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Present at the Creation: The Long Shadow of the Reform Campaign

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Monroe E. Price

I

I'll start with a direct answer to the main query: What are some lessons that can be detected from two decades or so of media assistance and its relationship to pro bono activities?

It takes a village. Cowboy public interest advice doesn't quite work. What's emerged is something more like a pro bono law community. This is thanks to some key players, among whom it's not wrong to single out Kurt Wimmer for his work at Covington & Burling and, of course, Dick Winfield, for his law firm contributions and then at the International Senior Lawyers Project. The point is that, over time, individuals build familiarity with the issues and also more comfort in going to distant places and providing advice in complex and novel environments. In recent years, the Center for International Media Assistance, under the direction of Marguerite H. Sullivan, has provided such a home.

It's surprising what is effective. A decade ago, the United States Agency for International Development (USAID) asked Peter Krug and me to write what became "The Enabling Environment for a Free and Independent Media." The idea of focusing on an "enabling environment" was the idea of a young Fellow at USAID, Ann Hudock. The project director had very clear ideas about the tone of the publication, its length, and the languages in which it would be produced. It became an important template in the field, useful to lawyers both on the giving and receiving end.

Understand the field. I was fortunate with my perch in a law school so that I could write as well as experience the pro bono environment. In 2001, the

World Bank asked for a mapping of the field—a way of describing, as it were, the media assistance industry in which pro bono media law activities fit. This resulted in a study titled *Mapping Media Assistance*, written with Bethany Davis Noll and Daniel DeLuce (http://repository.upenn.edu/cgi/viewcontent.cgi?article=1060&context=asc_papers). It was important to have some foundation material to describe who were donors, who were recipients, and how to conceptualize an environment in which pro bono and other activities might occur.

Move toward an oligopoly of media assistance providers. It's surprising how quickly the field of media assistance became an oligopoly, with the International Research & Exchanges Board (now known as IREX) and Internews Network as principal players and Open Society Institute and some other players involved as well. It was as if the major donors could function more easily with entities that had some scale. It was as if scale was desirable in furthering media assistance goals. And similarly, there was a duopoly, more or less, in the process of evaluating media freedom, with Freedom House and IREX as the main publishers of rankings (others such as Reporters Without Borders were important as well). The pro bono activities played off this concentration of media assistance enterprises, starting with Covington & Burling's early pro bono work with IREX.

Create a news and information backstop for pro bono law activities. During the early years of the Commission on Radio and Television Policy, with Andrei Richter, Peter Krug, and David Goldberg, we published the *Post-Soviet Media Law & Policy Newsletter*. This was designed to provide those working on pro bono questions a context for what was happening in courts and regulatory agencies in various parts of the Commonwealth of Independent States. The newsletter was continued until it evaporated with the direction of Peter Yu, some of its morsels being collected in the book *Russian Media Law and Policy in the Yeltsin Decade: Essays and Documents* edited by Monroe E. Price, Andrei Richter, and Peter K. Yu (The Hague, Netherlands: Kluwer Law International, 2002).

Luxuriate in opportunities for lawyers from various perspectives to meet and discuss law and policy questions together. I think this involvement started, for me, with the International Broadcast Institute and continued with the Commission on Radio and Television Policy. But another event was the first meeting of the MLRDC as it was then known (now the Media Law Resource Center) in London, and the bringing together of British and American lawyers who were happy to be united by a common language. This principle informs, as well, the spirit of the Annenberg-Oxford Media Policy Summer Institute and its progeny.

Be open to the possibility that the U.S. paradigm may be flickering. As wonderful, tried, and true as has been the U.S. media system, a pro bono effort must

recognize that the global system for the supply of information is shifting and that interesting and valuable insights are popping up everywhere. There's a danger of RMS—repetitive mantra syndrome—in which old messages are recycled without awareness of worldwide shifts (in technology, in industry, in patterns of consumption and politics). It's important to understand changes in geopolitical realities—not because of the power attached to particular points of view, but to understand how conflicts, religious shifts, economic development, and other factors affect media systems. Lawyers definitely understand the interplay of these factors with respect to their large-scale and mainframe clients. They have to see these connections in their pro bono work as well.

Be sensitive to the enabling environment. There's always the danger of overprescription—making recommendations about media law and policy that assume, to some degree, that courts work, that agencies work, that industry follows the rule of law, that licenses are distributed fairly, that journalists are not punished, that democratic elections follow an information-rich electoral campaign. The challenge is how to function and what to recommend when all these areas are in play (as they often are).

Identify successes. In looking out at the field of pro bono or related efforts over the past two decades, there are some outstanding successes. I would list the freedom of information movement as one of the best. I have been impressed with Freedom of Information Advocates Network (FOIAnet) and the community of lawyers and advocates who have globally pursued advancement of this tool of free expression. It would be interesting to dissect this effort; one might find a combination of a well-staffed public interest entity, many practitioners, and lone advocates around the world, the unifying and captivating spirit of a few leaders, and a cause that could have widespread support across ideological groups.

