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## Book Review

## Barron's 'Good Book' Examines Access Notion

*Freedom of the Press for Whom? The Right  
Of Access to Mass Media*—By Jerome A. Barron†

*Reviewed by John R. Snowden\**

Freedom of the press has long been a paramount concern of the dynamic human. A free press may act as a catalyst to thought in the eternal synthesis of the real and the ideal.<sup>1</sup> The free person, whether lawyer, artist, poet, or political philosopher has traditionally sought the freedoms of speech and press, and the Bill of Rights attempts in the first amendment to insulate discourse from the desires of those who would force a dichotomous choice on people seeking knowledge of the whole.<sup>2</sup>

The first amendment in its linear terms proposes to act as a shield, protecting expression not from personal or private wrath but from calculated suppression by majoritarian democratic government. Professor Barron, beginning with a seminal law review article<sup>3</sup> and continuing in this "good book,"<sup>4</sup> suggests that it is far

† Pp. 368. Bloomington, Ind.: Indiana University Press, 1973. \$8.95.

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1. "There is reaction as well as action. While it is convenient to view some human beings as agents and others as patients (recipients), the distinction is purely relative; there is no receptivity that is not also a re-action or response, and there is no agency that does not also involve an element of receptivity." J. DEWEY, *MY PHILOSOPHY OF LAW* 78 (1941). See also J. DEWEY & A. BENTLEY, *KNOWING AND THE KNOWN* (1949); B. HOLZNER, *REALITY CONSTRUCTION IN SOCIETY* (1968).
2. See generally N. BROWN, *LOVE'S BODY* (1966).
3. Barron, *Access to the Press—New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). See also Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969). Barron, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970).
4. "In this good book Jerry Barron combines knowledge insight, sensitivity, and a lively writing style to illuminate the controversies over that precious democratic freedom—freedom of the press . . . I highly recommend this book to all who are concerned about the future of our freedom in a time when that freedom seems endangered."

more fruitful to approach freedoms of press and speech and consequently first amendment constitutionalism as an antimajoritarian idea than solely as a restraint on government.<sup>5</sup> Barron argues that the majority of media owners, publishers and broadcasters are dedicated to "single-minded hucksterism"<sup>6</sup> and a passion for profits. In the electronic media this consuming majority interest yields not a onesidedness but a blandness as the abiding characteristic of American broadcasting.<sup>7</sup>

The significant case law of the first amendment is not yet fifty years old.<sup>8</sup> Minimally the first amendment seems to promise that the communication media shall not be restrained or intimidated for what they publish or broadcast. This narrow meaning of the constitutional protection appears anomalous to Barron in that expression is honored once it enters the market-place of ideas;<sup>9</sup> yet a constitutionally based right of entry to the market is not only unprovided for, but attacked as violative of press freedom. Professor Barron challenges the notion that the marketplace of ideas is freely or easily accessible. The mass media's "single-minded hucksterism" has foreclosed free trade in ideas since any idea not compatible with an integrated materialism is excluded by the media industry's overriding concern that a public spurred to thought by "robust and wide-open"<sup>10</sup> substance may forget the

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Johnson, *Press flyer* accompanying J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973). The views of Nicholas Johnson, former commissioner of the Federal Communications Commission, expressed in this press flyer should be of interest to commission followers. See also Johnson & Dysel, *A Day in the Life: The Federal Communications Commission*, 82 *YALE L.J.* 1575 (1973).

5. J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 317 (1973) [hereinafter cited as BARRON].
6. BARRON at 143.
7. BARRON at 136. While rampant materialism may undoubtedly produce forced blandness, it nevertheless may also result in one-sidedness that is just as aggravating to those who wish to avoid the buy-buy more syndrome. See Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 *COLUM. L. REV.* 960, 969 n.18 (1953).
8. From 1791 until 1925 the first amendment was thought only to apply to the federal government and litigated controversy was minimal. *Gitlow v. New York*, 268 U.S. 652 (1925), recognized freedom of speech and press as among the people's "fundamental personal rights" and consequently protected by the due process clause of the fourteenth amendment from state encroachment.
9. The marketplace of ideas concept is attributable to a dissenting opinion of Mr. Justice Holmes. *Abrams v. United States*, 250 U.S. 616, 624 (1919). It hardly needs notation that this concept, like most of the judicial gloss on the first amendment, was developed while the actors, the humans, were being denied even the minimal constitutional protection.
10. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

advertiser's product in the commercial market.<sup>11</sup>

If all the communications industry is closed to expression,<sup>12</sup> then the industry itself rather than government has become the censor. Moreover, it is not bound to the usual limits restraining the censor's discretion as to which ideas will be conveyed and which denied exposure.<sup>13</sup> With most cities dependent upon a single newspaper and three television networks, Barron argues for a positive interpretation of the first amendment which would recognize as the access interest "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas . . ."<sup>14</sup>

