

ADVERTISING
AND A
DEMOCRATIC
PRESS

C. EDWIN BAKER

Advertising and a Democratic Press



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FOR
NANCY, MARY, KIRA, AND KAITLYN

☆

☆ Preface ☆

I ARGUE in this book that advertising seriously distorts and diminishes the mass media's contribution to a free and democratic society—and then consider policy responses. Here I want to respond to two possible reasons for doubting the practical relevance of such an argument.

First, folk wisdom holds: “If it ain’t broke, don’t fix it.” Thus, when I argue for government interventions, for “repairs,” that would affect press production, it is worth wondering whether my exercise is not best ignored—or even more wisely, emphatically rejected. Our press, or at least its print media, is respected around the world. Moreover, history is filled with recurrent instances of various governments censoring the press—often with their interventions justified in good faith as purportedly promoting the public good. But time after time these arguments and the resulting censorship were seen in retrospect to have been misguided. Caution recommends a firm stand against proposals for government intervention. This caution is especially wise if the press is basically OK, even though surely each of us has a few complaints and would prefer a slightly different press.

As I await the early edition of the next day's *New York Times* each night at the newsstand, I have an almost reflexive reaction: “This isn’t perfect but it is quite informative; surely, we’ve got it pretty good with respect to the press.” Although there are always problems and lapses, the modern American press provides more and better information to the public than any previous institution. This impressive even if imperfect press arguably exists precisely because of its freedom from government restraint, freedom constitutionally guaranteed in this country. Any attempt by government to impose, for example, requirements of press responsibility would result in a loss of valuable freedom—this last point being central to First Amendment doctrine that I fully support.¹

But is our satisfaction Pollyannish? How would we know if the press were “broke?” In our understanding of all but the day’s most local events, we are largely the products of our press. It is awfully easy to adopt the Whiggish view that it is not broken precisely because “it” is largely “us.” Not knowing information or viewpoints that we do not have, how would we know if the press is not supplying the information and opinion that it should?

Granted, over time the American press has laudably served freedom and enlightenment. But this can hardly mean that it could not have done better and does not have serious flaws. Those interested in democracy in this country should be concerned about the public's incredibly low levels of political knowledge and its depressing level of even the minimal political participation involved in voting. Could this country's press be partly responsible for these failings? Once we begin questioning, many other questions follow. Is Watergate a victory of an adversarial press or a rare example of one paper's stumbling onto and atypically pursuing an astonishing, politically sensitive story? Why do not other reports of government and corporate failures and corruption generate constituencies for needed fundamental change? For every initiative for which observers praise the press, are there other equally or more important initiatives or media campaigns that the press fails to undertake—and how would we know? In an interesting project, nationally recognized commentators annually attempt to identify each year's top ten "censored" stories—not stories censored by the government but stories that the press on its own failed to publicize.² But since this project publishes media references for each story, "censored" obviously refers not to complete suppression but to the inadequacies of the national news media's coverage despite the story's obvious importance. Insignificant coverage can effectively mute a story's significant political or democratic relevance. These questions suggest that without reflective inquiry, there is no hope of understanding either the extent or the causes of the press's not undertaking needed initiatives. Nor of understanding the conditions under which the media could best serve a democratic society.

Advertising and a Democratic Press begins this critical inquiry. Despite widespread comfort with much of the American press, the book suggests that to a troubling and surprising extent the press *is* "broke" or, at least, in need of a major tune-up. Thus, the apparent adequacy of the existing press does not justify ignoring the possible need for structural reforms. The book also shows that advertising plays a key role in undermining press performance and, therefore, that advertising should be a major focus in the consideration of structural reforms.

Second, this book's call for laws directed at the press and informed by explicit governmental media policies might seem so inconsistent with valued First Amendment guarantees that the project can only be "academic" in the bad sense of the term. No matter how factually or normatively persuasive, arguably the book can have little real relevance because of the American constitutional order.

PREFACE

Policy-oriented media scholarship in this country, particularly within the legal academy, is undeveloped—underdeveloped in comparison with scholarship in other countries and especially in relation to the significance of the topic. Ironically, the shadow of the First Amendment may be part of the problem. My own scholarship has centered on deepening our understanding of the First Amendment or, more specifically, on broadening and strengthening its reach.³ Thus, for me, this tentative observation about the First Amendment is especially troubling. Still, the paucity of policy-oriented thinking about the press may reflect a tendency of Americans or, at least, of communications and legal scholars to assume that any government action focused on the press is likely to be unconstitutional—and, therefore, worth considering only in terms of how or why the intervention should be criticized.

