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## WHERE HAS MEDIA POLICY GONE? DEFINING THE FIELD IN THE TWENTY-FIRST CENTURY

SANDRA BRAMAN\*

*In recent years, the number of laws and regulations dealing with information and information technologies has exploded. As a result, the boundaries of the field of media policy are increasingly difficult to discern. Problems raised by technologies, media practices, the nature of policy-making processes and the unique characteristics of media as a policy issue area confound the effort. A variety of approaches to defining the field exist in the literature, but, to be useful, a definition of the field of media policy must be valid, comprehensive, theoretically based, methodologically operationalizable and translatable into the terms of legacy law. This article suggests that, broadly viewed, media policy is co-extant with the field of information policy, defined as all law and regulation dealing with an information production chain that includes information creation, processing, flows and use. More narrowly, media policy as a distinct subfield of information policy deals with those technologies, processes and content by which the public itself is mediated.*

When the United States Constitution was written, protections for freedom of expression stood out starkly in a landscape otherwise in-

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\*Professor of Communication, University of Wisconsin at Milwaukee. This research was funded in part by a grant from the Ford Foundation's Knowledge, Creativity and Freedom Program.

habited by policies for the economy, defense and other matters quite distinct from speech or press. With the transformation from an agricultural to an industrial and, more recently, to an information economy, however, that landscape has become filled with laws and regulations dealing with information and communication. Like the economy, social life, work and leisure, the law itself has become more information intense in the sense that ever-greater proportions of it are taken up with new information technologies. The number of laws involved is vast: More than 600 bills dealing with the Internet alone were on the table during the 107th Congress.<sup>1</sup> Various strands of law dealing with information technologies and the content they carry have come together,<sup>2</sup> often burying traditional media policy issues within a vast policy space.

Seeing the media policy trees within this forest is difficult. The media policy analyst or law maker is confronted with such questions as: Does the capacity to assert intellectual property rights in modes of doing business affect the media? When does technical standard-setting for the information infrastructure become a matter of media law? What does the controversy about control over domain names on the Internet mean for those with traditional media policy concerns?

Answering such questions is a pragmatic problem for those who need to know what is and what is not media policy: working policy makers, funders and those who design research agendas, curricula and courses. More importantly, it is a significant legal problem because of the constitutional and constitutive importance of media law as that which determines the conditions under which all other decision-making takes place.<sup>3</sup>

While the Constitution protected communication in order to enable the political form of democracy, much current law for information technologies and content is intended to serve other purposes. How a policy issue area is identified is political because it determines who participates in decision-making, the rhetorical frames and operational definitions applied, the analytical techniques and modes of argument used, and the resources—and goals—considered pertinent. When an information technology problem is defined as an economic,

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<sup>1</sup>The total is based on a search of the federal government database, Thomas., <http://www.thomas.loc.gov>.

<sup>2</sup>See Sandra Braman, *Policy for the Net and the Internet*, 30 ANN. REV. OF INFO. SCI. & TECH. 5 (1995).

<sup>3</sup>See Lawrence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985).

industrial or trade issue rather than as media policy, protections for speech and other constitutional principles important to the media may not apply. An overemphasis on what is new about digital technologies exacerbates the danger that fundamental principles developed over centuries to protect civil liberties and promote effective democratic processes will be lost in the electronic environment.

Turning away from technologies and towards that which is being mediated—the public—brings media policy back into view. Doing so is the first necessary step in identifying just what it is that can be learned, and what must be retained, from legacy law. This article looks at what makes the problem of defining media policy so difficult today, reviews competing approaches, describes the broad domain of information policy that has become the legal context for the media, and offers an approach for identifying media policy issues within that domain. In order to get from here to there, the article covers a great deal of ground each patch of which is deserving of attention to greater depth than is possible here; thus this argument should also be read as a research agenda.

### THE DEFINITIONAL PROBLEM

It used to be easy. When the Constitution and Bill of Rights were written, what we now call “media policy” ensured that citizens were able to use oral and print means of expression to communicate with each other and with their government about the constitution of society. Because content must be distributed as well as produced (and to be useful for constitutive purposes, distribution must be multidirectional), the synchronous and co-present sharing of ideas through assembly and asynchronous and distributed communication through publishing and the postal system were constitutionally protected.<sup>4</sup> Because in order to meaningfully discuss the constitution of society citizens need access to information and freedom to form their own opinions on the basis of that information, both of these were also protected.<sup>5</sup> And because, to be effective, ideas and opinions must be com-

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<sup>4</sup>The First Amendment protects assembly, and the postal provision of the Constitution established a postal service in order to provide universal access to the kind of distributed communication system considered critically necessary for the functioning of a democracy. U.S. CONST. art. I, § 8, cl. 7.

<sup>5</sup>The principle of open government was established in a very general way in Article 1, Section 5, of the Constitution, which mandates that Congress report to the public on its activities through a journal, and in Article 2, Section 3, which requires the President to provide Congress with information regarding the conditions of the country. The principle that individuals and groups have the right to form their own

municated to those who can act, the First Amendment further protected the right to seek changes in government.<sup>6</sup>

From there, it got more complicated. Technological innovation created truly mass media, expanding the set of regulatory subjects and adding issues raised by interactions among media. It was only about the time the first regulatory systems were being put in place for electronic media—in the 1920s—that the very word “media” came into use.<sup>7</sup> Over time, interpretation of constitutional law for the mediated environment articulated a number of dimensions along which rights and responsibilities were differentiated: *context* (public v. private), *content* (political v. economic v. cultural v. personal), *genre* (fact v. fiction, fact v. opinion, news v. history), *speakers* (public v. private, individual v. corporate v. governmental), receivers (voluntary v. involuntary, adult v. minor, competent adult v. incompetent adult) and *political condition* (war v. peace, elections v. between elections). Meanwhile, communication scholars gradually turned away from a focus on communication as a social process and towards communication technologies as their subject matter.<sup>8</sup>

By the opening of the twenty-first century, the field within which media policy operates has broadened yet again. Innovation has further transformed the fundamental nature of the technologies involved and the extent to which society is reliant upon those technologies. The directly communicative functions of the media are now a relatively small proportion of the overall role of information technologies in society. The distinction between public and private communicative contexts has become one of choice and will, rather than ownership, control and history of use. And we have come to understand that both non-political content and the infrastructure that carries it can have structural, or constitutive, impact.

These historical factors make bounding the domain of media policy more problematic than ever before. Conceptually, the field of media policy can be considered co-extant with that of information policy, broadly defined as all policy pertaining to information creation, processing, flows and use. The distinction remains important, however, in order to ensure that constitutional principles provide the foundation for the making, implementation and interpretation of the

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ideas and opinions is included in the First Amendment protection of opinion and indirectly in the Preamble.

<sup>6</sup>The right to seek change in the governance system is protected *via* inclusion of the right to petition the government in the First Amendment and *via* the vote.

