

# COMPARING BROADCAST STRUCTURES: TRANSNATIONAL PERSPECTIVES AND POST-COMMUNIST EXAMPLES

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## I. THINKING TRANSNATIONALLY

Enough activity is taking place, in terms of research and advice on broadcasting structures in Central and Eastern Europe and the former Soviet Union, that it is worthwhile to step back and think about the formidable process of shaping transnational perspectives. What is in the wardrobe of public or private concerns that motivates cross-cultural communications studies? In these extraordinary times of trying to manufacture liberal democracies from national pasts and the detritus of command economies, are these advising activities productive? How should one measure effectiveness? Who are the interested parties and what is the basis of their interests?

Governments, including those of the United States, the United Kingdom, and France, provide financial support for travel, research, and the interaction of journalists and scholars;<sup>1</sup> American foundations and universities provide critical encouragement. The outline of a small industry, made up partly of communications scholars from the West and academics and broadcasters from the East, is taking shape. It will be possible—maybe not now, but certainly at some future time—to establish a production chart: who are the manufacturers of new laws?; who are those engaged in research and development?; who are the retailers?; who are the installers and repairmen?<sup>2</sup> And finally, if

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<sup>1</sup> See, e.g., *Expanding the Boundaries of Freedom: The Balkans to the Baltics*, Report of the International Media Fund, Washington, D.C. 1992.

<sup>2</sup> A number of American legal scholars have assisted in the construction of new con-

things do not work out, who will collect the debris?

At this nascent industry's most basic level, there is the project of chronicling specific statutory drafts and laws country by country, organizing them by category, and engaging in a textual analysis that compares the proposed and achieved shifts in one state to those in another.<sup>3</sup> Various categories for analysis and archiving automatically come to mind; e.g., prior censorship, frequency allocation, extent of privatization, journalists' rights, viewers' rights, appointment of chief executive officers of public service broadcasters, composition and appointment of supervisory or regulatory bodies, and judicial review of regulatory decisions. Yet, in the post-modern, post-critical, post-legal-realist world we are more than naturalists with stuffed cabinets of statutes pinned like butterflies under glass. The mere text of laws, and certainly drafts, can be misleading, especially if the purpose of examining these is to reveal the evolution of the relationship between broadcasting structures and society. Without a sense of context, these drafts and statutes are evidence not of broadcasting practices, but of political divisions, possible aspirations, societal compromises, local confusions, or international fashions. The purpose of this essay and the collection of essays and appendices that follows is to provide that context, which will facilitate examination of the evolution in this relationship.

To measure actually the expansion of democratic values, the

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stitutions and statutes. These include, among many others, Professor Herman Schwartz, American University; Professor A.E. Dick Howard, University of Virginia; Professor Lawrence Tribe, Harvard University; Professor Peter Tillers, Benjamin N. Cardozo School of Law; and Professor Ruti Teitel, New York Law School. In Washington D.C., David Webster has convened the Trans-Atlantic Dialogue, a group of experts specially brought together to advise on press and media issues. The Central and Eastern European Law Initiative, an ambitious project of the American Bar Association, has provided small technical advisory missions of lawyers and academics on a wide variety of subjects, including the press and broadcasting laws of the newly emerging states. The International Media Fund, started with government financing, has paired journalism schools in the United States with counterparts in Central and Eastern Europe, and has hosted sessions designed to encourage revisions in structural thinking about the relationship between the press and the state. Internews, an organization that pioneered "space bridges" (satellite links) between the Soviet Union and the United States, has conducted intensive training sessions for journalists in independent reporting and has been instrumental in forging connections among such journalists in different Republics. The Carter Presidential Center in Atlanta, part of Emory University, has spawned the Commission on Radio and Television Policy—directed by Professor Ellen Mickiewicz—which has helped develop a model broadcasting statute for the Republics of the former Soviet Union. The author of this essay is a member of the Commission and participated in developing the draft. A complete list of those involved is too long to set forth here.

<sup>3</sup> The International Association of Mass Communications Research ("IAMCR") has established an entity called BLER (Broadcasting Laws of Eastern Europe and Russia), with a timetable for reports and analyses. The *rapporteur* is Professor Wolfgang Kleinwachter.

mere examination of documents is far from sufficient. Travel, meetings, and discourse must take place. There is a kind of odd intercourse here, reminiscent of European exploration of exotic lands. Western journalists and scholars travel to Central Europe or the former Soviet Union, where they spend time conducting interviews; a mosaic of their impressions provides some insight into what is taking place. Czechs, Poles, Russians, and Slovenians are flown to London, Washington, and Paris, like Native exemplars of a distant past; they perform and are studied to provide a basis for Western academics, governments, and businesses to determine the lay of the land. Meetings take place in castles and conference centers, or by fax and phone.

But what is communicated, even face-to-face? The problems of communication are probably similar to those that plagued eighteenth- and nineteenth-century scholars and civil servants. Formal language difficulties aside, a fundamental hurdle is the uncertainty about transferability of concepts. We cannot really know how rooted in a particular history and flow of experiences a set of practices might be. No matter how sophisticated we are, how schooled in the relativism of anthropology and sociology, it is too easy to conclude that laws and institutions come in ready-made, almost modular packages (though sometimes they must). What we must take into account is not merely the translation of words, or even of concepts, but the translation of deeply ingrained administrative environments. One cannot talk of "judges," of "neutral principles," or of "accountability of government officials to the rule of law" without sensitivity to the complexities of adjustment. Dynastic memory makes some forms of power and hierarchy more acceptable in the East than in the West. Even simple concepts, such as those involved in the implementation of broadcasting alternatives, may have complex counterparts.<sup>4</sup> On the other hand, tacit acceptance of the limitations that bar modular transformations will render the Western observer almost useless, for the implementation of Western ideals is critical to the development of liberal democracies. What should be sought, but is difficult to achieve, is the project of interpretation. Such interpretation comprises a critical study of the statutes and laws drafted in the transitional states, the construc-

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<sup>4</sup> Such concepts include industry self-regulation of indecent programming, the structure of public service broadcasters, libel laws, rights of reply, immunity for journalists, and policies with respect to political advertising. See PNINA LAHAV, *PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY* (1985).

tion of a set of narratives about the reshaping of broadcasting systems, and a journey into the dark forest of hermeneutics.

Only through the lens of differences—differences which have their origins in disparate internal histories—can the transferability of concepts be perceived; and the quintessential example of central historical differences is in the meaning attached in a given society to “freedom of expression”—the relationship between the political state and the media—the bellwether of differences in how states regulate the distribution of information.<sup>5</sup> Internal histories of free speech are hardly laboratory-pure, however. They are made through the absorption of other histories: histories of violence and war, of idealism and cynicism; histories that have become more complex with the expansion of international trade. It is this trade, not only in images and in goods but in the very concept of how pictures, thoughts, and words are regulated, that underscores the importance of the search for national identity in the transition states.<sup>6</sup> The tasks of interpreting new statutes and constructing a new broadcasting system are rendered more coherent by trying to locate, in each instance, the role of the state as a shaper of national identity.

In a world trained to think of itself as immersed in the “information era,” the relationship between the nature of any given political system and the structure of its communication systems is of great importance. For the political scientist Karl Deutsch, one way of understanding the political essence of a society is to examine and calibrate its internal web of message-sending.<sup>7</sup> He offers what he calls a “functional definition of nationality,”<sup>8</sup> a predictive model for the behaviors of nations that relies on gauging the coherence of its communication systems. For Deutsch, “the range and effectiveness of social communication . . . may tell us how effectively [a community] has become integrated, and how far it has advanced, in this respect, toward becoming a na-

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<sup>5</sup> Much has been written on this question. Two interesting recent books are LEE BOLLINGER, *IMAGES OF A FREE PRESS* (1991) and STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

<sup>6</sup> This search is partly in response to threats to the permeability of their boundaries. What constitutes permeability is a function of borders and definitions of national cultures. The vast reach of the former Soviet Union's central television signals did not present a formal issue of permeability when the boundaries of the U.S.S.R. existed. With the Union dissolved, the presence of these signals in Ukraine or Lithuania is now differently defined. As to the complex issues of permeability in Western Europe, see ELI NOAM, *TELEVISION IN EUROPE* (1991).

<sup>7</sup> KARL W. DEUTSCH, *NATIONALISM AND SOCIAL COMMUNICATION, AN INQUIRY INTO THE FOUNDATIONS OF NATIONALITY* (2d ed. 1966).

<sup>8</sup> *Id.* at 97.

tion."<sup>9</sup> He added that the limits of selfhood of a group of people "will be the limits of its effectiveness in transmitting and circulating information."<sup>10</sup>

Conversely, any study about the regulation of television must be more comprehensive, not focusing on just a single aspect of a general system, but touching questions concerning the nature of the entire communications and political structure. Of course, this is a difficult task. Television itself is mesmerizing, powerful, and ubiquitous, with an immediate glamour and presence that makes it the first, and strangely isolated, object of interest and study—a kind of demon of modern life. Indeed, the role of television may be shifting in its relationship to other media, including computers and radio. For example, the increase of global programming, partly a consequence of the improved capacity of satellite transmission and cable distribution, may mean that television is a progressively weaker instrument for the making of national identities. Regardless, the regulation of television receives enormous attention. It may not, however, be the kind of attention that fully takes into account all the necessary factors to be considered in defining the relationship between the media and society.

Part of the problem is that scholars are condemned to compare societies that have had almost opposite histories of communications structures—some moving toward liberal democracy from autocratic command approaches, some seeking to increase the diversity of content and the ease of access in an already relatively-free communications structure. Some societies have asserted the power to use communications networks totally to shape or control loyalties, while others have encouraged competition against the state and have also limited the state's role. There is a spectrum here, not necessarily of democracy versus authoritarianism, but of active state involvement in the construction of a public sphere and of sustaining a national identity on the one hand, or pretending to leave these questions to the mar-

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<sup>9</sup> *Id.* at 99.

