

## ACCESS TO THE MEDIA—A CONTEMPORARY APPRAISAL

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### I. INTRODUCTION

I want to thank Hofstra Law School and The Brennan Center for Justice for commemorating the fortieth anniversary of my article in the Harvard Law Review, *Access to the Press—A New First Amendment Right*,<sup>1</sup> by this conference on “Reclaiming the First Amendment.” I particularly want to thank Eric Freedman of Hofstra Law School and Marjorie Heins of The Brennan Center for Justice for the vision and energy they put into conceiving and building this conference. I am also indebted to all of you for writing papers and for participating in this conference. I never thought that *Access to the Press* would become the basis for a Supreme Court case or that I would argue it. I certainly never dreamed when I wrote the article that people would talk about the ideas expressed in it forty years later.

This occasion reassures me of something that teachers and scholars sometimes doubt, but need to remember. Ideas matter and they have enduring power.

### II. DEVELOPMENT OF THE IDEA OF ACCESS TO THE PRESS

I will first discuss the development of the idea of access to the press and about the initial reaction to it. I will then discuss the rejection of a right of access by the Supreme Court, as well as the response of the

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

media to that rejection. Then I will look at the present day fortunes of remedies of access and reply in the newspaper press, broadcasting and cable. Finally, I will reflect on the advent of the Internet and its significance for individual rights of access.

I started writing about access to the press as a means of responding to a new phenomenon. This was the steadily accelerating pattern of concentration of ownership in the media. These concentrated ownerships harnessed the new electronic technologies. As a result, they now possessed incredible communicating power. These new communication giants were able to reach audiences of a size that would have been impossible to achieve in the past. Then, as now, the centers of communicating power were seen as private actors. As such, they were not bound by First Amendment standards.<sup>2</sup> In fact, the reality of the matter is ironic indeed. These great communication centers can use the First Amendment to bar entry and to limit expression.

In light of all this, an idea that I wanted to develop was that censorship could be wielded by private hands as well as by the hand of government. Private censorship can be as repressive and as pervasive as public censorship. But I did not wish merely to call attention to the ways in which technology and media concentration have turned the possibility of private barriers to expression into a formidable reality. I wanted the law to respond to the reality of private censorship by affording opportunities for access and reply.<sup>3</sup> For many this remedy was, and remains, unacceptable. What I called private censorship, they argued, was in fact simply editorial judgment. To some, to speak of private censorship, and worse yet to advocate a legal remedy to respond to it was a First Amendment heresy of the first order. Yet for me and others, the need for access was simply a recognition of the enormous imbalances that characterized the contemporary marketplace of ideas.

Two years after I wrote advocating for a right of access to the press, support came from a surprising but welcome source—the Supreme Court of the United States. In *Red Lion Broadcasting Co. v. FCC*,<sup>4</sup> the Supreme Court unanimously upheld the FCC's fairness doctrine and personal attack rules. The idea that the First Amendment had an affirmative dimension and that law could not only protect freedom of expression but facilitate it was on the ascent.

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2. *Id.* at 1647-52.

3. *Id.* at 1666-70.

4. 395 U.S. 367 (1969).

Another sympathetic response came from the American Civil Liberties Union (“ACLU”). The ACLU generally took the position that any government imposed obligations on the press were constitutionally suspect. Yet in June 1968, they invited me to address their biennial conference at the University of Michigan. The ACLU passed a resolution during that conference urging the ACLU’s national board of directors to bring suit to challenge discriminatory refusals to publish ads by newspapers.<sup>5</sup>

Indeed, the response to the proposal for a First Amendment right of access was so encouraging that in my talk to the ACLU, I pointed to various signs indicating that a new approach to the First Amendment was emerging. This interest in providing for access for ideas spread to other forums besides the media. For example, the Second Circuit held that a publicly owned bus terminal was an appropriate place for distributing anti-Vietnam War leaflets because passers by, and especially servicemen from nearby Fort Dix, would thereby become acquainted with the case against the war in Vietnam.<sup>6</sup>

I thought a constitutional breakthrough had occurred when a court as influential as the Second Circuit concluded that an anti-war group had a First Amendment interest in reaching its intended audience.<sup>7</sup> If a right to distribute anti-war leaflets in a public bus terminal was capable of judicial evaluation and enforcement, so were questions of access to the private media.

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5. See JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA* 322 (1973). Another significant development came when the Freedom of Information Center at the University of Missouri’s School of Journalism published a monograph concerning the merits and demerits of a right of access. *ACCESS TO THE PRESS: A NEW RIGHT?* 9 (Missouri Sch. of Journalism: Freedom of Information Center, No. 216, Mar. 1969). Although the monograph was highly critical of such a right, what is interesting is that its authors made this acknowledgement: “If one looks at this complex issue as having to do only with assuring minority opinions a fair hearing, it is little wonder that a proposal like Prof. Barron’s would be considered salutary and long overdue.” Donald M. Gillmor & Jerome A. Barron, *MASS COMMUNICATION LAW: CASES AND COMMENT* 148 (West Publishing Co. 1969).