<sup>7</sup>See OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>8</sup>See John Durham Peters, *Institutional Sources of Intellectual Poverty in Communication Research*, 13 COMM. RES. 527 (1986).

law as well as to serve pragmatic needs. Unfortunately, several classes of problems confound the effort to carve media policy as a distinct domain out of the larger universe of information policy: those raised by technologies, media practices, features of the policy-making process, and characteristics of the media as a specific issue area.

### ***Technology-Based Problems***

The phrase “the convergence of technologies” conflates several analytical issues pertinent to the problem of bounding the domain of media policy. New information technologies are qualitatively different from those with which media policy has historically dealt; blur medium, genre, function and industry; are ubiquitously embedded in the objects of the material world; and replace slow-changing structuration processes with more rapid processes best described as “flexible.”

### ***From Technology to Meta-Technology***

The law has not historically distinguished between tools, technologies and meta-technologies, even though these differ along dimensions of legal importance.

- *Tools* can be made and used by individuals working alone and make it possible to process matter or energy in single steps. The use of tools characterized the pre-modern era. Because communication is an inherently social act it may only be when marks are made for the purposes of reminding oneself of something that it can be said there are communication tools.
- *Technologies* are social in their making and use; that is, they require a number of people to work together. They make it possible to link several processing steps together in the course of transforming matter or energy, but there is for each technology only one sequence in which those steps can be taken, only one or a few types of materials can be processed, and only one or a few types of outcomes can be produced. The shift from tools to technologies made industrialization possible, and the use of technologies thus characterizes the modern period. The printing press and the radio are examples of communication technologies.
- *Meta-technologies* vastly expand the degrees of freedom with which humans can act in the social and material worlds. Meta-technologies enable long processing chains, and there is

great flexibility in the number of steps and the sequence with which they are undertaken. Meta-technologies can process an ever-expanding range of types of inputs and can produce an essentially infinite range of outputs. They are social, but enable solo activity within the socially produced network. Their use characterizes the postmodern world. Meta-technologies are always informational, and the Internet is a premiere example of a meta-technology used for communication purposes.

The shift from technologies to meta-technologies affects the scope and scale of the policy subject, as when national law must cope with global media. A vastly expanded range of alternative outcomes must be considered in the course of policy analysis; the cost of failing to do so was demonstrated by the appearance of the new vulnerabilities and liability issues referred to as the potential for information warfare, hacking and cracking made possible as a result of government-funded software research and development. Meta-technologies also involve a causal chain that is potentially much longer and more variable than those with which policy analysis has historically dealt, requiring the development of both new policy tools and new methods for policy analysis. Policy makers are most comfortable making law when they feel they understand what it is that is being regulated, but we are still just learning about the effects of the use of meta-technologies.

### *Convergence of Communication Styles*

Media have been distinguished from each other in the past by the number of message receivers (one, a few or many); by the nature of interactivity, if any, between sender and receiver; and by the difference between synchronicity and asynchronicity. These dimensions together may be described as a matter of style.

In the past, specific media were characterized by particular styles of communication. Thus, over-the-air television is mass communication, from one to many; it does not permit direct interactivity between viewers and programming; and it is experienced by its entire audience at the same time, synchronously. Telephony, on the other hand, is predominantly person to person, is by definition interactive and is synchronous. Personal letter writing is one to one and interactive but asynchronous.

The Internet, however, blends communicative styles in all three dimensions. During a single session, a user may communicate with a single person, small groups and the public en masse, often fluidly

switching back and forth among the three. Similarly, one-way and interactive communications, both synchronous and asynchronous, can be mixed within single sessions of activity.

This blending of communication styles is problematic for the definition of media policy because point-to-point communication with a single receiver can no longer be excluded from discussions of media law. Under current law, several different regulatory approaches, each with its own assignment of rights and responsibilities, can concurrently apply to a single communicative act or message. Interactivity, too, must be included because it has been deemed constitutionally worthy of protection because of the way in which it changes a discourse and the nature of information exchanged.<sup>9</sup>

### ***Blurring of Medium, Function and Industry***

The convergence of technologies confounds any expectation that particular media, functions and industries will map onto each other. Such expectations were always unrealistic, for there has been experimental and often significant use of every medium to fill every possible type of social function. The telephone, for example, has been used as a mass news medium and for cultural gatherings in both Europe and the United States. In the current environment, however, experimentation and shifts in the location and form of specific social functions that once unfolded across time and place now take place simultaneously. This confounds efforts to apply law and regulation that are industry-specific as well as efforts to use law and regulation (largely but not exclusively *via* antitrust law) to keep industries separate from each other. It disrupts habits of policy analysis because typically such techniques are based on assumptions about the social functions to be served by particular media industries. And it alters the economics of each of the industries involved, further disturbing habitual analytical assumptions.

### ***Ubiquitous Embedded Computing***

People are accustomed to treating the media as an identifiable set of objects in which communicative capacity can be found and which serve only communicative functions, distinct from other objects and from individuals. Increasingly, however, information technologies are ubiquitously embedded throughout the material world in famil-

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<sup>9</sup>See *Kleindienst v. Mandel*, 408 US 753, 768 (1972).

iar objects such as cars, refrigerators, stoplights and paper. And while, at the moment, such technologies are embedded in humans only at the margins—by scientists experimenting with connecting computer chips to neurons, artists treating their bodies as electronic art media, and penal systems taking advantage of new ways of tracking and restricting those who have broken the law—it is likely that in the future, information technologies will also be ubiquitously embedded in plant, animal and human organisms as well. This change presents a conceptual and operational challenge to those making, implementing and interpreting media law.

### *The Media and Flexible Structuration*

Constitutive processes involve structuration, the interaction between structure and agency, with the latter defined as the ability to effectively act on the basis of one's own intention.<sup>10</sup> From this perspective, constitutional protections for the media are intended to ensure that individuals have the communicative agency necessary to affect governance. Of course, in the late eighteenth and early nineteenth centuries the nation-state was not the only source of structural power, for religious institutions retained a great deal of power, explicitly acknowledged in the Constitution when it is relegated to the private sphere. Agency through physical power has always been available and, as Kenneth E. Boulding noted some three decades ago, social norms and perceptual frames are also important.<sup>11</sup> In the terms of political science, these distinct forces are referred to as “instrumental power” (the ability to affect behavior through physical action), “structural power” (the ability to affect behavior through the design of institutions and rules), and “symbolic power” (the ability to affect behavior through shaping perceptions and modes of thought).<sup>12</sup> With informational meta-technologies, a fourth form of power has become important. “Informational power” affects behavior through manipulation of the informational bases of instrumental, structural and symbolic forms of power.<sup>13</sup>

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<sup>10</sup>Though the interaction between structure and agency has long been of interest to sociologists of the law, an explicit theory of structuration is developed in ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY passim* (1986).

<sup>11</sup>Kenneth E. Boulding, *National Images and International Systems*, in *COMPARATIVE FOREIGN POLICY: THEORETICAL ESSAYS* 90 (Wolfram F. Hanrieder ed., 1971).

<sup>12</sup>See, e.g., STEVE LUKES, *POWER* (1986).

