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Gillmor & Barron: Mass Communications Law: Cases and Comment

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BOOK REVIEWS

MASS COMMUNICATIONS LAW: CASES AND COMMENT. By *Donald M. Gillmor* and *Jerome A. Barron*. West, 1969. Pp. xxvi, 853. \$12.50.

*I read the news today . . . oh boy.**

Read the news today, and it will quickly become apparent why Gillmor and Barron's excellent and valuable case book is so timely.

Item: On November 14, 1969, Vice President Spiro Agnew criticized the television networks for their "instant analysis and querulous criticism" of President Nixon's November 3, 1969, Vietnam speech.¹ Although the network heads responded with eloquent statements of determination to resist governmental commands, they did not give one minute of live or special network coverage to the largest demonstration in American history—the antiwar demonstration on November 15, 1969, in Washington, D.C. Moreover, when the President again spoke on Vietnam, on December 8, 1969, the networks were silent; and ABC and CBS made no immediate comment following President Nixon's December 15, 1969, announcement of troop withdrawals from Vietnam. *TV Guide* observed that the Vice President's "scolding of the networks apparently had the desired result . . ."²

Item: The public has recently learned that for years United States district attorneys have been issuing subpoenas to numerous national newspapers, magazines, television networks and stations, and news reporters, ordering them to turn over their notes, correspondence, telephone-call memoranda, and unedited tapes and film ("outtakes") for apparent use in criminal prosecutions against persons who criticized the Government.³ The minute this surprising news broke, confidential news sources began to dry up. Walter Cronkite reported that during the first week there were two instances in which officials refused to "talk off the record" for fear that their remarks would be used in court.⁴ Television officials advocated destroying or erasing film or video tape within twelve hours after broadcast, and *Broadcasting* magazine reported that one unidentified station "already is destroying unused tape recordings."⁵

* The Beatles, "A Day in the Life," *Sgt. Pepper's Lonely Hearts Club Band* (Capitol).

1. N.Y. Times, Nov. 14, 1969, at 1, col. 2.

2. TV GUIDE, Jan. 3, 1970, at 1. Indeed, the Vice President himself recently reflected: "Sometimes when I look around [at] the tube from time to time, I think I have had a modicum of success. . . ." J. Osborn, *Agnew's Effect*, THE NEW REPUBLIC, Feb. 28, 1970, at 13-14.

3. See notes 16-18 *infra* and accompanying text.

4. BROADCASTING, Feb. 9, 1970, at 58.

5. BROADCASTING, Feb. 9, 1970, at 60.

Item: On December 1, 1969, Senator Pastore's Communications Subcommittee of the Senate Commerce Committee spent several hours berating the commissioners of the Federal Communications Commission (FCC) for failing to prosecute certain radio broadcasters for the alleged "obscenity," "filth," "smut," and "gutter language" contained in certain records, poems, and plays that were broadcast by their radio stations.⁶ FCC Chairman Dean Burch reassured Senator Pastore that the Commission would move quickly to punish broadcasters for speech prohibited by the broad statutory rubric of "obscene, indecent, or profane language,"⁷ and he reported that he had already obtained the willingness of Deputy Attorney General Kleindienst to initiate criminal prosecutions in such cases.⁸ Shortly thereafter, the FCC majority, with Commissioners Cox and Johnson dissenting, reversed its long-established policy against penalizing broadcasters for "a few isolated programs," and placed a Seattle station on a probationary one-year license renewal for accidentally broadcasting a few four-letter words which, although not ruled "obscene, indecent, or profane language" by the FCC, allegedly violated the station's *own* standards of propriety.⁹

Item: Early in 1969, at the urging of various lobbies from the broadcasting industry, Senator Pastore proposed legislation that would prevent citizens' groups from filing competing applications for the licenses of existing stations which the challengers felt were not serving the public interest.¹⁰ If enacted into law, this bill might easily convert a broadcaster's presently "temporary" three-year license, which is subject to renewal by the FCC, into a monopoly grant in perpetuity. Although certain citizens' groups expressed strong disapproval of the bill,¹¹ over one hundred senators and congressmen quickly moved to support it. What congressman, after all, can resist with impunity the demands of his home-state media when he is able to communicate with his electorate only at that media's pleasure?