<sup>10</sup> *Id.* at 167. The pursuit of Karl Deutsch's almost quantitative approach to definition coexists with another kind of elaboration; namely, the study of how the origins of any particular modern nationhood have been created, invented, or imagined. *See, e.g.*, BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991); *THE INVENTION OF TRADITION* (Eric J. Hobsbawm and Terence Ranger eds., 1983). While it is true that the circulation of information and access to outward messages indicate the health and durability of an organism (as Deutsch makes clear), it is also important to study how the state, or the political elite, participates in that zone of communication, frequently using its participation to create a representation of the state that functions as a reinforcing instrument of its own power.

ket on the other. Only by being reflective about these more complex issues—and not focusing solely on a single model of the democratic state—can Western observers and counselors constructively participate in the task of attempting to democratize and provide greater freedom for broadcasting structures in former socialist states.<sup>11</sup>

## II. SPEECH, POLITICAL, AND ECONOMIC STRUCTURES

An obvious and critical element in reviewing the patterns of a restructured media involves sources of financial support, the essence of the relationship with the state. In the Soviet *ancien regime*, the goal of the monopoly broadcasters, as instruments of the state, was relatively clear, and the source of financing to perform the prescribed functions was also clearly established.<sup>12</sup> The transformation of the once-formidable First Channel of the Soviet Union, virtually the official voice of the Soviet Union, provides an example. Secure in its financing, it was secure in its purpose. In the post-Soviet world, however, it suddenly had an ambiguous status and mandate, and that ambiguity was reflected in the insecurity of financing. With the loosening of the imperial ties, the Channel was seeking to be pan-Republican, the soft unifier of the "Commonwealth of Independent States," of the "Newly Independent States," of the territories of the former Soviet Union, or of some other geo-political mass.<sup>13</sup> This alternative was not necessarily consistent with the political goals of the new Republics, and ambiguity in role leads to ambiguity in financing. An informal agreement among the presidents of the Republics to maintain and finance the Channel provided shaky assurance. It was not clear whether the First Channel's purpose

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<sup>11</sup> The problem of expression is closely bound with specific pasts. In Bulgaria, for example, in early 1992, a fervent group—calling itself the "Ten Words Are Enough Movement"—sought to adopt a minimalist approach to the role of the state in defining a broadcasting system. Ten words, declaring that the media must be free, were believed sufficient to lead a new liberal democratic world. Perhaps this movement should have been embraced. However, the group was attacked as reactionary, linked to the Communist past, and as championing the *status quo ante*. The portability of the words of the First Amendment of the United States Constitution is a perilous matter, both for scholars and policy makers. See Verginia Jordanova, *The Politics of Change in Bulgaria*, 20 INTERMEDIA No.3, at 16 (1992).

<sup>12</sup> See Peter Krug, *The Abandonment of the State Radio-Television Monopoly in the Soviet Union: A First Step Toward Broadcasting Pluralism?*, 9 WISC. INT'L L.J. 377 (1991); Anna G. Kachkaeva and Andrei G. Richter, *The Emergence of Non-State TV in the Ukraine*, 17 CANADIAN J. COMM. 511 (1992).

<sup>13</sup> The very confusion over nomenclature, depending on whether adherents to the Commonwealth, former Republics, the Balkans, or other areas are included in a political grouping, underscores the problem of ambiguity of purpose and financing.

was to provide a Russian language signal to the large numbers of Russian nationals who inhabited the new states, to provide a common information sphere, to establish a new sense of linkage between a different center and a different periphery, or merely to maintain a flow of entertainment at a difficult economic period while the several state television networks were still weak and inexperienced.

To determine whether there is a model for a pan-Republic service is to assume important questions about what cultural, communications, and economic links there will be among the component parts of the Union. Ukrainian officials and others complain that the Channel maintains the tradition of Russification, and that it continues to be a voice of the Russian empire, though perhaps more subtly. What should the policy of the First Channel be? Who should appoint its chief? How are these questions considered from the perspective of free speech ideas? Programming changes were evident in the early 1990s as the First Channel sought to attract an audience with demographic features attractive to advertisers. Consequently, programming content that would not insult its now more diverse political constituency was necessary. An MTV look replaced the more somber presidential aesthetic. In what would probably be a temporary compromise, the Russian Federation seemed to underwrite the Channel's program costs prior to 1993 (though trying to decentralize transmission costs), partly as a reflection of the view in other Republics that the Channel espouses a Russian, not a regional, perspective.

Patterns of financing are more commonly a matter of concern in development of the print media than they are in television. An official state television network, financed by the state, is taken for granted in ways that a state-financed newspaper is not. As a result, questions involving the allocation and subsidization of newsprint are ubiquitous. Perhaps, in many of these structures, the state must underwrite civil society and its zone of discourse. Nonetheless, withdrawing subsidies from television may mean a steady decline to a diet of the shabbiest programming and the elimination of television as a source of culture, information, and discourse, just as it may mean a deterioration of the supply of information through newspapers. Transaction costs, including obstacles imposed by the assertion of intellectual property rights, can impede the growth of strong public service or independent broadcasters. Indeed, in some contexts, the adoption of a copyright regime may protect better-heeled state televi-

sion monopolies from the competition of non-state broadcasters.<sup>14</sup> Non-enforcement or slack enforcement of copyright can be seen as a kind of subsidy that discriminates in favor of independent broadcasters. Almost universally, advertising has become an acceptable, if not mandatory, source of revenue.<sup>15</sup> In societies where people are trying to be consumers, but where demand for consumer goods is not high and the supply is problematic, developing a market for advertising is quite difficult. Much advertising (off, more than on, television) is used to develop brand identification so that when the market matures particular competitors will have built a franchise for themselves.<sup>16</sup>

Redefinition of concepts of "independence," (as in "independent broadcaster") is a frequent aspect of the narratives of transformation. Westerners are always looking for "independent" journalists or "independent" producers, rarely stopping to examine the context of independence. In Ukraine, for example, where "independent" television services are beginning, they not only use the state transmitter and the state studio facilities, but they broadcast pursuant to rights that seem to be governed by the state television service itself.<sup>17</sup> One can see the hazards looming, but whether outside experts can merely fit the proper piece into the machinery of regulation is unclear. A sign of the difficult passage to independence could be witnessed during the early 1990s in Kiev as the state television service physically manifested its endurance.<sup>18</sup> A gleaming new television facility, started

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<sup>14</sup> The policy of the United States is to assure that the copyrights in motion pictures are respected and that films are not pirated. But most so-called infant "independent" television stations in the transition societies (primarily the Newly Independent States) were reliant on bootlegged films and similar product for a competitive edge. In some markets, these pirate-based independents were accounting for almost fifty percent of the audience market. Thus, it may be in the interest of the state broadcasters to choke off the supply of product to these competitors by joining in the insistence on compliance with copyright law.

<sup>15</sup> For a brilliant article on the impact of advertising support on content in the American context, see C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

<sup>16</sup> See Andrei G. Richter, *Broadcasting Law in the Ukraine*, BROADCASTING IN TRANSITION, NETCOM PAPERS NO. 3, at 60-61 (Leipzig 1993) for a discussion of the role of advertising on Ukrainian television.

<sup>17</sup> In early 1993, the Commission on Radio and Television Policy (based at the Carter Center in Atlanta with a membership of American broadcasting professionals and professionals from across the former CIS) helped prepare a Charter of Media Independence for use by non-state broadcasting entities in the former Soviet Union. The Charter provides that subscribing stations "adopt ethical guidelines that assure independence from government and other entities that might compromise journalistic objectivity."

<sup>18</sup> The overwhelming majority of radio and television channels in Ukraine are state owned; regional companies, theoretically autonomous, are very much under Kiev's administration. The state company is headed by a president appointed by the Cabinet of



as a monument during the statist days of a decade ago, was prepared for occupancy. Perhaps architecture, not legislation, demonstrates the role of the state in broadcasting—a physical symbol of the continuing relationship of state interest to non-state originated communications. Often things are not as they appear to be to the foreign observer; this makes long-distance reliance on formal language, or even casual narrative, extremely perilous as a guide to transformations.

### III. INTERPRETING TEXTS

A substantial distinction still exists between approaches to broadcasting structures in post-Communist and Western societies. In the transitional societies, perhaps primarily in the former Republics of the Soviet Union, the state's role in both establishing national identity and rendering the idea of the state more coherent has continued. The background factors—the social, economic, and political contexts—are clear. But what about text? Do the emerging texts of press and broadcasting laws reflect these differences? In the United States, Great Britain, and in Europe, the modern state appears—with some cyclical moves—to cope with competing demands for the loyalty of its citizens through the vocabulary of deregulation; i.e., the appearance of as little governmental intervention as possible and, to the extent possible, a continuing diminution in that intervention. For example, in the summer of 1992, President Mitterand of France was precluded from establishing a publicly-funded television advertising campaign to convince French voters to ratify the Maastricht

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Ministers with the consent of the Committee on Mass Media of Ukraine's Supreme Soviet. Nikolai F. Okhmakevish, the head of the company in 1992, was head of its predecessor during the Soviet era. All three vice-presidents are also appointed by the Cabinet. There is one full-time channel administered by Ukrainian state television (UT-1), which includes political programs and official information. Two other efforts are three-hour daily preemptions of the Russian channel from Moscow: UT-2 is less politicized, and UT-3, born in 1992, is mainly experimental, broadcasting movies and dramas from the West, dubbed into Ukrainian.

The basic languages on the Ukrainian channels are Ukrainian and Russian. In early 1993, the balance between the two was almost fifty-fifty, although the Russian programming is dwindling since no new programs are produced in the Russian language. Non-state television entities broadcast primarily in Russian. Dish antennas were prohibited for private use at the end of the 1980s. Kachkaeva and Richter, *supra* note 12, at 511-523.

Kachkaeva and Richter identify three stages in the evolution of "alternate television" in the former Soviet Union. In its first stage (1988-89), these were seen as in opposition to the "rearguard actions of [state] bureaucrats during the *glasnost* drive." *Id.* at 512. The second stage, during the disintegration of Gostelradio in 1990-91, involved use by the alternative institutional structures of state facilities and joint ventures with state television. The third phase began after the failed coup d'etat of August 1991. *Id.*

Treaty on European Union. Government use of its resources for the overt shaping of national identities through the media is considered less and less acceptable, and to the extent it takes place, it should be openly articulated and its structure should be transparent.<sup>19</sup> During the early 1990s, the situation was otherwise in the republics of the former Soviet Union and the states of Central and Eastern Europe. War (or the threat of war), irredentism, fierce immigration debates, and the general instability of economic transformations, meant that the competition for loyalties was extraordinary. The very definition of the state was often at issue. Therefore, government intervention in the cultivation of national identity was developing at a fevered pitch.

Of course, there is much—perhaps too much—that the formal statutory language, and even the process leading to enactment of the statute, does not disclose. Where does technology come in?; how much is regulable?; and how much is determined by the entry of satellite and cable technology rather than by the articulated desires of lawmakers? The formal language does not disclose the power of the audience, nor how it reads what is on the screen, nor what changes in its viewing patterns ensued from the entry of new competitors who are often outside the formal framework. Nor does the formal wording indicate patterns of conformity between the aspirations of law and the action of officials, much of what is called the “rule of law.” And aside from verbal aspirations, which mirror some adopted notion of democracy, the infrastructure for transformation (i.e., existence of a consumer market, availability of capital, and incentives for investment) may be wildly out of kilter with the established model. The language of statutes may have the purpose of camouflage, or may be designed to placate an international community rather than to guide conduct. The purpose here is not to determine what the law “is” or what conduct is proscribed or permitted; rather, it is to look at statutes in the same way that an archaeologist looks at shards to help decipher, decode, and explain an ancient civilization—as narrative text about the society.

