IMAGES OF A FREE PRESS. By Lee C. Bollinger.[1] Chicago: The University of Chicago Press. 1991. Pp. 222. $22.50.

Rodney A. Smolla[2]

Images of a Free Press is the natural sequel to Lee Bollinger's first book, *The Tolerant Society*,[3] and like his first book, is destined to become a standard in first amendment scholarship. *Images of a Free Press* is a critical examination of what Bollinger calls the "central image" of the American ideal of freedom of the press, an image crystallized in the Supreme Court's opinion in *New York Times Co. v. Sullivan*. The classical view of a free press embraced in *Sullivan* and recounted by Bollinger contemplates a press that operates at arm's length from the government, virtually free of all licensure or prior restraint, and except for a very narrow range of abuses—such as libel, invasion of privacy, or grave threats to national security—immune from liability for what it publishes. Even in these narrow circumstances, first amendment rules are tilted in favor of the press,

---

> My diary also recorded my attendance at a Sunday school whose principal was a tall, kindly, attractive man named John Lovejoy Elliott. The school was conducted by the Society for Ethical Culture which had been founded in New York City by Dr. Felix Adler with an emphasis on ethical conduct in all the relations of life. That was as near as we came to an organized religion in my family. Father was a freethinker and we children followed in that course until later in life when we came to our own conclusions in the realm of faith.

See generally, Ernest Gruening, *Many Battles: The Autobiography of Ernest Gruening* (Liveright, 1973). His father, Emil, was a distinguished ophthalmologist whose biography appears in the *Dictionary of American Biography*, Allan Johnson and Dumas Malone, eds., 4 *Dictionary of American Biography*, pt. 2, 32 (Charles Scribner's Sons, 1932). This biography mentions no religion for the Senator's father.

Third, the most interesting and instructive error is the statement on page 120 that Sandra Day O'Connor was on the list of potential women candidates "under consideration" for the vacancy ultimately filled in 1975 by Justice Stevens. Cited for this proposition is David M. O'Brien *Storm Center: The Supreme Court in American Politics* 86 (W.W. Norton, 2d ed. 1990). O'Brien says what our author says he said and cites materials in the Ford library. For my article in this publication entitled *The Case of Justice Stevens: How to Select, Nominate and Confirm a Justice of the United States Supreme Court*, 7 Const. Comm. 325 (1990), I reviewed the papers in the Ford Library and found that a relatively obscure employee in the White House wrote a memo passing on to her superior the name of Sandra O'Connor, whom she incorrectly identified. But the present Justice O'Connor was never "under consideration" for appointment in 1975. See id. at 331. When a Supreme Court vacancy occurs there are frequently both lists and *the* list. To have a person's name placed on a list at the White House does not mean that that person will be given consideration for appointment to the Court.

1. Dean and Professor of Law, University of Michigan.

2. Arthur B. Hanson Professor of Law, and Director, Institute of Bill of Rights Law, College of William and Mary, Marshall-Wythe School of Law.

3. Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford U. Press, 1986).

forcing the government to justify all incursions on press freedom with compelling arguments.

Bollinger's characterization of this classical image of the press, and his argument that it is epitomized by *New York Times Co. v. Sullivan*, are surely right. Anthony Lewis, for example, has recently given the *Sullivan* case a wonderful historical and philosophical treatment—a treatment that celebrates and endorses the classical image of the free press that Bollinger describes.[4] Indeed, in reading Bollinger's portrait of this classical image, I had the uneasy feeling of being reduced to a cultural and intellectual stereotype (something that happens often to me, by the way, as if I am living the life of a character in a Woody Allen movie), for I realized that I have always bought into this image—at least insofar as it captures succinctly my view of what the first amendment ought to mean.[5]

Bollinger's book is an argument that this traditional image of the press and the first amendment model of press freedom that emanates from it ought to be replaced by a more sophisticated imagery, one that incorporates a model of public discourse that places a greater premium on enhancing the quality of public discussion and decisionmaking. In Bollinger's view, public institutions—including the legal system—have a constructive role to play in improving the tenor of this public debate.

