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Introduction: Mass Media in the Twenty-first Century

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The title of this paper symposium, *Mass Media in the Twenty-first Century*, reflects the obvious reality that the mass-media landscape of 2006 looks nothing like that of 1996. As Rick Morris states in his contribution, the last decade has been one of the most exciting in terms of technological and intellectual development.² The internet is only the most obvious and influential development, one discussed in some measure by each of the contributors. The question we seek to explore in this issue is how these technological and intellectual developments affected the composition and role of the mass media. It is a question sounding in law, mass-communications theory, and journalism.

Three authors—Randall Bezanson and Gilbert Cranberg,³ Michael Gerhardt,⁴ and Susan Balter-Reitz⁵—examine changes in our understanding of journalism as a concept. Journalism, Bezanson and Cranberg argue, is a “human creation,” not part of the “natural order of things,” but a product of the early economics of the news business.⁶ New technology and new mar-

¹ Associate Professor of Law, FIU College of Law. My thanks to all the participants in this paper symposium.

² Rick Morris, *The End of Networks*, 2 FIU L. REV. 55, 70 (2007).

³ Randall P. Bezanson & Gilbert Cranberg, *Taking Stock of Newspapers and Their Future*, 2 FIU L. REV. 23 (2007).

⁴ Michael J. Gerhardt, *The Future of the Press in a Time of Managed News*, 2 FIU L. REV. 41 (2007).

⁵ Susan Balter-Reitz, *In Search of Truthiness*, 2 FIU L. REV. 7 (2007).

⁶ Bezanson & Cranberg, *supra* note 3, at 23.

kets simultaneously have expanded and contracted our understanding of journalism.

Journalism has expanded because of the increased number and range of people doing what can, at some level, be called journalism—gathering, distributing to the public, and increasing the free flow of news, opinion, information, and ideas.⁷ The definition of journalism and of who is a journalist is broadening, in turn broadening and enriching the marketplace of ideas, even while making it impossible to manage.⁸ The Supreme Court long ago stated that the First Amendment’s Press Clause protects the “lonely pamphleteer” as much as it protects the great metropolitan newspaper.⁹ Blogs and the internet are among several media that bring that idea to fruition.¹⁰ The “publisher-kings”¹¹ of newspapers are gone, replaced as the source from which most people receive information on public issues—partisan cable news programs, blogs, and movie documentaries.¹² The internet joins in one medium the lonely voices reminiscent of Thomas Paine,¹³ blogs reflecting the same partisanship of early-American Jeffersonian papers,¹⁴ and the objectivity of *The New York Times*.¹⁵

In other ways, however, journalism has contracted and declined. Whatever one might think of publisher-kings,¹⁶ journalism has been defined by a buffer between media owners and the consuming public, a judgment made in the middle distance by a professional class about what is important and what people need to know.¹⁷ The news revolution our authors identify entails inroads against that buffer. These include increased public-corporate

⁷ See Balter-Reitz, *supra* note 5, at 15 (agreeing with a definition of journalism focused on efforts to increase the free flow of information); see also *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”).

⁸ See *id.* at 22 (arguing that the public is best served by a broad definition of journalism); Gerhardt, *supra* note 4, at 47 (arguing that the proliferation of media outlets produces an unmanageable marketplace of ideas, but one that would otherwise be smaller and less rich).

⁹ See *Branzburg*, 408 U.S. at 704 (describing “traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods”).

¹⁰ See Balter-Reitz, *supra* note 5, at 11 (“The public accepts multiple platforms for news delivery.”); Gerhardt, *supra* note 4, at 45 (describing the rise of diverse new information outlets).

¹¹ Balter-Reitz, *supra* note 5, at 8.

¹² See *id.* at 11-12.

¹³ THOMAS PAINE, *COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE* (1969).

¹⁴ See RICHARD N. ROSENFELD AND EDMUND S. MORGAN, *AMERICAN AURORA: A DEMOCRATIC-REPUBLICAN RETURNS: THE SUPPRESSED HISTORY OF OUR NATION’S BEGINNINGS AND THE HEROIC NEWSPAPER THAT TRIED TO REPORT IT* (1997).

¹⁵ See Balter-Reitz, *supra* note 5, at 13 (“Journalism has grounded its definition of itself in a narrative of ‘objectivity.’”).

¹⁶ Balter-Reitz speaks of the arrogance of the media’s view of itself as a priestly class. Balter-Reitz, *supra* note 5, at 13.

¹⁷ See Bezanson & Cranberg, *supra* note 3, at 23.

ownership of news-media outlets,¹⁸ the concentration of ownership in the hands of a small number of corporations,¹⁹ and the subsequent downsizing of the newsroom to enhance profits.²⁰ The result is increased meddling in the editorial process and a resulting loss of credibility in the mainstream media.²¹ The bottom-line corporate approach to running newspapers has cut back on staff size, amount of space devoted to news, and scope of coverage of events.²² Errors are up, because newspaper copy-editing staffs are too small, inexperienced, and overworked to catch errors, leading to increased libel litigation,²³ which in turn raises First Amendment concerns.²⁴

There also is the increased public demand for, and media provision of, what Gerhardt calls “[s]oft news” or “info-tainment,” shows consisting of speculation and opinion and dramatic clashes between guests with polarized views, rather than nuanced discussions of public policy.²⁵ Gerhardt goes further in arguing that the internet does not alleviate this concern, because most people use it get soft news, entertainment, and to reinforce what they already believe.²⁶ Many of the alternate media “are less interested in educating or informing their audiences than they are in entertaining them.”²⁷ In fact, while journalism long was understood as functioning to inform the public,²⁸ new technologies allow each individual content consumer to create her own newspaper featuring only what she wants—“news, conservative or liberal, brash or logical, fact or opinion, argumentative or reflective.”²⁹

Gerhardt and Bezanson & Cranberg focus primarily on the decline of major newspapers.³⁰ Our fourth author, Rick Morris, examines the decline of the three major broadcast networks.³¹ He partly attributes this decline to the same technological advances, namely cable, twenty-four hour cable news, and the internet.³² Morris traces the legal and public policy rules that

¹⁸ See *id.* at 31-32; Gerhardt, *supra* note 4, 43-44.

