journalism.

The style of the book is surprisingly leaden. With a journalist, not a lawyer, writing about as vivid a subject as reporting crime, the unwary reader is nevertheless mugged by such opaque sentences as, "[i]nstitutions are supplanting individuals in the social process and more and more are demanding the civil rights conceived of originally for the protection and development of individual persons alone";[8] "[l]ike a cry for freedom to publish, the tradition of fair trial arose in countless encounters between individuals and the law over the past millenium";[9] and "[t]he events in which Farr was caught up, the Charles Manson cult murders, seem a fantasy from a world in which the legislatures undertook to undermine the authority of the courts."[10]

With some notable exceptions, such as Gerald's discussion of the Nebraska murders that led to the Supreme Court's *Nebraska Press*[11] decision, his discussion of cases is simply too abbreviated to be particularly helpful in understanding the nuances involved when the courts and the press are at loggerheads. Too often, as in his discussion of the *Corona* case,[12] Gerald is so careless with chronology and sloppy with procedural details that a reader finds it impossible to follow the sequence of events. Far more helpful and interesting than Gerald's two-paragraph precis of a complicated case are his more detailed discussions of legal or ethical dilemmas confronting a reporter. Should the name of a rape victim be published? If the police arrest a prostitute who has a list in her possession containing names of well-known business and political figures, should the names on the list be broadcast? Under what circumstances should a suspect's prior criminal record be reported? What circumstances should prompt a reporter to mention a suppressed confession or illegally seized evidence that was excluded from trial? How should the press accurately and fairly report plea bar-

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Simons as an advocate of the position that "the journalist knows society's needs as well as judges and should not be compelled to subordinate his judgment to other imperatives." *Id.* at 19.

8. *Id.* at 174.

9. *Id.* at 45.

10. *Id.* at 134.

11. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

12. Corona v. Superior Court, 24 Cal. App. 3d 872, 101 Cal. Rpt. 411 (1972); J. GERALD, *supra* note 1 at 68-70.

gaining which is responsible for disposing of about ninety percent of criminal charges? What ethical rules should govern reporters' use of confidential sources in criminal cases? The most interesting passages of Gerald's book wrestle with one of these particular problems in a concrete setting.[13] Unfortunately, Gerald too frequently opts for a bird's-eye view of these controversial areas without teasing out and analyzing the particular competing claims involved in a given case.

The first hundred pages of the book trace the tension between writing freely about criminal trials and providing the accused with a fair and impartial jury. After briefly describing a landmark contempt case of the early 1940's,[14] Gerald provides a detailed discussion of the Supreme Court's 1966 decision in *Sheppard v. Maxwell*[15] and then shows how the ABA Trial Standards evolved in reaction to *Sheppard*. In the Sheppard trial, the judge totally abnegated his duty to control events in his courtroom. The trial was a media circus in which "[t]he journalists took part as advocates in the entire criminal process . . . . Legal standards were put to one side in the enthusiastic effort to send Sheppard to prison."[16] Thus, the Supreme Court held that journalistic disturbance "inspired by the police, prosecutor, and coroner denied Sheppard a fair trial."[17] In response to *Sheppard*, the bar and the judiciary greatly overreacted to the possibility of prejudicial publicity, as many subsequent criminal cases clearly demonstrate. While the courts some-

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13. *See, e.g.*, J. GERALD, *supra* note 1, at 90-91

14. Bridges v. California, 314 U.S. 252 (1941). Gerald does not mention a number of important Supreme Court cases following *Bridges* and preceding Sheppard v. Maxwell, 384 U.S. 333 (1966) that addressed the question of what a newspaper could write about court proceedings. *See, e.g.*, Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); *see also* Wood v. Georgia, 370 U.S. 375 (1962).

15. 384 U.S. 333 (1966). Although he discusses the case later, Gerald ignores in this context Irvin v. Dowd, 366 U.S. 717 (1961), an extremely important due process case that was a forerunner of *Sheppard*.

16. J. GERALD, *supra* note 1, at 26. Gerald points out that most of the reporters covering the trial seemed to join in the prosecution's effort to convict Sheppard. Newspapers editorially demanded Sheppard's arrest and published lurid details of one of the doctor's extramarital affairs, long since over. The media

> systemically reported police charges according to a double standard. The police standard permitted individual investigators to float lies and fanciful fabrications which were presented in the media as fact. At one point, a front page picture of Mrs. Sheppard's blood stained pillow was published after being retouched to show the alleged imprint of a surgical instrument—inferentially her husband's. The cruel hoaxes or myths never got on the trial record because there was little or no truth in them. But the police and the newspapers helped get them into the minds of the community.

Id.