* * *

In 1947, the Hutchins Commission published its report, *A Free and Responsible Press*.[6] Lee Bollinger describes the report as "[e]legant, intelligent, and concise." Those same words are apt in describing the style of Bollinger's *Images of a Free Press*. The similarities, however, are more than stylistic. Bollinger's book is the intellectual heir to the Hutchins Commission report. Bollinger suggests that a new "Hutchins Commission" be convened in the

4. See Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Random House, 1991). Even so, Lewis is an excellent example of a journalist who is also often critical of the practices of his colleagues and the tenor of public discourse. It would be fair, in fact, to characterize Lewis' sensibilities about how the press should conduct itself as quite parallel to Bollinger's—and to my own. The difference between Lewis's (or my) position and Bollinger's comes down to the extent to which one is willing to see these intuitions about how the press should operate enacted into positive law dictating how the press must operate.

5. See Rodney A. Smolla, *Free Speech in an Open Society* 4-5 (Knopf, 1992) ("*Free Speech*") ("A society that wishes to take openness seriously as a value must therefore devise rules that are deliberately tilted in favor of openness in order to counteract the inherent proclivity of governments to engage in control, censorship, and secrecy.")

6. The "Commission on Freedom of the Press" took its nickname from Robert M. Hutchins, the famous chancellor of the University of Chicago, who served as its chair. It was formed in 1943 by grants from Time, Inc., and Encyclopedia Britannica, Inc., and was administered by the University of Chicago. Among its distinguished members were Reinhold Neibuhr and Zechariah Chafee, Jr.

1990s, to reexamine the current state of the press and press law in light of the rich body of experience, court decisions, and legal scholarship that has been generated since 1947.

Among the Hutchins Commission's many thoughtful statements was its summary of what society should want from the press. In the commission's view, this was "first, a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning; second, a forum for the exchange of comment and criticism; third, a means of projecting the opinions and attitudes of the groups in the society to one another; fourth, a method of presenting and clarifying the goals and values of the society; and fifth, a way of reaching every member of the society by the currents of information, thought, and feeling which the press supplies."[7]

This is a wonderfully full and articulate expression of what an ideal press in an open democracy might be, and measured against the standard, the Hutchins Commission found the press of its day wanting:

> The news is twisted by the emphasis on firstness, on the novel and sensational; by the personal interests of owners; and by pressure groups. Too much of the regular output of the press consists of a miscellaneous succession of stories and images which have no relation to the typical lives of real people anywhere. Too often the result is meaninglessness, flatness, distortion, and the perpetuation of misunderstanding among widely scattered groups whose only contact is through these media.[8]

Would Bollinger say that the press in the 1990s is as bad as the press described by the Hutchins Commission? Not in so many words. But he certainly comes close:

> There is no guarantee that the press will not abuse the freedom it possesses under the autonomy model. And there are many ways in which it might do so. The press can exclude important points of view, operating as a bottleneck in the marketplace of ideas. It can distort knowledge of public issues not just by omission but also through active misrepresentations and lies. It can also exert an adverse influence over the tone and character of public debate in subtle ways, by playing to personal biases and prejudices or by making people fearful and, therefore, desirous of strong authority. It can fuel ignorance and pettiness by avoiding public issues altogether, favoring simple-minded fare or cheap entertainment over serious discussion. Even if the pressures for

7. Commission on Freedom of the Press, *A Free and Responsible Press* 20-21 (U. Chi. Press, 1947) ("*Responsible Press*").

