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FREEDOM OF THE PRESS AND THE BUSINESS OF JOURNALISM: THE MYTH OF DEMOCRATIC COMPETITION IN THE MARKETPLACE OF IDEAS

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I. INTRODUCTION

Because of the traditional responsibilities attributed to the press as an institution in the United States,¹ the First Amendment to the Constitution² has been interpreted to hold, with very few exceptions, that the press is protected from govern-

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¹ Throughout many of the opinions discussing the concept of freedom of the press, the Supreme Court has adopted the view that the media operates in a democratic government as a "fourth estate" that serves as a check on all the branches of government. *See, e.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980) (where Justice Brennan concurred stating that "[t]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self government"); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Houchins v. KQED*, 438 U.S. 1, 8 (1978) ("Beyond question the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business"). Based on this view of the press, Justice Potter Stewart argued in a very influential law review article that the press clause of the First Amendment provides a "structural" protection to the institution of the press. *See*, Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975). Other commentators have advocated this interpretation. *See* Randall P. Bezanon, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What does it Add to Freedom of Speech?*, 26 HASTINGS L. J. 639 (1975).

² The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

ment intervention.³ This freedom from government control has allowed the press to choose its methods of practice with less concern for liability.⁴ This way, the press is encouraged to report the news and to provide a more complete range of ideas from where the public is free to "buy" or select which ones to believe or adopt.⁵

Evidently, this description of the theory of freedom of speech is based on an analogy to the economic market. Indeed, the dominant metaphor for "freedom of the press" throughout most of this century has been the "marketplace of ideas".⁶ The metaphor is based on the assumption that "the truth" will always win in a free and open encounter with falsehood.⁷ It is also based on a classic model of freedom of speech built upon the image of "soapbox orators" or individual pamphleteers who tried to reach their audiences.⁸

It is not at all clear, however, that truth will always be the result of the operation of the marketplace of ideas. The Consti-

³ See, e.g., *Smith v. Daily Mail*, 443 U.S. 97 (1979) (violation of First Amendment to impose subsequent sanctions on the press unless proponent shows a state interest of the highest order); *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (First Amendment protects against government intervention in editorial decisions); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (no recognition of cause of action against public officials unless there is a showing of actual malice); *Near v. Minnesota*, 283 U.S. 697 (1931) (the First Amendment guarantees against prior restraints on the press).

⁴ For a discussion of what the authors argue are negative consequences of this see William P. Marshall & Susan Gilles, *The Supreme Court, The First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 169-71 (1994).

⁵ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), where the Supreme Court stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"

⁶ Although not the only theory used by scholars and courts to explain the First Amendment, the "marketplace of ideas" theory remains the most famous and has been called "the most rhetorically resonant of all free speech theories" and "a central driving force in contemporary free speech thinking." RODNEY A. SMOLLA AND MELVILLE B. NIMMER, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 2:1, at 2-4 (3rd ed. 1996). In her dissenting opinion in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988), Justice O'Connor referred to the marketplace of ideas as "a metaphor that has become almost as familiar as the principle it sought to justify."

⁷ See text accompanying notes 19-25.

⁸ See text accompanying notes 27-29. See also Randall P. Bezanson, *The Future First Amendment*, 37 S.D. L. REV. 11, 12 (1992).

tutional protection granted to the marketplace of ideas, then, cannot exist to guarantee a certain result, but simply to allow the interaction between the “supply and demand of ideas” to operate. Because the model cannot guarantee the result to be the triumph of the truth at all times, all it can do is guarantee there will be a *space* for a “wide open and robust” *exchange* of ideas and debate.⁹ This view leads to the conclusion that the constitutional guarantee is a “structural” one, designed to protect the “process” by which speech is exchanged.¹⁰

There are many ways by which speech or information can be exchanged, however, and the First Amendment explicitly recognizes two of them. In it, the Constitution acknowledges protection to both freedom of speech and freedom of the press and through its decisions, the Supreme Court has often used the metaphor of the marketplace of ideas to justify the protection in both contexts.¹¹ However, the *process* by which speech is ex-

⁹ In *New York Times v. Sullivan*, 376 U.S. 254, 292 (1964), the Supreme Court held that the First Amendment’s goal of protecting the “uninhibited, robust and wide open” discussion of ideas outweighed the interest of a public official in being protected from defamatory statements.

