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Positing a Right of Access: Evaluations and Subsequent Developments

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COMMENTARY

POSITING A RIGHT OF ACCESS: EVALUATIONS AND SUBSEQUENT DEVELOPMENTS

FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA. BY JEROME A. BARRON. Bloomington, Ind.: Indiana University Press, 1973. Pp. 352. $8.95.

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Theories of the first amendment guarantees of free speech and a free press have been subjects of continual refashioning and redefinition. Political, social, and technological developments of the past decade again have forced reexamination of basic tenets and development of new theories. Particularly significant is Dean Jerome A. Barron's thesis that if freedom of speech and press is to continue as a viable concept, individuals must be afforded the right to compel access to the mass media. *Freedom of the Press for Whom?* is an expansion of Dean Barron's earlier essay on the subject[1] proposing that a right of access be created by judicial decision interpreting the first amendment or by statute consistent with the first and fourteenth amendments. The book forcefully presents this controversial and stimulating argument in a manner suitable for a general audience, providing valuable insight into the function of the first amendment in today's society.

THE FUNCTIONAL PROBLEM

In considering an unusual approach to the first amendment such as Dean Barron's, the initial inquiry should be whether and to what extent societal developments require that doctrine be rethought. In the context of an argument for a right to compel access to the mass media, the question is whether the media already cover, in one form or another, all issues to an extent sufficient to expose them to the consideration they merit. Dean Barron undertakes persuasively to establish that they do not. Although his conclusion ultimately may be valid, it is an informed subjective judgment not fully supported by data.

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1. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

It is true, for example, that the process of selecting for publication letters to newspaper editors[2] is susceptible to a newspaper's bias and that the most prestigious newspapers reject many more letters than they publish.[3] Selectivity, however, is necessary and, at least arguably, is done with a degree of fairness.[4] Seldom do editors totally suppress ideas with which they do not agree, and editing of published letters usually reflects an effort to preserve the essence of what was written.

In addition, one-sided reporting, a criticism offered by almost every controversial figure, is not without justifying explanation. Reportage reflects a strain of accepted opinion of varying width and intensity, affected only partially by the editor's philosophy. Moreover, viable journalism involves the presentation of ideas on the basis of a complex evaluation of their potential merit, their degree of deviation from conventional thinking, their potential newsworthiness, and their manner of presentation, including intellectual force and psychological appeal.

The problem is compounded by the media market Dean Barron posits. The electronic media and newspapers of general circulation are presented as the overwhelming focal point of the discussion, while neglected are the multitude of other means of communication, such as rallies, leafleting, door-to-door canvasses, a waxing and waning underground press, ethnic and other special interest newspapers, and a broad spectrum of magazines. Nevertheless, all of these vehicles have their limits. It is easier to leaflet a college campus than a city of several million, much less the entire country. Although the newsweeklies remain potent forums, mass magazines of general interest are virtually in total decline, replaced by special interest magazines, which, as a result of the symbiotic relationship they hold with their readers, serve generally not as vehicles for change but as forums for repetition of ideas already held by their readers.

Dean Barron does, in a nine-page chapter entitled "Crime as a Forum," [5] discuss *United States v. O'Brien*[6] and *United States v. Kiger*,[7] in which convictions for draft card burning were upheld over the claim that such conduct was protected symbolic speech against the war

2. J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA 44-52 (1973).

3. *Id.* at 47.

4. Note, however, Dean Barron's discussion of two California newspapers which refused to publish any letters to the editor on certain issues. *Id.* at 45.

5. *Id.* at 117-25.

6. 391 U.S. 367 (1968).

