

Freedom and Fairness: Regulating the Mass Media

To make its research readily available to a broad audience, the Center for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Center for Philosophy and Public Policy*. Named after the abbreviation for “questions,” *QQ* summarizes and supplements Center books and working papers and features other selected work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Center or its sponsors.

In this issue:

With the growing power of today’s mass media, we need protections *from* the press as well as protections *for* them. Does this mean that heightened regulation of the media may be justified? p. 1

A leading legal theorist examines arguments for and against allowing gender-segregated institutions p. 6

The Legal Services Corporation has been all but dismantled by the Reagan administration. Should it rise again? p. 9

Human beings think they’re better than everybody else. One philosopher says they’re right p. 12

A new working paper series is announced p. 15

Freedom of the press is the cornerstone of America’s image of itself, *par excellence* “what we have that the Russians don’t.” Only compare the striking difference between Soviet press (non) coverage of the Chernobyl disaster with searing, exhaustive U.S. press coverage of the Challenger explosion. Until the day of the funeral, the ill health of a Soviet premier is denied by government-owned newspapers; American papers embarrass the first lady by emblazoning the front page with elaborate diagrams of the president’s colon and prostate gland. Even when we feel that the press goes too far, jeopardizing national security for the sake of a scoop, we often find in the end that its vigilance was justified—most recently, when reporters’ unwillingness to “back off” from investigating the release of hostage David Jacobsen led to the uncovering of Contragate. We cherish the ideal of a press free from government interference.

Of late, however, the shining armor of the press has come in for some tarnishing. The increasing number of libel suits and the size of punitive judgments against the press show public wariness about its trustworthiness. Critics charge that reporters are not, indeed cannot be, impartial spokesmen for the Truth, but necessarily represent the interests of entrenched power groups, inspiring the quip that the only way to have freedom of the press is to own one.

According to Judith Lichtenberg, director of the Center for Philosophy and Public Policy’s project on news, the mass media, and democratic values, the

growing power of the mass media means that we need protections *from* the press as well as protections *for* them, and both, she argues, are consistent with the ideal of freedom of speech. Our commitment to freedom of speech has two different strands: the first is an opposition to censorship, based on a belief that "one should not be prevented from thinking, speaking, reading, writing, or listening as one sees fit"; the second, equally fundamental, is our conviction that "the purposes of freedom of speech are realized when expression and diversity of expression flourish." We want no voice to be silenced; we also want many voices to be heard. While "government intervention seems to intrude upon the first principle, . . . it may advance the second."

Both principles are codified in landmark Supreme Court cases. In *Miami Herald v. Tornillo* the Court struck down a Florida statute requiring newspapers to provide politicians, attacked in the course of an electoral campaign, with a free opportunity to reply. Freedom of the press here was equated with editorial autonomy. But the second strand in our commitment to free speech is represented by *Red Lion Broadcasting v. FCC*, in which the Court upheld the FCC's requirements that radio and television stations provide free reply time to those attacked in station broadcasts. Unlike their print counterparts, the broadcast media, which are subject to federal licensing, are required by the "fairness doctrine" to devote a reasonable amount of time to the coverage of controversial issues of public importance, and to do so fairly. While the asymmetrical treatment of the print and broadcast media is troubling to many, it is not clear whether the discrepancy should be resolved by treating the press more like broadcasting or treating broadcasting more like the press.

Proposals for heightened regulation of the press raise goosebumps in many, however, who view governmental intervention in the mass media as a last resort. They would rather implement the goals of broadening access to the press and stimulating robust wide-open debate of public issues by allowing the press itself to exercise professional responsibility or by relying on market forces. Only if these fail can government regulations be considered—and even then perhaps not. Whether or not we turn to the state to implement our commitment to a diversity of voices may depend crucially on how well it has been shown to work—what kinds of regulation work best, what kinds work at all.