¹⁰ See text accompanying notes 23-27. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 (1973), the Court stated that “[t]he Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.” Likewise, in *Miami Herald v. Tornillo*, 418 U.S. 241, 256 (1974), the Court held that “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”

¹¹ For example, in several cases the Court has referred to the marketplace of ideas as a metaphor for the individual exchange of ideas under the speech clause of the First Amendment. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding the First Amendment protects the right to burn an American flag as an expression of protest. In his dissenting opinion Justice Rehnquist, disagreed and suggested that “[t]he flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas”) *Id.* at 429; *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (holding that New York teachers’ loyalty oath had no place in the classroom because “[t]he classroom is peculiarly the ‘marketplace of ideas.’”); *Healy v. James*, 408 U.S. 169, 180-81 (1972) (holding that “The college classroom . . . is peculiarly the ‘marketplace of ideas’, and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”). Other courts have also expressed this view. See, e.g., *Right to Read Defense Committee v. School Committee*, 454 F. Supp. 703, 715 (D. Mass. 1978) (holding a School Committee

changed in these two contexts is very different. In the case of *individual* speech, the "competition in the marketplace" refers to the abstract process of individual decision making when people are confronted with differing ideas. In the context of the press, on the other hand, the *process* is an actual economic market characterized by competition for profits. In the first case, the use of the concept of the "marketplace" is an analogy to describe a different process. In the second case, the marketplace is an actual description of the reality involved.

Notwithstanding this important distinction, through some of its decisions, the Supreme Court has taken the concept of the marketplace to mean that economic competition among media is necessary for a successful marketplace of ideas.¹² In other words, the concept of the marketplace, originally a metaphor used to describe the exchange of ideas among people, has now been extended to make economic competition a principle upon which First Amendment freedom of the press decisions are based.¹³

could not ban a book from a school's library because "the library is a mighty resource in the marketplace of ideas."); *Sheck v. Baileyville School Committee*, 530 F. Supp. 679, 687 (D. Me. 1982) (holding that "[p]ublic schools are major marketplaces of ideas, and [the] first amendment rights must be accorded to all 'persons' in the market for ideas, including secondary school students . . ."). On the other hand, the Court has used the metaphor to refer to the protections afforded to the media under the press clause of the First Amendment. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (the Court held that the purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . ."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (where Chief Justice Rehnquist cited Holmes' dissent in *Abrams* and described what he called "the truth-seeking function of the marketplace of ideas").

¹² *See*, Peter L. Kahn, *Media Competition in the Marketplace of Ideas*, 39 SYRACUSE L. REV. 737, 738 (1988).

¹³ In *Miami Herald*, 418 U.S. at 251, the Court discussed the economic reality of the business of journalism and compared it to the circumstances when the First Amendment was enacted. The Court at all times referred to the "marketplace of ideas" as the actual business competition among the different media. It suggested that a true marketplace of ideas existed at the time the First Amendment was enacted, while at present it is threatened because the marketplace is now a monopoly controlled by the owners of the market. The Court has allowed government regulation of the media when it feels the marketplace within which the particular media operates is "dysfunctional". *Compare*, for example, the Court's treatment of the issue in *Miami Herald, id.*, where the court declared unconstitutional a right to reply statute, and *Turner*

Using the concept of the marketplace of ideas in the latter sense, however, is a faulty analogy.¹⁴ It should not be used to support the concept of freedom of the press because economic competition in the marketplace of ideas is increasingly leading to less press independence and more misinformation. Given that the exigencies of the economic market do not support a venture that is not profitable, the diversity of the available ideas in the marketplace has actually been reduced. This result suggests the need to either search for a more accurate metaphor or for a radical change in the way we think of regulation of speech by the media.

II. THE ORIGINAL MARKETPLACE OF IDEAS AND THE GOAL OF THE "COMMON GOOD"

The idea that freedom of speech is achieved through competition in the intellectual marketplace is founded on an analogy with the doctrine of *laissez-faire* capitalism. According to this doctrine, the common good is best achieved by encouraging "the uninhibited pursuit of self-interest"¹⁵ by participating in "free and competitive markets".¹⁶ This participation will "bring supply and demand into equilibrium and thereby ensure the best allocation of resources."¹⁷ The driving force behind this theory is its ultimate result. Whether it is called the "common good" or the "best allocation of resources", the defense of the market system rests on the argument that it will lead to a socially beneficial

Broadcasting Systems v. FCC, 512 U.S. 622 (1994) where the Court stated it would allow regulation of television and cable television if there is a clear showing of dysfunction in the market.

¹⁴ For logicians, reasoning by analogy means comparing things to infer that because they are sufficiently similar if one has a certain characteristic, the others will probably have it also. See RAY PERKINS, JR., *LOGIC AND MR. LIMBAUGH* 46 (1995). As Ray Perkins explains: "We commit the fallacy of faulty analogy when we reason by analogy in ways that overlook or ignore important dissimilarities between the things being compared." *Id.*

¹⁵ George Soros, *The Capitalist Threat*, *THE ATLANTIC MONTHLY*, February 1997, at 45, 48.