8. Id. at 68.

> low-quality discussion come from the people themselves, as to some extent they do, the press acts harmfully by responding to those demands and hence satisfying and reinforcing them. It matters not whether the press is the instigator of what is bad or the satisfier of inappropriate demands originating in the people. In either case, the press can be an appropriate locus for reform. (26-27)

While *Images of a Free Press* is crafted in the cautious tones of this passage, the message comes through. Although the quoted passage begins only with the moderate suggestion that there are ways a free press "might" abuse its power, and ends with the supposition that the press "can" be the locus of reform, the aggregate force of the book's argument is more assertive: Bollinger believes that the press *should* be reformed, and that government and law should at least be participants in the process.

A good illustration of the ethos of this book is Bollinger's discussion of the nature of the "injury" that is caused when the press makes mistakes. In the course of his argument, Bollinger makes the point that modern first amendment doctrines pay insufficient attention to the harm caused by libel and invasion of privacy, particularly in their neglect of the public damage these press errors cause. A libel or an invasion of privacy is not just a harm to the individual who is libeled, Bollinger maintains, it is an injury to public discourse itself.[9]

Another good illustration is Bollinger's return to what is probably his most well-known thesis, the notion that on balance society benefits from an understanding of the first amendment that prohibits regulation of print media, but allows regulation of broadcasting. The book continues the debate with Professor Scot Powe over whether it is appropriate to permit government regulation of the broadcast spectrum. Powe's book, *American Broadcasting and the First Amendment*, took aim at Bollinger's defense of a press "half free and half tethered."[10] In *Images of A Free Press*, Bollinger fights

---

9. Bollinger argues that the Supreme Court has focused primarily on the injury to the individual in striking the constitutional balance in defamation and privacy cases. See pp. 35-39. While he is correct in this observation, in fairness to the Court it should be noted that on at least one occasion the Court actually accepted the type of thinking Bollinger advances, focusing on the harm to the polity as much as the harm to the individual. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), Justice Rehnquist, writing for the Court, held in a libel case that the state of New Hampshire had an interest "in safeguarding its populace from falsehoods," id. at 777, concluding that "[f]alse statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens." Id. at 776 (emphasis in original).

10. Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* 248 (U. Calif. Press, 1987).

back.[11] This debate centers largely on the fairness doctrine, about which much ink and political blood have been spilled.

In whatever way the FCC, Congress, or the Supreme Court may ultimately resolve the fairness doctrine question in modern times, for purposes of understanding Bollinger's thesis it is not the legitimacy of the doctrine itself that really matters, so much as what the fairness doctrine—and indeed, the entire regime of broadcast regulation—reveal about our cultural image of the press, and our basic conceptualization of what "freedom of the press" ought to mean in the American constitutional experience. For Lee Bollinger, freedom of the press ought to mean more than freedom; it ought also embrace a commitment to *quality*, a commitment to a process in which the press and government are engaged in at least a limited joint venture to improve the political and intellectual quality of life in the democracy.

I do not wish to overstate Bollinger's zeal here, nor understate his resolve. He is committed to improving the quality of public discourse, but the book is never arrogant or oracular in purporting to have all the data or all the answers. Nor does Bollinger appear to contemplate anything beyond modest participation by the government in this effort to improve discourse, a participation presumably limited primarily to the non-print media. Further, Bollinger's style is marked by a becoming modesty and caution, and never in the book does he provide anything that might be characterized as a vicious indictment of the press. But Bollinger has no fear of the unpopular argument (and his argument will be, I think, unpopular with press "classicists"), and the opaque but nevertheless discernable image of the press that comes through in Bollinger's book is a close approximation of the image offered by the Hutchins Commission.

* * *

How bad is public discourse today? How bad is the performance of the press? To Bollinger's credit, he does not presume to offer definitive answers, but merely asserts that there are enough things wrong to warrant a study as rigorous and contemplative as that of the Hutchins Commission decades before.