17. *Id.* at 28.

times employed traditional remedies to combat the prejudice of a hostile community, such as change of venue, continuance, an extensive *voir dire*, severance, additional peremptories, admonishment of jurors, and sequestration, the gag order became a favored device. In the 1976 landmark decision *Nebraska Press Association v. Stuart*,[18] however, the Court rejected the gag order and took the opportunity to emphasize the range of available remedies that do not directly impinge upon the right of the press to report information in its possession. As Gerald points out, "big publicity cases do not occur often";[19] hence no need exists to distort the first amendment and the normal rules of criminal procedure to accommodate the occasional, extraordinarily well-publicized case. Of course, massive publicity inevitably will ensue when a presidential assassin is himself assassinated or when a crime spree erupts leaving a number of corpses in its wake. The widespread reporting of such events is inevitable and desirable insofar as the community is then more accurately informed and the public dangers defined and clarified. Moreover, widescale publicity is not necessarily the same as prejudicial publicity. The legal test for the exclusion of jurors has never been mere knowledge of a crime, but rather the kind of indelible preconceptions that are impossible to renounce.[20] Gerald describes in detail the procedures followed by Judge Jack B. Weinstein in the *United States v. Pfingst* case[21] and documents how a vigilant

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18. 427 U.S. 539 (1976). The Court unanimously voted to reverse the Nebraska Supreme Court's decision, but only five Justices joined the Chief Justice's opinion for the Court.

19. J. GERALD, *supra* note 1, at 74. Chief Justice Burger has commented that " '[i]n an overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [the] important right [of fair trial].' " *Id.* (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976)).

20. In Murphy v. Florida, 421 U.S. 794, 798 (1975), the Court declined to rule as a matter of due process that "persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced." The Court held that "[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved [so long as] . . . 'the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " *Id.* at 799-800 (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961). Although Gerald mentions the *Murphy* decision, J. GERALD, *supra* note 1, at 72-73, he evinces no awareness of how difficult it is since *Murphy*, for a defendant to gain a new trial because of juror prejudice or bias that is demonstrated on *voir dire*. While the Supreme Court did not overrule *Irvin* or *Sheppard*, it sharply limited them to situations "where the general atmosphere in the community or courtroom is sufficiently inflammatory." 421 U.S. at 802. The "sky-is-falling" kind of outery that prosecutors and judges occasionally raise concerning the possibility that newspaper publicity will cause a reversal on appeal is, to say the least, usually very ill-founded.

21. J. GERALD, *supra* note 1, at 82 (discussing United States v. Pfingst, 477 F.2d 177 (2d Cir. 1973), *cert. denied*, 412 U.S. 941 (1973)).

and careful judge can successfully conduct the trial of a highly visible judicial corruption case without infringing the rights of either the defendant or the press. Clearly, gag orders normally result from the mismanagement of a judicial assignment and, more often than not, are conceived in unreality and destined for futility.[22]

Gerald then traces the reaction of the lower courts to the *Nebraska Press* decision, pointing out how the rejection of the gag order led courts to regulate their own processes more closely, both by orders preventing attorneys and court personnel from talking to the press and by orders closing court proceedings. The battleground today is over access to these closed hearings, and here, unfortunately, Gerald proves a less than reliable guide. In large part, Gerald is not to blame because the Supreme Court's access decisions of the past five years have been contradictory and confusing. Gerald attempts to reconcile the *Gannett*[23] and *Richmond Newspapers*[24] decisions and to derive a unified and rational principle from them. In one sense, Gerald accurately states that "[t]he difference between them is that the Court says a hearing is not a trial and may be closed for reasons somewhat less substantial than those required to close a trial."[25] But the holdings cannot be so easily rationalized, and the Court's later decision in the *Boston Globe* case,[26] which Gerald barely notes, clearly shows that the controversial 5-4 *Gannett* decision was simply a misstep and an aberration. Gerald's failure to distinguish clearly between the Court's sixth amendment "public trial" focus in *Gannett* and its first amendment focus in *Richmond Newspapers* and *Boston Globe* makes his summary discussion of the positions of the various Justices in the two cases impossible to understand. This failure also obscures the fundamental transformation wrought by *Richmond Newspapers*, a case that did not simply "[bring] First

22. Gerald observes that in the *Nebraska Press* case itself, the prejudicial facts that the local judge sought to suppress already had circulated in the community:

> When the county court judge, Ronald Ruff, issued his gag order to the journalists on October 22, [1975,] in preparation for the hearing the next day, he was trying to wipe out the news that had already been published and to roll back human minds in Lincoln County to the point where Simants could be regarded as innocent until the cumbersome legal system got around to giving him a trial. In doing so, he sought to follow legal standards mired in the mud of unreality.