See "law" as broad-gauged and affecting many parts of society. There is an enthusiastic and significant part of the pro bono media law and practice that emphasizes litigation, and this is critical. Even now, having the newly shaped backup and support group the Media Law Defence Initiative is a significant and welcome addition. Pro bono work involves helping to establish media law courses that will turn out advocates of the future; it involves providing for a knowledgeable in-country set of clients (nongovernmental organization staff members and citizens); and it involves improving the regulatory environment as well. All this is back to the "enabling environment."

Read lots of C. Edwin Baker's work. I'm a big fan of the late Ed Baker. He was one of the best advocates and experts to send abroad. He combined a profound knowledge of the United States system with a deep humility, a willingness to listen, and a deep sense of empathy. His 2002 book *Media, Markets,*

and Democracy is an example. Many people expressed Susan Benesch's sentiments that "After reading Ed for years, it was astonishing to meet him. A guy that brilliant turned out to be so gentle and kind, so willing to debate with anyone." This was the view of law students in Jordan and China as well.

II

How can we unravel the threads that link all our pro bono activities? I will try to offer reflections on this subject, not as a definitive analysis but as a kind of proposal for further study. It would be excellent to have a neat bouquet of meaning on these questions, but that is an unlikely outcome. Yet the subject is an important one because the industry of democracy promotion goes forward—in the Middle East, in Africa, in Central Asia, even within the reaches of Central and Eastern Europe.

I start with a memory of the early 1990s. It could have been Prague or Budapest or Kiev, or other similarly situated cities outside the capitals of the former Soviet Union. In a darkish room, around a group of functional metal tables arranged in a square, sits a delegation from the Council of Europe or the United States, preparing to lecture on the merits of a proper transition in the media sphere. At the table sit one or two of the invariably young, charming, talented figures—proud to serve as bridges between the lately oppressed and the newly triumphant, the fresh holders of knowledge about the world into which their country is marching. Next to them are the ever-present representatives from the United States or Western Europe, toeing the line between arrogance and ignorance—individuals designated as carriers of progress, confident that their media systems hold the key to "democratizing" media in the region, yet unfamiliar with the politics of the location and—just as likely—the complex meanings of their legal practices at home.

This was the early world of media assistance: delegations primarily from the United States, but also France, the United Kingdom, and elsewhere, consisting of journalists, professors, regulators, managers, specialists, and entrepreneurs, sent to talk to their counterparts. One of the jobs of the young representatives in the field was to round up warm bodies to listen and react, with sufficient attention to provide the illusion that wisdom was being proffered and to some extent imbibed. At times, there was advice fatigue. The task, increasingly difficult, was to obtain the critical mass of local influentials and individuals who would turn the gruel of advice into the exactness of legislation or business plans or trainings that would justify the time and expense—flights, hotels, dinners—of the experts. Reports had to be written, donors satisfied

that the expenditure of government or private philanthropic dollars was obtaining results.

Many friendships were fostered during these visits, bonds that have blossomed and endured. Some people at those tables have become parliamentarians, some judges, some legislative drafters, and others academics who continue to ask many of the same questions that have persisted since the early 1990s. And of course, many small and medium differences were made in the media sectors; one can point to major newspapers that would not exist, laws that would not have been passed, journalists who have risen in their ranks who received training. But there remains a perpetually haunting question: Did these efforts make a difference? In the new Europe, is the face of the media, particularly the broadcast media (the focus of much of the attention), any different now from what it might have been absent the media assistance work? What role did the parade of "experts" and advisers to the region have at maintaining or encouraging some drive to change?

One characteristic of the transition period (and beyond) was a search for such metaphors for the instantiation of language and, through language, a weighing of competing models. Countries were investing in the credibility of whole ways of thinking, ways of imagining the future. It was at this moment that the language of change was being negotiated and potential directions were being charted. Metaphors allowed for the translation of complicated concepts into potentially practical realities, and models made debate of these concepts more efficient. Of the metaphors, there was, of course, the "marketplace of ideas," but also metaphors of "independence," of "highways of information," and of "television without frontiers." Models were constructed of elements that purported to have explicit functions, elements that were characterized in ways that often fit with ideologies. Models set forth were shorthand forms for persuasion. Bandied about were concepts like "the BBC model" of public service, the "U.S. model" of private broadcasting, or "mixed models" taking both elements of public service and rising capitalism.

