INTERNAL EXAMINATION: SELF-REGULATION AND THE AMERICAN MEDIA

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INTRODUCTION

While American broadcasters historically have lived with a regime of government regulation and specific rules of accountability, much of the American press, as represented by the print media, has virtually been exempt from regulation because of the negative command of the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1] This has led to an "anything goes" ethic in much of the American press, which posits that if it is not specifically forbidden by this ultimate law governing American communication, it must be acceptable. A doctrine of no "prior restraint" of publication is at the heart of legal interpretations of the First Amendment, although there is a considerable body of law that allows "after the fact" remedies for harm to individuals and institutions. First Amendment absolutist Hugo LaFayette Black, a long-serving justice of the U.S. Supreme Court, put it succinctly when he said, "I simply believe that 'Congress shall make no law' means Congress shall make no law."[2]

Were this truly the case, there would not be extensive libraries housing countless volumes of media law and regulation covering a wide variety of court decisions, administrative rules, and legislative mandates affecting the media. But it is true that the law of communication in the United States requires no accountability for the press except that afforded by an independent judiciary, which resolves disputes arising after publication.

The electronic media historically have operated under a different regime, one that formerly required community "ascertain-

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1 U.S. CONST. amend. I.

2 HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45 (1968); *see* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 3-10 (Everette E. Dennis et al. eds., 1978). For judicial expounding on this view, see, e.g., New York Times Co. v. United States, 403 U.S. 713, 714-20 (1971) (per curiam) (Black, J., concurring); Smith v. California, 361 U.S. 147, 155-60 (1959) (Black, J., concurring). In the latter case, Black expressed his belief as follows: "I read 'no law . . . abridging' to mean *no law abridging*." *Smith*, 361 U.S. at 157.

ment." This was a formal system of accountability in which a broadcast station consulted community leaders and other interests about their performance prior to license renewal. That requirement, and other codifications of accountability, have largely been pushed aside as a result of industry deregulation during the 1980s and 1990s.[3]

For the print media, and increasingly for electronic media outlets from networks to local stations, accountability has been a strictly voluntary affair, though sometimes hastened by public opinion and negative public attitudes toward the press. From its beginnings, the American press has run head-on into a cyclical climate of public opinion that is critical of issues ranging from media ownership and content to the performance of employees, namely journalists. Even with its constitutional mandate, the media greatly need public acceptance and support, if not outright popularity. It is said that the media's greatest franchise is its credibility, which is based on public trust and presumably some "safety valve" of feedback or accountability.

Thus, while formal accountability is not required, the American news media have experimented with a wide range of self-regulatory approaches to accountability, ranging from commission-style critiques and recommendations to codes of ethics, press councils, media criticism projects, insider assessment vehicles, public opinion polling, and even the education and training of journalists and other media people.

Under the "anything goes" standard of the First Amendment, formal suggestions aimed at the press are often deemed offensive; journalists and jurists alike agree that nothing requires the press to be responsible or accountable. The only expectation for the media is that it be free to disseminate information and opinions in an unfettered fashion. However, public criticism of the news media has accompanied various social and philosophical trends in America and inevitably has led to a de facto system of accountability.

I. Freedom and Responsibility

Since the end of World War II, many media executives and critics have subscribed to what one book calls a "theory of social responsibility."[4] This was drawn from the proceedings of the 1947

[3] *See* Sydney W. Head et al., Broadcasting in America: A Survey of Electronic Media (7th ed. 1994).

[4] *See* Fred S. Siebert et al., Four Theories of the Press 73-103 (1956).

Commission on Freedom of the Press, a privately funded group headed by then-University of Chicago chancellor Robert Maynard Hutchins, and known as the Hutchins Commission. This report set a standard for subsequent commissions engaged in media assessment, most of which urged structural and substantive improvements in the American press, pointing to more accountability, that is, a media system more responsive to the public interest. Positing a "representative picture" theory of the press wherein virtually all constituency groups of society would be included in news coverage, the work of the Hutchins Commission was widely quoted but largely ignored as a blueprint for action. However, it later became a text for journalism schools and was used extensively in ethics courses.