My own intuitions on the state of the marketplace, and my own instincts as to what we should do to improve upon its shortcomings, are somewhat different from Bollinger's. Neither Bollin-

11. See pp. 128-32. Powe, it ought to be noted, also has a new book on freedom of the press. See Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* (U. Calif. Press, 1991). Powe, like Bollinger, writes beautifully and argues cogently, and I would certainly commend both books to serious students of the first amendment.

ger's book, nor my review, presume to have either empirical evidence or special insight into the current state of the American marketplace of ideas. But exercising the license that accompanies lack of evidence, let me suggest that things are better than we think. Take, as an exhibit, coverage and public discourse surrounding the 1992 presidential campaign. I use this example because it is, presumably, on Bollinger's strongest ground. Most people, I suspect, will reflexively blanch at the very mention of the campaign, finding in it forceful evidence of the kinds of shortcomings identified by the Hutchins Commission.

But I wonder if this is a fair indictment. It depends largely, I suggest, on what one means by the "press." If the "press coverage" of the presidential campaign is limited to what appears on the three major networks and one's local newspaper, then, assuming the local newspaper is not very good, a citizen's understanding of the presidential race might well be flawed by shallowness, bias, and sensationalism.

But for people who want more than this, more is available. One can listen to National Public Radio. People with access to cable will normally be able to supplement or substitute network coverage with CNN, C-Span, or PBS. One may be lucky enough to have a local newspaper that provides excellent political coverage and a strong op-ed page. And in almost every community in the country, the local newsstand, bookstore, or drugstore will carry many of the great newspapers in the United States and scores of magazines representing virtually all points on the political spectrum. It is, in short, my impression that political and news junkies do not have difficulty obtaining their daily fixes—whether their drug is "hard news" or the ruminating pontifications of pundits.[12]

Now this is not to say that there isn't a great deal wanting in this year's presidential campaign politics and coverage. At the "mass culture level," the level that may ultimately determine outcomes in elections, the fixation on the personal lives of candidates will probably not meet the Hutchins Commission's definition of quality public discourse.[13] Nor will the tendency of political debate

12. Solicitor General Kenneth Starr, when he was on the District of Columbia Court of Appeals, made much this same point in endorsing the idea that regulation of broadcasting is not justified in a world in which there is no *numerical* scarcity of diverse viewpoints in the marketplace. See *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654, 682 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 493 U.S. 1019 (1990).

13. The Czech novelist Milan Kundera offers some of the best insights into modern journalism. In his recent novel *Immortality*, Kundera has a passage about journalists engaging in devastating interviews of politicians:

> Those interviews were more than mere conversations; they were duels. Before the powerful politicians realized that they were fighting under unequal conditions—for

to reduce itself to euphemism and catch-phrase.[14]

Yet even if there was consensus of moral judgment about press

---

she was allowed to ask questions but they were not—they were already rolling on the floor of the ring, KO'ed.

Those duels were a sign of the times; the situation had changed. Journalists realized that posing questions was not merely a practical working method for the reporter modestly gathering information with notebook and pencil in hand; it was a means of exerting power. The journalist is not merely the one who asks the question but the one who has a sacred right to ask, anyone about anything. But don't we all have that right? And is a question not a bridge of understanding reaching out from one human being to another? Perhaps. I will therefore make my statement more precise: the power of the journalist is not based on his right to ask but on his right *to demand an answer.*

Milan Kundera, *Immortality* 109-10 (Peter Kussi, tr., Grove Weidenfeld, 1991) (emphasis in original). Is the assertion of this right morally legitimate? Kundera offers an answer—not among equals:

> Please note carefully that Moses did not include among God's Ten Commandments "Thou shalt not lie!" That's no accident! Because the one who says, "Don't lie!" has first to say, "Answer!" and God did not give anyone the right to demand an answer from others. "Don't lie!" "Tell the truth!" are words we must never say to another person insofar as we consider him our equal. Perhaps only God has that right, but he has no reason to resort to it, since he knows everything and does not need our answers.

Id. at 110. I must say that I agree. On this issue I associate myself with the views of Milan Kundera, God, and Moses.

