

HOW I STOPPED WORRYING AND LEARNED TO LOVE THE PRESS

Alex Kozinski*

This article argues that the conclusions reached by the Hutchins Commission were wrong 50 years ago, and even more wrong today. First, greater diversity of media and market segmentation have made it easier, not harder, to voice an opinion today. Second, the expanding number of media outlets allows deserving opinions to reach large audiences indirectly by persuading the mainstream press to pick up on the subject. Third, the First Amendment should not be construed to place a special responsibility on the media to make judgments about what kinds of views and ideas the public should be exposed to.

I hate mornings.

And I particularly hate morning lectures.

I know what a lot of you are thinking right now. Sure, you dragged yourselves out of bed for the opening of the conference, you met some friends, you had a nice breakfast. Now it's time to slip back to the room for a little nap. But no—you have to listen to some guy up there who is going to drone on for an hour—practically an eternity. And it is not just any guy. No, it's a federal judge with contempt powers, a guy who can send the United States Marshal after you. What if you are sitting at lunch with him later and he says something like: "Don't you think my lecture was brilliant?" and you have no idea?

So what I thought I would do is start by giving you a brief summary of what I think about the Hutchins Commission Report: [Judge Kozinski offers a "major raspberry."] OK, now you know pretty much everything I have to say; everything else is fluff, filler;

*Judge, United States Court of Appeals for the Ninth Circuit. The author thanks his law clerk, Victor Fleischer, for valuable assistance with this article.

just something I threw together on the plane to earn this coveted trip to beautiful downtown Urbana.

Truth be told, until I was asked to speak here, I had never heard of the Hutchins Commission. So I read the report, and some of the materials explaining how it came about and asked myself what any self-respecting judge on the Court of Appeals for the Hollywood Circuit would ask: Would this make a good screenplay? If I were peddling this in Hollywood, I would call Harold Lieberman and say something like: "Hey Hal, baby, I got it, I GOT it! Absence of Malice meets Twelve Angry Men. It's going to star Brad Pitt as Robert Hutchins, Sean Penn as Zechariah Chafee and Madonna as Henrietta Luce. We'll get Oliver Stone to direct. It's going to be called—are you ready for this Hal, baby—'Natural Born Paparazzi!' "

OK, so what do I really think of the Hutchins Commission Report? It's what happens when a guy with way too much money meets a guy with way too much time. Did you catch Steve Bates' description of how all this came about?¹ So it's 1942 or 1943 (no one knows for sure) and Henry Luce and Bob Hutchins are sitting in a meeting of the Encyclopedia Britannica Board of Directors, and they are bored to tears—sort of the way you are right now. I've been lucky enough not to have ever attended a board of directors meeting, but I know people who have and they bring along toothpicks to prop their eyes open; it's sort of like watching an Ingmar Bergman movie: You know this is important and you ought to pay attention, but your mind keeps wandering off. Now if you or I had wandering thoughts, they might go to such things as where to go for dinner or how to catch a ride to the airport. But Henry Luce was above all that, so he writes a note asking the most pompous and self-important question in the history of American journalism: "How do I find out about the freedom of the press and what my obligations are?" Now you would think that he would have come to the right place to find an answer to that question. Bob Hutchins, after all, went to law school, became a law professor, associate dean and then dean—all within about three years. But wait, all of that happened at Yale Law School, so it's not surprising that Hutchins comes back with a terse reply: "I don't know."²

Now then, let's say you are a really successful publisher with money coming out of your wazoo and you have a question about the legal regime governing your business. The sensible thing would be

¹STEPHEN BATES, REALIGNING JOURNALISM WITH DEMOCRACY: THE HUTCHINS COMMISSION, ITS TIMES, AND OURS 4 (1995).

²*Id.*

to talk to your lawyer. But what's the use of being rich if you are going to limit yourself to doing the sensible thing? So Luce comes up with the perfect retort to Hutchins' shrug of the shoulders: "Well, why don't we set up a commission on freedom of the press and find out what it is?"³

Dangling a commission in front of an academic is sort of like dangling a piece of cheese in front of a rat. Who wants to do boring things like teach class and grade blue books? Better to spend somebody else's money setting up a commission that can come up with a report with your name on it. So Hutchins pounced: "If you'll put up the money, I'll organize the committee."⁴ Henry Luce must have rued his doodlings, but it was too late. So he put up \$200,000 (now worth \$2 million, we are told) to fund the darn thing.