7. 297 F. Supp. 339 (S.D.N.Y. 1969), *aff'd per curiam*, 421 F.2d 1396 (2d Cir.), *cert. denied*, 398 U.S. 904 (1970).

in Vietnam. Casually overlooked, however, are other forms of communication utilized by critics of the war. The efforts of 1967 culminating in Senator Eugene McCarthy's declaration for the Presidency were numerous, substantial, and clearly within the law—rallies, vigils, teach-ins, picketing, and leafleting. Whatever the source of their ability to communicate, Senator McCarthy and his advocates were influential in the decision of President Johnson not to seek reelection. Although their position did not prevail with the electorate in November 1968, the fact remains that initially unpopular ideas were widely communicated, received, and accepted, all to a large extent through forums other than the mass media. When, however, in the spring of 1970, it became obvious to critics of Vietnam policy that their ideas had not received sufficient acceptance to be implemented despite wide exposure, many, unlike Kiger and O'Brien who had employed arguably legal means to communicate ideas then receiving insufficient access, engaged in clearly illegal acts.[8] It would thus appear that at least part of the problem upon which Dean Barron posits the need for a right of access to mass media results not from the lack of adequate forums but simply from a lack of acceptance of unpopular ideas, notwithstanding sufficient opportunity to communicate those ideas.

These observations hardly defeat Dean Barron's thesis. He has taken and pursued a position which is quite reasonable and very possibly correct. Failure to put forth sufficient empirical data to support his access argument is perhaps justified by the elusiveness of the concepts and constructs embodied in its theory. Nevertheless, the need for a firm empirical underpinning should be recognized by an advocate and, particularly in this instance, pursued.[9] Courts understandably are leery

8. These acts included the widely publicized burning of buildings, ransacking of draft board offices, disruptive conduct on college campuses in opposition to fighting in Cambodia, and the aftermath of the demonstration at Kent State University. The mass media were, by this time, supplying wide exposure to all forms of protest, including those clearly lawful.

9. Further information necessary fully to support Dean Barron's thesis includes a realistic model indicating the source of the public's information; this would likely require a study of the degree to which people turn to newspapers and television as their sole source of information. Note, for example, the 1973 Harris Poll commissioned by the Senate Subcommittee on Intergovernmental Relations, in which the sampling indicated that the public depends "a great deal" on television news (65 percent) and newspapers (52 percent) for information on government and politics. 1973 Harris Poll, in BROADCASTING, Dec. 10, 1973, at 46. Second, there must necessarily be a showing that *nowhere* in the public information sources is there sufficient access. Clearly, the letters-to-the-editor studies and the stated policies of broadcasters lend some support to Dean Barron's proposal, but these, too, must be pursued further.

of accepting such extreme departures from traditional theory without solid evidence of the need.[10] Legislators considering the statutory implementation of a right of access must have empirical data upon which to base a decision of such magnitude. Until statistical evidence is forthcoming, the access argument, while continually gaining acceptance, is unlikely to prevail except in limited circumstances, such as where the existence of state action compels a right of access[11] or where a statute is founded upon an especially strong basis in reason.[12]

The Judicial Option

Dean Barron's failure to foresee the judicial rejection of efforts to create a right of access, while understandable, is a lamentable shortcoming of the book. He unfortunately relied upon the decision of the Court of Appeals for the District of Columbia Circuit in *Business Executives' Move for Vietnam Peace v. FCC*[13] that a broadcaster's policy of summarily refusing paid editorial advertisements contravened the first amendment. This decision was certain of review, especially in the context of the ruling of the Supreme Court in *Lloyd Corp. v. Tanner*[14] and those of lower courts that state action is a prerequisite to a right of compelled access.[15] The Court in *Lloyd Corp.*, in holding that the property rights of the owner of a shopping center were superior to the right of an individual to use the center's mall for leafleting unrelated to the center's operation, shifted the emphasis of the access inquiry from freedom of speech to private property rights:

> The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory [is] Marsh v. Alabama [326 U.S. 501 (1946)],

10. *Compare* Tornillo v. Miami Herald Publishing Co., No. 43,009 (Fla. July 18, 1973), *appeal granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 797) *with* Opinion of the Justices, — Mass. —, 298 N.E.2d 829 (1973). In *Tornillo* a Florida statute requiring reply rights for attacked political candidates was upheld as part of a larger scheme to prevent campaign abuses. *Opinion of the Justices* held contra with respect to a similar proposed Massachusetts statute. *See* notes 45-62 *infra* & accompanying text.