All this said, studying the language of legislative provisions, proposed and enacted, that deal with the relationship between the media and the state is a way to search for the vocabulary of change. Laws and lawmaking are clues as to the nature of the

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<sup>19</sup> How and whether these goals have been achieved or whether it is, in fact, an objective, is the subject of a larger project which touches upon such complex issues as funding for public broadcasting, subsidy policy with respect to the arts, and structures of access during political debates.

transformations—whether, for example, they represent a revolution of rights, or as Andras Sajo has argued, an attempt to restore some hard-to-locate pre-Socialist order of an imagined national past. Broadcasting legislation might be the actual working out of conflicts, or it may be evidence of inexorable anxieties that plague the society. Some parts of the new broadcasting laws may be drafted not as a reflection of internal realities, but rather of the compulsion, inducement, or idealized hopes of outside models—a mirror pointed outside toward the face of the West. Some parts show the scars of the past; they can be read mainly as articulated triumphs over some seemingly rejected torturous practice, retained in the very act of forceful repression. Broadcasting statutes reflect the definition of power in the new societies and the competition between assertions of legislative, executive, judicial, and personal authority. As they reveal the ambivalence toward the shift in ownership from public to private, the statutes and the statutory process involve the debate over the state monopoly for loyalties. There are residual prohibitions on those outside the state: *glasnost* with limitations, restrictions on ownership, and limitations on the range in which hostility to the very idea of the state can be expressed. During the current period of change, these new legal texts provide some insight into the new conceptions of the state, of government, and of democracy that their drafters hold. In the remainder of this essay, I examine several such transitional statutes or drafts of broadcasting laws.

#### A. *The Russian Federation Law on Mass Media of 1991*

Convoluting and complex by American standards, the Russian Federation Law on Mass Media of 1991 was one of the first and most comprehensive media statutes to emerge in the post-Communist era.<sup>20</sup> Intrigue, xenophobia, a search for modernity,

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<sup>20</sup> At the time this article was going to press, the Russian Federation Law on Mass Media of 1991 ("Russian Media Law") was embroiled in the fierce contest between President Yeltsin and the Congress of People's Deputies. On March 28, 1993, the Congress passed a decree that required the heads of state television and radio broadcasting companies to be appointed and dismissed by a new entity called the "Federation Observation Council for the Ensurance of the Freedom of Speech at State Television and Radio Broadcasting," though only with the consent of the Supreme Soviet of the Russian Federation. Concluding that "unequal granting of time on tv and on the air to expressions of different political views" amounted to political censorship, the Congress decreed that "the activity of organs of management unenvisaged by law . . . should stop." Tass Reports, Mar. 28, 1993.

Just prior to the above-mentioned congressional decree, Boris Yeltsin issued a special decree on March 20, 1993, in view "of the real threat to the freedom of information . . . and in order to avert the monopolization of the mass information media and unlawful interference in their activity." He placed the mass media "under the protection of

compliance with international pressures, the "solutions" proposed by advisors parachuted in from the United States and elsewhere—all this is part of the mix that produced the infant legislative drafts in Russia and other beleaguered new states. Everywhere was the blanket of the past—with its purposive, penetrating, stifling controls—a complex backdrop for the evaluation of any proposed approach.

The Russian Media Law can only be understood as an evolution from the preceding order, not as a comparison to some distant and culturally ill-fitting parallel.<sup>21</sup> Looking at the media law may be like examining the wrists of a recently-freed prisoner where the marks of the chains are still present. Drafted by a group of journalists and academics as an ideal, almost apolitical, formulation of the relationship between the media and the state, the statute is organized into seven chapters, the first of which, by honored position, sets forth a basic guarantee of freedom from censorship for "mass information."<sup>22</sup> The second chapter provides a form of regulation relatively unknown in the United States: a detailed concern with the internal organization of the media activities, including meticulous concern with the organization of ventures, the agreement between founder and editor, and the arrangements, both editorial and functional, between the editor-in-chief and the journalists.<sup>23</sup> The third chapter includes a guarantee of physical distribution of newspapers and magazines that reflects a remembered fear of the perils of state control over the machinery of distribution.<sup>24</sup> This chapter also deals with the issuance, regulation, and annulment of television and radio broadcast licenses,<sup>25</sup> as well as familiar aspects of content con-

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the law and the president of the Russian Federation as the supreme official personage of the state." BBC Summary of World Broadcasts, Mar. 24, 1993 (emphasis added). The Ministry of Internal Affairs was charged with the responsibility of guarding state television and radio companies, presumably from interference by perceived enemies of the state. *Id.* See also *Yeltsin Decree on Information Stability*, BBC Summary of World Broadcasts, Mar. 25, 1993 (establishing minimum standards which include the guidance of the declaration on the media and human rights of the consultative assembly of the Council of Europe).

<sup>21</sup> See BRIAN MCNAIR, *GLASNOST, PERESTROIKA AND THE SOVIET MEDIA* (1991) and ELLEN MICKIEWICZ, *SPLIT SIGNALS: TELEVISION AND POLITICS IN THE SOVIET UNION* (1988) for a history of media in the Soviet Union.

<sup>22</sup> It is more than interesting that what the legislation purports to cover is described as "mass information." This term has the flavor of the model of society in which there is a largely undifferentiated class-constant population with a vertical relationship between the publisher and the reader. Already, the law reveals a valuable conceptual relic of the past.

<sup>23</sup> Russian Media Law art. 22.

<sup>24</sup> *Id.* art. 25.

<sup>25</sup> *Id.* art. 31-32.

trol.<sup>26</sup> The fourth chapter demonstrates the synergetic nature of freedoms. Not only must there be the abolition of censorship, and not only must the finished product of the editorial process receive guaranteed distribution, but the citizens' right to receive information must also be assured.<sup>27</sup> The fifth chapter reminds the journalist of the occupation's double-edged sword. The state affords a journalist power, but he or she must be responsible. Thus, there is an ornate and important set of regulations describing the rights and responsibilities of journalists,<sup>28</sup> a section that is rich in its reverberations of past into future. Other sections deal with foreign publications and foreign correspondents,<sup>29</sup> the imposition of sanctions for statutory violations,<sup>30</sup> immunities for journalists and editors,<sup>31</sup> and citizen access to the courts.<sup>32</sup> The sixth and seventh chapters pertain to interstate agreements and other foreign matters, and placing responsibility for violation of the statute, respectively.

The outline of the statute tells us something about the drafters' consciousness in terms of the national goals for a broadcasting system. This is not a statute that begins with language glorifying the state, or in which the state is even the central actor. The idea—the very organization—of the statute is to involve the state as little as possible, to construct autonomous broadcasting entities that have rights against the state, rather than the other way around. But it requires a more meticulous examination of the statute's provisions to determine the extent to which the state creeps back in. As an embodiment of Western traditions of independence, the statute might be an emblem of democratization—an ingredient, like a new flag, of a new national identity—rather than the means to implement or require aspects of loyalty.

The censorship provisions have such significance and scope that they become an important starting point in examining the statute for its narrative import. Obviously, a broad prohibition of censorship was important to proclaim, as the statute begins with

<sup>26</sup> *Id.* art. 36 (addressing advertising) and art. 37 (regarding erotic publications).

<sup>27</sup> *Id.* art. 38.

<sup>28</sup> *Id.* art. 47, 49.

<sup>29</sup> *Id.* ch. VI. Entitled *Interstate Cooperation*, chapter six encompasses art. 53-55.

<sup>30</sup> *Id.* art. 56, 59-60.

<sup>31</sup> *Id.* art. 57.

<sup>32</sup> *Id.* art. 61. One appealing aspect of the draft statute, from the archaeological perspective, is that it appears to be almost wholly home-grown. It has the charm of aspiration, seeking to absorb the style of democratic societies without the support or context, and with a need to extend the tools and the vocabulary. In that sense it is also an interesting baseline against which to look at later developments and at statutes where the intervention of foreign scribes is more evident.

a general prohibition on governmental and some non-governmental intervention in editorial policy.<sup>33</sup> More interesting, however, is what was omitted from the sweep of anti-censorial zeal: Article 4 lists the permissible content prohibitions and thereby somehow defines the proper zone of national concern with the shaping of public consciousness.<sup>34</sup> For example, the statute prohibits instruments of mass information from calling for a change in the existing constitutional order by force; from arousing religious animosities; from fomenting social, class, or national intolerance; or from proliferating war propaganda.<sup>35</sup>

These exceptions, these nodes of sensitivity, are extraordinarily expressive of the overriding concerns of an insecure young state—as they were of an insecure older state before it. To prohibit a call for revolution in the existing constitutional structure suggests an institutional aspiration for stability, for the preservation of basic elements of the status quo, for a political debate that has important bounds. The exception is a sign of concern, perhaps justified, that some speech, by representatives of the Soviet *ancien regime* for example, is potentially very dangerous, and that the state has a duty to defend against the promulgation of messages that could be destructive to the process of openness. Prohibiting the arousal of religious animosities suggests a role for the nation in fostering, preserving, or perhaps strengthening the position of religious organizations. This exception from the ban on censorship foretells a society in which these specific wounds to an important institution cannot be permitted again. An exception prohibiting speech that foments social, class, or national intolerance denotes an important role for the state in ameliorating the harsh schisms and ancient hatreds between ethnic groups—breaking with a tradition that sometimes required the denial that these and other conflicts existed. The prohibition against “war propaganda” is also a reminder of past beliefs (founded or not) that a private, capitalist press can stir the people into unwarranted aggression, against the interest of the state. Here, as in all of the exceptions, the state is positioned as separate, authoritative, and capable of having a proper sense of what is a just war and what is not.

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<sup>33</sup> *Id.* art. 3.

<sup>34</sup> *Id.* art. 4.

<sup>35</sup> *Id.* The law prohibits the divulgence of official secrets, the use of the mass media to perform criminal acts, and the use of hidden or subliminal advertising. Some of these prohibitions may be based on Article 20 of the International Covenant on Civil and Political Rights, which prohibits propaganda for war and advocacy of national, racial or religious hatred.

