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## Some Anxious Thoughts about Utopian Dreams: A Reply to Professor Smolla

Lillian R. BeVier†

Professor Rodney A. Smolla's article confronts a commentator with a genuine dilemma about how to proceed. At least this is so if, like me, the commentator begins with the assumption that she owes it both to the *Legal Forum* Symposium organizers and to the author of the lead article to take *that article* as her point of departure. In preparing this comment, I considered it my obligation to take Professor Smolla's article seriously and to give the ideas it embodies my most careful critical attention. My dilemma arises because I am quite certain that Professor Smolla did not really intend his article to be taken as a serious set of proposals for reform. According to the Symposium Editors, the piece is a "thought experiment," and it expresses views that "may or may not be those"<sup>1</sup> that Professor Smolla holds or would genuinely defend on their own merits. Moreover, Professor Smolla at one point described himself as "actually . . . against most of the wild-eyed ideas suggested by [his] fictional party."<sup>2</sup> Professor Smolla fails to inform his audience, though, precisely which of the views he does hold and which he would disavow. Would he disclaim or embrace, for example, his hypothetical Coalition's diagnosis of the need for American society to "come to a new understanding of what is meant by freedom of speech and freedom of the press?"<sup>3</sup> Would he repudiate or defend the Coalition's extraordinarily coercive, collectivist remedies, and their supporting, highly paternalistic rationales? Indeed, taking the article as a whole, I remain quite in the dark about the hypothesis that Professor Smolla seeks to test by his "thought experiment."

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<sup>1</sup> Editors' Note to Rodney A. Smolla, *Report of the Coalition for a New America: Platform Section on Communications Policy*, 1993 U Chi Legal F 149.

<sup>2</sup> Letter from Professor Rodney A. Smolla to Annalisa Pizzarello, 1992 University of Chicago Legal Forum Symposium Editor (Sept 14, 1992) (on file with the University of Chicago Legal Forum) (discussing intended focus of Symposium presentation).

<sup>3</sup> Smolla, 1993 U Chi Legal F at 153 (cited in note 1).

Because I am unclear about, and thus unable to comment upon, what the point of offering his "wild-eyed" proposals is, what reality he seeks to illuminate by offering them, and what threat he seeks to avert, I have decided that my best course of action is to take the article at its face value. Thus, I will treat the descriptive, normative, and prescriptive intentions that Professor Smolla expresses as if they were genuine attempts on his part to portray reality and to offer for our consideration an achievable alternative to the present scheme.

#### I. PROFESSOR SMOLLA'S VISION OF A FREE AND RESPONSIBLE PRESS

On its face, Professor Smolla's article shares a distinctive normative vision both with the Hutchins Commission<sup>4</sup> and with much of Dean Bollinger's work, especially *Images of a Free Press*.<sup>5</sup> I am going to begin this reply, therefore, by describing my understanding of how the press would behave in the rather Utopian world that these writers impliedly assert as their normative baseline.

In the world the Hutchins Commission and Dean Bollinger envision, the press would adhere to a set of ethical norms that would require it to behave consistently with the goals of a decent society in a progressive democracy. The press would willingly act as common carriers for public debate. The press would never avoid important public issues; indeed, it would treat such issues in depth and with utter impartiality. The press would refrain from excluding important points of view. It would portray reality undistorted by bias, omission, or factual misrepresentation. The press would not sully the reputations of upstanding citizens; if it unwittingly did so, it would retract its misstatements without protest or offer the victims an effective opportunity to reply. The press would not invade people's privacy by reporting on intimate personal facts. It would eschew gossip and scandal. Instead of succumbing to the temptation to pander to the lowest common denominator of public appetite, it would take it upon itself to elevate community tastes and to enlighten the populace about complex issues of the day. The press would, in short, be reliable and trustworthy suppliers of all of the information the public would need about the actions of government or about any other issues legitimately on the public

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<sup>4</sup> Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, 1947) ("Hutchins Report").

<sup>5</sup> Lee C. Bollinger, *Images of a Free Press* (University of Chicago Press, 1991).

agenda, and it would supply it in such a way that it would guarantee a very high quality of public discussion.

In addition to this normative vision of how a "responsible" press would behave, Professor Smolla seems to harbor, along with both the Hutchins Commission and Dean Bollinger, a willingness to entertain seriously the proposition that the freedom of the press ought to be viewed as instrumental in achieving the goal of quality debate and informed public discussion. In other words, the authors appear to reject both the notion that freedom of the press is an end in itself, valuable for its own sake, and the alternative notion that freedom of the press serves only to check government power.