11. *See, e.g.*, Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971), *aff'g* 306 F. Supp. 1097 (W.D. Wis. 1969); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

12. *See* Tornillo v. Miami Herald Publishing Co., No. 43,009 (Fla. July 18, 1973), *appeal granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 797). For a discussion of this case and the legislative approach to the access question generally, see notes 36-62 *infra* & accompanying text.

13. 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broadcasting System v. Democratic Nat'l Committee, 93 S. Ct. 2080 (1973).

14. 407 U.S. 551 (1972).

15. *See* cases cited note 11 *supra*.

> . . . [where] the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.
>
> Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. . . . We . . . say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.
>
> We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.[16]

The majority in *Lloyd Corp.* restricted *Amalgamated Food Employees v. Logan Valley Plaza*[17] and *Marsh v. Alabama*[18] to their facts; the dissent[19] followed the broader rationale of *Logan Valley* and *Marsh* to its ultimate conclusion. Reading the two opinions together and considering the requirement of state action imposed by lower courts in access cases, it was manifest that the current majority of the Supreme Court would reject an argument of a constitutional right of access to newspapers on a private property theory and to broadcast media absent a finding of state action. Nevertheless, Dean Barron elected to treat *Lloyd Corp.* as an irritating aberration,[20] not the shift of philosophical balance, however wrong or even transient, that it represented.

16. 407 U.S. at 569-70 (footnote omitted).

17. 391 U.S. 308 (1968). Like *Lloyd Corp.*, this case involved the question of access to a large shopping center. The peaceful picketing in *Logan Valley*, however, concerned a labor dispute with one of the stores, while the handbilling in *Lloyd Corp.* was "unrelated to the shopping center's operations." 407 U.S. at 552. In distinguishing *Logan Valley*, the Court in *Lloyd Corp.* stated: "*Logan Valley* extended *Marsh* . . . only in a context where the First Amendment activity was related to the shopping center's operations." *Id.* at 562.

18. 326 U.S. 501 (1946).

19. 407 U.S. at 570-86 (Marshall, J., dissenting).

20. J. BARRON, *supra* note 2, at 104-07. Dean Barron analyzes the holding in *Lloyd Corp.* as a result of the predilections of the "four new Nixon appointees," rather than as sound constitutional doctrine. *Id.* at 106. The usage is pejorative in the same sense that "Warren Court" has become a critical phrase when uttered by those who dislike the constitutional philosophy of the Court under Chief Justice Warren.

In any case, *Business Executives' Move*, reviewed by the Supreme Court in *Columbia Broadcasting System v. Democratic National Committee*,[21] ought to have been affirmed. First, although it is possible to reconcile the result with *Red Lion Broadcasting Co. v. FCC*,[22] the philosophical thrust of which is towards access, the cases require a more rigorous distinction than the Court in *Democratic National Committee* afforded. It is true that in *Red Lion* the Court focused upon the right of the public to receive suitable exposure to ideas, not the rights of broadcasters or of those who propound the ideas to present them: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." [23] Similarly, in *Democratic National Committee* the Court stressed a first amendment right to receive ideas, rather than a right to communicate them.[24] It neglected, however, a fundamental proposition underlying the issues in *Red Lion* and referred to in dicta[25] in that case that an idea can best be presented by one who truly believes in it; in other words, the most effective receipt of ideas results from their presentation by their staunchest advocates. Nor, more importantly, did the Court in *Democratic National Committee* address the intense problem of where the ideas people have a right to receive will originate if the trustees of the airways do not present them or permit others to do so.[26]

Second, the Court in *Democratic National Committee* failed adequately to refine the concept of state action and, indeed, thrust it into considerable confusion; what was provided is but a series of plurality holdings.[27] Most significant is the argument of Chief Justice Burger, joined by Justices Stewart and Rehnquist, that Congress opted against government control of broadcast media.[28] The opinion, although eloquent, fails to refute the argument that state action, in a constitutional

21. 93 S. Ct. 2080 (1973).

