THE NEED FOR A GUARANTEED RIGHT OF ACCESS TO THE PRESS THROUGH ADVERTISING

Thesis for the Degree of M. A.
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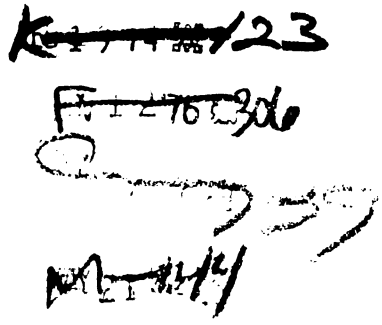


ABSTRACT

THE NEED FOR A GUARANTEED RIGHT OF ACCESS
TO THE PRESS THROUGH ADVERTISING

By

Kent Richards Middleton

The First Amendment, which prohibits government interference with the press, was adopted in 1791, a time when newspapers were small and independent. Since that time, courts have interpreted the First Amendment to mean that publishers cannot be forced to print anything. This interpretation has been considered the best safeguard of a free press.

Unlike early newspapers, modern media are frequently owned by large corporations and often are not competitive. It is not unusual for one corporation to publish all of the daily newspapers in a major American city. It has been argued that some points of view, perhaps unpopular but still important to the community, cannot gain access to this press.

Questions arise: do media conglomerates inhibit free speech, and, if so, should the First Amendment be reinterpreted to guarantee that all viewpoints in a community will find a public forum? If access to the media should

be guaranteed by the government, how will the important press function of critic be protected from government control?

This thesis argues that there is an access problem in the press; that a guaranteed right of access to the press should be established; and that it can be done without impairing the editorial autonomy so important if the press is to be free to criticize a democratic government. This thesis argues that large, general circulation newspapers offer their advertising pages to the general public on a non-discriminatory, commercial basis, and should therefore be required to accept all lawful, paid, advertisements proffered to them. A partial solution based on market fairness, then, is proposed for a problem of free speech.

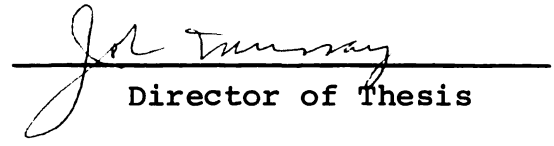
Chapter I documents the nature of the access problem and reviews several proposed remedies--including a guaranteed right of reply, right to editorial space, as well as a right to advertising space--found in recent periodical literature.

Chapter II reviews the major court cases involving newspaper advertising between the turn of the century and 1968. These cases, which are commercial for the most part, provide important legal background for the more recent First Amendment debate. During this period the courts refused to regulate newspapers as "public businesses" and refused to deal squarely with an increasingly prominent issue of abusive monopoly power.

Professor Jerome Barron has analyzed court rulings which have expanded the public's First Amendment rights in broadcasting and in places of public gatherings. Barron uses these cases to argue by analogy for an expanded right of access to the press. His arguments, and judicial responses to them, are presented in Chapter III.

Chapter IV discusses the possibility of a statutory solution to the access problem, a solution which several courts have contended is necessary if newspapers are to be regulated at all. Antitrust statutes are rejected as unworkable, but a statute, requiring newspapers to accept all lawful advertisements, is recommended, providing it is general enough to leave the courts wide latitude in interpretation.

Accepted by the faculty of the School of Journalism, College of Communication Arts, Michigan State University, in partial fulfillment of the requirements for the Master of Arts degree.



Director of Thesis

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A THESIS

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CHAPTER I

THE NEED FOR A GUARANTEED RIGHT TO BUY LEGAL ADVERTISING

Commercial advertising, debates between political candidates, and adversary court procedures all attest to an American belief that from conflicting claims the average rational citizen can adequately determine the best product, the ablest leader and the guilty defendant. From diverse, often antagonistic views, in a free "market place of ideas," truth is believed to emerge.

To insure that the American people would enjoy the free expression necessary for a healthy democracy the First Amendment to the U.S. Constitution was adopted in 1791, prohibiting the Congress from passing any law abridging free speech or press.[1] Consistent with American laissez-faire

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[1]The classical arguments for the value of free expression are John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing found in Areopagitica and of Education, and John Stuart Mill, On Liberty (Baton Rouge: Thomas J. Moran's Sons). See also Justice Oliver Wendell Holmes' famous dissent in Abrams v. United States, 250 U.S. 616, 630 (1919).

economics, the negative command of the First Amendment was considered the best safeguard for a free press at a time when newspapers were small and fragile enterprises.[2]

The economics of newspapers has changed markedly since 1791. "Newspapers in 97 per cent of the nation's 1,500 daily cities now enjoy a local 'monopoly,' and nearly half are owned by some group or national chain."[3] Groups and chains control about 58 per cent of the total daily circulation and about 63 per cent of the Sunday circulation.[4] With roughly 1,750 dailies in the United States, there are only about 45 cities with competing dailies.[5]

The cost is immense of entering the newspaper business on equal competitive terms with established papers. One estimate of the total cost for plant and equipment, not including land, for a newspaper of only 50,000 circulation, is $2.5-4.5 million.[6]

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[2]Between 1690 and 1820, more than half of the American papers expired before two years of existence. Charles S. Brigham, History and Bibliography of American Newspapers, 1690-1820, Vol. I (Worcester, Mass.: American Antiquarian Society, 1947) p. xii.

[3]Raymond B. Nixon, "Trends in U.S. Newspaper Ownership: Concentration with Competition," Gazette, XIV (1968), 181.

[4]Ibid., p. 191. [5]Ibid., p. 184.

[6]Hearings before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on S. 1312, The Failing Newspaper Act, 90th Cong., 1st sess., pt. 2, (1967), pp. 888-89. Estimates of costs for a newspaper with a circulation of 200,000 are $12-14 million; with a circulation of 500,000, $22-26 million.

This growing consolidation of press ownership, indeed of all media ownership, has some advantages. Nixon writes that with the growth of circulation and the increased dependence of the press on advertising, the newspaper has lost much of its partisanship and has become a "general vehicle of information and opinion designed to serve all groups within its circulation area." Editors and publishers have become more aware of their "broad obligations to the public."[7]

Certainly modern newspapers are more objective and factual than during the days of the partisan post-Revolutionary press or at the end of the last century when the press was often sensational. Taking into account the number of national news magazines, specialized publications, radio and television, it is perhaps "clear that Americans have access to a larger and more diversified volume of mass communications than ever before."[8] A wide variety of information is available for those who desire it.

It remains that newspapers, however, with the possible exception of the New York Times and Wall Street Journal are local, not national, in contrast to much of broadcasting. It is to a local newspaper, with its "natural monopoly," that a reader must turn "for detailed information about the place where he lives and works."[9]

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[7]Nixon, "Trends in U.S. Newspaper Ownership," p. 183.

[8]Ibid., p. 189. [9]Ibid., p. 190.

Nixon may be correct in stating that newspapers become less partisan because of their dependence on advertising, but a major danger in having a locality served by a single publishing company is that newspapers depend so very heavily on local advertising.[10] Newspapers are therefore susceptible to the prejudices and pressures of powerful local advertisers. If a monopoly newspaper, willingly or not, reflects the narrowest interests of the city's powerful advertisers, then minority and dispossessed groups may be deprived of a most important channel of expression.

There is evidence that the local press does not always do what it might to insure a free flow of divergent points of view. The ideas and beliefs of some legitimate groups are purposely denied access to some newspapers. Yet the courts consistently uphold the autonomy of newspapers and the rights of publishers, as private businessmen, to publish or not publish as they please.[11]

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[10]Keith Roberts, "Antitrust Problems in the Newspaper Industry," Harvard Law Review, LXXXII (December, 1968), 321. National brand name advertisers account for only about 20 per cent of newspaper advertising linage, while, in 1961, about 17 per cent of television's advertising was local.

[11]Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913); Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.W. 400 (1924); In re Louis Wohl, 50 F.2d 254 (E.D. Mich. 1931); Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1913); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S. 2d 515 (Sp. Ct. 1954); Gordon v. Worcester Telegram, 343 Mass. 142, 177 N.E.2d 586 (1961); Approved Personnel v. Tribune, 177 So.2d 704 (Fla. 1965); Bloss v. Federated Publications, 5 Mich. App. 74,

An attorney in Winchester, Massachusetts, Herbert Lord, was urged in the pages of the Winchester Star to drop an action against the Massachusetts Municipal Board of Selectmen. Lord sued the paper for refusing to print a letter from him which stated his position on the matter. The Massachusett's Supreme Court backed the paper's claim of complete editorial autonomy.[12]

In New York, the owner of a race horse was erroneously accused by the State Racing Commission of illegally drugging his horse. The accusation was correctly reported by a wire service and printed in at least one New York newspaper. The government report was privileged; the government, the newspaper, and the wire service could not be sued for damages. Neither the paper nor the wire service was under any legal obligation to help repair the horse owner's damaged reputation.[13]

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145 N.W.2d 800 (1966) aff'd. 380 Mich. 485 (1968); Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970); Resident Participation of Denver v. Love, 322 F. Supp. 1100 (1971).

[12]Lord v. Winchester, 346 Mass. 764, 190 N.E.2d 875 (1963), cited in Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, LXXX (June, 1967), 1669.

[13]Harriet F. Pilpel and Kenneth P. Norwick, "But Can You Do That?" Publishers' Weekly, May 25, 1970, p. 32

After the 1966 Biennial Conference of the American Civil Liberties Union (ACLU), the organization sent out letters to dissident and minority groups, as well as to professional journalists, asking for specific examples of access to the media being denied unjustly.[14] Several monopoly abuses were alleged.

Jesse D. Scott, of Los Angeles, field director of the National Association for the Advancement of Colored People (NAACP), replied to the ACLU:

> Our news releases are sent to the City News Desk, in turn, they are placed on the wire service for all the media.
> Seldom, if ever, these releases are carried by any of the mass media. Neither the Los Angeles Times or the Herald Examiner carry releases on announcements of meetings, conferences and/or program positions...
> News items on minorities, in general, and the Negro in particular, are seldom seen in the Los Angeles Dailies.[15]

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[14]Trudy Hayden and Beatrice Gelfand, "Biennial Conference Resolutions #33-40 on Right of Access to the Mass Media," (typewritten memo to the national Board of Directors of the American Civil Liberties Union, ACLU national office, New York, June 4, 1969), pp. 1-2. Forty-seven letters were sent out and 18 returned, some suggesting that the media problem was not so much one of denied access as one of generally imcompetent or biased coverage on a day-to-day basis. The Kerner Commission report concluded that the mass media do not accurately report the everyday reality of minority life. See Report of the National Advisory Commission on Civil Disorders, Otto Kerner, Chairman (New York: Bantam Books, 1968) pp. 374-83. The ACLU is presently conducting a more thorough study of the access problem.

[15]Beatrice Gelfand and Alan Reitman, "1968 Biennial Conference Recommendations Concerning the Right of Access by Politically Dissident and Racial Minority Groups to the Communications Media," (typewritten memo to the Communications Media Committee of the National Office of the American Civil Liberties Union), ACLU national office, New York, May 7, 1969, p. 2.

Marvin Wall, a staff member of the Southern Regional Council in Atlanta, Georgia, and a former newspaper man, wrote the ACLU:

> It is fair to say that the urban press, nowadays, pays more attention to news from the black community. I can recall when it was hard even to find the score on the sports page involving the predominantly black schools and colleges . . . In rural areas, I am sure that you would find many weekly newspapers which do not . . . print news pertaining to black people in the community. I am certain that a systematic study would turn up an overwhelming amount of evidence.[16]

One newspaper in West Virginia refused to carry birth and death notices of Negroes.[17]

While some claim that minority groups are denied access to the press, or generally ignored, some aggressive dissident groups have been treated with hostility in news columns and pointedly rebuffed when access through paid advertising was sought.

Steve Kosokoff, of the War Resisters League of Portland, Oregon, reported to the ACLU through a New York colleague:

> 1. In 1967 we attempted to place an ad in the Oregonian (S. I. Newhouse owned, largest in state, etc.). The ad said, "We Won't Go" and had names of young men. Then it said "We support those who won't go" and had many more names. We came to the paper with money in hand. They refused to accept it. The publisher said, "I'll see all you yellow-bellied bastards in hell before I'll print that ad." ACLU was no help.
> 2. Two years ago when Alan Ginsberg was going to read here and do a peace rock dance thing the entertainment

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[16] Ibid., p. 3. [17] Ibid., p. 14.

> editor of the Oregonian was threatened with the loss of his job if he ever again mentioned Ginsberg or the sponsoring group (Society for New Action Politics).[18]

The Oregonian is published by the Oregon Publishing Company, which publishes the only two general circulation newspapers in Portland.[19]

Marvin Wall reported that in Atlanta, which is also a monopoly newspaper city,:[20]

> The hippies are treated like any other unpopular minority group. They are harrassed by police and their activities are covered with hostility by the press. Local peace groups have consistently had difficulties getting their activities publicized. The situation got so bad at one point that Joe Gross read aloud at a meeting addressed by Eugene Patterson the long list of fillers clipped from the Constitution. He was pointing out the amount of space dedicated to such trivia as contrasted with the news releases that had been sent in by peace groups. . . The big Viet Nam rally held at the stadium several years ago got second coming headlines and coverage in the Atlanta papers. There was an obvious pattern.[21]

Another group that asserts it is unjustly denied access to newspapers is the Mattachine Society of Washington, D.C., an organization that works for equal rights for homosexuals. In an unsolicited letter to the ACLU, the president of the society claimed that no papers in Washington would accept the organization's paid advertisements. He wrote:

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[18] Ibid., p. 3.

[19] Editor and Publisher International Yearbook, 1970 (New York: Editor and Publisher, 1970), p. 235.

[20] Ibid., p. 86.

[21] Gelfand and Reitman, "Conference Recommendations," p. 4.

> Our advertisements are dignified, conservative, informational, non-commercial, . . . do not propose illegal action, nor are they in poor taste in any way (unless mere mention of the subject of homosexuality is considered to be in poor taste).

This ban on advertisements, the president continued, "means that an entire large group of citizens, and an entire lawfully-acting movement working on their behalf, are denied any access at all to the press.[22]

These examples of alleged abuses by newspapers are presented as a sample of the complaints against the press. In some instances the newspapers in question may have had good reasons for denying access. For example, a particular advertisement may have been illegal. But taken together, these examples illustrate that an access problem exists, although these examples do not define the scope of the problem.

Charges of unfair denial of access to powerful general circulation newspapers are not new. For years the problem of monopoly power has been analyzed and remedies suggested. In a 1931 newspaper case, plaintiff charged that two Detroit newspapers together formed a monopoly in the evening news field. The court refused to force the newspapers to accept plaintiff's commercial advertisements.[23]

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[22]Letter to the Board of Directors of the American Civil Liberties Union from the President of the Mattachine Society, ACLU national office, August 19, 1970.