¹⁶ *Id.*

¹⁷ *Id.* Chief Justice Rehnquist explained the analogy in his dissent in *Central Hudson Gas & Elec. Corp. v. PSC of New York*, 447 U.S. 557, 592 (1980) by saying that the marketplace of ideas "was deemed analogous to the commercial market in which a *laissez-faire* policy would lead to optimum economic decision making under the guidance of the 'invisible hand' [of the market]."

result.¹⁸

Similarly, as developed by its first proponents, the theory behind the marketplace of ideas was based on the view that the common good would be achieved if each individual member of society pursued its own self interest in acquiring knowledge.¹⁹ The "common good" in this context was considered to be the attainment of "the truth".

Although many commentators suggest that the marketplace of ideas metaphor has its precedent in John Milton's *Areopagitica* (1644) and John Stuart Mill's *On Liberty* (1859),²⁰ it is Justice Oliver Wendell Holmes who is usually credited with introducing the concept into American jurisprudence. In his dissent in *Abrams v. United States* he wrote that

men . . . may come to believe . . . that *the ultimate good* desired is better reached by *free trade* in ideas—that the best test of truth is the power of the thought to get itself accepted in the *competition of the market* and that truth is the only ground upon which their wishes safely can be carried out.²¹

Evidently, Holmes argued that the First Amendment should be interpreted to protect speech in the marketplace of ideas because the operation of the market would lead to the "common good" result of "the truth"²². Just as the capitalist *laissez-faire* theory justifies some negative consequences with the promise of a beneficial end result, Holmes concluded that the protection of objectionable speech was justified by the its result.

¹⁸ See, e.g., MILTON FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980).

¹⁹ See Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 158-59 (1980), where the author argues that John Stuart Mill's defense of free speech "involved an individualist premise—that the progress of mankind depends on the mental development of its individual members—and a utilitarian one—that free expression promotes the discovery and social acceptance of 'truth'." *Id.*

²⁰ For a contrary view, see HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 52-54 (1992) who argues that neither Milton nor Mill analogized the exchange of ideas to buying and selling in the competition of economic markets.

²¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (emphasis added).

²² Both John Stuart Mill and John Milton also argued the result of the competition of ideas would be the truth. See Chevigny, *supra* note 19, at 159.

Holmes' argument was based on an analogy between products and ideas. The merchants in the marketplace of ideas, whether individuals or the institutional²³ press, place their "products" in the market to compete with those of others for the consumers to choose from.²⁴ But when the product exchanged *is* an idea, it is not clear how it can be determined that one is "truer" than another, and there is no possible guarantee that the ideas chosen by the consumers are the "truth".²⁵ In fact, the Supreme Court has accepted the notion that ideas cannot be true or false,²⁶ which makes it futile to argue that the marketplace of ideas should be protected because it will lead to the attainment of the truth. The justification for the protection must, therefore, be based on some other reason. The more recent decisions of the Supreme Court suggest that this reason is the protection of the *process* by which the ideas are exchanged rather than the *result* of the exchange.²⁷

²³ I will use the word "institutional" to refer to the commercial media as opposed to printed materials produced by individuals for distribution, an activity traditionally called "pamphleteering".

²⁴ This view is reflected in many decisions of the Supreme Court. *See, e.g.*, *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 300 (1984) ("But the First Amendment does guarantee an open marketplace for ideas—where divergent points of view can freely compete for the attention of those of those in power and of those to whom the powerful must account."); *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information").

²⁵ The Court has stated that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas". *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

²⁶ The Court first expressed this view in *dicta* in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), by stating: "Under the First Amendment there is no such thing as a false idea." Building on this notion of falsity, the Court went on to explain in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) that since defamation actions must be based on assertions of fact, ideas which cannot be proved either true nor false, cannot be actionable. Only statements that the fact finders can understand to be based on *provable* facts are actionable. *See also*, *Central Hudson Gas & Elec. Corp. v. P.S.C. of New York*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) ("For in the world of political advocacy and its marketplace of ideas, there is no such thing as a 'fraudulent' idea . . .").

²⁷ Indeed, Justice Stewart reached this same conclusion in his article *Or of the Press* when he stated that the Constitution "establishes the contest, not its resolution". Stewart, *supra* note 1, at 636. He suggested that for the "result"

III. THE PROCESS OF EXCHANGE OF IDEAS IN THE MARKETPLACE OF IDEAS

When writing about the triumph of truth in the marketplace of ideas in 1919, Holmes was not referring to the actual economic competition among media, and certainly not among the media giant oligopolies of today. He was using the words as an analogy to a *place* where people exchanged products and to a *process* by which the exchange was performed. The product exchanged was the ideas and the consumers were those who were exposed to them. In 1919, this process was still characterized mostly by individual speech. *Abrams* itself involved a lone pamphleteer who was prosecuted for distributing leaflets criticizing certain government activities during World War I. In essence, Holmes' marketplace was not one characterized by press enterprises in economic competition to sell news, entertainment and advertising space but one where individuals were free to gather and offer their opinions to their audiences. This is the *laissez-faire* process of exchange of ideas which was an integral part of the original concept of the marketplace of ideas.