¹⁹ See Bezanson & Cranberg, *supra* note 3, at 29-30; Gerhardt, *supra* note 4, at 43-44.

²⁰ See Bezanson & Cranberg, *supra* note 3, at 34-35.

²¹ See Balter-Reitz, *supra* note 5, at 11.

²² See Bezanson & Cranberg, *supra* note 3, at 34.

²³ See *id.* at 30.

²⁴ See generally *New York Times v. Sullivan*, 364 U.S. 278 (1964).

²⁵ Gerhardt, *supra* note 4, at 47.

²⁶ *Id.* at 50; see also Bezanson & Cranberg, *supra* note 3, at 38 (describing changes in the definition of what kinds of stories count as news and how and why they count).

²⁷ Gerhardt, *supra* note 4, at 47.

²⁸ See Bezanson & Cranberg, *supra* note 3, at 26 (arguing that journalism relies on the exercise of human judgment about what the public needs to know); Gerhardt, *supra* note 4, at 47-48 (discussing need for special constitutional protection for press, given role of informing the public about hard news and helping everyday Americans become better citizens).

²⁹ Bezanson & Cranberg, *supra* note 3, at 37.

³⁰ See *id.* at 24; Gerhardt, *supra* note 4, at 48.

³¹ Morris, *supra* note 2, at 66 (describing decrease in network share of viewing audience from 69% in 1985 to 29% in 2002).

³² *Id.* at 60-61, 65.

allowed the major networks to rise to power in the first place, as well as the legislation and regulation, beginning in the 1980s, that produced this decline in power. But Morris also discusses how the networks have dealt with these changes. Recognizing that this decline in market share is permanent, the networks adjusted their way of doing business. Morris calls this “neo-networking,” in which the networks seek to satisfy the immediate demands of media consumers, in part by expanding from broadcasting onto cable and the internet.³³ The result, Morris argues, is a world in which “the only important thing is how creative your content is and whether people are watching it,” regardless of when and where.³⁴

Our final two authors examine developing First Amendment controversies involving the news media. The first involves the right of the press to receive and publish leaked classified national security information.³⁵ This actually involves two distinct legal disputes. One is whether reporters should be entitled to a constitutional or statutory privilege from having to disclose the identities of anonymous sources from such reports when questioned before grand juries.³⁶ The other, which Dean Geoffrey Stone analyzes in his contribution (adapted from his 2006 congressional testimony), is whether media outlets and media members should be subject to criminal prosecution and punishment for publishing government secrets. The United States has not had, or needed, such a legal prohibition in its 215-year history.³⁷ Stone argues that the “very notion of punishing the press for publishing information because the government wants to keep that information secret runs counter to the fundamental tenets of public accountability.”³⁸ The solution, instead, is for the government to do a better job of preserving confidentiality—reconciling two irreconcilable needs by protecting an expanding right of the press to publish leaked information, while simultane-

³³ *Id.* at 69-72.

³⁴ *Id.* at 73.

³⁵ See, e.g., James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, THE NEW YORK TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200> (last visited Jan. 16, 2007) (story exposing classified National Security Agency wiretap program, base on anonymous sources); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (last visited Jan. 16, 2007) (story exposing classified CIA operation of overseas prisons for terror suspects).

³⁶ See, e.g., Mary-Rose Papandrea, *Citizen Journalism and the Reporters' Privilege*, 91 MINN. L. REV. ____ (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932681 (last visited Jan. 16, 2007); Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006); see also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (rejecting existence of First Amendment reporters' privilege).

³⁷ Geoffrey R. Stone, *Prosecuting the Press for Publishing Classified Information*, 2 FIU L. REV. 93, 93, 95 (2007).

³⁸ *Id.* at 93.

ously protecting a strong power of the government to prohibit leaks from occurring.³⁹

The second First Amendment controversy, examined by our final author, Craig Smith, involves efforts to regulate media violence. Smith focuses on arguments equating violence with indecency, the latter already subject to greater regulation, at least in broadcast media.⁴⁰ These new regulatory efforts largely have failed because of the inability to develop a non-vague working definition of violence that does not sweep in too much creative or innocuous speech.⁴¹ Smith shows that courts have uniformly rejected the argument equating violent content with indecent and sexually explicit speech.⁴² Finally, and most importantly, he shows that the social-science evidence of a link between violent content and societal violence, including among children, is questionable, at best, undermining the government interest in regulating violent expression.⁴³

These six short essays examine, in brief, important First Amendment and communication issues. We hope they serve as a jumping-off point for further discussions on these subjects.

³⁹ *Id.* at 96.

⁴⁰ See Craig R. Smith, *Violence as Indecency: Pacifica's Open Door Policy*, 2 FIU L. REV. 75, 83-86 (2007); see also *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁴¹ See Smith, *supra* note 40, at 85-86.

⁴² *Id.* at 86-87.

⁴³ *Id.* at 87-91.