<sup>13</sup>See Sandra Braman, *Horizons of the State: Information Policy and Power*, 45 J. OF COMM. 4 (1995).

Among the effects of informational power is a blurring of the distinction between agency and structure, for informational structure itself becomes agency. Legal analysis of the effects of computer code<sup>14</sup> and revision of the Standard Industrial Classification (SIC) codes used as the basis of economic analysis into the North American Industrial Classification System (NAICS) to take new features of the information economy into account demonstrate governmental acknowledgment of the importance of informational power.<sup>15</sup> Breaking down the distinction between structure and agency makes structuration processes far more flexible, complicating media policy by dissolving the policy subject and introducing more complex modes of causality.

Law and regulation are always based on at least implicit assumptions about causality as direct, discernible, affected by relatively few intervening variables, occurring *via* single or very few causal steps, and effected by identifiable agents. United States media policy of the eighteenth and nineteenth centuries constrained and used symbolic power. During the late nineteenth and twentieth centuries, the development of antitrust law manifested the addition of structural power to the subjects of media policy and the repertoire of tools used to protect individual agency in the face of the nation-state and large corporations. Today, it must adapt to the realities of informational power: There are agents that have not been recognized as such by the law, or there may be no identifiable agents at all. Causality may be indirect, indiscernible, affected by multiple intervening variables, and involve causal chains that are beyond analytical reach. These changes in the nature of agency and causality are evident in practice-based problems faced by those seeking to define media policy.

### ***Practice-Based Problems***

Contemporary media practices make the problem of defining media policy more difficult because there is constant innovation, genres are blurred, players have multiplied, and policy subjects are now often networked rather than autonomous entities.

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<sup>14</sup>The most popularly influential analysis of the structural effects of computer code and the ways in which those effects can be law-like in nature is offered in both theory and with multiple examples in LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

<sup>15</sup>The role of the informatization of society in motivating the revision of the SIC codes is discussed in Jack Triplett, *Economic Concepts for Economic Classifications*, 73 *SURVEY OF CURRENT BUSINESS* 45 (1993).

### ***Constant Innovation***

Media products, services and organizational forms all continue to evolve. Examples of innovation in practice include the widespread practice of changing Web page design in response to the number of reader hits per article and the gatekeeper-free broadcasting of news stories and documentaries by independent media groups such as IndyMedia that are easily accessible on the Web. Service innovations include individually designed content and the use of intelligent agents for information seeking and delivery. Institutional and industry innovations appear when newspapers start acting like Internet service providers, news-oriented media turn to entertainment, and firms in professional service industries such as the law start contracting out printing services. These changes problematize the definition of media policy because that field historically treated distinct products, services and industries differentially, and the law was applied within the media industry at the firm level. The process of adapting statutory and regulatory law to reflect the categories of the new classification system, which came into use only at the close of the twentieth century, has not yet begun.

### ***Blurring of Genres***

Genre distinctions in constitutional law—those such as fact and fiction, fact and opinion, and news and history—are fundamental to analysis of law dealing with such matters as libel, advertising regulation and postal rates. The blurring of genre thus adds conceptual problems to legal analysis. People continue to struggle with the application of standards of facticity that are important from the perspective of libel and fraud. The long-standing distinction between history, fiction and news based not only on facticity but on the currency of information claimed to be fact that supports differential pricing of information distribution *via* the post office is only one of the approaches to differential pricing of Web-based information, and it is being used in a *de facto* rather than *de jure* way.

### ***Tactical Media***

Tactical media practitioners work with the possibilities unleashed by the interchangeability of structure and agency. While mainstream and alternative media have historically used content to engage in political battles, the tactical media movement launched in the 1990s spurns struggles over content as a losing battle. Instead, these jour-

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nalists/artists/activists take seriously Marshall McLuhan's insight that the medium *is* the message and have turned, instead, to manipulation of information production, processing and delivery systems.<sup>16</sup> The goal is to alter the semiotic and electronic realities within which media operate, an exercise of informational power. Tactical media practitioners combine news and political commentary with art. Consumption, aesthetics and humor are viewed as opportunities to enact power, often most successful in stand-alone events rather than the persuasive campaigns to which people have become accustomed. Media law and policy focused on content are inadequate in the face of tactical media. Rather, tactical media practitioners see themselves as "pre-policy," acknowledging that what they do is stimulate legal innovation.<sup>17</sup>

### *Everyone's a Player*

In the pre-digital era, most areas of media policy affected professional communicators almost exclusively. Libel law and problems of copyright infringement are good examples. In the electronic environment, however, everyone who communicates runs the danger of bumping into the same legal and regulatory issues, even when individuals perceive themselves to be involved solely in interpersonal communication. Traditional approaches to media policy that orient towards professional communications and established media organizations must be reconsidered in this context.

### *Antitrust in a Network Society*

Antitrust law has been used heavily since the late nineteenth century to restrain firms in the media industry; indeed, much of the current shape of the telecommunications industry still reflects antitrust decisions made in 1913 and 1956.<sup>18</sup> Intertwined ownership of the infrastructure and the multidimensional networking of firms, however, can make it difficult to treat firms as distinct and autonomous units for the purposes of antitrust law. Constant innovation, the emphasis on services rather than goods, and the interchangeability of

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<sup>16</sup>MARSHALL MCLUHAN, UNDERSTANDING MEDIA (1964/1994).

<sup>17</sup>The perspective and practices that can be characterized as "pre-policy" are presented, among other places, in CRITICAL ART ENSEMBLE, DIGITAL RESISTANCE: EXPLORATIONS IN TACTICAL MEDIA (2001).

<sup>18</sup>See MICHAEL K. KELLOGG, JOHN THORNE & PETER W. HUBER, FEDERAL TELECOMMUNICATIONS LAW 16, 199–202 (1992).

goods and services make it difficult to conduct antitrust analysis of products; globalization makes it difficult to conduct antitrust analysis of markets.

### ***Policy Process-Based Problems***

Some of the problems in defining media policy today derive from the nature of policy-making itself, such as the tension between incremental and radical change, the importance of latent as well as manifest policy, invisibility, policy interdependence and precession, and relationships between public policy and other types of influential decision-making.

### ***Transition Policy***

Policy change can be radical, when an entire body of existing law is abandoned in favor of building anew from scratch during revolutionary periods, or incremental, in a series of small evolutionary steps. Incremental policy making is necessary for working decision makers in both the public and private sectors who must operate within existing law under severe time and resource constraints. In addition, there is always a lag between the development of new ideas about and knowledge of social circumstances and their application in arenas as detailed and complex as the law—a lag reinforced by reliance upon precedent. Nor is it possible immediately to understand all of the effects of new technologies in their entirety; it took, after all, about 500 years to begin to fully comprehend the effects of the printing press.<sup>19</sup> Those who analyze, make and implement media policy today face the problem of trying to achieve incremental legal change during a period of revolutionary change in the policy subject.