6. The court said a forum is sometimes chosen as a site for the dissemination of protest either because there is a relationship between the object of the protest and the site of the protest, or because it is the site where the relevant audience can be found. *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 90-91 (2d Cir. 1968). Ultimately, the Supreme Court rejected the rationale of these cases by saying that examining whether there was a relationship between the object of the protest and the site of the protest would involve the courts in content analysis. Rather than discriminate against ideas, they held there was no right of access for ideas to public facilities at all. *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976).

7. Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 *GEO. WASH. L. REV.* 487, 494 (1969).

An important access case soon made it clear that the Supreme Court of the United States thought otherwise. Two groups, the Democratic National Committee and a businessman's group opposing the Vietnam War sought to purchase time to present their viewpoints. The three major networks turned them down flat. The groups went to court and the case ultimately went to the Supreme Court of the United States. The case directly raised the issue whether the First Amendment itself could serve as a wellspring for a right of access.<sup>8</sup> In 1973, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, Chief Justice Burger, speaking for the court, rejected the First Amendment-based access claims of those groups.<sup>9</sup> The court exhibited a much less sympathetic attitude toward the right of access than had the *Red Lion* Court four years before. Furthermore, Chief Justice Burger declared that a right of access to broadcast journalism was not necessary because the fairness doctrine was available.<sup>10</sup> More fundamentally, Chief Justice Burger said: "For better or worse, editing is what editors are for; and editing is selection and choice of material."<sup>11</sup>

Justice Brennan joined by Justice Marshall dissented. Justice Brennan rejected the notion that the broadcast networks could deny access because they were private companies. On the contrary, he contended, "the governmentally created preferred status of broadcast licensees [and their] pervasive federal regulation" served to bring them "within the orbit of constitutional imperatives."<sup>12</sup>

I mention Justice Brennan's dissent in order to contrast it with an idea often found in the courts and the legal academy. This is the view that the First Amendment should be silent when the source of a restraint on expression is a private media company rather than the government.

### III. THE SUPREME COURT AND ACCESS TO THE PRESS

So far I have dealt with the broadcast media. The case, of course, that repudiated the idea that a right of access to the print media could be consistent with the First Amendment was *Miami Herald Publishing Co. v. Tornillo*.<sup>13</sup> In that case, the *Miami Herald*, the daily newspaper with the largest circulation in the state of Florida, refused to publish replies to

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8. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 97-98 (1973).

9. *Id.* at 129-30.

10. *Id.* at 130-32.

11. *Id.* at 124.

12. *Id.* at 173 (Brennan, J., dissenting).

13. 418 U.S. 241 (1974).

editorials attacking the candidacy for the state legislature of Pat Tornillo, the head of the classroom teachers union in Dade county.<sup>14</sup> The case was particularly attractive from an access point of view because it would not be necessary to persuade the court that the First Amendment itself afforded rights of access and reply. Florida actually had a right of reply statute dating back to the beginning of the twentieth century.<sup>15</sup> It was part of the Florida electoral code, part of Florida's famous government in the sunshine.

Pat Tornillo's lawyer, Tobias Simon, asked me to join him as counsel in seeking a right of reply for Pat Tornillo. Consequently, I argued the case on behalf of Pat Tornillo in the Supreme Court. We were mildly optimistic. To succeed, all that would be necessary would be to persuade the courts that a statute affording a right of access was permissible under the First Amendment. Such a position seemed eminently reasonable. Participants in public life had recently been given greater insulation from defamation liability than ever before.<sup>16</sup> This was done because encouragement of debate and criticism of government was what the First Amendment was all about. In *New York Times Co. v. Sullivan*, Justice Brennan said that the whole purpose of the First Amendment was to encourage uninhibited and robust debate.<sup>17</sup> Yet unfortunately, debate was not necessarily the result. I had written on this very point in my paper on access to the press.

But in fact the [*New York Times Co. v. Sullivan*] decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate.<sup>18</sup>

When the *Miami Herald* contended that the Florida right of reply statute violated the First Amendment, we defended the statute by pointing out that the debate that Justice Brennan had extolled in *New*

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14. *Id.* at 243-44.

15. FLA. STAT. ANN. § 104.38 (repealed 1975).

16. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring proof of "actual malice" for defamation liability).

17. *Id.* at 279.

18. Barron, *supra* note 1, at 1657.

*York Times Co. v. Sullivan* was implemented by the Florida right of reply statute.