Over the years, the Supreme Court justified many of its decisions invalidating government interference with speech with an argument for the need to protect the *laissez-faire* process of this "abstract" marketplace of ideas. Drawing from this tradition, the Court articulated this principle best in *New York Times v. Sullivan* by referring to a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open".²⁸ This principle has been referred to many times since.²⁹

we must rely "on the tug and pull of the political forces in American society." *Id.*

²⁸ 376 U.S. 254, 270 (1964).

²⁹ See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Waters v. Churchill*, 511 U.S. 661 (1994); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Miami Herald v. Tornillo*, 418 U.S. 241 (1974); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Keyishian v. Board of Regents of the Univ. of New York*, 385 U.S. 589 (1967).

At times, however, the Supreme Court has transferred the argument for the need to protect the process of exchange of ideas from Holmes' *theoretical* marketplace to the real economic process of competition in the market of information in which media outlets compete against each other for profits. Following the same analysis that supported the original analogy, the Court has suggested that real economic competition involving speech would also lead to the common good in the marketplace of ideas.

However, as discussed above, since that common good cannot be some objective "truth", it must be the process itself. In the media market, the common good in terms of the process would mean there would be access to participation in the process, more diversity of ideas available for exchange, better journalism and a wide open and robust debate of ideas. But the fact is that there is no equilibrium in the economic market and "in the absence of equilibrium, the contention that free markets lead to the optimum allocation of resources loses its justification".³⁰ With no justification for the theory of economic marketplace competition, it can hardly be argued it should be used to justify the Constitutional protection of the marketplace of ideas.³¹

Indeed, with the advent of the commercial media the process of exchange of ideas has undergone significant changes that call into question the continued validity of the marketplace analogy as a principle of First Amendment jurisprudence. Competition in the market of information has led to the concentrated ownership of media, decision making processes based on the interest in making a profit (which in turn are based on consumer consumption patterns), the emergence of advertising as the primary source of income and the integration of news and entertainment. This tendency has replaced the individual speech of the "pamphleteer" or "soapbox orator" with a form of *institutional* speech

See also, Central Hudson Gas & Elec. Corp., 447 U.S. at 598 (Rehnquist, j. dissenting) ("The free flow of information is important . . . not because it will lead to the discovery of any objective 'truth', but because it is essential to our system of self government.")

³⁰ Soros, *supra* note 15, at 50.

³¹ Chief Justice Rehnquist reached a similar conclusion in his dissenting opinion in *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 592, where he concluded that "[t]here is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market". *Id.*

dominated by a perceived "consensus" of opinions as the main participant in the market of ideas.³² Just like the economic market, "the marketplace of ideas . . . will inevitably be biased in favor of those with the resources to ply their wares."³³ The economic marketplace, therefore, differs substantially from Holmes' marketplace where individual speakers had relatively easy access to consumers.

The history of the press in the United States supports the view that economic competition and the pursuit of profit does not yield a marketplace of ideas in equilibrium nor a wide open and robust debate of ideas. It has been argued that the most vigorous political discussions in the U.S. press occurred during the times when the press was not economically independent,³⁴ as it was during the colonial period. One commentator has summarized the journalism of that period:

During the colonial and revolutionary periods, the press served as a vehicle for voicing interests of one group against those of another. Each group vied for the support of public opinion through the press. Indeed, almost every newspaper served as a channel for public debate and became an open forum for the discussion of politics. During the years preceding the revolution, several newspapers existed strictly as journals of opinion and did not even bother to print hard news.³⁵

³² Bezanson, *supra* note 8, at 14-15. Jerome Barron has argued that the media "is using the free speech and press guarantees to avoid opinions instead of acting as a sounding board for their expression". Jerome Barron, *Access to the Press-A New First Amendment Right*, 80 HARV. L. REV. 1641, 1646 (1967).

³³ SMOLLA, *supra* note 6, at 2-16. Citing Laurence Tribe, Smolla concludes that "the ideas of the wealthy and powerful will have greater access to the market than the ideas of the poor and disenfranchised." See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 786 (2d. ed. 1988).

³⁴ Kahn, *supra* note 12, at 773.

³⁵ Patrick Garry, *The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept*, 72 MARQUETTE L. REV. 187, 218 (1989), citing JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* 18 (1980); SIDNEY KOBRE, *FOUNDATIONS OF AMERICAN JOURNALISM* 77 (1968) (citations omitted); JOHN TEBBEL, *THE COMPACT HISTORY OF THE AMERICAN NEWSPAPER* 35 (1963); and ARTHUR M. SCHLESINGER, *PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN, 1764-76* (1958).