[23]In re Louis Wohl, 50 F.2d 254 (E.D. Mich., 1931).

In a 1945 antitrust case, the Supreme Court of the United States asserted that the government may, at times, have an affirmative role to play in protecting the First Amendment guarantees for a free market place of ideas. "It would be strange indeed," the court said,

> if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the republic, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some.[24]

While arguing that the government has an affirmative responsibility to promote the "widest possible dissemination of information," the court took the trouble to point out that it was not applying a "public utility" concept to the press.[25]

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[24] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[25] Ibid., p. 19. The court was making it clear that it did not consider the press to be a public utility, like a telephone or gas company. A public utility is one of several "public interest" businesses which can be regulated by the government, in whole or in part, and which are usually required to serve all customers without discrimination. Ford P. Hall, The Concept of a Business Affected with a Public Interest, (Bloomington, Ind.: Principia Press, 1940), p. 61. Public utilities usually are distinguished by the special privileges, such as eminent domain, granted to them by the state. Wolff Packing v. Court of Industrial Relations of the State of Kansas, 262 U.S. 522, 67 L.Ed. 1103, 1108, (1922). A "common carrier" is a public business

Two years after the court in Associated Press v. United States mentioned affirmative government responsibilities to insure a press of divergent viewpoints, the prestigeous Commission on Freedom of the Press,[26] frequently referred to as the Hutchins Commission, issued a report warning that monopolization of media was inhibiting the free market place of ideas. The commission urged media managers to open their channels of communication to a wider range of opinion.[27]

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in which one agrees "for a specified compenstion to transport such property from one place to another for all persons that may see fit to employ him." Hall, Concept of a Public Business, pp. 102-03, quoting Gerhard and Hey v. Cattaraugus Tanning Co., 241 N.Y. 413, 150 N.E. 500 (1926). See also Wolff Packing, 67 L.Ed. 1108. A broader, more elusive, concept is that of a business "affected with a public interest." To be so classified, a business must dedicate itself or hold itself out as a public interest business. Hall, Concept of a Public Business, pp. 101-03 and Wolff Packing, 67 L.Ed. 1108.

[26]Members besides Robert M. Hutchins, chancellor of the University of Chicago, included Zechariah Chafee, Jr., of Harvard Law School; Harold D. Lasswell, Yale Law School; Archibald MacLeish, poet and former assistant secretary of state; Reinhold Niebuhr, Union Theological Seminary; and Arthur M. Schlesinger, Sr., history professor at Harvard.

[27]Commission on Freedom of the Press, A Free and Responsible Press (Chicago: University of Chicago Press, 1947). A report authored by a single member of the Hutchins Commission presents a more detailed critique of the inadequacies of traditional laissez-faire press operations. The author provided a philosophical rationale for viewing the press as imbued with a public interest responsibility. See William E. Hocking, Freedom of the Press: A Framework of Principle (Chicago: University of Chicago Press, 1947). Hocking argued that for man to have freedom, he must not only be unconstrained, but must also have the wherewithal to exercise his freedom. To be free to speak, one must have a forum. p. 54.

Because of growing consolidation of media ownership, the commission said that

> to protect the press is no longer automatically to protect the citizen or the community. The freedom of the press can remain a right of those who publish only if it incorporates into itself the right of the citizen and the public interest.[28]

The communications industry should remain a private business, the commission said, "but it is a business affected with a public interest."[29]

The commission was not clear about exactly what should be done to make the press more representative of the divergent beliefs found in a given community. One suggestion was that media "accept the responsibilities of common carriers of information and discussion on a voluntary basis.[30] Part of the responsibility of the press, the commission said, was in "maintaining the rights of citizens and the almost forgotten rights of speakers who have no press."[31]

The commission's suggestions were well-meaning, but not particularly strong by the time the commission explained the restrictions they would put on their recommendations. While the commission thought that the dispossessed should be

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[28]Commission on Freedom of the Press, A Free and Responsible Press, p. 18.

[29]Ibid., pp. 91-92. See above, note 25.

[30]Ibid., p. 92. See above, note 25.

[31]Ibid., p. 18.

represented in the media, it also thought that "some seekers for space are bound to be disappointed and must resort to pamphlets or such duplicating devices as will spread their ideas to such public as will attend to them"[32] The commission thought that the government might use the antitrust laws only "sparingly" to break up large media units.[33] As for a guaranteed right of reply for those individuals and groups attacked in the press, the commission concluded that such an alternative should be "carefully considered in the future."[34]

The Hutchins Commission report was not a radical document. But it was important that such a prestigious group of men would argue that the laissez-faire market place of ideas was malfunctioning. The commission warned that either owners of monopoly media would make the media more responsible to a larger audience or, "of its own motion, the power of government will be used, as a last resort, to force it to be so."[35]

The effect of the Hutchins Commission report on the movement for a right of access to the press cannot be accurately assessed. However, discussion of the need for a

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[32] Ibid., p. 24.

[33] Ibid., p. 83.

[34] Zechariah Chafee, Jr., Government and Mass Communications, A Report from the Commission on Freedom of the Press (Hamden, Conn.: Archon Books, 1965), p. 84.

[35] Commission on Freedom of the Press, A Free and Responsible Press, p. 80.

guaranteed right of access to the press, and the possibility of some affirmative government action to this end, has increased in the years since the commission's report.

In 1950, a law review article by Richard C. Donnelly repeated Hocking's argument,[36] that First Amendment freedom is more than just the negative freedom from government control. Donnelly argued that First Amendment freedom must embody a positive dimension, an insurance that the press is free and open.[37] In 1956, James Russell Wiggins, then managing editor of the Washington Post, devoted a chapter of his book on the press to "The Right of Access to Means of Publishing,"[38]

Adding strength to the argument that a guaranteed right of access to newspapers should be established, was the United States Supreme Court decision in New York Times v. Sullivan, a decision that extended First Amendment protection to paid non-commercial advertisements.[39]

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[36]See above, note 27.

[37]Richard C. Donnelly, "Government and Freedom of the Press," Northwestern University Law Review, XLV (March-April, 1950), 44-50.

[38]James Russell Wiggins, Freedom or Secrecy (New York: Oxford University Press, 1956), pp. 167-81.

[39]New York Times v. Sullivan, 276 U.S. 254 (1964). Commercial advertisements are not so protected. In Valentine v. Chrestensen, 316 U.S. 52 (1942), the court held that New York City officials could legally prohibit F. J. Chrestensen from distributing commercial handbills in the streets of the city: "This court has unequivocally held that the

In the Sullivan case, the Supreme Court held that a civil rights advertisement critical of southern law enforcement officials was protected under the First Amendment because

> it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[40]

Since the Sullivan decision, a newspaper is free to criticize and comment upon the conduct of public officials without fear of losing a libel suit, unless the publication is made with "malice."[41] This decision gave newspapers freedom to write with near impunity about public officials without any requirement that a public person be permitted to reply. Although the court had hoped in this decision to help open up newspapers to new ideas, the ruling added significant new immunities to the already great powers of the press.

The court, in dictum, recognized the importance of access to newspapers through editorial advertising. "Any

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streets are proper places for the exercises of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." p. 54.

[40] Ibid., p. 266.

[41] Ibid., p. 280.

other conclusion," the court said in its decision, "would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities."[42] The stated goal of the court is a familiar theme. The court wanted to preserve for democracy "debate on public issues" that is "uninhibited, robust, and wide-open."[43]

The American Civil Liberties Union entered the debate over right of access to the press in 1966.[44] Participants in the ACLU's 1966 Biennial Conference requested the organization to study the policy issues raised by the question: "Given the complexity of modern society, does the government have an obligation to encourage and support affirmatively means of securing freedom of expression?"[45]

The national ACLU has never taken an official stand supporting a particular legal right of access to the privately owned press. A resolution adopted in 1966 by the union urges privately owned media to "voluntarily" open themselves to controversial advertising.[46]

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[42] Ibid., p. 266. [43] Ibid., p. 270.

[44] Hayden and Gelfand, "Conference Resolutions #33-40," p. 6. "In the main, the Union has adhered to the classic theory that diversity in speech is the natural outgrowth of the free competition of a multitude of voices, unimpeded by government."

[45] Ibid., p. 1. For partial results, see above notes 14-22 and accompanying text.

[46] Ibid., p. 7.

The national ACLU does support government action to require publicly-owned or regulated facilities that sell advertising space to accept controversial non-commercial advertising.[47] Some local chapters of the organization have argued in court for wider legal rights of access to the privately owned media.[48]

The most powerful arguments to be made for a guaranteed right of access to monopoly media are those of Jerome A. Barron, professor in the School of Law of George Washington University, Washington, D.C. Professor Barron's provocative article in the June, 1967, Harvard Law Review, urging an affirmative obligation on the part of government to guarantee that minority and dissident viewpoints get access to the media, has been noted in several court cases involving newspapers,[49] and has inspired or been mentioned in several articles.[50]

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[47]Ibid., pp. 6-7. See Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) and Wirta v. Alameda-Contra Costa Transit District, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

[48]New York Times v. Sullivan, 376 U.S. 254 (1964); United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C.D.C. 1966); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970).

[49]See Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y 1969); Resident Participation of Denver v. Love, 322 F. Supp. 1100 (1971).

[50]See William M. Douberley, "Resolving the Free Speech-Free Press Dichotomy: Access to the Press through

Barron, like others before him, believes that the traditional negative interpretation of the First Amendment is not adequate. It is a "romantic" view of the First Amendment, Barron thinks, to believe that protecting the complete autonomy of publishers will preserve a market place of ideas in times of media conglomerates and single newspaper cities. Holding to a laissez-faire interpretation of the First Amendment, while monopolization of press ownership continues, becomes a "rationale for repression."[51] The First Amendment must be reinterpreted to include the public interest in access to media.

Barron attributes no sinister motives to media managers, but he regrets their excessive concern with commercial matters. As businessmen, Barron thinks that media managers

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Advertising," University of Florida Law Review, XXII (Fall, 1969); William A. Resneck, "The Duty of Newspapers to Accept Political Advertising--An Attack on Tradition," Indiana Law Review, XLIV (Winter, 1969); Clifton Daniel, "Right of Access to Mass Media--Government Obligation to Enforce First Amendment?" Texas Law Review, XLVIII (March, 1970); Ben H. Bagdikian, "Right of Access: A Modest Proposal," Columbia Journalism Review, VIII (Spring, 1969); John D. Stevens, "Proposal to ACLU: Newspapers Must Carry All Viewpoints," The Journalism Educator, XXIII (Fall, 1968); Gilbert Cranberg, "New Look at the First Amendment," Saturday Review, Sept. 14, 1968; Ronald L. Bottini, "Access to the Press: A New Right?," Freedom of Information Center Report No. 216, Columbia Mo.: University of Missouri School of Journalism, March, 1969; "Free Press: Newspaper Discretion to Refuse Advertising in Monopoly Situation," Minnesota Law Review, LIII (1969).

[51]Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, LXXX (June, 1967), 1642.

program and print homogenized, non-controversial material to insure the largest, surest return on their investments.[52]

The lack of access to the media of divergent points of view results in serious consequences, Barron thinks. He suggests that some of the violent protests of the 1960's might not have taken place had the dissidents been allowed to voice their grievances and simultaneously vent their frustrations in mass media.[53] "At some point," Barron says, "the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a non-discriminatory basis to representative groups in the community."[54] Minority and dissident groups have a First Amendment right of access to the media, and the government has an affirmative responsibility to insure that right.

Barron is not entirely clear about what the government's role should be. He does not want the government to contribute its own information to the media in some

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[52] Ibid., 1646.

[53] Ibid., p. 1647. There is truth to this assertion, considering mass media in general. However, the print media are probably not greatly responsible for creating frustration among some dissidents. To the extent that groups are poor and uneducated, the print media are little used for information. See V. O. Key, Jr., Public Opinion and American Democracy, (New York: Alfred A. Knopf, 1961) p. 351.

[54] Ibid., p. 1666.

institutionalized way. He wants some kind of "governmentally-sponsored process for stimulating the interchange of ideas."[55]

Both judicial and legislative steps might be taken to insure a more participatory information process, Barron thinks. He argues that courts, under existing laws, could require newspapers to grant access to more divergent views on "public issues." A natural place to begin, he thinks, would be in the letters columns and advertising pages.[56] Specifically, Barron has suggested that public persons who are attacked in the press be accorded a right to reply, and that there be established a right to buy political advertisements.[57] Barron has not set forth in any detail the form that a statutory solution to the problem might take, but he has suggested that a statute might, at least, require that denial of access not be "arbitrary."[58]

In discussing possible solutions to the access problem, it is important not to forget the First Amendment prohibition against interference with the press. It is necessary that even monopoly newspapers retain editorial

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[55]Jerome A. Barron, "An Emerging First Amendment Right of Access to the Media?" George Washington Law Review, XXXVII (March, 1969), p. 507.

[56]Barron, "Access to the Press," p. 1667.

[57]Jerome A. Barron, "Access--The Only Choice for the Media?" Texas Law Review, XLVIII (March, 1970), p. 774.

[58]Barron, "Access to the Press," p. 1670.

independence from government intervention. Large, powerful newspapers perhaps identify too closely sometimes with government interests, but even so, it is important that the editorial autonomy remain intact. In times of great government deception, such autonomy would be the country's best safeguard.

Of the various suggestions that have been made for expanding access to the press, only the right to buy non-commercial advertising would help in a limited way to diversify the press and, at the same time, preserve the autonomy of the editorial departments, vis-à-vis the government. All other solutions to the access problem--access to the letters column, a right of reply, a right to editorial space--would be constitutionally unsound and unacceptably cumbersome.

Requiring access to free editorial space would be unmanageable. Sheer volume would make it impossible to require newspapers to print letters or replies from the thousands who might desire such a privilege. The New York Times received 37,719 letters in 1968, most of them acceptable, of which it had space to print about 6 per cent.[59]

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[59]Clifton Daniel, "Right of Access to Mass Media," p. 785. The Times can print at best about 10 per cent of the average 1,300,000 words of news material it receives each day.

On the other hand, requiring a newspaper to accept lawful advertisements provides the revenue for a paper to expand its news columns.

If newspapers were required to accept letters and replies, the courts would be burdened with frequent litigation over editorial decisions.[60] It is doubtful that the courts should, or could, try to decide the subtle and the mundane editorial questions.

Barron argues that if obscenity is of such constitutional importance as to require judicial interpretation, then certainly the courts have a function in guaranteeing the First Amendment right of free expression to groups unjustly denied access to media.[61] Unfortunately, the chances of judges doing better than editors is not great. While the courts do have a right to establish definitions of obscenity, Justice Black has observed that on the obscenity issue the Supreme Court is "helplessly struggling"

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[60]Some of the questions which Barron thinks the courts capable of dealing with include: "What is a minority point of view? When shall such opinions be heard? Has some significant space been given to the controversy in the first place? Must every issue of the publication contain a reference to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish on a particular issue a 'news' decision and when is it a decision based on an effort to obstruct the opinion process?" "An Emerging First Amendment Right," p. 496.

