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The Duty of Newspapers to Accept Political Advertising - An Attack on Tradition

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NOTES

THE DUTY OF NEWSPAPERS TO ACCEPT POLITICAL ADVERTISING — AN ATTACK ON TRADITION

A subject of current concern and controversy[1] is the imposition of greater obligations on newspapers to see that competing views are given a forum. With one authority to the contrary, the courts have tradition-

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1. In an unusually provocative article Professor Jerome Barron has recently argued that the "marketplace of ideas" theory of the eighteenth century is a romantic conception today in view of the twentieth century monopoly newspaper, and an affirmative "right of access" to the press should be created so that novel and unconventional ideas are able to receive a forum. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

The article resulted in the extension of an invitation to Professor Barron to address an American Civil Liberties Union gathering. The address was apparently accorded favorable reception. See G. Cranberg, *New Look at the First Amendment*, SATURDAY REVIEW, Sept. 14, 1968 at 136-37, wherein it is noted that ironically the American Civil Liberties Union, usually the most vocal opponent of any governmental interference in the "free marketplace of ideas," has supported the bringing of law suits to challenge discriminatory refusal of advertisements and to establish affirmative access to the press. Mr. Cranberg, editorial writer for the Des Moines, Iowa, Register and Tribune, feels that governmental action would be expressly forbidden by the first amendment.

A recent ACLU workshop reported that:

> [I]t was established that minority groups and proponents of unpopular causes are frequently denied access to the press. Examples of such denials included: a Southern paper which refuses to print obituaries of Negroes, refusals to accept paid advertisements opposing the Vietnam war, systematic omission of news about particular issues, individuals, or organizations, and publication of attacks on individuals or organizations without affording any opportunity to reply.

American Civil Liberties Union Workshop on Newspapers and Magazines report, quoted in SATURDAY REVIEW, Sept. 14, 1968, at 136.

Conventional works, such as A. DRURY, CAPABLE OF HONOR (1966), have pointed out the role which the press may play in distorting truth. Moreover, the small circulation "left-wing" press contains countless claims of collusive denials of a forum. For example, author Mark Lane has maintained that publication of his best-selling attack on the Warren Commission Report has resulted in complete exclusion from the news media of his subsequent comments on the issue, and New Orleans District Attorney James Garrison has maintained that the granting of a federal injunction preventing his prosecution of an alleged conspirator in the assassination of President Kennedy was not reported by news media. Los Angeles Free Press, July 7, 1968. Mr. Lane has alleged that an editor of the New York Times, when queried as to the failure of that paper to report issuance of the injunction against Mr. Garrison, responded by checking recent issues of the Times and notifying his inquisitor that since no pertinent story had appeared in the Times no such injunction could have been granted. *Id.* For further allegations of an attempt by wire services to exclude news of recent developments pertinent to the assassination of the late President, see Los Angeles Free Press, Dec. 22, 1967, Sept. 11, 1968, and Aug. 30, 1968. Evidently the frustration reflected in the pages of the left-wing press is ripening into lawsuits. See note 18 *infra*.

ally refused to fashion a "right of access"[2] to the press.[3] Characterizing the newspaper as a private enterprise, the courts have upheld the newspaper's right to refuse publication of material unacceptable by its standards.

The framers of the Constitution were acutely aware of dangers inherent in governmental interference with and censorship of the press. However, with the advent of technological advancements in mass communication, the transformation of newspapers from pamphlets to nationwide dailies requires a reappraisal of the notion of freedom of the press. As the collapse of the laissez-faire system in economics necessitated governmental intervention, obstructions to free discussion may also require affirmative action.

> The breakdown of laissez-faire extends not only to the economic but to other spheres, and our system of free enterprise is no longer self-operating. The complexities of modern society have introduced into the free marketplace of ideas blockages and distortions that can only be removed by affirmative social controls. The situation is indeed paradoxical. Freedom of expression is by its very nature laissez-faire; it implies absence of government control. Yet the conditions under which freedom of expression can successfully operate in modern society require more and more governmental regulation.[4]

This note will examine and evaluate various rationale for any conclusion that should be reached in this area. The discussion will be framed in the context of the first amendment. However, first amendment arguments prove to be a two-edged sword: they can be justifications

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2. Barron, *supra* note 1.

3. Some of the more recent cases are J.J. Gordon, Inc. v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961); Bloss v. Federated Publications, Inc., 380 Mich. 485, 157 N.W.2d 241 (1968); Poughkeepsie Buying Service v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515 (1963); Mid-West Elec. Co-op, Inc. v. West Texas Chamber of Commerce, 369 S.W.2d 842 (Tex. 1963).

An especially relevant decision is Lord v. Winchester Star, Inc., 346 Mass. 764, 190 N.E.2d 875 (1963), *cert. denied*, 376 U.S. 221 (1964); discussed in Barron, *supra* note 1, at 1669, involving the refusal of the town's newspaper to print a letter to the editor from a local attorney who took a position opposing the newspaper on a local matter.

The sole authority to the contrary is Uhlman v. Sherman, 22 Ohio N.P. 225, 31 Ohio Dec. 54 (1919). Three competing merchants were keeping a fourth from advertising. The court held that newspapers have acquired a quasi-public character which requires that when it has advertising space to sell and the advertiser has complied with the law and the reasonable rules of the company as to the kind and character of the advertisement offered, then the company is bound to accept the advertisement. This case has been explicitly rejected by other courts.

4. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 902 (1964).

against imposing restrictions on the press to preserve the "free marketplace of ideas,"[5] or rationale for regulation to remove impediments to discussion.

Creation of a Right of Access

Public Expression

Recent court decisions in other areas may be useful as analogues to justify imposing greater obligations on newspapers.

In *Kissinger v. New York City Transit Authority*,[6] a member of "Students for a Democratic Society" sought a declaratory judgment requiring the defendant, the New York City Transit Authority, to accept for display on the walls in New York City subway station platforms two posters opposing United States participation in the war in Vietnam.[7] The court held that freedom of speech protection extended to the posters and in order to justify a refusal to exhibit them, the Authority had to show that the posters would present a "clear and present danger."[8] The court also ruled that whether the posters would seriously endanger safety in the subways was a question of fact that would only be resolved at trial.

In *Niemotko v. Maryland*,[9] members of Jehovah's Witnesses had their conviction of disorderly conduct overturned as a violation of their constitutional rights of free speech and religion. The court found the conviction based, not upon evidence of disorder, or threats of violence or riot, but on the fact that the defendants had used a public park for Bible talks without a permit, their application for a permit having been denied by municipal authorities in exercise of a power derived, not from a statute or ordinance, but from a local practice not defining any standards or limitations.

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5. Barron, *supra* note 1.
6. 274 F. Supp. 438 (S.D.N.Y. 1968).
7. The posters contain a picture of a child with a scarred back and arm with the following words in large lettering:

WHY ARE WE BURNING, TORTURING, KILLING, THE PEOPLE OF VIETNAM —TO PREVENT FREE ELECTIONS

In smaller lettering the posters continue:

PROTEST this anti-democratic war
WRITE President Lyndon B. Johnson, The White House, Washington, D.C.
GET THE STRAIGHT FACTS
WRITE
Students for a Democratic Society
119 Fifth Avenue, New York, N.Y. 10003

In small print the poster states:

This 10-year-old girl was burned by napalm bombs.

8. This was the first amendment test used in Schenck v. United States, 249 U.S. 47, 52 (1919).
9. 340 U.S. 268 (1951).

Wolin v. Port of New York Authority[10] held that refusing to allow a group opposed to the war in Vietnam to pass out leaflets in the Terminal Building operated by the Port of New York Authority was an abridgment of the group's first amendment freedoms. In deciding whether the Terminal was an appropriate place for political expression the court framed the issue in the following manner:

> [w]here the issue involves the exercise of first amendment rights in a place clearly available to the general public, the inquiry must go further: does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal or office plaza.[11]

The terminal building had been used by glee clubs, charity solicitors and automobile exhibitors in the past. To allow these types of activities yet deny a forum for political expression would be an illogical result.[12]

In rejecting the argument that Wolin's message bore no special relation to the operation of the terminal the court gave two indices of relevance: either the place should represent the object of protest, the seat of authority against which the protest is directed, or the place should be where the relevant audience may be found.[13] The propriety of the terminal's use was justified on the latter ground, as Wolin's message was directed to the public at large.

If the rationale of *Kissinger, Niemotko* and *Wolin* were applied to newspapers, then, arguably, a right of access would follow. *Kissinger* and *Niemotko* hold that first amendment rights cannot be abridged by the state, yet newspapers seem to be able arbitrarily to refuse to accept any advertisement, unchecked by any standards or limitations.[14] If the *Wolin* measure of appropriateness of use as a forum for public issues is applied, then newspapers, society's traditional vehicle for opinions, would certainly qualify. Access to print one's views in a newspaper seems to be as important as opportunities to expound them in public buildings or

10. 392 F.2d 83 (2d Cir. 1968).
11. *Id.* at 89.
12. *Id.* at 90.
13. *Id.*
14. A publisher of a newspaper who enjoys a virtual monopoly in a given area may refuse to accept an advertisement if he sees fit to do so. J.J. Gordon, Inc. v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961).

parks.

However, since newspapers are privately owned, their refusal to print advertisements would not appear to be the requisite "state action"[15] involved in exclusion from a public building or park. In *Dorsey v. Stuyvesant Corp.*,[16] the corporation undertook the rehabilitation of a substandard area by constructing new housing under a contract with the city. Refusal of the corporation to consider applicants as tenants because of race, color, creed or religion was held not to be "state action" so as to violate the equal protection clauses of the state or federal constitutions. Arguably, if it is not permissible to force private apartment owners to rent to undesirable tenants, then newspaper enterprises should not have to devote their privately owned resources to the dissemination of unwanted opinions. However, Congress has rejected the homeowner-private property argument with the passage of the Civil Rights Act of 1968,[17] and the Supreme Court has upheld the constitutionality of this statutory preference accorded civil rights vis-a-vis property rights. Perhaps newspapers should shoulder the responsibility of expressing various types of ideas, just as homeowners must now sell to the first bona fide purchaser. Moreover, on a policy level the distinction between government and private bodies becomes increasingly blurred when one considers recent litigation brought to force newspapers published at state universities to print political advertisements.[18]

Counterbalancing Recent Decisions

Decisions in the area of newspaper liability for libel or invasion of privacy offer further justification for imposing greater responsibilities on newspapers to print diverse opinions. Those whose points of view are

15. *Wolin*, for example, held that the public character of the terminal—the ready access to its facilities, its creation pursuant to a compact between two states—fulfilled the requisites of state action. 392 F.2d at 88.