Citing the Report prepared by the 1947 Commission on Freedom of the Press, the Supreme Court reviewed this history in its decision in *Miami Herald v. Tornillo* and stated:

While many of the newspapers [in 1791] were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.³⁶

In contrast, sometime around the mid 1800's, newspapers began to change into economically independent businesses slowly moving away from vigorous debate into "overt depolitization".³⁷ Given the new need to appeal to mass readership, it has been argued that the content and style of newspapers changed to become less partisan, "less political, and less unique."³⁸

IV. THE PROCESS OF EXCHANGE OF IDEAS IN THE ECONOMIC MARKETPLACE

The general changes in the practice of journalism described in the previous section have since been justified as a move from partisan reporting to a more balanced practice of news reporting based on the need for *objectivity*. This appeal to a *balanced approach* and to *objectivity* has become one of the most fundamental goals in the ethics of journalism³⁹ and the public has been

³⁶ *Miami Herald v. Tornillo*, 418 U.S. 241, 248 (1974).

³⁷ Kahn, *supra* note 12, at 773.

³⁸ *Id.* at 780.

³⁹ Most journalism ethics codes, in one way or another, make reference to the need for "objectivity" or lack of bias in the news. See AMERICAN SOC'Y OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES, ART. IV (1975) ("Every effort must be made to assure that the news content is . . . free from bias . . ."); See also THE SOC'Y OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1987) ("Objectivity in reporting is another goal which serves as the mark of an experienced professional"); ASSOCIATED PRESS MANAGING EDITORS ASSOC., CODE OF ETHICS FOR NEWSPAPERS AND THEIR STAFF, MODEL CODE (1975) ("A good newspaper is fair, accurate, . . . independent. . . . It avoids practices that would conflict with the ability to report and present news in a fair and unbiased manner.").

conditioned to believe that objective journalism is necessarily better journalism. Journalists constantly claim their duty is to present the facts so that the public can form their own opinions. Following the metaphor, they claim they only stock the shelves of the marketplace from where the consumers are free to choose what to buy.⁴⁰

The ideology of objectivity, however, serves to hide the contradictory effects of economic market competition on the availability and exchange of ideas in the marketplace of ideas. As discussed by the Supreme Court in *Miami Herald v. Tornillo*, every decision made in the practice of journalism, will be necessarily based on subjective editorial judgments.⁴¹ The idea that a journalist can be totally objective or neutral is pure fantasy. Just as the owner of the grocery store, the provider of ideas must choose what to provide in the first place. "The news is whatever I say it is", David Brinkley said once.⁴² And, he is right; the media determines what is news, because editors must decide what news to publish, in what order, what emphasis to give to them, where to place them in the newspaper or broadcast, what length of time or space to give a story, what language to use, and how much accuracy is required. Even the Supreme Court has recognized that the ability to make these choices gives the media tremendous power to *manipulate* popular opinion, change the course of events and influence the public to believe what are the important issues of the day.⁴³

⁴⁰ A current series of television commercials for the Fox News Network is a good example. Using different leads and contexts, the conclusion of the commercials is always: "We report; you decide". The implication is that the journalist should only present the facts so that the consumers can reach their own conclusions about the issues.

⁴¹ The Court stated:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Miami Herald v. Tornillo, 447 U.S. 241, 258 (1974).

⁴² Ford Rowan, *News Media Responsibility -A Program for Improvement*, 17 WILLAMETTE L. REV. 231, 231 (1980).

⁴³ In *Miami Herald*, 447 U.S. at 249, the Court stated that the press has become non-competitive and "enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events". *Id.*

In addition, even the ideology of objectivity itself gets compromised when it must respond to economic competition and the realities of the market. The most apparent result of the trend to maximize profits is the tendency of the press to avoid covering news that show the influence of the market on the press itself. When the media itself is part of the news, editors must decide whether to serve the interests of the corporations that run the business of the news or the interests of the public in getting the news. If they were to follow the ethical codes, they would always choose to serve the interests of the public. Yet, they often do not. In fact, all three major television networks have recently been involved in incidents that demonstrate the risks to ethical practice created by the realities of the economic market.

In attempts to secure the corporate takeovers of ABC and CBS, the news departments of both networks avoided defending their Constitutionally protected rights against lawsuits of dubious validity. While the Walt Disney Corporation was attempting to buy ABC, for example, ABC made some inaccurate statements about the tobacco industry, for which a cigarette manufacturer then sued the network. Likewise, CBS was sued while it was about to be purchased by Westinghouse. The threat of liability in the lawsuits was a major threat to the completion of the deals. Rather than stand by their stories and defend the cases in court, the networks decided to appease the concerns of the corporations who did not want their investments threatened by legal liability and whose primary interest is assuring a profitable enterprise. ABC chose to apologize for the story and CBS's program "60 Minutes" decided to suppress an interview of a tobacco company executive who was ready to testify that the tobacco manufacturers manipulated nicotine levels in their cigarettes.⁴⁴ Similarly, NBC has refused to report on organized boycotts against its parent company General Electric while questioning the influence of Japanese companies over American film companies.⁴⁵

⁴⁴ These incidents are described and discussed in Ken Auletta, *The Wages of Synergy*, THE NEW YORKER, Dec., 1995 at 8, 9.