### ***Latent and Manifest Policy***

Not everything that falls within the domain of media policy is labeled as such. Thus, borrowing from the late Robert K. Merton, it is useful to distinguish between media policy that is manifest—clearly directed at what has traditionally been understood as the mass media—and that which is latent.<sup>20</sup> The general notion of latent policy first

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<sup>19</sup>Though the printing press and moveable type were reinvented in Western Europe with fast and significant effect in 1450, the first histories of the influence didn't begin to appear until the late twentieth century. See, e.g., ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979).

<sup>20</sup>See Robert K. Merton, *A Paradigm for the Study of the Sociology of Knowledge*, in *THE LANGUAGE OF SOCIAL RESEARCH* 498 (Paul F. Lazarsfeld & M. Rosenberg

appeared in the 1920s,<sup>21</sup> and has since gained currency in fields ranging from technology policy<sup>22</sup> to political science.<sup>23</sup> Latent policy includes that which is created as a side effect of decisions aimed at other subjects, as when Securities and Exchange Commission regulation of the financial markets mandates the distribution of particular types of information. It can develop when its subject matter is categorized under other names, as in the “confidence- and security-building measures” (CSBMs) incorporated into arms control treaties of the 1980s and 1990s that required specific types of information exchange in support of foreign policy.<sup>24</sup> Latent policy can also appear synergistically when policies from a variety of decision-making arenas interact to produce something quite different in combination, as when the use of alternative dispute resolution systems to reduce the burden on the courts results in a loss of public access to the kinds of information about conflict resolution the Constitution recognized as so essential to a democracy. The effects of latent policy can be direct. Its importance adds to the definitional task by requiring inclusion within the boundaries of the field those matters that have not habitually been assumed to fall within the domain. The importance of latent forms of media policy places demands on the research agenda as well: It must attend to latent as well as manifest issues, bring the latent into visibility, and explore relationships between those issues that are latent and those that are manifest.

### *Invisible Policy*

Many types of media policy decisions are highly influential but little discussed or even acknowledged. The world of media policy includes such things as presidential executive orders, decisions by federal and state attorneys general and the practice of hiding statu-

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eds., 1955); Robert K. Merton, *Remarks on Theoretical Pluralism*, in *CONTINUITIES IN STRUCTURAL INQUIRY* i (Peter M. Blau & Robert K. Merton eds., 1981).

<sup>21</sup>Benjamin Cardozo did not use the term “latent policy,” but the concept is implicit in his discussion of the interaction between general principles as rules and the facts of specific cases. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 121–22 (1921). The same implicit concept is found in his analysis of the interactions between principles and/or lines of precedent. See *id.* at 40–43.

<sup>22</sup>An early and influential exemplar of policy analysis of technology *qua* technology can be found in W. HENRY LAMBRIGHT, *GOVERNING SCIENCE AND TECHNOLOGY* (1976).

<sup>23</sup>See Theda Skocpol, *Bringing the State Back In*, in *BRINGING THE STATE BACK IN* 3 (Peter Evans et al. eds., 1985).

<sup>24</sup>See Sandra Braman, *The Impact of Confidence-Building Measures on Information Policy*, in *CONFIDENCE-BUILDING IN THE NON-MILITARY FIELD* 47–58 (Kaarle Nordenstreng & Wolfgang Kleinwachter eds., 1991).

tory law directed at one issue within a piece of legislation commonly understood to deal with another. The significance of invisible sources of law and regulation to media realities makes it necessary to take such decision-making venues into account in the process of defining the field. Invisible policy is formal and is developed within government, but has largely escaped attention.

### *Policy Interdependence*

Media policy made at different levels of the social structure is highly interdependent, reflecting the emergence of networked forms of organization in all aspects of life and the interpenetration of political structures. Indeed, for many countries around the world, international organizations are as important, or more so, than national governments in shaping their media policy,<sup>25</sup> and it was in the area of the information infrastructure that the European Economic Commission (EEC), for the first time, explicitly applied commission law to member states.<sup>26</sup> Such interdependence is described as both necessary<sup>27</sup> and a potential policy trap.<sup>28</sup> Some efforts to extend United States or European law outside its borders occur naturally, through harmonization of legal systems<sup>29</sup> or the movement of decision-making into the realm of private contracts when there is a legal vacuum<sup>30</sup> rather than through the excesses of extraterritoriality (unilateral efforts by a nation-state to exert its law outside its borders). The globalization of the information infrastructure and growing appreciation of the populations in developing countries as potential markets make it more likely that developed countries will come to take the needs and concerns of developing countries into account.<sup>31</sup>

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<sup>25</sup>See FORGING PEACE (Monroe Price & Mark Thompson eds., 2002).

<sup>26</sup>Stuart Wall, *The British Telecommunications Decision*, 24 HARV. INT'L. L.J. 299 (1984).

<sup>27</sup>See John T. Soma et al., *The Communications Regulatory Environment in the 1980s*, 4 COMPUTER/L.J. 1 (1983).

<sup>28</sup>See Robert Pepper & Stuart N. Brotman, *Restricted Monopolies or Regulated Competitors?* 37 J. OF COMM. 64, 71 (1987).

<sup>29</sup>See ROBERT R. BRUCE ET AL., FROM TELECOMMUNICATIONS TO ELECTRONIC SERVICES: A GLOBAL SPECTRUM OF DEFINITIONS, BOUNDARY LINES, AND STRUCTURES (1986); Dorothee Heisenberg & Marie-Helène Fandel, *Projecting EU Regimes Abroad: The EU Data Protection Directive as Global Standard*, in THE EMERGENT GLOBAL INFORMATION POLICY REGIME (Sandra Braman ed., in press).

<sup>30</sup>See Yves Dezalay, *Putting Justice "Into Play" on the Global Market*, 6 TID. FÜR RATTSSOC. 9 (1989).

<sup>31</sup>See Jean-Luc Renaud, *The ITU and Development Assistance*, 11 TELECOMM. POL'Y 179 (1987).

Interdependence also characterizes media policy within the United States. The need to promote the national information infrastructure has been used as an argument in support of federal preemption of state law,<sup>32</sup> but this runs counter to other forces urging decentralization of decision-making.<sup>33</sup> Influence runs from the bottom up as well as the top down, for even decision-making at the local level can have an influence on national policy.<sup>34</sup> Interdependence requires far more consultation, cooperation and even policy coordination in order to avoid intolerable disruptions of national and international economies.<sup>35</sup> It complicates the problem of founding the field of media policy for specific nation-states by adding the requirement that both supra- and infra-national laws and regulations must be taken into account.

### *Policy Precession*

Treatment of policy as a design problem must also take into account interactions among policies. This is the problem of precession—the need to link analysis of several types of decisions in order to understand the implications of their interactions. Precession occurs when two systems interact such that a decision or event in one changes the axis along which decisions or actions in the other can take place. The notion of path dependence suggests precession but does not incorporate sensitivity to the number of precessive steps that may be linked, the degree of complexity precession adds to the analytical problem, or differences in the angles of change. When precessive links are understood by some players but not by others, it is possible to erect barriers to meaningful participation in decision-making on one issue by foreclosing options through filters or actions designed by a related piece of legislation or regulation.