Censorship is the negative aspect of government power. A media act can also be revealing in terms of its implications for the resulting structure of a press sector. Will there be an all-powerful state broadcasting authority with private entities only at the margin? Can government assure "diversity" in terms of an imposed outcome in which many voices are guaranteed to be heard? Or will the solution be market-oriented, in which the state withdraws and has little assurance as to the organic composition of the resulting economic circumstance? The law that I am examining, like many media statutes, is tantalizing concerning these questions, but not sufficiently detailed to allow the archaeologist to know what actually was intended or what might have grown from the draft.<sup>36</sup>

I have mentioned the provisions for the registration and internal management of mass media.<sup>37</sup> A statute that requires pre-publication registration with discretionary approval makes some statement about the potential role of the state. A registration scheme can be non-threatening by limiting the discretion of the registration authority. The Russian Media Law of 1991 tries to accomplish this by limiting the power of the registering authority to grant registration. Because there are limits on who can establish the mass media, a registration could be refused if the ownership or structure is improper. More troublesome is the power to deny a registration of the applicant where the registering authority knows that the content to be produced would violate the law (for example, that it would foment class or national intolerance).<sup>38</sup> A registration scheme often conditions permission to publish on the proper kind of ownership, and ownership restrictions provide one of the most important insights into the national

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<sup>36</sup> Earlier drafts dealt with monopoly aspects. Article 4 empowered the government to set standards to assure that instruments of mass information were not so concentrated as to constitute a monopoly. Article 28 stated that for printed periodicals, no group of such periodicals should have a combined circulation exceeding 30 percent of the printed periodicals within a specific territory. The exact implications for the structure of a television and radio industry were left for another law. So long as the reader does not know how extensive, how much of a market share, or how pervasive state broadcasting will be (or whether a state-controlled newspaper will be subsidized and have favorable access to newsprint), the power of government officials to shape loyalties and to impose an idea of the state cannot be ascertained.

<sup>37</sup> Russian Media Law, ch. II (encompasses art. 7-24).

<sup>38</sup> *Id.* art. 13. The registration authority could have established separate fees for registrants based on the following: (1) fees for instruments of mass information that specialize in the production of advertising or erotic material could be higher, while; (2) publications for children, youths, invalids, and for education and culture could be lower. This power is an important one because it would give an agency the need to decide on a discriminatory fee structure and some authority to decide what constitutes a publication in each category.

tendencies of a media law. In the Russian statute, which has a category called "founder,"<sup>39</sup> foreign citizens cannot establish the mass media,<sup>40</sup> nor can persons without citizenship who do not live continuously within the boundaries of the Russian Federation.<sup>41</sup>

Ownership is a clue, in another vital way, to analyzing the effect of the media in shaping national identity. Should the government, directly or indirectly, be able to establish and operate an instrument of mass information? One could conceive the answer to this question as a hallmark determinant about the nature of the state and its potential for shaping public opinion and fostering loyalties. Most Western democracies have had state-controlled, or heavily state-influenced broadcasters; in a sense, that is what public service broadcasting has been. The United States has been relatively unique in its historic policy of ambivalence toward all but the private.<sup>42</sup> The Russian law would permit, in Article 7, any "state organ" to found a mass media.<sup>43</sup> The statute denotes continuity with the environment of the past, a situation in which great powers in the society—Ministries, Unions, even Parliament—can be founders of newspapers.

National power to register—to legitimate—implies a power to deregister, to close, to delegitimize. The relationship between a publication and the state, and the capacity of the state to influence content (often not so subtly) is a function of this harshest of sanctions: the power of the government to actually close a newspaper down. One could conceive of a statutory scheme that had no such power, relying, if necessary, on the ordinary authority of the state to punish individuals for criminal acts, or to collect taxes, or to impose damages for injury inflicted. The Russian law has the beguiling appearance of liberalization, but also an implied sense that the government can step in when something is dreadfully wrong. Article 16 governs the power to close down the mass media.<sup>44</sup> The article speaks in the language of limita-

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<sup>39</sup> See *infra* note 48.

<sup>40</sup> Russian Media Law, art. 7. In the United States, newspapers and magazines can be founded by anyone, and so can broadcasting entities, though there is a percentage limitation on the degree of ownership by noncitizens.

<sup>41</sup> *Id.* This does not prevent foreigners from circulating their foreign-published mass media. That is governed by Article 54.

<sup>42</sup> I include the nonprofit public broadcasting stations within the realm of the ambivalence.

<sup>43</sup> Article 7 of the Russian Media Law, entitled *Founder*, reads as follows: "[t]he founder (cofounder) of a mass media may be a citizen, an association of citizens, an enterprise, institution, organization, or state organ."

<sup>44</sup> Article 16 of the Russian Media Law is entitled *Termination and cessation of activity*.



tions. Only in certain circumstances can the founder himself cease publication. Furthermore, the Ministry of Press and Information can force closure only if the publication, after warning, persists in violating the prohibitions discussed above (fomenting conflict,<sup>45</sup> etc.), and then only after a court order.<sup>46</sup>

The statute, because it undertakes to regulate the internal working of the press and because it would confer special privileges on the press, must define the press. This leads to a hypothesis worth testing in construing draft media legislation: from a statute's definition of the press, one can infer a definition of the state. There could be a corollary: from a statute's definition of the powers of the state, one can infer the nature of the press. In the United States, one unusual and intriguing aspect of First Amendment jurisprudence is that, over time, definitions of "the press" have almost disappeared, even though the amendment specifically prohibits Congress from abridging "freedom of speech, or of the press." There has been an understanding that the press is freer if it has the rights of mere speakers in society than if it has more specific rights that come from a defined status.<sup>47</sup> Under the Russian law, the "press," referred to as a "mass media," has a defined status; each publication has a stated purpose and a stated range of publication, each registers, and each has an announced internal structure.

The 1991 Russian Federation Law on Mass Media specifies a

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During the run-up to the April 25, 1993 referendum, the Ministry of Information sought closure of a newspaper for "collective fabricated hooliganisms." *Moscow Evening News* (Apr. 20, 1993).

<sup>45</sup> The then-Minister of Information, Mikhail Poltoranin, issued a warning to *Sovetskaya Rossiya*, which the newspaper was required to carry in its June 27, 1992 edition. The minister quoted an article about picketing at Ostankino. "Russia's government has launched a bloody war against its own people . . . blood is being shed in Moscow's streets . . . More than two hundred people were injured. There are fatalities . . ." The minister pointed out that the reports "have been officially denied as not corresponding to the facts." Russian Press Digest, RusData DiaLine, June 27, 1992.

Subsequently, at the time of the spring 1993 crisis, the Minister of Press and Information initiated court action to close down *Sovetskaya Rossiya* and another paper, *Den*. Press Conference of Minister of Information, Mikhail Fedotov, Mar. 23, 1992, Fed. Info. Sys. Corp., Official Kremlin Int'l New Broadcast.

<sup>46</sup> See Russian Media Law, art. 43-46 (public remedies) and art. 60 (possible additional private remedies). Article 15 renders registrations possibly "invalid" if, among other reasons, the registration was obtained deceptively, or if the instrument of mass information has not been published for a year, or if the statute of editorship has not been accepted.

<sup>47</sup> Hence, debates in the United States over whether reporters should have special rights of access, whether newspapers should have libel defenses greater than those of citizens, and whether journalists should have special shield laws. See *infra* note 64. Of course, there are some definitions, including those for special mailing privileges (but these are for printed matter, not press). In addition, regulatory bodies, such as the FCC, must determine who comes within their sway.

set of rules setting forth the relationship between the "founder"<sup>48</sup> and the staff for most "mass media."<sup>49</sup> The law accords the journalists' collective the right to approve the regulations by a majority vote, provided that no less than two-thirds of its membership is present and that the regulations are also approved by the founder.<sup>50</sup> These regulations would cover the manner of appointing the editor-in-chief,<sup>51</sup> the manner for ceasing operation,<sup>52</sup> and the manner by which founders or publishers could be changed.<sup>53</sup> Article 26 of the law seems to mandate that a publication could only be distributed after the editor has given permission.<sup>54</sup> Journalists, in their capacity as journalists, are provided special rights of access, including a kind of post-Chernobyl right to visit calamities, catastrophes, and "mass unrest and mass gatherings of citizens, as well as areas in which a state of emergency has been declared."<sup>55</sup> Somewhat chillingly, they are burdened with responsibilities as well.<sup>56</sup> If journalists "fail" (e.g., if they distribute false information that impugns the honor and dignity of a state organ),<sup>57</sup> they can be stripped of accreditation by that agency. If they are "good," the government "guarantees the journalist protection of his honor, dignity, health, life and property."<sup>58</sup> The inverse is troubling because it infers that one who is not "good" is not guaranteed these protections. The Russian law, perhaps revealing fears from the past, seeks to guarantee, in some detail, the freedom to distribute mass media, and to specifically enjoin the government, unions, and citizens from harming the process of disseminating information. The law imposes a

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<sup>48</sup> The concept of "founder" is itself an interesting artifact of free speech theory. All mass media were organs of the government or of the Party; the transition to another form of collective ownership had to take place through the creation of sponsoring organizations, not private publishers. Consequently, the device of "founder" was invented, a kind of intermediary between government and Party on the one hand, and journalists on the other. Interview with Professor Yuri Baturin, author of the Union Press Law, in Moscow (Feb. 3, 1993).

<sup>49</sup> Russian Federation Law on Mass Media of 1991, art. 18-22.

<sup>50</sup> *Id.* art. 20.

<sup>51</sup> *Id.* art. 20, ¶ 3.

<sup>52</sup> *Id.* art. 20, ¶ 4.

<sup>53</sup> *Id.* art. 18, ¶ 5. The decree of the Russian Congress of People's Deputies, March 28, 1993, "On Measures to Ensure the Freedom of Speech at State Television and Radio Broadcasting and in News Organizations" included a provision stipulating that organs of executive authorities and their officials "cannot be founders of state television and radio broadcasting companies and news organizations, and that their powers pass on to representative authorities and local government authorities." Tass Reports.

<sup>54</sup> "The distribution of the mass media product is permitted only after the editor-in-chief gives permission for publication (airing)." Russian Media Law, art. 26.

<sup>55</sup> *Id.* art. 47.

<sup>56</sup> *Id.* art. 49.

<sup>57</sup> *Id.* art. 48.

<sup>58</sup> *Id.* art. 49.

duty on government, unions, and certain official entities to furnish information about their activities to newspapers, television, and other mass media.<sup>59</sup> The Bulgarian draft seems to have a similar provision.<sup>60</sup>

In the American context, we do not ordinarily think of government as ordering a particular design for the internal structure of a newspaper organization or a television network. There is no guarantee in American law that an editor will be "independent" of the publisher. To the extent that an editor is independent, it is a result of tradition, not a constitutional or statutory right. It is also rare, unless reflected in the ownership structure, for journalists, as a body, to have rights independent of collective bargaining agreements.<sup>61</sup>

From this perspective, looking at the shards of the Russian law, a perverse statism appears. The architects seem to overdefine freedom, stamping out any interference with the journalist, whether by the government or by the publisher. Accordingly, the legislation must posit how an instrument of mass information should be organized by imposing limits on how the editor is hired and fired, as well as by providing both the journalists and the editor with specific rights concerning the financial and editorial management of the publication.<sup>62</sup> The authors of the law—the architects of the building we are trying to reconstruct—considered these provisions as additional guarantors of freedom. But the law is strangely limiting. It discourages foreign investment and is dependent on the state to sanction internal agreements. Consequently, it is likely to lead to less diversity and

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<sup>59</sup> *Id.* art. 35, 38.