J. GERALD, *supra* note 1, at 97.

23. Gannett Co., v. DePasquale, 443 U.S. 368 (1979).

24. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

25. J. GERALD, *supra* note 1, at 105.

26. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

Amendment openness back in good order,"[27] but also recognized an important new access right that appears inconsistent with the Court's earlier niggardly protections afforded journalists' efforts to gather information.[28] *Gannett* and *Richmond Newspapers* are consistent only in the most myopic and technical sense: their fundamental thrust is different, with the more sweeping first amendment analysis of the latter case plainly destined to swallow up the former's emphasis on an individual defendant's right to regulate courtroom access.

Gerald offers a number of scattered, but useful, insights about the *voir dire* process, which is emerging as one of the most important safeguards of an impartial trial. Although critics have described it as too often "stilted, hurried, and routine,"[29] in analyzing a number of high publicity trials Gerald demonstrates how a careful and comprehensive *voir dire* can reduce the risk of biased jury decisionmaking. These descriptions are helpful because they emphasize that an impartial jury is not necessarily an ignorant jury. In some cases, such as *Irvin v. Dowd*,[30] however, the *voir dire* reveals that unfavorable publicity about the accused has so saturated the community that prejudices cannot effectively be put out of jurors' minds. The difficulty in these cases, as Gerald recognizes, is the dearth of empirical studies of the relationship between what jurors say on *voir dire* and how they act during the actual verdict process.

Despite its defects, *voir dire* remains a critical safeguard for the criminal defendant, given the first amendment implications of certain other remedies. Thus, recent dicta in a Supreme Court opinion that appeared shortly after publication of the Gerald book are simply incomprehensible. In *Press-Enterprise Company v. Superior Court*[31] the Court considered a *voir dire* process in a capital trial for the rape and murder of a teenage girl. The process had

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27. J. GERALD, *supra* note 1, at 107.

28. In earlier opinions the Court had taken the view that "[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally." Pell v. Procunier, 417 U.S. 817, 834 (1974) (footnote omitted). *See also* Houchins, Sheriff v. KQED, Inc., 438 U.S. 1, 11-12 (1978) (opinion of Chief Justice Burger, for the Court); Saxbe, Attorney General v. Washington Post Co., 417 U.S. 843, 850 (1974).

29. J. GERALD, *supra* note 1, at 78.

30. 366 U.S. 717 (1961). *But see* Murphy v. Florida, 421 U.S. 794 (1975) (no presumption that persons learning of defendant's criminal record from news reports are prejudiced against him); *supra* note 20.

31. 52 U.S.L.W. 4113 (U.S. Jan. 18, 1984).

consumed six weeks, all but three days of which had been closed to the public. Following the first amendment analysis of *Richmond Newspapers* and *Boston Globe*, the Court held unanimously that openness enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system: "[T]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[32] The Chief Justice's opinion, joined by seven other Justices, contained a footnote criticizing the length and conduct of the *voir dire*:

> We cannot fail to observe that a *voir dire* process of such length, in and of itself undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is not unknown in California courts for jury selection to extend six months.[33]

Mr. Justice Marshall blasted this gratuitous comment in a concurring opinion, noting that obtaining a fair and impartial jury might well require such a lengthy *voir dire*:

> After all, this was a *capital* case involving an interracial sexual attack that was bound to arouse a heightened emotional response from the affected community. In a situation of this sort, the public's response to the use of unusually elaborate procedures to protect the rights of the accused might well be, not lessened confidence in the courts, but rather heightened respect for the judiciary's unshakeable commitment to the ideal of due process even for persons accused of the most serious of crimes.[34]

As Gerald recognizes — but as the *Press-Enterprise* Court apparently did not — the trade-offs necessary to protect first amendment rights are not cost-free. Forgoing the administratively simple remedies of closure and gag orders will almost certainly entail greater judicial expenditures of time and money for *voir dire*, change of venue, sequestration,[35] and, in exceptional cases, retrial.

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32. *Id.* at 4115-16.

33. *Id.* at 4116 n.9.

34. *Id.* at 4119 (footnote omitted) (emphasis in original). *See, e.g.*, Babcock, *Voir Dire: preserving 'Its Wonderful Power,'* 27 STAN L. REV. 545 (1975). Babcock contends that limits on the *voir dire* examination undercut the ability of the litigant to exercise his peremptory challenges that are essential to the jury trial right and also may implicate the equal protection clause.