An example is provided by an interaction between patent and anti-trust law: The ability to assert property rights in ways of doing business through patent law combined with the trend towards asserting property rights as early as possible in a processing chain in order to claim ownership of all products of that process<sup>36</sup> means that anti-

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<sup>32</sup>See *Capital Cities v. Crisp*, 467 U.S. 691, 698–704 (1984).

<sup>33</sup>See PAUL TESKE, *AFTER DIVESTITURE* (1990); Eli M. Noam, *Federal and State Roles in Telecommunications*, 36 VAND. L. REV. 949 *passim* (1983).

<sup>34</sup>See ALFRED LEE & TIMOTHY SLOAN, *COMPETITION IN THE LOCAL EXCHANGE TELEPHONE SERVICE MARKET* 1, 45 (1987).

<sup>35</sup>See JOAN SPERO, *THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS* 83 (1981).

<sup>36</sup>See Brian Kahin, *Codification in Context*, in *THE EMERGENT GLOBAL INFORMATION POLICY REGIME* (Sandra Braman ed., 2003).

trust law may no longer be able to reach some pertinent types of anticompetitive practices. Sensitivity to precession further expands the domain of media policy.

### ***Public Policy and Other Decision Making***

Formal policy mechanisms unfold within a broader legal field as understood in the Bourdieian sense.<sup>37</sup> Public policy also interacts with decisions made by private decision makers, often collaboratively through what is referred to as policy networks.<sup>38</sup> There are also purely private sources of decision-making with constitutive impact, informal aspects of decision-making processes that are highly influential but have received relatively little analytical attention, and technological and normative trends with enormous structural force. Decisions made in all of these arenas should be included within the definition of media policy. Some of these non-traditional types of media policy are relatively obscure and may require specialized knowledge in order to be comprehensible, such as those made by technical standards bodies. Others are easier to understand, like the role played by ISPs in determining speech conditions for the Internet. While traditionally the word “policy” has been reserved for public sector decision-making and the word “strategy” for private, the impact of the latter on the former today and the intermingling of the two types of decision-making suggests the definition of media policy may also need to include both.

### ***Issue Based Problems***

Political scientists group together issues related to the same subject into what they term “issue areas.”<sup>39</sup> Compared to traditional issue areas—defense, agriculture and trade—media policy is relatively new and, for digital technologies, very new. Because policy is devel-

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<sup>37</sup>French sociologist Pierre Bourdieu developed the concept of the field as a way of understanding both the context for and the nature of many fundamental social processes and relations. See, e.g., PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* (1994). It is this conceptualization of the field that is relied upon in analysis of transformations of the global legal environment. See Yves Dezalay, *The Big Bang and the Law: The Internationalization and Restructuring of the Legal Field*, 7 *THEORY, CULTURE & SOC'Y* 279 (1990).

<sup>38</sup>COMPARING POLICY NETWORKS (David Marsh ed., 1998).

<sup>39</sup>See William C. Potter, *Issue Area and Foreign Policy Analysis*, 34 *INT'L. ORG.* 405 (1980); Jerel Rosati, *Developing a Systematic Decision Making Framework*, 33 *WORLD POL.* 234 (1981); Martin Sampson, *Policy Coordination and Issue Type*, *ISSUES IN INT'L POL'Y COORDINATION* 83–101 (1982).

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oped in response to perceived characteristics and effects of specific technologies, the fact that neither those characteristics nor their effects are yet fully understood complicates the already difficult definitional problem. Other unique characteristics of media policy include the multiplicity of players and decision-making arenas and the level of impact on other issue areas.

### ***Multiplicity of Players and Decision Making Arenas***

Unusually large numbers of players, types of players and decision-making venues are involved in the making of media policy. In other areas, such as tuna fishing, there is a natural limit to those with a legitimate involvement and few ambiguities regarding responsibilities, information technologies—and thus decision-making about them—are pervasive. As a result, literally dozens of entities—governmental, quasi-non-governmental and private—have a history of some type of involvement and, often, a stake. Within any single branch of government, several different agencies can be involved, often in conflict with each other. In the early 1980s, one study showed that the single issue of electronic funds transfer systems was under examination by at least four different committees of the House of Representatives, none of which had enough authority to deal with all of the technological, financial and regulatory questions raised by the prospect of such a system,<sup>40</sup> and the situation has been exacerbated since. The result is often “policy gridlock,” an inability to make policy at all. It also makes it more difficult for the United States to operate internationally, for others cannot be sure with whom to work or rely upon consistency in the U.S. position. Because of this multiplicity, it is inappropriate and inadequate to use a venue-based approach (that is, “policy made by the FCC”) to defining media policy.

### ***Impact on Other Policy Issue Areas***

Another unique aspect of media policy is the degree to which it influences decision making in other issue areas through constraints on both decision-making processes and the lenses through which issues are viewed. Media policy creates the communicative space within which all public and decision-making discourses takes place; determines the kinds of information that will be available to inform those

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<sup>40</sup>See DALLAS W. SMYTHE, *DEPENDENCY ROAD* i (1981).

discourses; provides the stuff of the institutions within which, and processes through which, decision-making takes place; and offers many of the policy tools used to implement policy decisions directed at other types of social processes. The relative importance of media policy confounds the problem because it adds pressure to the politics of the definitional process discussed. To the degree that those involved with decision making in other issue areas *understand* the importance to what they do, there will be the efforts to subsume media policy within treatment of other issue areas or to define it as something other than media altogether.

### DEFINITIONAL APPROACHES

The effort to keep media policy in sight in an expanding legal field for information and information technologies began several decades ago. A review of the literature reveals a variety of definitional approaches, some implicit and some explicit—by list, legacy legal category, industry, stage of the information production chain, and impact on society. Each has strengths and weaknesses.

#### *By List*

Early efforts to think about media policy in the new environment simply listed areas to be included. In an influential governmental report of the 1980s, for example, Kenneth Leeson included technical knowledge and its diffusion, physical network components and structure, services offered and terms of network use, and regulation of content.<sup>41</sup> Others during the same period included aerospace defense research and development and industrial planning as pertinent to the media as well because they affected the nature of the infrastructure available to the media.<sup>42</sup> This approach has the appeal of being relatively easy, but lists are inevitably incomplete and rapidly obsolete. Because they are not based on a coherent logic, they do not provide a foundation from which policy analysis can be conducted.

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<sup>41</sup>The "Leeson Report" for the Department of Commerce was published in book form. See KENNETH W. LEESON, *INTERNATIONAL COMMUNICATIONS* (1984).

<sup>42</sup>See Vincent Mosco, *Critical Thinking About the Military Information Society: How Star Wars is Working*, in *COMMUNICATION FOR AND AGAINST DEMOCRACY* 37–57 (Marc Raboy & Peter A. Bruck eds., 1989).