Of course, you cannot very well spend that kind of money and conclude that everything is hunky-dory. That would be sort of like invading Canada and then figuring out we really don't want it. No, once you have put together a commission, you have to find some problems to solve—big, serious problems, too, not crabgrass-on-the-lawn kind of problems. Fortunately, the commission found plenty of problems, nothing BUT problems, when it got down to business. Just read Bob Hutchins' apocalyptic foreword for a preview of all the horrors inside: "One dreadful curse of contemporary life," Hutchins tells us,

is the terrifying flood of words with which the agencies of mass communication threaten to inundate the citizen. Anybody with nothing to say can say it by mass communication if he has a knowing press agent, or a considerable reputation, or an active pressure group behind him, whereas, even with such advantages, anybody with something to say has a hard time getting it said by mass communication if it runs counter to the ideas of owners, editors, opposing pressure groups, or popular prejudice.⁵

So the big problem, according to Hutchins, is that we are drowning in a flood of words by people who have nothing to say, while people who do have something to say can't get a word in edgewise.

³*Id.*

⁴*Id.*

⁵COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS xii–xiii (Robert D. Leigh ed., Midway ed. 1974) (1947) [hereinafter HUTCHINS COMMISSION REPORT].

Now the perceptive reader might ask himself a question: Why does someone who has nothing to say spend all that money and energy flooding us with words? If you truly have nothing to say, you'd rather be doing something productive like running a sweatshop or oppressing the poor, no? Quite obviously what Hutchins was concerned about was not speech by people who have *nothing* to say, but speech by people who are saying the wrong things—things that Bob Hutchins thought were not worth saying. Is this just a small problem? No, it's a "dreadful curse of contemporary life"—the modern equivalent of the bubonic plague.

You have to get a little deeper into the report to figure out exactly the nature of this calamity. But not far. In the first chapter, the commission lays out the problem: Freedom of the press is in danger because (1) "the importance of the press to the people has greatly increased" as a result of mass communication, while the proportion of the people who can use the press to express themselves has decreased,⁶ (2) those in control of the press "have not provided a service adequate to the needs of society"⁷ and (3) "those who direct the machinery of the press have engaged from time to time in practices which the society condemns and which, if continued, it will inevitably undertake to regulate or control."⁸ I'm not making this up; these are all quotes. As you leaf through page after page of the report, the commission's big beef seems to be that people who own the instruments of the press—newspapers, radio, motion pictures, magazines and books—were being irresponsible by making judgments about what to include and what to exclude from their medium. And they were making those judgments based upon their own personal ideas of what is right and wrong, true and false, good and bad. If everyone did this, in Bob Hutchins' words, ideas owners of the media disagree with "will not have a fair chance."⁹ Neither Hutchins nor the commission explains how the owner of a newspaper can figure out the difference between an idea he disagrees with and an idea by someone who has nothing to say. I don't know about you, but when I hear someone saying things I disagree with, I usually figure they have nothing to say.

But there was more going on with the commission. The press, they feared, did not take seriously its responsibility to educate the public and foster a sense of community. Am I making this up? No. I quote again from the report:

⁶*Id.* at 1.

⁷*Id.*

⁸*Id.*

⁹*Id.* at xiii.

The press can be inflammatory, sensational and irresponsible. If it is, it and its freedom will go down in the universal catastrophe. On the other hand, the press can do its duty by the new world that is struggling to be born. It can help create a world community by giving men everywhere a knowledge of the world and of one another, by promoting comprehension and appreciation of the goals of a free society that shall embrace all men.¹⁰

Pretty heady stuff, eh? And you thought you were just trying to make a living selling a few newspapers.