35. Gerald points out one of the little-appreciated consequences of sequestration: "Sequestration means that persons of professional status or business responsibility usually cannot give time to jury duty." J. GERALD, *supra* note 1, at 81. Trial lawyers have long been

Gerald's analysis of the problems that arise when journalists rely on sources which they have promised not to disclose is muddled and misleading. He begins by positing what is surely an inaccurate formulation of the reporter's dilemma: "[I]n order to get to the news, the journalist is driven to assert an ethical position which is essentially contradictory. He asks the public to trust him but he cannot or will not offer proof."[36] Nothing is really "contradictory" about the position of the journalist who must rely on confidential sources for a portion of what he or she reports. The reporter is essentially saying, "I am doing the best I can — here is what I can tell you," and any "trust" that arises springs from the general credibility of the reporter and the reporter's account. The reporter is certainly offering "proof", but it is proof that may be more difficult to assess and that may be credible only in the context of a carefully reported story which contains other precisely described and documented information. Gerald writes:

> Trouble arises when investigative reporters question witnesses, make voice records of conversations while in search of incriminating admissions, and insist at the same time upon immunity against subpoenas to testify. Reporters obtain secret witnesses who, in fear, ask for state protection. They accept and disseminate leaks from lawyers who, in a specific case, are under silence orders designed to protect petit juries. These events, contradictory in motive and consequence, are the heart of the court-press conflict, for the courts are required to exclude information not qualifying as evidence. The media, in effect, follow a law of their own: that the First Amendment gives them authority to tell the public everything. They argue that the public has a right to know about accusations and that it can judge whether prosecutions should follow. There is not much concern about apparent conflict between ethics and law.[37]

This passage is puzzling, insofar as it suggests that in the usual case the reporter is doing something to affirmatively endanger the legal process. Precious few witnesses have ever "ask[ed] for state protection" because of knowledge possessed by reporters. In the usual case the reporter, by dint of an industrious investigation, has discovered facts about crime or corruption and has published a story based upon those facts. Even if the reporter is "follow[ing] a law of [his] own," his actions are precisely what the first amendment countenances, and it is very difficult to find any conflict between "ethics and law" apart from the journalist's insistence that

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aware that sequestration inevitably results in selection of a different class of jurors, leading to a jury which is more rootless, less affluent, and possessing fewer human attachments than the average cross-section of the community.

36. J. GERALD, *supra* note 1, at 118.

37. *Id.* at 127.

he or she not violate pledges of confidentiality.

Throughout his discussion of the shield law question,[38] Gerald mischaracterizes the nature of the journalists' claims and the factual contexts in which they normally arise. For example, referring to the grand jury as "an old and seldom criticized law enforcement institution,"[39] is hardly accurate, in view of the massive abuses of grand jury power that have been documented over the last few decades.[40] As often as not, grand juries in well-publicized cases have served to stifle dissent and to cover up official corruption. While Gerald discusses the three cases that led to the Supreme Court's closely divided 1972 ruling in *Branzburg v. Hayes*,[41] he asserts that "[t]he Branzburg case went to the Supreme Court at a time when journalists not only were resisting grand jury subpoenas, but were writing stories based on grand jury proceedings, that is official papers which, by law, could not be released until a judge had edited them for public use."[42] While stories based on grand jury leaks[43] have been grist for the judicial mill from time immemorial, no surge in the number of such stories occurred in the late 1960's and early 1970's. The litigation that led to the *Branzburg* decision concerned something quite different; only by understanding this litigation are the later shield laws and the post-*Branzburg* cases comprehensible.

The pre-*Branzburg* litigation typically concerned an enterprising and energetic reporter who uncovered some kind of official corruption or actually witnessed something that a prosecutor might deem criminal conduct. When subpoenaed to testify before a grand jury, the journalist's position was that the first amendment afforded newsgathering at least a qualified protection, lest confidential informants be deterred from talking to the press and the flow

38. A "shield law" refers to the limited privilege that half of the states have granted to journalists to permit them not to identify their sources. *See* J. GERALD, *supra* note 1, at 115-150.

39. *Id.* at 129.

40. *See, e.g.*, M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 18-42, 52-116 (1977).

41. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court adjudicated three cases: Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), and Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971).

42. J. GERALD, *supra* note 1, at 129.

43. Many kinds of grand jury "leaks" are not illegal or unethical in any way. While prosecutors and grand jurors are bound to keep secret what transpires in the grand jury room, witnesses are not; they are free to relate the interrogation they have undergone. Savvy journalists, as well as criminal defense lawyers, often may be able to track accurately the course of a grand jury investigation by debriefing grand jury witnesses.

of news to the public therefore be constricted. This position is hardly a claim, as Gerald phrases it, to "operate outside the law."[44] Insofar as the journalist discovered acts of crime or corruption, she called these acts to the community's attention, and the criminal justice system, with its far greater investigative resources, then was able to address the problem. All too often, however, the grand jury's way of addressing the problem was to address a subpoena to the reporter. The reporter's resultant claim of privilege does not differ materially from that of an attorney, asked by a grand jury about his client's statements; a priest, asked about statements made to him in the confessional; or any grand jury witness, asked to make a statement under oath that might incriminate the witness. Of course, the Court rejected the journalist's claim in *Branzburg*, but Gerald neglects to probe the question-begging logic of the Court's emphasis on the rule that " 'the public . . . has a right to every man's evidence,' "[45] on which the Supreme Court purportedly based its *Branzburg* holding.