⁴⁵ In 1990, a consumer protection group organized a national boycott against products manufactured by General Electric to protest GE's leading role in the production of nuclear weapons. This was the biggest organized boycott that year. NBC producers did not know this when they contacted the editor of National Boycott News to appear in a story about current boycotts. They specifi-

In conclusion, rather than lead to the common good of availability of more information in the marketplace of ideas, the reality of the economic competition in the media market has often lead to a compromise in both the availability of news and their objectivity.

V. THE PARTICIPANTS IN THE PROCESS OF EXCHANGE OF IDEAS IN THE ECONOMIC MARKETPLACE

Whereas the participants in Holmes' marketplace where mostly individual speakers, the participants in the economic media marketplace are an increasingly smaller number of commercial entities. Indeed, economic failure has been the trend in the media business in the United States for many years. There are fewer newspapers, there are fewer cities with more than one daily newspaper in competition with each other and there is much more concentration of ownership of media outlets.⁴⁶ Many of the newspapers around the country are owned by national chains like Knight-Ridder, Gannett and the Hearst Corporation, which own 76% of all the newspapers and control over 80% of total daily circulation.

The trend toward fewer media outlets has been accelerated by amendments to the rules limiting broadcasting media concentra-

cally requested he speak as to the most important boycott of the year. When he informed them this was the boycott against GE, the network informed him that he could not talk about that one. The network then stalled for months and eventually ran a story about a few other smaller boycotts. Yet, the same evening NBC ran the story about the smaller boycotts, NBC Nightly News' report on the buy out of MCA studios by the Japanese Matsushita Company focused on the danger of the new Japanese owner interfering with the content of MCA's output. Todd Putnam, *The GE Boycott: A Story NBC Wouldn't Buy*, in *THE BEST OF EXTRA!* 10 (1994).

⁴⁶ In 1923 there were 502 cities with independently owned newspapers in competition within one market; in 1978 there were 35. In other words only 2.3% of the cities with daily newspapers have more than one alternative. In 1991 alone, 153 radio stations suspended operations in the United States. Ben Bagdikian, *Pap Radio*, *THE NATION*, April 13, 1992, at 473, 488. Another study concluded that at the beginning of 1968, 150 cities had competing newspapers controlled by the same owner. Between 1910 and 1968, the number of cities with a daily newspaper declined from 689 to 45. BENNO SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 39 (1976), cited in BOSMAJIAN, *supra* note 20, at 71. In *Miami Herald*, 447 U.S. at 249, n.13, the Court included a footnote asserting that there are competing newspapers in only 4 per cent of the larger cities in the United States.

tion and cross ownership.⁴⁷ For many years, the Federal Communications Commission has imposed limits on cross ownership of media to make sure the marketplace is not dominated by the all the same participants. In recent years, however, the regulations have been amended to allow more concentration of ownership.⁴⁸ As of 1985, a corporation could not own more than seven AM radio stations and seven FM stations in the same market. This limit was later increased to twelve and in 1992 it was raised to thirty. As it currently stands, the regulation allows a corporation to own up to 25% of a big market and up to 50% in a small market.⁴⁹

⁴⁷ These changes now appear in the Telecommunications Act of 1996. The Commission is required to review its broadcast ownership rules every two years in the light of changes in competition and to repeal or modify any rules that no longer serve the public interest. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 110-11 (1996).

⁴⁸ The 1996 Act increased the basic national ownership audience cap of 12 stations reaching 25 percent to a 35 percent audience cap with no limit on the number of stations. As of March 1996, when the FCC began the rule-making process to create the 35 percent audience cap, CBS was at 32 percent; ABC at 24 percent; NBC at 23 percent; and Fox at 22 percent. S.F. EXAMINER, March 9, 1996 at D-2, cited in MARC FRANKLIN & DAVID ANDERSON, MASS MEDIA LAW 86 (Supp. 1997). The FCC has been ordered to hold hearings on radio-TV local combinations and to expand its current waiver policy in the top 25 markets to the top 50 markets if 30 independent voices will remain after the change. Telecommunications Act of 1996, § 202(d). The national ownership limits for radio which had limited most owners to 20 AM and 20 FM stations nationwide have been eliminated. Telecommunications Act of 1996, § 202(a). The local limits are that in a market of 45 or more radio stations, no one may own or control more than 8 of these stations, of which no more than 5 may be in the same service (AM or FM). Telecommunications Act of 1996, § 202(b)(1)(A). With 30-44, the limit is 7 with no more than 4 in the same service. Telecommunications Act of 1996, § 202(b)(1)(B). With 15-29, the limit is 6 with no more than 4 in the same service. Telecommunications Act of 1996, § 202(b)(1)(C). With fewer than 15 stations, the limit is 5 with no more than 3 in the same service plus the added restriction that no person may own or control more than half the stations in that market. Telecommunications Act of 1996, § 202(b)(1)(D). Ownership of an AM-FM combination in a small market is already permitted despite the 50% limit. All these limits may be waived if the FCC concludes that the waiver would lead to a larger number of stations. Telecommunications Act of 1996, § 202(b)(2). For example, single owners control eight stations in the Denver and Dallas-Fort Worth markets and seven stations each in Boston, Chicago, and Baltimore/Washington, Wichita and Spokane. BROADCASTING & CABLE, March 11, 1996 at 8, cited in MASS MEDIA LAW 85 (Supp. 1997).