Item: On January 15, 1969, the FCC accomplished much of

6. *Hearings on S. 2004*, 91st Cong., 1st Sess., at 343 (1969).

7. 18 U.S.C. § 1464 (1964) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

8. *Hearings on S. 2004*, 91st Cong., 1st Sess., at 343, 367 (1969).

9. Jackstraw Memorial Foundation, 21 F.C.C.2d 833, 18 P & F RADIO REG. 2d 414 (1970). See also Eastern Educ. Radio (WUHY-FM), 18 P & F RADIO REG. 2d 860 (1970) (FCC 70-346, released April 3, 1970, notice of apparent liability).

10. S. 2004, 91st Cong., 1st Sess. (1969).

11. For example, Black Efforts for Soul in Television (B.E.S.T.) charged that S. 2004 was "back door racism" and would exclude minorities from access to media ownership in most large communities; the National Citizens Committee for Broadcasting (N.C.C.B.) argued that the Senate Bill would perpetuate excessive concentrations of media control; and the American Civil Liberties Union (A.C.L.U.) warned that S. 2004 would remove "competition" from the system of broadcast regulation and would "freeze out every underrepresented class in American Society."

Senator Pastore's work for him by adopting, over Commissioner Johnson's dissent, a "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants."¹² The policy statement announced that the FCC would refuse even to consider applications by citizens' groups for existing stations if the incumbent licensee could show that his programming was "substantially attuned to meeting the needs and interests of its area,"¹³ no matter how superior the challenger's programming proposals were, or how monopolistic the incumbent licensee might be.

Item: In 1968, two citizens of Salt Lake City filed complaints with the FCC arguing that the license of KSL-AM, owned by the Mormon Church, should not be renewed. The complainants based their challenge to renewal partially on the grounds of monopoly—referring to the Mormon Church's control over KSL-FM, KSL-TV, Brigham Young University's FM-TV complex, and one of Salt Lake City's two daily newspapers. The Commission twice rejected these complaints, on the theory that media ownership patterns should not be changed by ad hoc citizens' petitions.¹⁴ Unfortunately, the United States Court of Appeals for the District of Columbia Circuit affirmed,¹⁵ holding that the FCC was not compelled by its statutory mandate to resolve questions of excessive media concentration on individual cases as they arose, but could, in its discretion, settle them in general rule-making proceedings. Until the FCC reverses its position, therefore, citizens may have lost their right to challenge license renewals on grounds of "undue concentration of control."

Item: For many years, the FCC has required broadcasters to survey the needs and interests of their communities periodically by consulting with community leaders and other individuals and then broadcasting programs that respond to these needs and interests. This requirement is, perhaps, the only effective "handle" by which the FCC can ensure that broadcasters provide *some* community-service programming. On March 2, 1970, however, *Broadcasting* magazine reported that the FCC staff is preparing a memorandum suggesting that the community ascertainment procedure be "scrapped."¹⁶

In sum, during the past year or so, the Administration has moved against the news media by means of the Vice President's speeches and the Attorney General's subpoenas; and Congress has

12. Comparative Hearing on Renewal Applicants, 22 F.C.C.2d 424, 18 P & F RADIO REG. 2d 1901 (1970).

13. 22 F.C.C.2d at 425, 18 P & F RADIO REG. 2d at 1904.

14. KSL, Inc., FCC 68-1005 (Oct. 4, 1968), *petition for reconsideration denied*, 16 F.C.C.2d 340, 15 P & F RADIO REG. 2d 458 (1969).

15. *Hale v. FCC*, Case No. 22,751 (D.C. Cir. Feb. 16, 1970).

