Media, Markets, and Democracy

The mass media and free press should serve people both as consumers and as citizens. Critics claim that government interventions in media markets prevent audiences from getting the media products they want. Political theorists assert that a free press is essential for democracy. The critics' claim is incorrect and the theorists' assertion is inadequate as a policy or constitutional guide. Even if markets properly provide for people's desires or preferences for most products, Part I of this book shows that unique aspects of media products systematically cause markets to fail in respect to them. Part II shows that four prominent, but different, theories of democracy lead to different conceptions of good journalistic practice, good media policy, and proper constitutional principles. While implicitly favoring a theory of "complex democracy," Part II makes it clear that the choice among democratic theories is crucial for understanding what should be meant by a free press. Part III explores one currently controversial issue – international free trade in media products. Contrary to the American negotiating position relating to media products, both economic and democratic theory justify deviations from free trade.

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Politics and relations among individuals in societies across the world are being transformed by new technologies for targeting individuals and sophisticated methods for shaping personalized messages. The new technologies challenge boundaries of many kinds – between news, information, entertainment, and advertising; between media, with the arrival of the World Wide Web; and even between nations. *Communication, Society and Politics* probes the political and social impacts of these new communication systems in national, comparative, and global perspective.

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For all journalists and all activists and all scholars
who work to make the mass media
better serve democracy

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Preface

Conservatives in the United States often disagree over media policy. The conflict reflects a frequently observed division between a cultural, traditionalist conservatism and a pro-property, free-market libertarian strain. Many in the first group see the mass media as a leading force in the moral decay of American society. Bad taste is rampant. Portrayals of sex and violence are seen as possibly the two most ubiquitous features of the mass media. One conservative refrain, going back long before Vice-President Spiro Agnew characterized media executives as "pointy-headed liberals" and journalists as "nattering nabobs of negativism," sees the national media as deeply elitist and unjustifiably liberal reading [or hearing or seeing] only what is fit for children," and the Court has resisted mandated cleanups of the Internet.[1] Maybe objectionable content should be subject to additional limits and maybe liability should be imposed for any harms caused.

From this traditionalist conservative perspective, the media needs reform. Somehow society – consumers or corporate executives or government – needs to restrict bad content. Of course, the word "censorship" is hardly popular, but at least such content should not receive government support – think of Senator Jesse Helms leading the charge to withdraw support from the National Endowment for the Arts for its support of vulgar performance art and from museums that exhibit obscene or sacrilegious art or the desire to gut the "liberal" Public Broadcasting Corporation. Moreover, objectionable content should be labeled. Even better, it should be removed, at least from all spaces easily accessible to children, a strategy that has received hesitant support from the Supreme Court, although the Court still maintains the principle that any such effort is unconstitutional if it operates to "reduce the adult population

Others on the right reject paternalism. Freedom is the key. Government should keep its hands off. Democracy and liberty both entail a free press. This pro-market, pro-property strand of conservatism arguably is central to the regime of deregulation that (with various, usually pro-industry, exceptions) has swept telecommunications and broadcasting both in the United States and globally during the past quarter century.

The left is equally conflicted – as well as in its usual state of disarray. Media are mostly owned by capitalists and the left instinctively *knows* that this creates a problem. Many on the left think it obvious that this ownership combined with other problems with markets makes a major contribution to why their message does not play more effectively in the public sphere. Moreover, unlike the libertarian right, the left is not in general burdened by any belief that freedom means uncritical support for private property and free markets. Thus, given their normative commitments and their empirical observations, many on the left conclude that intervention is needed. Nevertheless, in the media context, unlike other realms of social life – such as welfare, health care, labor policy, race policy, or the environment – the interventionist left is relatively unclear about what type of intervention is needed. This programmatic failure has a variety of causes. One problem is that many on the left have neither, for whatever reason, thought carefully enough about the nature of the problem with existing media nor related a program of reform to any carefully formulated normative ideals, such as an affirmative theory of democracy.