<sup>60</sup> See Jordanova, *supra* note 11, at 16.

<sup>61</sup> Such agreements usually deal with the economic terms and conditions of employment.

<sup>62</sup> The Russian law presupposes a formal arrangement. Every mass media product would include three distinct components: a founder, an editor-in-chief, and a journalists' collective. Together, the editor-in-chief and the journalists' collective are known as "the editorship." Article 19 states that the editorship performs its tasks "on the basis of professional independence," and Article 18 states that the founder cannot interfere with the editorship except as the founder and the editorship have agreed. A status agreement is required to cover a number of extremely important points (Articles 16 and 20). For example, it sets forth the circumstances under which the owner may close the newspaper. The document must also set forth how the editor-in-chief is appointed and, presumably, how he or she is removed. The agreement would specify what powers the journalists' collective possesses and what happens if there is a proposed change in ownership or constituency. It would be interesting to know if there is a European or other model for this kind of document. Under Article 22, the founder and the editor are also to agree as to the very important financial side of producing an instrument of mass information. For example, they should agree on "ensuring proper education and social domestic living conditions and labor conditions for the editorial office associates." Russian Media Law, art. 22.

innovation than might otherwise be the case. The greater the opportunities for disputatious friction between publisher and editor, the more likely the state will be called in as arbiter.<sup>63</sup> Article 47 provides journalists with a right of access,<sup>64</sup> and, as with the definition of "the press," one question is whether there should be an official category of "journalist" who has more of a right than anyone else to enter prisons, to rummage through government files, or to see what is going on in defense installations. The law seems to resolve this question quite firmly. The journalist has rights *as a journalist*. These rights of access include the right to look for information, to visit government organs, to copy papers, and to take photographs.

Privileges yield responsibilities, as Vaclav Havel learned from his frankness with Western press notables. Asserting such responsibilities, however, raises fears that an alternative framework for censorship is being structured. For example, Article 49 provides a virtual Boy Scout Code: the journalist is supposed to verify information, protect confidential sources, honor those who should be cited, get prior permission when it appears that a news report will be an invasion of privacy, notify those persons whose pictures have been taken, keep superiors informed of possible law suits, and refuse assignments that might entail breaking the law.<sup>65</sup> If a journalist does all this, the government then "guarantees the journalist protection of his honor, dignity, health, life and property" as a person who performs a public duty.<sup>66</sup> As meritorious as these goals appear, the imposition of such government standards suggests a relationship between journalist and government that is reminiscent of the sometimes velvet, sometimes steel prison of the past.<sup>67</sup>

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<sup>63</sup> In an earlier draft of the statute, the broadcast licensing authority could require at least a statement of how much time will be devoted to foreign programs and to transmissions from any Commonwealth-wide entity. Article 33(f) would have allowed a requirement that the licensee distribute "information and materials of organs of government power and leadership."

<sup>64</sup> There is complex case law on this question in the United States which leans toward a principle that there is no higher right of access for journalists than for citizens. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (validating the proposition that the media acts as a surrogate for the public); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

<sup>65</sup> The law also provides that a journalist should "respect the rights, legal interests, honor, and dignity of citizens and organizations." Russian Media Law, art. 49.

<sup>66</sup> *Id.* Journalists can be excluded from events "when the decision has been made to hold a closed meeting." *Id.* art. 48. A government organization can also strip a journalist of his or her accreditation, though only with court approval, if the rules are broken or if the journalist distributes false information that impugns the honor and dignity of the government organization. *Id.* This seems like an invitation to harass the journalist.

<sup>67</sup> Article 51 provides that the journalist is forbidden to use his or her privileged

Finally, one important measure of a media statute's treatment is the openness of a society to foreign sources of information. The Russian Media Law demonstrates the desire for a state with permeable boundaries; indeed, Article 54 asserts that the citizens of the Russian Federation are "guaranteed unhindered access to reports and materials of the foreign mass media." But, with its vestiges of statism, the law must define freedom, and, in so doing, suggests the potential for state intervention and control. For example, Article 53 authorizes "interstate agreements" with respect to foreign mass media. The circumstances of distributing such foreign publications can be decided by "interstate agreement," a phrase of complex ambiguity. In the 1950s and 1960s, the United States and the Soviet Union had an agreement in which the Soviet Union had the right to distribute a limited number of copies of *Soviet Life* in the United States and the United States was permitted to distribute limited numbers of like publications in the Soviet Union.<sup>68</sup>

The Russian Media Law of 1991 was drafted under the auspices of journalists, and it reflected their view of mass media. It was also a monument to the idea of new freedoms, of a transformation. The legislation was deemed an idealistic construct and was celebrated as an artifact of the new order. In the brutal year of Soviet dissolution and the inchoate adjustment to new realities, perspectives on the nature and function of law were substantially altered. The 1991 law was largely about press immunity from government intervention; major provisions dealt with the rights of journalists against their publishers and editors, and with the rights of citizens and journalists against the state.<sup>69</sup> Little in the law touched upon the role of legislative bodies, as opposed to

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position to cover up falsification of information, distribute rumors under the guise of truth, collect information for unauthorized persons or organizations, or distribute information "for the purpose of defaming a citizen or individual categories of citizens exclusively on the basis of sex, age, racial or national affiliation, language, attitude toward religion, profession, place of residence and work, or in connection with their political convictions." Articles 59 and 60 provide a list of potential sanctions for journalists who are not true to these responsibilities. Again, these may be meritorious goals, but the existence of a "journalist" status—with standards to be enforced and sanctions that can be imposed—provides substantial state leverage.

<sup>68</sup> For a discussion of these agreements and restrictions on the export and import of film, as well as other attributes of the Cold War, see ELIZABETH HULL, *TAKING LIBERTIES* (1990). See also Monroe E. Price, *The First Amendment and Television Broadcasting by Satellites*, 23 UCLA L. REV. 879 (1976). Under the Russian Media Law, where there is no such agreement, the foreign publication would apply to the Ministry of Press and Information. Article 54 singles out direct television broadcasting for special protection. No limitations are allowed for such programs except by prior inter-governmental treaties.

<sup>69</sup> See Russian Media Law, art. 38, 39, 47 (journalists' rights) and art. 43-46, 49, 51, 59, and 62 (citizens' rights against the media).

the powers of the president or his Ministry of Press and Information. That would soon change. From the summer of 1992 through the spring of 1993, deliberations in the Congress of People's Deputies reflected political competition, arguments over control, and a focused sense that the future structure of the media should be a matter of keen debate.<sup>70</sup>

Within the scope of the debates leading to a 1992 parliamentary draft, the idea of a commission established to ensure that all power would not be established by the president was discussed.<sup>71</sup> According to the proposal, the director general of any government-controlled mass media (which could include some newspapers as well as radio and television) would be appointed only after approval by such a commission. The pattern of ministerial subsidies for mass media would be subjected to scrutiny, and a legislative standard regarding the amount of circulation would be established for such subsidies. Also implicated was the status of the major newspaper *Izvestia*. Although founded by the Soviet Parliament, journalists claimed the paper for themselves after the approval of the all-senior Soviet in August of 1991. By 1992, the Russian Parliament, through its speaker, was asserting that it was, in effect, the publisher, with some rights over editorial policy. "Freedom of the Press," became a rallying cry, particularly for President Boris Yeltsin, in opposing greater parliamentary power. Almost all legislation, whether having to do with *Izvestia* or with radio and television, was pigeonholed as an interference with freedom of the press. Undoubtedly, a less encumbered press was an objective, but the statutory debate was also about which political forces would have more or less leverage in defining the new Russia. For those who favored a faster turn to the West and a more dramatic commitment to a market economy, resistance to parliamentary intervention had political as well as ideological advantages. A "free press" was more likely to side with the president than with Parliament, at least in the short run.<sup>72</sup>

#### b. *Other Attempts at Transformation*

With regard to broadcasting structures, somewhat similar agonies affected almost all of the other states in the former so-

<sup>70</sup> The intensity of the struggle over the press between the president and the Parliament became extraordinary in the crisis of the spring of 1993.

<sup>71</sup> This commission was never established in the draft law.

<sup>72</sup> For an extremely detailed account of the *Izvestia* controversy, see Jamey Gambrell, *Moscow: The Front Page*, N.Y. REV. BOOKS, Oct. 8, 1992, at 56.

cialist bloc. In each, the problem of defining the new state and fashioning identities coexisted with the tasks of transformation, economic change, and reordering of the media. Sharp differences, of course, existed. In Ukraine, for example, where arbitrary borders, a sizeable ethnic minority, and an unsure set of past imaginings existed, the creation of a new identity was a formidable undertaking. The task of accommodating transition was perhaps less difficult in a locus like Hungary, whose history of a separate existence was richer and more stable than elsewhere. Even in Hungary, though, a history and narrative had to be found that would satisfactorily come to terms with the Communist period, with the Nazi period, with the claims of the Church, with attitudes toward Jews, and with the relationship between Hungary and the Hungarian communities in Romania, Slovakia, and elsewhere. Control of this process—power over the narrative—became a central element in the restructuring of the media.

Rhythms of adjustment and similarities in approaches to transition became relatively obvious. Almost everywhere, there was a struggle over the direction of the state television and radio stations. Almost everywhere, newly energized political parties sought a process of change that would, they thought, favor their outlooks. Competition for control was also institutional, with the question of the appropriate balance between parliamentary control, independence, and executive direction always an issue. Almost everywhere, men and women of the past were trying to shake or modify the persona of state television as an instrument of power, seeming to become critics of government—watchdogs enforcing some mythical right to know. Almost everywhere, there were politicians who, having come to power democratically, now claimed that the historic capacity to use broadcasting as an instrument of the state belonged legitimately to them.