16. BROADCASTING, March 2, 1970, at 5.

begun to consider Senator Pastore's license monopoly bill.¹⁷ In addition, during 1969, the FCC has begun moving against broadcasters for their nonconventional modes of expression; it has threatened to undermine the community ascertainment programming surveys; and it has seriously curtailed the ability of citizens' groups both to file competing applications for broadcast licenses and to challenge media "monopolies" at license renewal time.

At this juncture, Professors Gillmor and Barron have introduced their book of cases and materials on the "law of mass communications." No brief review of a book such as this can adequately summarize its contents or achievements. Suffice it to say that the authors' work is comprehensive, well organized, perceptively annotated, and a generally valuable contribution to students and teachers of law and journalism.

Yet the ultimate value of this casebook may lie beyond its excellence as measured in such traditional law school terms as depth, thoroughness, and breadth. Gillmor and Barron's book, in the words of its authors, is "the outcome of an interdisciplinary collaboration between a professor of journalism [Gillmor] and a professor of law [Barron]" (p. xi). The principal value of this collaboration may stem from the fact that it provides students with the perception and skills to resist some of the aforementioned recent and serious incursions on the freedoms of mass communications.

One example will suffice: the recent wave of subpoenas issued by the Justice Department. From sketchy newspaper accounts, the public has recently learned that the Justice Department has *for years* and as a matter of standard procedure obtained from news reporters—by formal subpoenas or informal cooperation—notes, memoranda, and film to be used either as evidence in criminal prosecutions or as "background files" on allegedly "subversive" persons. The following examples illustrate the type of demands that have been put on the media:

During the lengthy trials following the demonstrations at the Democratic Convention in Chicago, the local news media—especially broadcasting stations—received repeated subpoenas for news film. Reporters said the practice was "an almost daily burden of nearly unmanageable proportions. 'We are treated as evidence gatherers for the law.'"¹⁸

In connection with the Government's prosecution of David Hilliard, a Black Panther leader from the West Coast, for allegedly

17. Congress has also been considering the "Failing Newspaper Act," S. 1520, 91st Cong., 2d Sess. (1970), H.R. 279, 91st Cong., 2d Sess. (1970), which would permit newspaper cooperation otherwise barred by the antitrust laws. The bill, as amended on the floor, passed the Senate and is currently in the House Judiciary Committee, and is apparently destined for passage.

18. BROADCASTING, Feb. 9, 1970, at 58.

threatening the President, the Justice Department issued a subpoena on January 8, 1970, for all CBS video tape (including "outtakes," the unused portions of the interview) made in connection with the *60 Minutes* program on the Black Panthers, which was broadcast on January 6, 1970. According to indications from Richard Salant, CBS News President, CBS's initial response was to supply the requested material.¹⁹

On October 2, 1969, the Justice Department subpoenaed all the notes of a reporter from *Fortune* magazine, John McDonald, on an interview with James Ling, head of Ling-Temco-Vought, in connection with an antitrust proceeding. It also subpoenaed McDonald's tape recordings, documents furnished by Ling, and "the successive drafts" of McDonald's article before it was published. While *Fortune* was considering the request, officials from the Justice Department visited the headquarters of Time, Inc., which publishes *Fortune*, and appropriated the written material. Four months later the Department publicly apologized.²⁰

19. BROADCASTING, Feb. 2, 1970, at 55. Apparently unsatisfied with even this broad subpoena, the Justice Department—this time in connection with the Secret Service and the FBI—issued a second subpoena against CBS on January 26, 1970, demanding records of all correspondence, memoranda, notes, and telephone calls made in connection with the *60 Minutes* Black Panthers program, including material relating to the CBS interview in Algeria with Eldridge Cleaver, the Panthers' minister of information. This second subpoena covered materials from mid-1968 to 1970. An unidentified legal spokesman from CBS stated that the network might go to court if a "really solid" freedom of the press question were raised, but he indicated that he wanted to reach an accommodation with the federal authorities.