I should disclose, in connection with this discussion, that I recently represented (on a *pro bono* basis) Senator Chuck Robb of Virginia during the course of press coverage of allegations involving his personal life. My views that, as a matter of journalistic ethics (rather than first amendment doctrine), public officials should enjoy a sphere of personal privacy were not influenced by the episode—since I already held those views—but they were reinforced. My observations on what I learned from the Chuck Robb matter, and further reflections on the insights of Milan Kundera, appear in a forthcoming essay in *Ethics*, as part of a symposium sponsored by the Hollins Institute for Ethics and Public Policy.

14. We may be tempted to think of the sound bite as a phenomenon of American politics, grounded in the influence of broadcasting on modern political campaigns. That analysis, however, may be wrong. Milan Kundera has attempted to trace the beginnings of the sound bite in Western Culture. Interestingly, he places its genesis in Europe, long prior to the invention of modern electronic mass media. The crystallizing moment for Kundera is when Goethe is given an audience with Napoleon. What happened at the moment the two first met? Kundera describes the scene:

> Napoleon glances at him and slides his right hand under his jacket, so that his palm touches the bottom left rib. . . . and says loudly, for everyone to hear: "*Voila un homme!*" "There is a man!"

Kundara, *Immorality* at 53 (cited in note 13). Napoleon here had defined the essence of modern mass politics, the art of the sound bite:

> Politicians make long speeches in which they keep shamelessly repeating the same thing, knowing that it makes no difference whether they repeat themselves or not since the general public will never get to learn more than the few words journalists cite from the speeches. In order to facilitate the journalists' work and to manipulate the approach a little, politicians insert into their ever more identical speeches one or two concise, witty phrases that they have never used before, and this in itself is so unexpected and so astounding that the phrases immediately become famous. The whole art of politics these days lies not in running the *polis* (which runs itself by the logic of its own dark and uncontrollable mechanism), but in thinking up "sound bites" by which the politician is seen and understood, measured in opinion polls, and elected or rejected in elections.

Id. at 53-54.

behavior, or persuasive empirical data demonstrating marketplace failures, what role should law play as a corrective? Bollinger's argument here is subtle. The role of law in influencing press behavior is not always coercive so much as rhetorical. There is a value, if you will, in the very dialogue between journalists and the legal system. Arguments about first amendment policy and doctrine contain an idealized imagery of the press that in turn coaxes the press to live up to the ideal. Bollinger writes: "What appear on the surface to be theoretical justifications of the First Amendment become, on further inspection, rhetorical stimulants designed to inspire the press to particular behavior and to limit abuses from the freedom conferred."

But what about the use of law in the more conventional sense in which courts and lawyers know law? To what extent does Bollinger regard it as appropriate for law to regulate public discourse and press behavior in order to improve upon the quality of the marketplace? On this issue, *Images of a Free Press* is mildly ambiguous.

On the one hand, throughout the book Bollinger appears to hold fast to the "split press clause theory" (with a free market for print and a regulated market for broadcasting) for which he is famous, and on which he has joined issue with Scot Powe. But there are hints of a broader assertion here. In an important passage, Bollinger states:

> In other words, in my judgment—and this is clearly one of those matters on which facts are elusive and a judgment is all one can reasonably pretend to have—broadcast regulation has not been an isolated, aberrant, self-contained experience but one with a spreading influence. And, if that is true, then freedom of the press in this country has never meant, and does not mean today, the absence of government control. (86)

What is to be made of the phrase "spreading influence?" Is Bollinger asserting that a more generalized "government control" of the press (a control not limited to broadcasting) is desireable?