[61]Ibid.

in a "quagmire."[62] The likelihood that some administrative agency, like the Federal Communications Commission, could regulate access to the press successfully is also doubtful.[63]

The board of directors of the national office of the American Civil Liberties Union tabled, after considerable debate, a resolution to support a guaranteed right of reply.[64] It was decided that the outside interference with editorial decision making powers would be too great. A participant in an ACLU Communications Media Committee discussion noted that a right of reply might conceivable mean that a Republican newspaper could not consistently attack a Democratic paper, and vice versa.[65]

What makes a right to buy advertisements in newspapers an acceptable alternative, but not a right to editorial or letter space, is the commercial nature of advertising, even of editorial advertisements. While editorial

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[62] Curtis v. Butts, 388 U.S. 130, 171.

[63] See Glen O. Robinson, "The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation," Minnesota Law Review, LXVII (November, 1967).

[64] Excerpt from Minutes of June 21-22 Board Meeting, "Discussion on Right of Access to the Mass Media," (New York: American Civil Liberties Union), p. 4. (Typewritten.)

[65] Gelfand and Reitman, "Conference Recommendations," p. 15. For more arguments against a right of reply, see Zechariah Chafee, Jr., Government and Mass Communications (Hamden, Conn.: Archon Books, 1965), and Gilbert Cranberg, "New Look at the First Amendment," Saturday Review, Sept. 14, 1968, pp. 236-37.

advertisements have First Amendment protection, and while the First Amendment goal of a robust debate is an important argument for requiring newspapers to accept editorial advertisements, the fact remains that any advertisement enters a newspaper through the newspaper's business department, not its editorial department. And while the courts do not agree, it seems to this writer that large general circulation newspapers hold their advertising space out generally to the public and should be required to accept all lawful advertisements, not just editorial advertisements, without discrimination.[66]

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[66]Despite the United States Supreme Court's efforts to distinguish between commercial and non-commercial advertisements (see above, note 39), it is doubtful that, for First Amendment purposes, a valid distinction can, or should, be drawn. There are many "commercial" advertisements of social value which deserve First Amendment protection. What about an advertisement for a political speech where admission will be charged? What about an advertisement for a "socially important" movie. See Aldrich v. Times Mirror Co., 440 F.2d 133 (1971). Ben H. Bagdikian relates that "for years, Consumers Union could not buy ads in newspapers because the magazine was considered hostile to the brand-name mystique." Letter from Bagdikian to Gilbert Cranberg, July 22, 1969, located in the files of the ACLU national office, New York. Even the civil rights advertisement in New York Times v. Sullivan, 276 U.S. 254 (1964), solicited financial support for the movement. The main value in making the distinction between editorial and commercial advertisements is that the advertisements with the first amendment protection would seem to have a stronger claim to a right of access. So far, this has not proved to be true in court tests. See Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970) and Resident Participation of Denver v. Love, 322 F. Supp. 1100 (1971). See William A. Resneck, "The Duty of Newspapers," pp. 233-34, for arguments why newspapers should be required to accept editorial, but not necessarily commercial, advertisements.

The advertising department of any newspaper that claims to be objective is independent of the editorial department, and probably separated physically. Newspapers recognized for quality want the advertising department separate so that the interests of powerful advertisers cannot influence the news content of the paper.[67]

The general business nature of a newspaper's advertising function has been acknowledged in judicial decisions and statute. Courts have consistently upheld the right of newspapers to refuse advertisements, commercial or editorial,[68] but the right of the private businessman to avoid making commercial contracts has figured much more heavily in these decisions than concerns for First Amendment freedoms.

The Newspaper Preservation Act of 1970 assumed a distinction between editorial decisions and at least some of the advertising decisions of a newspaper. In the spirit of the market place of ideas, the policy goal of the Act was to maintain a newspaper press "editorially and

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[67]Adolph Ochs, former publisher of the New York Times, purposely placed the advertising and news departments on different floors so that the news department would not be influenced. "When The New York Times cares about what its advertisers think, a few executives have said, it will no longer be The New York Times," Gay Talese, The Kingdom and the Power (Cleveland: World Publishing Co., 1969), pp. 74-75.

[68]See above, note 11.

and reportorially independent and competitive in all parts of the United States.[69] To promote this end, the act allows newspapers in financial distress a partial exemption from the antitrust laws in order to participate in certain joint operating agreements. Permissible joint operations do not include editorial or reportorial functions. The act does allow for joint solicitation of advertising and setting of rates, however.[70]

The business nature of the advertising function of a newspaper is further illustrated by an examination of the Editor and Publisher International Yearbook. There it can be seen that several large newspapers do not solicit all of their own advertising, but have it done through a hired agency, perhaps in another city. Newspapers also frequently advertise to the general public the market powers of their own advertising columns.

Because newspapers in the United States are frequently monopolistic enterprises, offering advertising space generally to any lawful customer, newspapers should not be allowed to discriminate against a particular advertiser on the whim or the prejudice of the publisher. The First Amendment purpose in requiring newspapers to accept

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[60]Newspaper Preservation Act, 84 Stat. 466, Sect. 2 (1970).

[70]Ibid., Sect. 3(2).

all lawful advertisements is the promotion of a more diversified press through editorial advertisements. But certainly many "commercial" advertisements are of great importance to the public welfare.

In requiring newspapers to accept all lawful paid advertisements, some legal questions will emerge that will require adjudication. Requiring newspapers to accept free letters and replies could burden the courts with new and broad ranging editorial decision, but requiring newspapers to accept lawful advertisements would only require infrequent litigation on borderline questions. The commercial and First Amendment issues involved in these cases--contracts, libel, obscenity, privacy, contempt--are issues which, for better or worse, the courts have already struggled with and have made considerable progress in defining legal limitations.

As press ownership continues to consolidate in the United States, some expanded right of access is necessary. As alluring as a legal right to have replies and letters printed might be, constitutional prohibitions and practical operational considerations dictate against such a solution. The best way to help democracy to realize a genuine market place of ideas is to open up the advertising section of general circulation newspapers; these advertising sections are, or should be, held out to the general public, without discrimination.

It is important that individuals and groups who have been maligned in a paper, or who hold unpopular ideas, have some chance to communicate these ideas to the general public. The solution, a limited solution, which best preserves the editorial autonomy of publishers is to allow all lawful ideas to be presented in paid advertisements.

CHAPTER II

THE CONCEPT OF NEWSPAPERS AS "PUBLIC BUSINESSES" IN COMMERCIAL ADVERTISING COURT CASES

American courts have been consistent in their holdings that privately owned newspapers can refuse without explanation public notices,[1] legal commercial advertisements,[2] and legal editorial advertisements.[3] Even if one agrees with Barron,[4] Resneck,[5] and Douberley[6] that papers

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[1]Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913); Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.W. 400 (1924).

[2]In re Louis Wohl, 50 F.2d 254 (E.D. Mich, 1931); Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515 (Sp.Ct. 1954); J.J. Gordon v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961); Approved Personnel v. Tribune Co., 177 So.2d (Fla. 1965); Bloss v. Federated Publications, 5 Mich. App. 74, 145 N.W. 2d 800 (1966) aff'd. 380 Mich. 485 (1968). Friedenberg v. Times Publishing, 170 La. 3, 127 So. 345 (1930).

[3]Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970); Resident Participation of Denver v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

[4]Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, LXXX (June, 1967).

[5]William A. Resneck, "The Duty of Newspapers to Accept Political Advertising--An Attack on Tradition," Indiana Law Review, XLIV (Winter, 1969).

[6]William M. Douberley, "Resolving the Free Speech--

should be required to accept all lawful editorial, but not commercial, advertising, it is instructive to look at the legal notice and commercial advertising court cases before considering more recent editorial advertising cases. The earlier commercial and legal notice cases reveal why the courts have not regulated newspapers as public interest businesses.[7]

In the commercial advertising cases, the courts considered several of the legal criteria used to determine if a business is "affected" with a public interest. These criteria include concepts of "necessity," "holding out," and "monopoly," concepts that will be discussed in this chapter. As will be seen, the courts never considered very seriously the idea of a newspaper being regulated as a public business. In continually holding that newspapers are private businesses which can make advertising contracts independently, the courts actually ignored the important monopolization of press ownership since the turn of the century.

To understand why the courts have continually refused to require newspapers to accept lawful

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Free Press Dichotomy: Access to the Press through Advertising," University of Florida Law Review, XXII (Fall, 1969).

[7]There is one exception to this rule which has never been followed by other courts. Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225 (C.P. Ct. Defiance County 1919).

commercial advertisements indiscriminately, one must understand the concept of being "affected," or "clothed with a public interest."

Ford P. Hall, in a small but intelligent book, The Concept of a Business Affected with a Public Interest,[8] writes that attempting to define a public interest business can be approached in two ways, economic or legal.

> In the former case, the most important question seems to be what businesses are sufficiently affected with a public interest to justify extensive governmental control? In the latter case, the important questions are, what businesses have already been placed in the public category, what legal guides are to be found by which one can determine the character of a business, and what are the constitutional limitations upon the power of control?[9]

Despite the fact that "judicial logic has sometimes played strange tricks in the world of economics," Hall believes that "law, both in the form of statutes and judicial decisions, does represent the needs of mankind expressed possibly in more real terms than formal economic categories."[10]

Hall's book is a legal analysis of the public interest concept, but he points out that good regulation of businesses requires that judges and legislatures be aware of the "economic or social significance of their actions or

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[8]Ford P. Hall, The Concept of a Business Affected with a Public Interest (Bloomington, Ind.: The Principia Press, 1940).

[9]Ibid., p. 2.

[10]Ibid., p. 4.

decisions."[11] Hall quotes the dissenting opinion of former Justice Brandeis in the case of New State Ice Company v. Liebman [285 U.S. 262 (1932)] as an example of this necessary awareness:

> . . . the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is or not depends upon the conditions existing in the community affected. If it is a matter of public concern it may be regulated, whatever the business. The public's concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation. . . . On the other hand, the public concern about a particular business may be so pervasive and varied as to require constant and detailed supervision and a very high degree of regulation.[12]

Hall writes that all too often the courts and legislatures are not aware of the broader implications of their decisions. It is questionable if the judges, in the cases where newspapers denied commercial advertisements, had much of a concern for the economic hardship caused advertisers or the rights of the public to information.

The legal definition of a public interest business is fluid. But in a famous case, Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas,[13] the United States Supreme Court attempted a definition. In the Wolff Packing Company case, the court held that a state

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[11] Ibid., p. 154. [12] Ibid., p. 155.

[13] Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas, 262 U.S. 522, 67 L.Ed. 1103 (1922).

administrative agency in Kansas violated the due process clause of the Fourteenth Amendment when it set wages in a non-monopolistic meat packing firm. The agency had acted under a Kansas statute establishing that a company that prepared food was affected with a public interest and therefore susceptible to regulation.

In declaring that the Kansas agency's action was illegal, the U.S. Supreme Court set up three categories of businesses which can be legally regulated. The first category is that group of businesses that have special public grants or privileges--such as a railroad has rights of eminent domain granted by the state--which in turn imposes public obligations on the business.[14]

The second category of public interest business includes occupations that have special obligations because of their public importance. For example, keepers of inns, cab drivers and the operators of grist mills.[15] The public interest classification of inn keepers, ferrymen and cabmen, apparently grew out of early common law and there is no particularly good reason why some of these businesses are still considered public today.[16]

The third category is the one into which newspapers would fall, if at all:

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[14]Ibid., p. 1108. [15]Ibid.

[16]Hall, Concept of a Public Business, p. 8.

> Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in the use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly.[17]

The court went on to say that in nearly all cases in which a non-public business became clothed with a public interest, "the thing which gave the public interest was the indispensible nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."[18]

Hall lists several important factors used by courts to determine if a business is affected with a public interest. Included are the degree of monopoly, the necessity of the business to the public, the existence of special state privileges such as eminent domain, the presence of an emergency, and whether a business has assumed a public interest by "holding out" its services to all indiscriminately.[19]

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[17] Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas, 262 U.S. 522 67 L.Ed. 1103, 1108 (1922).

[18] Ibid., p. 1109.

[19] Hall, Concept of a Public Business, p. 92.

From the judicial language on the "indispensible nature" of a public business,[20] the concepts of necessity and emergency are derived. A merchant dependent on newspapers for advertising, or a defense department official during a time of emergency, might consider newspapers to be public necessities worthy of regulation. A judge or legislature must ask if all or part of an enterprise should be regulated because of general public dependence or because of special conditions.

In the judicial language of "devoting" or "granting" a business to a public use lies the basis for the concept of "holding out."[21] "In general, a statement or conduct on the part of a person engaged in a business are the important considerations" in deciding if a business is holding itself out to the public.[22] "Conduct appears to be more persuasive than statement."[23] Holding out is a kind of affirmative action on the part of a business to serve the public indiscriminately.

Perhaps the most important business consideration for judges or legislatures trying to determine if a newspaper's advertising function should be regulated in the

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[20]See above, text accompanying note 18.

[21]See above, text accompanying note 17.

[22]Hall, Concept of a Public Business, p. 103.

[23]Ibid., p. 104.

public interest is the degree of monopoly enjoyed by the paper. This was the concern of the court in the Wolff Packing Company case, when it mentioned "exorbitant charges" and the ability of a business to exercise "arbitrary control."[24]

Newspapers have not been charged with price abuses, but the arbitrary powers of monopoly papers to deny access to legitimate ideas is precisely the concern of critics such as Barron and the Hutchins Commission.

It is doubtful if the criteria of eminent domain would ever be relevant in determining if a newspaper is vested with a public interest. It is difficult to imagine a newspaper, like a railroad, being given the right to condemn property for the public good.[25]

In considering the application to newspapers of the criteria for determining a public business, one must not forget the special protection afforded to the press by the First Amendment. No matter how much of a necessity, or how

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[24]See above, text accompanying note 18.

[25]In a couple recent editorial advertising cases, however, it was argued unsuccessfully that the privilege accorded newspapers to distribute papers on the public sidewalks constitutes a special relationship with the government which imposes on newspapers an obligation to serve all indiscriminantly. Amalgamated Clothing Workers of America v. Chicago Tribune, 307 F. Supp. 422 (N.D. Ill., E. D. 1969), aff'd 435 F.2d 470 (7th Cir. 1970); Resident Participation of Denver v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

a paper holds itself out to the general public, or how monopolistic, the First Amendment protection against interference with freedom of the press must always be borne in mind. Any argument for imposing public responsibilities on the press in order to enhance the market place of ideas must be tempered by the First Amendment guarantees for an independent press.