Gerald, therefore, fails to appreciate the manner in which the shield laws—which the states enacted after *Branzburg*—were perfectly consistent with the development of other well-recognized exceptions to the testimonial obligation. Although he notes some of the decisions that recognized qualified claims of confidentiality,[46] he misses entirely the remarkable efflorescence of lower court decisions that focus on the Powell concurrence in *Branzburg*[47] and afford journalists in non-grand jury situations exactly the kind of qualified first amendment privilege they had sought in *Branzburg*.[48] Gerald ends his discussion with a conclusion that

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44. J. GERALD, *supra* note 1, at 149.

45. 408 U.S. at 688 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

46. J. GERALD, *supra* note 1, at 146 (discussing United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981)).

47. A fact often overlooked is that while Justice Powell wrote separately in *Branzburg*, he joined Justice White's opinion for the Court, making that a majority opinion. 408 U.S. at 665.

48. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977), *rev'd on other grounds*, 52 U.S.L.W. 4043 (U.S. Jan. 11, 1984); Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). Gerald briefly describes some of the more famous cases since *Branzburg*—those involving William Farr, Myron Farber, and the "Fresno Four"—in which journalists have gone to jail rather than reveal confidential sources. *See* J. GERALD, *supra* note 1, at 134-41. Gerald, however, presents the facts in choppy and confusing form: frequently the reader has difficulty divining the exact procedural sequences of the case from Gerald's narrative, which provides no summary evaluation. With respect to Farr, in particular, a number of questions arise concerning the propriety of what he did and of the ways in which his case is or is not represen-

merits quoting at length because it is representative of the style of the book:

> This chapter has recounted the efforts of journalists to obtain as much elbow room under law as they could and has noted the consequences. The major episode was a decision of the United States Supreme Court (Branzburg v. Hayes) placing rather clear limits on the scope of special testamentary privilege. It became clear, under that reasoning, that while journalists had much freedom to gather and write news, they also were subject to regulation in the public interest—not as public utilities, but as the carriers of information and opinion upon which society must depend for the formulation of policy. Moreover, once the major policy decision was made, the U.S. circuit court majorities facilitated rather than impaired journalism's watchdog role. Regrettably, from journalism's viewpoint, this kind of facilitation limits the absolutist version of freedom of speech and press, and it requires the individual writer and editor to confront his own motives and to respect his professional work standards in order to avoid retribution defined by law. This risk of retribution is imbedded in two lines of cases, one shielding the journalist against revealing his or her sources of information when asked to testify in court, and the other subjecting him, under court rules that define the limits of privilege, to intensive interrogation about his standards of work and the motives which energized his treatment of the subject. While the pilgrimage to today's definitions of freedom has not been completed without journalistic martyrs, and a treasure in litigation costs, the facts reviewed do not show major shifts in freedom of the press.[49]

The problems with this summary are manifold. Even the most absolute of first amendment "idealists" could hardly call the *Branzburg* decision one that subjected the press to "regulation in the public interest." Further, the court of appeals decisions that have followed *Branzburg* have largely turned their back on the majority opinion and have afforded journalists the very qualified privilege espoused by the Stewart dissent. Finally, simply as a matter of style, it is unclear how the "risk of retribution" is "imbedded" in two lines of cases when under one line the journalist may actually *protect* his or her sources. Too often, this verbal fogginess sets in during Gerald's analysis of the difficult dilemmas that he addresses.

The chapter on photographing criminal trials is a somewhat self-contained survey of the entry, exit, and return of courtroom cameras. Gerald traces how the excesses of the *Hauptmann* and *Sheppard* trials, and perhaps the *Ruby* trial, apparently inspired the Supreme Court's remarkably sweeping opinion in *Estes v. Texas*.[50] The *Estes* trial, as Gerald makes clear, was not a particularly sensationalized one. Television covered portions of the trial,

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tative. Gerald addresses none of these questions.

49. J. GERALD, *supra* note 1, at 149-50.

50. 381 U.S. 532 (1965).

and although television equipment was plainly visible in the courtroom, the broadcasting did not disrupt the trial. "The Estes lawyers, having few facts with which to defend their client, claimed he was deprived of due process by the televising and broadcasting of his trial . . . .' "[51] The Supreme Court agreed. Chief Justice Warren sought an unequivocal majority to ban television forever from the courtroom under the sixth and fourteenth amendments, but Justice Clark finally wrote an opinion for the Court that was only slightly more moderate: "With hardly a citation to fact in it, but in indignation and fear, he found cameras a threat. His opinion was not factually proved, but awesomely conjectural."[52] The *Estes* decision retarded but did not stifle the use of television in the courtroom, and a number of states experimented with various forms of coverage. Finally, in *Chandler v. Florida*,[53] the Supreme Court approved the televising of a criminal trial under strict court guidelines over the defendant's objection.