As mentioned earlier, in most of these societies the struggle for power focused on the capacity to name the senior officials of radio and television. Competition over loyalties was a hallmark of the debate surrounding the Hungarian media law. The debate in Hungary took place against the backdrop of a Parliament in which the majority, but not a super-majority, represented the Magyar Democratic Forum ("MDF"), a coalition of somewhat rightist factions, more or less nationalistic organizations, and religious groups. The second party, the Free Democrats, represented more of a liberal, cosmopolitan, European tradition. Under an agreement dating from the formation of the government, a super-majority, requiring approval outside the ruling co-

aliation, was required for passage of the legislation. Given this sharp struggle for power, governance of the media was of utmost importance because it had the potential to define not only a vision of the future (and the past), but also an ideology that might influence forthcoming elections. The drama of competition for loyalties was underscored in the debate over governance of state radio and television. Each of the two major sides in the Parliament drafted an alternative form of governance. The Free Democrats proposed that the presidents of radio and television be elected and discharged by Parliament (after a hearing by its Cultural and Press Committee), with a two-thirds vote required. The MDF proposed that the heads of radio and television be appointed by the president upon the initiative of the prime minister, thereby more firmly lodging power in the government. Prior to passage of the legislation, a dispute concerning the power to discharge senior broadcasting officials almost caused a constitutional crisis in Hungary. The prime minister instructed the president of Hungary, Arpad Goncz, to dismiss the heads of radio and television, partly in response to a concern among the government officials that state broadcasters were biased against them. The president refused to be bound by the prime minister's request, and the issue was pursued in Hungary's Constitutional Court, which decided in favor of the president.<sup>73</sup> The situation was eased by the president's announcement that he would follow the procedure set forth under the new legislation, including a commitment to recognize the prime minister's power to hire and fire, and ultimately by the decision of the heads of television and radio to resign.

What was significant in both the drafting process and the arguing of the constitutional case was the shift between the language of law and the language of politics. At the grand level, this was a debate about institutions: how ceremonial was the role of the president of Hungary to be?; what was the nature of the power in a parliamentary government when the prime minister has majority support? Also at the grand level, it was a debate in which "freedom of the press" was invoked. Those who sought to maintain the heads of television and radio in power represented their position not as a struggle between two parties, or even between the president and the prime minister, but as a question of the government's power to intervene in the management of the media. In that respect, the debate represented a test of the pace

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<sup>73</sup> MK. 48/1991 (X.26) [Magyar Közlöny].



of transformation, of the rate of adoption of Western (perhaps American) ideas. Immunity from intervention, the kind of immunity that would not lead even to subtle government pressure, would be a better token of a shift towards the West. On the other hand, the debate could also be read as almost purely political—an important battleground among the skirmishes leading to the next Hungarian elections, sometimes represented as keeping state television and radio neutral, sometimes as a contest over the nature and form that control and bias would take. How one mediates between the discourse of the law and the discourse of politics remains unclear. From the outside—from what is thought to be an Archimedal point of observation, but is, perhaps inevitably, an American perspective—maximizing immunity from governmental intervention is devoutly to be desired. Yet the difficulties involved in enshrining and enforcing the principle suggest that its invocation masks the competition for loyalties within the transition societies.

Poland provides another example. After Solidarity came to power in September 1989, Prime Minister Tadeusz Mazowiecki, in his maiden speech to Parliament, announced that the government would maintain control over state television and radio, in part to promote beneficial change during a period of severe economic constraints and austerity measures.<sup>74</sup> In Poland, as in Hungary, there had been a struggle between government and the president for control of television, though for quite different reasons, given that in Poland the position of the president was far more powerful and the prime ministers were dependent on the president for patronage. Accordingly, the prime ministers followed the president's wishes regarding appointments to the top positions in Polish state broadcasting. In Poland, as Karol Jakubowicz has put it, "there is little real belief in the ideal of autonomous, impartial and politically neutral public service broadcasting."<sup>75</sup> Indeed, "it is quietly assumed that every government will seek to bring pressure to bear"<sup>76</sup> on the state media in any way it can.

In political terms, . . . PRTV is poised between the govern-

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<sup>74</sup> Prior to September 1989, Solidarity had obtained the right of opposition parties to broadcast weekly programs on radio and television; the Roman Catholic Church also had rights to air time and, more importantly, to establish its own radio and television stations. In this early period, Solidarity also had its own department within Polish Radio and Television, which was dissolved upon Solidarity's ascendancy to power.

<sup>75</sup> Karol Jakubowicz, *The Restructuring of Television in East-Central Europe* (paper given at the CCIS, University of Westminster) (May, 1992).

<sup>76</sup> *Id.*

ment and the president. There is direct political intervention in the running of television, especially as regards news and current affairs. This takes the form both of securing the appointment of ranking executives (like the head of the news department) known to support either the president or the prime minister, and of residual day-to-day "manual steering," with government officials influencing coverage of particular stories or making their displeasure known if news or current affairs departments dealt with issues in a way they do not accept.<sup>77</sup>

The mechanisms for structuring the broadcasting councils—bodies that supervise the public service or state broadcasting companies and sometimes allocate frequencies for private broadcasters—also reflect the struggle for power. Often, the German system of a *Rundfunkrat*, which provides for broad representation by officials, parliamentarians, and citizens, was taken as a model, though revised substantially to reflect local political exigencies. The working draft of a Polish broadcasting bill, later enacted, envisaged a National Broadcasting Council that would be, in theory, relatively autonomous, outside the government, subordinate neither to the Council of Ministers nor to the Parliament, and, hopefully, immune from political pressures. The president would nominate the head of the Council, who might or might not have considerable powers as chief. The Council would consist of nine members: three nominated by the Sejm, three by the Senate (the two chambers of the Parliament), and three nominated by the president. In Romania, the National Audio-Visual Council consisted of two members nominated by the president, three by the government, and six by the Parliament. In Russia, a new Federal Broadcasting Commission would have three members nominated by the president, three by the Constitutional Court, and six by the chambers of Parliament.<sup>78</sup>

A more elaborate articulation of the representational issues was present in the Hungarian draft legislation. The legislation would establish a Supervisory Committee of Hungarian Radio and Television that would function only at a policy level and not intervene in the quotidian activities of the state companies. About half of the committee would be composed of appointees from government and Parliament, but parliamentary members would represent not the body as a whole, but rather the political parties represented in the Parliament. In addition to sitting

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<sup>77</sup> *Id.*

<sup>78</sup> See Wolfgang Kleinwachter, *Out with the Cold, in with the New?*, 20 INTERMEDIA No. 3, at 12-13 (1992).

members, each political faction would appoint a public member. From a prescribed list, selected organizations would delegate a member. These organizations included national and ethnic minorities in Hungary, nationalities outside Hungary, religious organizations, and organizations of journalists, environmentalists, and employees. A substitute version would have provided rotating membership for organizations within the following classes: (a) the historic churches of Hungary; (b) the nationalities of Hungary; (c) trade unions; (d) youth organizations; (e) pensioners' organizations; (f) environmentalists and conservationists; and (g) women's organizations.<sup>79</sup>

The debate in Hungary over a new media act showed other problems in fusing the old vocabulary with the novel technological and political context. A statute was drafted that embraced aspects of the European Community Broadcasting Directive of October 3, 1989 ("Television Without Frontiers Directive"),<sup>80</sup> but also maintained emblems of national identity (e.g., high quotas for Hungarian-made programs—primarily on the public systems, but also on the private systems). It included exhortations that public broadcasters pay special attention to the values of national and ethnic minorities in Hungary, as well as the values of Hungarian and general culture. The draft statute obligated them to provide "extensive, comprehensive, objective and unbiased information about Hungarian . . . events . . . which are of interest to the general public." Further, the draft statute required substantial ownership by Hungarians, or Hungarian-based entities, of the private television distribution systems.<sup>81</sup>

Another draft, for the law on public media in Slovenia,<sup>82</sup> is equally fascinating in terms of providing insight into the structures of transformation. Like the Russian statute, the Slovenian draft encompasses print and broadcast media. The definition of mass media includes "daily and periodical publications (newspa-

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<sup>79</sup> Draft Media Act, Ministry of Justice, 20.053/1991 IM.VII (Second Draft), including alternate A and B versions.

<sup>80</sup> Council Directive 89/552, 1989 O.J. (L298) 23 [hereinafter *Television Without Frontiers Directive*]. For further information on the Directive and the Convention of the Council of Europe, see *TRANSFRONTIER TELEVISION IN EUROPE: THE HUMAN RIGHTS DIMENSION* (Cassese & Clapham eds., 1990).

<sup>81</sup> The regionalist tendencies in the draft are clearly toward Europe. Hungary, on the fast track for full membership in the European Community, has seen bringing its broadcasting structure into conformity with the requirements of the Community as a relatively easy step. Consequently, the drafts included a European quota for programs as well as a Hungarian one, and many of the prohibitions (on advertising and sponsorship) are similar to those in the *Television Without Frontiers Directive*, though with some exceptions.

<sup>82</sup> Slovenia Draft Law on Public Media, Dec. 19, 1991.

pers and magazines) radio and television channels . . . as well as other forms of daily or periodically issued information through print, voice or picture and in a way which is accessible to the public."<sup>83</sup> Also extremely important is Article 2, which rather singularly among the draft statutes explicitly recognizes a national identity role. The draft provides that the Republic of Slovenia is responsible for the development of public media "important for the fulfillment of the rights of Slovenian citizens to be informed and for the preservation of Slovenian national identity."<sup>84</sup> The draft also creates an obligation for the government to provide information to the Italian and Hungarian nationalities in Slovenia and the Slovenian nationalities in Italy, Austria, and Hungary. The relationship between the government and the national minorities recurs throughout the legislation. For example, if a newspaper or television station is founded to provide information for the Italian or Hungarian nationalities, the relevant community must be consulted regarding not only content, but also the appointment and dismissal of the editor, unless the newspaper or television station is founded by the national community itself.<sup>85</sup> Further, as a kind of substantive fairness, Slovene-language national radio and television programs must contain information about the life and work of the Italian and Hungarian nationalities.<sup>86</sup>

Remnants of the search for identity are also reflected in the legislation's nostalgia for institutional originators of mass publications—institutions that provide a program, a purpose, and a link with a collective self. Like the Russian statute, the draft Slovenian media act preserves the idea of a "founder" (an institution or individual that "defines the contextual basis" of the publication) and ensures that the financial and material conditions exist for implementing the founder's vision.<sup>87</sup> The founder is empowered to appoint or dismiss the editor, though the draft statute provides some notion of a check by the journalists.<sup>88</sup> The founder is obliged to appoint a public council that would evaluate its editorial product, determine whether journalistic codes of ethics have been upheld, and discuss the proposals and comments of journalists, listeners, viewers, or readers, as the case

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<sup>83</sup> *Id.* art. 1.

<sup>84</sup> *Id.* art. 2.

<sup>85</sup> *Id.* art. 8.

<sup>86</sup> *Id.* art. 16.

<sup>87</sup> *Id.* art. 8.

<sup>88</sup> A "consensus" or some other vote of the journalists might be necessary for either the appointment or the dismissal. *Id.*

may be. The members of these councils would be drawn from viewers or listeners, prominent experts, and organizations related to the media. Public officials or members of the founder's family would not be permitted to be members of the council.