22. 395 U.S. 367 (1969). *Red Lion* put the stamp of constitutionality on the fairness doctrine, which requires broadcasters to provide reasonable opportunity for the presentation of conflicting viewpoints on controversial issues of public importance. *See* J. BARRON, *supra* note 2, at 127.

23. 395 U.S. at 390.

24. 93 S. Ct. at 2099-2101.

25. 395 U.S. at 392 n.18. The Court was here adopting a proposition first asserted by John Stuart Mill.

26. *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). This case is discussed in J. BARRON, *supra* note 2, at 194-98.

27. *See* 93 S. Ct. at 2120-21 (Brennan, J., dissenting).

28. *Id.* at 2093.

sense, is *inherent* in a viable system of broadcasting. It may be conceded that scarcity of broadcast frequencies alone is not a sufficient rationale for finding state action in government licensing of broadcasters, since television and radio are no more scarce than newspapers;[29] in fact, in an economic sense, barriers to entry to publishing in many markets are as high as those to broadcasting.[30] In the context of broadcasting, however, scarcity must be viewed in conjunction with the phenomenon of interference among frequencies as compelling state selection of broadcast licensees. It is this action of the state required by scarcity and interference, and not the scarcity and interference themselves, which necessitates application to broadcast media of first amendment principles guaranteeing the public the right to receive a broad spectrum of ideas.

Nor does the plurality opinion of Chief Justice Burger succeed in distinguishing *Public Utilities Commission v. Pollak*,[31] in which the Court held that approval by the Public Utilities Commission of the District of Columbia of radio broadcasts on buses constituted state action by the federal government contravening the first amendment rights of passengers not wishing such broadcasts thrust upon them.[32] In *Democratic National Committee*, Chief Justice Burger implied that there is less government control of broadcasting than of bus transportation because the government freely chose to involve itself in providing transportation but was forced to become involved in broadcasting.[33] Any such distinction is irrelevant to the issue of state action. The question which must be asked is whether the state *does* become entangled in the conduct of private activities, not whether it wants to become involved. Inasmuch as the broadcasting industry not only is molded to a substantial degree by government regulation but also could not exist without it, especially in deciding who may broadcast,[34] there is state action. Although actually an unwilling and, to a degree, unwanted agent of the public interest, the licensee is denominated a public trustee.[35] Any lack of desire for involvement on the part of the state

29. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396-401 (1969).

30. *See, e.g.*, Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959); Levin, *The Radio Spectrum Resource*, 11 J. LAW & ECON. 433 (1968); Levin, *Federal Control of Entry in the Broadcasting Industry*, 5 J. LAW & ECON. 49 (1962).

31. 343 U.S. 451 (1952).

32. *Id.* at 462.

33. 93 S. Ct. at 2086-92.

34. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-90 (1969).

35. *See* Columbia Broadcasting System v. Democratic National Committee, 93 S. Ct. 2080, 2093-94 (1973).

cannot negate the necessity of that involvement to the existence of a broadcast industry.

The Legislative Approach

The possibility of statutory resolution of the access problem is much more sanguine. Dean Barron argues that section five of the fourteenth amendment empowers Congress to enact legislation creating a right of access.[36] That the fourteenth amendment would support such legislation, if the first amendment permits it, is beyond serious dispute.[37] What has been troublesome about such legislation is its administrative feasibility, a focal point of attack upon the idea of access generally.

A bill drafted by Dean Barron appears eminently workable.[38] Under its terms, the right of access is restricted to newspapers of general circulation; reliance presumably is placed upon FCC action for application of the right to broadcast media, although the proposal is silent on this point. The bill requires newspapers to accept an editorial advertisement at going rates if no newspaper in the area will accept it voluntarily, as well as to grant space for reply to persons and organizations who have been subject to comment. The right of access would be enforceable by mandatory injunction in the federal courts.

Although the terms "newspaper of general circulation" and "organization" as used in the bill lack a certain precision, they and other terms are defined adequately to enable courts to act confidently in reaching decisions and adding specificity. The bill does, however, leave open the question of liability of a newspaper for defamation in material it is required to publish; presumably such liability could be removed, as is done for broadcasters under section 315 of the Federal Communication Act.[39] No other major problem appears, and any that might arise would be amenable to the traditional equity power of the courts. Assuming, as one must, that good faith compliance would follow determination of the legislation's constitutionality, Dean Barron's bill satisfies the major burden of establishing practicality.