In the commercial advertising cases, public necessity played little role in judicial thinking. In Mack v. Costello,[26] the publisher of the only paper in Clarion, South Dakota, refused to print notice of a petition made by Mack to the town's board of trustees. The petition requested the board to exclude Mack's land from the corporate limits of the town. The law prohibited the board from taking action on the request until public notice had been made in the newspaper that the petition was pending. The state supreme court held that the publisher, as a private businessman, could make or not make contracts with whom he pleased.

The court talked about a newspaper as a necessity:

> It may be that the publishing of a newspaper is a quasi public business; but, if so, it is only because, from long experience, it is regarded as a public necessity. But as much might be said of the hardware or grocery business, and yet no one could contend that a grocer or hardware dealer could be compelled by mandamus to sell his wares if he preferred to keep them on the shelf.[27]

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[26] Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913).

[27] Ibid., p. 951.

The court was not thinking of grand schemes of robust debate, antagonism of ideas, the public's right to know or the harm that might be caused Mack. In the court's concern, and other courts' concern, for upholding the right of contract, the court could not think of the existence of the only newspaper in the city as a necessity. The right of private contract in the free enterprise system is the right of individual economic units to make free business choices, which will cause a business to thrive or wither in the market place. The market, and for the most part, the courts, were indifferent.

Little mention, too, was made in the commercial advertising cases of newspapers being regulated in the public interest during emergency conditions. The Massachusetts Supreme Court thought that the legislature might have authority to impose special obligations on newspapers in war time.[28]

A more important concern, from a legal point of view, in determining if a newspaper should be considered to be affected with a public interest and therefore regulated, is the concept of "holding out."

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[28] Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.W. 400, 402 (1924).

In Wohl,[29] Gordon,[30] and Bloss,[31] plaintiffs claimed that the newspapers refusing advertising were public interest businesses. The Wohl case is apparently the first time in American law that a plaintiff asserted that a newspaper was affected with a public interest and should be required to accept a lawful advertisement.

In this 1931 case, the Detroit News and Detroit Times refused the commercial advertisements of Louis Wohl. Wohl claimed that together the two papers constituted a monopoly in the evening news field. This was the basis of his claim that they should be considered as affected with a public interest.

In holding that the two papers were not affected with a public interest because they had not held themselves out to serve the general public indiscriminately, the court tried to explain the concept of holding out:

> Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. Negatively, it does not mean that a business is affected with a public

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[29] In re Louis Wohl, 50 F.2d 254 (E.D. Mich., 1931).

[30] J. J. Gordon v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961).

[31] Bloss v. Federated Publications, 5 Mich. App. 74, 145 N.W.2d 800 (1966) aff'd. 380 Mich. 485 (1968).

> interest merely because it is large or because the public are warranted in having a feeling of concern in respect to its maintenance.[32]

The words here are about the same as those used by the court in the Wolff Packing Company case to define the third category of public interest business.[33] The italicizing seems to emphasize the active nature of holding one's business out for public use. But adding emphasis with italics, like raising one's voice, helps little to explain a concept if the words do not change.

Hall holds that the concept of holding out is usually used to determine if a business, already recognized as public, in fact holds itself out "to serve all indifferently to the limit of his capacity or dedicates his property to a public use."[34] For example, a trucker who printed "Haul anything, anywhere--Long and short hauls" on his truck was determined to have held himself out as a common carrier.[35]

The problem of deciding if a newspaper is invested with a public interest because of holding out is more difficult because newspapers have not "usually been recognized as public," nor have they wanted to be. It is a nationwide

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[32]In re Louis Wohl, 50 F.2d 254, 256 (E.D. Mich., 1931); quoting Williams v. Standard Oil Co. of Louisiana, 278 U.S. 235, 49 S.Ct. 115, 116.

[33]See above, text accompanying note 17.

[34]Hall, Concept of a Public Business, p. 101.

[35]Ibid., p. 105.

practice for newspapers to claim the right to reject any advertisement for any reason.[36]

The question is, if by conduct, newspapers have in fact offered themselves, or at least their advertising space, as a medium for use by that part of the general public which is willing to pay the going advertising rates. The courts in the commercial advertising cases found no evidence of holding out, but there is little evidence that the courts gave the matter great consideration.

Justice Paul Adams, of the Michigan Supreme Court, is one judge who would like to see the courts examine more closely the question of newspapers' holding out. In his dissent in Bloss v. Federated Publications, a case where the Michigan court upheld a lower court ruling that a monopoly newspaper could legally refuse to accept an advertisement for an adult movie, Justice Adams wrote: "I would remand for a determination as to whether or not in fact the defendant had conducted its newspaper business as a purely private one with no holding out to the public of its columns for advertising. . ."[37] Newspaper advertising departments, with their physical separation from the editorial department, and their frequent use of professional

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[36]Douberly, "Resolving the Free Speech--Free Press Dichotomy," p. 300.

[37]Bloss v. Federated Publications, 380 Mich. 485, 491 (1968).

agencies to solicit advertisements, do seem to hold themselves out generally to lawful advertisers.

Perhaps the most important business concept for courts or legislatures to weigh in determining if a business is affected with a public interest is the degree of monopoly. Whether a business can control prices unfairly or exercise arbitrary control should be considered carefully in determining if all or part of a business should be regulated in the public interest.

Monopoly became an increasingly prominent issue in the legal notice and commercial advertising cases between 1913 and 1966.[38] It is perhaps strange that monopoly was not the most important issue considering the fact that, of the cases considered here, only the Boston Transcript case and the papers in the Wohl case were not monopoly presses in their respective cities. As the issue of monopoly became more prominent in the cases, the courts framed questions well, but they did not deal squarely with the economic fact of a growing monopoly press and its influence, for good or bad, on the economic market place or the market place of ideas.

In the Mack case,[39] the fact that the Cavour Clarion was the only paper in town was mentioned, but was not made a

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[38] See above, notes 1 and 2.

[39] Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913).

distinctive part of the decision. Considering the judge's laissez-faire holding regarding the right of private businesses to engage in contracts, there is no reason to presume that monopoly was considered an issue.

The Wohl court,[40] before which plaintiff charged that the two defendant newspapers formed a monopoly of evening papers, dealt superficially with the monopoly issue. The court noted that the newspapers had not been granted any powers of eminent domain as had other monopoly businesses regulated in the public interest.[41] This may well be an irrelevant distinction. A newspaper might have public interest functions without ever being accorded powers of eminent domain by the state.

The Wohl court also stated that defendant newspapers could be distinguished from an insurance company that had been regulated in the public interest because the insurance company was national while the newspapers were only of local importance.[42] Presumably then, if there were only one information medium in metropolitan Detroit, the court would not have considered the citizens of the area to be deprived of their right to an open press, because they were "local".

The Wohl court did not deal adequately with whether a monopoly existed in Detroit evening newspapers and, if

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[40] In re Louis Wohl, 50 F.2d 254 (E.D. Mich., 1931).

[41] Ibid., p. 257. [42] Ibid., p. 256.

so, if publishing power was being abused. The holding of the court may well have been the best one, but one might wish that the court had shown more awareness of economic realities and their possible impact.

In the Shuck case of 1933,[43] the issue of monopoly was not presented. A clothes cleaner filed for damages resulting from lost advertising when the only paper in Carroll, Iowa, refused him advertising space without explanation. The judge cited authority on the strictly private nature of the newspaper business and, with curious analogies, explained the danger of requiring a newspaper to take an advertisement. The "newspaper business" is

> as private as that of the baker, grocer, or milkman, all of whom perform a service on which, to a greater or less extent, the communities depend, but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with the public use.[44]

Perhaps there was only one individual baker, grocer, milkman as well as newspaper in Carroll, Iowa in 1933, so they operated on equal terms. But in general this is a doubtful analogy. A single journalist might well parallel a baker, grocer or milkman and be easily expendable from the point of view of public need. A newspaper business, however, especially the only one in town, might more likely parallel

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[43] Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933).

[44] Ibid., p. 815.

a gristmill, a food processing plant, or a milk producers association. All of these institutions have considerable potential power over an area, especially if each is a monopoly in its own field. In Munn v. Illinois,[45] the U.S. Supreme Court held that a monopoly gristmill could legally be regulated under state authority in the public interest. In Nebbia v. New York,[46] the U.S. Supreme Court upheld the constitutionality of a state statute allowing for the regulation of the price of milk. In this case, the milk industry had not even been declared by the legislature to be a public interest business.

The Shuck court's argument continued:

> If a newspaper were required to accept an advertisement, it could be compelled to publish a news item. If some good lady gave a tea, and submitted to the newspaper a proper account of the tea, and the editor of the newspaper, believing that it had no news value, refused to publish it, she, it seems to us, would have as much right to compel the newspaper to publish the account as would a person engaged in business to compel a newspaper to publish an advertisement of the business that that person is conducting.[47]

This analogy makes no distinction between commercial and non-commercial advertising, or between an advertisement and a news story. The overly broad language of the analogy would seem to be of little consequence except for the fact

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[45] Munn v. Illinois, 94 U.S. 113 (1876).

[46] Nebbia v. New York, 291 U.S. 502 (1934).

[47] Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813, 815 (1933).

that other courts have quoted it for authority.[48] One may well want to guard against the wholesale invasion of a newspaper's news columns, even of a monopoly paper as found in the Shuck case, but the court should have asked whether requiring a monopoly paper to treat all advertisers on equal terms would really be a threat to the editorial autonomy of the paper.

It was not until 1961, in J. J. Gordon v. Worcester Telegram,[49] that a court framed the monopoly newspaper question in precise terms for the first time, but then failed to answer it directly. Plaintiff was a real estate broker who had been advertising in the papers owned by the Worcester Telegram Publishing Comapny, the only publisher of daily papers of general circulation in the Worcester, Massachusetts, area. After the company declined to accept any more advertisements, Gordon went to court claiming that the papers were a "publicity utility" in the area and that it was an absolute necessity that he be allowed to advertise in them.

The court stated the monopoly issue well: "Thus the question narrows to whether the publisher of a newspaper

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[48] Approved Personnel v. Tribune Co., 177 So. 2d 704, 706 (Fla. 1965); Bloss v. Federated Publications, 5 Mich. App. 74, 145 N.W.2d 800, 804 (1966).

[49] J. J. Gordon v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961).

who enjoys a virtual monopoly in a given area . . . may refuse to accept an advertisement if he sees fit to do so."[50]

In answer to the question, the court repeated the general rule about newspapers being private enterprises, not affected with a public interest.[51] The court then tried to answer whether a monopoly paper, in particular, was strictly a private business:

> Although the precise question here involved has not often been before the courts, the prevailing view in the few cases that have considered the question--and in our opinion the correct one--is that the publisher of a newspaper is under no obligation to accept advertising from all who may apply for it.[52]

For authority the court cited Shuck,[53] Friedenberg v. Times Publishing Co.,[54] and Poughkeepsie Buying Service v. Poughkeepsie Newspapers.[55] While the papers in Shuck and Poughkeepsie were themselves monopoly newspapers, in none of the three cases cited by the Gordon court was monopoly an issue. All of the precedents cited by the Gordon

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[50]Ibid., p. 587. [51]Ibid., p. 588. [52]Ibid.

[53]Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933).

[54]170 La. 3, 127 So. 345 (1930). Friedenberg was a case in which the Supreme Court of Louisiana upheld the legality of the Times Publishing Company's refusal to accept commercial advertisements because of plaintiff's past advertising debts.

[55]205 Misc. 982, 131 N.Y.S.2d 515 (Sp. Ct. 1954). The only general circulation newspapers in Poughkeepsie, New York refused advertisements from a local merchant. The court denied relief to the merchant, arguing the private nature of the newspaper business.

court were decided in the context of private business rights to make contracts in a competitive economy. None of the precedents had made any distinction between monopoly and competitive newspapers, nor had they been concerned about the monopoly issue, though they had as much reason to be as had the Gordon court.

By asking if a distinction might be made between monopoly and competitive newspapers, and then answering "no" by citing Shuck, Friedenberg and Poughkeepsie, the Gordon court officially brought monopoly newspapers into the main stream of common law rulings without ever examining the monopoly issue. The chance of clothing a newspaper, or at least its advertising function, with a public interest was again bypassed.

"The court in Gordon, by its failure to concern itself with the presence of a monopoly enjoyed by the defendant, was in essence condoning its existence."[56] This is a far cry from Brandeis's admonition to decide, based on "the conditions existing in the community affected," if, and how much, regulation of a business the public interest requires.[57]

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[56]Hurley D. Smith, "Torts--Newspapers--Publishers of a Newspaper Under No Obligation to Accept Advertising," Notre Dame Lawyer, XXXVII (May, 1962), 581.

[57]See above, text accompanying note 12.

In Approved Personnel v. Tribune Co.,[58] a 1965 case in Florida, the monopoly newspaper issue was again squarely before a court. An employment agency which had been placing classified advertisements in the Tribune Company's Tampa Tribune and Tampa Times was told that no more advertisements would be accepted. No reason was given why Approved Personnel could no longer advertise in Hillsborough County's only English language dailies, while competitors of the employment agency were allowed to continue to place advertisements. The plaintiff alleged that the Tribune Company was exercising monopolistic practices in restraint of trade and sought injunctive relief.

The Florida court, in holding that a monopoly paper is a private business said, "The decisions appear to hold that even though a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance."[59] Monopoly has certainly never been unusual in a case; it has appeared in several of them. But it is only because the courts failed to deal with the existence of monopoly and its potential or actual abuses, that monopoly has appeared to be of "little significance."

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[58] 177 So.2d 704 (Fla. 1965).

[59] Ibid., p. 706.

For authority, the Florida court quoted the tea analogy from Shuck,[60] quoted from Poughkeepsie where, as in Shuck, monopoly was not the issue,[61] and quoted Gordon on the monopoly issue.[62]

With Gordon now being cited as authority, earlier cases can fade into the background. The holding that monopoly newspapers, like competitive papers, are private businesses, free of the obligations of public interest enterprises, can become firmly entrenched in the law. The legal reasoning dealing with the flimsiest, most transcient city daily of decades ago continues in uninterrupted flow to be applied to the powerful monopolistic newspaper empires of today, without judicial consideration of the economic changes. Perhaps the consistent holding that a newspaper is strictly private business is the best ruling and should not be altered. But at least it seems that the courts should reflect in their decisions an awareness of the economic realities of the cases they are deciding.

One reason employed by some courts to avoid serious consideration of the monopoly issue was that there was no charge or evidence of antitrust violations on the part of

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[60] Ibid.; See above, text accompanying note 47.

[61] Ibid., p. 707; See above, note 55.

[62] Ibid., pp. 707-708; See above, text accompanying note 52.

the defendant newspapers.[63] The court in Poughkeepsie stated that newspapers' reasons for rejecting an advertisement are immaterial "absent factual allegations connecting them with a duly pleaded fraudulent conspiracy or with furthering an unlawful monopoly."[64] A secure monopoly business does not need to act in "conspiracy," however, so it is questionable if monopoly newspapers could be successfully prosecuted under the antitrust laws. The general proposition of creating antitrust legislation to break up newspaper ownership is discussed in Chapter IV.