Self-Regulation of the Press

Many journalists maintain that external regulation of the press is unnecessary, because the press itself is its own severest critic. Reporters, at least in popular imagery, are by nature independent and skeptical, delighting in controversy and muckraking, even when some of the muck to be raked lies close to home. In numerous ways the various organs of print and broadcast journalism bend over backwards to achieve fair and balanced coverage of thorny issues. A casual reading of the ombudsman's column in *The Washington Post* and

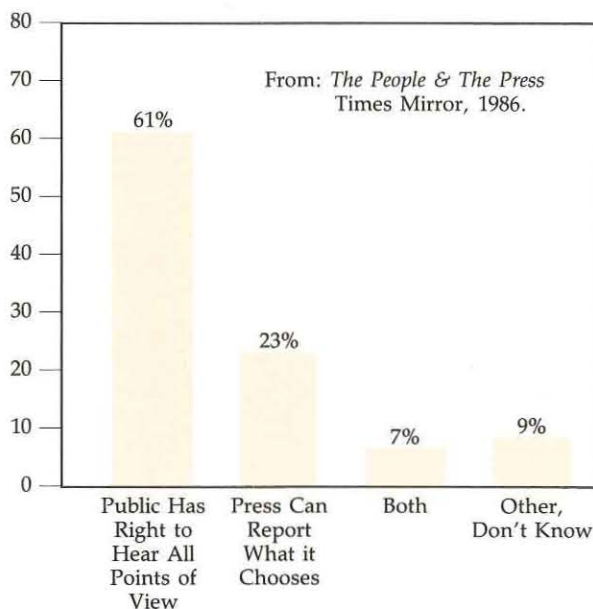
a week's worth of letters to the editor shows the willingness of a major paper to print inside accounts of its own failures and hostile outside criticism. Thus Carl Sessions Stepp, a member of the journalism faculty at the University of Maryland, argues that "journalism is a craft peculiarly suited to internal reform. . . . Journalists are propelled by the First Amendment syndrome, a set of beliefs (maybe even a mythology) that, via broad acceptance, assumes a self-fulfilling power that can drive the profession."

Several recent trends, however, which Stepp himself notes, undermine the journalistic heritage on which his hopes for reform are founded. The first of these is intensified concentration of media ownership. Twenty corporations control more than half the 61 million daily newspapers sold every day; twenty corporations control more than half the revenues of the country's 11,000 magazines; three corporations control most of the revenues and audience in television, ten corporations in radio, eleven corporations in all kinds of books, and four corporations in motion pictures. Continuing concentration drastically centralizes control over the forum in which voices are heard and likely limits access to it.

A second troubling development is the increasing intrusion of non-news corporations into the news enterprise. As Stepp points out, "The press is part of big business, and, increasingly, it is owned and operated by big business corporations that may have only incidental interest in journalism and that may be controlled

FREEDOM OF THE PRESS: A POLL

Question: What does freedom of the press mean to you? Does it mean: That the public has a right to hear all points of view? That the press can cover and report what it chooses? Or something else?



by individuals without grounding in journalistic principles." Finally, the proliferation of broadcast and cable outlets forces the news media to compete incessantly for consumer time, thus driving public affairs coverage further toward entertainment.

Even in the face of these challenges, Stepp still calls for a renewed commitment to professional responsibility on the part of the media themselves, rather than government regulation. In his view, regulation would only make matters worse: "The system is animated by the ideal of First Amendment freedom from government interference; government intrusion would necessarily subvert that ideal and demolish the fundamental assumption on which the press operates. It is hard to imagine that the ensuing system would be an improvement."

But Owen Fiss, Professor of Law at Yale University, fails to see an inevitable tension between government regulation and professional accountability: "Why is it assumed that state regulation of the media and professional independence are necessarily inconsistent? It seems to me that it all depends on the nature of the regulation. Indeed, the fairness doctrine can be seen as strengthening and perhaps even generating the resolve of reporters and editors to act in a way that furthers the democratic aspirations of the First Amendment. As we saw from *Brown v. Board of Education* and the civil rights movement of the sixties, exemplary 'folkways' can sometimes be nourished—and maybe even created or legitimated—by strong exercise of state power." He concludes that professional norms alone are "frail and weak, compared to the challenge."