Gerald describes, but makes no real attempt to explain, the vehemence of the opposition of some judges and lawyers to televising court proceedings. The educational value of such coverage is enormous, and the malign influence of the television camera on judicial proceedings is almost entirely speculative. With the miniaturization of the broadcasting equipment and reasonable rules to preserve courtroom decorum, no valid reason exists for not allowing the television camera to substitute for the citizen in attendance during a trial. Despite the ABA's 1982 approval of cameras in the courtroom under carefully prescribed conditions, however, the opposition to television experiments is often hydrophobic. For example, the Virginia State Senate recently defeated a bill to allow television cameras in selected courtrooms during a two-year experiment, with individual senators asserting that the experiment would "violate the sanctity of the courtroom," transform trial lawyers into "more Virginia hams than we've got in Smithfield," and unfairly distort the events of trial.[54]

"Judges and journalists alike interpret the Constitution,"[55] ob-

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51. J. GERALD, *supra* note 1, at 158. "The only thing sensational about the facts was the flair which Estes had for swindling his friends and neighbors." *Id.*

52. *Id.* at 159.

53. 449 U.S. 560 (1981).

54. The Virginia Senate Majority Leader is quoted as saying, "What's going to be on the media? It will be only a 20-second or 30-second clip of what goes on. That is all." Washington Post, Mar. 3, 1984, at B1, col. 2.

55. J. GERALD, *supra* note 1, at 88.

serves Gerald, but "journalists lack the power to put people in jail."[56] Judicial fiat, however, will not easily govern the long-standing love-hate relationship between journalism and the criminal courts. Events of the past decade have proven that a judicial ukase flatly inconsistent with the traditional practice of journalism is not likely to control the press. The Court has not overruled enfeebled precedents like *Branzburg* and *Gannett*; and they are still on the books, "[lying] about like a loaded weapon ready for the hand of any authority."[57] But protections have slowly evolved through the judicial process, enabling the press to better fulfill its vitally important role of bringing the news of crime, criminals, and courts to the public.

56. *Id.* at 89.
57. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson J., dissenting).

3 FEDERAL ANTITRUST LAW: THE ROBINSON-PATMAN ACT. By Earl W. Kintner and Professor Joseph P. Bauer. Cincinnati, Ohio: Anderson Publishing Co., 1983. Pp. xvii, 748.

*Reviewed by Glen E. Weston**

The treatise *Federal Antitrust Law*[1] is a significant contribution to antitrust law. Four volumes out of a projected eight volume project now have been published,[2] and the high quality of these three indicates that the end result will be a comprehensive treatise that is both an important pragmatic research source and an influential guide for understanding antitrust policy. The chief author, Earl W. Kintner, has distinguished himself as an antitrust and trade regulation expert[3] who has brought enormous energy, intelligence, imagination, and organizational skill to each of the many projects he has undertaken. One of the most significant of these projects was the organization within his law firm of a publication group that has rendered important service to the profession and public by producing an excellent series of texts on antitrust and trade regulation,[4] an exhaustive compilation of the legislative history of the antitrust laws,[5] and now the first volumes of this extensive treatise. Mr. Kintner's co-author of Volume 3 of the treatise, Joseph P. Bauer of the University of Notre Dame Law School, is a

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* S. Chesterfield Oppenheim Professor of Antitrust and Trade Regulation Law, George Washington University National Law Center. B.S., 1943, University of Maryland; J.D., 1948, George Washington University National Law Center; Co-editor with S. OPPENHEIM, THE LAWYER'S ROBINSON-PATMAN ACT SOURCEBOOK (4 Vols. 1971).

1. 1 & 2 E. KINTNER, FEDERAL ANTITRUST LAW (1980); 3 E. KINTNER & J. BAUER, FEDERAL ANTITRUST LAW (1983).

2. Volumes 1 and 2, dealing with the Sherman Act, were published in 1980. Volume 3, dealing with the Robinson-Patman Act, was published in 1983. Volumes 4 and 5 deal with the Clayton Act; Volume 4 was published, and Volume 5 is scheduled to be published, in 1984.

3. Among other positions, Mr. Kintner served as Chairman of the Federal Trade Commission from 1959 to 1961, after spending six years as General Counsel to the Commission. He is presently a senior partner with the Washington, D.C., law firm of Arent, Fox, Kintner, Plotkin & Kahn.