The Supreme Court was not persuaded. It unanimously ruled that the Florida right of reply statute violated the First Amendment.<sup>19</sup> The *Tornillo* Court did not deny the existence and implications of the facts. Indeed, summarizing the nationwide pattern of concentration of ownership in the media, the Court observed: “The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.”<sup>20</sup> Nonetheless, rights of access and reply were rejected. Why? The last part of the opinion again reflects the idea that “editing is what editors are for.”<sup>21</sup> The Chief Justice declared that the “choice of material to go into a newspaper . . . and treatment of public issues and public officials” concerns editorial judgment, and government regulation of that judgment is inconsistent with the First Amendment.<sup>22</sup>

#### IV. THE AFTERMATH OF *TORNILLO*

##### A. *The Print Media—The Newspaper Press*

The immediate press response to *Tornillo* to some extent took me by surprise. In some ways, it served to mitigate the disappointment I experienced as a result of the Supreme Court’s decision in *Tornillo* rejecting the access idea. The response of the press was one of soul-searching and self-examination. Many journalists around the country expressed the view that the *Miami Herald* should have voluntarily offered to afford a reply to Pat Tornillo to respond to the editorials it published attacking him.<sup>23</sup> They felt that the issue of fairness on the part of the press was not something that one should have to sue for. Newspapers appointed ombudsmen to review and assess their fairness and receptiveness to opposing views.

Another post-*Tornillo* development was the emergence of op-ed pages in many of the country’s leading dailies.<sup>24</sup> Still another

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19. *Tornillo*, 418 U.S. at 258.

20. *Id.* at 250.

21. See Chief Justice Burger’s plurality opinion in *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973).

22. *Tornillo*, 418 U.S. at 258.

23. See, e.g., Albert Shanker, Op-Ed., *Freedom of the Press Requires Responsibility in the Press*, N.Y. TIMES, July 7, 1974, at E7.

24. See Andrew Ciofalo, *Survey Probes Status of Op-Ed Journalism and Practices of Op-Ed*

development, which in the years following *Tornillo* acquired a good deal of attention, was press councils.<sup>25</sup> Of these three developments—press ombudsmen, op-ed pages, and press councils—the one which I believe continues to be of significant importance today is the op-ed page.

### B. *The Electronic Media After Tornillo*

What impact did *Tornillo* and its rejection of a right of access to the press have on the electronic media? Many of the *amici* in *Tornillo* begged the court to overrule *Red Lion* and its affirmation of the fairness doctrine.<sup>26</sup> The court did not oblige. In fact, the *Red Lion* decision was not even mentioned by the Supreme Court in *Tornillo* nor was the fairness doctrine or the personal attack rules which had been upheld in that case. Yet both of these remedies shared a certain kinship with the Florida right of reply law.

What the Supreme Court declined to do in 1974, the FCC cheerfully did in 1987. The FCC abolished the fairness doctrine.<sup>27</sup> In 2000, the corollary to the fairness doctrine—the personal attack rules—also fell by the way.<sup>28</sup> The FCC rarely gave the fairness doctrine vigorous enforcement, yet the possibility of its enforcement was important. The very existence of the doctrine cautioned against excessive one-sidedness in the presentation of public affairs.

All that is left with respect to rights of reply and access in radio and television today is the rule affording political candidates “equal opportunities”<sup>29</sup> and the rule affording “reasonable access” to federal political candidates.<sup>30</sup> These are laws that afford rights of access and reply, but they are laws that benefit the politicians who enact them. It would be easy to disparage this situation. Politicians provide access and reply to themselves but to no one else. But in a media world owned by so few, these surviving rules are important. They assure that candidates for political parties who media owners do not support will still have a

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*Editors*, 19 NEWSPAPER RES. J. 18, 19 (1998) (“While op-ed pages may have a long hidden history, they seemed to burst upon the editorial scene in 1970.”).

25. See, e.g., William B. Arthur, Letter to the Editor, *News Media’s Protector*, N.Y. TIMES, Aug. 1, 1974, at L28.

26. See, e.g., Brief for National Broadcasting Co. as Amicus Curiae Supporting Appellant at 5, *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797).

27. *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057 (1987), *aff’d sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654, 665 (D.C. Cir. 1989).

28. *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000).

29. 47 U.S.C. § 315(a) (2000).

30. *Id.* § 312(a)(7).

voice. What should be disparaged is that the rest of us do not have equivalent remedies.

The battle about the fairness doctrine in radio and television, like the battle about access to the newspaper press, was a battle about a symbol. The idea was not that every issue presented had to be followed up with its opposite. It was the idea that a radio or television station had an obligation to the community with respect to the content they generated. That obligation was to provide the community it served with a roughly representative overview of the issues that beset its audience.