The judicial attitude toward such legislation appears encouraging.

36. J. Barron, *supra* note 2, at 67-68.

37. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

38. Truth Preservation Act, H.R. 18941, 91st Cong., 2d Sess. (1970). The bill is reproduced in J. Barron, *supra* note 2, at 55-58.

39. 47 U.S.C. § 315 (1970). *See* Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959).

A Supreme Court decision on defamation[40] cited with approval[41] Dean Barron's seminal article on access [42] as stating a possible basis for modification of the *New York Times Co. v. Sullivan*[43] doctrine. Moreover, the Court in *Democratic National Committee*, after finding an absence of congressional intent in the Federal Communications Act to require access, specifically left open the question of the validity of either an FCC rule or congressional enactment requiring access.[44]

In *Tornillo v. Miami Herald Publishing Co.*,[45] the Florida Supreme Court recently upheld a long-neglected Florida statute creating reply rights for attacked political candidates.[46] In so doing, it generally accepted the argument of Dean Barron, who was on the prevailing brief, that the continued concentration of the press jeopardizes "[t]he right of the public to know all sides of a controversy and . . . to be able to make an enlightened choice . . . ." [47] To protect the public's right to information, the argument continues, the absolute power of private censorship must be restricted.[48] Doing so prohibits nothing, "but rather . . . requires, in the interest of full and fair discussion, additional information." [49] Thus, the affirmative use of state power to require access vindicates, rather than restricts, first amendment rights, since providing

40. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), in which the Court held that an individual cannot recover damages for libel against a radio station if the context in which he allegedly was defamed was such as to make him a subject of the public interest.

41. *Id.* at 47 n.15.

42. Barron, *supra* note 1.

43. 376 U.S. 254 (1964). The Court in *Sullivan* held that a newspaper has a qualified privilege to defame public officials with respect to their official conduct and is liable for defamation in such case only upon a finding of actual malice. *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Garrison v. Louisiana, 379 U.S. 64 (1964).

44. 93 S. Ct. at 2100-01.

45. No. 43,009 (Fla. July 18, 1973), *appeal granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 797).

46. The statute provides, in pertinent part:

> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree . . . .

FLA. STAT. § 104.38 (1965).

47. No. 43,009 (Fla. July 18, 1973), at 6.

48. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

49. No. 43,009 (Fla. July 18, 1973), at 6.

the opportunity for full and robust debate of all issues without public or private censorship fulfills the mandate of the Constitution.

Although a concurring opinion in *Tornillo* found *Democratic National Committee* inapposite because it was grounded upon the scarcity of broadcast time for sale as advertising as well as the protection afforded by the fairness doctrine,[50] the Supreme Judicial Court of Massachusetts, in an advisory opinion to its state legislature that a proposed bill requiring access to newspapers would be unconstitutional, concluded otherwise.[51] Rather than relying on Chief Justice Burger's plurality opinion in *Democratic National Committee*, which found no state action, the Massachusetts court based its opinion on two concurrences and a dissent in that case. Justices Douglas[52] and Stewart,[53] in concurrence, refused to impose upon the electronic media burdens they found unconstitutional for the printed media. Justice Brennan, in a dissent in which Justice Marshall joined, found a basis for access premised on state action in the electronic media, whereas, he stated, in the printed media no state action exists and thus no right of access can be compelled.[54] The Massachusetts court also emphasized language from dissenting opinions in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[55] in which the Supreme Court upheld a prohibition of sex-designated commercial advertising. Rejecting the reasoning of the majority, Chief Justice Burger continued the concept of "protected journalistic discretion" [56] which he had first advanced in *Democratic National Committee*,[57] and Justice Stewart, with whom Justices Douglas and Blackman agreed in this particular, asserted that the government cannot "tell a newspaper in advance what it can print and what it cannot." [58]