Perhaps more important than the Hutchins Commission's actual recommendations was the model it set as the "granddaddy" of all media commissions—some public, some private—that have subsequently been impaneled. Others have included the Kerner Commission, which followed urban riots in the 1960s and urged greater coverage of minority communities and greater minority representation on news staffs; the Eisenhower Commission of the 1970s, which urged a role for the media in containing violence; and several others. It is not uncommon for a foundation to use the commission form as a vehicle for analysis of problems and recommendations for action. The main role of such bodies has been to stimulate debate and discussion, thus fostering a public climate of media improvement and greater public sensitivity.[5]

II. The Consumer Experience

Public reaction to the actual performance of the press has also stimulated self-regulatory activity. In the 1890s, gossip mongers in the press and extensive intrusion into the private lives of prominent citizens led to concern with the right of privacy that, while given some modest statutory authority, was mostly a philosophical commitment to a less sensational press. Similarly, excesses in the press in the period after World War I led to a journalism ethics movement and the adoption of codes of ethics by several national organizations of journalists and editors. This period also led to the establishment of what were called "bureaus of accuracy and fair play" within newspapers, which pledged more rigorous and verifiable reporting of public affairs. Over time, industry-wide codes of

[5] *See* The Commission on Freedom of the Press, A Free and Responsible Press: A General Report on Mass Communication (midway reprint 1974) (1947).

ethics dealing with standards of performance and defining conflicts of interest were initiated by such groups as the Society of Professional Journalists, the American Society of Newspaper Editors, the Radio-Television News Directors Association, and others. These broadly gauged codes were joined by more specific codes developed by broadcast networks, individual newspapers, and others, all pledging a more professional and accountable performance. Closely related to the consumer feedback, or "Better Business Bureau," approach to self-regulation is the ombudsman approach, which involves the appointment of an ombudsman or "reader's representative" at a number of leading news organizations. The ombudsman takes reader and viewer complaints, occasionally adjudicates disputes, and sometimes writes a reflective column for the newspaper's editorial page.[6]

III. Professional Self-Regulation

Beyond the quieter and largely individualistic codes of ethics, the media industry has also been somewhat responsive to various citizen-media councils and other advisory bodies, again to provide a conduit for criticism, to correct errors, and to respond to complaints. The best known of these have been press councils, based loosely on the quasi-governmental British Press Council and those of several other European countries. The American model, which began with a statewide effort in Minnesota, eventually led to the creation of the National News Council as well. Additionally, there were some local press councils, mostly in the 1960s and 1970s. The Minnesota News Council was founded in 1971 and is still functioning, while the National News Council existed from 1973 until its dissolution in 1984.

The press council idea offers a channel for citizen complaints about the performance of the media to be adjudicated by a citizen group made up of media and public members. Those bringing complaints agree to waive any future litigation, and then the voluntary action moves ahead. Findings are made much in the fashion of a court, although press councils have only the "power of embarrassment" as a penalty. The best press councils have developed a kind of common law of media ethics, but the movement has had only a modest impact. Efforts to transplant it to a number of locales in the United States were unsuccessful. It is not uncommon, however, for media critics to call for the revival of the National

6 *See* Lee Brown, The Reluctant Reformation: On Criticizing the Press in America 66 (1974).

News Council, which died largely from a lack of media support—the most notable opposition coming from *The Wall Street Journal*.[7]

IV. Media Criticism and Media Reporting

After a long period during which it was regarded as unprofessional for one media organization to undertake an assessment of another, this taboo has largely fallen by the wayside. There is now a vigorous effort at media criticism in the United States, notably in leading newspapers and magazines and on television, as well as a trend toward more actual reporting on the media industries, including the news media. Unfortunately, only two of the nation's "big five" newspapers—*The Washington Post* and *The Los Angeles Times*—have notable track records in criticism. But others are doing serious media reporting, which affords the public a view of media decision making and operations in a critical context. Several years ago, the Markle Foundation funded a new media magazine called *Channels*, which had as its mission the stimulation of more media coverage (particularly on television) and criticism of regional newspapers, something that has happened, even though the magazine itself died.[8]

V. Journalism Reviews and Trade Publications

While trends in media criticism are ordinarily aimed at the general public, journalism reviews and media magazines provide media criticism and analysis for industry insiders. The *Columbia* and *American Journalism Reviews*, which assess journalistic content and coverage on a timely basis, are published by universities (Columbia University and the University of Maryland). The *Forbes Media Critic* is a privately funded publication aimed more broadly, but in fact read mostly by insiders and media junkies. My own organization's *Media Studies Journal* aims at media leadership, top managers, and educators. Professional publications and trade journals, of which there are many, similarly engage in a sometimes critical assessment of professional work.

7 *See* William L. Rivers et al., Backtalk: Press Councils in America 16 (1972). Rivers describes the "fears of news executives" in 1967, when the first press councils were being formed. Upon discovering that a number of regional newspapers had agreed to work with press councils, an executive of *The Wall Street Journal* sent a letter to the editor of each newspaper asking, "Why are you giving up your press freedom?" *Id.*

8 *See generally* John McMillan, *Homegrown Media Critics*, Media Stud. J., Spring 1995, at 59. This issue examines the work of media critics "who reach a broad audience in newspapers, television and magazines." *See Preface, Media Critics*, Media Stud. J., Spring 1995, at x.