The feeling that Pat Tornillo should not have had to sue to secure a reply to the editorial attacks coming from the *Miami Herald* had its counterpart in electronic journalism as well. In his book, *The Good Guys, the Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting*,<sup>31</sup> one of the truly great men of American broadcast journalism, Fred Friendly, observed that NBC journalist Bill Monroe was once asked if testimony he had given opposing the fairness doctrine still represented his view. Fred Friendly recorded Monroe's answer:

"Hell, yes!" but then there was a pause and he added, "but we are never going to get rid of it until we do something about voluntary access . . . . We're almost arrogant about not letting viewers who disagree with us or think we made a big error have access to some kind of air time to rebut us."<sup>32</sup>

Fred Friendly was not a supporter of a right of access to the media, but he thought the press should be both free and fair. Another journalist whom I came to know and debate on the merits of the access idea was Ben Bagdikian. Bagdikian was a vigorous foe of a right of access to ideas.<sup>33</sup> But one access argument struck a chord with him: the ever increasing concentration of ownership of the media. Indeed, he wrote a book documenting with great force and with an avalanche of data the ever increasing concentration of ownership in the media.<sup>34</sup> Legal writers sometimes speak of the press as if it is a single entity. But there is a difference between those who own the press and those who write for it. Ben Bagdikian exemplified that distinction.

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31. FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* (1976).

32. *Id.* at 223-24.

33. Ben Bagdikian, *Right of Access: A Modest Proposal*, 8 COLUM. JOURNALISM REV. 10 (1969).

34. BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 4-22 (1983) [hereinafter BAGDIKIAN, *MEDIA*]; see also BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 1-6 (2004).

## V. THE FUTURE OF ACCESS TO THE MEDIA

There is a question that doubtless many of you have. I have it too. In the media world of today, is there still a need for access to the media? When I first started thinking about this issue, the media world in the United States was very different than it is today. The major television networks and the daily newspapers had an influence on and a dominance over the opinion process that they do not have today. These television networks and newspaper chains once operated as the gatekeepers to the opinion process. They are still powerful and influential, but the rise of the Internet has shrunk their domain.

In the foregoing account I have described the rise and fall of the legal architecture that once promised to resolve the problem of access to the media.<sup>35</sup> Rights of access to the media were proposed as a counterweight to the dominance of a romantic conception of freedom of expression in this country.<sup>36</sup> This was the concept that there was a self-executing marketplace of ideas that was freely accessible to speakers. The marketplace of ideas metaphor is less accepted today, but the same “inequality in the power to communicate ideas,”<sup>37</sup> which existed forty years ago with regard to the established traditional major media, still exists. In some respects, the situation is somewhat worse. Although global media conglomerates have vast communicating power that dwarfs all competitors, in the United States much of the legal architecture which might have ameliorated this situation has either been repealed or struck down.

I propose now to look at what I call the major traditional media—the newspaper press, broadcasting and cable—and their present day response to the problem of access to the media. I will then consider the extent to which the Internet remedies the problem of access, the hope the Internet presents and the dangers it confronts.

### A. *The Newspaper Press*

When I first thought about the problem of access to newspapers, I thought a principal problem was that the majority of newspapers were owned by just a few chains. For many years the pattern of independent newspapers being acquired by great national chains simply intensified.<sup>38</sup>

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35. See *supra* notes 4-34 and accompanying text.

36. Barron, *supra* note 1, at 1641.

37. *Id.* at 1647.

38. See BAGDIKIAN, *MEDIA*, *supra* note 34, at 8-9.

But recently a possible counter-trend has appeared on the American daily newspaper landscape. In some cities, local interests and individuals seek to buy the local daily newspaper currently owned by a chain.<sup>39</sup> Why? To be sure that local issues and local concerns will be the focal point of the local daily. Moreover, the newspaper chains in some instances are themselves breaking up. The vaunted economies of scale which were supposed, both in broadcasting and in the newspaper press, to produce greater resources for informing the public have resulted in less not more resources put into local and national news and issues.

The current troubles experienced by the newspaper chain owned by the Tribune Co. illustrate both of these phenomena. The protests against personnel cuts and moves for local ownership constitute a protest against

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39. In Los Angeles, three billionaires who would like to see local control of the *Los Angeles Times* expressed interest in buying it. The *Los Angeles Times* is owned by the Tribune Co., a newspaper chain based in Chicago, which owns eleven daily newspapers including some with such distinguished reputations as the *Chicago Tribune*, the *Hartford Courant* and the *Baltimore Sun*. The *Los Angeles Times* and its parent, the Tribune Co., have been engaged in a struggle. Issues of conflict involve orders to cut staff and disagreement "between centralized control from Chicago and local control in Los Angeles." Katharine Q. Seelye & Jennifer Steinhauer, *At Los Angeles Times, A Civil Executive Rebellion*, N.Y. TIMES, Sept. 21, 2006, at C1. The potential *Los Angeles Times* purchasers were David Geffen, Eli Broad and Ronald Burkle. One of the three, David Geffen, said he was prepared to put "hundreds of millions of dollars into [the paper]" to improve the newspaper's flawed local coverage. Geffen said his goal would be to give much greater coverage to matters of local interest to the residents of Los Angeles. *Id.*