How come no one noticed this problem during the first 17 decades of the Republic? It's because "the press has been transformed into an enormous and complicated piece of machinery."¹¹ Can I say it without holding my nose? The press has "become big business."¹² Yes, no longer were we in those idyllic times when "presses were cheap; the journeyman printer could become a publisher and editor by borrowing the few dollars he needed to set up his shop and by hiring an assistant or two."¹³ No. Rather:

The modern press itself is a new phenomenon. Its typical unit is the great agency of mass communication. These agencies can facilitate thought and discussion. They can stifle it. They can advance the progress of civilization or they can thwart it. They can debase and vulgarize mankind. They can endanger the peace of the world; they can do so accidentally, in a fit of absence of mind. They can play up or down the news and its significance, foster and feed emotions, create complacent fictions and blind spots, misuse the great words, and uphold empty slogans. Their scope and power are increasing every day as new instruments become available to them. These instruments can spread lies faster and farther than our forefathers dreamed when they enshrined the freedom of the press in the First Amendment to our Constitution.¹⁴

There is a lot more stuff in the report, but this is a fair cut at what it is about. After discovering all these problems, they came up with a bunch of solutions—the kind of solutions you would expect from people who go looking for problems to solve, things like urging

¹⁰*Id.* at 4.

¹¹*Id.* at 15.

¹²*Id.*

¹³*Id.* at 14.

¹⁴*Id.* at 3.

the press to act like common carriers,¹⁵ engage in vigorous mutual criticism¹⁶ and aim at the highbrow crowd by financing media undertakings "of high literary, artistic, or intellectual quality" even without the likelihood of quick profits.¹⁷

The commission also had lots of things to suggest to the government, like breaking up giant media empires and increasing taxes to benefit new communications companies. And wouldn't you know it, the commission's crowning recommendation was the creation of an "independent agency" to keep an eye on the press by examining such things as "press lying" and the exclusion of minority views.¹⁸

I don't know about you, but I find this entire report just slightly baroque. I'll gloss over some of the peripheral concepts, like the idea that it was much easier to get yourself heard in the good old days when presses were cheap and most people couldn't read. I want to talk about three core concepts and see how they have withstood the test of time. First, let's take the idea of the press as a great monolith—as a highly concentrated business that wields tremendous sway over the public and therefore has public responsibilities akin to a common carrier. I am not a historian and have not gone to great lengths to research the question, but then neither did the Hutchins Commission.¹⁹ A couple of nights ago, though, I pulled off my bookshelf *The Americans* by Daniel Boorstin, and there found this passage which seems to dispute much of this premise:

By the mid-20th century ... the United States remained a leader in the number of different papers being published in proportion to population. Of about 7,200 daily newspapers published in the world in the mid-20th century, about one-quarter were published in the United States. Despite the rise of newspaper chains, despite combinations and mergers, the American newspaper remained a widely diffused local community enterprise. ... Of course, certain big-city papers like *The New York Times* had great prestige, but the daily circulation of all New York City newspapers still amounted to only about ten percent of the national total. Of the approximately 1800 dailies in the country, over 1500 were published in centers of less than one hundred thousand population; these provided about one-third of total daily circulation. ... Improvements in communication and transportation, such as the introduction of Rural Free Delivery by the Post

¹⁵*Id.* at 92.

¹⁶*Id.* at 94.

¹⁷*Id.* at 93.

¹⁸*Id.* at 100–02.

¹⁹*Id.* at v.

Office in 1897, did not (despite widespread prophecy to the contrary) kill the community press. In the mid-20th century there were still, in addition to the small-town dailies already mentioned, about ten thousand so-called "country weeklies," which themselves reached about half the population of the United States.²⁰

Maybe I am wrong about this; maybe Dr. Boorstin is. I won't argue the point, though it strikes me that the Hutchins Commission, for all its money, seemed remarkably unconcerned with documenting its central assumptions. But let's zoom forward 50 years and see where we are today. With the benefit of hindsight, the Hutchins Commission's vision of a monolithic press serving a captive audience borders on the ludicrous. Technology and the free market have only accelerated the trend—which must have been obvious even then—toward greater diversity, competition, market segmentation. In addition to numerous national, local and neighborhood papers, there are dizzying numbers of magazines from *Action Pursuit Games*—which caters to the paintball warrior—to *Reader's Digest*. Radio stations fill the available spectrum and the universal availability of cable and satellite has brought countless domestic and foreign television stations into the American home. And with the advent of the World Wide Web and e-mail, practically anyone can be a publisher, reaching tens of thousands—sometimes millions—of people.²¹ On this score—the fear of market concentration and lack of access by minority points of view—the Hutchins Commission's concerns seem not to have been borne out.