Of course, this legalistic response seldom blocks inquiry when the inquiry is demanded by a powerful, influential constituency. The media themselves, a politically central “interest group,” have gotten special postal subsidies, special access to government officials and files and proceedings, exemptions from some taxes, monetary support through “patronage” advertising, a limited exemption from antitrust laws, along with various other privileges and economic benefits. But the media business has not sought legislative responses to the problem described in this book, the corrosive effects of private power on press freedom. Such legislation is likely to be costly to many elements within two of our society’s most influential interest groups—the corporate-owned press and the corporate-serving advertising industry. Even if scholarly media critics show that lack of structural reform seriously damages both political and cultural democracy, the public is unlikely to feel the injury acutely or to associate the injury with the structure of the press. Organized public pressure for change does not easily develop.*

Still, the first step is to make reform “thinkable”—for example, not to be improperly blinded by the First Amendment. Thus, I ask those readers who assume the American press is in fairly good shape to suspend judgment long enough to read the critique in the first three chapters. And I ask those with the strongest commitments to the First Amendment, among whom I count myself, still to consider the policy proposals offered in chapter 4. Finally, chapter 5 will directly address the First Amendment issue—and show that the book’s policy proposals would not be part of the history

* Although I maintain hope that it is not crucial, media reform seems much more likely in countries with strong political parties that can play a leadership role in change.

PREFACE

of misguided censorship but instead would promote constitutional ideals while meeting constitutional standards.

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Many people helped me in one way or another with this book, and although I cannot mention them all here, I do want especially to thank, without attributing any responsibility for mistakes, several people: Mike Fitts, Oscar Gandy, Jr., Douglas Halijan, Jason Isralowitz, Seth Kreimer, Erin Lynch, Michael Madow, Guillermo Margadant, Gerry Neuman, Ed Rock, and Carol Sanger, and my editor at Princeton, Malcolm DeBevoise. I should also note that this book is a somewhat revised, updated, and expanded version of an article of the same title published in June 1992 in the *University of Pennsylvania Law Review*, whose editors provided useful assistance.

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Advertising and a Democratic Press



☆ Introduction ☆

THE FIRST AMENDMENT guarantees the press freedom from “abridgment” by government. Adopted in the wake of the colonists’ resistance to the British Stamp Act, which heavily taxed newspaper advertisements as well as newspapers themselves, and at a time of early Massachusetts printers’ resistance to similar state levies,¹ this constitutional guarantee might plausibly be interpreted to prohibit all taxes or governmental regulations of the press. Government might be seen as the sole, relevant threat to freedom, and freedom of the press might mean at bottom a *laissez-faire* marketplace for the mass media industry.

The thesis of this book, however, is that this view of freedom is wrong. Despite the potential danger and occasional occurrence of governmental censorship, private entities in general and advertisers in particular constitute the most consistent and the most pernicious “censors” of media content. Of course, advertising operates as a “censor” only because the media content desired by advertisers is not the same as the content desired by media consumers. Chapters 1 and 2 describe a variety of ways in which this divergence is manifested. The book shows that existing structures and behavior of private power centers prevent the media from adequately serving the needs of a democratic society. Organized private power is today probably the most serious threat to a free and democratic press. Thus, although advertising can be viewed as the lifeblood of free media, paying most of its costs and thus making the media widely available, this book examines advertising as a threat to a free and democratic press.

Once advertising is seen as a powerful censor and influential taskmaster that systematically undermines a free and democratic press, a host of questions arise. Which of advertisers’ relations with the media are objectionable? Do they violate existing laws? Are new regulations desirable? Constitutional? Would a tax on advertising in the mass media be desirable, for example, as a means to reduce the influence of advertisers over media content? Constitutional? Might answers depend on how broadly the tax is applied? Or on the use of the resulting tax revenue?

The Stamp Act was not the last tax on newspaper advertising. For good reasons or bad, advertising taxes are often proposed. During the Civil War, Congress raised revenue by taxing newspaper advertising.² Florida recently adopted a tax on various services, including advertising, but underestimated the power of the advertising lobby, which quickly forced repeal.³

The Bush administration proposed, but quickly abandoned, a plan to limit the deductibility of advertising expenses.⁴ Academics have proposed a progressive tax on newspaper advertising as preferable to the Newspaper Preservation Act's "joint operating agreements" as a means of promoting newspaper competition.⁵ Many states are currently considering extending existing taxes to either newspaper sales or newspaper advertising.⁶