It has also been reported that Eli Broad and Ronald Burkle had submitted a bid to buy the Tribune Co. in its entirety. All three billionaires have indicated that they are interested in buying the *Los Angeles Times* because of its status as a local institution rather than solely for financial gain. Sharon Waxman, *Two Billionaires Offer to Acquire the Tribune Company*, N.Y. TIMES, Nov. 9, 2006, at C4. Despite their bid for the Tribune Co., some analysts suggest that Broad and Burkle were still *mainly* interested in acquiring the *Los Angeles Times*. *See id.*

Other daily newspapers presently owned by non-local companies are possible targets for purchase by local ownerships. Illustrative is a move by a group headed by Ted Venetoulis, former Baltimore community newspaper owner and politician, to purchase the *Baltimore Sun*. He says he wants to restore the *Sun's* reputation for "quality and broadness." Frank Ahrens, *Sun Joins a Growing List of Papers that Investors Aim to Take Private*, WASH. POST, Oct. 27, 2006, at D1. There are similar efforts with respect to the *Boston Globe*, which is owned by the New York Times Co. and the *Hartford Courant*, which like the *Sun*, is owned by the Tribune Co. *See id.*

Still another possible buyer for the Tribune Co. is Maurice Greenberg, former Chairman of AIG (American Insurance Group) who has twenty billion dollars at his disposal. *See* Andrew Ross Sorkin, *Ex-Chairman of Insurer May Bid for Tribune*, N.Y. TIMES, Nov. 13, 2006, at C1. Some media experts are critical of the foregoing developments. Edward Wasserman, a journalism professor at Washington and Lee University, expresses skepticism. The potential buyers claim to not be interested "in making money" or in "interfer[ing] in the editorial process." Professor Wasserman asks: "[W]hat exactly is the deal here?" David Carr, *Dubious Mix: Rich Suitors, Ailing Papers*, N.Y. TIMES, Nov. 13, 2006, at C1. A Chicago real estate magnate bought the Tribune Company for \$8.2 billion. *See* Chris Zappone, *Zell Buys Tribune Co.*, CNN MONEY, Apr. 3, 2007, [http://money.cnn.com/2007/04/02/news/companies/tribune\\_zell/index.htm](http://money.cnn.com/2007/04/02/news/companies/tribune_zell/index.htm).

the homogenization of news. In a sense, they also demonstrate a hunger for local access—for discussion of local news, local controversies and local public affairs.

Chain newspapers, and the newspaper industry in general, are beset with problems. A declining readership, the disappearance of the younger subscriber, and the advertising pull of the Web all serve to limit the future capacity or ability of the newspaper to generate the circulation and the revenues of the past.

There are of course a few American daily newspapers which serve as national newspapers. These still have great influence. Television commentators and reporters often candidly base their sound bites on stories they have just read in these newspapers. Experts are put on TV shows to comment on the news events of the day. But often what they have to say has been formed by their reaction to the presentation of news and opinion by newspapers of influence.

But in many parts of the country daily newspapers, rather than dominating the opinion process, have abandoned it. If that is so, one can certainly understand why. At least as far as international and national news are concerned, the news that is found in the morning daily is stale. The public are sated either by the cable news networks such as CNN, MSNBC, and FOX News, or by the local TV news and network TV news. By the time the morning paper comes, those interested in news are way ahead of the morning paper by virtue of television and the Internet.

There is less self-examination by the press now than there was, say, in the ten- or fifteen-year period that followed *Tornillo*. There are good reasons for this. When your very life is threatened, the threats to one's soul easily can become eclipsed. Veteran newspaper editor John Carroll has recently summed it up: “[w]ith the advent of the Web, our rotary presses, those massive machines that once conferred near-monopolies on their owners, are looking more and more like the last steam engine.”<sup>40</sup> John Carroll makes the further point that the primary allegiance of many corporate newspaper owners today is to serve their shareholders rather than their readers.<sup>41</sup> The reality of declining circulations has moved questions of access far from the forefront of major press concerns.