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*By Legacy Legal Category*

The legacy approach to defining media policy orients around the categories established by statutory and regulatory law, separately for each technology.<sup>43</sup> There are strengths in this approach: It is familiar; precedent is well developed. The terms of legacy law still govern daily activity and provide the conceptual, rhetorical and analytical frameworks for policy discourse. Many traditional issues are still adequately addressed with legacy law—false advertising is still false advertising, and libel is still libel.

The phrase “legacy law” came into use, however, because inherited legal categories often no longer fit empirical realities.<sup>44</sup> Diverse legal and regulatory systems have developed over time in response to specific technologies, each defining rights and responsibilities differently. The right to editorial control provides an example: It is unlimited in print up to the boundaries determined by constitutional law, constrained in broadcasting and forbidden in telecommunications; in the digital environment the same message could easily travel through all three types of systems as it is produced and delivered, and thus be simultaneously the subject of all three types of regulation. The silo habits of legacy law also impede the ability to directly confront issues that span traditional legal categories, as in the problem of regulating privately owned interfaces with the public communications network. One such interface (the mailbox) is discussed in constitutional law,<sup>45</sup> while another (CPE, or “customer premises equipment,” from the telephone to the computer) is a matter of telecommunications regulation within administrative law.<sup>46</sup> Though the

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<sup>43</sup>See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM passim* (1983).

<sup>44</sup>The phrases “legacy systems” and “legacy technologies” have come into popular use to refer to the problem faced by organizations that find their technological systems are outdated but must continue to be used as new systems are added to complement and/or ultimately replace the older technologies. The phrases “legacy law” and “legacy regulation” have similarly come into use in recent years to refer to the problem faced by legal and regulatory systems that must work with existing, perhaps obsolete, policy in the course of incrementally developing new approaches. In a speech to the Wireless Communication Alliance on June 25, 2001, for example, FCC Commissioner Kathleen Q. Abernathy commented, “[A]s a commissioner I am hopeful that we can reduce legacy legislation. . . .” At 1.

<sup>45</sup>See, e.g., *U.S. Postal Service v. Greenburgh Civic Association*, 453 U.S. 114 (1980).

<sup>46</sup>The Federal Communications Commission has long used the phrase “customer premises equipment” to distinguish the telephone from other portions of the network such as wires to the home, the switching system, and so forth that are treated separately for regulatory and accounting purposes. Myriad documents pertaining to CPE can be found on the agency’s Web site at <http://www.fcc.gov>.

two simply present different faces of the same issue, well-developed discussions in each area of the law never reference or draw upon each other, nor are the outcomes of those discussions necessarily consistent with each other.

### ***By Media Industry***

Because policy issues often arise when they become problematic for the corporate world, there has been experimentation with industry-oriented approaches. Such approaches are appealing because they speak directly to immediate concerns and can form the basis of discussion and operationalization *via* “best practices” within industry-specific contexts such as trade associations. There is, however, no longer any fixed map of industrial sectors, and there is not likely to be one for quite a while, if ever again. An industry-based approach also skews the discourse in favor of profit and efficiency at the cost of values such as equity, human rights and the protection of civil liberties. From an industry perspective, those who make media messages become “producers” and those who “receive” them are “consumers,” rather than “citizens” or active participants in a culture. Focusing on industries also raises the risk that an approach to resolving a problem within one industry may be incompatible with techniques or interpretations used in other sectors.

### ***By Stage of the Information Production Chain***

Models of an information production chain are rife, though not always explicit. Such models may be explicit but are always at least implicit in the minds of media policy makers. They are implicit in constitutional law, for example, as a means of distinguishing among types of communicative spaces for the purposes of differential application of the First Amendment. The Office of Management and Budget (OMB) put forth an explicit example in its model of the “information life cycle” as a conceptual frame for interventions into the statistical practices of federal agencies.<sup>47</sup> Models of such a chain are myriad, but a synthesis of versions put forward by Fritz Machlup<sup>48</sup> and Kenneth Boulding<sup>49</sup> has proven useful in the study of media policy.<sup>50</sup>

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<sup>47</sup>See OMB Circular A-130 (1983).

<sup>48</sup>See FRITZ MACHLUP, *KNOWLEDGE AND KNOWLEDGE PRODUCTION* (1980).

<sup>49</sup>See Kenneth E. Boulding, *The Economics of Knowledge and the Knowledge of Economics*, 56 AM. ECON. REV. 1 (1966).

<sup>50</sup>Examples of the utility of this heuristic include its use in the analysis of constitutional law, international trade agreements and arms control agreements. See San-

This approach includes the stages of information creation (*de novo*, generation and collection), processing (cognitive and algorithmic), storage, transportation, distribution, destruction and seeking. Relations between stages of an information production chain change when new linkages become possible between stages of the chain, as when the Web makes it possible for producers and users of information to become directly linked; when parties at a stage of the chain lose their independent functions, as when the intermediaries between producers and users are no longer necessary; or when relations among parties change in such a way that there is reason for drastic reorganization, as multiple information providers choose to pool their resources.<sup>51</sup> The entire information production chain can be seen as the subject of media policy: There are no messages to send without information creation and processing, information is often transported in the course of gathering inputs into message creation, storage may be combined with distribution (as in books or records), and while it has received less attention than other media policy matters, destruction of the historical record created by the media is an important political issue.

One advantage of defining media policy *via* reference to the information production chain is that doing so provides a meso-level theoretical link between the abstract and the empirical. Another advantage is that it permits exclusion of certain types of information, actors or modes of processing from either specific or all stages of the chain, thus incorporating the sensitivities of those who resist the commoditization of all information.

The model of an information production chain is useful in breaking down complex communicative processes into their elements for differential analysis and legal treatment of those elements. Thus, while interactive and non-interactive, synchronous and asynchronous, and intercast, narrowcast and broadcast communications may all be mixed by users of the Internet, the concept of an information production chain can be of value in determining just how to distinctly apply legal principles. The heuristic utility of the approach has been demonstrated. There are also problems, most importantly the lack of a consensus on ways of distinguishing among different types of information processing beyond the gross distinction suggested above be-

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dra Braman, *Contradictions in Brilliant Eyes*, 47 GAZETTE 177 (1991); Sandra Braman, *Information and Socioeconomic Class in U.S. Constitutional Law*, 39 J. COMM. 163 (1989); Sandra Braman, *Trade and Information Policy*, 12 MEDIA, CULTURE & SOC. 361 (1990).

<sup>51</sup>See BRUCE OWEN & STEVE WILDMAN, VIDEO ECONOMICS 1–24 (1992).

tween algorithmic and cognitive modes. The analytical problem it presents can be complex, for many media processes, phenomena and products involve more than one stage of the chain.