16. 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

17. Pub. L. No. 90-284, § 804 (Apr. 11, 1968). See also Jones v. Mayer Co., 392 U.S. 409 (1968): Civil Rights Act of 1866, 42 U.S.C. 1982 (1964) banning all racial discrimination, private as well as public, is a valid exercise of Congress' power to enforce the thirteenth amendment.

The commerce clause has been used to justify recent civil rights legislation and would appear to support equally well federal regulation of the press.

18. An action has recently been filed in the United States District Court for the Western District of Wisconsin alleging that the student newspaper published by the Whitewater Division of the Wisconsin State University adopted a policy of refusing all political advertisements after it began to receive demands to publish advertisements condemning the Vietnam war. The plaintiffs have asserted that a portion of the student activities fee collected by the State University from each student is used to support the publication. The newspaper also receives revenue from commercial advertising. The decision to ban political matter appears to have been made by University officials, and the Board of Regents of State Colleges was named as a defendant. Lee v. Board of Regents of State Colleges, Civil No.—, (W.D. Wis., filed Apr. 16, 1968).

accepted and published by newspapers have been given great freedom to express their point of view.[19] Now that the press has been fortified with heavy protection from libel litigation, it seems only just that all parties should have an opportunity to respond. If not, recent decisions will have the ironic result of inhibiting rather than promoting free speech.[20]

Newspapers and the "Quasi-Public" Concept

In addition to these policy reasons for imposing greater responsibilities on allegedly private enterprises, the link between newspapers and the public interest may be seen clearly in the light of the "quasi-public" concept formulated in *Marsh v. Alabama.*[21] The court, in overturning a conviction against a member of Jehovah's Witnesses who was distributing literature on a company-owned sidewalk in a company-owned town, stated: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[22]

In its most recent decision in this area, the Court has applied the "quasi-public" doctrine to privately-owned shopping centers. *Amalgamated Food Employees Union Local* 590 *v. Logan Valley Plaza, Inc.*,[23] held that a Pennsylvania state court injunction limiting peaceful picketing of a business located within a privately-owned shopping center to berm areas and prohibiting picketing in the store's pick-up zone and parking lot violated the first amendment. Mr. Justice Marshall, speaking for the Court, noted that the present case was distinguishable from *Marsh*

19. New York Times Co. v. Sullivan, 376 U.S. 254 (1964): public official must prove "actual malice" in order to recover. Garrison v. Louisiana, 379 U.S. 64 (1964): even though an accusation might affect an individual privately, "anything which might touch on an official's fitness for office" is protected unless "actual malice" could be shown. 379 U.S. at 77. Rosenblatt v. Baer, 383 U.S. 75 (1966): public official includes "those among the hierarchy of government employees who have, or appear to the public to have substantial responsibility for, or control over the conduct of governmental affairs." 383 U.S. at 85. Curtis v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967): first amendment protection on freedom of the press applies to "public figures" as well as to "public officials."

20. The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to libel litigation will remove restraints on expression and lead to an 'informed society.' But in fact the decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate.

Barron, *supra* note 1, at 1657.

21. 326 U.S. 501 (1946).

22. 326 U.S. at 506.

23. 391 U.S. 308 (1968).

as the petitioners were not totally denied access to the community. However, this fact was held not to be determinative.

> We see no reason why access to a business district in a company town for the purpose of exercising first amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town.[24]

Mr. Justice Marshall stated that the decision did not mean that shopping centers were now to be treated like municipalities, but that freedom of expression could not be abridged in a community business block.[25]

Mr. Justice Black, in a vigorous dissent, also found the issue presented to be under what circumstances private property can be treated as though it were public, but contended that the majority misread *Marsh*, since "the answer that *Marsh* gives is [that the property must have] taken on *all* the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a business block on which business places are situated.' "[26]

The decisions in *Marsh* and *Logan* seem consonant with the upholding of freedom of expression in *Kissinger* and *Wolin*.[27] Private shopping centers, dealing with the public at large on a nondiscriminatory basis, seem closely analogous to public subway stations. It is submitted that if expression of public issues within the confines of the first amendment must now be permitted in these areas, newspapers actively engaged in the discussion of public issues should be deemed "quasi-public" enterprises and required to deal with the public at large on a nondiscriminatory basis. Arguably, Mr. Justice Black could agree with this result as a logical adjunct to *Marsh*. In *Marsh*, expression of ideas entailed access to the property of the company-owned town. Analogically, the only feasible means of effectively presenting and countering previously-voiced opinions to the community at large is through the same medium—the community newspaper.

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24. *Id.* at 319.
25. *Id.*
26. *Id.* at 332, quoting *Marsh*.
27. See text accompanying note 6 *supra*.

STATUTORY CREATION OF DUTY

Not only may private property rights be constitutionally abridged under certain circumstances, but policy considerations necessitate the regulation of private monopolies for the public good.