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40. John S. Carroll, *What Will Become of Newspapers?*, Speech at the Annual Meeting of the American Society of Newspaper Editors (Apr. 26, 2006), at 3, available at [http://www.ksg.harvard.edu/presspol/news\\_events/news\\_archive/2006/last\\_call\\_carroll.pdf](http://www.ksg.harvard.edu/presspol/news_events/news_archive/2006/last_call_carroll.pdf) (published by the Joan Shorenstein Center on the Press, Politics and Public Policy, Kennedy School of Government, Harvard University).

41. *Id.* at 3-4.

### B. *Broadcasting: Radio and Television*

Let us look at the situation of radio. Today radio comes to us in many forms—AM, FM, and satellite radio. Radio has more outlets than could have been dreamed of when the first broadcast legislation was enacted. Many of you will remember that it was this new wealth of channel capacity, not only in radio itself but in cable and satellite television, that was used as an argument for the abolition of rights of access and reply. It was successfully argued that because technology has made possible this abundance of outlets, there is, therefore, no need for rules to assure access to ideas and debate.<sup>42</sup> Surely, given radio's many voices, the public would be informed of the issues of the day. It has not worked out that way. V.S. Naipaul titled one of his books *Among the Believers*.<sup>43</sup> That is how I would describe radio today. Those who already agree with Fox News or Air America are tuned to it. Opposite points of view do not reach either audience.

On this point, it is rare to find a lament for the fairness doctrine in mainstream journalism. But a couple of years ago Paul Krugman, in an op-ed piece in the *New York Times*, provided one: “[t]he ‘fairness doctrine’ forced broadcast media to give comparable representation to opposing points of view.”<sup>44</sup> I agree that the fairness doctrine rendered valuable service, but I would put it somewhat differently. I think responsibility, not compulsion, was at work. The fairness doctrine caused broadcasters to have a sense of responsibility that they should on occasion present both sides of an issue. That sentiment flowed from the existence of the doctrine rather than from its enforcement. Opponents of a right of access and of kindred doctrines like the fairness doctrine have focused too much on their capacity for enforcement and too little on the beneficial results that flowed from their very existence. Would we characterize radio today as a place where debate and discussion abound? I think we would not. I think one would say that instead radio is a forum which only in its entirety presents diverse views. Otherwise, monologue abounds.

### C. *What Is the Situation in Broadcast Television?*

The lock on the national audience that the television networks once had is no more. A friend of mine who is an executive of one of these still

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42. See, e.g., *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989).

43. V.S. NAIPAUL, *AMONG THE BELIEVERS: AN ISLAMIC JOURNEY* (1981).

44. Paul Krugman, Op-Ed., *In Media Res*, N.Y. TIMES, Nov. 29, 2002, at A39.

significant but weakened networks said to me sadly not too long ago, “we are a broken business.” What broke them? The rise of cable television and the subsequent rise of satellite television both contributed mightily to the shrinking of the network television audience.<sup>45</sup> The illness that has eaten away at the network television audience—as this audience knows more than most—is fragmentation.<sup>46</sup> Viewers can no longer be promised to a television advertiser on the scale that was the case in the past. The multi-channel capacity of cable and the hundreds of channels available on satellite has changed all that. “Must-carry” provisions have stopped the bleeding only slightly.<sup>47</sup> But it is important to bear in mind that although the network audiences have shrunk, they have not disappeared. Their audience is still important.

It is also important to recognize that the Internet has provided an access avenue to television. Television tells us: “Send us your e-mails. We want to know what you are thinking.” They may be more interested in counting viewers for their advertisers than in what you are thinking. But you do have an opportunity to tell them—and to do so easily.

#### D. Cable Television—A Success For Access

There is not much on the television landscape to encourage advocates of access, but cable television is a bright spot for public access. Congress has authorized local franchise authorities to require cable operators to set aside public access educational and governmental channels. These local franchising authorities are given discretion. They do not have to require the cable operator to have a public access channel, but many localities have required them.<sup>48</sup> The cable operator is prohibited by law from exercising any editorial control over public access channels except in the case of obscene material.<sup>49</sup>

These public access channels on cable are found throughout the country. Their channel capacity is usually open on a first-come first-

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45. See ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING, 2003 REPORT, 19 F.C.C.R. 1606, 1669 (2004).

46. See James G. Webster, *Beneath the Veneer of Fragmentation: Television Audience Polarization in a Multichannel World*, 55 J. COMM. 366, 367-69 (2005).

47. See Rob Frieden, *Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 MEDIA L. & POL’Y 230, 232-34 (2006).

48. 47 U.S.C. § 531(b) (2000). For a discussion of public access channels, see Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 852-853, 860-61, 870-72 (1998).

49. 47 U.S.C. § 531(e) (2000).

served basis.<sup>50</sup> These channels are usually underfunded. Their programming sometimes lacks the professionalism of commercial television. Public access cable can even be wacky, as portrayed in the movie *Wayne's World*.<sup>51</sup> But they fill a void for the communities they serve. Often these public access channels are run by non-profits who offer the organizations using these channels help with staffing, lighting, and even programming. Public access channels are hardly the most widely watched channels on cable. But cable television is presently the only television arena where public access exists and where it exists by law.