Richard Salant indicated at that time that CBS might supply the Government with information in limited cases, even though it "might hurt journalistic functions." BROADCASTING, Feb. 2, 1970, at 55. In February, however, CBS said that it might challenge subpoenas in "appropriate" cases, and Salant expressed his personal opposition to the subpoena procedure. *Washington Post*, Feb. 4, 1970, at A-8, col. 6.

20. *N.Y. Times*, Feb. 10, 1970, at 24, col. 4. In recent months, several other cases of official pressure on the media have been made public. For example, following the "Weathermen" incident in Chicago, in October 1969, the United States Attorney demanded that Chicago's four daily newspapers, its TV stations, and *Time*, *Life*, and *Newsweek* magazines turn over films, photos, and files on the incident. *Time* and *Life* apparently complied; *Newsweek* made some effort to protect confidential informants; and the newspapers apparently decided to turn over that information which the Government could not get elsewhere. *Washington Post*, Feb. 4, 1970, at A-8, col. 6. Similarly, after the Chicago police raid on the Black Panthers in December 1969, "blanket subpoenas" were again issued to the Chicago media, according to James Hoge, editor of the *Chicago Sun-Times*. Apparently the Chicago media did not vigorously or publicly resist. *Washington Post*, Feb. 4, 1970, at A-8, col. 6. The Justice Department also recently subpoenaed all the notes and tape recordings of *New York Times* reporter Earl Caldwell, made with Black Panthers during interviews dating back to the beginning of 1969. *Washington Post*, Feb. 4, 1970, at A-8, col. 6. At last report, however, the Justice Department had "postponed indefinitely" its subpoena of Caldwell, *Washington Post*, Feb. 11, 1970, at A-14, col. 6, and a federal court has ruled that Caldwell may refuse to disclose the identities of his confidential informants until the government makes a "clear showing of compelling and overriding national interest that cannot be served by alternative means." *In re Caldwell*, 38 U.S.L.W. 2540 (N.D. Cal., April 14, 1970). The executive editor of the *Washington Post* reported that twice in the past two years the *Post* has been asked to supply photographs for use in criminal actions. The *Post* has refused both requests. *Washington Post*, Feb. 4, 1970, at A-4, col. 1. Again, in 1968, following the April 1967 civil disorders in Washington, D.C., the

Why did the media tolerate these serious incursions on their journalistic freedoms for so long without even raising a public outcry or protest? The answer, I think, lay in a "communications gap" between journalists and lawyers. The journalists were unaware of the legal methods available to resist the demands of the Justice Department. And the lawyers, too often working as hired guns for the corporate board rooms of large media conglomerates, either failed to understand the serious chilling effect of these subpoenas on journalistic freedom or simply placed the profit-and-loss statements of their corporate overlords above traditional first amendment values.

Alan Adelson has reviewed the subpoenas controversy for *Saturday Review* in an article entitled, "Have the News Media Become Too Big To Fight?"²¹ For four months, Adelson reported, the most prominent news institutions turned over films and reporters' accounts of interviews and disturbances to law enforcement authorities. Why had these institutions "neglected to defend fully the right to privacy with their sources"?²² Adelson's conclusion is one that serious students of the media should ponder long and seriously:

According to several accounts, the [media's corporate] lawyers saw not only no alternative to complying with the subpoenas but little reason not to. As Barton Clausen of the American Civil Liberties Union puts it: "Corporate attorneys don't even know about press freedom." While that judgment may be a bit harsh, the accepted practice for media attorneys is to worry about protecting first profits and the stockholder interests, and then the freedoms and the prerogatives of the journalists.²³

According to Adelson, network officials at CBS admitted that "an internecine conflict broke out between the news department and the corporate lawyers over whether the network should deliver its films and notes on the Black Panthers."²⁴ According to another account, attorneys for *Time*, *Newsweek*, and CBS "not only advised against any hope of winning a court battle but suggested that every-

Justice Department subpoenaed newsfilm and news photographs of TV stations and newspapers. After conferences between the Department and the stations, some of the film was viewed at the stations. BROADCASTING, Feb. 9, 1970, at 60. In addition, film shot by cameramen from a Baltimore television station of the 1969 raid by the "D.C. Nine" on the offices of Dow Chemical in Washington was subpoenaed and introduced as evidence at trial. BROADCASTING, Feb. 9, 1970, at 60. Finally, at the trial of the "Catonsville Nine," a group accused of burning draft files in Baltimore, air film as well as "outtakes" were subpoenaed and used at the trial. BROADCASTING, Feb. 9, 1970, at 60.