The decision in *Democratic National Committee* and the views of the dissenters in *Pittsburgh Press* clearly are inapposite to the question of validity of a statutory right of access; indeed, other decisions of the Supreme Court provide sound support for the decision in *Tornillo*. The scarcity which does exist in the electronic media, the adequate minimal protection provided by the fairness doctrine, and only a general first

50. *Id.* at 13-15 (Roberts, J., concurring).
51. Opinion of the Justices, — Mass. —, 298 N.E.2d 829 (1973).
52. 93 S. Ct. at 2109.
53. *Id.* at 2101.
54. *Id.* at 2120, 2131-36.
55. 93 S. Ct. 2553 (1973).
56. *Id.* at 2563.
57. 93 S. Ct. at 2097.
58. 93 S. Ct. at 2566 (dissenting opinion).

amendment theory, rather than specific statutory authority, were factors present in *Democratic National Committee*. *Pittsburgh Press* dealt with an exclusion, not an inclusion, and thus was censorship (in the view of Justice Stewart in dissent), not a promotion of robust debate. The *Tornillo* decision, on the contrary, creates safeguards for and promotes robust debate, prime values stressed by the Supreme Court in *New York Times Co. v. Sullivan*[59] and *Rosenbloom v. Metromedia, Inc.*[60]

A final consideration involves the support for the Florida statute in legislative findings of campaign abuses,[61] to which the statute is directed; apparently no such justification was advanced for the proposed Massachusetts bill.[62] The Florida statute ought to survive judicial scrutiny. The same should be true of a well-drawn bill such as Dean Barron's, provided it, too, is supported by a legislative finding of necessity.

Further Comments on Communications Theory

Some observations on other aspects of Dean Barron's book are in order. A substantial portion of the work is devoted to communication policies which are interesting but only tangentially germane to the problem of access.

The discussion of citizen group and rival applicant entry into the process of license renewal[63] does not add a significant aspect to the book, but rather leaves the reader with an optimistic, bitter-sweet—we are winning even though we are losing some—feeling of the progress of such groups. Unfortunately, progress is not being made. Those seeking entry have a hard position to establish. *Hale v. FCC*,[64] the KSL-AM case, which is fully discussed by Dean Barron,[65] illustrates the problem. Virtually impossible procedural requirements for a petition to deny renewal of a radio station license were imposed, including the pleading with specificity of the facts establishing the alleged violation; such a requirement could well entail an analysis of the entire programming for the period in controversy. Nor is *Brandywine Main-Line Radio, Inc.*[66] much more encouraging. Although the FCC premised license

59. 376 U.S. 254 (1964). *See* note 43 *supra*.

60. 403 U.S. 29 (1971). *See* notes 40-43 *supra* & accompanying text.

61. Tornillo v. Miami Herald Publishing Co., No. 43,009 (Fla. July 18, 1973), *appeal granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 797).

62. Opinion of the Justices, — Mass. —, 298 N.E.2d 829 (1973).

63. J. Barron, *supra* note 2, at 194-208.

64. 425 F.2d 556 (D.C. Cir. 1970).

65. J. Barron, *supra* note 2, at 226-32.

66. 24 F.C.C.2d 18 (1970), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972).

revocations of WXUR-AM and FM on violations of the fairness doctrine,[67] alternative grounds for revocation because of false statements of the licensee were set forth.[68] The Court of Appeals for the District of Columbia Circuit, while arguing the complex fairness doctrine question at great length,[69] affirmed on the less difficult basis of misrepresentation in the application.[70]

The same court in *Citizens Communications Center v. FCC*[71] failed to improve the rival applicant position which the FCC threw askew after the WHDH case[72] and the uproar caused by Senator Pastore's recommendations.[73] The FCC not only has made preliminary remarks evidencing an attempt to avoid requirements established by the courts[74] but also has rendered a decision[75] which makes clear that it views the major factor in licensing proceedings to be the preservation of the status quo ante. Although these efforts of the FCC doubtless will be challenged, optimism is difficult. Delay and attrition aid the established industry position and the acquiescent agency, not the citizen advocate seeking reform.

