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# Commentary on Adrian Cronauer's "The Fairness Doctrine"

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Does the invocation of the Fairness Doctrine chill speech and inhibit controversial, provocative public affairs programming? Might not the doctrine provide access to victims of outrageous treatment by local media, but whose ill treatment falls short of libel standards? I am in substantial agreement with Adrian Cronauer's position that the doctrine is not in the public interest and raises serious First Amendment questions. The federal courts wisely have never pronounced the doctrine violative of the First Amendment, following the traditional principle not to pass on a constitutional question if there is some other ground on which a case can be resolved.[1] The resolution of constitutional issues should not be the exclusive preoccupation of the courts, particularly when they turn on empirical conclusions which fact-finding bodies are better equipped to determine. For now the decision to resuscitate or not is better left to the Federal Communications Commission (FCC or the Commission) and Congress.

Although the doctrine is moribund today, Adrian Cronauer's analysis has important implications for the right of free speech and press for the future of the communications industry. He points out that the printed medium, which has always had First Amendment protection from the Fairness Doctrine, does not need to be regulated to ensure varying views or response by those individuals whose integrity has been attacked.[2] Libel

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1. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 657 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The D.C. Circuit found neither capricious nor arbitrary the FCC's decision to abandon the Fairness Doctrine because it was not in the public interest and probably violative of the First Amendment. *Id.* at 665.

2. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

law is sufficient protection for the latter. Cronauer's view is that broadcasting is not different from the printed press, and it should have the same constitutional protection. Nor is broadcasting more influential or pervasive than other media which do not have a Fairness Doctrine, including videos and films.

Cronauer's analysis is especially strong when it puts to rest the "scarcity of the spectrum" argument. His challenge to assumed linkages between multiple licensing for broadcasters and diverse views is particularly sound. Cronauer clearly demonstrates that those who support the Fairness Doctrine, such as those who supported the *Red Lion* holding, are mistaken in assuming that broadcasters who compete for licenses naturally have a diversity of views on public affairs.[3] The truth is that station owners are interested in obtaining licenses to make money by pleasing viewers, not to offer alternative views of public affairs. Natural limits on the spectrum are limits on players in the broadcasting market, not restrictions on alternative views. Public-affairs programming is market driven just like all other programming. Cronauer's analysis also demonstrates that "narrowcasting" and the multiplication of cable and satellite technology have rendered the scarcity argument meaningless and obsolete.

Most importantly, Cronauer argues that the Fairness Doctrine discourages, rather than encourages, imaginative, informative programming where minority views are aired, because it enhances the possibility that the Fairness Doctrine might be invoked by those who disagree with the program. Since that will require broadcasters to absorb costs for litigation and loss of commercial time to show alternative views, the pragmatic strategy for a broadcast manager is to avoid controversial views. For several of these reasons the FCC abolished the doctrine in 1987.[4] In abolishing the Fairness Doctrine, the FCC relied upon the Supreme Court's indication that it would reassess its past support of the Fairness Doctrine on its basis of the outdated notion of spectrum limitations.[5]

I would like to expand on Mr. Cronauer's criticism of the Supreme Court's holding in *Red Lion.* The Court stated, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[6] The rhetoric of "rights" raises problems that are deeper than

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3. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

4. In Re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, N.Y., *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, para. 98 (1987), *recons. denied*, 3 FCC Rcd. 2035, para. 6 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

5. FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11, 378 n.12 (1984).

6. *Red Lion*, 395 U.S. at 390.

those suggested by Mr. Cronauer. Other Supreme Court holdings employ this rhetoric. In *CBS, Inc. v. Democratic National Committee*, the Democratic National Committee had requested a declaratory ruling from the FCC that either the Federal Communications Act of 1934 or the First Amendment required CBS to sell advertising time to groups wishing to present views on public issues.[7] In this 1973 case, as in the late 1940s, the FCC argued that the Fairness Doctrine represented the "right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter."[8]

In ordinary discourse, we frequently speak of balancing "rights" when we mean merely balancing values. We may balance the right of the community to be free from fear of crime with the right of criminals to due process. But when ordinary meanings are substituted for serious legal analysis, considerable confusion occurs. There has been a rhetorical use of "rights" language among legal scholars, journalists, and philosophers for the last several decades that leads to incoherence when applied to morality and law. The incoherence carries over to discussion of the Fairness Doctrine.