Let the Market Do It

If self-regulation cannot give us the kind of media we require in a democracy, what about letting the people themselves decide what kind of media they want by what kind of media they watch? Let them vote, so

By allowing the media to be driven by ratings and advertising, we will at least be giving the people the media they want, indeed, the media they deserve.

to speak, with their remote control buttons. Originally regulation of broadcasting was justified by appeal to scarcity of broadcast frequencies; the fairness doctrine was devised to correct the "market failure" produced by the physical limitations of the electromagnetic spectrum. Now, with the advent of cable and satellite technology, scarcity has given way to abundance, oligopoly to cornucopia. With this impediment to a freely functioning market removed, market forces should ensure that if people in fact want a certain kind of news

coverage it will be provided; if in fact they don't, then on one view of democracy the loss is not to be regretted. By allowing the media to be driven by ratings and advertising, we will at least be giving the people the media they want, indeed, the media they deserve. By accurately mirroring popular tastes, ratings are a way of empowering the people to have the final say on television programming.

We might find ourselves appalled, however, at what popular sovereignty in this context really means. Fewer

The "democratic" defense of ratings-driven news misunderstands what democracy really requires.... It treats viewers not as democratic citizens at all but only as consumers tuning in to be amused....

people watch the news every night than watch "Wheel of Fortune." The ratings wars between network news programs have been blamed for the further crumbling of the time-honored wall of separation between news and entertainment and the resulting replacement of hard news coverage with fluffier "lifestyle" stories. (As one network news executive asked, "Do people in Lubbock, Texas, really need to know about the latest vote in Ways and Means?") Interest in events of the day gives way to interest in what sweater Dan Rather is wearing and what sign-off phrase he uses.

According to Jeffrey Abramson, Associate Professor of Political Science at Brandeis University, the "democratic" defense of ratings-driven news misunderstands what democracy really requires; it assumes that "the only news democratic citizens need is news that pleases them—news that they watch for the same reasons that they watch a situation comedy. But this is to treat viewers not as democratic citizens at all but only as consumers tuning in to be amused.... (Such news) can flatter the culture but not examine it; it can please viewers but not make them think."

Abramson also objects that the only audience that matters to Nielsen ratings is the mass audience—measured in forty or sixty million persons. "All power goes to that audience and even a show that attracts, say, thirty million persons in a time slot where competitors are bringing in forty million persons is in danger of cancellation. A television documentary such as PBS's history of the civil rights movement is expected to hold an audience of 1 million persons per segment; but this is a virtual no-show as far as commercial television is concerned."

Each network thus pursues the same mass audience with the same fare in each time slot. As a result, Abramson concludes, "The nation can for the most part conduct its business on television only on borrowed time; the economics of commercial television are

pushed solely by the imperative to capture the largest possible audience for advertisers. This imperative typically stands against the realization of democratic ideals we commonly associate with diversity in programming or access to the marketplace of ideas for the widest possible array of the contending voices."

Is Regulation the Answer?