If by this "spreading influence" Bollinger means merely the sort of "rhetorical" benefits that come from regulation, then this passage merely reinforces Bollinger's primary argument about the utility of a split press clause, and his more subtle point that the first amendment rhetoric exerts informal pressures on press behavior. If this spreading influence contemplates the involvement of law in a more coercive sense, however, the passage is more dramatic, and for me, at least, more troubling.[15] One wonders, for example, what

15. See generally Smolla, *Free Speech* at 117-40 (distinguishing between moral obliga-

Bollinger would say of the statement of the philosopher William Earnest Hocking (who served on the Hutchins Commission), who claimed that "[l]aw is the great civilizing agent that it is . . . because it is a working partner with the advancing ethical sense of the community."[16] It was Hocking's view—expressed in the Hutchins Commission report—that because of the central role of the press in modern culture, it had "lost the common and ancient human liberty to be deficient in its function."[17]

* * *

Even if one had no objections in *principle* to the use of law to elevate the performance of the press, there are many pragmatic objections. My suspicion is that the performance of the press and the general quality of public discourse are determined by cultural and economic forces that tend to overwhelm the types of legal doctrines most likely to be invoked.

If law is to be a "great civilizing agent" in the marketplace of public discourse, what kind of regulation are we talking about? The fairness doctrine?[18] Rules requiring "public interest" coverage?[19] Curbs on vulgarity?[20] Even if one were to accept Hocking's premise

---

tion and legal obligation regarding invasion of privacy of public figures) (cited in note 5). It is interesting to observe that as a descriptive matter, Bollinger's "split press clause" is also an apt characterization of modern free speech jurisprudence generally. The Supreme Court has, if you will, adopted a "custom level" of highly speech-protective doctrines that largely prevent government regulation in the general marketplace of public discourse, but has then carved out large areas in which those general doctrines do not apply, and in which substantially greater regulation of speech is allowed. See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (public schools); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) (non-public forums); *Connick v. Myers*, 461 U.S. 138 (1983) (speech by government employees on matters not of "public concern"). Bollinger's book does not deal with these matters (and it should not, for he has set out only to deal with the press side of the first amendment), but as a matter of theory, at least, the full spread of this "spreading influence" could become quite expansive one day.

16. William E. Hocking, *Ways of Thinking About Rights: A New Theory of the Relation Between Law and Morals*, in 2 *Law: A Century of Progress* 242, 258 (N.Y.U. Press, 1937) quoted in Robert E. Drechsel, *Media Ethics and Media Law: The Transformation of Moral Obligation into Legal Principle*, 6 Notre Dame J.L. Ethics & Pub. Policy 5 (1992).

17. Commission on Freedom of the Press, *Responsible Press* at 131 (cited in note 7). See generally Dreschel, 6 Notre Dame J.L. Ethics & Pub. Policy 5-6 (cited in note 16). The symposium volume in which Professor Drechsel's article appears contains a foreword by Bollinger, in which he concisely sets forth much of the agenda covered by his book *Images of a Free Press*. See Lee C. Bollinger, *Foreword*, 6 Notre Dame J.L. Ethics & Pub. Policy 1 (1992).

18. See generally *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

19. See *In Re Complaint of Representative Patsy Mink*, 59 F.C.C.2d 987 (1976). The *Patsy Mink* case, the only case in which the FCC enforced the "affirmative" side of the fairness doctrine, requiring public interest coverage, is discussed by Bollinger at some length.

20. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978). The *Pacifica* case involved George Carlin's "dirty words" comedy routine. The Pacifica station was sanctioned for broadcasting Carlin's monologue. The case is highly controversial, and I have often attacked its legal analysis. But legal analysis aside, for me the case is also an example of the perils of

that law should be a civilizing agent, would these sorts of legal doctrines do the job?

To the extent that experience since 1947 is to be a guide, what are we to make of the level of "civilization" found in broadcasting—that side of the press spectrum that has been subject to such regulation? My hypothesis is that to the extent there is genuine excellence in current broadcasting about political and social issues,[21] it has been achieved for reasons that have nothing to do with such matters as the fairness doctrine.