A coherent right requires someone else as a matter of legal or moral obligation to enforce the right. It demands specificity and some operationalized remedy. Municipalities have rights, groups have rights in class action suits, individual stations and networks have rights, and individuals aggrieved by libel and slander have rights. But communities cannot have rights; indeed, the notion of an abstract right of the public is incoherent as a matter of law. The general public cannot have a "right to be informed." There is no right of the public to know. There is no right to health care. These are not simply wrong statements; they are incoherent statements. Such rhetoric is viscerally appealing given a political culture of rights language, but causes substantial mischief when we assess law and policy.

Defining the "public interest," as Mr. Cronauer points out so well, is a business varnished with special pleading in the history of the Fairness Doctrine. Mr. Cronauer sees the public interest better satisfied by the free market, rather than with rhetorical appeals to the right of the public over that of broadcasters. That is because it is really individuals with idiosyncratic views, and not an abstract "general public," that contends for the right to have their views expressed under the Fairness Doctrine. It was, after all, Fred Cook and his views, and not the views of general public, that

7. CBS, Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973).

8. *Id.* at 112-13 (citing *In re* Editorializing by Brdcst. Licensees, *Report of the Commission*, 13 F.C.C. 1246, para. 6 (1949)).

were defended in *Red Lion*.[9] I certainly agree with Mr. Cronauer's conclusion that this chills First Amendment rights of broadcasters to free speech and press.

I do, however, disagree with Mr. Cronauer's philosophical justification for free speech and press. Mr. Cronauer assumes that an "invisible hand" of market forces should define the public interest, and cites that unfortunate metaphor, the marketplace of ideas. The sentence from Justice Holmes from which the familiar metaphor comes is as follows.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[10]

While I have confidence that the free market will better protect fairness in public-affairs programming than will government applications of the Fairness Doctrine, it is another matter to argue that economic success is an acceptable criteria for evaluating good journalism and good programming in public affairs. Both Holmes and Cronauer are wrong on this score. The political test of ideas for public policy is indeed a competition analogous to the marketplace, namely, elections where votes are competed for and candidates are marketed. Ideas and images are "products" of the communications market. But it is quite another matter to say that what is acceptable in the marketplace ought to be the criteria of what is ultimately good in journalism, programming, or any other human endeavor.

If the public interest is defined by which ideas "win" (that is which ideas generate acceptance based on viewership or readership of media), the argument from the marketplace to a public interest would justify slavery in the early nineteenth century, medical fraud at the turn of the century, and pederasty on the Internet today. Political liberties such as free speech and press deserve better arguments than that.

The purpose of free speech and press, in my view, is to provide protection for autonomous communication so that citizens can decide what the public interest is. Of course, we do not agree on what the public interest is; that is why we have a system of politics. That political system is an ongoing process. The Fairness Doctrine was an attempt to protect

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9. *Red Lion*, 395 U.S. 367 (1969). Pennsylvania radio station WCCB, owned by Red Lion, aired a broadcast which made disparaging remarks against Fred Cook for his book *Goldwater—Extremist on the Right. Id.* at 371.

10. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

forums for public discussion in broadcasting. But it was an unnecessary and clumsy attempt that too easily crossed the line and chilled the content of the forum in a manner prohibited by the First Amendment. The choice of what should be broadcast about public affairs under the Fairness Doctrine reflected a specific government's understanding of the public interest that tended to suppress dissenting ideas. That is why we are better off with the free market in newscasting.

But we need not conclude from the above argument that the public interest is better defined by the market, or that the government and the media have no responsibility to separate the public interest from what sells. There is a normative consideration that transcends the law. The criteria for good journalism ought not be a market criteria any more than the parameters of public interest and social justice ought to be dispositively defined by electoral success. Ethics and character in journalism matter. Traditional news has been transformed to a market-driven entertainment industry. The proliferation of cable TV and "narrowcasting" has produced a political culture of segmented sensationalism where good journalism currently has very little institutional support. Congress can, and has, prohibited commercial advertising for cigarettes, snuff, and little cigars when it frames the public interest in the field of health.[11] Government has an important responsibility to shape citizen understanding of public affairs in other fields as well. To be neutral would be to abdicate a leadership role in identifying and pursuing the public's interests. How government will go about fulfilling that role in the coming communication revolution is problematical. But Cronauer has adroitly made clear that the Fairness Doctrine is an anachronism past its time, if it ever had a legitimate time, because it does not protect free speech or facilitate public dialogue.

11. 15 U.S.C. § 1335 (1988).