Two other topics considered by Dean Barron, the treatment of which deserve particular comment, are CATV, or cable television,[76] which receives short shrift, and objectionable presentations,[77] to which Dean Barron attaches much significance but fails thoroughly to explore.

Although cable television is recognized by Dean Barron as a potential, and indeed likely, source of access, cursory treatment is afforded

67. 24 F.C.C.2d at 22.

68. *Id.* at 28-32.

69. 473 F.2d 16, 40-48 (D.C. Cir. 1972).

70. *Id.* at 50-52.

71. 447 F.2d 1201 (D.C. Cir. 1971).

72. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *aff'g* 16 F.C.C.2d 1 (1969). In this case, the renewal of the license of a Boston television station owned by one of the city's newspapers was refused by the FCC in favor of a rival applicant who successfully argued that the public would be better served, and the FCC policy of diversification of media ownership better enforced, by granting the license to an independent voice. *See* J. BARRON, *supra* note 2, at 132-33, 210-13.

73. Senator Pastore introduced a bill to amend the Communications Act to require a comparative hearing for license renewals between the present licensee and rival applicants only after a finding that the incumbent licensee was not serving the public interest. *See* J. BARRON, *supra* note 2, at 213-14.

74. *See In re* Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 27 F.C.C.2d 580 (1971).

75. *In re* WTAR Radio-TV Corp., 27 P & F RADIO REG. 1 (March 15, 1973).

76. J. BARRON, *supra* note 2, at 249-69.

77. *Id.* at 270-303.

whereas detailed consideration is necessary. How, for example, will the fairness doctrine and the general public interest criteria attach to cable television? May they, indeed, attach in a constitutional manner? In a sense, access to cable television will resemble a return to colonial America in that everyone can have his say, just as everyone could have a printing press, without everyone having to receive the presentation. Rather than merely noting that a firm doctrine of common carrier access does not exist, the framework of potential obligations ought to be examined. Problems of concentration of ownership are discussed thoughtfully, but not fully resolved. Since cable television has generated a massive amount of literature, Dean Barron's failure thoroughly to survey the topic is not critical. Nevertheless, after the brilliant resolution of the general problem of administering a right of access in the discussion of his proposed bill, the failure to consider in more depth the perplexing problem of cable television is disappointing.

Although the matter of objectionable presentations needs to be explored, the bare recital of the problem, ending with the conclusion merely that access for objectionable material should not be denied, adds little. The analysis is restricted to the context of radio and television, presumably because the cases are there and an analogy for printed media is assumed. Dean Barron fails to come to grips with the real problem—that programs projected into the home are perceived to be unavoidable by those who wish to avoid them. The problem is even more intractable following *Paris Adult Theatre I v. Slaton*,[78] in which the Supreme Court held that obscene material can be denied consenting adults even in a theater which advises potential patrons of its wares, and the brace of cases[79] which, by prohibiting transportation of obscenity and, by strong presumption, its communication, limited the protection of *Stanley v. Georgia*[80] to obscene material already possessed in the home. While the problem of objectionable presentations deserves treatment, any undertaking to do so should be thorough.

Conclusion

Too much has happened since publication of *Freedom of the Press for Whom?* to hold Dean Barron precisely to his assertions. The work

78. 93 S. Ct. 2628 (1973).

79. *E.g.*, United States v. Orito, 93 S. Ct. 2674 (1973); United States v. 12 200-Ft. Reels of Super 8mm. Film, 93 S. Ct. 2665 (1973); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

80. 394 U.S. 557 (1969). The Court in *Stanley* held that in the privacy of the home, one is immune from prosecution under state obscenity laws.

is a very lucid and readable exposition of the Barron thesis of access, which has contributed fruitfully to first amendment thought. Although its shortcomings emphasize the need for more empirical research to support its thesis, as well as for development of alternate theories of and means to support and implement a more functional first amendment in contemporary America, the book provides an excellent starting point in the effort to reconcile traditional first amendment goals with our present circumstances.