I previously disclosed my inclinations about the current state of the marketplace of ideas, for example, suggesting that on the whole it is not that bad, and that there are any number of bright spots. Let me confess a more specific bias. While I am by no means a religiously loyal listener, I would say that NPR and PBS, on the whole, do a commendable job of covering social and political issues. NPR programs such as *All Things Considered* and *Morning Edition* do, for my money, fulfill the hopes of the Hutchins Commission. It is worth considering the observation of E.B. White, quoted by Bollinger in a footnote:

> Noncommercial television should address itself to the ideal of excellence, not the idea of acceptability—which is what keeps commercial television from climbing the staircase. I think television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills. It should be our Lyceum, our Chautauqua, our Minsky's,

striving for quality through regulation. I am not one of those who defends George Carlin and the Pacifica station on the grounds that Carlin's routine "may not have been pretty but it ought to be protected." Rather, in my subjective view, Carlin's comedy was high-quality speech. I think—quite sincerely—that George Carlin's comedy has been of extraordinarily high quality for decades. I include the routine at issue in *Pacifica* as an example of that excellence. I rate Carlin's routine as excellent because it possesses the type of "dynamic quality" that philosopher/novelist Robert Pirsig, author of *Zen and the Art of Motorcycle Maintenance* and *Lila*, describes in his writings: it has the capacity to shock us out of our static patterns of existence. See Robert Pirsig, *Lila: An Inquiry into Morals* 114-18 (Bantam, 1991). I accept that whether children should be sheltered from Carlin's routine is a question of constitutional law and policy on which reasonable people may differ. But I would resist ever treating Carlin's monologue as an impoverished form of speech, a low-grade "necessary evil" that we must tolerate in a free society, something that we would exorcise on "lack of quality" grounds if only the Constitution would let us.

21. I am not one who believes that the principal purpose of the first amendment is to facilitate self-governance, or that its protections should be limited primarily to political speech. And certainly, any full assessment of the "quality" of modern broadcasting would assess its performance with regard to the full range of informing and entertaining functions it performs. But because Bollinger's book, and the Hutchins Commission before him, are concerned primarily with the more serious social and political content of press performance, I have voluntarily limited my hypothesis here to only that type of speech.

> and our Camelot. It should restate and clarify the social dilemma and the political pickle. Once in a while it does, and you get a quick glimpse of its potential.[22]

E.B. White's statements ring true. And while public broadcasting has its critics, on the whole I would say it certainly does "with some frequency" meet White's aspirations.

Now to the extent that one is willing to indulge my subjective assumption that *All Things Considered* is quality broadcast journalism, what makes it so? Do we really believe it has much to do with FCC regulation? The partnership with government is certainly significant in the *funding* contribution government makes to the enterprise. But I would argue that it is the *independence* of NPR (including, as E.B. White described it, independence from "the idea of acceptability") more than substantive regulation of programming content that most encourages NPR's high achievements.[23]

In sum, if something on the order of a newly constituted Hutchins Commission were convened, it would seem to me the new commission should subject to an acid bath of rigorous scrutiny all assumptions about the current state of the marketplace, as well as all assertions of what can be done and what should be done about its shortcomings.[24]

* * *

Images of a Free Press is a first-rate book that every student of the first amendment should read. Bollinger's argument is provocative and challenging, presented with a pleasing and elegant economy of words. The grace and modesty of his narrative match the graciousness and humility of his personality. Whether or not one is persuaded by his judgments—and I to a significant degree am not—one certainly will be enriched and instructed by his ideas.

---

22. *Public Television: A Program for Action, The Report and Recommendations of the Carnegie Commission on Educational Television* 13 (Bantam, 1967) (statement of E.B. White) quoted at 107, n.67.

23. The Supreme Court helped secure additional editorial independence for public broadcasters in 1984, striking down a provision in the Public Broadcasting Act that prohibited editorializing. See *F.C.C. v. League of Women Voters of California*, 468 U.S. 364 (1984).

24. And this sort of scrutiny is, I am confident, exactly what Bollinger contemplates.