Professor Barron is well qualified to participate in the "right of access" discussion. He was the first to develop access as first amendment theory;<sup>15</sup> he has taught and prepared teaching materials in the area;<sup>16</sup> and he worked with Congressman Feighan in preparing and proposing access legislation, the Truth Preservation Act.<sup>17</sup> *Freedom of the Press for Whom?* more than adequately fulfills its stated purpose of critically examining the present functioning of the communications media and chronicling the struggles, legal and extra-legal, to open up the media via citizen group pressure, court action and the prodding of federal agencies.

The case for access is well stated. At every turn Professor Barron returns to the basic argument that "[t]he First Amendment should be restored to its true proprietors—the reader, the viewer, the listener. Freedom of the press must be something more than a guarantee of the property rights of the media owners."<sup>18</sup> The book is lively and human as it narrates and docu-

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11. BARRON at 321. Of course, the irony is not lost on Professor Barron that it has been generally understood that "commercial" speech is less favored than speech directed at the discussion of political controversy. See *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 201 (1973) (Brennan, J., dissenting); *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The writer by citing authority for the "commercial" speech distinction does not mean to suggest its acceptance.

12. See BARRON at 312.

13. BARRON at 113-16.

14. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); BARRON at XIV.

15. Note 3 *supra*.

16. D. GILLMOR & J. BARRON, *MASS COMMUNICATIONS LAW* (1969).

17. 15 U.S.C. § 1801 (1970). See BARRON at 55-62.

18. BARRON at XIV. See generally D. LACY, *FREEDOM AND COMMUNICATIONS* 69 (1961); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Canby, *The First Amendment Right to Persuade: Access to Radio and Television*, 19 U.C.L.A.L.

ments particular access episodes for the layman while carefully weaving and re-weaving the legal theory and authority essential for the communications lawyer or scholar. The notes are complete and excellent although this reader would prefer they had been placed with the text.

Barron begins with *New York Times Co. v. Sullivan*<sup>19</sup> and suggests that the interests of national commitment to debate which the Court sought to foster there will not be advanced until publication of offered editorial advertisements is a legal right and until a right of reply to those whom the newspapers attack is also legally required.<sup>20</sup> The litigated history of the print media access notion is carefully presented. Access to the campus press is examined as an area where press censorship has been successfully challenged through court action,<sup>21</sup> and Barron argues that it is

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REV. 723, 727 (1972); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972); Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971); Lange, *The Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1 (1973); Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89, 94-95, 98-99; Malone, *Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?*, 5 U. MICH. J.L. REF. 193, 205-11, 216 (1972); Note, *FCC's Fairness Regulation: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294, 296 (1969); Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532 (1971); Comment, *Freedom of Speech and the Individual's Right of Access to the Airways*, 1970 LAW & SOCIAL ORDER 424, 428; Note, *The Wasteland Revisited: A Modest Attack Upon the FCC's Category System*, 17 U.C.L.A.L. REV. 868, 870-75 (1970); Note, *Free Speech and the Mass Media*, 57 VA. L. REV. 636 (1971). The reader might also be interested in the smattering of media response to the access notion. See generally J. ARONSON, *THE PRESS AND THE COLD WAR* (1970); J. RESTON, *THE ARTILLERY OF THE PRESS* (1967); Bagdikian, *Right of Access: A Modest Proposal*, 8 COL. JOURNALISM REV. 10 (Spring, 1969); School of Journalism, Univ. of Missouri at Columbia, *Freedom of Information Center Report No. 005*, Oct. 1967; EDITOR & PUBLISHER, Dec. 16, 1967.

19. 376 U.S. 254 (1964).

20. BARRON at 12. No such rights have yet been recognized by the courts. *Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Co.*, 435 F.2d 470 (2d Cir. 1970), cert. denied, 402 U.S. 973 (1971). See also *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (M.D. Ala. 1971).

