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How to Talk Back to Your Television Set

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BOOK REVIEW

How to Talk Back to Your Television Set. NICHOLAS JOHNSON. Boston and Toronto: Little, Brown and Company. 1970. Pp. ix, 228. \$5.75.

One's immediate reaction to FCC Commissioner Johnson's book is to compare it to *Equal Time*¹—a collection of former FCC Chairman Newton Minow's speeches published shortly after his resignation from the Commission in 1963. Minow was, after all, the first Commissioner since the 1940's² to direct any serious criticism at the broadcast industry; with his "vast wasteland" speech,³ he not only frightened his audience, the National Association of Broadcasters, but also added some new jargon to the language.

The two books are dissimilar, however; Johnson's analysis of television's endless offering of "tasteless gruel"⁴ is more incisive than Minow's. Minow seemingly acquiesced in the basic structure of the broadcast industry and sought, through a combination of pleas and threats,⁵ to improve program quality. Johnson, on the other hand, questions the basic nature of what he calls the "broadcasting establishment"⁶ and suggests the need for some radical changes.

Johnson begins with a commitment to what has been labelled⁷ the "romantic" first amendment goal of a "marketplace of ideas."⁸ He then documents the poor quality and deleterious social impact of television entertainment—findings that have by now become commonplace. His more important and original observations, however, concern television's relation to social change. Although disclaiming any contention that "television is the *only* influence in our society," he maintains that it "*is* a common ingredient in a great many . . . social ills."⁹ More specifically, he points to the role that television has played—or rather failed to play—in the civil rights struggle. Like the Kerner Commission,¹⁰ he focuses on two main failings of the broadcast industry in

1 N. MINOW, *EQUAL TIME* (L. Laurent ed. 1964).

2 See L. WHITE, *THE AMERICAN RADIO 182-84, 197-98* (1948).

3 N. MINOW, *supra* note 1, at 45.

4 P. 91.

5 N. MINOW, *supra* note 1, at 53-62, 77-91.

6 P. 6.

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

8 P. 46.

9 Pp. 16-17 (emphasis in original).

10 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 382-84 (Bantam ed. 1968).

this area: first, its inability to communicate the plight of black people to white people; and second, its failure to provide programming adapted to the needs and desires of black people.¹¹ The first failing has forced black people to take increasingly more dramatic action to make their grievances heard, while the second has fostered a growing sense of black alienation.¹²

Johnson attributes responsibility for these failings to the economic structure of the industry and the goals of those who control the industry. Station licenses have come to be treated as vested rights, not as the privileges that they were originally understood to be. Most stations are now part of conglomerate corporations, and networks are concerned solely with reaching the largest possible audience.¹³ This leads, he says, to an artificial restriction on the marketplace of ideas and to a form of self-censorship. First, since the broadcast industry is interested solely in appealing to mass audiences, it abandons cultural and ethnic minorities.¹⁴ Second, it will not air programming that may adversely affect related economic interests.¹⁵

Johnson's first point is well-founded.¹⁶ The technological nature of television, when combined with the economic realities of advertiser-supported television, requires a broadcaster to look to the lowest common denominator. The limited number of available frequencies allows only a few stations to operate within any given locality, and advertising revenues are maximized by attracting the largest possible audience. As a result, the individual licensee and network must be extremely wary of offending any possible viewers. His second point appears somewhat tenuous. Like others,¹⁷ he can document specific instances in which media owners have blatantly attempted to censor bad, or create good, publicity for their own interests.¹⁸ He maintains that such conduct is somehow inherent in conglomerate ownership of media,¹⁹ but he fails to provide support for such a sweeping proposition. Although the particular abuses he documents indicate that his position may indeed have some validity, the situation is far from clear and in need of closer and more comprehensive study.

¹¹ Pp. 100-01, 110-11.

¹² Pp. 15, 108-09. See also Barron, *supra* note 7, at 1647.

¹³ Pp. 20-21, 46-47, 85-86.

¹⁴ Pp. 20-21.

¹⁵ Pp. 87-90.

¹⁶ Barron, *supra* note 7, at 1645-47; see N. MINOW, *supra* note 1, at 40.

¹⁷ N. MINOW, *supra* note 1, at 14-21. Minow was primarily concerned about the influence of program sponsors, rather than that of media owners.

¹⁸ Pp. 54-55, 58-59.

¹⁹ Pp. 54, 59-60.

Having explained the malaise of the broadcast industry and its causes, Johnson next considers how to improve the situation. His suggestions—though not held out to be detailed plans of action—range from increased government activity to a restructuring of the mass media.