Likewise, American history provides many examples of regulation of advertising. The Federal Trade Commission regulates "false and misleading" *commercial* advertising, though when the "product" is a politician, such misleading advertising is arguably the norm and is certainly constitutionally protected. Tobacco advertising is subject to various forms of regulation that would be impermissible if applied to noncommercial advocacy of unhealthful practices or policies. The many forms of regulation of commercial speech—some wise, some not so—were constitutionally unquestionable as long as the commercial speech was understood not to be protected by the First Amendment. Given recent Supreme Court decisions, these regulations may again be safe from effective constitutional challenge.⁷ More theoretically, I have argued in another book that excluding commercial speech from constitutional protection is justified, either because the advertising of a market-oriented enterprise is an integral part of an instrumentalist exercise of power by participants in market exchange, or because the dictates of the market rather than human choice determine the message content of advertisements.⁸

Powerful policy arguments against taxes on advertising, as well as other government regulations of advertising, emphasize that advertising pays the largest part of the bill for our "free press."⁹ By "subsidizing" the press, advertising makes mass media broadly available. This subsidy enables the media to engage in the expensive activities of gathering, shaping, and distributing news (and entertainment). Advertising is so important to the press that some democracies give it constitutional status. For example, Germany, which like many countries views only the print media and not broadcasting as the "real" press, gives constitutional protection to the print media's reliance on advertising.¹⁰

Still, could advertising also undermine a free press? Defenders of advertising's present role easily concede that, like most social practices, advertising has negative as well as positive aspects. On the positive side, advertising often provides useful information to consumers and promotes purchasing behavior that may stimulate the economy. But there is a darker side. Two of the greatest causes of premature death and of loss of work are tobacco and alcohol—hardly products whose use merits promotion. Nevertheless,

“in 1979, tobacco and liquor companies were [magazines’] two largest advertisers.”¹¹ More generally, advertising often distorts facts. It promotes contested consumerist values and contested visions of social life, of women, and of men. Neither advertising’s overt nor its implicit messages have unambiguously desirable consequences for social life. Arguably the government should deal with these negative effects, if at all, with regulations directed at specific objectionable contents found in some advertising—and these regulations should be permissible. But, of course, narrow regulation of specific, objectionable content may be inadequate if, as Michael Schudson suggests, the most objectionable feature of advertising relates to its pervasive role in creating an impoverished culture, what Schudson terms “capitalist realism,” an art form or symbolic culture that shapes our values, flattens experience, simplifies, portrays satisfactions as inevitably private, and glorifies private life and material ambition.¹²

In this book, however, I want mostly to put aside issues concerning the good or bad of advertising’s own content. There is likely to be a wide consensus that, whatever evils are associated with the content of advertising, one reason for caution in regulating advertising is that it supports the media’s nonadvertising content. The assumption is that advertising plays a key structural role in maintaining a free and democratic press. The primary purpose of this book is to evaluate that assumption. Thus, chapters 1 and 2 will consider the effect of advertising on media’s nonadvertising content and on the distribution of that media content. Chapter 3 will briefly consider the light that an economic efficiency analysis sheds on the observations of chapters 1 and 2. Each chapter deepens the critique of the current advertising-based system of supporting the mass media. Then chapter 4 begins the necessary task of designing responsive policy proposals. Since any legislation dealing with the press immediately raises First Amendment questions, the book concludes in chapter 5 with an evaluation of the constitutionality of the proposals described in chapter 4.

Of course, to criticize effects of advertising on the press implies some image of proper press performance. My evaluative standpoint will be that of creating or maintaining a democratic, free press.¹³ The focus is on the role of the press in serving a democratic government and culture. This standpoint reflects what I assume is a central element of the constitutional justification for extending protection to the press as an institution rather than merely protecting the press as an element of the individual’s right of self-expression. Of course, this democracy-serving justification for protection is instrumental—but then the value and significance of any institution must lie in how it serves human values and interests.¹⁴ Here the policy

concern is this: what type of press, what type of mass media, will adequately serve a free and democratic society?

Obviously, this evaluative perspective will be influenced by the evaluator's conception of democracy. An elitist conception may require most centrally a press that performs the "checking function," that is, a press capable of and oriented toward exposing abuse of power.¹⁵ A more robust conception of "participatory" democracy would require additional press functions, possibly suggested by the slogan "the public's right to know."¹⁶ Depending on whether the more broad-based conception of democracy emphasized a republican *common* dialogue or, alternatively, a diversity of groups each with its own concerns and dialogue, the nature of optimal press segmentation of audiences would vary.