⁴⁹ *Id.*

All these developments provide proof of the inherent contradiction in the marketplace metaphor: the more competition in the market, the fewer outlets of ideas there will be.⁵⁰ As one commentator has argued:

By steadily relaxing the limits on ownership and introducing other new provisions, the FCC has done two things. It has fostered broadcasting that is a nationally homogenized mix of programs, indistinguishable from one market to another, and it has made licensing a game largely reserved for big corporations. More and more, local political, ethnic and social groups, women, minorities and unions are out of the picture.⁵¹

VI. THE PROCESS OF EXCHANGE AND THE NEED FOR ADVERTISING REVENUES

Admittedly, it is difficult to think that there are few choices for the public in the marketplace of ideas since any visit to a local bookstore will reveal innumerable weekly and monthly journals and publications. This assumption would be true if the choices actually covered most of the political or ideological spectrum. It has been argued, however, that, again as a result of economic demands, the content of the news has become mostly homogeneous.

The economic market pressure comes from two obvious sources: advertisers and the reading public, both of which provide revenues for the media. Any media outlet knows it cannot afford to lose its economic support from either one of the two sources of revenue, particularly from advertisers. Otherwise, economic failure becomes a real possibility. Herman and Chomsky explain:

With the growth of advertising, papers that attracted ads could afford a copy price well below production costs.

⁵⁰ The Court recognized this trend in *Miami Herald v. Tornillo*, 447 U.S. 241, 249-50 (1974):

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

⁵¹ Bagdikian, *supra* note 46, at 473.

This puts papers lacking in advertising at a serious disadvantage: their prices would tend to be higher, curtailing sales, and they would have less surplus to invest improving the stability of the paper For this reason, an advertising-based system will tend to drive out of existence or into marginality the media companies and types that depend on revenue from sales alone. With advertising, the free market does not yield a neutral system in which final buyer choice decides. The *advertisers'* choices influence media prosperity and survival.⁵²

Therefore, the economic survival of each publication will depend on its ability to secure a portion of the reading public with consumer interests that can attract the attention of enough advertisers.⁵³ It has been argued, therefore, that the media is interested in attracting audiences with buying power, not audiences per se⁵⁴, which requires editorial judgments made for large audiences that "reflect a greatly *reduced* measure of independent editorial judgment about what is important and a greatly *increased* measure of what editors will think or know that particular individuals or particular segments of their audience want to hear or read."⁵⁵ First Amendment scholar Zachariah Chafee has argued that this is precisely the obstacle that prevents "the truth" from emerging from competition in the *economic* market. He has argued that the means of communication are owned by people who basically have, or at least express, the same views.⁵⁶ Indeed, in recent years it has become clear that the need to secure advertising and a distinct portion of the public can lead to avoiding controversial issues or promoting open debates. It has been argued that "[t]he publications that

⁵² EDWARD HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* 17 (1988).

⁵³ The media must then secure the advertising by presenting some evidence of its ability to reach the public. In the magazine business, the standard measure is "cost per thousand" (CPM) which measures the cost to an advertiser to reach 1,000 readers. In its Annual Report for 1984, CBS revealed a new method to approach advertisers called a "client audience profile". This method was intended to "help advertisers optimize the effectiveness of their network television schedules by evaluating audience segments in proportion to usage levels of advertisers' products and services". *Cited in id.* at 16.

⁵⁴ *Id.*

⁵⁵ Bezanson, *supra* note 8, at 17-18.