III

I can't quite remember when I became an addict of the pro bono media law variety. Undoubtedly, it goes back to the Yale Law School and a class with Telford Taylor who was teaching a seminar on media regulation (of the decidedly domestic variety). We imbibed some notion of public interest law with our dose of statutes and regulations. The consequence was that we were marked for life. In my case, the commitment was sealed by a few post-law school as-

signments: one as an aide de camp to the President's Task Force on Telecommunications Policy (chaired by Eugene Rostow with a young Richard Posner as an intellectual supreme) and the Sloan Commission on Cable Communications in the early 1970s. By then I was ensconced at UCLA Law School and (to keep my memories of the East Coast warm) had established the Communications Law Program (directed in turn by Geoffrey Cowan, Tracy Westen, Charlie Firestone, and Daniel Brenner).

Somewhere along the way, I added the international bug to my involvement in public interest communications. I became an adherent to what was then called the IBI—the International Broadcast Institute—which brought together people from the academy, industry, and government and encouraged them to celebrate common interests in excellent places such as Cyprus, Italy, Poland, the United Kingdom, and other exotic climes. I was hooked.

Perhaps a turning point was when Edith Bjornson of the Markle Foundation placed me on something grandiosely called the Commission on Radio and Television Policy, which was designed to elicit discourse between Soviet (and later the Commonwealth of Independent States) broadcasters, regulators, academics, and public interest groups and their U.S. counterparts. Ellen Mickiewicz (and Andrei Richter) helped instill a culture of lasting conversation on these questions. During this time, at Oxford's Centre for Socio-Legal Studies, I developed the Programme in Comparative Media Law and Policy with Stefaan Verhulst and, at the Cardozo School of Law, the Howard M. Squadron Program in Law, Media and Society, each of which served as a platform for providing assistance to counterparts in transition societies. And then most recently, the great Annenberg School for Communication at the University of Pennsylvania allowed the creation of the Center for Global Communication Studies—another wonderful platform to think about media assistance and the role of law.

IV

Oddly, one way I can define my interest and effort in media law and policy is to describe (taken from a memoir I wrote in 2009, *Objects of Remembrance*) my experience as a public interest lawyer for Native Americans (and then practicing a bit in the field). In 1969, I went to work, part-time and largely as a volunteer, for California Rural Legal Assistance, one of the most adventurous programs funded under President Johnson's Office of Economic Opportunity (part of the War Against Poverty). There, I learned to see law as charismatic force, and lawyers as charismatic figures. CRLA was princi-

pally designed to serve Mexican-American farmworkers, but much to its surprise found a great demand for legal assistance by the fragments of surviving Indian tribes and groups both in Northern and Southern California. At CRLA's request, together with George Duke, a lawyer working for CRLA in Santa Rosa, I helped establish California Indian Legal Services, which would assume the duty of providing such assistance throughout the state; through the California entity I helped develop the core proposals for the Native American Rights Fund.

Throughout, I saw more than a glimmer of resemblance between the issues as defined by Native American tribes and the rhetoric dunned into me earlier in my life as described in my memoir. The tribes were coping with problems of identity, of assimilation versus separation. They were striving, often, to maintain physical communities, assure marriage within the group, pass on a culture and tradition to young people who heard the siren song of modernity and the city. Native Americans complained of the destruction they had suffered, the expulsion of many from their original lands, the robbing of their customs, and the downgrading of their beliefs.

A casebook I published in 1971 called *American Indians and the Law* has this subtext. Who controls education? How does a fragile society defend itself against the norms of the dominant culture? Can a private, consensual system of rule making and enforcement exist within a fairly hostile state environment? How important is it to have a physical place for a group to have its national identity? It was hardly foreign to ask what it meant to be Navajo if Navajos were in a permanent diaspora without any Indian country to consider their home.

Another element of this connection came out of opportunities I had to put these connections to use and provide actual legal advice. Terry Lenzner, who had been appointed head of the Office of Legal Services nationally, asked me to visit tribes and similar entities throughout the United States to help make more useful the legal services programs that would be established for their benefit. I ultimately traveled to Mississippi and the Choctaws throughout the Southwest and California, to Pine Ridge in South Dakota, to Alaska, and to Micronesia where the Trust Territory was seen to have common issues. I (and others) argued a philosophy that, unlike lawyers for the urban poor (whose task might be to move people above the poverty line), government-funded lawyers for Native Americans could consider themselves more like advocates for the wealthy, or at least a kind of landed poor. They could use their skills architecturally to reassert tribal control over their assets and alter their value. Tribes required lawyers who thought creatively about what constituted an asset or an advantage and helped redefine the group's confidence in itself and its functioning as a sovereign manager of its world. Lawyers needed to listen more

carefully to the articulation of these issues by the Native Americans themselves rather than accept the status quo.