In the Hutchins Commission's willingness to settle for self-regulation as a palliative for the quality defects it perceived in press performance, the Commission seems to have adopted the view that press freedom is provisional, on loan, subject to defeasance should quality continue to decline. Dean Bollinger's work, praising the regulatory regime applied to the electronic media and contrasting it with the autonomy of the print media, operates from a central premise that freedom is divisible. Because it might undermine the very values that the First Amendment is supposed to further,<sup>6</sup> among which he does not explicitly count the value of freedom itself, Dean Bollinger suggests that press autonomy, and in particular our legal regime that imposes so few constraints on either defamatory falsehoods or invasions of privacy, might be too costly. Professor Smolla's foray into legal science fiction confronts us with the possibility that freedom as we know it and his Utopian vision of press "responsibility" just might turn out to be mutually exclusive states of the world. Professor Smolla suggests that if we want to achieve his Utopian dream, we simply may have to abandon freedom and learn to view government and law not as the enemy or subverter of First Amendment values, but as the benign, all-purpose tool by which society forges a responsible press and secures a truly informed public debate.

## II. MY EVALUATION OF PROFESSOR SMOLLA'S VISION

That the Hutchins Commission, Dean Bollinger, and Professor Smolla link their common normative vision to the notion that it is appropriate to regard press freedom as purely instrumental raises two different kinds of questions, each important and, not surprisingly, each related to the other. The first kind of question goes to

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<sup>6</sup> Id at 24-39.

the soundness of the normative vision itself: Should we strive to arrive at the particular Utopia they describe? Should we measure our present performance by such a standard? Should the press view itself as owing, and performing, a "fiduciary obligation to the marketplace of ideas?"<sup>7</sup> How informed, as a practical matter, do we think the average citizen can realistically strive to be?<sup>8</sup> Are there any ideas that ought to be deemed just too far beyond the pale to earn room on the common carrier? Do we have determinate criteria to measure the "quality" of public debate? Will we know when the public's tastes have been sufficiently elevated so that we can stop raising the bar?

The tone and nature of these rhetorical queries suggest that I entertain some doubts about the normative vision that Professor Smolla shares with the authors of the Hutchins Commission Report and Dean Bollinger. I hasten to affirm that, in principle, I am not against the idea that, all else being equal, a democracy peopled by an informed and interested citizenry, neither preoccupied by gossip nor misled by false and defamatory reports about its leaders, is normatively to be preferred to a democracy in which the citizens are ignorant and indifferent, pandered to by scandalmongers, and seduced by lies. To be sure, contemplating the spectacle of present press behavior does not give one the sense that one is gazing upon a monument to the best that the human spirit can produce.<sup>9</sup> But to note this fact is merely to note that there is probably some truth to the platitudes that bemoan the present low quality of public debate and some appeal to the daydreams about a tonier, more genteel public discourse.

I nevertheless remain skeptical about the normative vision that propels these platitudes because I cannot identify the criteria that informs the vision. I do not know how to give the criteria content of sufficient specificity so that if we were ever to arrive in Utopia we would know we were there. Perhaps I am just idiosyncratic in my scholarly tastes, but I think it crucial to identify with a high degree of precision what the goal is toward which we strive and the criteria for deciding how much information is "enough," how much

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<sup>7</sup> Smolla, 1993 U Chi Legal F at 159 (cited in note 1). See also Bollinger, *Images of A Free Press* (cited in note 5).

<sup>8</sup> See, for example, Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 Cal L Rev 482 (1980).

<sup>9</sup> Two recent books about the press give vivid, though depressing, accounts of some worrisome systematic tendencies. See Suzanne Garment, *Scandal: The Culture of Mistrust in American Politics* (Times Books, 1991); Larry J. Sabato, *Feeding Frenzy: How Attack Journalism Has Transformed American Politics* (Free Press, 1991).

gossip and scandal would be "too much," and how to know that the price we are paying for whatever press autonomy we decide to retain is "just right." I would want the answers to questions like these before I could comfortably sign on, even in principle, to the normative vision that the Hutchins Commission, Dean Bollinger, and Professor Smolla embrace. In particular, I would want the answers to such questions because achieving their goals would involve such a significant increase not only in the level of government intervention in the marketplace of ideas but also in the amount of outright government coercion with regard to the content of what the press would publish.