Let's look at a second central concern of the Commission, namely that in the cacophony of voices generated by modern media, only the rich, the powerful and those with clever press agents will be heard; other deserving voices will be drowned out. This cannot be brushed aside quite so easily, although the proliferation of media outlets and the segmentation of the market into thinner and thinner slices, seems to make this concern less pressing than before. Desktop publishing, mass mailing, ultra-focused magazines, throw-away papers, teeny-tiny cable stations, late-night radio, e-mail, list-servs, web access—all of these and more have made it much, much easier for anyone with something to say to get heard, but not necessarily listened to, by a fairly large number of people for relatively little money.

Still, this is not a complete answer, for some voices—even in this environment, perhaps especially in this environment—are unlikely

²⁰DANIEL BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 133 (1965).

²¹See *The Drudge Report* <<http://www.drudgereport.com>>; Mark Jurkowitz, *Drudge Report's Scandalous Scoop*, *BOSTON GLOBE*, Jan. 22, 1998, at E1.

to be listened to. For example, I know a lot more about what's on the mind of Steven Spielberg (who has never written to me) than about Tony Alamo, who sends me a pamphlet almost every week extolling the virtues and benefits of something called Zon. So the second big question posed by the Hutchins Commission: is it fair, is it appropriate that those who are rich and talented get listened to more than the poor and untalented? And to this I must answer no, this is not fair, just as it is not fair that Michael Keaton gets to date and drop Michelle Pfeiffer, while my law clerk Victor, who would be much better for her, hasn't even had a date with her.

Yes, I agree that life is often not fair. Unfairness is the hallmark of human existence. But that, it seems to me, is not the proper test and, giving the Hutchins Commission its due, they were saying more than that. They were saying that we have a serious structural problem—one that undermines the foundations of democracy—because certain points of view are drowned out by others who are less deserving but more powerful. If that was a legitimate problem 50 years ago, it seems much less so now. Look at the Washington press corps, for example. In the 1930s and 1940s journalistic convention was to show Franklin Roosevelt only from the waist up, and never to mention his handicap. The American public got the idea that the President was a normal guy who liked to sit a lot. As late as the 1960s, John Kennedy could use the White House the way ordinary mortals use the no-tell motel, and the press kept mum about it. The polyglot of media outlets has made it virtually impossible to keep stuff like that from the public. To be sure, some points of view get more play than others, but it is not at all rare to have big stories first break in small publications and then, when they strike a public nerve, have the mainstream press pick them up and run with them. Everyone here I'm sure can come up with their own favorite examples, but I'm particularly thinking of David Brock's disclosure in the *American Spectator* of Governor Clinton's alleged interlude with a woman named Paula, which, of course, led to the Paula Jones media jamboree.

So let's examine the Hutchins Commission's third central premise—which is really the meat of the coconut: The idea that the press somehow has special responsibilities because it plays an exalted role in our society—because it holds the keys to the jewel box of democracy. Think back to Henry Luce's question at that fateful Britannica Board meeting—"How do I find out about the freedom of the press and what my obligations are?" Now you can bet your White House press pass that J.P. Morgan and Andrew Carnegie didn't write notes to pointy-headed academics asking: "How do I find out about the

Freedom of Contract and what my obligations are?" And why not? J.P. and Andy rightly assumed that if they followed the law—or at least didn't get caught breaking it—they will have fulfilled their obligations. This noblesse oblige—the idea that the press is given special privileges and therefore has special obligations—strikes me as awfully self-aggrandizing. The Hutchins Commission Report is chock-full of such self-congratulatory statements: "Freedom of the press is essential to political liberty. Where men cannot freely convey their thought to one another, no freedom is secure. ... Free expression is therefore unique among liberties: it promotes and protects all the rest."²²

Gimme a break. Sure, free speech is important, free press is important, but a lot of other things are important too—like the right not to have your life, liberty or property taken away without due process. I know a lot of people who would gladly give up the right to read the *Weekly World News* in order to retain the right not to have their job legislated out of existence.