"State Action"

One final obstacle in the creation of a right of access to the press is that *Kissinger, Niemotko, Wolin, Marsh* and *Logan* may all be interpreted as a negative prohibition against state interference with first amendment rights which does not entail any affirmative duties.[28]

Before the enactment of the 1968 Civil Rights Act and the Court's decision in *Jones v. Mayer*, if state action was not involved, a refusal by private homeowners to sell or rent because of race, color, creed, or religion was permissible. These recent developments have demonstrated that in the absence of state action the civil rights of an individual may be superior to another individual's property rights. As an individual seeking a "right of access" to a newspaper is faced with the hurdle provided by the state action requirement, it is submitted that legislation should be enacted to implement the freedom of the press clause of the first amendment, as has been done in the case of the equal protection clause of the fourteenth amendment. However, in so doing, Congress would have either to equate an individual's first amendment rights with his civil rights or at least recognize that his first amendment rights are superior to another individual's property rights. Opponents of applying this rationale to newspapers contend that our society places high value on a free press, and its right to exercise private discretion should not be judicially or legislatively circumscribed. As a theoretical justification this argument is unimpeachable, if the result is a free interchange of political ideas. On the other hand, if freedom of the press signifies the suppression of unpopular views, as often seems to be the situation at present, then governmental intervention is clearly warranted, not as a restriction on existing news coverage, but as an expansion and stimulus to debate.

Present Newspaper Regulation

Regulation of monopolies in wire services has been the extent of statutory control over newspapers. Associated Press by-laws allowing members to prohibit the sale of news to non-AP members and to block the admission of new members has been held to be a combination and conspiracy in restraint of trade and commerce among the states and an

28. Perhaps the most famous "state action" case, Shelley v. Kraemer, 334 U.S. 1 (1948), has been interpreted in this manner. *See, e.g.*, Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

attempt to monopolize a part of that trade in violation of the Sherman Antitrust Act.[29] The Court specifically stated that the decision was not an application of the "public utility" concept to the newspaper business,[30] although Mr. Justice Frankfurter in a concurring opinion[31] and Mr. Justice Roberts dissenting[32] thought otherwise. Mr. Justice Black, writing for the Court, reasoned that imposition of restraints on first amendment expression necessitated affirmative governmental action:

> [The first] amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, 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 is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the first amendment does not sanction repression of the freedom by private interests.[33]

Also, in *Lorain Journal Co. v. United States*,[34] the Court upheld an injunction[35] which prevented a newspaper, desiring to monopolize advertising and news channels, from destroying a radio station by refusing to publish advertisements for local merchants who advertised through the radio station. It seems anomalous that the need for free interchange of economic commodities has justified very broad and intricate legislative intervention which clearly infringes the "rights" of some to conduct their affairs as they please while the exchange of ideas remains shackled by archaic notions of individual rights. The antitrust laws are *sui generis* because they seek only to implement policies created by express statutory language, viz., destruction of monopoly and promotion of free competition; nonetheless, the Court went a long way toward implementing a first amendment right.[36]

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29. Associated Press v. United States, 326 U.S. 1 (1945).
30. *Id.* at 19.
31. *Id.* at 29.
32. *Id.* at 45.
33. *Id.* at 20.
34. 342 U.S. 143 (1951).
35. The injunction's basic thrust was to restrain Lorain from refusing to accept for publication any advertisement because the advertiser proposed to utilize other advertising media.
36. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 828 (1965):

The Brandeis tradition may be described as the inclination on the part of

Newspapers and the FCC

Regulation of broadcasting has been legitimatized,[37] but in a thirty-five year old decision, without giving any reasons to justify its result, one court held that the Federal Communications Act of 1934 does not apply to communications published in newspapers, but only to those transmitted by wire or radio.[38] The rationale which has since been most often propounded for the distinction drawn between broadcasting and newspapers is that broadcasting by its very nature—since its facilities must be restricted to prevent a station from using another's frequency and since the available frequencies must be rationed—is inherently more susceptible to government regulation.[39] However, arguing that broadcasting is more susceptible to regulation evades the question of whether newspapers should be regulated.

It appears that the "fairness" doctrine,[40] providing equal opportunities for expression, should be applicable to newspapers as well as broadcasting. The Court of Appeals for the District of Columbia has recently upheld the doctrine.[41] However, in *Radio Television News Directors Association v. United States*,[42] the FCC's "personal attack" rules, requiring the radio station to notify the person or group attacked and offer a reasonable opportunity to respond, have been invalidated by

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some courts to consider a very broad range of values, even non-economic values, in the decision of antitrust cases. Conspicuous examples of this [are] Judge Learned Hand's opinion applying first amendment considerations through the Sherman Act in *Associated Press*, and Justice Frankfurter's concurring opinion in the Supreme Court.

37. National Broadcasting Co. v. United States, 319 U.S. 190 (1943), upholding Federal Communications Act of 1934, derived from the Federal Radio Act of 1927, ch. 169, 44 Stat. 1162, now 47 U.S.C. § 151 *et seq.* (1964).

38. Associated Press v. KVOS, Inc., 9 F. Supp. 279 (W.D. Wash. 1934), *rev'd and temporary injunction granted*, 80 F.2d 575 (9th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269 (1936).

39. See Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), and Barron, *In Defense of Fairness: A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 CALIF. L. REV. 31 (1964).

40. § 315(a) of Federal Communications Act of 1934, 48 Stat. 1088, *as amended*, 47 U.S.C. § 315 (1964):

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. . . .