Professor Smolla's article contains some striking inconsistencies and unwitting ironies that exacerbate my concern about its failure to articulate criteria. While claiming to endorse the conventional First Amendment position that "censorship is not tolerable in a free society,"<sup>10</sup> for example, the article nevertheless propounds the wholly inconsistent and most censorious idea that freedom must be defined in a manner "that includes, within itself, a notion of *virtue*, of *quality*,"<sup>11</sup> and that accordingly sanctions vigorous use of "the force of law"<sup>12</sup> to accomplish its ends. In section after section of his article, Professor Smolla prescribes remedies that are not merely coercive but that are coercive precisely with respect to the *content* of what is published. For example, such regulatory techniques as imposing legally enforceable codes of journalistic ethics, mandating affirmative obligations for the media to provide a public forum for debate and discussion, requiring the mass media to grant access rights to citizens whose ideas are otherwise insufficiently represented, and controlling commercial advertising so that it provides only information that the government considers useful, all entail very substantial government supervision of speech content. Such techniques would effectuate a massive shift of ultimate editorial control from the private sector to the government. To propose such techniques hardly manifests the aversion to censorship that Professor Smolla professes to entertain.

In defending his position that the moral obligations of the press should be legally enforceable, Professor Smolla asserts

that no democracy will tolerate concentrations of power strong enough and irresponsible enough to thwart the as-

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<sup>10</sup> Smolla, 1993 U Chi Legal F at 152 (cited in note 1).

<sup>11</sup> Id at 155 (emphasis in original).

<sup>12</sup> Id at 157.

pirations of the people, and thus . . . the American communications industry, having failed for decades to control itself, must now be subject to the force of law.<sup>13</sup>

I trust it is not amiss to point out that there is considerable irony in asserting that an appropriate cure for unacceptable private concentrations of power is to subject them to the greatest concentration of power of all—namely the coercive power of the state, embodied in the force of law. Professor Smolla implies that the private marketplace of ideas works imperfectly and “thwart[s] the aspirations of the people.”<sup>14</sup> He fails to consider, however, the possibility that a government-monitored marketplace might, because coercively imposed, turn out to thwart the people’s aspirations to an even greater, and far less tolerable, extent.

### III. ENFORCING PROFESSOR SMOLLA’S VISION OF PRESS FREEDOM

In addition to questions about the criteria that inform his normative vision and about the coercive implications of giving his normative vision the force of law behind it, Professor Smolla’s notion that press freedom is merely a dispensable means to the end of “quality” public debate raises another set of questions. This set of questions has to do with the specifics of the trade-off between freedom and the legally enforceable quality controls that Professor Smolla envisions. Both Dean Bollinger and Professor Smolla are concerned that our present regime of press autonomy generates press performance that is often disappointing as measured along some key quality dimensions, and they both evince surprise and chagrin that this should be so. Indeed, they seem disconcerted by the rather obvious fact that freedom as it has conventionally been defined in this country is a risky, messy business, not a tidy, orderly, controlled condition of static perfection.

Still, as they imply, every now and then it is good to attempt an accounting of the costs of autonomy, and to consider whether legal remedies might be devised to reduce them. Take, for example, the areas of defamation and publication of intimate private facts. In both of these areas, the press is, as a practical matter and with the obvious exception of the occasional large libel judgement, legally unaccountable for either the private harm or the social costs of its behavior. Yet both defamation and invasions of privacy produce significant amounts of individual and social harm. Defa-

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<sup>13</sup> *Id.* at 161.

<sup>14</sup> Smolla, 1993 *U Chi Legal F* at 161 (cited in note 1).

mation destroys reputations and can ruin lives; it also distorts public debate by permitting it to be premised on false information. On the margin, its prevalence no doubt discourages qualified and able people from entering public life, thus impoverishing the ranks of qualified public servants. Publication of intimate private facts not only harms important individual dignity interests but also subverts public tastes and debases public discourse. The question, however, is whether "press autonomy" causes these troublesome phenomena, in the sense that if we trade that autonomy for coercion or control, we can expect to eliminate or minimize these quality defects. If autonomy is the cause, then we must ask ourselves whether we are so wedded to a particular normative vision that we are prepared to trade some of our freedom for it. If the answer is yes, then we must decide what bits of freedom are expendable and whether we really can design a system of quality control by legal fiat. What would such a system look like, and what kinds of risks would it pose to the realization of our dreams for a perfectly responsible press?