## VI. CONCLUSION: THE RISE OF THE INTERNET

I wrote about the need for access to the press forty years ago. Is the situation with respect to access to the dominant media improved? I think it is improved, but the improvement has largely come from without, not from within. The harsh truth stated by that acerbic journalist, A.J. Liebling—"Freedom of the press is guaranteed only to those who own one"—still has bite.<sup>52</sup> But the rise of the Worldwide Web has given an opportunity for individual exercise of free speech that did not exist when I first wrote. Technology has done for access what law refused to do.

Today individual access is possible on a scale that was unfathomable forty years ago. The Internet, whose very mode is access, has transformed our world. As we all know, what happens on the Web travels to the traditional media and provides a kind of indirect access to those media. Almost thirty-five years ago Justice Brennan wrote: "the First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view."<sup>53</sup> The individual participation in debate that a right of access to the media was intended to provide has, to some extent, been provided by the rise of the Internet.

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50. Thomas W. Hazlett & George Bittlingmayer, *The Political Economy of Cable "Open Access,"* 2003 STAN. TECH. L. REV. 4, 63 (referencing the FCC's policy of "leased access" as described by former FCC General Counsel, Henry Geller), available at [http://stlr.stanford.edu/STLR/Articles/03\\_STLR\\_4/](http://stlr.stanford.edu/STLR/Articles/03_STLR_4/).

51. WAYNE'S WORLD (Paramount Pictures 1992).

52. See A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, NEW YORKER, May 14, 1960, at 105, 109.

53. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting).

The rise of the Web is generally considered to be the cause of the decline of the newspaper press, but it may prove to be its rescuer. There is considerable potential in the revenue stream that may yet flow from the online properties that newspapers now own. There is also an access dimension to all this. The ability of newspaper readers to email the newspapers with their views, criticisms and opinions provides them with a participatory forum which the old print media institution, the letters to the editor column, cannot match. Interactive access is now a reality.

Have the problems wrought by concentration of ownership in the media been redressed by the advent of the Web? To some extent the aspirations of those of us who have advocated access for individuals in the opinion process have finally been realized in the Internet. That individual access should thrive on the Web is understandable. The freedom of speech component of the First Amendment is at last given a voice. Freedom of speech arguably has a chance of being effectively realized. The media world can no longer be described as consisting of those who speak and those who are spoken to. Potentially, the opinion process no longer belongs just to the fourth estate—it belongs to everyone. Technology in this view has made individual access and participation in the life of ideas a reality.

Armies of bloggers express opinions that are far outside the conventional set of opinions, which are often still the necessary tickets for access to television or the daily newspapers. Yet although there are armies of bloggers, their audiences do not begin to rival those of the beleaguered television networks. As Les Moonves, Chief Executive of CBS, put it recently, speaking of the television industry he loves: “If you want 30 million people, you can’t get that anywhere else [but television] . . . . Television will hold, and the Internet will augment what we do.”<sup>54</sup>

The search engines—Google, Yahoo and Ask.com—make it possible for these bloggers to be accessed and to have influence.<sup>55</sup> At the same time we have to realize that unlike television, which reaches virtually the whole of society, the Internet reaches only a part. There are barriers to Internet access. There is a digital divide. Millions of our citizens do not have a personal computer; they do not surf the Web.

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54. Geraldine Fabrikant & Bill Carter, *A Tortoise Savors the Lead: But the Race Isn't Over at CBS*, N.Y. TIMES, Sept. 12, 2006, at C1.

55. See, e.g., Katie Hafner, *Like Yahoo, Google Adds Customized Search Engine*, N.Y. TIMES, Oct. 24, 2006, at C3 (new tool allows Web site and blog owners to choose and rank pages in their index, making their sites more accessible to visitors).

They do not have the means or the educational training to access the Web. This digital divide springs from two sources. One is a generational divide. There is an older print-oriented generation for whom the Internet is foreign and intimidating. Then there is an economic and educational divide.

There is also an additional problem—a steadily building pressure to censor the Internet.<sup>56</sup> As a few Internet service providers and search engines become the major platforms and tools for the dissemination of content, pressures on them to censor and to deny access are likely to become ever more intense. So far the Internet remains largely free. But there have been some domestic and international encounters between government and the cause of a free Internet that are troubling. For example, there was the alarming subpoena from the United States Department of Justice requesting data from Google concerning its users.<sup>57</sup> Internationally, the compliant response of Rupert Murdoch's STAR TV channel in 2001 to pressures from the Chinese government was disturbing.<sup>58</sup> More recently, there are the unhappy censorship experiences of United States Internet companies such as Google and Yahoo! with the Chinese government.<sup>59</sup>

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56. See, e.g., Tom Zeller, Jr., *A Slippery Slope of Censorship at YouTube*, N.Y. TIMES, Oct. 9, 2006, at C5.