41. 381 F.2d 908 (D.C. Cir. 1967), *cert. granted*, 389 U.S. 968 (1967) (No. 600, 1967 Term; renumbered No. 2, 1968 Term). Belittling remarks concerning author Fred J. Cook were made by the Reverend Billy James Hargis on his program series, *The Christian Crusade*. Mr. Cook wrote and requested equal time, to be furnished at the expense of WGCB. The FCC held that free time must be furnished to Cook, if he is unwilling to pay and sponsorship cannot be obtained.

42. 400 F.2d 1002 (7th Cir. 1968).

the Seventh Circuit Court of Appeals. The court strongly hinted that the "fairness" doctrine might be unconstitutional, although the decision did not require that issue to be reached.[43] The justification for the latter decision is that the requirement of personal notification inhibits discussion of controversial issues, which would imply that the basic premise of the "fairness" doctrine—a balanced presentation—is not being questioned. Moreover, it is in this context that the most fundamental element of the question of newspaper regulation may be seen most clearly. As recent events graphically illustrate, to force a speaker at a public gathering or a speaker employing broadcast media to devote a portion of the time available to a proponent of an opposite view restricts the time available for his own presentation, and most importantly, the difficulty of resolving such issues as precisely which factions are entitled to representation and by whom may well preclude anyone's speaking.[44] Patently, adding pages to a newspaper raises significantly fewer difficulties. Proper cognizance of these mechanical realities leads to the surest refutation of the averment that to foist upon newspapers the views of third parties is to abridge their first amendment rights; simply requiring a newspaper to accept political advertisements in no way impedes presentation of the newspaper's editorial viewpoint. Thus the implications raised in *Radio Television News Directors* as to the possible unconstitutionality of the abridgment of speech inherent in the difficulty of implementing the fairness rules need have no application to newspapers.[45]

Limits and Extent of Duty

If the duty to accept advertisements is imposed on newspapers, minimal standards must be promulgated to forestall the inundation of newspapers with unprintable matter.

Political—Commercial Distinction

Presently, newspapers have the right to reject both political and commercial advertisements.[46] To espouse abolition of discretion as to the former practice is not to challenge the latter. This result would harmonize with the previously discussed decisions concerning the first amendment

43. "We are not prepared to hold the fairness doctrine unconstitutional." 400 F.2d at 1018.

44. For example, the difficulty of arranging for participation of minority group candidates was raised as a major issue in the controversy over scheduling a debate between major party Presidential candidates in 1968.

45. *Id.* The court began with the premise that newspapers could not be regulated and proceeded to note the similarities between newspapers and broadcasting. *Cf.* Note, *The Federal Communications Commission's Fairness Regulations: A First Step Toward Creation of a Right of Access to the Mass Media*, 54 Corn. L. Rev. 294 (1969), where it is argued that an affirmative right of access to broadcast media should be created.

46. Bloss v. Federated Publications, Inc., 380 Mich. 485, 157 N.W.2d 241 (1968).

as well as with very recent court approvals of the traditional rule as to commercial matter. Existing statutes, such as the antitrust laws, do provide relief from some of the more egregiously unfair commercial practices.[47]

Commentators generally agree that "[t]he notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law."[48] For example in setting the boundaries of the obscenity standard, the Supreme Court has examined the framework of the questionable material. The Court's confusing opinion in *Ginzburg v. United States*[49] has been interpreted as an assertion that certain books violated the obscenity standard not because they were obscene per se, but because they were distributed "against a background of *commercial* exploitation of erotica solely for the sake of their prurient appeal."[50] Also municipal prohibition of the distribution of commercial handbills does not abridge freedom of speech, even when one side of a handbill is devoted to public issues.[51] Moreover, in its widely publicized decision on libel of public figures, *New York Times Co. v. Sullivan*,[52] the Court noted that the first amendment applied since the advertisement at issue was not a commercial one.[53]

Cogent policy reasons underlie the courts' concern with the character of the advertisement.[54] Dissemination of "false" political ideas serves a socially useful purpose not present in false claims by manufacturers advertising their products. In the commercial marketplace false assertions are likely only to breed more false assertions from competitors with no

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47. See text at notes 29-36 *supra*.

48. *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967). See also cases cited therein.

49. 383 U.S. 403 (1966).

50. *Id.* at 466. *But cf.* Dyson, *Looking-Glass Law: An Analysis of the Ginzburg Case*, 28 U. PITT. L. REV. 1 (1966), contending that Ginzburg was convicted not for the distribution of obscene matter, but for the obscene distribution of matter. It is argued that *Ginzburg* does not stand for the proposition that the obscenity of material may be judged by the way it is advertised, since the decision did not label the material obscene. Instead, the case holds that one who promotes distribution by emphasizing the sexually provocative aspects of the publication is later estopped to deny his prior assertions in an action for "pandering."

51. Valentine v. Chrestensen, 316 U.S. 52 (1942). The court held that provisions of the Sanitary Code forbidding distribution in the streets of commercial and business advertising matter could not be sidestepped by printing a double-sided handbill with one side devoted to "public protest" and the other to commercial advertising.

52. 376 U.S. 254 (1964). See discussion at note 19 *supra*.

53. The publication was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. 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.

Id. at 266.