Professor Smolla's article contains a number of specific suggestions about how to implement a comprehensive quality-control scheme. I turn my attention to just one of his ideas. In order to assess this on its own terms, I shall assume the propriety of Professor Smolla's apparent normative premises (at least insofar as I understand them).

To implement his normative vision, Professor Smolla suggests instituting a licensing scheme for journalists.<sup>15</sup> The scheme would treat journalists as public trustees and impose upon them legally enforceable fiduciary responsibilities to the public and the marketplace of ideas. The scheme would create a national code of ethics for journalists that has the force of law. The ethics code would be enforced by requiring a license to practice journalism, with the threat of suspension or revocation for serious violations of the ethics code. Presumably, the ethics code would embody all the standards of quality, ethical behavior, and professionalism that "ought" to characterize press behavior.

When considering press autonomy and its accompanying social costs, it is always appropriate and fair to ask "as compared to what?" In this spirit, I am willing to consider press autonomy in comparison to a world in which the press is licensed in accord-

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<sup>15</sup> *Id.* at 164.

ance with Professor Smolla's suggestions. But my imagination is stymied by an initial hurdle that I cannot quite surmount: I cannot visualize, nor can I stop myself from wondering about, the operational details of such a licensing scheme. Professor Smolla does not specify, for example, how one would qualify for a journalist's license. Would professional training be necessary? Would "better training" of journalists really improve the quality of public debate? Though admittedly anecdotal and limited, my own and many of my colleagues' personal experiences show journalists to be not so much preoccupied with scandal and gossip, nor even "bad journalists." Rather, they reveal that journalists come to their task with their own set of biases and predilections and, what is worse in terms of its implications for the quality of their reporting, generally appear to understand scandalously little about the complex issues they are asked to cover. This observation leads me to wonder whether, in order to qualify for a journalist's license, it should be necessary for applicants to demonstrate that they are both free of bias and sufficiently well-educated to be genuinely able to understand and comprehensibly report upon the world around them. I suspect this is not what Professor Smolla has in mind.

I also wonder about the criteria for enforcing the ethical norms to which Professor Smolla would have journalists adhere. Rather than going into great detail, I shall briefly highlight two principal concerns. First, I assume that the goal is to devise a scheme that will produce a recognizably higher, better quality of public debate than freedom is now producing. The quality of news reporting, however, seems hardly susceptible to government inspection and evaluation. News, after all, is not like a side of beef that can be objectively judged and then confidently graded "choice" or "prime" according to disinterestedly specified, scientifically validated standards.

Then, too, there is a risk that a requirement that journalists conform to "ethical standards" could too readily be transformed into a requirement that they conform to the reigning political orthodoxy of the day. In this very contentious modern world, where there is a tendency among the cognoscenti to put a premium on political correctness and to monitor one another's use of language for signs of path-straying, the risk of politicizing what are designed to be merely ethical standards seems all too real. Thus, because we lack strict criteria with which to measure press behavior, the risks of unchecked monitoring may be too great.

## CONCLUSION

In conclusion, on its face, Professor Smolla's article raises three key concerns:

First, there is the issue of specifying criteria. It is important to be clear about what the normative baseline for judging the behavior of the press is or ought to be. When it comes to criticizing the press, it is easy to intone vague platitudes, but much harder to specify attainable goals for improving press performance. Professor Smolla has not identified concrete criteria to achieve a responsible press.

Second, there is the issue of whether freedom is an end or a means. It is important to think through the extent to which we view freedom as a good in itself or as merely instrumental. If freedom is merely instrumental, we should be able to agree quite precisely on the end it is designed to achieve. Freedom is costly, and messy, to be sure; it produces an imperfect world. That should not surprise us. But maybe we should nonetheless value freedom for its own sake. Professor Smolla appears to value freedom solely as a means to an end.

Finally, there is the issue of evaluating the content and the efficacy of the regulatory techniques for implementing a quality-control agenda. If we are prepared to trade part of our freedom for a higher quality of public debate, we must be clear about the terms of the exchange. Professor Smolla has not set forth sufficiently clear rules. Most importantly, we should get a warranty from the proponents of coercive measures that the rules and regulations they offer will actually work as advertised to produce a net gain in quality in return for the proposed loss of freedom. What a ghastly surprise would await us were we to trade our freedom and find we had just been snookered by a bunch of fast-talking law professors!