VI. Journalism Education and Training

One major form of socialization for American journalists is a complex system of journalism education at the university level, both for undergraduate and graduate students. This formalized system of accredited and non-accredited journalism schools involves tens of thousands of students and accounts for a large percentage of entry-level hires at American newspapers and broadcast stations. Journalism education promotes high standards of professional performance, institutional memory, and media ethics. There is also an elaborate system of graduate level work. Buttressing formal college and university training are a number of training centers, mid-career institutes, and other training efforts. Organizations like the American Press Institute, Poynter Institute, Foundation for American Communication, and The Freedom Forum offer short-term training and performance improvement sessions on general and specialized journalistic practice. Much of this effort is supported by private philanthropy, and some by media enterprises and their progeny, including The Freedom Forum, Knight Foundation, Hearst, Scripps-Howard, Tribune, Pew, and others. The media foundations also support such efforts as minority journalism organizations, specialized media organizations (mostly scientific writing), and varied projects aimed at diagnosing and improving media content and quality. One recent effort is the much publicized and controversial "public" or "civic" journalism projects, which urge local news organizations to be more responsive to their communities by supporting specific public policy initiatives.[9]

VII. Monitoring Public Opinion

Measuring and assessing public attitudes toward the news media has also been a means of self-regulation. Media organizations are quite curious about, if not fascinated by, what the public thinks of them. Over the years, groups like the American Society of Newspaper Editors have commissioned polls, and various public opinion firms occasionally have asked the public how they feel about the press. Most of this work was somewhat haphazard until 1985, when the Times Mirror organization formed its Center for People and the Press in Washington, D.C. The center issues periodic soundings of public opinion about the media, studies that are widely covered and much discussed in newsrooms. This is concurrent with what has been called the "media credibility" movement, which

[9] *See The Making of Journalists*, Gannett Center J., Spring 1988, at 85 (roundtable discussion on journalism education).

pushes the media toward more internal reflection and action on matters that particularly concern the public.[10]

VIII. Media Research

Closely connected to the market-driven efforts of pollsters with regard to people's attitudes toward the media is wide-ranging media research conducted by "think tanks" and other research centers, as well as universities and proprietary laboratories. Such research takes up a wide range of topics and concerns from ownership and structural control, to content of the news, to the performance of individual journalists or groups of journalists. Research done in universities and in privately funded labs usually is practical in orientation and aimed at solving problems. Scores of journalism schools and research organizations do such work, which eventually becomes available in academic journals, trade magazines, books, and other forms.[11]

IX. Popular Culture

Yet another form of "self-regulation" is found in popular culture images, whether on television situation comedies and dramas, or in movies, advertising, or elsewhere. What people think about the media and know about media activities is often linked to the popular culture image. Such images are often widely discussed and better known than more serious media criticism, analysis, or self-regulation. Images of the journalist in everyday media fare are important as they correspond to public acceptance and understanding, as well as the media's response to their own public image and reputation, whether positive or negative.[12]

Conclusion

The self-regulatory experience of the American media is concerned with matters of freedom and accountability, and lives comfortably within the constraints of the First Amendment as commonly understood. Some efforts are purely voluntary and function along the lines of other nonprofit, self-regulatory, and completely voluntary organizations in a local community. Still other efforts, like press councils and fair trial-free press councils,

[10] *See* Richard P. Cunningham, *Self-Regulation: Reflections of an Insider*, *in* Media Freedom and Accountability 55-60 (Everette E. Dennis et al. eds., 1989).
[11] *See* Everett M. Rogers, A History of Communication Study: A Biographical Approach (1994).
[12] *See* Everette E. Dennis, The Media Society: Evidence About Mass Communication in America (1978).

are somewhat fiduciary in character but are still voluntary. In America, self-regulation always lies somewhere between market forces on the one hand and government regulation on the other. The media must meet a First Amendment standard, if challenged, and rely almost entirely on the power of persuasion and the willingness and wherewithal to change.

To be sure, the American news media—notably the print media, but increasingly the electronic media as well—have experimented widely with different forms of voluntary self-regulation. Some elements of the media, like press councils, emerged from comparative research and long theoretical considerations. They were implemented carefully and sensitively only to fail, however, in the short run. Others, like fair trial-free press codes, were the hurried result of heavy breathing commissions, which designed them to control damage and head off genuine First Amendment intrusions by legal authorities. Some others, like market research-oriented credibility and public attitude studies, are associated with the profit motive, the bottom line, and corporate public relations. All of them (and some not mentioned here) are part of the feedback process in democratic communication. They are based on the assumption that free, authoritative, and successful media, in order to continue their efforts, must have the "permission" of the local and national public and community. In America, the idea of a responsive media has often developed as a protective shield against the kind of legal and quasi-legal accountability commonly imposed in other societies. No one argues that the public as a whole knows or understands the channels for feedback implied here. But it is believed that their very existence has value.