54. For a good discussion of this area see *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

corresponding improvements in the products sold. On the other hand, expression of political opinion is likely to inspire discussion which can lead to further clarifications and thus be an impetus to progress or reform.[55] Furthermore, assertions about the virtues of a product are capable of empirical verification, unlike political assertions which often expound a normative standard rather than empirically demonstrable truths.[56] As John Stuart Mill appropriately stated:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[57]

Reasonable Regulations

One way of controlling both the number and content of advertisements would be by reasonable regulations, framed against a constitutional background. In *Kissinger*, the court touched on this issue:

> Even if the authority and the advertising company are required to accept the posters for display, however, it does not follow that others must be accepted, and, in addition, the authority and advertising company could impose reasonable regulations on the display of plaintiff's posters and others of a similar nature as to the number to be displayed and the time and place for their display.[58]

First amendment freedoms have been circumscribed by various concepts such as "clear and present danger,"[59] "balancing of competing

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55. *Id.* at 1030.

56. *Id.* at 1031.

57. Buckley v. Meng, 35 Misc. 2d 467, 474, 230 N.Y.S.2d 924, 932 (Sup. Ct. 1962) (quoting J.S. MILL, ON LIBERTY).

58. 274 F. Supp. 438, 443 n.6 (S.D.N.Y. 1968).

59. Speech is protected unless it is of such a nature as to create a clear and present danger that it will bring about substantive evils which the federal or state legislatures have a right to prevent. American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950), *rehearing denied*, 339 U.S. 990 (1950); Schenck v. United States, 249 U.S. 47 (1919).

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or otherwise, under the guise of conserving desirable conditions.

Mr. Justice Roberts, speaking for the Court, in Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

interests"[60] and other tests.[61] *Breard v. City of Alexandria*[62] held that an ordinance forbidding peddlers to call upon private residences without an invitation does not interfere with interstate commerce or deny freedom of the press. While the case may be contended to have turned upon the fact that admitting unwanted intruders could lead to robbery or worse, the Court stressed the homeowner's right of privacy. Similarly, *Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.*,[63] involved regulations promulgated by the owner of a housing development prohibiting entry of any apartment building for the purpose of canvassing, peddling, soliciting contributions or distributing literature except upon written consent or invitation of a tenant previously furnished to the manager. The plaintiffs, members of Jehovah's Witnesses, argued that such restrictions were a violation of their freedom of speech, and that they had an absolute right, despite the regulations, to go at will through the apartment buildings to propagate their religious beliefs. The court upheld the restrictions as validly leaving the determination up to each individual tenant. Also, *Kovacs v. Cooper*[64] upheld a statute which banned sound trucks broadcasting items of public interest from the public streets when amplified to a loud and raucous noise level. Just as homeowners are entitled to be free of missionaries intruding or messages blaring into their homes, newspaper subscribers should have the right not to be besieged by advertisements in poor taste under anyone's standards.[65]

On balance it would seem that if a newspaper must accept advertisements it should not then be exculpated from all responsibilities for their content no matter how irresponsible or inflammatory, especially in light of the fact that the young are exposed to newspapers. At present, when discussing "public officials" or "public figures" newspapers are only liable if "actual malice" is shown, and this protection could be extended

60. Freedom of speech and press are not absolute rights, and the validity of a statute under the first amendment depends upon a balancing of competing interests. Shelton v. Tucker, 374 U.S. 479 (1960).

61. As many as five different first amendment formulations can be found: the "bad tendency" test, the "clear and present danger" test, the "ad hoc balancing" test, the "absolute" test, and the "definitional balancing" test. For theoretical discussions see Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

62. 341 U.S. 622 (1951). The Court reached the same result in Martin v. Struthers, 319 U.S. 141 (1942).

63. 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied*, 335 U.S. 886 (1948).

64. 336 U.S. 77 (1949).

65. Access to advertise one's political convictions, for example, should not confer the right to depict brutal war scenes.

to include good faith defamatory errors[66] as well as to errors in publishing or excluding subversive or obscene matter. This balance would be appropriate, for as Mr. Justice Black, speaking for the court in *Farmer's Education & Cooperative Union v. WDAY, Inc.*,[67] stated:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as 'truth' and the privilege of fair comments. Such issues have always troubled courts. Yet, under petitioner's view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent political decisions.[68]

Regulations must also be promulgated covering rates and policies as to disclosure of the author of the advertisement. Rates should be kept at a minimum consistent with space and expense in order that the poor as well as the rich may receive a forum. It has been held that establishing the commercial advertising rate as a maximum rate for political advertise-

66. See Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642 (1966).

67. 360 U.S. 525 (1959): The Court held that § 315 of the Federal Communications Act providing for equal time for political candidates and prohibiting censorship, forbids the station to delete libelous material and immunizes the station from libel actions under state laws.

68. *Id.* at 530.

ments in newspapers does not abridge freedom of the press.[69] If litigation currently underway to establish that such publications as newspapers published by state-run universities are "publicly" operated[70] proves successful, then arguably the precepts of *Murdock v. Pennsylvania*[71] should restrict their rates to no more than recoupment of cost.