21. SATURDAY REVIEW, March 14, 1970, at 106.

22. *Id.*

23. *Id.*

24. *Id.*

one keep the whole question quiet."²⁵ It was not until Jack Gould broke the story in the *New York Times* a week later that the public learned of the industry-government deal.²⁶

Why, then, did highly trained lawyers react in ways so antagonistic to first amendment freedoms? Again, the answer may be that journalists and lawyers do not communicate their values and concerns to each other. Law schools have generally not devoted much attention to the law of "mass communications." Most students are acquainted with this body of law only tangentially, through courses in constitutional, copyright, or administrative law. Apart from a few isolated cases concerning movie censorship,²⁷ even constitutional law courses deal primarily with books, magazines, newspapers, soap box orators, and the occasional pamphleteer. Rarely do students come in contact with the special problems of radio, television, cable television, telephone and common carrier regulation, communications satellites, and the like. Moreover, to the extent that law courses in "Communications" do exist, they are too often confined to the technical aspects of administrative regulation, such as license renewal applications, transmitter changes, broadcast signal overlaps, and fairness doctrine complaints.

Conversely, journalism schools have generally offered courses designed to give their students only a brief acquaintance with some of the legal pitfalls they may encounter in their profession—libel and slander, deceptive advertising, copyright problems, and some first amendment violations. Rarely are journalism students familiarized with such "legal" problems as rights of "access" by individual citizens or groups to the facilities owned and controlled by the mass media, rights of privacy, or the application of antitrust laws to the press; and they are almost never given a thorough grounding in the principles and values of freedom of speech or in the many facets of broadcast regulation—diversification of ownership, the fairness doctrine, ascertainment of community needs and interests, and so on.

Gillmor and Barron's book bridges this interdisciplinary gap with substantial success. Of the six major chapters, Professor Barron has been the principal author for I, V, and VI: "The First Amendment Impact on Mass Communication," "Selected Problems of Law and Journalism," and "The Regulation of Radio and Television Broadcasting." Professor Gillmor has taken primary responsibility for chapters II, III, and IV: "Libel and the Newsman," "The Puzzle of Pornography," and "Free Press and Fair Trial."

25. *Id.* at 107.

26. *N.Y. Times*, Jan. 21, 1970, at 71, cols. 1-4.

27. *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Schneider v. Town of Irvington*, 308 U.S. 147 (1939); *Near v. Minnesota*, 283 U.S. 697 (1931).

Chapter I takes the student through the perplexing but ringing debates over the "clear and present danger" test. As the reader makes his way along the historic route of *Schenck*,²⁸ *Abrams*,²⁹ *Gitlow*,³⁰ *DeJonge*,³¹ *Douids*,³² *Dennis*,³³ and *Yates*,³⁴ he encounters some of the most brilliant constitutional doctrine ever penned by the Justices of the Supreme Court. He sees Justice Holmes, for instance, caution against "falsely shouting fire in a crowded theatre,"³⁵ create the "clear and present danger" test,³⁶ and remind us that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."³⁷ He sees Justice Sanford warn that speech alone may threaten revolution and that a "single revolutionary spark [of speech] may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration,"³⁸ and he sees Justice Brandeis, two years later, counter with the famous words: "Fear of serious injury cannot alone justify suppression of speech and assembly If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."³⁹ Throughout their discussion of the evolution of first amendment doctrine, Gillmor and Barron carefully encourage the student to draw contemporary implications from older precedent. For example, drawing on Justice Holmes' "market place of ideas" concept, the authors suggest that "[t]he 'market' Holmes is talking about is basically what we call today the mass media. . ." (p. 16). They then ask whether "'free trade in ideas' [is] the distinguishing characteristic of these media" (p. 16). This stress on the free flow of ideas ties together the latter portions of the first chapter, which are devoted to recent cases and writings on the theory—proposed by Professor Barron—that truly free speech requires "access" to the microphones, the television lenses, and the printing presses of the mass media. Free speech, the authors suggest, cannot be free in a closet. Rather, true communication requires both a speaker *and an audience*, and that audience today is the audience of millions who sit before their radio or television sets and read their daily newspapers.