His first, and least original, suggestion is that the Commission, which he sees as having been "captured by the industry,"²⁰ make more affirmative use of its regulatory powers. His criticism of the Commission's torpor seems amply justified. A recent Commission policy statement, from which Johnson dissented, immunizes existing licensees from challenges by competing applicants in license renewal proceedings so long as the licensee has demonstrated what amounts to average past performance;²¹ and the wholesale renewal of all Oklahoma radio and television licenses, to which Commissioners Johnson and Cox objected, dramatizes the Commission's failure to scrutinize renewal applications.²² Nevertheless, Johnson is unclear—and perhaps undecided—as to the extent to which he would support actual regulation of programming. He refers, without comment,²³ to Professor Barron's proposal that a legal "right of access" to the mass media be created.²⁴ At the same time, however, he strongly condemns government censorship,²⁵ and falls back on the need for more responsibility on the part of the media.²⁶ He thus appears, like many students of the first amendment, to be caught between the censorship problem inherent in Professor Barron's scheme and the media's blatant lack of responsibility.

²⁰ P. 201.

²¹ Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 18 P & F RADIO REG. 2d 1901 (1970). The standard established by the Commission is whether the renewal applicant's performance has been "substantially attuned to meeting the needs and interests of its area." *Id.* at 1904. The Commission recognized the vagueness of such a standard (*id.* at 1905) and attempted to define it by saying that it meant "solid" or "strong" performance. *Id.* at 1904 n.1.

What its action really amounted to was public disavowal of WHDH, Inc., 16 F.C.C.2d 1 (1969), in which a plurality of Commissioners had refused to renew a license, ruling that a renewal applicant's past record would be disregarded when within "the bounds of average performance." *Id.* at 9. The WHDH case, and subsequent renewal challenges, prompted the so-called Pastore Bill, S. 2004, 91st Cong., 1st Sess. (1969), which would have imposed an even wider ban on renewal challenges. The later Policy Statement was presumably an attempt—and apparently a successful one—to reduce support for the Pastore Bill.

²² Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

²³ Pp. 92-93, 188-89.

²⁴ Barron, *supra* note 7.

²⁵ Pp. 34-36.

²⁶ P. 95.

Johnson proposes that the economics of broadcasting be changed in order to make meaningful programming financially attractive. Perhaps his most interesting suggestion is that the Commission require the networks to reserve a definite amount of public service time, thus eliminating—at least within that given time period—the economic necessity of appealing to the largest possible audience.²⁷

Johnson's second plan of attack is aimed more directly at changing the industry's economic structure which, as mentioned above, he finds responsible for many of broadcasting's woes. He argues that more stringent limitations on ownership of different media, both in the same and different markets, are essential to achieve a more competitive marketplace of ideas.²⁸ Here, too, his criticism of the Commission's failure to act²⁹ seems amply justified. The Commission has done nothing about its own inquiry into common ownership of CATV systems and other media;³⁰ it is still puzzling over a two-year-old proposed ban on ownership of more than one standard or FM radio or television broadcast station per market³¹ in a proceeding which was to be terminated "with dispatch."³² In a related area, it has only recently adopted a five-year-old proposed limitation on the amount of network programming carried on local stations.³³

The main problem inherent in Johnson's position, however, is the impracticability of changing a structure as firmly entrenched as that of the broadcast industry. Implementation of his suggestions would cause industry-wide, and therefore presumably politically impossible, disruption; as he himself admits, any immediate attempt at divestiture is "highly unlikely."³⁴ Moreover, it is somewhat less than clear that any form of divestiture, immediate or prospective,

²⁷ Pp. 178-80.

²⁸ Pp. 180-82.

²⁹ Pp. 60-61.

³⁰ Botein, *The FCC's Proposed CATV Regulations*, 55 CORNELL L. REV. 244, 258-59 (1970).

³¹ Notice of Proposed Rule Making, Docket No. 18110, 33 Fed. Reg. 5315 (1968).

³² Memorandum Opinion and Order, 12 F.C.C.2d 912, 915 (1968). Sincerity on the part of the Commission may be indicated by its decision to defer action on interim applications that would be within the scope of the proposed rules. *Id.* at 912-13; Notice of Proposed Rule Making, Docket No. 18110, 33 Fed. Reg. 5315 (1968).