57. The United States government sought information from Yahoo!, MSN, AOL and Google "in order to examine the effectiveness of software filters to block pornography" in connection with a Supreme Court case dealing with pornography on the Internet. *Here Be Dragons: Google Enters the Chinese Market, Practising Enlightened Self-Censorship*, ECONOMIST, Jan. 28, 2006, at 59, 59. Yahoo, MSN, and AOL complied with the government's request; Google did not. *Id.* at 59-60. In January 2006, the United States Department of Justice brought suit against Google in order to make it respond to a subpoena seeking "more than [one million] [W]eb addresses and a week[']s worth of all users' searches." *Id.* at 59. But the United States government did not demand information that "would identify individual users." *Id.*

58. In December 2001, Rupert Murdoch's News Corporation was given permission to operate a cable channel in China. In the past, Murdoch's Star TV had only been allowed to broadcast to tourists, expatriates, and tourist hotels. News Corporation spokesman, Wang Yukui, announced that there would be no news on the new cable service. Wang Yukui declared: "If you call this self-censorship, then of course we're doing a kind of self-censorship." *Murdoch Wins China Cable TV Deal*, BBC NEWS, Dec. 20, 2001, <http://news.bbc.co.uk/2/hi/entertainment/1721160.stm>. In 1994, STAR TV's satellite service had stopped offering the BBC International News Service to its subscribers in China because of a BBC program carried by the Star satellite network which angered Chinese authorities. *Id.* The program was a negative portrayal of the late Chinese Communist leader, Mao Zedong. *Id.* The decision to remove BBC to placate the Chinese authorities was widely criticized around the world. *Id.*

59. Google now operates in China but rather than consent to Chinese government censorship as MSN and Yahoo! have, Google has reduced its offerings in China. Google's Chinese subscribers will not receive "email, blogging or social-networking services." *Here Be Dragons, supra* note 57, at 59. However, Google has consented that its news service "will contain only [Chinese]

There is also the complicated issue of net neutrality. Net neutrality would preclude broadband providers by law from offering high-speed video services only to themselves and their affiliates but not to others. In the absence of such a law, the others may have to face the daunting prospect of competing with the faster access offered by the broadband providers to the video services which they or their affiliates own. The fear is that failing to insist on net neutrality would undermine the level playing field that is now the Internet.<sup>60</sup> Opponents say that adopting net neutrality would bring regulation to the Internet to redress a problem that has not happened.<sup>61</sup> Moreover, net neutrality would set a precedent for further regulation and limit future innovation. Net neutrality advocates respond that absent net neutrality, the open access Internet we know now will be lost.<sup>62</sup>

Here in the United States, given contemporary anemic views of what constitutes state action, the major Internet service providers have enormous discretion. At the same time, they are entirely free from First Amendment mandates. Subtle pressures on the privately owned Internet service providers or search engines, rather than direct censorship, is yet another concern. Ultimately, we may face once again the issues that were raised long ago by the power of the broadcast networks and chain newspapers. Should the very small number of companies that own major Internet platforms and search engines be viewed as state actors so that they will be subject to First Amendment restraints? In short, the quest to assure that individual citizens will have access to the opinion process is a continuing one. But I believe that it is an effort that the First Amendment should both encourage and secure.

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government-approved media sources." *Id.*

60. "Some argue that net neutrality would not necessarily produce a level playing field but might result in a giveaway to those who are hardly in need of it. By dressing up the net-neutrality debate as a fight for online freedom, however, Google, eBay and other big [I]nternet firms have cleverly diverted attention from an unpleasant truth. As telecoms firms around the world upgrade their networks, there are two ways in which they can recoup the money. They can simply charge subscribers more; or they can pursue new business models in which big [I]nternet firms and other content-providers pick up some of the bill too." *Your Television is Ringing: A Survey of Telecoms Convergence*, ECONOMIST, Oct. 14, 2006, at 16, 18.

61. Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1908 (2006) ("Given the ambiguity about whether mandating network neutrality would promote or impede economic welfare, the more technologically humble course would be for policymakers to embrace a principle of network diversity, which would permit individual network owners to explore alternative business arrangements until concrete harm to competition can be demonstrated.").

62. See, e.g., Anne Broache, *Technologists Square Off on Net Neutrality*, CNET NEWS.COM, July 19, 2006, [http://news.com.com/2100-1028\\_3-6094954.html](http://news.com.com/2100-1028_3-6094954.html).