As for the identification problem, *Talley v. California*[72] seems to stand for the proposition that requiring the sponsor's signature is an unconstitutional abridgment of free speech. This case involved a Los Angeles city ordinance prohibiting distribution, in any place under any circumstances, of handbills which did not have printed on them the names and addresses of persons who prepared, distributed or sponsored them. The ordinance was justified on the grounds that it was aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity and libel."[73] Mr. Justice Black, speaking for the Court, found that fear of reprisals might deter peaceful discussions of public matters of importance. Mr. Justice Harlan concurred on the grounds that the ordinance was not limited on its face to the matters cited by the city, but implied that under such limitations the ordinance would be acceptable. Justices Clark, Frankfurter, and Whittaker dissented on the grounds that freedom of speech does not guarantee the right of anonymity. The justification for ordinances of this type is that one who prints must identify himself in the same manner as one who speaks from a public platform. Justice Harlan's approach seems most appropriate: identifiable state policies will often necessitate disclosure.[74]

Periodicals Excluded

Any rule requiring the right of access to daily newspapers should

69. Chronicle & Gazette Pub. Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690 (1947).

70. See note 18 *supra*.

71. 319 U.S. 105 (1942). The Court held in violation of the first amendment a municipality's licensing tax on canvassers as applied to Jehovah's Witnesses whose activities might have been curtailed by the expense.

72. 362 U.S. 60 (1960).

73. *Id.* at 66.

74. NAACP v. Alabama, 357 U.S. 449 (1958): a court order requiring disclosure of the NAACP's membership list was ruled a violation of the due process clause of the fourteenth amendment. The purpose of the production order, to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute, did not outweigh the likelihood of possible "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility." *Id.* at 462. Furthermore, *officers* of the NAACP had no objection to divulging their identity, thereby satisfying the purposes of the statute.

Although state policies here did not justify disclosure, prevention of fraudulent and obscene advertisements is a sufficient rationale for requiring identification. Requiring sponsors of advertisements to identify themselves would probably reduce the number of irresponsible and factually inaccurate advertisements submitted.

not apply to scholarly journals or opinion magazines, such as *The New Republic* or *The National Review* or to such essentially propagandistic papers as *The Daily Worker*, as these periodicals make no claim to unbiased reporting. Furthermore, these types of publications span the political ideological spectrum, and refutation of "liberal" arguments may be found in "conservative" periodicals. On the other hand, monopoly newspapers in a small community are often the only effective means of communication on matters of local concern, and denial of access here often results in an effective stifling of debate.[75] It would seem that even weekly newsmagazines should be excluded on the grounds that the publishers are seeking to offer the public an integrally designed total package aimed at a less broad audience that of newspapers. While this distinction is one of degree it is bolstered by the empirical observation that newspapers presently publish a wider variety of advertisements than most magazines. The courts have recently upheld the right of magazines and law reviews to refuse to print political matter.[76]

REMEDY

One possible remedy would be to allow a rejected advertiser an action in tort against the offending newspaper. However, cases[77] that have already utilized the tort action have not been successful, since newspapers have no duty to serve without discrimination.[78] If, however,

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75. See discussion at note 3 *supra.*

76. Avins v. Rutgers State University, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), involved the rejection of an article submitted for publication in the *Rutgers Law Review.* The article reviewed the legislative history of the Civil Rights Act of 1875 as it pertained to school desegregation, concluding that the United States Supreme Court had erred in Brown v. Board of Educ., 347 U.S. 483 (1954). In his letter of rejection the articles editor of the Review stated that "approaching the problem from the point of view of legislative history alone is insufficient." 385 F.2d at 152. Avins asserted that the editors of the Review had discriminated by accepting articles reflecting a "liberal" jurisprudential outlook in constitutional law, an outlook which rejects the primacy of legislative history and the intent of the founding fathers. Avins asserted that his article was rejected solely because of its conservative approach, thereby violating his free speech rights. The court, in affirming the trial judge's granting of summary judgment for the defendants, held that free speech does not give the right to speak on any subject at any time, and that editors of a law review must necessarily have broad discretion. See also, Mid-West Elec. Cooperative, Inc. v. West Texas Chamber of Commerce, 369 S.W.2d 842 (Tex. Ct. Civ. App. 1963), where the court upheld the Chamber's right to refuse to accept an advertisement from an electric cooperative, a member of the Chamber, on the grounds that it was contrary to political philosophies of the organization.

77. See, *e.g.*, J.J. Gordon, Inc., v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E. 2d 586 (1961).

78. RESTATEMENT OF TORTS § 762 (1938):

> One who causes intended or unintended harm to another merely by refusing to enter a business relation with the other or to continue a business relation terminable at his will is not liable for the harm. . . .

The comments following this section give as an example of non-liability in this area the refusal of a newspaper to accept an advertisement.

newspapers have a duty statutorily imposed upon them, they could be liable under a provision analogous to section 763 of the RESTATEMENT OF TORTS[79] for a violation of that duty. This type of tort action seems to offer a greater chance of success than the traditional defamation remedies.[80] However, damages may be hard to prove when the only harm suffered is repression of political ideas rather than economic interests, and editors might regard such damages as costs well justified so long as some ideas remain unprinted.