### ***By Impact on Society***

Some advocacy groups and scholars start not from the law, but from the social impact of the law. The Center for Media Education deals with any type of communication policy that affects children (from media violence to software filtering),<sup>52</sup> for example, and the Electronic Privacy Information Center (EPIC) looks at any type of policy that has an impact on personal privacy (from encryption to the USA PATRIOT Act).<sup>53</sup> The value of this approach is that it turns attention away from the minutiae of existing law and regulation and towards the point of the policy-making exercise—building and maintaining the kind of society people want to live in. It offers a way of incorporating the entire range of values that need to be accommodated within the policy-making process. This approach makes it possible to bring the historically disparate medium-specific issues within a common framework, and in turn can enrich analysis of specific problems by bringing to bear upon them pertinent discourse irrespective of originary legal realm. It offers both justification and techniques for finding the best from legacy law, as law, policy and regulation are adapted and transformed to meet today's circumstances. And it encourages the enrichment of policy thinking by theories and empirical knowledge derived from the social sciences and humanities. Often, however—as in much of the discussion about the “digital divide”—concerns are expressed in such general terms that it is difficult to identify specific laws or regulation that might usefully be the subject of attention. Bounding the domain of media policy by social impact also places significant demands on communication theory. Because most who do this start with a single issue of concern, there is no overarching framework within which to relate one issue to another or to serve as a foundation for policy analysis. A theoretical response to this problem is possible, but would be a formidable intellectual task.

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<sup>52</sup>Details of this organization's activities can be found on its Web site at <http://www.cme.org>.

<sup>53</sup>Details of this organization's activities can be found on its Web site at <http://www.epic.org>.

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**DEFINING MEDIA POLICY FOR THE TWENTY-FIRST CENTURY**

With all of this in mind, just what is the broad legal field within which media policy appears? How do we distinguish media law and regulation from other policy dealing with information technologies and the content they carry? To be useful, an approach to bounding the domain of media policy for the twenty-first century must be:

1. *Valid*. It must map onto empirical reality.
2. *Comprehensive*. It must include all matters of concern.
3. *Theoretically Based*. It must rest on a theoretical foundation that can provide a basis for thinking through positions on media policy issues.
4. *Methodologically Operationalizable*. It must use concepts that are susceptible to analysis via social science research methods, in order to facilitate the process of informing policy positions with the results of research and advances in theory.
5. *Translatable*. It must be cast in terms that make it possible to translate new policy principles, tools and specific policies into the language of legacy law in order to enable incremental legal change.

None of the definitional approaches reviewed heretofore meets all of these criteria. Indeed, it may not be possible for a single approach to serve all of the functions that must be fulfilled—developing a theoretical framework for the field, identifying specific media policy issues for attention, analyzing those issues in ways that incorporate the range of pertinent types of social science knowledge, and translating the results of that analysis into the language and genres of the legal system. Extending an approach to defining information for policy-making purposes,<sup>54</sup> an alternative is to accept a multiplicity of definitional faces, each of utility at a different stage of the policy-making process.

***Stage 1: A Broad Vision***

The first step is achieving a broad vision of the field within which media policy questions arise. Doing so is necessary in order to develop a theoretical stance from which to examine issues, place vari-

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<sup>54</sup>See Sandra Braman, *Defining Information: An Approach for Policy-Makers*, 13 TELECOMM. POL'Y. 233 (1989).

ous issues relative to each other and understand interactions among issues. Here, the field of “information policy” is broadly defined as all law and regulation that deals with information creation, processing, flows and use. Use of a model of an information production chain as a heuristic makes it possible to read across the categories of legacy law to determine what falls within the domain of information policy and what does not; its stages include the following.

### ***Information Creation***

Information can be created in three ways: It can be the product of a genuinely original creative act and thus come out of nothingness, so to speak (creation *de novo*); it can be the outcome of systematic procedures for development such as those referred to by the concept of facticity (the facts of journalism) or the methodologies of statistics (data); it can be generated as a byproduct of other life activities and processes, such as when one interacts with an institution (registering for a class or getting a driver’s license, for example) or changes one’s status (getting married, for example). Media policy questions involving information creation include matters of intellectual property rights and access to both information and infrastructure.

### ***Information Processing***

Information processing can be algorithmic (undertaken through procedures describable in mathematical form and thus accomplishable by computers) or cognitive (undertaken through procedures only available to the human brain). Some forms of information processing may be exclusive to one or the other of these categories, while other forms of information processing (alphabetization, for example) can be undertaken either way. There is a plethora of ways of more finely articulating differences among types of information processing, a task of importance across policy-making venues and issues because more subtle distinctions are critical to the interpretation and implementation of the law. The work needed to develop a set of distinctions that can achieve consensual acceptance is therefore a critical item for the research agenda. Media policy issues in this area include restrictions on information that come from defining it as not speech and therefore not covered under the First Amendment (part of the debate over encryption),<sup>55</sup> or as a result of the government’s claim that access to information in the public do-

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<sup>55</sup>The Electronic Privacy Information Center (EPIC) is documenting the history of debate over this issue. See <http://www.epic.org>.

main does not include the right to process that information (a claim made in the *Progressive* case of the 1970s).<sup>56</sup> Information processing also raises antitrust issues, as was seen in the legal challenge to Microsoft's treatment of the relationship between its browser and its operating system.<sup>57</sup>

### ***Information Transportation***

Information transportation takes place when a single message is transported (to one, a few or many). A conversation on the street, a letter or the production of a single documentary would be examples of information transportation. This stage of the chain involves single messages. Restrictions on content or communicative behaviors put in place by ISPs as well as in non-electronic environments, including surveillance, are examples of media policy issues that can arise here.

### ***Information Distribution***

Information distribution is distinguished from transportation because it involves regular transportation of messages over time to either narrowcast or broadcast audiences and often with a commercial aspect. Rather than messages, distribution involves channels. Media policy issues at this stage of the information production chain include trying to ensure a diversity of voices in all facets of the public sphere, access to the distribution network, anonymity and censorship *via* the chilling effect of surveillance.<sup>58</sup>

### ***Information Storage***

Information storage occurs through fixation in a medium and through archival and cultural practices. Storage is important because it enables the communication of ideas across space and across time and because it forms the basis of our social memory. From the media policy perspective, information storage and destruction issues are two sides of the same coin. Laws and regulation that mandate the creation, storage and destruction of public records create the public memory so important as an input into policy making and as a matter

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<sup>56</sup>United States v Progressive, Inc., 467 F.Supp. 990 (W.D. Wis. 1979).

<sup>57</sup>United States v Microsoft Corporation, No. 98-1232 (D.D.C. Feb. 2, 2003).

<sup>58</sup>The American Library Association (ALA) is so concerned about the chilling effect of surveillance on First Amendment rights that it issued a policy on the subject, first crafted in 1973 and revised in 1981. AMERICAN LIBRARY ASSOCIATION, POLICY ON GOVERNMENTAL INTIMIDATION (1981).

of identity. The reliability and security of the information infrastructure are also important.

### ***Information Destruction***

Just as information can be produced essentially *de novo*, unlike matter, it can be utterly lost or destroyed as well. The fragility of digital information, and the ease with which it can be altered, have raised the salience of issues raised by the risk of loss of knowledge and memory as policy issues. Loss of public memory through destruction of public records is the key media policy issue at this stage of the information production chain.