The interventionist left's lack of program may also reflect, in part, the influence of the other branch of the left. This other branch includes those who, in the media realm, are most offended by (and most fearful of) the censorious inclinations of cultural conservatives. These freedom-loving leftists, while unhappy with capital's ownership of the media and, in most arenas of social life, favorable toward egalitarian governmental interventions, are very hesitant to approve governmental interventions in this area. These leftists know that a free press and free speech must be part of their liberatory program – as Brandeis once put it, as both an end and a means.[2] They know that historically these freedoms have been crucial for the left in its struggle for equality and human dignity.[3] Inevitably, interventions will be censorious, controlled by those in power merely to maintain their cultural, economic, or political hegemony, or they will be ineffectual for whatever legitimate goals exist.

Although most readers will soon find it easy to see my political bias, there is something to be said for the viewpoints of each of the four groups. Both the cultural conservative and the interventionist leftist are right to see the media often doing harm or performing inadequately. Importantly, however, there is often room for disagreement about which media content is harm-causing, and certainly the reform programs of these two groups often differ. Likewise, the libertarian conservative and the freedom-loving leftist are right to want to protect press freedom. Here, however, a point of the interventionist leftist is well taken. Not only government but also capital can threaten press freedom. Or, more precisely, the market will not only fail to cure many inadequacies of the media but can also function in ways that reduce freedom. But this is getting way ahead of the story.

I do not directly enter into the debate between these four groups, although the extent of wisdom in each position should become clearer as the discussion proceeds. For me, and I expect for many readers, paternalism (sometimes) seems fine for children but very questionable for adults. Moreover, democracy is a basic norm that merits respect, and a *free press*, whatever that means, is surely a key element of democracy. The question of this book is, for one who accepts those premises, what does lack of paternalism and a commitment to democracy mean for media policy. Would a rejection of paternalism require the government to keep its hands off the media? Does a commitment to democracy require the same?

Part I of this book answers no to the first question, but in doing so it requires a close look at the economics of the media. Part II answers no to the second question, but the answer depends on the conception of democracy that a person accepts. If, however, I am right that both answers are no, what type of interventions are appropriate? Both Parts I and II offer some suggestions based on the economic and democratic theories described. Finally, Part III illustrates these themes by applying the earlier analyses to one issue, policies concerning international free trade in media products. I conclude with a claim about digital technologies and the Internet – that however much they transform the world, the issues and analyses of this book remain crucial for thinking about media policy.

This book is a revised, edited, and updated version of three articles published between 1997 and 2000: "Giving the Audience What It Wants," *Ohio State Law Journal* 58 (1997): 311; "The Media That Citizens Need,"

University of Pennsylvania Law Review 147 (1998): 317; and "An Economic Critique of Free Trade in Media Products," *North Carolina Law Review* 78 (2000): 1358. I received help and inspiration from a host of people, only some of whom I am now able to list, while writing the articles and then transforming them into this book. I especially want to thank Yochai Benkler, Jamie Boyle, Mike Fitts, Oscar Gandy, Lani Guinier, Fritz Kubler, Jason Johnston, Carlin Meyer, Gerry Neuman, Jim Pope, Margaret Jane Radin, and Carol Sanger. In addition, Michael Madow has been invaluable as a sounding board and reader of drafts, saving me from many factual and conceptual errors and trying to save me from others. Patisserie Claude and Les Deux Gamins have provided coffee and a welcome place in which much of this has been written. I have gained from the opportunity to present portions of the book in various venues, including workshops at either the law school or communications department of University of Chicago (2000), New York University (2000), Yale University (1999), Stanford University (1997), University of Pennsylvania (1995), and University of Oregon (1995). I have also benefited from being permitted to present portions of the argument at the Mass Communications Section of the Association of American Law Schools Annual Convention (1999, 2000); Conference: Prospects for Culture in a World of Trade (Canadian Consulate & NYU, 2000); Convention of the Union for Democratic Communications (1999); Commodification of Information Conference (Haifa, Israel, 1999); Cultural Environment Movement National Convention (Athens, Ohio, 1999); Symposium on American Values, Angelo State University (1998); Law and Society Annual Conference (Glasgow, 1996); luncheon seminar at the office of FCC Chairman Reed Hunt (1996); and Critical Legal Studies Conference (Washington, D.C., 1995).