Another common claim used by the courts to explain their failure to deal directly with the monopoly question was that the responsibility to regulate a business in the public interest lies with the legislatures, not with the courts.[65] In Approved Personnel the court virtually invited the plaintiff to petition the legislature for a

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[63]Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.W. 400 (1924); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515 (Sp. Ct. 1954); J. J. Gordon v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961).

[64]Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515, 518 (Sp. Ct. 1954).

[65]Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.W. 400 (1924); Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); Friedenberg v. Times Publishing, 170 La. 3, 127 So. 345 (1930); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 516 (Sp. Ct. 1954); Approved Personnel v. Tribune Co., 177 So.2d 704 (Fla. 1965).

change in the newspaper laws if he had a just complaint as it appeared he might.[66]

"As a rule," Hall writes, "the legislative branch of the government is the one which takes the initiative in determining that a business is public by imposing upon it certain duties or regulations."[67] But clearly, courts have an important negative power which could nullify a legislative determination that a business is clothed with a public interest. In Mack v. Costello, the court did not invite the legislature to enjoin papers to publish public notices. It is "the plain duty" of the legislature, the court said, to find a way of publicizing notices "other than through the columns of the newspapers."[68] The Boston Transcript court declared a state statute requiring the publication of administrative findings to be unconstitutional.[69] In the Wolff Packing Company case, the U.S. Supreme Court claimed the right of review of the constitutionality of any regulation resulting from legislative determination that a business is affected with a public interest.[70]

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[66]Approved Personnel v. Tribune Co., 177 So.2d 704, 709 (Fla. 1965).

[67]Hall, Concept of a Public Business, p. 90.

[68]Mack v. Costello, 32 S.D. 511, 143 N.W. 950, 952 (1913).

[69]Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.W. 400 (1924).

[70]Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas, 262 U.S. 522 67 L.Ed. 1103, 1109 (1922).

Presumably a court, in exercising its right of review of a particular legislative regulation imposed on a public business, would consider the economic structure of the business in question and the public needs. This is what is asked of the courts when plaintiff advertisers, with commercial or editorial advertisements, seek judicial relief from monopoly abuses of newspapers.

Besides having negative powers, courts can take affirmative action on their own. While the initiative is usually left to the legislatures to declare a business in the public interest, "courts have sometimes declared a business to be public which had not previously been recognized as such by the legislature."[71] The public callings of cabmen, ferrymen and inn keepers developed out of early common law.[72] In Tallassee Oil and Fertilizer v. Holloway,[73] the Alabama Supreme Court held that a near-monopoly cotton ginning business was affected with a public interest and could be prohibited by the court from requiring customers to sell their cotton seeds to the company as a condition for ginning their cotton.

The only case in which a newspaper was held to be affected with a public interest was Uhlman v. Sherman, a

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[71]Hall, Concept of a Public Business, p. 90.

[72]Ibid., p. 8.

[73]200 Ala. 492, 76 So. 434 (1917).

case decided by a common pleas court, which has never been followed.[74] Uhlman brought suit to enjoin Sherman and two other competing merchants from coercing the local newspaper publisher to refuse Uhlman's commercial advertisements. Uhlman also sought an injunction to restrain the publisher, Crescent Printing Co., from refusing his advertisements.

In discussing the economic scope of a newspaper and the importance of the press in American life, the low court in Ohio dealt with the important criteria of monopoly, necessity and holding out that should be considered in determining if a newspaper is clothed with a public interest:

> Newspapers in this country have become universal. They are now practically in every home. They give to the people daily the news from all quarters of the globe . . . They are favored by law, with the publishing at a liberal price of sheriffs' sales, financial reports of city and county officers, sales of county and municipal bonds, . . . rates of taxation, . . . and many other public notices of various kinds. These all add to the interests of the public in the business and serve to make it a success, and cause the public to depend on newspapers for knowledge of these matters of public concern which vitally affect every citizen and taxpayer. We believe that the growth and extent of the newspaper business, the public favors and general patronage received by the publishers from the public, and the general dependence, interest and concern of the public in their home papers, has clothed this particular business with a public interest and rendered them amenable to reasonable regulations and demands of the public.[75]

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[74] Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225 (C.P. Ct. Defiance County 1919).

[75] Hall, Concept of a Public Business, pp. 41-42, quoting Uhlman v. Sherman.

While the court's social awareness was perhaps admirable, its use of precedent was less sound, and the holding was ambiguous. "We do not intend to hold that a newspaper company may not reject some class or classes of advertising entirely," the court said. "We are of the opinion, however, that the rules should be reasonable and applicable to all persons in the same class."[76] What the favored classes should be was not discussed.

The Uhlman decision, written in 1919, has never been followed, but the reasoning in it is not dead. In 1966, Justice Adams of the Michigan Supreme Court renewed the argument for considering at least the advertising columns of a newspaper as being clothed with a public interest. In his dissent in Bloss v. Federated,[77] Adams argued that it is within the proper judicial role for courts to consider the criteria of monopoly and holding out to determine if newspapers, particularly their advertising function, should be regulated. In making his argument Adams distinguished clearly between a newspaper news columns and advertising space.

> Certainly our decision should not be so broadly stated as to preclude future plaintiffs--political candidates, commercial enterprises, governmental units--from the

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[76] Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225, 234-235 (C.P. Ct. Defiance County 1919).

[77] Bloss v. Federated Publications, 5 Mich. App. 74, 145 N.W.2d 800 (1966) aff'd. 380 Mich. 485 (1968).

> right to insist upon access to newspaper coverage upon equal terms where a newspaper controls the sole means of daily paid printed communication within a given area and the newspaper has held itself out generally to the public as affording such means of communication, subject to its rules and regulations. The issue in this case is not one of freedom of the press to control its news columns but, rather, the right of one person to have published in a newspaper paid advertising upon the same terms and conditions the newspaper has set for other like persons.[78]

Conclusion

A review of the legal notice and commercial advertising cases from 1913 to 1968 substantiates that the courts have consistently held that newspapers are private businesses which are free to make or not make contracts for advertising space. Courts relied heavily on the laissez-faire economic argument that private business must be independent.

Even as the monopoly issue became more prominent in recent cases, judges did not evaluate the alleged monopoly of the defendant papers. By relying on cases which did not deal with monopoly, the courts brought monopoly newspapers under the same general rulings as competitive papers without ever giving fair weight to changes in economic conditions.

Some courts claimed that they could not provide remedy, even if there were monopoly abuses, because no charges were brought under the antitrust laws or because regulation is strictly a legislative responsibility.

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[78] Ibid., p. 491.

Regulation of public businesses is primarily a legislative responsibility, but the courts do have leeway for taking independent action to prevent an injustice.

The courts' rulings in the commercial advertising cases may be the soundest for the American economy as well as for freedom of the press, but it is regrettable the courts paid little attention to the important criteria of monopoly, holding out and necessity to judge whether a newspaper should be clothed with a public interest. This might seem excusable if the courts had relied on First Amendment prohibitions against interference with the press. But First Amendment freedoms were not important considerations for the courts. The fact that the courts decided these cases on the grounds of private business contract, rather than First Amendment protections, emphasizes the commercial nature of newspaper advertising.

Had the courts looked more closely at the newspapers in question, they would have found several monopoly newspapers on which advertisers as well as the general public depended. Had the courts wanted to, they could have decided if newspapers in fact do hold their advertising space out to the general public.

CHAPTER III

LEGAL ANALOGUES FOR EXPANDED ACCESS, AND JUDICIAL RESPONSES

Between 1900 and 1968, several newspapers were involved in litigation over the rejection of advertising. While some of the newspapers concerned were monopolies in their communities, the central issue in these cases was not monopoly abuse nor First Amendment questions of robust debate. Courts showed more awareness of the existence of monopoly in more recent cases, but, in general, judges were concerned with the rights of private newspapers to refuse unwanted advertising contracts.

It is only recently that litigation has been undertaken against allegedly monopolistic papers in the name of First Amendment freedoms. Several legal analogues, elaborated by Jerome Barron in law review articles, have been argued in privately owned newspaper advertising cases in an attempt to open the papers up, usually to editorial advertisements.

While continuing to hold that private newspapers can reject any and all advertising, the courts still are not facing squarely the First Amendment or monopoly issues, but

the argument for expanded access, in the name of free speech, has moved from the law review to the courtroom.

The concern for robust debate is one legitimate reason for wanting to require newspapers to accept editorial advertising; a more practical, but less lofty goal, however, is to want to require newspapers to accept all legal advertising, editorial or commercial, on a non-discriminatory basis. Such a goal serves First Amendment purposes, and at the same time keeps the legal rationale in a commercial--as well as equal rights--context where courts seem to feel more comfortable.

When arguing for a legal right of access to the press, one has only to look to broadcasting for legal parallels. Broadcasting has long been licensed and regulated in the "public interest." Broadcast regulation was initiated because the demand for use of the limited number of broadcast channels was too great.[1]

Unlike newspaper publishers, broadcasters have legal obligations to present diversified points of view. The Federal Communications Act of 1934 required broadcasters to provide "equal time", if requested, to all legitimate political candidates if time was given to one.[2] Amended to

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[1]Harold L. Nelson and Dwight L. Teeter, Law of Mass Communications (Minneola, N.Y.: Foundation Press, 1969), p. 407.

[2]See, Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367, 370 (1969), note 1.

the Act in 1959 was the "fairness doctrine", which puts an affirmative responsibility on broadcasters "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[3]

Two recent court cases have expanded the public interest concept of broadcasting. In what Jerome Barron considers "one of the most significant cases in public law in recent years," a federal circuit court held that responsible representatives of a community could contest a television license renewal before the Federal Communications Commission.[4] Previously, FCC regulations declared that only individuals or groups which had been interfered with economically or electrically had "standing" before the commission to contest a license renewal.[5]

The federal circuit court held that the United Church of Ghrist had standing before the commission to protest abuses by WLBT, TV in Jackson, Mississippi. Representing the Negroes who make up 45 per cent of the population in the station's prime viewing area, the United Church of

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[3] Ibid.

[4] Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, LXXX (June, 1967), 1664; discussion of Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966).

[5] Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1000 (D.C. Cir. 1966).

Christ charged that Negroes were given less television exposure than others on the station and that what exposure there was often was disrespectful.[6] The federal court believed that some "audience participation" must be allowed in license renewal proceedings.[7]

Barron writes of the decision: "Church of Christ marks the beginning of a judicial awareness that our legal system must protect not only the broadcaster's right to speak but also, in some measure, public rights in the communications process."[8] Barron would like to see the public rights with regard to broadcasting extended to newspapers, but the court in Church of Christ was careful to distinguish between the need for regulation of limited broadcasting channels and the freedom to publish.[9]

"But can a valid distinction be drawn between newspapers and broadcast stations, with only the latter subject to regulation?" Barron asks.[10] For Barron, the existence of powerful monopoly newspapers and the fact that cities are served by more broadcast stations than newspapers makes the

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[6] Ibid., p. 998. [7] Ibid., p. 1005.

[8] Barron, "Access to the Press," p. 1665.

[9] Ibid. Barron quotes the court: "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim and caprice of its owners; a broadcast station cannot."

[10] Ibid., p. 1666.

"limited channels" argument obsolete.[11] He believes that newspapers deserve to be regulated as much as broadcasting.

In a more recent broadcasting decision, the U.S. Supreme Court affirmed a lower court ruling upholding the constitutionality of the FCC's "fairness doctrine."[12] The court held that stations must offer a chance for reply, without charge, to anyone who is "attacked" on the air. To Barron, Red Lion is

> not just a broadcast case. It is a media case. It represents a look at the first amendment in the light of new social realities of concentration of ownership and control in a few hands that has been produced by the twin developments of media oligopoly and technological change.[13]

Barron was impressed by the court's interest in the public's right to a wide range of ideas rather than a single concern for the rights of broadcasters. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here," the court said.[14]

Barron would like to see the principle of fairness extended to newspapers. He recognizes that the fairness

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[11] Ibid.

[12] Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367 (1969).

[13] Jerome A. Barron, "Access--The Only Choice for the Media?" Texas Law Review, XLVIII (March, 1970), 771.

[14] Ibid. Here Barron quotes from Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367, 390 (1969).

doctrine has frequently worked unevenly in broadcasting,[15] but this does not, in Barron's view, detract from the value of the goal of fairness. "What is necessary is not to point to the lack of a 'fairness' principle with regard to the legal responsibilities of newspapers but rather to point to the 'fairness' principle as a standard which should have some analogue in the press as well."[16]

The broadcasting analogue has been argued in one newspaper case, unsuccessfully, since Barron's discussion of it. Associate and Aldrich v. Times Mirror Co., plaintiff tried to get defendant newspaper company to print without alteration an advertisement for the film, The Killing of Sister George.[17] A minor part of plaintiff's argument was that the fairness doctrine, as declared constitutional in Red Lion, should govern in a newspaper case. The court relied on the "limited channels" argument to distinguish between the need to regulate broadcasting, but not newspapers.[18]

The courts think of "freedom of the press" as anything from the publication of the New York Times to the printing of handbills in a cellar. Powerful newspapers do

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[15] Jerome A. Barron, "An Emerging First Amendment Fight of Access to the Media?" George Washington Law Review, XXXVII (March, 1969), 503.

[16] Ibid., p. 504.

[17] Associates and Aldrich v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).

[18] Ibid., p. 136.

have much in common with network television, as Barron points out, but the fact remains that there are unlimited opportunities, with little capital, for starting a small newspaper and having it grow.[19] Broadcasting, however, involves a considerable initial capital investment and, to date, a finite number of channels.

Newspaper publishing should not be regulated by the government like broadcasting because the two are different. A right of reply is perhaps a good requirement for broadcasting, but it is too broad a requirement for newspapers. Newspaper editors should retain their powers of selection, even editors of monopoly newspapers.

What should be required of newspapers is that the part which they hold out generally to public use, their advertising function, should be accessable to all lawful advertisers without discrimination. If the advertisement in question in Aldrich was not "obscene" under present laws,

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[19]Clifton Daniel, of the New York Times, relates that Norman Mailer and Edwin Fancher, who started the Village Voice in the 1950's, began to turn a profit after investing only $70,000. In 1969 it had a circulation around 127,000. See Clifton Daniel, "Right of Access to Mass Media--Government Obligation to Enforce First Amendment?" Texas Law Review, XLVIII (March, 1970), 789. It has been estimated that 150,000 read American "counter-culture" newspapers like the Los Angeles Free Press and Detroit's Fifth Estate. See Edwin Diamond, "Multiplying Media Vices," Columbia Journalism Review, VIII (Winter, 1969-1970), 23. The dominant black newspapers of 25 years ago--Pittsburgh Courrier, Chicago Defender and Baltimore Afro-American--have been seriously challenged for circulation by more militant papers like the Black Panther and Muhammed Speaks. See L. F. Palmer, Jr., "The Black Press in Transition," Columbia Journalism Review, IX (Spring, 1970), 31.

it is regrettable that the court did not require the newspaper to accept it. But plaintiff, as well as Professor Barron, is speaking too broadly in this writer's opinion, in arguing that a newspaper should accept a paid commercial advertisement because broadcasters must offer a free right of reply. Fairness as a principle is admirable for both broadcasting and publishing, but an editor cannot be regulated into "fairness."[20] A businessman, however, might be required to serve all lawful advertising customers equally.