⁵⁶ ZACHARIAH CHAFEE, *BLESSINGS OF LIBERTY* 107 (1956), *cited in* BOSMAJIAN, *supra* note 20, at 67.

report politics for most Americans have become notorious for their unwillingness to confront the substantive issues of political campaigns".⁵⁷

The reasons for this tendency are fairly straightforward. Media outlets in competition within a certain market make more profits if they can lower costs and secure more advertising revenues. Both goals are met by increasing circulation and circulation is increased more easily if the content of the press is not too controversial, appears to be objective and reflects the views of the dominant majority of the population.⁵⁸ As the media becomes more concerned with the needs of economic competition, it becomes imperative not to run the risk of alienating the public for which it must become more objective, less "politicized" and more "mainstream". Therefore, in an attempt to maximize circulation and profits, the media is often forced to choose political speech from the median of the political spectrum.⁵⁹

Evidently, to conform to the ideology of *objectivity*, the press cannot afford to go to extremes and eliminate debate altogether. In most cases, therefore, the press does present some level of debate, as when it features columnists from different perspectives. Yet, these columnists generally do not represent the full spectrum of opinions, but only that portion which is acceptable without creating a threat of alienation to the public.⁶⁰ Also, the amount of "columnists" is surprisingly limited since their columns are reproduced throughout the country in different newspapers, many of which are owned by the same publishing

⁵⁷ Kahn, *supra* note 12, at 739, cited in DAVID PALETZ AND ROBERT ENTMAN, *MEDIA POWER POLITICS* 234-48 (1981); THOMAS PATTERSON AND ROBERT MCCLURE, *THE UNSEEING EYE: THE MYTH OF TELEVISION POWER IN NATIONAL POLITICS* 27-29 (1976).

⁵⁸ Jim Detjen, a former reporter on matters related to the environment for the *Philadelphia Inquirer*, has argued for example, that "advocacy journalism" is not a good idea because it could "alienate readers and viewers and cause them to stop trusting the media". Quoted in Karl Grossman, *Saving the Earth Isn't Their Job*, EXTRA!, January/February, 1997, at 27.

⁵⁹ Kahn, *supra* note 12, at 758. During the Depression years, when the American press was most critical of the government, advertising revenues dropped considerably. *Id.* at 786-87.

⁶⁰ See Jeff Cohen, *Television's Political Spectrum*, in *THE BEST OF EXTRA!* 18 (1994) arguing that "those who hold daily or weekly positions as political analysts on television run from right to center . . ." and that television's spectrum "is clearly slanted in favor of the right".

chains.⁶¹ The important issue to resolve, therefore, is whether the level of choices available within the market is enough to justify calling it a marketplace or whether the choices are so limited and expensive that the public is actually just shopping in a "convenience store" of ideas.

The interaction between advertising and the news media has a tendency to reduce the equilibrium needed to justify the marketplace of ideas as the leading metaphor. Since advertisers are themselves in economic competition, it must be understood they use the press to maximize their profits. For advertisers, this is done by reaching the public. Therefore, they will seek to advertise in the outlets with most circulation. Finally, since the newspapers are seeking advertiser support, they will do what is necessary to attract and keep their business. What is necessary is not to alienate the readers and to keep as broad a reception as possible or to become the only alternative within the market. Since it is not uncommon to see advertisers take support away from the media in response to content that may alienate the audience the advertisers want to reach,⁶² both alternatives lead to less diversity of ideas in the market. On the one hand, the media would try to avoid controversy or debate by adapting to consumption patterns of the readers, on the other it would seek to eliminate competing voices altogether.

VII. CONCLUSION

The dominant metaphor for "freedom of the press" throughout most of this century has been the "marketplace of ideas". As originally proposed, it was based on the assumption that "the truth" will always win in a free and open encounter with falsehood and on a process of exchange of ideas where mostly individuals had fairly easy access to their audiences. Therefore, as originally stated, the metaphor served as support for an argu-

⁶¹ The Supreme Court again recognized this argument in *Miami Herald*, 447 U.S. at 250 when it stated: "Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary and interpretative analysis."

⁶² Public television station WNET lost its corporate support from Gulf & Western in 1985 after the station aired the documentary "Hungry for Profit", which contains material critical of multinational corporate activities in the Third World. HERMAN & CHOMSKY, *supra* note 52, at 17.

ment of freedom of speech because it referred to the protection of a *space* for a "wide open and robust" *exchange* of ideas and debate.

The *process* by which speech is exchanged in the economic market of ideas is very different, however. It has replaced the individual speech of the "pamphleteer" or "soapbox orator" with a form of *institutional* speech dominated by homogeneity of opinions as the main participant in the market of ideas.

Using the concept of the economic marketplace of ideas to support an argument for the protection of freedom of the press is a faulty analogy because its premises are false or inaccurate. The process of exchange of ideas is not what it once was and continued reliance on the old metaphor has led to the interchangeability of a concept once used as an analogy and a concept that describes a specific reality. The economic marketplace is dominated with concerns over economic survival rather than over the *ideas*. There is no guarantee that the process will result in the discovery of the truth, there are few participants in the market and economic competition has done very little to promote a wide open and robust debate. If anything, it has resulted in fewer sources, less press independence and less diversity of information.

It is time for Constitutional scholars to come up with a new metaphor to support the need for the Constitutional protection for freedom of the press.