STUDENT SYMPOSIUM: COMMUNICATIONS REGULATION

Foreword

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Oliver Wendell Holmes once observed: “It cannot be helped, it is as it should be, that the law is behind the times.” Whatever benefits of stability this truism heralds, it also announces the never-ending need for law reform. This ongoing reform is especially necessary in light of the massive scientific and technological developments of the last half century, developments that have transformed our world. Revolutionary breakthroughs in nuclear energy, genetics, medicine, and transportation, to name a few areas, have recast the human experience and the conflicts government must resolve.

There have been equally revolutionary innovations in the modern techniques for communicating across distance, time, and cultures. This moment marks a turning point in the history of broadcast and telecommunications. Technologies developed since the adoption of the Communications Act of 1934 exceed even the reach of what was science fiction imagination—and more advanced technologies are constantly being developed. We can now send a film of a presidential funeral, a photograph of a newborn child, or a score from a baseball game around the world in seconds. Our capacity to share knowledge and experiences with multitudes of people has never before been so great. Satellite broadcasting, cable facilities, data processing, and the emerging promise of fiber optics have already metamorphosed our sense of ourselves and our world.

These technological innovations challenge the premises of legal arrangements, premises devised in simpler times to direct traffic in the airwaves. Notions of scarcity, frequency interference, and the unique pervasiveness of mass media were used to justify relatively intrusive

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1. O.W. Holmes, Law and the Court, in Collected Legal Papers 291, 294 (1921).
regulation of telecommunications. Thus, the Federal Communications Commission was authorized to regulate mass media, despite the apparent first amendment conflicts posed by such a scheme. Recent technological innovation, however, has drained these old justifications of their persuasiveness. It has also led to complicated and anomalous regulatory practice.

Clearly, a thorough rethinking of the legal treatment accorded telecommunications is in order. The student Comments in this issue are an indication of a growing awareness of this need. I have offered substantive comments of my own elsewhere. Without casting my lot with any particular proposal, I do want to suggest what should be the proper contours of the debate. It is imperative that the ambit of the debate be broader than current law may suggest. Minor adjustments to a structure that has failed simply will not do, and would serve only to worsen the problems. It will not be easy to challenge the investment in the present system, but reform must be far-reaching and farsighted if the law is ever to catch up with the reality of our times. The belief that significant reform is not a viable choice produces tunnel vision.

Our vision must include more than the definition of property interests in media licenses, advancement of the public's "right to hear" and rights of access, and increase of competition and diversity. At least two more issues come to my mind when I think of the communications revolution: challenges to privacy and risks of international conflict. The revolutions in gathering and transmitting information jeopardize

6. For example, I have proposed reduction or elimination of "behavioral" regulation through licensing procedures by which the Federal Communications Commission influences the content of programming and conduct of licensees. Instead, "structural" regulation—such as the use of antitrust laws to limit concentration of media ownership—may effectively promote diversity without trammeling freedom of expression. Bazelon, The First Amendment and the "New Media"—New Directions in Regulating Telecommunications, 31 FED. COM. L.J. 201 (1979).

In addition, consider the impact of television upon the American people: 95% of American homes have television sets, the average home operates the TV set for over five hours a day, and 60% of homes rely primarily on television for news coverage. With such impact, concentrated power in three major networks cries out for reform. See S. Michaelson, The Electric Mirror 25 (1972); Twentieth Century Fund, Voters' Time, Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era 6 (1969). Cf. CBS v. FCC, No. 79-2403 (D.C. Cir. Mar. 14, 1980) (FCC can regulate network decisions regarding access of political candidates).
the protection for personal privacy traditionally accorded by custom and courtesy. The data processing devices already available hold great promise for easing access to information. Yet, the devices can’t answer tough questions, such as who retains control over the information they handle. Telephone access to computerized health records, publicly available, could mean the difference between life and death in an emergency situation. However, the intimate, personal information on those records may be just what we do not want made available without our express permission. Worldwide communications expose each of us to each other in new ways—in part by peeking behind traditional veils of privacy. Who is to determine the proper use of new satellites that can detect the presence of natural resources, private possessions, and people far below without technically trespassing?

This points to the second issue—the international dimension of communications. The global nature of communications has created brand new policy issues, such as the allocation of spectrum space and satellite orbits. The new communication technology may potentially promote world understanding, but for now we must reconcile it with narrower national claims. Western nations, especially the United States, today enjoy dominant control of media and information technology. This position exposes us to charges of a new kind of imperialism. The vehicles are television shows and computer hardware instead of tanks or submarines, but invaded nations feel no less threatened. How will we channel the power inherent in communications know-how? How will we respond as other nations catch up?

Whether conceived in terms of national or international policy, communications policy must grapple with both the enduring human need for order and the endless human yearning for freedom, especially freedom of expression. The tension between order and freedom cannot be resolved by logic alone, even if masked as law or economics. As the legal philosopher Morris Cohen wrote,

While logic helps us to see the inadequacies of existing rules and the possibility of varying them or departing from them, it cannot by itself determine what new premises are necessary to make the law work more satisfactorily or to satisfy the maximum of human needs. When we ask: how are we to choose the basic premises of our legal system we enter the realm of ethics as the science of ultimate human ends.7

To reshape our basic premises ordering the use of telecommunications, we must articulate the fundamental values at stake. Legal norms are one source of values; indeed, it may now be time to apply uncompromised first amendment protections to mass media8 along with no-

8. See Bazelon, supra note 6, at 214.
tions of equitable access and efficiency. Other values, such as personal privacy and respect for the legitimate expectations of other nations, must also instruct reform of communications regulation. Above all, that reform must proceed posthaste. As time passes, the law only falls further behind.