4. *See* E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER (2d ed. 1982); E. KINTNER, A ROBINSON-PATMAN PRIMER (2d ed. 1979); E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (2d ed. 1978); E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER (1974); E. KINTNER, AN ANTITRUST PRIMER (2d ed. 1973); E. KINTNER, PRIMER ON THE LAW OF MERGERS (1973).

5. E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (7 vols. 1978-1983).

leading teacher of antitrust and trade regulation law. Professor Bauer has written numerous highly regarded articles, particularly on the Clayton Act's merger and tie-in provisions and on refusals to deal.[6]

In 1980 Mr. Kintner published Volumes 1 and 2 of *Federal Antitrust Law*. Volume 1 provides a background of economic theory, a careful exegesis of development of the common law and legislative history of the Sherman Act,[7] full analyses of the constitutionality of the Sherman Act and of the frequently troublesome issues surrounding the Act's interstate or foreign commerce requirement, and a lucid explication of the basic "Rule of Reason" standard of the Sherman Act. Those readers who are not well versed in antitrust will find this volume of immense value because it provides an excellent background for understanding the basic nature and purpose of antitrust. It is written quite objectively and with admirable balance. It interweaves comments by and references to both writers who are associated with the so-called "Harvard" or "structuralist" school of antitrust economics and those scholars commonly regarded as adherents to the "Chicago School" of antitrust economics,[8] apparently regarding their differing viewpoints as peripheral when placed in the overall perspective of antitrust law and policy. While justification for this point of view exists—there are no monolithic "schools" of economists—this reviewer would prefer to see more focus upon the differences between the approaches of those writers usually identified with one group or the other. Volume 2 is a detailed and carefully written exposition of how sections 1 and 2 of the Sherman Act pertain to a wide range of agreements and practices. In short, it is a very pragmatic guide to the application of the Act to specific practices.

Volume 3 of the treatise, the focus of this Book Review, is a detailed text on the Robinson-Patman Amendment to section 2 of the Clayton Act,[9] which regulates price discrimination and discriminatory advertising and promotional plans by interstate sellers of commodities. Volume 3 is of particular significance to the antitrust

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6. *See* Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers?*, 71 CALIF. L. REV. 348 (1983); Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283 (1980); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979).

7. 15 U.S.C. §§ 1-7 (1982).

8. For a discussion of these two approaches, see S. OPPENHEIM, G. WESTON & J. MCCARTHY, FEDERAL ANTITRUST LAWS 9 n.13 (4th ed. 1981).

9. 15 U.S.C. §§ 13-13b, 21a (1982).

bar and to corporate counsel because no definitive text on the Robinson-Patman Act has appeared in the more than twenty years since the publication of Frederick W. Rowe's classic 1962 treatise,[10] which is now out-of-print. While one could not expect Volume 3 of *Federal Antitrust Law* to match fully the incredible depth of analysis of the Rowe work, the Rowe text is outdated as a result of the enormous changes in enforcement policies, economic theories, and judicial interpretation that have occurred over the past two decades. For the past several years this reviewer has been recommending to lawyers as well as to students, Kintner's *Robinson-Patman Act Primer*[11] as the best general text on the Act, although that book's limited objectives and short length necessarily affected its utility. Volume 3 of *Federal Antitrust Law* now meets the critical need for a high-quality, comprehensive text on this most complex of all antitrust statutory provisions.

This volume skillfully combines an excellent introduction and overview of the Robinson-Patman Act with a detailed exploration of the murky depths of this "singularly opaque and elusive statute," as the late Justice Harlan once characterized it.[12] The book is, thus, exceptional because it is well-suited to the needs of the newcomer to the price discrimination law, while also serving many of the more exacting requirements of those who already are sophisticated in the intricacies of the Act. The beginning chapters, which introduce the Clayton Act and discuss the background and legislative history of the Robinson-Patman Amendment, provide an understanding of the economic crisis and social and political conditions that spawned the statute. The chapter on jurisdictional requirements for a section 2(a) violation is a thorough, but concise, analysis of the many specific elements that must be present before price differentials fall within the reach of this complex prohibition. These jurisdictional requirements have been a fertile source of litigation, prompting the perceptive comment by an astute British observer that "[n]o statute better demonstrates the legislative folly of trying to define 'sin' in detail."[13] Lawyers endeavoring to advise clients on whether particular pricing systems comply with the Act, or on whether their clients may have causes of action for treble damages, can find valuable assistance in this careful exploration of

10. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962).
11. E. KINTNER, A ROBINSON-PATMAN PRIMER (2d ed. 1979).
12. FTC v. Sun Oil Co., 371 U.S. 505, 530 (1963) (Harlan, J., dissenting).
13. D. GOYDER & A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 468 (2d ed. 1970).

the judicial interpretation of each requirement.

