

Some Future Considerations

There is considerable discussion about the Constitution in Canada, and has been since it was adopted in 1982. However, little if any of the controversy centers around concerns over government control of the media or court limitations of Charter guarantees of press freedom. This is not to say that journalists and media owners in Canada do not have concerns about these issues or that they would not prefer greater freedom and less government control. It is just that these are not major concerns, at least not compared to the larger constitutional issues being discussed.

This is not the case in the United States where journalists and media owners have long been eager and vocal critics of any attempts by government or the courts to limit press freedoms and violate their First Amendment guarantees. In fact, Justice Brennan's speech in 1979, where he presented his two-model approach to the First Amendment, was largely in response to media criticism of recent court decisions that were unfavorable to media interests.

However, the growing criticism and concerns about court interpretations of the speech-press clause of the First Amendment are coming from non-media sources who are concerned about too much freedom at the expense of other interests, particularly the rights and interests of disadvantaged groups like women and minorities. In particular, concerns being raised by feminists, critical scholars and especially critical legal theorists are that the court's continuing emphasis on protecting press freedoms serves only to advance the status quo and favors the special interests of corporate-owned media conglomerates.¹⁴⁸ These are variations of the same kinds of criticism and concerns expressed by Jerome Barron, who argued nearly 30 years ago that "Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible. But if ever there were a self operating marketplace of ideas, it has long ceased to exist."¹⁴⁹ He went on to argue for a legal right of access to the media to provide citizens with the kind of marketplace originally intended by the Founding Fathers.¹⁵⁰

More recently, Patrick Garry has proposed a "revised marketplace model" for press freedom in the United States.¹⁵¹ His approach serves the values of a free press through a two-part approach. The first part protects individual media outlets in their performance of individual media press and speech functions. The second part of the model addresses the structure of the press industry in its commitment to two primary goals: 1) media responsiveness to the community and diversity of expression; and 2) wide public participation in the society-building and self-government process.

Similarly, concerns are being raised in journalistic circles about the status of American journalism, about public criticism of the press and about the appropriate roles *and responsibilities* of the media in a free democratic society. One of the best, recent books on this subject is by Anderson, Dardenne and Killenberg, who argue for a more ecumenical, constructive, participative, and democratically responsive role for journalism's institutional future.¹⁵² Other significant, recent

¹⁴⁸ See, for example, Mark Tushnet, "A Critical Perspective On the Law of Speech And Communication," *Journal of Communication Inquiry*, 19:2 (Summer 1995), 5-15; Robert Trager and Joseph A. Russomanno, "'... The Whole Truth ...' The First Amendment, Cultural Studies, and Comparative Law," *Journal of Communication Inquiry*, 19:2 (Summer 1995), 16-32; and Matthew D. Bunker, "First Amendment Theory and Conceptions of the Self," 1 *Communication Law and Policy* 241-269 (1996).

¹⁴⁹ Jerome Barron, "Access to the Press--A New First Amendment Right," *Harvard Law Review* 80 (1967) at 1641.

¹⁵⁰ See also Jerome Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Bloomington: Indiana University Press, 1973). He applies these concerns to Canadian issues in: Jerome A. Barron, "Public Access to the Media Under the Charter: An American Appraisal," in Anisman and Linden, eds., *supra* note 17, at 177-202.

¹⁵¹ Patrick M. Garry, *The American Vision of a Free Press*, (New York: Garland Publishing, Inc., 1990) at 108-116.

¹⁵² Rob Anderson, Robert Dardenne, and George M. Killenberg, *The Conversation of Journalism: Communication, Community, and News* (Westport, Conn.: Praeger Publishers, 1994).