The Slovenian draft also shows vestigial efforts to prescribe a public sphere by constructing a framework for discourse that is neither a monopoly of the state nor the precinct of the owners of publications or radio and television stations. The mandating of councils advisory to the founder is an indicator of the search for a public sphere. One function of these councils would be to determine "the influence the public has on the realization of the content and editorial policies of a public medium."<sup>89</sup> Also indicative of these efforts is the detail in which the draft statute describes a citizen's right to access for the purpose of replying to damaging published information. To ensure that the right is effective, the draft statute requires that the editor responsible for the whole of a publication (or for parts, where there is more than one) be clearly identified. Intriguingly, both the Russian Media Law and the Slovenian draft place great emphasis, and provide enormous detail, on a right to reply. Emerging from a context in which accusations could go unanswered, the revisionists seize on the right of reply as providing the model of a better society.

The Slovenian draft statute, like the Russian Media Law, establishes journalists as a specialized professional class with rights and accompanying responsibilities. The Slovenian model creates, at least as one alternative, a collegial entity called the Chamber of Journalists.<sup>90</sup> The Chamber, a separate and presumably independent entity, would examine and license journalists "who fulfill the conditions defined by the Chamber . . . and successfully pass its professional examination."<sup>91</sup> The Slovenian draft, while asserting responsibilities of journalists,<sup>92</sup> is not as comprehensive and, as a result, is not as potentially intimidating as the Russian Media Law. Defining journalists as an entity seems to be the professionalization of the public sphere: taking what is a desire for a Republic of Letters and locating it in a specialized social entity charged with important general obligations (such as pro-

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<sup>89</sup> *Id.* art. 9.

<sup>90</sup> *Id.* art. 12.

<sup>91</sup> *Id.* art. 13. The Chamber also determines when a journalist's license may be revoked. The draft included the possibility of omitting the licensing scheme and not establishing such a Chamber.

<sup>92</sup> *Id.* art. 15.

viding for the free flow of information and the openness of public media to a variety of opinions).

#### IV. CONCLUSION: SEARCHING FOR STANDARDS

Given the bewildering complexities inherent in evaluation, one might ask whether absolute norms can be expressed, or whether Western observers are doomed to come to the task of advice and evaluation with their objectives wholly suppressed or only half-articulated. An effort to make more transparent the standards used by those who are engaged in the process of change could be useful. Some obvious formal norms are Article 19 of the Universal Declaration of Human Rights, Article 10 of the European Convention on Human Rights, Articles 19 and 20 of the International Covenant on Civil and Political Rights<sup>93</sup> and the First Amendment to the United States Constitution. These norms, part of the consensus for the new discourse, are superficially advocated, transferred, and transported—even enforced—as a condition of providing financial assistance. But what motivations provide the underpinnings of this consensus? Why do the messengers from the West seem so committed to particular free-speech practices, which are familiar to them but are sometimes difficult to translate in exact terms across formerly impenetrable borders? We need to unpack the surface ideas of these concepts and determine what bases exist for giving individual and governmental support to advocacy of the vital speech aspects of liberal transformations. Given the basic context of this discussion—namely, that of Western observers studying transformations said to be *from* authoritarianism *to* greater political involvement—measuring the formal adoption of Western words in media statutes and in constitutional forms ought not be considered sufficient. In thinking about transformations in these transitional societies, it is useful to ask whether the same objectives exist for Western intervenors that consciously or unconsciously underlie their appraisal of speech regulation in their own countries. Are these champions of arguments grounded in domestic political theory, in self-realization, and in the protection of dissent at home restricted to similar arguments in considering reform

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<sup>93</sup> The former USSR, the former Czechoslovakia, the former Yugoslavia, Poland, Hungary, Bulgaria and Romania were parties to the International Covenant. As to whether the Russian Federation succeeded to the Soviet Union's human rights treaties, see van den Berg, *Human Rights in the Legislation and the Draft Constitution of the Russian Federation*, 18 REV. CENT. & E. EUR. L. 197, 199-203 (1992) (formerly REV. SOCIALIST L.).

abroad?<sup>94</sup> Is it enough to say that the desired restructuring of the broadcasting system contributes in fact to a more pluralistic, democratic society? If the motivation of the Western advisors is not merely to replicate their home ambitions, how can their goals be articulated? Several sources of motivation can be contemplated, if not for those who advise, then for those who recruit and dispatch the advisors.

What might be called the "missionary basis" is altruistic. Its source is a profound moral and political belief in human dignity, and a concurrent duty, philosophical and almost religious in origin, to ensure that others see the light. It is the understandable desire to make a common bond with people similarly situated who can be assisted in reaching shared goals. Academics devote their time to writing and advising about the transformation of broadcasting structures because they fundamentally believe in freedom and want to extend its reach. Like many of their fellows in and out of government, academics may be caught up with the hope for an ideal that is unrealized in their own countries. Free speech is fundamental to a democratic society; in some respects it is the centerpiece of a secular religion with a strong and productive priesthood. There are variants on this missionary theme. Some find it more congenial to preach their doctrine abroad than at home. There is a romantic illusion that in a transforming society, hurdles that seem insurmountable in the structured home environment might be overcome elsewhere. To the extent that free speech is the celebration of dissent against authority, the advocacy of broadcasting reform abroad can be the consequence of frustration with battling against an entrenched establishment at home. This time, they hope, a society will get it right.

Even if change, in text and practice, appears to contribute little to these goals in the short run, an iron variant can be articulated: broadcasting reform is designed to create a safety net for democratic political change. By placing talent trained outside the government's immediate control together with a kind of technology of independence, the sustainability of democratic dissent is perpetuated. The immediate historical setting for this argument is the famed August 1991 coup in Moscow. The inability of its perpetrators to gain immediate control of radio and other means of communication was said to be an important element in its downfall. Permeable information frontiers, including a network of domestic independent transmitters (in both senses of the

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<sup>94</sup> See SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 3 (1990).

term), provide a resource for continued discourse and criticism. In times of emergency, they provide an alternate source for representations of truth and calls to action.

Of course, even this standard is full of complexity—since pluralism and democracy can be at odds—and much of the debate (or lack of debate) in the region is about the pace of change itself. “Progress” against this standard seems to involve three sub-tests: (1) is there a greater flow of information to the citizenry than before?; (2) is there a larger zone for public discourse than before?; and (3) is there a capacity for a broad diversity of views, including the unfettered opportunity to criticize the government? The relationship between this cluster of standards and the new and proposed broadcasting structures is a difficult one. That the absence of censorship increases the availability of information and affords a greater diversity of views is axiomatic.<sup>95</sup> But in what distribution? Though other segments of the population now have quicker access to greater quantities of the world’s information store, are there large segments that are more deprived of information now than before? Assumptions about how much news (biased and unbiased) was available under the *ancien regimes* of the newly emerging states may be far wide of the mark. In the absence of competition, news programs may have been watched more consistently by a greater range of the population. New economic differentiation may mean greater access to information by the rich or middle class, and less access by the working class. This will be particularly true if state broadcasting diminishes or if its subsidies and quality decline. The modern trend in the West is to move away from requirements that a substantial percentage of time be devoted to news and documentary programming. Arguably, in the transformed, advertising-supported structure of the media, the zone of public discourse—of argumentation and establishment of opinion outside the umbrella of government—is far more likely to exist in newspapers than in television (with radio falling somewhere in between). With regard to minorities, television may become a place for the mere parading of diversity—a pluralism structured by the state, as opposed to a forum for a sharp diversity of views or sources of information. Those rendering advice are thus often involved in an odd cultural bind: either recommending a free-market approach in which increased entertainment crowds out news and cultural programming, or

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<sup>95</sup> More than anecdotal accounts of persistent censorship exist, but the pace of movement is beyond the scope of this article.



recommending output-based structures (more news, more education) that are superficially inconsistent with trends in their own countries. Most proposed broadcast structures seem to have more substantial public service requirements than is currently fashionable in the market-based structures of the West.<sup>96</sup>

A frequently articulated national defense argument is related, but problematic: i.e., free speech yields a democratic state, and democratic neighbors are less likely to engage in war; reason prevails where discourse is open and unencumbered. Nevertheless, free speech can also subvert governments and destroy, as well as promote, democratic forms. For American foreign policy, piping truth behind the Iron Curtain was sometimes considered therapeutically destabilizing. Among the shaky neophyte republics (now friends), the destabilizing aspects of truth may not continue to be of such high priority. From a defense perspective, then, free speech becomes double-edged. The time may come when Western passions no longer demand the adoption of speech codes that tolerate the widest range of criticism and diversity. Destabilizing speech can come from neo-Nazis, fundamental religionists, ethnic separatists, or advocates of the old totalitarian way of life.

Altruism, commitment to democracy, and the creation of stable democratic societies—these are the major tropes of reform. But other motivations can be briefly canvassed. One is that an enhanced world market relies on the expansion of efficient national markets, and that both require broadly available uncensored information. The capacity to distribute information to potential consumers, whether retail or manufacturing, is vital to nurturing demand. Moreover, unencumbered access to information concerning societal activities—whether it is the plans of government, the political tendencies of the citizenry, or aspects of behavioral change—is profoundly important for those who take risks (e.g., entrepreneurs and producers). Late twentieth-century ideas of free speech include substantial opportunities for advertising and commercial messages, as well as for corporate influence over the structure of taste and consumption. Accordingly, the West is a net exporter of the products that accompany free

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<sup>96</sup> There is also the question of differing determinations of what constitutes "news." In some instances, such as the Hungarian draft, there is a requirement that the news be objective. What constitutes "news" is a politically charged subject and is substantially affected, in most of these loci of transformation, by government policies. "News," as the consequence of a command structure, will differ, it is assumed, from "news" that is the product of a market; but how—other than in terms of the potential for criticism of the government—is rarely clear.

speech—its paraphernalia and programming. Enhanced networks of communication become the infrastructure for substantial developments in trade.<sup>97</sup> In these terms, a standard to be applied in evaluating reform is whether the broadcasting transformation contributes to the strengthening of a market economy, both by enhancing the market for information and ideas, and by enhancing the market for other goods and services. Privatization of the broadcast media is often put forward as a measure for acceptable movement, but this point must be analyzed further. In most of the countries, the pace of privatization of television—in the sense of taking state services and turning them over to private entities—has been quite slow, although the process is speedier for newspapers and radio. There are few, if any, examples of fully privatizing a major television service (i.e., sale to a private entity unconnected with the government).