Barron has two other important analogues, besides broadcasting cases, supporting his argument that the press should be opened up to editorial advertising and right of reply. One legal trend Barron notes is an expanding right of public access to governmentally controlled property. Barron hopes that this concept of a public forum will extend to private newspapers. The other legal trend cited by Barron is the blurring in some cases of the usual definitions of private and public property. In these cases, courts allow the public exercise of First Amendment privileges on private property because the property has become like a public facility. Barron argues that privately owned monopoly newspapers should be considered public facilities.

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[20]It is doubtful that a broadcaster can either. See Glen O. Robinson, "The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulation," Minnesota Law Review, LXVII (November, 1967), 67-163.

Before presenting these cases, it is necessary to discuss the concept of "state action," because all of these cases are dependent on it. To overcome the newspaper editor's traditional right to refuse advertising, . . . "the most formidable obstacle to be overcome is the state action concept of the Fourteenth Amendment. There must be either a circuitous path around the concept, or the newspaper industry must be shown to qualify under state action."[21] To date, no circuitous path has been found, nor have courts come close to considering newspapers to act with any state authority.

The Bill of Rights was established as a limitation on the powers of the federal government. Under the First Amendment, the federal government was prohibited from interfering with the operation of the press. The passage of the Fourteenth Amendment in 1868 extended to the residents of the individual states the "equal protection of the laws." State governments were thereby prohibited from proscribing individual freedoms which the federal government itself could not proscribe.

However, "the prohibitions of the Fourteenth Amendment apply only to state action and not to conduct in the private sector."[22] Therefore, if a private individual or

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[21]William M. Douberley, "Resolving the Free Speech--Free Press Dichotomy: Access to the Press Through Advertising," University of Florida Law Review, XXII (Fall, 1969), 311.

[22]Burton V. Wilmington Parking Authority, 365 U.S. 715, 721 (1961).

business violates the First Amendment rights of another individual, the injured party cannot sue in federal court unless state action can be shown.

Private conduct may be considered state action only when it is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[23] To claim that a privately owned newspaper has violated an advertiser's first amendment right of free expression, the plaintiff must show that the newspaper's denial was largely attributable to the requirements of the government.

To Barron, this requires a rather "rabid conception" of state action. He writes:

> A right of access to the pages of a monopoly newspaper might be predicated on Justice Douglas's open-ended 'public function' theory which carried a majority of the Court in Evans v. Newton, Such a theory would demand a rather rabid conception of 'state action', but if parks in private lands cannot escape the stigma of abiding 'public character,' it would seem that a newspaper, which is the common journal of printed communication in a

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[23] Evans v. Newton, 382 U.S. 296 (1965) as quoted in Resident Participation of Denver v. Love, 322 F. Supp. 1100, 1102 (D. Colo. 1971). The prohibition against individuals violating the constitutional rights of others "under color" of state authority was embodied in the Civil Rights Act of 1871: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States.. to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (43, U.S.C.A., section 1983, p. 201).

> community, could not escape the constitutional restrictions which quasi-public status invites. . . . If monopoly newspapers are indeed quasi-public, their refusal of space to particular viewpoints is state action abridging expression in violation of even the romantic view of the first amendment.[24]

Barron does not discuss state action at great length, but he does rely on several cases involving state action as analogues for a guaranteed right of access to the press. Barron does not argue strongly that newspapers are imbued with state action, but, as Douberley says,[25] the concept of state action is a formidable obstacle to expanded access to the press.

In three recent cases where newspapers have refused editorial or commercial advertisements, plaintiffs have claimed the newspapers' action to be illegal state action in violation of the first and fourteenth amendments.[26] While the courts, in their decisions, refute the state action claim, they do not examine the monopoly powers of the newspapers involved.

The group of cases which appears to support a right of access to private newspapers is a group that expands the

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[24]Barron, "Access to the Press," p. 1669.

[25]See above, text accompanying note 21.

[26]Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970); Resident Participation of Denver v. Love, 322 F. Supp. 1100 (1971); Associates and Aldrich v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).

right of access to public places and publications that had not previously been open for public expression. In Kissinger v. New York City Transit Authority, the federal district court ruled that a municipal transit authority could not, through its hired advertising agency, refuse anti-war advertisements for its subway stations simply because they were "entirely too controversial."[27] The private advertising agency's refusal to accept the advertisements was considered a "state action" by the court because the transit authority was created by the New York State Legislature as a "public benefit corporation."[28]

Barron recognizes that this case depended on a concept of state action, [29] but he thinks it significant that the

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[27]Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 443 (S.D.N.Y. 1967). Two similar cases in which courts ruled that public transportation agencies that offered advertising space could not arbitrarily refuse to accept controversial political advertisements are Wirta v. Alameda-Contra Costa Transit District, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) and Hillside Community Church v. City of Tacoma, 455 P.2d 350 (Wash. 1969). In Wirta, a group of Women for Peace were denied permission to post anti-war advertisements in publicly operated motor coaches. The California court ruled that the transit authority, "having opened a forum for the expression of ideas by providing facilities for advertisements on its busses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection." pp. 984-985. The transit authority had refused the advertisements on the ground that it took no political advertisements except during election campaigns.

[28]Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 441 (S.D.N.Y. 1967).

[29]Barron, "An Emerging First Amendment Right," p. 489.

private advertising company which represented the transit authority was named as defendant with the authority. "For one thing," Barron writes, "if the New York Advertising Company is a private company, then it is the first time in American law where a court has suggested that a private organization has a constitutional duty not to deny freedom of expression to those with whom it deals."[30]

It is appealing to think of a newspaper advertising department as analogous to the advertising agency in Kissinger. Unfortunately the judicial distinction is clear. The private advertising agency was acting in the name of a transit authority created by the state and supported by public funds.

The important point of the case, however, is not whether the advertising firm was public or private, but the fact that the public subway could not refuse a lawful advertisement because of its political content. By analogy, it would seem reasonable to prohibit a private newspaper, which holds its advertising space out generally to all customers, from discriminating against lawful, but perhaps unpopular advertisements, if state action is present or not.

Barron suggests further that the Kissinger decision may presage the development in the subways of an affirmative obligation, such as that imposed on broadcasters, to seek conflicting points of view.

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[30] Ibid.

> The significance of Kissinger is the court's indication that merely abandoning controversy might not satisy the subway's constitutional obligation; the court raised without deciding the question of whether public entities such as the Transit Authority have an affirmative obligation to facilitate presentation of controversial public issues.[31]

It seems unlikely to this writer that any company, private or public, would ever be required to seek paid advertisements representing divergent points of view.

In another state action case, Wolin v. Port of New York Authority,[32] the federal district court held that Wolin had the First Amendment right to distribute antiwar literature in the New York City Port Authority Terminal, "property essentially dedicated to public use."[33] The court pointed out that the terminal was designated by the state legislatures "in all respects for the benefit of the people of the states of New York and New Jersey. . . . " Evidence of the public nature of the building includes the fact that its securities are tax exempt, the terminal's main concourse is lined with public shops and services, and thousands of pedestrians pass through it everyday.[34]

Barron sees in Wolin an awareness on the part of the court of the realities of changing living patterns. The court considered the bus terminal to be much like a street,

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[31] Ibid., p. 490.

[32] 268 F. Supp. 855 (S.D.N.Y. 1967), aff'd. 392 F.2d 83 (2nd Cir. 1968).

[33] Ibid., 268 F. Supp. 859 (S.D.N.Y. 1967).

[34] Ibid., 268 F. Supp. 860 (S.D.N.Y. 1967).

with the same rights for expression attendant. "This approach recognizes that the scope of permissable uses of governmentally controlled facilities for the expression of opinions must be broadened if the First Amendment is to be relevant to the mass transportation realities of urban life."[35]

Also significant to Barron was the appeals court's recognition that it is sometimes important for protest to have a forum "where the relevant audience may be found."[36] Barron thinks, "The Second Circuit's concern that dissent or protest have an audience is an important and novel development in first amendment case law." Barron recognizes the existing legal difference between a public forum and a private newspaper, but he thinks that once the concern for access is recognized by the courts, judicial decisions expanding right of access will spread beyond public forums.[37]

The concepts of a "public forum" and "relevant audience" may eventually extend to privately owned newspapers as the concepts are now being applied to a broader range of governmentally controlled property. The author of this paper would hope that if they are extended it would not

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[35]Barron, "An Emerging First Amendment Right," p. 490.

[36]Ibid., p. 491. Hundreds of soldiers on leave, who presumably might have been interested in Wolin's literature, passed through the terminal every day.

[37]Ibid.

be beyond a requirement that newspapers accept lawful advertisements indiscriminately. It is doubtful that these concepts could surmount the state action barrier to be applied to private newspapers, but they have already been extended to newspapers supported by state supported institutions which did meet the state action test.

In 1969, two plaintiffs managed in federal courts to require newspapers published by state-supported institutions to print editorial advertisements. In Zucker v. Panitz,[38] and Lee v. Board of Regents of State Colleges,[39] plaintiffs brought suit claiming violation of First and Fourteenth Amendment rights and denial of civil rights under section 1983 of the Civil Rights Act of 1871.[40]

Zucker concerns a high school newspaper in New Rochelle, New York which had been barred by the principal from accepting an antiwar advertisement from a student group. Board of Regents involves refusal of the newspaper of the Whitewater branch of the Wisconsin State Univeristy System to publish a paid antiwar advertisement. In ruling for the plaintiffs, both federal courts cited Wirta and Kissinger for support.[41] Both judges were aware of Barron's

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[38] 299 F. Supp. 102 (S.D.N.Y. 1969).

[39] 306 F. Supp. 1097 (W.D. Wisc. 1969).

[40] See above, note 23.

[41] See above, note 27 and accompanying text.

Harvard Law Review article,[42] and both thought that newspapers published by state supported-educational institutions were clearly "forums" for expression that should be open to widely divergent views.[43] In restricting their rulings to the educational environment, the courts seemed to be applying the "relevant audience" concept set forth in Wolin v. Port of New York Authority.[44] These decisions on school newspapers might well have much broader implications however, as Barron points out.

> The only student newspaper in a high school does not occupy a very different role in terms of community dependencies and expectations than does the only daily newspaper in a community. The daily press is also meant to serve an educational function in its role as supplier of information to the public. Surely the only newspaper

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[42] Zucker v. Panitz, 299 F.Supp. 102,104 (S.D.N.Y. 1969); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097, 1101 (W.D. Wisc. 1969).

[43] Zucker v. Panitz, 299 F.Supp. 102,105 (S.D.N.Y. 1969); Lee v. Board of Regents of State Colleges, 306 F.Supp. 1097,1101 (W.D. Wisc. 1969). The court in Regents said: "As a campus newspaper, the Royal Purple constitutes an important forum for the dissemination of news and expression of opinion. As such a forum, it should be open to anyone who is willing to pay to have his views published therein--not just to commercial advertisers."

[44] See note 36 above and accompanying text. An earlier case which helps to muddy the waters regarding publications of state-supported institutions is Avins v. Rutgers, the State University of New Jersey, 385 F.2d 151 (3rd Cir. 1967), in which the federal appeals court upheld the right of the editor of the Rutgers Law Review to refuse publication of an article submitted to him.

In Avins state action was not brought forth as an issue, though it is clear that the plaintiff based his claim on the fact that the law review was published by a state-supported university and was therefore "a public

> in a city can be assigned quasi-public status for the purposes of providing access for banished ideas by way of advertisement and right of reply.[45]

Barron's willingness to impose a right of reply upon private newspapers is perhaps too great a departure from traditional constitutional interpretations of a free press. Imposing a right of reply on private newspapers would also place an unworkable editorial burden on the courts. But requiring privage newspapers "to be open to anyone who is willing to pay to have his views published therein--not just to commercial advertisers"--would promote robust debate without interfering with editorial independence.

While the concept of right of access has expanded in buildings and newspapers supported by public funds, there has been no parallel extension of the right to publish commercial or non-commercial advertisements in privately owned

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instrumentality in the columns of which all must be allowed to present their ideas . . ." (Avins, p. 152).

The judge ruled that even in a publication of a state-supported institution editorial decisions of selection must be made. The editors of the law review were within their legal rights declining the plaintiff's article. (p. 153) "The right to freedom of speech," the court said, "does not open every avenue to one who desires to use a particular outlet for expression."

The fact that the publication in this case was a law review instead of a newspaper, and that the material submitted was an article instead of a paid advertisement, perhaps distinguishes this case from Board of Regents and Zucker. But certainly editors of state-supported newspapers have editorial functions analogous to those of the editor of a law review. It would perhaps have made issues clearer had the judges in Zucker and Board of Regents attempted to establish a definite distinction.

[45]Barron, "Access--the Only Choice?" p. 777.

newspapers. To date the cases which expand public access to governmentally controlled property--Kissinger, Wolin, Zucker, and Board of Regents--have not been employed by the plaintiffs in any cases in an attempt to force the acceptance of paid advertisements by privately owned papers.

Another analogue used by Barron to argue for an expanded access to the press is the "blurring" of the distinction between privately owned property and publicly owned property.[46] Cases from this argument have been used unsuccessfully in an attempt to force newspapers to accept editorial advertisements.[47]

In Marsh v. Alabama the United States Supreme Court held that the main street of a company owned town had the same function for the dissemination of ideas as the business section of a municipality where streets have always been legal places in which to propagate ideas.[48] The court said that it was a violation of a Jehovah's Witness' First Amendment rights of expression for a company policeman to block her from handing out literature on the town's main street. Even though the Jehovah's Witness was blocked by a private

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[46]Barron, "An Emerging First Amendment Right," p. 494.

[47]Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970); Resident Participation of Denver v. Love, 322 F.Supp. 1100 (1971).

[48]Marsh v. Alabama, 326 U.S. 501, 508 (1946).

company, the federal court had jurisdiction under the state action concept because the company policeman arrested her under authority of an Alabama trespassing law. The court said:

> Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.[49]

The court continued:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.[50]

In Marsh the conflict was the same as in newspaper cases: should private rights of property prevail over those of the first amendment? If one thinks of the First Amendment in affirmative terms, as actively assuring a robust debate, then the language in Marsh can be easily used in arguing for an expanded right of access.