Having defined the right to free press as so very important, the commission then found good reason to impose all sorts of obligations on the press; after all, with privileges come responsibilities. What are some of those responsibilities: no deliberate lying; providing uplifting content for the masses; filtering out bad ideas, and promoting good ones; giving a forum to minority views, even if you disagree with them, even if they are stated in a rude, unappealing fashion. If you don't do these things—the commission warned—you can be damn sure that the press' special privileges will be abridged.

As we all know, the commission could not have been more wrong on this score. The press has pretty much ignored its recommendations and freedom of the press today is stronger than ever. If you have any doubt about it, just read the Supreme Court's decision last term striking down the Communication Decency Act.²³ Is this just an accident? Is the Commission like Jeremiah, destined to be vindicated, but not until much, much later?

No way, I say. The reason the commission's dire predictions did not come true is that they were wrong—dead wrong in their fundamental premises. Take something simple like the responsibility to tell the truth. Sure, most of the time the press should tell the truth. If it doesn't it may get sued for libel and lose the confidence of the reader. But that's no different than saying that the people who sell

²²HUTCHINS COMMISSION REPORT, *supra* note 2, at 6.

²³See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2351 (1997) ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.")

you ground beef have a responsibility not to cut it with sawdust. Except that the press actually has a lot more latitude in this regard: No one would buy sausages laced with shards of glass, but there is an entire industry that publishes stories that everyone knows is not true: like how President Bill Clinton was captured by Martians and neutered.

The simple fact is that the written word is a commodity; information is a commodity; truth is a commodity; fiction is a commodity. There are no clear-cut lines between them. What, to pick one example out of many, would you call JFK the movie? Was it truth, was it fiction, was it theory, was it entertainment? Well, I have the answer to that one: it was boring. What about *Fatal Vision*? Or *Food Lion*?

Of course, the journalist or the author or the director have to play fair with the public. They have to disclose when they're reporting and when they're embellishing. But it is often a fine line and the journalist dare not cross it, not out of some super-responsibility he has to the democratic process, but to preserve his good name and the good name of his publisher.

The more pernicious notion is that journalists have a special duty to make judgments about what kinds of views and ideas the public should be exposed to. Making the press a platonic guardian of the tastes and mores of the American public strikes me not just arrogant but dangerous. About the time the Hutchins Commission issued its report and for decades afterwards, the people who ran the media played exactly this role, and I'm not sure it was such a good thing. Whom, exactly, was the Washington press corps protecting by keeping from the American people that the leader of the free world was getting a little nooky on the side in between talks to Khrushchev on the hotline?

Had the information, or suspicion, been revealed at the time, it might have given JFK a chance to deny it, to fess up and repent, or tell us, in the words of Zero Mostel: "Hey baby, if you got it, flaunt it." Whatever his response, it would have been an occasion to bond with or alienate the American public. As it is, the revelations—not really significant, after all—leave a bad taste in the mouth. Since JFK is not here to deal with the problem, the story remains a permanent stain on his record; one he has no chance to blot out or put in perspective.

Or take FDR's handicap. What was the big secret? Far from being a cause for embarrassment, FDR's handicap might have been a source of pride, proof of his Yankee perseverance, a sign that in America what counts is talent and ability, not outward appearance. It might also have made Americans more sensitive to, and tolerant

of, the needs and capabilities of the physically handicapped, a cause that had to wait another half-century to take its rightful place in the American consciousness.

As I see it, the good old days were not all that great. In the days when the media and television in particular, viewed themselves as the guardians of our virtues and sensibilities, we lost touch with who and what we really are, mesmerized instead by some fun house mirror version of reality.