21. See *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). But see *Schwartz v. Schuker*, 298 F. Supp. 238 (E.D.N.Y. 1969).

anomalous that other citizens do not enjoy the same general right of access. Although it is argued that the government's thumb is on the scales of the private press so as to yield the necessary state involvement to bring it within the scope of the campus press cases,<sup>22</sup> the heart of the argument seems axiological rather than analytical.<sup>23</sup>

It is more than the "fortuitous fact" of publication with public funds that separates the "simplistic dichotomy" between the public and private press, access and no-access media. Government is constitutionally bound to equality and due process, the individual or corporate press is not. One cannot deny the need for the free and violent clash of a multitude of ideas in the marketplace of the mind.<sup>24</sup> Newspapers should as a moral issue publish as letters-to-the-editor the views of those opposing newspaper positions and accept all advertisements as a matter of course. Those positions seem inherently reasonable and coherent with the first amendment. However, the first amendment does not require reason. The core of the free speech and press notion is the right to be unreasonable, to be immoral, to deny your duty to others. The first amendment is not sumptuary legislation, but rather a declaration of amorality in the search for truth.

Barron's rough treatment of the print-media moguls is needed and well taken. But access is not a neutral value. It is "repressive tolerance" in the coherence of first amendment amorality.<sup>25</sup> Neither does it seem likely that the claim to public first amendment use of private property is "fundamentally just an episode"

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22. BARRON at 13-25 (discussing *Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Co.*, 435 F.2d 470 (2d Cir. 1970), *cert. denied*, 402 U.S. 973 (1971)).

23. See J. WU, JURISPRUDENCE (1958).

On the other hand, when the axiological jurisprudence asserts that rights and duties are correlatives, or that the more power you have the greater is your responsibility, it is not making an analytical statement, but announcing an axiological judgment. It says that since you enjoy so many rights you ought to bear some duties as well. This judgment is synthetic rather than analytic, because the proposition that you ought to bear some duties is not contained in the proposition that you enjoy so many rights. The correlativity here is not one of logical necessity, but one of reason and justice, of balance and proportion.

*Id.* at 569.

24. It is doubtful, however, that the Supreme Court itself has ever adhered to the notion. See *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (Douglas, J., concurring).

25. In an interesting chapter Barron discusses the media philosophy of Mill, Agnew and Marcuse. "Repressive tolerance" is a concept of Marcuse who is well criticized for his totalitarian position with regards to the media. BARRON at 75-93.

in a desperate attempt to find a substitute for the true forms of speech.<sup>26</sup> Rather, it seems a genuine issue in a dynamic society where traditional physical and geographic forums for the exercise of first amendment rights have been created or purchased by private interests. Finally, the argument that crime, in particular draft card burning, demonstrates the need for access to the media falls short of the greater first amendment interest in recognizing and honoring the position of symbolic speech in the marketplace of ideas.

Roughly the last two-thirds of the book is devoted to access and the electronic media. Barron gives the Federal Communications Commission ("FCC") a scalding bath as he details examples of bureaucratic sophistry.<sup>27</sup> The broadcasting industry fares no better as Barron criticizes the commercial and therefore bland orientation of the electronic press.

*Freedom of the Press for Whom?* traces the history of controversy in the electronic media from its beginning in 1941<sup>28</sup> through the famous *Red Lion* case<sup>29</sup> and concludes with the *Business Executives' Move for Vietnam Peace* ("BEM") and *Democratic National Committee* cases.<sup>30</sup> Unfortunately, much of Barron's optimistic legal analysis based on *BEM* has been set asunder by the Supreme Court's reversal of *BEM*.<sup>31</sup> Nevertheless, Barron raises a number of interesting issues as he discusses the fairness doctrine, citizen group action, CATV and the problem of access for obscenity and hate.

"The basic defect of the fairness doctrine is the primitive level on which it functions."<sup>32</sup> Additionally, the efforts to make fair-

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26. BARRON at 112. See generally *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir. 1968); *Kissinger v. New York City Transit Auth.*, 274 F. Supp. 438 (S.D.N.Y. 1967).

27. Former FCC Commissioner Nicholas Johnson is deservedly spared, and appears in *Freedom of the Press for Whom?* as he so often appeared in FCC actions.

28. See *Mayflower Broadcasting Corp. v. The Yankee Network*, 8 F.C.C. 333 (1940). The resulting *Mayflower* doctrine took the position that broadcasters should neither initiate nor participate in public controversy. By 1949 the FCC had reversed itself. See *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

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

30. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

31. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

32. BARRON at 150. The fairness doctrine stems from the 1949 Report on *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), and

ness do the work of access are portrayed as contributing to the "unfairness of fairness." Everyone including the FCC is at the least concerned with the present state of affairs,<sup>33</sup> and Professor Barron's analysis of the doctrine and its effect should be of interest to the layman. A complete analysis of the doctrine's fortunes in the FCC and the courts is not presented within Barron's access focus.