³³ This proceeding was begun in 1965. Notice of Proposed Rule Making, Docket No. 12782, 4 P & F RADIO REG. 2d 1589 (1965). This May the Commission finally adopted a modified version of the earlier proposed rule allowing network affiliates in the 50 largest markets to accept a maximum of three hours of network programming between 7 and 11 P.M. First Report and Order, Docket No. 12782, 18 P & F RADIO REG. 2d 1825 (1970). Whether the rule will remain in effect is somewhat questionable, since Chairman Burch has publicly taken a stand against it. BROADCASTING, May 11, 1970, at 22, 24.

³⁴ P. 75.

would really help very much. Johnson himself maintains that one of the reasons for television's poor quality is the economic necessity of mass appeal; it thus seems doubtful that diversification of ownership would radically change either station or network programming.

Johnson's third and final suggestion is to shape new communications technology to create more diversity of ideas. Taking the individual's access to information as his touchstone,⁸⁵ he maintains that future communications planning should use a comprehensive "systems approach."⁸⁶ One of the more interesting possibilities that he raises is the potential development of CATV. If properly used, CATV could become a means not only of bringing scores of communications channels into each home, but also of tying each household into other homes, commercial establishments, and public institutions.⁸⁷ CATV could thus supplement—or eventually supplant—normal commercial broadcasting and its economic need for mass appeal. The Commission has given this possibility some recognition.⁸⁸ Whether the Commission has any commitment to it is yet to be seen, but it has gone at least as far as requiring all large CATV systems to originate programming⁸⁹—an initial step in the direction of developing multi-channel capability. More recently, the Commission tentatively approved an informal staff memorandum that would liberalize CATV importation of distant signals, require development of multi-channel capacity and origination, and attempt to work out a system of CATV payments to copyright owners and educational television.⁴⁰

One of the most pressing problems raised by such CATV development is the familiar one of ensuring nondiscriminatory access to the medium. The problem, however, is compounded with CATV, since a CATV system, operating as a single entity, may control forty or more channels of communication. Johnson, like the Commission as a

⁸⁵ Pp. 132-33.

⁸⁶ P. 123.

⁸⁷ Pp. 152-53, 156, 165.

⁸⁸ Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 419-21 (1968).

⁸⁹ *Id.* at 422.

⁴⁰ BROADCASTING, May 25, 1970, at 21. If the Commission approves a more detailed version of the staff memorandum, it would probably issue it as a Notice of Proposed Rule Making within the next few months.

One interesting aspect of the proposal is that it has made for some strange bed-fellows among its supporters. Johnson presumably backs the proposal because of its potential for program diversity, while Chairman Burch, apparently a staunch defender of the broadcast industry, may see it as a means of promoting peaceful coexistence between broadcasting and CATV. See *id.*

whole,⁴¹ gives the issue somewhat tangential treatment;⁴² he does not, however, seem to see it as a major problem, and he has not formulated even a tentative approach to it. This seems especially anomalous in light of his disapproval of the influence vested in media owners.

A common theme running through all of Johnson's suggestions is the need for citizen participation in changing the media. He suggests that group pressure can help ensure a more active Commission, readier divestiture of mass ownership, full development of CATV's possibilities, and refusals to renew licenses to unworthy stations.⁴³ While his confidence in the efficacy of private action is reassuring, it is impossible not to wonder whether it is realistic. As Johnson demonstrates, individuals have won significant victories before the Commission.⁴⁴ At the same time, however, the Commission has demonstrated the capability of totally cutting off individuals' avenues of redress.⁴⁵ Although the public can play an important role in shaping communications policy, that role may not be as large as Commissioner Johnson indicates.

Finally, it should be noted that this book is not—and has no pretensions of being⁴⁶—a comprehensive, scholarly treatment of mass communications in the United States. To a certain extent this is unfortunate since it will make the book vulnerable to those critics of Commissioner Johnson who disagree, not with his scholarship, but rather with his attitude towards the broadcast industry. The book is invaluable, however, for revealing the perhaps insoluble problems that confront a concerned public official who seeks reform in the face of widespread institutional inertia.

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⁴¹ Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 427, 443 (1968).

⁴² Pp. 157, 213.

⁴³ Pp. 74, 154, 177-78, 201-02.

⁴⁴ Johnson relies most heavily on Television Station WCBS-TV, 8 F.C.C.2d 381 (1967), in which John F. Banzhaf, III, a private attorney, persuaded the Commission to apply the fairness doctrine to cigarette commercials. Pp. 202-05. Such victories are probably the result of a combination of legal talent and Commission predisposition.

⁴⁵ Note 21 *supra*.

⁴⁶ This collection is modest in scope and purpose. . . . It is a sampling. I would readily acknowledge that much of this book was originally prepared under much greater pressure than the most thorough and thoughtful scholarship would require.

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