How specific the description of either democracy or the corresponding vision of an ideal press must be depends on the evaluative issues at stake. For purposes of this book's claims that advertising undermines a democratic press, I implicitly assume only that democracy involves the possibility of broad-based cultural and political participation of people with diverse inclinations. Therefore, I use "democratic" (or "free and democratic") to modify press in order to emphasize two dimensions of media output: (1) availability—a press is more democratic the more its products are widely available; and (2) content—the content of a democratic press should serve the diverse *desires* or, somewhat more controversially, the diverse *needs* of the various elements of the democratic society. Thus, the "democratic" aspect of the press relates both to circulation and to provision of "uncensored" information and opinion that readers desire or need. A democratic press should be both responsive and pluralistic in its communications.¹⁷

Advertising: Financial Support and Structural Subversion of a Democratic Press

ADVERTISING AS A SUBSIDY

ADVERTISING in the media confers obvious benefits. First, but mostly beyond the scope of this book, are benefits to the enterprises that advertise, to the buying public that relies on advertising for information about transaction opportunities, and to the economy as a whole because of advertising's stimulus to economic activity. Often, readers and viewers are as interested in the ads as in the media's nonadvertising or "editorial" content. (Throughout, I will refer generically to all of the media's nonadvertising content, including hard news, news analysis, features, and opinion, as "editorial content.") For example, three out of four women in a 1974 survey agreed that they were "about equally interested in [a newspaper's] advertising and news stories"; a 1979 study found that "58% of all adults consulted newspaper classified ads at least once" during the week; and in 1977 44% of the public said that "they look forward to newspaper advertising" (as compared to 9% who held similar positive views of television ads).¹ Of course, rather than providing these benefits, advertising sometimes imparts misinformation that is injurious to both the public and the economy. Moreover, normative assessments of our consumer society and of advertising's role in creating and maintaining it are contested. I put these issues aside.

Second, advertising provides financial support for the mass media. Virtually all of commercial radio and television broadcasters' revenue comes from advertising. The newspaper industry, which is the focus of this chapter, obtains approximately 75% of its revenues from advertising.² Of course, advertising also imposes costs—for ink, newsprint, solicitation of ads, composing, distribution (because of added bulk and weight), and the like. Conceivably, most advertising revenue could be expended on providing the ads, leaving little to subsidize other aspects of the newspaper's operations.³ Since not only do advertisers value readers but often readers also value ads (as well as editorial content) and the paper sells to both, the direction of subsidy might be expected to reflect which party, reader or

advertiser, values the other more. The relationship is likely to be historically and contextually variable—for example, in the eighteenth century the availability of goods for sale might have been especially valuable news to the reader, while today mass marketers and competitive sellers most likely value the reader more than the reader does them.⁴

Virtually all observers and economic studies appear to agree that throughout the twentieth century advertising has paid a large portion of the costs of supplying the public with newspapers. One economic study estimates that without advertisements newspapers would cost as much as five times their current price and concludes that “a full cost-to-the-reader general newspaper free of advertisements would not be commercially viable.”⁵ Another study concluded that today’s \$.30 paper would sell for \$1.15 if it could maintain present circulation, but since it could not maintain circulation at that price, the absence of ad revenue would “result in the extinction of the press as it has functioned historically.”⁶ Thus, for a democratic press the advertising “subsidy” may be crucial. Without advertising, the resources available for expenditures on the “news” would presumably decline, predictably leading to an erosion of quality and quantity. The cost of the “news” to the public would increase, thereby restricting its “democratic” availability.

This assessment of advertising may seem uncontroversial—the application of simple economic logic. Both advertisers and readers willingly pay for and both benefit from getting the same product, a newspaper combining editorial content with advertising, into the hands of the reader. The reader, who may be either relatively indifferent to or desirous of advertising, is willing to pay some amount for the newspaper. The advertiser’s goal of getting the reader to look at the advertising content requires that the reader pick up the paper. Therefore, in addition to paying the costs of advertising content, the advertiser is willing to pay part of the cost for editorial content in order to obtain readers for the medium containing the ads. This willingness to pay for nonadvertising content is in principle the same in newspapers as in over-the-air broadcasting where advertisers pay for (virtually) all the nonadvertising content. The newspapers’ advertisers will even pay extra for more expensive, “high quality” editorial content if it attracts a particularly desirable readership.⁷ Given that both purchasers—advertisers and readers—are willing to pay for editorial content, surely not collecting from one of two potential “joint” purchasers of a product would cause the seller to receive less for the product. Any blockage of newspapers’ transactions with advertisers would produce an inefficient contraction of