### ***Information Seeking***

Sociologists and psychologists have brought information seeking to our attention as a distinct type of cognitive and social process worthy of attention in its own right. Information seeking has also been examined from an economic perspective, as its costs are of importance when considering research and development budgets, risk analysis and in a number of other arenas. Incorporating sensitivity to cultural, social, personal and cognitive differences in modes of information-seeking into laws and regulations is one possible policy response. Positive support for education in media literacy is another. Surveillance is an issue here since government knowledge of information-seeking practices can have a chilling effect.

### ***Media Policy and the Information Production Chain***

Media activities typically involve at least two and often more of the above stages of the information production chain. These stages may be sequenced in any order in another difference from processing in the material world. Legal rights and responsibilities differ according to stage of the chain, however, as do the political, economic, cultural and social forces and effects of what is undertaken at each stage. Thus use of the information production chain in analysis of a media policy issue must:

1. Distinguish between the different stages of the chain involved;
2. Separately analyze the policy issues involved at each stage of the chain pertinent to a particular media event, content or process; and

3. Link analyses of the issues at each stage together in order to master the effects of interdependence and precession. In summary, then:

*Media policy in its broadest sense is co-extant with the field of information policy, which involves issues that arise at every stage of an information production chain that includes information creation, processing, flows and use.*

### ***Stage 2: Narrowing the Lens***

Though media policy issues can be identified at every stage of the information production chain, not everything within the broad field of information policy involves the traditional media policy concerns with freedom of expression and participatory decision making regarding the fundamental structures of society. To bound media policy in such a way that constitutional concerns remain focal, the question must be asked: What is being mediated? Typically, the media have been understood to mediate between sender and receiver, entities involved in the *process* of mediation. Alternatively, however, the word could be used to refer to the *product* of mediation—the public. Doing so provides a definitional principle for narrowly bounding the domain of media policy and suggests three additional definitional principles as corollaries.

#### ***Definitional Principle: Mediating the Public***

The question of just what it is that is being mediated has not been addressed by media policy analysts in the past because it has been assumed that the answer is obvious: The media are technologies that come in between the sender(s) and receiver(s) of a message. Though this is accurate, it is also trivial, addresses only part of the mediation process and has little analytical utility. Focusing attention instead on the product of mediation, the public, provides a conceptual foundation for analysis of media policy in terms of its constitutional and constitutive functions. The *constitutional* functions of media policy, determined by constitutional law, address the conditions under which the public can actively engage in the production and reproduction of the society in which members of the public live. Within the constraints thus established, the media play the *constitutive* role of structurally shaping society through its facilitation of the constructive roles of the public. Thus:

*Media policy as narrowly defined is that subset of information policy that deals with those technologies, processes and content by which the nature of the public is mediated.*

***Corollary 1: Media in the Public Interest***

Starting from this definitional principle makes it possible to narrow the field of media policy by excluding issues the resolution of which serve *only* economic or other purposes. Patricia Aufderheide has offered a definition of the public interest that may be useful here: It is “discourse about shared problems that require shared solutions.”<sup>59</sup> This suggests a corollary:

*Media policy is that policy which affects public discourse about shared problems that require shared solutions.*

***Corollary 2: Media for All of the Public***

There is a temptation to restrict the domain of media policy to the mass media, those technologies and processes through which a message is transmitted from one point to many points. However, narrowcast communication (from one point to a few points) and “intercast,” or point-to-point communication, are also important to the nature of the public and public discourse and protections for these are also rooted in the Constitution. All three are mixed in the Internet. Thus:

*Media policy is that policy that affects discourse from and to the public and within the public sphere.*

***Corollary 3: Media With Either Direct or Indirect Constitutive Effect***

Some existing media law requires a direct causal relation between a message and its effect, as in the “imminence” requirement of the test put forth in *Brandenburg v. Ohio*<sup>60</sup> test for clear and present danger. The strengthening of constitutional protections for commercial speech because of its ultimate political importance in recent decades demonstrates growing appreciation for the constitutive role of indirect causal relations as well. The lengthening of the causal chain involving media technologies discussed increases the relative propor-

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<sup>59</sup>Patricia Aufderheide, *Tactical Media*, TACTICAL MEDIA: VIRTUAL CASE BOOK (2002), at <http://www.nyu.edu/fas/projects/vcb/>.

<sup>60</sup>395 U.S. 444 (1969).

tion of actions or decisions that may ultimately have an impact on discourse in the public sphere but do not directly do so; technical standards for the information infrastructure provide a vivid example of this. Thus a further corollary is suggested:

*Media policy involves law and regulation of those matters that have either direct or indirect impact on the nature of the public.*

### ***Stage 3: Analysis of Media Policy Issues***

The ultimate analytical criterion for any type of policy must be its constitutional effect. Other types of questions may usefully and appropriately be addressed along the way, involving feasibility, economic consequences, cultural impact and winners and losers. The first and last question in any analysis must, however, be the impact of a decision on the nature of society—its identity, structure, borders and change of society. Social theory, and the results of social science research, have much to offer in response to such questions, though casting legal analysis solely in terms of legal precedent and economics has provided a conceptual barrier to policy use of such theory and data. To frame policy analysis in such a way that social theory and data become desiderata as decision-making inputs, and to ensure that analysis is oriented towards fundamental constitutional goals, then, the definitional face of media policy at the analytical stage must be oriented around society itself:

*Media policy deals with issues that affect the identity, structure, borders and change of the society served by the nation–state.*

### ***Stage 4: Translation of Analysis into Law***

In order to achieve efficacy, the results of society-oriented analyses must finally be translated into the language, and the genres, of legacy law. It is only in this way that theoretically and empirically informed analysis of media policy issues can provide the basis for incremental legal change. One of the biggest intellectual problems faced by those involved in media policy is building bridges between the definitional approaches necessary at different stages of the policy-making process. Doing so, however, is an important element of the definition of media policy:

*In order to be effective, theoretically and empirically based analysis of media policy issues must shift its definitional face so that its conclusions are translated into the language and genres of legacy law.*

## CONCLUSIONS

Identifying media policy issues from the broad array of laws and regulations dealing with information technologies and the content they carry is of import to society at large because of the constitutional and constitutive roles played by the media as well as to many individuals and groups for pragmatic reasons. This essay has explored sources of the problem of defining media policy in an information-intense legal environment and reviewed various definitional approaches for their strengths and weaknesses. In response to both, a multi-faceted approach to defining media policy is offered.

Conceptually, it can be argued that media policy is co-extant with the field of information policy broadly defined as that which applies to all forms of information creation, processing, flows and use. In order to sustain a focus on the fundamental expressive and political concerns that underlie constitutional protections for the media, however, a more narrow approach to bounding the field focuses on those issues which mediate the public itself and public discourse about shared issues of concern. Analysis of such issues should draw upon social theory and the results of empirical research regarding the impact of the media upon the identity, structure, borders and change of society. In order for such analyses to inform policy-making processes, they must in turn be translated into the language and genres of legacy law.