A more recent case, in which the supreme court relied on Marsh v. Alabama, is Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza.[51] The court said that a shopping plaza is suburbia's business block, and that the state's trespass laws could not be used to block the exercise of First Amendment rights. Barron sees in this

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[49] Ibid., 507. [50] Ibid., 509

[51] 391 U.S. 308 (1968).

decision, as he did in Wolin,[52] a recognition by the court of changing economic and social patterns. The growth of monopoly newspapers is a part of this change.

> What is truly significant about Logan Valley is that it represents a confrontation between modern land use and the first amendment . . . in Logan Valley the Court attempts to point out the significance which the shopping center has acquired in American life. The Court reasoned that in the automobile-centered suburb, the shopping center is a focal point for the community, so that access to its parking lot may be indispensible to secure access to the community. The blurring of what is 'private' and what is 'public' which has come to characterize so much of our life, eventually may create an access-oriented approach to first amendment values which will endow any natural or obvious forum in our society with responsibilities for stimulating the communication of ideas.[53]

In two recent cases, Amalgamated Clothing Workers of America v. Chicago Tribune[54] and Resident Participation of Denver v. Love,[55] Marsh and Logan Valley have been cited in a futile attempt to require publication of lawful editorial advertisements. The first judicial feedback to Barron's ideas concerning privately owned media are found in these cases. The judge in the Love case took considerable time to reject Barron's arguments directly.

In Clothing Workers, the union brought suit against the Chicago Tribune Company, the Chicago American Publishing

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[52]See above, text accompanying note 35.

[53]Barron, "An Emerging First Amendment Right," pp. 493-494.

[54]435 F.2d 470 (7th Cir. 1970).

[55]322 F.Supp. 1100 (1971).

Company, and Field Enterprises, together the publishers of the four major Chicago dailies of general circulation. The papers, apparently acting independently, refused to publish a union advertisement protesting the sale of imported clothing at Marshall Fields department store. The union claimed that refusing to publish was a state action which abridged the union's First Amendment right of free expression and Fourteenth Amendment right to equal protection under the laws.

Field Enterprises, publisher of the Chicago Sun-Times and the Chicago Daily News, refused to publish the editorial advertisement on the ground that it does not print advertisements that name others unless the named parties consent.[56] The Tribune said that the advertisement was rejected under a section of the paper's advertising acceptability guide which provides for rejecting any advertisement which "reflects unfavorably on competitive organizations, institutions or merchandise," or that is "misleading." Ultimately the paper "reserves the right to reject any advertising which, in its opinion, is unacceptable."[57]

In an attempt to argue that the newspapers' refusal was a "state action," the union tried to establish a close relationship between the papers and the government. The

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[56] Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470,473 (7th Cir. 1970).

[57] Ibid.

union noted that an Illinois statute exempts several categories of newspaper employees, including reporters, from jury duty. Illinois law also obligates newspapers to publish certain legal notices, such as notice of elections and municipal ordinances. State statute excludes newsprint and ink from use taxes. A Chicago city ordinance restricts newsstands on public streets to the sale of papers published in the city of Chicago, giving the newspapers, the union argued, special market privileges. The union also argued that the newspapers have special government privileges in being allowed to use rooms in public buildings specifically designated for news gathering purposes. The union also claimed that the four newspapers, all making the same decision not to publish, formed a monopoly of Chicago's general distribution papers. As supporting precedent, the union cited Marsh v. Alabama, and Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, among others.[58]

The circuit court in distinguishing away Marsh and Logan Valley, reverted to the now familiar language of what constitutes "holding out" a business to the public use, and reiterated the basic right of private businesses to make contracts.

> The sidewalks and streets of a company town or a shopping center bear little analogy to the printing press, its product, and the distribution system of a newspaper

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[58] Ibid., P. 473-474.

> publisher. Unlike the company town or the shopping center, none of the defendants has consented to unrestricted access by the general public to its advertising columns or pages. Such access is a matter of private contract. Nor in the publication of its newspapers has any of the defendants assumed the performance of a public function which carries with it a concomitant obligation to each member of the general public.[59]

The owners of the company town and the shopping center might be surprised to know that they "consented to unrestricted access by the general public." The fact that these owners had members of the general public arrested for exercising their First Amendment rights would seem to indicate they did not willingly consent to an unrestricted use of their property. Willingly or not, however, the owners of the town and plaza did consent to a general public access. Publishers of large, general circulation newspapers who hold their advertising sections out to the public, have also consented to a general public access.

Besides denying the relevance of the judicial authority cited by the union, the court in Clothing Workers refuted each claim made by the union that the newspapers have a special relationship with the government, giving the papers a mantel of state action. The newspapers' exemption from newsprint and ink use taxes was admitted by the court to be a "state involvement" in the newspaper business, but it does not provide evidence of actual state participation

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[59] Ibid., p. 475, (emphasis added).

in the business, the court said. The exemption from jury duty for newspapermen likewise does not involve state participation in the business. The exemption is perhaps a benefit to the newspaper businesses, but its purpose is so that the general public will not be deprived of newspapermen's uninterrupted services.[60]

The state may require that newspapers publish certain notices, but the court pointed out that the state has no stake in the profits from those notices.[61] The court did not mention, and might have, that there are cases upholding the right of newspapers to refuse to publish notices even when publication is required by statute.[62]

The court said that the special privileges given to newspapers for use of the streets in distributing papers is not so much to benefit the papers as for public convenience. The number of papers that could be sold is restricted to keep public sidewalks from becoming cluttered. Press facilities in public buildings are also for the public welfare--to help insure that the public gets the news fast--rather than for the advantage of newspapers.[63]

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[60] Ibid., p. 477.

[61] Ibid.

[62] See Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.E. 400 (1924) and Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913).

[63] Amalgamated Clothing Workers of America v. Chicago Tribune, 435 F.2d 470, 478 (7th Cir. 1970).

On the monopoly issue, the circuit court pointed out that none of the defendant publishers have a monopoly position in the Chicago metropolitan area. In fact, they have a relatively high degree of competition the court thought. No charge of concerted action was made by the plaintiff; "there was no individual 'monopoly power' and there was no exercise of monopoly power by means of combination."[64] It was evidently coincidence that all four major papers refused the same editorial advertisements critical of a major advertiser.

The seventh circuit also took the time to respond to briefs of amici curiae that argued for establishing a right of access for editorial advertisements. The court refuted the claim that First Amendment guarantees require a newspaper to serve as a public forum. The court said that the First Amendment is to protect the rights of the private publisher:

> It is urged by amici curiae that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all--they need not be purchased at the price amici would exact. The Union's right to free speech does not give it the right to make use of defendant's printing presses and distribution systems without defendant's consent.[65]

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[64] Ibid., p. 477.

[65] Ibid., p. 478.

The court's rebuttal to the access argument is consistent with a long chain of commercial advertising cases. The First Amendment protects the independence of the individual publisher, big or small; the First Amendment does not imply any affirmative obligations for access to a forum.

Another recent case involving the rejection of an editorial advertisement, Resident Participation of Denver v. Love,[66] is an even more direct refutation of the Barron thesis. The two defendants were the Denver Post and the Denver Publishing Company which publishes the Rocky Mountain News. Love was argued in a manner similar to Clothing Workers and judged by the federal district court in much the same way.

Plaintiffs submitted advertising copy to the two newspapers critical of a food company that owned controlling interest in a company that planned to construct a plant for cutting up the carcasses of animals. Plaintiffs warned in the editorial advertisement that odor and dirt from the plant would make living in the area very unpleasant.

After some question of the legality of the editorial advertisements, plaintiffs submitted modified advertisements that resolved the legality problem. When the newspapers refused to accept these advertisements, plaintiffs sought an injunction, claiming that the newspapers' refusal was a state action in violation of plaintiffs' First Amendment rights.

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[66] 322 F.Supp. 1100 (1971).

As in Clothing Workers, plaintiffs argued that the papers had a special relationship to the state (Colorado) and the the city (Denver). Specifically, the Resident Participation organization cited statutes requiring that legal notices be published; they pointed out the exemption of editors and reporters from jury duty; and a provision of the Denver Municipal Code which allows newspapers to put vending machines on public property was mentioned. Plaintiffs claimed that the separately owned newspapers had a monopoly on papers in the Denver area. For supporting authority, plaintiffs cited Logan Valley, Marsh, Terry v. Adams and others.[67]

The district court denied, as did the court in Clothing Workers, that the specific claims of a special relationship between the newspaper and the government established the requisite state action.[68] Confident that the alleged tie of the papers to the government was disposed of, the court then turned directly to the access issue:

> Plaintiffs' alternative contention, while considerably less precise, better expresses what the complaint against defendant newspapers is actually about. Plaintiffs argue that newspapers ought to have a duty to

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[67] Ibid., p. 1102. Terry v. Adams, 345 U.S. 461 (1953) was a case where whites refused participation to Negroes in a private election primary which, in effect, selected the winner of the later public primary. The United States Supreme Court held that the state of Texas had a legal responsibility to insure that citizens were not denied their lawful right to vote. By passively sitting by, the state was permitting an illegal state action.

[68] Ibid., pp. 1102-1103.

> provide reasonable space for citizens to express their views because in Denver, as elsewhere, newspapers exercise 'monopoly control in an area of vital public concern.' This does not mean, we take it, that defendants are monopolies within the meaning of the antitrust laws, since no violation of those laws is alleged, but rather that the soapbox has yielded to radio and the political pamphlet to the newspaper. . . . However, the fact that defendants control a method of reaching a large audience and that this is a matter of importance to us all does not mean defendants' conduct should be considered government conduct and the cases which plaintiffs cite do not support such a proposition.[69]

With its concern for state action, the court neglects any real assessment of the power of these two separately owned newspapers. The area of "vital public concern" turns out not to be the free flow of ideas through newspapers, but whether newspapers fall within the legal category of state action. In rejecting the appropriateness of Marsh or Logan Valley to the case, the court in Love proposed and rejected, without discussion, the idea that newspapers hold their advertising space out to the public generally.

The court said that neigher Marsh nor Logan Valley

> even remotely resembles the case before us. Plaintiffs do not argue, nor do we believe they could, that defendant newspapers hold their columns open to the public or perform a function of governmental character.[70]

In distinguishing away Terry v. Adams,[71] the Love court, like the Clothing Workers court, rejected the idea that the government has an affirmative responsibility to impose requirements on publishers in the name of the First Amendment:

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[69]Ibid., p. 1104. [70]Ibid.

[71]See above, note 67.

> Clearly defendant newspapers are not engaged in an enterprise which is ultimately the responsibility of government to regulate or carry out. Nor can we discover in any legislative inaction evidence which suggests that Colorado has permitted newspapers to emasculate the first amendment, for while it is obvious that the fifteenth amendment prohibits racial discrimination in voting, it is not equally clear, even assuming state action, that the first amendment prohibits newspapers from refusing advertisements, at least as long as the refusal has a reasonable basis.[72]

The last clause is curious. After upholding the traditional interpretation of the First Amendment, the court throws a curve. What constitutes a "reasonable basis" for refusing advertisements would be interesting to know. Adding this last clause seems to be an admission by the court that in some circumstances, judicial remedy might be warranted where an advertisement is rejected for publication. For the court to reject the idea that government has an "ultimate" responsibility to regulate a newspaper, and then to imply that a paper might not be legally free to refuse an advertisement on an "unreasonable" basis, does little to clarify the issues.

Finally, the court in Love turned directly to Barron's Harvard Law Review article, and pointed out the chasm which exists between his proposals and the realities of state action.

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[72] Resident Participation of Denver v. Love, 322 F. 1100, 1105 (1971).

> We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable. Professor Barron simply concludes, without noticeable explanation, that newspapers can be subjected to the 'constitutional restrictions which quasi-public status invites.' As desirable as this might be, we are unable in good faith to reach it.[73]

In the Clothing Workers case and the Love case, the state action requirement proved insurmountable. Because of this requirement, legal, but critical viewpoints, which might have been of value to the community, were squelched in both Chicago and Denver. The fact that the newspapers in these two cities exerted a monopoly power when they acted in agreement, and the fact that the advertisements in question would have First Amendment protection if printed, made no difference to the courts. The power of city newspapers to protect the establishment from embarrassment, should not include the right to reject lawful messages in that section of the newspaper which is for sale in the marketplace, the advertising section.

Conclusion

In the most recent legal attempts to require privately owned newspapers to accept editorial advertisements, the important issues of monopoly and rights to a forum have

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[73] Ibid.

been largely lost in concern over the legal concept of state action. Pertinent legal analogues have been argued in an attempt to open privately owned newspapers to editorial advertising, but to no avail. Because of the state action hurdle and because of long legal precedent, the courts have not been moved.

If a partial solution to the access problem is to be found, it will not be wholly based on free speech arguments, nor on charges of monopoly abuses. The solution will have to take into consideration the fact that all newspaper advertising is commercial in the sense that it is purchased, and the courts' persistent concern for commercial contract rights will have to be honored. A requirement that newspapers accept all lawful advertisements would be a partial solution. First Amendment ideals would be served, and courts would be demanding no more of newspapers than that they treat all advertisers indiscriminantly, a demand that the courts should make on all commercial enterprises anyway.

CHAPTER IV

STATUTORY SOLUTION

The courts, in holding that newspapers are private businesses that can not be required to accept advertisements, have not weighed adequately in their decisions the public dependence on the advertising columns of large, often monopolistic, dailies. The courts' concern with the right of contract of private businesses, and more recently with the concept of state action, has barred any remedy for advertisers, commercial or editorial, who are arbitrarily denied access to the press.

A frequent claim of the judges in advertising cases is that they lack statutory authority to make requirements of the press. Some courts suggested that they might have ruled against a monopoly newspaper if some illegal restraint of trade had been proven under the antitrust laws.[1] A more

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[1] Commonwealth v. Boston Transcript, 249 Mass. 477, 144 N.E. 400 (1924); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515 (Sp. Ct. 1954); Gordon v. Worcester Telegram, 343 Mass. 142, 177 N.E. 2d 586 (1961); Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune, 307 F. Supp. 422 (n. D. Ill., E. D. 1969), aff'd 435 F.2d 470 (7th Cir. 1970); Resident Participation of Denver v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

general reference to statutes made by the courts was simply that it was the responsibility of the legislature, not the court, to regulate a business in the public interest.

One considers the possibility of a statutory regulation of newspapers with great reservation. The First Amendment prohibition against congressional interference with the independence of the press, and the powerful partisan pressures on individual legislators, are good reasons why legislatures, in general, should not try to interfere with the press.

Zechariah Chafee warns against any broad attempt to regulate the press:

> There are basic objections to any idea that the press should be part of a general scheme of controlled enterprise, even if that is to be the fate of commodity businesses. Liberty of the press would vanish if the government should assume 'constructive responsibility' for working out a comprehensive plan for each communications industry, or if Congress should set up a commission to do for the press what the Interstate Commerce Commission does for railroads.[3]

The judiciary, rather than the legislature, says Thomas I. Emerson, is the "chief institution of the state capable of

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[2]Friedenberg v. Times Publishing Co., 170 La. 3, 127 So. 345 (1930); In re Louis Wohl, 50 F.2d 254 (E.D. Mich., 1931); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515 (Sp. Ct. 1954); Approved Personnel v. Tribune Co., 177 So.2d 704 (Fla. App. 1st Dist. 1965).