I know what I'm talking about. I came to the United States in 1962 at the age of 12 and spent the next several years glued to a television set, assimilating American culture by watching shows like *Leave It To Beaver*, *I Love Lucy*, *The Donna Reed Show*, *Father Knows Best* and *Mr. Ed*. It took me years to figure out what a complete farce these were. To begin with, almost everyone in these shows were white and most were Wasps. Everything was hunky-dory: Spouses never had any serious arguments, the children were models of civility and good sense the fathers were real men and the mothers were cute and fluffy.

Didn't these people have any real problems? Were none of the sons gay? Did none of the daughters get pregnant—or at least pimples? How about old dad; didn't he ever have too many drinks or get a hankering for the lady next door? What about Mrs. Cleaver and Eddie Haskell?

When I was about 16, I got kind of tired of this stuff and decided I could come up with much better shows without even changing any of the characters. For example, it occurred to me that two sitcoms could be combined to advantage to come up with *Father Knows Donna Reed Best*. And how about the *Mr. Ed* Sullivan show? Makes you wonder whether Topo Gigio would have been quite so anxious to say "give me a keeess, Mr. Ed." Or how about bringing a dark new sense of reality to situation comedies by having *Beaver in the Naked City* or *The Fugitive from Petticoat Junction*? Network executives in those days would have been horrified at any of these ideas. *Murphy Brown*, *Ellen* and even *The Jeffersons* were far off in the future.

As I look back on the years I spent glued to the television set, absorbing a desiccated, sterilized version of American life, a couple of incidents stand out like oases in the desert. In the midst of endless hours of *I Love Lucy* and *The Real McCoys*, I remember the first time I laid eyes on a self-avowed homosexual. It was 1962 or 1963 and homosexuality was definitely taboo in television and polite society. I happened to be watching a morning talk show on station WBAL, the local NBC affiliate, and one of the guests was there for no other reason than to tell us that he was gay and perfectly content

content with the fact. He had always known he was attracted to men and kept that knowledge secret from his friends and family for years. More recently, he had come to accept his situation and decided to come out of the closet. He was not advocating homosexuality; he was merely letting others know that homosexuals can have a happy, satisfying life.

At 12 or 13, or whatever age I was then, I had not yet entirely figured out heterosexuality, much less homosexuality. I had heard that there were people out there who mated with their own sex but never quite believed it. And there he was in the flesh, in my living room telling us that he was one of them.

The incident stayed with me a long time. There was something about the man's quiet assurance, his serenity, that challenged everything I thought I knew about homosexuals. I wondered, too: Would I be able to face who I turned out to be with as much confidence as the man I had seen? Looking back many years later, I realized that something important had happened. Someone in that local television station had decided to break the unwritten code which said that television viewers could only be trusted to absorb bland, mindless, regurgitated pap. At the time, I resented the fact; I had not turned on my television set to let Mr. Homosexual into my living room. But he was there, and he pierced my consciousness far more permanently than any episode of *I Love Lucy* or *I Dream of Jeannie* ever could.

The notion that the press—or the media as they are now called—must serve as the National Nanny because the public is sort of trusting and sort of stupid and has to be fed good ideas or else they'll choke on bad ones is quaint and insulting today. The media provide a commodity like any other. It is a commodity people value, but it's one of many. Like the purveyors of other consumer goods, those in the press must serve the tastes and interests of the public—not out of a sense of duty, but because they will quickly lose an audience if they don't. Sure, they can lead by giving the public something it doesn't yet know it wants—like the Shopping Channel, DirecTV and Slate Magazine—but not out of a sense of noblesse oblige, but in the hope of making a killing. In this regard media entrepreneurs are no different from any other entrepreneurs, except maybe that their products are so much more dispensable. The airs put on by Henry Luce and Bob Hutchins about how the press is just sooooo different and important should be put in the same class as Richard Nixon's rantings about the Presidency. The grandiose report they produced should be viewed like the moral equivalent of *Ishtar* or *Heaven's Gate*—bad idea, bad direction, bad acting, way too much money. In other words, the time has come to bury the Hutchins.