The ideal remedy would be a mandatory injunction compelling the newspaper to publish. Where impending events, such as an election, would make a plaintiff's right of expression moot by the time the issue is litigated, utilization of interlocutory injunctions, either temporary restraining orders or preliminary injunctions,[81] would be necessary. Except for situations such as impending elections where "time is of the essence," injunctions will probably be issued only after a full trial.[82] Interlocutory mandatory injunctions seldom are utilized,[83] and only in circumstances where necessary to prevent irreparable injury.[84] Furthermore is-

79. RESTATEMENT OF TORTS § 763 (1939):

> 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 so to serve another is liable to the other for the harm caused thereby.

Of course, the "all" whose duty it would be to serve is the relevant "all" with the limitations discussed above taken into account.

80. For a list of the various remedies available, *e.g.*, retraction, reply, and the difficulties with each, see Note, *Vindication of the Reputation of A Public Official*, 80 HARV. L. REV. 1730 (1967).

81. *See* FED. R. CIV. P. 65.

82. Courts have been hesitant to award preliminary mandatory injunctions, since the result is a granting of the relief before the issues are fully litigated. In Amalgamated Furniture Factories v. Rochester Times-Union, 128 Misc. 673, 219 N.Y.S. 705 (1927), this rationale was followed in denying plaintiff's plea for a preliminary mandatory injunction to force the defendant newspaper to publish its advertisements under their contract. The defendant claimed the advertisements were misleading; no affirmative relief could be granted until this issue was litigated. Winton Motor Carriage Co. v. Curtis Publishing Co., 196 F. 906 (D. Pa. 1912), held that a weekly magazine could not be compelled by preliminary mandatory injunction to publish an advertisement submitted by an auto manufacturer when there was a contract dispute.

In Rose v. Brown, 186 Misc. 553, 58 N.Y.S.2d 654 (1945), a mandatory preliminary injunction issued compelling a radio station to broadcast programs in compliance with its contract, since by the time the issue was litigated the broadcast date would have passed.

83. A mandatory injunction, especially at a preliminary stage of proceedings, is rarely issued, and only where it is essential to maintain the status quo pending the trial. Action Bag & Envelope Co. v. Lerner, 218 N.Y.S.2d 880 (1961). Courts do have power to issue mandatory injunctions where it is necessary to preserve the status quo or to prevent irreparable injury to the plaintiff. Graham v. Board of Superintendents, 49 Misc. 2d 45, 267 N.Y.S.2d 383 (1966).

84. It has been sometimes said that a mandatory injunction cannot be issued before the final hearing, and that is generally true, since the purpose of an interlocutory injunction is merely to preserve the status quo until the rights of the parties can be determined. But in special circumstances mandatory inter-

suance requires an extremely clear showing of the rights of the parties and in any case in which the vague standards of the first amendment are raised as a defense such a showing is unlikely.

Since a newspaper's determination of whether or not to accept an advertisement for publication involves consideration of imprecise first amendment tests and vague defamatory standards with their corresponding intricate legal defenses,[85] newspapers should not be held liable as long as their decisions concerning publication are in good faith and reasonable under the circumstances. If we should not hold newspapers liable for good faith judgments not to publish, neither is it equitable to force advertisers to undertake court actions seeking an injunction and/or damages in order to have their advertisements published. To state that the remedy is not without difficulties, however, is not to state that we should be without the remedy.

CONCLUSION

Opponents of governmental intervention argue that if any reforms are needed, an enlightened press should undertake its own policing.[86] However, portraying publishers as benevolent despots would not seem to provide the adequate safeguards needed to insure greater access. Arguably creation of this new right may lead to demagoguery and even possible violence. On the other hand, possibilities of excess or violence are not justifications for curbing freedom of expression[87] until there is a "clear and present danger" of such disorder,[88] and allowing greater freedom for the expression of opinion may inhibit rather than promote

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locutory injunctions have been granted, as where the rights of the parties are clear. . . .

H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 33 (2d ed. 1948).

85. See the analogous discussion by Mr. Justice Black in discussing defamation in broadcasting at the text accompanying note 68 *supra*.

86. See, *e.g.*, Z. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947).

87. The right of freedom of speech and press has broad scope; the authors of the first amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential, if vigorous enlightenment was ever to triumph over slothful ignorance.

Martin v. Struthers, 319 U.S. 157, 181 (1943).

88. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for an acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, 315 U.S. 568, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminello v. City of Chicago, 337 U.S. 1 (1948).

unrest.[89] Moreover our greatest danger today seems to be an apathetic majority.[90]

Distinguishing political from commercial advertisements and identifying inflammatory or obscene matter may be difficult in some cases, but differentiating "public officials" and "public figures" is no less difficult. Subways, terminal stations and shopping centers now serve as forums for public expression. The creation of a right of access to newspapers is long overdue.

William A. Resneck

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89. Barron, *supra* note 1, at 1650:

> Ideas are denied admission into media until they are first disseminated in a way that challenges and disrupts the social order. They then may be discussed and given notice. But is it not the assumption of a constitutional guarantee of freedom of expression that the process ought to work the other way—that the idea be given currency first so that its proponents will not conclude that unrest and violence alone will suffice to capture public attention.

90. Buckley v. Meng, 35 Misc. 2d 467, 476, 230 N.Y.S.2d 924, 934-35 (Sup. Ct. 1962):

> The danger of our times is not that we as a people have become aroused to fever pitch by the excitement of ideas. It is rather by the opposite, that we as a people have become inert and conformist, that we do not often enough hear the vital issues of our day, mooted from a public platform.