The experienced antitrust lawyer will derive substantial benefit from the discussion of several of the most troublesome problems of the Robinson-Patman Act. Foremost among these issues is the application of the statute to "functional discounts"—for example, a wholesaler's or retailer's discount[14]—and to "dual distribution"—a seller's practice of using differing marketing channels for distribution of goods.[15] The Act presents sellers using these common distribution systems with horrendous, insoluble problems of compliance with hopelessly conflicting judicial decisions[16] and several differences of opinion between the FTC and the Department of Justice.[17] Kintner and Bauer offer no magical solution to these dilemmas, but they do provide a very worthwhile analysis of the application of the Act to a variety of common "dual distribution" situations and an excellent discussion of some of the differing theories and suggested arguments for handling these difficult problems.

Among other important areas of great complexity in which both the expert and novice will find substantial assistance from the book, the following are noteworthy: Issues of "standing to sue" for treble damages for violations of the Act; the kinds of "services or facilities" that sections 2(d) and 2(e) cover;[18] and the vagaries of the "meeting competition" defense, with which the FTC for many years attempted to impose numerous limitations in a seriatim "Catch 22" fashion. The first of these—"standing to sue"—is of paramount importance at present because of a near moratorium on government enforcement, which makes private treble damage ac-

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14. 3 E. KINTNER & J. BAUER, *supra* note 1, at § 22.14.

15. *Id.* For example, dual distribution occurs when a manufacturer sells directly to some ultimate users through company owned retail stores and also sells to independent wholesalers, independent retailers, or both. *Id.*

16. *See* Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951). *See also In re* Boise Cascade Corp., 97 F.T.C. 199, 246 (1981); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345 (E.D.N.Y. 1960); Secatore's, Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959).

17. *See* Memorandum for United States as amicus curiae in support of petition for *certiorari*, Purolator Products, Inc. v. FTC, 389 U.S. 1045 (1968), *denying cert. to* 352 F.2d 874 (7th Cir. 1965), *reprinted in part*, 1 S. OPPENHEIM & G. WESTON, THE LAWYER'S ROBINSON-PATMAN ACT SOURCEBOOK 819-21 (1971); Memorandum for United States as amicus curiae in opposition to petition for *certioriari*, Monroe Auto Equipment Co. v. FTC, 382 U.S. 1009 (1966), *denying cert. to* 347 F.2d 401 (1965), *reprinted in part*, 1 S. OPPENHEIM & G. WESTON, THE LAWYER'S ROBINSON-PATMAN ACT SOURCEBOOK, 849-51 (1971).

18. 15 U.S.C. §§ 13(d)-13(e) (1982).

tions the principal enforcement mechanism. As a result, the major thrust of client counselling must be the avoidance or minimization of exposure to potential treble damage claims.

The authors' treatment of "first-line" or seller level competitive injury evokes a mild dissent by this reviewer. The authors apparently adhere to what may be called the "traditional" view, supported by a long line of FTC and court decisions,[19] of the competitive injury requirement in geographic price discrimination cases. These cases permit a finding of competitive injury without requiring clear proof that the lower prices were below "cost," according to an objective standard of "cost." In this reviewer's opinion, recent economic theory and empirical studies have established the need to use objective standards in identifying "predatory pricing" in order to safeguard adequately consumers' interests in vigorous price competition. Professors Areeda and Turner of Harvard Law School, beginning in a landmark 1975 law review article, have presented brilliant arguments for such a standard.[20] Their articles have influenced greatly the lower federal courts in their interpretation of the Robinson-Patman Act, as well as the Sherman Act, in first-line injury cases.[21] Although Kintner and Bauer make substantial references to the Areeda-Turner theories and to some judicial opinions relying upon these views, Volume 3's discussion is too concise to suit this reviewer. It apparently reflects the authors' viewpoint that the Supreme Court is not likely to adopt the Areeda-Turner approach. In this reviewer's opinion, however, the Court is likely to adopt a variant of the Areeda-Turner view, currently prevailing in lower federal court decisions, that pricing above "average variable cost" is at least presumptively "non-predatory" and, therefore, valid in first-line injury cases.

In summary, the Kintner-Bauer Volume is now the leading Robinson-Patman text. It is concise and clear and, at the same time, sufficiently detailed, thorough, and scholarly to meet the diverse requirements of a wide range of users. It is the one book

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19. *See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

20. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). *See also* Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978); Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976).

21. *See, e.g.*, Transamerica Computer Co. v. International Business Mach. Corp., 698 F.2d 1377 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 370 (1983); O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

available that best fills the critical need for an up-to-date and detailed coverage of this important and complex federal statute regulating price and service discrimination. A good law library would be incomplete without it.