28. *Schenck v. United States*, 249 U.S. 47 (1919).

29. *Abrams v. United States*, 250 U.S. 616 (1919).

30. *Gitlow v. New York*, 268 U.S. 652 (1925).

31. *DeJonge v. Oregon*, 299 U.S. 353 (1937).

32. *American Communications Assn. v. Douds*, 339 U.S. 382 (1950).

33. *Dennis v. United States*, 341 U.S. 494 (1950).

34. *Yates v. United States*, 354 U.S. 298 (1957).

35. *Schenck v. United States*, 249 U.S. 47 (1919).

36. 249 U.S. at 52.

37. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Justice Holmes, dissenting).

38. *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

39. *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (concurring opinion).

Chapter II systematically organizes and explores the law of libel, but from the newsman's perspective as well as the lawyer's. Thus, in addition to the more or less standard treatment of *New York Times Co. v. Sullivan*⁴⁰ and its progeny, the authors delve into questions of damages, criminal libel, malice, burdens of proof, and—in virtual hornbook fashion—the defenses against libel. The authors also discuss the newsman's privilege to refuse to disclose his confidential sources of information—a subject which the recent subpoena controversy has dramatically brought to the public's attention. Chapter II also contains a clear exposition of the "secondary" defenses to libel—retraction and apology, reply, settlement, proof of previous bad reputation, and reliance on a usually reliable source—and of other facets of this difficult area which are particularly important to newsmen.

Chapter III analyzes the law of "obscenity" and provides substantial historical, sociological, and anecdotal material on the problem.⁴¹ Law students in this area are too often trapped in a moral and sociological wilderness with only the compass of well-worn legal phrases to guide them. The authors seek to remedy this deficiency by drawing upon materials from literature, psychology, sociology, and the experiences of other countries. Although such terms as "hard core," "patently offensive," "well beyond the bounds of contemporary community standards," "socially redeeming interest," "pandering," "prurient interests," and "obscenity per quod" soon begin to swim before the student's eyes—despite Justice Stewart's contention that at least *he* knows it when he sees it⁴²—the authors have made the best of a difficult job.

One deficiency in chapter III, for my purposes at least, is the absence of any discussion of standards for the control of "obscenity" or "indecent" language over the broadcast media. To put the problem bluntly, if *I Am Curious (Yellow)* is cleared by the Supreme Court for distribution in movie houses around the United States, how should the FCC react to a network proposal to show it on the "Nine O'Clock Movie" to a potential audience of sixty million? Everyone is accustomed to reading four-letter words occasionally, even in some of the nation's leading magazines. Reading, however, is essentially a private activity, engaged in solely by the person in whose hands the book or magazine is placed; hence those offended by some of the oldest Anglo-Saxon words in the English language have the simple expedient of not reading them. But what of radio

40. 376 U.S. 254 (1964).

41. The authors note, for example, that "[t]he Illinois Vigilance Association discovered in 1922 that jazz had 'caused the downfall' of one thousand girls in Chicago alone So laws were passed to prohibit the playing of jazz in public places" (p. 287).

42. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart, concurring).

and television? Is television anything more than an electronic, public billboard? And how would the law react to public billboards (electronic or otherwise) depicting scenes of intercourse or stating familiar "four-letter words"? Traditional constitutional law analyses have defined the concept of "obscenity" as material designed to arouse prurient interests in sexual matters.⁴³ Yet what form of constitutional protection should be given to "four-letter words"—especially when broadcast over radio and television? Individual four-letter words may arouse a number of emotions in the average listener but I rather doubt that a "prurient interest in sex" is one of them. Where, then, in that hierarchy of constitutionally protected forms of expression, are we to find the often-used, but much-maligned, "four-letter word"? Gillmor and Barron's casebook offers us little guidance in answering this question.⁴⁴

Chapter IV, "Free Press and Free Trial," in addition to discussing *Irvin v. Doud*,⁴⁵ the Oswald case and the *Warren Report*,⁴⁶ and the *Sheppard* case⁴⁷ and the Reardon Report,⁴⁸ contains interesting materials on the use of cameras in the courtroom. Again, the law student will benefit from the anecdotal material supplied by the journalism professor, Mr. Gillmor. Chapter IV also devotes a fascinating section to the liability of the American and English press for "contempt of court" for statements about the parties or the judge in a pending trial. Not many Americans know, for example, that if an English court concludes that a newspaper story has had a "reasonable tendency" of "polluting the streams of justice,"⁴⁹ it can hold the publisher, the editor, the reporters, or the printers in contempt of court and commit them to prison. In 1949, for instance, the editor of the London *Daily Mirror* was sentenced to

43. *Roth v. United States*, 354 U.S. 476, 489 (1957).

44. For the Federal Communications Commission's recently enunciated views on "indecent language" over the airwaves, see Eastern Educ. Radio (WUHY-FM), 18 P & F RADIO REG. 2d 860 (1970) (FCC 70-346, released April 3, 1970), (Commissioners Cox and Johnson dissenting).

45. 366 U.S. 717 (1961). In *Irvin*, the Court vacated a murder conviction on the ground that the defendant did not have a fair trial by a panel of impartial jurors. The Court found that the effect of widespread newspaper publicity was to create a "pattern of deep and bitter prejudice" shown to be present throughout the community," 366 U.S. at 727, a pattern which was reflected in the voir dire examinations of the jurors who were finally placed in the jury box.

46. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964).

47. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

48. The Reardon Report, prepared by the American Bar Association's Advisory Committee on Fair Trial and Free Press [Proposed Final Draft approved Feb. 19, 1968; earlier version published under the title *Fair Trial and Free Press* (1966)], suggested the use of the courts' contempt power against persons who had disseminated extrajudicial statements deliberately designed to affect the outcome of a trial during its pendency. It is strongly criticized by Professor Gillmor (Pp. 372-78).

49. Barron & Gillmor (p. 420) (emphasis supplied).

three months in prison and fined approximately 28,000 dollars when the *Mirror* headlined the arrest of a murder suspect, "The Vampire Man Held," in a rather obvious reference to the rumor that the suspect drank the blood of his victims through a straw.⁵⁰ Similarly, when *Newsweek* magazine hinted that a relationship might exist between an English doctor accused of administering overdoses of sleeping pills and the legacies left him by his deceased patients, *Newsweek's* chief European correspondent barely escaped a contempt citation from an English court, even though he had absolutely no connection with the story. These materials on English law demonstrate the comparative freedom which the American press has for comment on pending trials, and they thus place that freedom into striking perspective.

Chapter V samples a number of lesser-known, but nevertheless important, problems of law and journalism. Included are treatments of access to the records of governmental agencies (a subject in which Ralph Nader is rapidly becoming expert), the freedom of newsmen to travel to collect information, the rights of individuals to resist the glare of publicity, and the problems of lobbying and anonymous speech. Most important, however, the authors consider a subject that is often overlooked in comparable studies—the interrelation of the antitrust laws and the freedoms of speech and press. In early cases on this subject, the press had argued successfully that the first amendment effectively exempted them from the sanctions of the antitrust laws.⁵¹ The courts, however, have stood this notion on its head—intimating in a number of cases that the first amendment may actually *compel* the equivalent of antitrust treatment for the communications media.⁵² As the authors suggest, the "market place of ideas" is a sterile concept when all the newspapers and all the radio and television stations in one community or state are owned by the same person, entity, or corporation.