[3]Zechariah Chafee, Jr., Government and Mass Communications, A Report from the Commission on Freedom of the Press (Hamden, Conn.: Archon Books, 1965), p. 594.

affording the necessary degree of legal support for a system of free expression."[4]

Any proposed statutory solution to the access problem must not attempt to establish a "general scheme" for controlling the press. Whether a legislature tried to open up the press to more divergent views through the enactment of antitrust laws or through some other statutes, the legislation must be focused on the specific functions of a newspaper that are to be regulated. But the legislation must also be broad enough to allow the courts to apply the access principles realistically, case by case.

To date, statutes have not been used to any great extent to regulate the press. The antitrust laws have been used in a few important cases in which press powers were used coercively in restraint of trade. In Associated Press v. United States,[5] the U.S. Supreme Court declared unconstitutional wire service by-laws that allowed members of the Associated Press to block membership of competitor newspapers. In Lorain Journal v. United States,[6] a monopoly newspaper was held in violation of the Sherman Antitrust Act

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[4]Thomas I. Emerson, Toward A General Theory of the First Amendment, Vintage Books (New York: Random House, 1963), p. 31.

[5]Associated Press v. United States, 326 U.S. 1 (1945).

[6]Lorain Journal v. United States, 342 U.S. 143 (1951).

when it refused to accept local advertisements from advertisers who bought time on a competing radio station.

Several suggestions have been made as to how certain press practices might be attacked under existing antitrust laws in an effort to make newspapers more diverse,[7] but in general, antitrust laws are poor instruments for increasing access to the press. It is doubtful that the antitrust laws could even serve their primary function well--to insure economic competition--with regard to newspapers.[8]

The Commission on Freedom of the Press warned that the antitrust laws are so vague that they could "be very dangerous to the freedom and the effectiveness of the press."[9] Zechariah Chafee did not think the Sherman Antitrust Act was

> a fit instrument for the delicate work of making the press give the news and opinions which our society needs. How can we recommend it for that purpose when its suitability for controlling the cruder traffic in steel and beef and chemicals is far from proved after half a century.[10]

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[7]See Keith Roberts, "Antitrust Problems in the Newspaper Industry," Harvard Law Review, LXXXII (December, 1968), 322-48.

[8]See Richard J. Barber, "Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy," Louisiana Law Review, XXIV (April, 1964), 503-554, and Thomas E. Humphrey, "The Newspaper Preservation Act: An Ineffective Step in the Right Direction," Boston College Industrial and Commercial Law Review, XII (April, 1971), 937-954.

[9]Commission on Freedom of the Press, A Report from the Commission, A Free and Responsible Press (Chicago: University of Chicago Press, 1947), p. 85.

[10]Chafee, Government and Mass Communication, p. 592.

Professor Barron says that "antitrust law operates too indirectly in assuring access to be an effective device."[11]

Antitrust laws are not suitable tools for opening up the press, and there is little likelihood anyway, that Congress would pass new antitrust legislation in an attempt to promote access. Congress recently passed an act exempting newspapers from some requirements of the existing antitrust law.[12] Whether the Newspaper Preservation Act will help preserve independent editorial voices as it is intended, or whether it will merely make it easier for powerful publishers to consolidate control in a particular area, remains to be seen. But Congress is loosening, not tightening, regulation of newspapers under antitrust laws. If an acceptable statutory solution is to be found to the access problem, as some courts insist is the only way, it will have to be outside the antitrust field.

One rather ambitious statutory proposal for opening up newspapers to non-commercial advertising was debated by the American Civil Liberties Union. In response to a directive from the national board of directors, the Communications Media and the Free Speech Association committees of the ACLU prepared a draft statute along with a legal

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[11]Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, LXXX (June, 1967), 1654.

[12]Newspaper Preservation Act, 84 Stat. 466 (1970).

rationale--based on Barron--for the right of access theory.[13] The statute was rejected by the Communications Media Committee, and it was voted that further study of the access problem was necessary.[14]

There was a long, unresolved debate in the ACLU committee meetings on whether a statute should be like a public accomodations statute,[15] prohibiting the refusal of advertising because of the "race, color, creed, sex or political belief" of the advertiser, or whether a statute should also prohibit the refusal of advertisements because of "facts, opinions, ideas, beliefs, or assertions expressed therein."[16]

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[13]"Legislative Proposal and Supporting Legal Analysis on Right of Access to Media Theory," (typewritten memo from the national office to the Free Speech/Association Committee and Communications Media Committee of the American Civil Liberties Union, New York, August 22, 1969), p. 1. See Appendix for full draft statute.

[14]"Report on Communications Media Committee Discussion on Legislative Proposal and Supporting Legal Analysis on the Right of Access to the Media," (typewritten memo from the national office to the board of directors of the American Civil Liberties Union, New York, September 25, 1969), p. 4.

[15]Such a statute would prohibit discrimination on the same grounds as existing public accomodations statutes. For example, the Public Housing Act of 1968 makes it illegal to discriminate in the sale or rental of housing on the basis of "race, color, religion, or national origin." 82 Stat. 83, Pub. Law 90-284, Apr. 11, 1968, sec. 804.

[16]"Legislative Proposal and Supporting Legal Analysis," p. 3. This optional wording is from article II of the draft statute.

As Arthur Bonfield, professor of law at the University of Iowa, points out, it is different to prohibit discrimination because of qualities of the advertiser, such as race or religion, and to prohibit discrimination because of the opinions and beliefs contained in an advertisement. Professor Bonfield writes that

> Public accomodations statutes already say that newspapers cannot discriminate in such sales [of advertisements] based on the religious belief of the potential advertiser. It is not much of an extension to say that they cannot discriminate because of the political belief of the potential advertiser.[17]

As a practical matter, then, establishing a public-accomodations-type access statute, prohibiting discrimination based on race, religion and sex, would be redundant. It would also be impossible to enforce. Under such a statute, a publisher could, for example, refuse an advertisement because of racial prejudice but claim only that the content of the advertisement was unacceptable.

If a statute is to be passed to open up newspapers to a wider range of ideas in accordance with First Amendment goals, the statute must prohibit discrimination against legal advertisements which contain "facts, opinions, ideas, beliefs, or assertions" with which a publisher might disagree. Bearing in mind the First Amendment protection for editorial

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[17]Letter from Arthur E. Bonfield to Gilbert Cranberg, September 5, 1969, found in files of the national office of the ACLU, New York.

advertisements as opposed to "commercial" advertisements,[18] one might consider a statute requiring a newspaper to accept only editorial advertisements. However, the general offering to the public of advertising space by large, metropolitan newspapers, and the general public dependence on this advertising space for commercial and ideational information, make the distinction between commercial and non-commercial advertisements unnecessary.[19]

What is needed, if indeed an access statute must be legislated, is a rule requiring that large newspapers treat all legal advertisers on an equal basis. Such a rule might take the form of section 763 of the Restatement of Torts:

> One who engages in a business which carries with it a duty to serve without discrimination and on proper terms all who request his service and who without legal excuse refuses to serve another is liable to the other for the harm caused thereby. . . [20]

If newspapers were required to sell advertising to all on an equal basis, then it would be necessary , it has been suggested, to remove some responsibility publishers now have for libelous or unlawful material printed in their papers.[21] This suggestion is countered with the phrase in

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[18]See New York Times v. Sullivan, 376 U.S. 254 (1964).

[19]In many advertisements the distinction between commercial and non-commercial would be impossible to make. See Chapter II.

[20]Restatement of Torts, sec. 763, 1939.

[21]William M. Douberley, "Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through

the Restatement, "without legal excuse." A newspaper should be required to serve all advertisers indiscriminately, except for those who present a publisher with a legal excuse for refusing an advertisement. Under such a statute, newspapers would retain legal responsibility for what is printed; a publisher could reject an advertisement that extended beyond the newspaper's own legal boundaries.

A statute, embodying the Restatement's broad principle of non-discrimination, and legislated to apply only to a newspaper's advertising function, would have the advantage of allowing the courts to establish the dynamics of the access policy on a case by case basis.[22] The courts would have responsibility for judging if advertisements were unjustly denied because of a publisher's claim that they exceeded the paper's own legal latitude in the areas of libel, obscenity, privacy, contempt or fraud.

Advertisers would seldom want to go to court over rejected advertisements that bordered on illegality. Newspapers would seldom want to risk the time and expense of

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Advertising," University of Florida Law Review, XXII (Fall, 1969), 317; William A. Resneck, "The Duty of Newspapers to Accept Political Advertising--An Attack on Tradition," Indiana Law Review, XLIV (Winter, 1969), 235. In Farmers Educational and Cooperative Union v. WDAY, 360 U.S. 525 (1959), the Supreme Court held that a broadcaster was immune from liability for defamatory political statements that FCC regulations prohibited the station from censoring.

[22]See above, text accompanying note 4.

litigating over advertisements it refused simply because it disagreed with the message contained. Some well-meaning publishers with prejudiced readers might welcome the requirement that controversial legal advertisements be published. When controversies occasionally emerged between publishers and potential advertisers, the courts would be working with subtle questions, but the issues would be familiar to the courts, and workable guidelines have already been established.

Another advantage of a statute worded like the Restatement is that it would allow the individual who is denied access for a lawful advertisement to take his complaint to court, himself, for remedy. There would be no necessity to prove state action, and no problem of establishing legal standing before the court.[23]

Conclusion

It would perhaps be best if legislatures did not have to involve themselves in any attempts to increase access to the press. The smoothest, safest method for expanding access would be for the courts to recognize the growing consolidation of newspaper ownership; to admit that the

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[23]"Legislative Proposal and Supporting Legal Analysis," p. 7. For a discussion of the problem of establishing standing to contest a broadcasting license renewal see Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966).

public is dependent on the advertising space in these papers for diverse points of view as well as for information about commercial products; and to declare that large, general circulation newspapers offer their advertising space generally to all lawful customers, and therefore cannot discriminate against some.

The courts have not been willing to acknowledge changing economic conditions, to admit to a public dependence on the monopoly press, nor to make any requirements on newspapers in the public interest. Instead, the courts have concerned themselves with private contracts and state action, arguing that if monopoly is the problem, then either a charge of an antitrust violation should be made or the legislature should take responsibility to place public interest obligations on newspapers.

It has traditionally been up to legislative initiative to declare businesses to be affected with a public interest and to regulate them in whole, or in part. But the courts can take initiative if there is no remedy at law. If the courts will not exercise any initiative, then perhaps a general statute is needed, a statute that requires that newspapers accept all lawful advertisements, but a statute that leaves the courts their rightful role of interpreting the contours of legality.

APPENDIX

APPENDIX

LEGISLATIVE PROPOSAL FOR RIGHT OF ACCESS THEORY AMERICAN CIVIL LIBERTIES UNION, NEW YORK

(Note: For explanation of bracketed sections see footnotes.)

I

For the purpose of this statute

a) [news]* publication shall be defined as any [printed or published newspaper, in whatever form and by whatever name called]* [publication]* which appears four or more times per year and which has an average circulation of not less than ____ copies per issue, calculated as including subscriptions, single copies sold, copies sold for retail distribution and copies distributed free of charge or which accounts for more than ____% of the circulation of all the [news]* publications in the same language which are distributed in a given market, defined as morning daily, evening daily, weekly or Sunday in a given area, defined with reference to ____ standard metropolitan area, political subdivision, population, geographic unit, etc., in which a given [news]* publication competes for readers, advertising revenues, etc., or

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*[News] publications

[printed or published newspapers, in whatever form and by whatever name called]

vs.

[publication]

In both the Biennial Conference and the Communications Media Committee's versions of Recommendation #33, reference is made simply to "publications" or "publications of general circulation." Do the Committees desire to confine the statute to newspapers?

in which it has a monopoly. The circulation of a [news]* publication owned, published or written by a person, firm, group or corporation which also owns, publishes or writes one or more other [news]* publications in the same market shall, for the purposes of this definition, include the circulation of such other [news]* publication or publications. Publications which are written or published primarily for a religious purpose other than financial support of a religious organization are exempt from the operations of this statute;

b) terms and conditions of advertisement or publication shall include price, space, arrangement, location, commencement and period of insertion;

c) [advertising shall not include non-ideational commercial advertising except where such advertising is for matter which is protected by the First Amendment to the Constitution.]**

II

No [news]* publication distributed to the public for the purpose, in whole or in part, of commercial profit, or which is in general circulation, shall, by reason, in whole or in part, express or implied, of the race, color, creed, sex, or [political belief]** of the person, firm, group, or corporation submitting an advertisement or advertisements, or the [facts, opinions, ideas, beliefs, or assertions expressed therein]**

a) refuse to accept for publication or refuse to publish any advertisement or advertisements or discriminate as to the terms and conditions of publication or advertisement;

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*Ibid.

**a) [political belief]

[or facts, opinions, ideas, beliefs, or assertions expressed there. The Board discussion on June 21, 1969 reflected a clear difference of opinion as to whether the statute should operate on political, as well as on racial, credal and sexual discrimination. If the Committees choose to submit a narrower, purely-public-accomodations type statute, the bracketed words should be stricken.

b) refuse to accept for publication or refuse to publish any advertisement or make or adhere to any contract for the publication of advertisements on or accompanied by any condition, agreement or understanding, express or implied, that the person, firm, group, or corporation shall restrict, alter, cut or edit the content of the advertisement or advertisements, or shall allow the content to be restricted, altered, cut or edited by the [news]* publication or by any third party;

c) cancel, terminate, refuse to renew or in any manner impair any contract, agreement, or understanding involving the publication of advertisements, between said [news]* publications and any person, firm, group, or corporation.

III

Any [news]* publication covered by this statute shall continue to have the power to choose not to publish advertising or notices, or to determine the total amount of advertising or notices which it will print.

IV

No [news]* publication distributed to the public for the purpose, in whole or in part, of commercial profit, or which is in general circulation, or which accepts notices, obituaries, announcements and other items of information submitted by individuals or groups shall refuse to accept for publication or refuse to publish any announcement, notice, obituary or other item of information submitted by individuals or organizations for publication or discriminate as to any terms or conditions of publication where the reason of such refusal or discrimination is, in whole or in

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b) Definition of advertising in Article I (c).

Presumably, if the Committee chooses the narrower, purely public-accomodations-type statute, it will wish it to apply to commercial as well as non-commercial advertising, and would strike the limiting definition of advertising in Article I(c).

part, express or implied, the race, color, creed, sex or [political belief]** of the person, firm, group, or corporation submitting the notice, obituary, announcement or other item of information [or the facts, opinions, ideas, beliefs and assertions expressed therein].**

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*Ibid.

**Ibid.

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