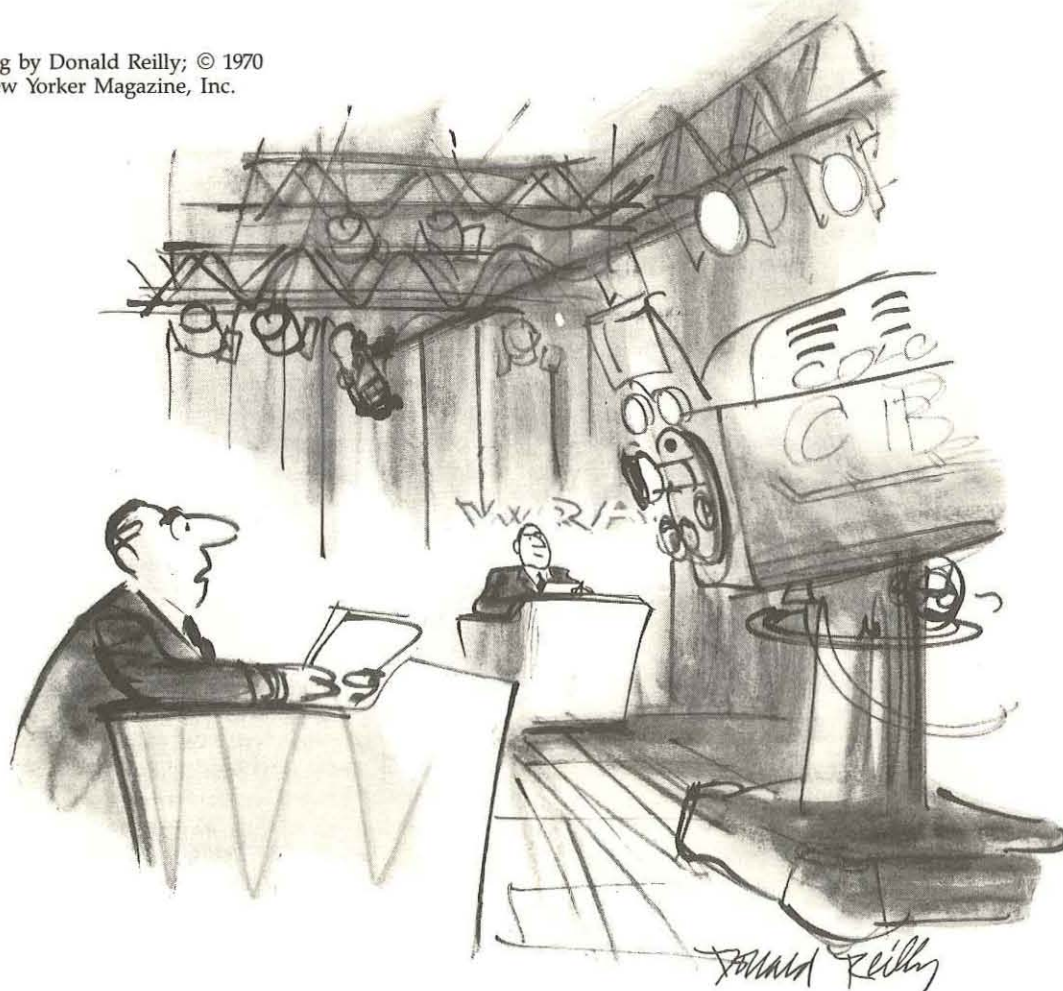
Considerations such as these lead us to turn to the state for a remedy, for government, via such provisions as the fairness doctrine, can mandate broader access to the media and enhance the quality and breadth of public debate. But now the question arises: how can we trust the government to be a watchdog of the media when a chief function of the media is to be a watchdog of the government? If the government is empowered to tell the media how to run their business, won't this compromise the fundamental adversary relationship between the two?

The appropriate response here, according to Lichtenberg, "is not that we can trust government more than

opponents of regulation believe, but that we can trust others less. Regulation is needed just because private power poses a grave threat to the independence and integrity of the press." Lee Bollinger, Professor of Law at the University of Michigan at Ann Arbor, states simply: "Our concern is with power—that is, the ability to command an audience more or less exclusively—and that is a concern that is not diminished by the way in which that power is achieved. It should make no difference to us, in other words, whether the power is the consequence of physical limitations associated with the use of that medium . . . or the result of limitations of the economic system (concentrations of economic power) or the result of clear market success in solidly appealing to a segment or majority of the community. It is the risks associated with power over access to the marketplace that raise the sense of alarm and not the source of that power."

But isn't the state equally subject to the influences of social and economic power that it would seek to control? A democratic government is responsive to the

Drawing by Donald Reilly; © 1970
The New Yorker Magazine, Inc.



"So much for my version of the news. And now over to my colleague for the same news but with a different set of biases, hangups, and axes to grind."

public will, which often means to private money, and hence to privileged power groups. Stepp argues, "If one defines the problem of access and diversity as seeking voice for perspectives other than those of a privileged and powerful minority, then government seems an ironic place to turn for help. Government is by definition integrated with the power class in American society and it is axiomatic that the press already gives greater voice to the 'outs' than the government does or is likely to."

Fiss concedes the danger that the state "will be the victim of the very same forces that dominate public debate and not counteract the skew of the market but rather reinforce it." He maintains nonetheless that "There is still a difference worth observing between a public official and a program manager of one of the networks (or an editor of a newspaper). However imperfect the systems of accountability are in the public sphere, at least they exist." Fiss concludes, "We turn to the state because it is the most public of institutions and because it alone has the power...to counteract, or modulate, the influence of the market and the constraint that it imposes on our policies."