Finally, chapter VI acquaints the student with certain legal and policy questions involved in radio and television broadcasting. After discussing the rationale for the FCC's regulatory control over broadcasting, the authors take the reader through an analysis of the Commission's "balanced programming" concepts, the fairness and equal-time doctrines, policies of the diversification of ownership rules, and problems both of new technologies—cable television, pay-TV, and communications satellites—and of their impact on the future of mass communications.

A reading of Gillmor and Barron's excellent 853-page treatment

50. The rumor, by the suspect's own admission, was subsequently confirmed as true.

51. *E.g.*, *Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103 (1937).

52. *See, e.g.*, *Hale v. FCC*, No. 22, 751 (D.C. Cir., Feb. 16, 1970), at 1, 7, 8-10 (slip opinion) (Judge Tamm, concurring and citing further authority).

of the law of mass communications may strike the reader with an important but somewhat hidden aspect of constitutional law: whereas literally hundreds of cases involving the limits of permissible-speech content have reached the federal circuit courts and the Supreme Court—in areas of obscenity, group association, subversive activity, and so forth—*not one case*, to my knowledge, has reached these courts in the past three decades concerning permissible-speech content in the broadcasting media. This absence seems odd, since booksellers, magazine publishers, and film distributors—starting with the famous test cases over *Ulysses*⁵³ and *Lady Chatterley's Lover*⁵⁴—have repeatedly gone to court to defend the people's freedom to disseminate and receive ideas, concepts, and varying forms of artistic expression. What accounts for the absence of the broadcasters in this fight to defend first amendment freedoms?

The answer, I think, is twofold. First, broadcasters have stayed so far away from the "experimental," the "innovative," or the "controversial" that they have never had to test the limits of free speech in this country. Whatever else *Green Acres*, *The Beverly Hillbillies*, or other mass-appeal programs may be, they scarcely appeal to one's "prurient interests" or create a "clear and present danger" of fomenting ideas heretical to entrenched notions of national security in this country. Second, even when broadcasters *have* occasionally, and perhaps accidentally, strayed too close to the line separating mediocrity from creativity, they seem to have generally refused to seek judicial protection for their first amendment rights.⁵⁵ When in such cases the Government has subpoenaed information from the broadcasters or has imposed fines or other forms of punishment on them for allegedly "subversive" programming, and when the broadcasters have then been faced with the option of fighting in court or submitting to the Government, they have too often opted for submission. The same willingness to comply with the Government at any cost can be seen in the newspaper industry. For example, one commentator reported that a *New York Times* newsman "suggested to an editor at the *Times* that his being subpoenaed to appear at the Spock trial was a violation of the First Amendment guarantees of

53. *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *affd.*, 72 F.2d 705 (2d Cir. 1934).

54. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), *affd.*, 276 F.2d 433 (2d Cir. 1960).

55. The latest example of such acquiescence involved WUHY-FM. *See* note 44 *supra*. The FCC (Commissioners Cox and Johnson dissenting) fined WUHY-FM \$100 for broadcasting allegedly "indecent" language. In so doing, the FCC created new justifications for bans on minority forms of speech over the broadcast media, hoping that the licensee would take this important test case to the courts. Rather than fight, however, WUHY-FM decided to pay the \$100 fine and the proceedings were terminated. Apparently no appeal will be brought, and this dangerous Commission precedent will remain on the books.

press freedom But he says he was told not to make an issue of it and to answer."⁵⁶

Gillmor and Barron's book will not supply intestinal fortitude to industries known more for their acquiescence than their courage in fighting for freedoms of speech. But it may encourage broadcasters and journalists to push their skills to the limits of the first amendment, and it may give lawyers for the corporate media the commitment to support the broadcasters and journalists when they do.

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56. SATURDAY REVIEW, March 14, 1970, at 106.