Another standard not often articulated by Western observers—and possibly in conflict with those more frequently stated—is whether a transformation contributes to establishing a more secure and enduring national identity. Some draft statutes (e.g., Slovenia's and Bulgaria's)<sup>98</sup> reinforce the new national identity and duty of the broadcasting enterprise. There is no objective national identity, however, and it thus falls to the government or to the broadcaster (as a surrogate) to define which national identity should be projected. Certainly, unstable regimes rely on the state-controlled media to help strengthen their power. These are often states in the process of being “invented,” to use Hobbsbawm's term,<sup>99</sup> or “imagined,” to use Benedict Anderson's term.<sup>100</sup> The role of the broadcasting system in this process is an important priority. In Kiev, a special effort has been made to find and promulgate a Ukrainian national identity.<sup>101</sup> Perhaps it is no accident that the Crimean Parliament, largely Russian, declared that the substitution of its channel for the Russian Channel from Moscow was one ground for its short-lived declaration of inde-

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<sup>97</sup> There is a more cynical view of the link between the messengers of democratic reform and developments in trade. The patina of democracy, including the freedom associated with broadcasting reform, compensates for injurious developments in the economic sphere. In some transforming societies, according to this view, chaos, flights of capital, disappearance of natural resources, and declining quality in the fundamentals of the standard of living are articulated as transitional, with the new freedoms serving as partial, and perhaps sufficient, compensation.

<sup>98</sup> See Breda Luther, *Slovenia Struggles with the Reithian Ethos*, 20 INTERMEDIA No. 4-5, at 33 (1992); Jordanova, *supra* note 11, at 16.

<sup>99</sup> THE INVENTION OF TRADITION, *supra* note 10.

<sup>100</sup> ANDERSON, *supra* note 10.

<sup>101</sup> See Richter, *supra* note 16, at 60-61.

pendence.<sup>102</sup> But certainly, a fundamental problem in the translation of concepts concerns the way in which the state defines the role of the broadcasting system. National quota provisions and statutory obligations to reflect the cultures of specific national minorities are frequent characteristics of the new identity-oriented legislation that is typical of our time. More important than these formal provisions, however, is the internalized idea of the broadcasting system. Perhaps by definition, the *ancien regime* treated the mass media as an instrument of the state, dedicated to its own perception of what was needed to strengthen the public cause. Even now, it is hard for this concept to disappear, and for those who try to cross the borders of understanding, comprehending this concept may be important.

We have come to think of broadcasting as part of "the press" or part of "speech" and, therefore, specially privileged. But in terms of generating images of national identity, broadcasting institutions have to be seen among other media that perform similar functions. Educational systems are the prime example. Many of the debates about the purpose and content of public education (or the public financing of private education) turn on the state's role in reproducing itself, in delineating itself, and in projecting itself in certain ways. In some countries—England among them—the connections between the role of the state in education and its role in broadcasting have been quite evident. Perhaps what is occurring in Central and Eastern Europe and the former Soviet Union is the formation of a complex market for individual and group loyalties—a market that can be defined in the same manner as the market for capital, labor, automobiles, or sugar. If there is such a market, the government certainly plays a role both as a creator and as a participant. One can look at proposed structures in these countries (or at international conventions and existing structures) as methods of articulating the particular rules that apply to this competitive marketplace. These rules, by measuring out the rights of individuals to receive and impart information, delimit the state's power to coerce an unfair advantage in the competition for loyalties. Most Western structures similarly impose constitutional norms that deny government the power to monopolize the market for national identities. What they do not do, however, is preclude the state from acting as one of the competitors. For example, the First Amendment to the Constitution

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<sup>102</sup> The complexity of the new literature on national identity is extraordinary, and this is not the place to parse it. See addendum for a bibliographic listing of such literature.

of the United States, which precludes Congress from abridging the freedom of speech and the press, forbids the government from using the force of law to block competition in the market for loyalty and national identity. The First Amendment does not disable the government from participating as a seller in the market for loyalties, except in one particular way—by establishing a church. The European Convention on Human Rights also provides for an open market for loyalties in Article 10, but it provides very specific and relevant exceptions. Governments may restrict their competitors when regulation “is necessary in a democratic society in the interests of national security, territorial integrity or public safety.”<sup>103</sup>

As the struggling governments of Central and Eastern Europe enter this market for loyalties, one can look at their statutory drafts from this analytical framework. What competition for loyalties is permitted? Does the state have a monopoly both in broadcasting and the press? Does a competitive and vital newspaper market make a concentrated and government-oriented broadcasting structure more tolerable? Does the march toward privatization and commercialization mean that broadcasting will be less of a forum for public discourse and competition than might otherwise be the case? Additionally, as these countries are dedicating themselves to transforming broadcasting structures, important global transformations come into play that may render a viable and effective national system impossible. The increasing permeability of borders to signals and information from abroad means that purposive efforts to control discourse may be increasingly ineffective. Besides, given the depth and persistence of basic ideas of identity held by national subgroups (as we see bursting forth everywhere: the Slovaks out of Czechoslovakia, the Russians in the Ukraine, the Germans in Kazakhstan, the dismemberment of Yugoslavia), it is not clear that the talent, skill, and insight involved in using broadcasting to build counter-identities—identities of cohesiveness—can be effective. Perhaps broadcasting can reinforce and inflame, but not shift, deep-

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<sup>103</sup> The state may also restrict (or impose conditions or penalties) for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The British government, in a case that was arguably about national identity, cited the confidentiality protection provision in seeking an injunction against a former member of the British Security Services. *See Sunday Times v. United Kingdom* (no. 2), 50 Eur. Ct. H. R. 241/312 (1991). For a discussion of the case see *Violation of Article 10 ECHR on Account of Interlocutory Injunctions Imposed on the Publication of Details in the Book "Spycatcher" Alleging Unlawful Conduct by the British Security Service*, 13 HUM. RTS. L.J. No. 1-2, at 30.

seated popular identities. Finally, the entry of advertising creates new, and potentially more effective, competitors for loyalty. These are forces that shift individual identities from those of citizens to a new status as consumers, who believe not in their flag, but in their commercial hopes and fantasies. The Western observer comes on the scene of Eastern transformations at a time when, for him, the positive function of the state in preserving and communicating the idea of the center has diminished. Both the BBC in Great Britain and the Public Broadcasting Service in the United States have been under fire recently because of doubts about whether government should generate (or subsidize the generation of) images of national identity. If allowed, what images they should be permitted to so generate?<sup>104</sup>

Every state<sup>105</sup> holds a conversation with its subjects as to the legitimacy of its existence. In this conversation, the state is engaged in self-justification, in making the case for the continuation and improvement of the state, and in seeking the loyalty of its citizens. Governments generate images that reinforce the relationship between its subjects and itself for many reasons. Indeed, national identity, so theatrical and compelling a concept, may be nothing more than that collection of images that the government (or a series of interest groups) manufactures or encourages to keep itself in power. The state may claim to intervene in defense of its culture, and that may be a valid and relevant ground for the intervention. But those in power may use the machinery of the state to encourage a world outlook—grounded components of a “national identity”—which, to reinforce their dominance, is consonant with their political status. Some states may have so weak a franchise (absent force and fiction), that the creation and propagation of a narrative of legitimacy is all-consuming, pervasive, and devastatingly revealing of the regime. Even in democratic societies, however, the necessity for generat-

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<sup>104</sup> See, e.g., *CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS* (R. Bolton ed., 1992) (focusing on the National Endowment for the Arts). One might wonder whether there is or should be a jurisprudence of transformations; whether there is a way of looking at the process of restructuring of legal systems at the time of paradigm shifts—from capitalism to socialism, from feudalism to the modern state, from an authoritarian society to a democratic one. Looking across examples of these vast changes, are there similarities from which we can predict the process of change? What might be interesting would be to ask this question: if there were such a jurisprudence of transformation, what would it tell us about the complexities of restructuring broadcasting systems? Or, put differently, given the experience that is accumulating in the process of restructuring, what can we infer from it that will help articulate or foreshadow such a jurisprudence of transformation?

<sup>105</sup> Perhaps it is more accurate to say the ruling elite in every state.

ing and maintaining a narrative of community is an important occupation. What is significant is that these ideas and images are part of every state's definition.

*Addendum*

*See e.g.*, BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991); ARJUN APPADURAI, *IMPLoding WORLDS: IMAGINATIONS AND DISJUNCTURE IN THE GLOBAL CULTURAL ECONOMY*; JAY G. BLUMLER, *TELEVISION AND THE PUBLIC INTEREST* (1992); JAY G. BLUMLER ET AL., *COMPARATIVELY SPEAKING: COMMUNICATION AND CULTURE ACROSS SPACE AND TIME* (1992); RICHARD COLLINS, *CULTURE, COMMUNICATION AND NATIONAL IDENTITY: THE CASE STUDY OF CANADIAN TELEVISION* (1990); RICHARD COLLINS, *TELEVISION, POLICY AND CULTURE* (1990); DANIEL DAYAN AND ELIHU KATAZ, *MEDIA EVENTS: THE LIVE BROADCASTING OF HISTORY* (1992); LAWRENCE GROSSBERG ET AL., *CULTURAL STUDIES* (1992); ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1987* (1990); *THE INVENTION OF TRADITION* (Eric J. Hobsbawm & Terence Ranger eds., 1983); CONRAD P. KOTTAK, *PRIME TIME SOCIETY: AN ANTHROPOLOGICAL ANALYSIS OF TELEVISION AND CULTURE* (1990); JAMES LULL, *CHINA TURNED ON: TELEVISION, REFORM AND RESISTANCE* (1991); BRIAN MCNAIR, *GLASNOST, PERESTROIKA AND THE SOVIET MEDIA* (1991); DAVID MORLEY, *TELEVISION, AUDIENCES AND CULTURAL STUDIES* (1992); RALPH NEGRINE AND STYLAINOS PAPATHANASSOPOULOUS, *THE INTERNATIONALISATION OF TELEVISION* (1990); ELI NOAM, *TELEVISION IN EUROPE* (1992); J. PINES, *BLACK AND WHITE IN COLOUR: BLACK PEOPLE IN BRITISH TELEVISION SINCE 1936* (1992); VICTOR PORTER AND SUSAN HASSELBACH, *PLURALISM, POLITICS AND THE MARKETPLACE: THE REGULATION OF GERMAN BROADCASTING* (1991); MARC RABOY AND BERNARD DAGENAIS, *MEDIA, CRISIS AND DEMOCRACY; MASS COMMUNICATION AND THE DISRUPTION OF SOCIAL ORDER* (1992); PHILIP SCHLESINGER, *MEDIA, STATE AND NATION: POLITICAL VIOLENCE AND COLLECTIVE IDENTITIES* (1991); MICHAEL SKOVMAND AND KIM C. SCHRODER, *MEDIA CULTURES: REAPPRAISING TRANSNATIONAL MEDIA* (1992); ANTHONY D. SMITH, *NATIONAL IDENTITY* (1991).