In the late 1960s, I put some of these ideas together in an essay,[1] and that in turn helped inform California Indian Legal Services. I wasn't the only one who held this view, and it was certainly at the heart of the massive legal services program established on the Navajo Reservation and the basis of the strategy of the Pequot Indians in Maine who later negotiated a breakthrough settlement redefining their economic and political relationship to the state. For better or worse, in a kind of enormous legal joke, the approach, using jurisdiction as an asset, led to the extraordinary right of Indian tribes to engage in gaming, establishing casinos throughout the country. By 2000, Indians were among the major contributors to the Democratic Party nationally, and, with mixed consequences, some tribes were transformed.

This philosophy of wealth accumulation was extended, after 1973, when my main professional focus was on the Natives of Alaska, where, for about a decade, I represented Cook Inlet Region, Inc., a group of Indians, Aleuts, and Eskimos assembled into a for-profit corporation by the Alaska Native Claims Settlement Act of 1971. Cook Inlet Region, Inc., which started as a corporation in trouble, with few land and other resources, transformed into a successful seizer of opportunities that distributed $500 million to its couple of thousand shareholders in 2001. CIRI began its modern corporate life at a time when the promise of oil development in Alaska gave the Natives substantial leverage. In a settlement that I helped negotiate, CIRI was allowed to exchange its rights to unprofitable tundra and mountaintops that had been foisted upon them for property (real estate, especially) the federal government was declaring surplus throughout the United States and would put up for auction. Instead of having a valueless dowry of land unusable to their members, CIRI ended up with a huge inventory of apartment buildings, warehouses, and other structures from Florida to Hawaii. And availing itself of a regulatory advantage given to minorities so that they could own radio and television stations, CIRI became perhaps the largest minority owner of broadcasting properties in the nation. There were many reasons and many people that were responsible for CIRI's transformation. Senators, governors, the team of Alaskan Natives who ran the corporation, more radical forces that kept pressing for justice, lobbyists, and environmentalists were all part of it. But at the core, I felt the impact of an idea and, in a way, the playing out of my philosophy.

1. Monroe E. Price, "Lawyers on the Reservation: Some Implications for the Legal Profession," LAW AND SOCIAL ORDER 161 (1969).

There was, in this process of working with Native Americans, much that would be reflected in thinking about media law and policy in later decades. I had learned about the power of law to build communities of confidence, individual autonomy, and potentials of societies for better governance and economic development. The connection to media policy was easy.

V

I'd love to pin all advances in democracy and good governance to the very small army of pro bono lawyers in the media field. But institutions have a way of developing because of the context in which they find themselves. It's likely—and I think all pro bono lawyers would agree to some extent—that working in this field benefits us, sometimes more than it does the environment as a whole. We learn. We grow. Otherwise, we're of hardly any use whatsoever.

Who else changes?

Have parliamentarians, leaders, entrepreneurs, and future regulators emerged differently because of the media assistance process, and how, if at all, did that affect the public sphere? Or, during the 1990s, did factors other than the elegance of models of free expression have a more substantial effect—including pressures by foreign investors for legal frameworks that would make their entry into the media markets profitable, or the demands that accompanied the European Union accession process? It may be that key decisions taken in the early years in each transition state cast a long shadow and that some of these key decisions turned on local conditions of history, culture, and politics rather than on the impact of outside intervention or assistance. Some combination of the thirst for the commercial, preexisting political and media history stretching over centuries, notions of national identity—all these were factors that could have had great persistence over the epiphenomena of parachuting experts. We need to be more introspective in terms of what role our strengths of ideologies played and how they interacted with the overarching views of the societies we have visited.

And then there is the next decade or so. Will there be shifts now in styles of providing media assistance, and by extension, pro bono legal activities because of huge changes in where demand exists and how that demand manifests itself? If the answer is yes, one reason will be shifts in the technology of information delivery, in zones and patterns of conflict, in changes in the global ownership and management of media firms. For example, there will be increasingly a contest over how and whether to regulate the Internet, including the Web and social networks. In the 1970s, the broadcast networks lined up to

foster a global legal and regulatory network that would be sympathetic to the growth of commercial television. Later, as cable and satellite emerged, the propagating of multichannel video became an important desideratum. Now the issue is assuring a legal system globally that will allow the new distributors of information to flourish.

Increasingly, there will be competing visions for the Internet. National security issues and the threat of terrorism have become powerful tropes that increasingly trump free expression concerns. Privacy becomes an increasingly dominant question. The relationship between language (the persistence of particular languages) and culture will rise again as a legal issue. Attention has shifted, and will continue to shift, to conflict societies, to the wake of civil wars, to changing borders. In all of these areas, media law and policy (probably rebranded) will have a new face.

There's a vibrant interest throughout the world in the issues that have thrilled us for the past two decades. Even in light of a shadow over journalism, schools of journalism and communication are thriving. Societies are playing with trade-offs between historic approaches to media freedom and other modes of delivering better governance, more education, economic opportunities, and personal autonomy. In all of this, the institutions of the media and the challenges for media assistance organizations will change.