Does Regulation Work?

The final question is a pragmatic one: does regulation work? If there is no objection to it in principle, there may still be objections in practice. Does it in reality enhance or stifle robust, wide-open debate? Does it foster or chill discussion of public issues?

How successful—and how intrusive—regulation is depends on the form it takes. Two broad approaches to regulation of the media are usually distinguished. *Content regulation* makes specific demands of press institutions to cover certain kinds of issues, to cover them in a certain way, or to provide access to certain points of view. (The fairness doctrine is the most prominent example.) *Structural regulation* instead builds rules and constraints into the structure and organization of the media taken as a whole.

Most press resistance has been mounted against content regulation, as both dangerous and ineffective. Sara Engram, Deputy Editorial Page Editor for the Baltimore *Evening Sun*, reflects the sentiments of many journalists in arguing that the fairness doctrine ends up working against the goals it is designed to achieve: "Instead of encouraging enlightening discussion of matters of public interest, the fairness doctrine provides a crutch for the kind of journalism that can be described as, at best, terminally bland." In her view, the fairness doctrine "can—and does—encourage a constricted notion of fairness that ultimately limits the public debate. . . . I suspect that in practice 'each side' quickly becomes 'both sides' and the broadcaster can move on to the next 'issue' satisfied that he has gotten the FCC off his back."

Bollinger replies, however, that evidence for the alleged "chilling effect" of the fairness doctrine rests largely on broadcasters' own testimonial claims, which are likely to be self-serving. He points out that the often

overlooked first provision of the fairness doctrine, which requires broadcasters to provide coverage of public issues, could be used to overcome any chilling tendencies of the requirement of fairness. Finally, he insists that any amount of chilling must be balanced against the enhancement of speech provided by the expanded number of voices heard.

But has the fairness doctrine, as it is now enforced, enhanced public debate significantly? Henry Geller, Director of the Washington Center for Public Policy Research, charges that the FCC has "failed miserably" in requiring broadcasters to devote a reasonable amount of time to issues of public concern: "In a half-century of regulation, it has never denied a license for failure to deliver sufficient news or public affairs. . . . The comparative renewal process is just as great a charade. The incumbent always wins, no matter what its past record." The fairness doctrine has shaped broadcasters' concern more by the shadow it casts than by the stick it wields.

We might do better, then, to rely on structural approaches to regulation, such as rules prohibiting multiple ownership of news organizations or designating certain cable channels for public access. Economic incentives can be offered to news organizations to promote diversity or provide services that are unlikely to be offered in the unrestricted marketplace. Geller proposes eliminating the concept of broadcasters as public trustees, bound by the fairness doctrine, and in its place exacting from station owners a modest "spectrum fee," to be used to subsidize public affairs and similar programming by public radio and television stations, who are willing and able to provide the high-quality broadcasting that other stations eschew. This proposal faces the objection that only a miniscule proportion of the population tunes in to public stations and so the majority would still lack exposure to thorough, thoughtful treatment of the issues of the day. But their deprivation would be self-chosen, and in any case, most people already avoid public affairs programming assiduously.

Conclusion

The press has had a long history of resisting governmental regulation and defines itself by its adversary role to government. But as it grows more powerful, the government may be needed as an adversary to it, and, in the late twentieth century, both may be needed as adversaries to powerful economic interests. The question we should be asking, then, is not whether regulation of the press is permissible, but what kinds of regulation work most effectively to enhance the diversity and quality of public debate in our democracy.

The views of Judith Lichtenberg, Carl Sessions Stepp, Owen Fiss, Jeffrey Abramson, Lee Bollinger, Sara Engram, and Henry Geller are taken from their essays in *Democracy and the Mass Media*, edited by Judith Lichtenberg, Maryland Studies in Public Philosophy (forthcoming). The book culminates a two-year project on "News, the Mass Media, and Democratic Values" funded by the John and Mary R. Markle Foundation.