With the focus on FCC side-stepping, five chapters treat the activities and legal problems of citizen group efforts to open the broadcast media. "FCC solicitude for the industry it is supposed to regulate" is nicely illustrated through the prism of the *United Church of Christ* case,<sup>34</sup> the Barron is at his best taking the FCC to task for their 1970 handling of the broadcast license renewal problem.<sup>35</sup> As a result of the 1970 renewal policy, citizen groups have begun to negotiate informally with broadcasters always holding as a stick the threat of filing a petition to deny renewal. But, as Professor Barron points out, the petition to deny unless plentifully documented does not require an evidentiary hearing, and without the hearing the citizen group may be unable to document its petition.<sup>36</sup>

Barron's discussion of CATV as a hopeful access avenue is disturbing.<sup>37</sup> It shows both his axiological first amendment bent and

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the statutory authority of section 315 of the Federal Communications Act of 1934. The doctrine was approved as constitutionally consistent with the first amendment in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

33. *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 33 F.C.C.2d 798 (1972).
34. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). BARRON at 195.
35. See *WHDH, Inc. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970); *WHDH, Inc.*, 16 F.C.C.2d 1 (1969); Glodin, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970). See also *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 27 F.C.C.2d 580 (1971).
36. See *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970). Barron argues that an evidentiary hearing should be a clear right for any group which files a petition to deny, but that all citizen groups protesting renewal should be joined in one hearing. Barron also recognizes that the recent moves to urge the use of summary judgment procedures in administrative decisions is a hovering problem for citizen group action. BARRON at 245-48. See generally Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).
37. There is a rich literature dealing with CATV. See generally Barnett,

his lack of real commitment to the marketplace of ideas notion when ideas are granted entry. He argues that if CATV does provide access, FCC regulation is still needed because "[t]he social basis or interest in broadcasting is the real reason for its regulation."<sup>38</sup> Additionally, he would give more freedom to print media because of its necessarily more rational and less emotional appeal.<sup>39</sup> The first amendment does not create a preference for reason. Speech is not to be unprotected because some find it lacking in reason. Emotion or intuition is a valid mode of knowing, and the premise of the first amendment should be taken as holding all ways of knowing to be equal and free in the search for truth.

Barron notes that there is always a child in the house and consequently there is a consensus that some programming controls are necessary. He then proposes a variable obscenity control and reluctantly agrees to allowing hate on the air. Nevertheless, he feels the need to exhort the just to speak.<sup>40</sup> What happened to parents? Parents who rely on Barron or variable obscenity as a control have already lost the battle and probably the war.<sup>41</sup> If the just do not speak, then perhaps few are just.

Jerome Barron has done an excellent job of portraying the problems, and indeed they are serious, that give rise to the access notions. His scholarship is complete and unquestionably expert and forthright as he argues for legal recognition, either legislative or judicial, of the access interest. He finds the "romantic conception" of the first amendment out of place in this time of rapid technological development in the communications media. Unfor-

*State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972); Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681 (1972); Gerlach, *Toward the Wired Society: Prospects, Problems, and Proposals for a National Policy on Cable Technology*, 25 MAINE L. REV. 193 (1973); La Pierre, *Cable Television and the Promise of Programmed Diversity*, 42 FORDHAM L.J. 25 (1973); Rinkin, *The Changing Signals of Cable T.V.*, 60 GEO. L.J. 1475 (1972); Walsh, *CATV: Let Cables Grow*, 55 MARQ. L. REV. 205 (1972).

38. BARRON at 260.

39. BARRON at 257. But, "the basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

40. BARRON at 270-303.

41. In fairness to Barron, variable obscenity is a considerable step closer to the first amendment than the present FCC policy toward obscenity. See *In re WUHY-FM*, 24 F.C.C.2d 408 (1970); 18 U.S.C. § 1464 (1970). It should also be noted that the bleep you hear on Johnny Carson is not a broadcaster programming policy decision.

tunately, romance is the heart of the first amendment, and it cannot be replaced by the best intentioned "repressive tolerance" even when such a laudible goal as access to the marketplace of ideas is the illusory prize.