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Cover Page Footnote

Member, Ohio Bar.

LAW, COMMUNICATION, AND SOCIAL CHANGE— A HYPOTHESIS

MARK H. AULTMAN*

I. INTRODUCTION

EQUALITY, neutrality and uniformity are fundamental ideals of the American legal system. The law must be neutral, defining a uniform system of rules and procedures, and applying such standards equally to everyone. These ideals, as well as the social system they serve, seem sorely threatened by recent developments in society.

Black power and black separatism have called into question the ideals of equality and neutrality. It has been argued that in order to correct past injustices, the effects of which are perpetuated in the present, different treatment of different groups before the law is not only permissible but necessary. Campus disorders have called into question the entire notion of peaceful change through legal process. The feeling seems to be that traditional methods of social change are not responsive to present social needs. Sudden increases in the crime rate¹ suggest that the law is becoming increasingly irrelevant to a growing segment of society. The result has been a public outcry against the technicalities of due process by which criminals are allowed to go free for reasons having nothing to do with their crimes. Thus for one reason or another, respect for the legal system seems to have declined in all segments of society.

When faced with such developments, the first reaction is usually to suggest that the legal system needs reinforcement—more judges, more efficient court administration, better police training, more riot prevention and control devices, more lawyers for the poor; in short: more money. Before such investments are made, however, it would be well to stop and consider whether the widespread disrespect for law can be cured by simply reinforcing the basic structure of the legal system so that it can operate more efficiently. Perhaps there are deeper reasons for the disenchantment. It is possible that there has been a shift in the values of the citizenry and that the traditional legal system is not able to accommodate these new values. Some of the recent developments in the field of communications theory may provide at least a hypothesis that such may be the case.

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1. According to the F.B.I., the crime rate (serious crimes per 100,000 population) increased by 71% between 1960 and 1967, the sharpest increase occurring in the latter years—16% in 1967. Federal Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports of the United States 2* (1968). Preliminary reports show a 19% increase in 1968. *Uniform Crime Reporting Release, Table 1* (Dec. 16, 1968).

II. COMMUNICATIONS THEORY

Until recent times, communications theory has confined itself largely to studies of the psychological effects of the content and style of various communications media.² The emphasis has been on the quantitative content, the effects of psychological reinforcement through repetition, and the resultant opinion formed in an individual or group. The process has been viewed from the point of view of communicator—medium—communicatee.³ Then in 1947, Professor Harold Innis, of the University of Toronto, delivered an address entitled "Minerva's Owl" to the Royal Society of Canada, making reference to Hegel's famous dictum "[t]he owl of Minerva takes wing only as the twilight falls."⁴ The theme was that different media of communication, not what is communicated, determine to a large extent the cultural patterns of a civilization, and that the rise and fall of various civilizations can be traced to the intrusion of a different mode of communication upon them. Communication is not a neutral medium. The medium itself imposes its own bias, quite apart from any bias on the part of the parties involved. Furthermore, a pattern of historical change based upon changes in such media can be traced.⁵ Where writing is dominant, *e.g.*, the Roman Empire, law seems to prevail, with the emphasis on space or logic.⁶ Where the oral tradition is dominant, *e.g.*, Homeric Greece, religion seems to prevail, with the emphasis on time or experience.⁷ Thus, changes in the prevailing technology of communication bring changes in the prevailing cultural patterns.

While the ideas contained in the speech and later published in a book entitled *The Bias of Communication* were not completely novel, Innis' mode of reasoning and his method of exposition were, especially to an academic world used to reasoning from carefully documented data. Innis' development was historical, describing broad social interactions. The question it posed hit at the heart of a problem which has concerned thinkers through the ages: if our thoughts are all we have to discover truth, how can we discover if our thoughts themselves are true? Among those impressed by Innis' theory was a professor of English named Herbert Marshall McLuhan. Recently, there has emerged from McLuhan's writings a hypothesis which may explain or help to explain many of the phenomena presently occurring in our society. What follows is an attempt to take some of McLuhan's theories and relate them to the social developments mentioned in the beginning of this article.

2. See, *e.g.*, C. Hovland, I. Janis & H. Kelley, *Communication and Persuasion* (1953).

3. *Id.* at 269.

4. G. Mure, *The Philosophy of Hegel* 183 (G. Mure transl. 1965).

5. H. Innis, *The Bias of Communication* ch. 2 (1951).

6. *Id.* at 46.

7. *Id.* at 105.

III. THE EFFECTS OF MEDIA

Tribal man lived in a world of participation, a kind of "all at oneness." He did not divide the world up into categories, but confronted it as he experienced it.⁸ The ratio between man's various senses is not constant but fluctuates according to how much the particular senses are used.⁹ In tribal man there was much more emphasis on the auditory sense than in modern man. Studies of less civilized tribal societies today show this same relatively more highly developed auditory sense.¹⁰ Writing of whatever sort brings about a greater reliance on the visual sense. The type of writing and especially its closeness to actual lived experience will determine the nature and extent of this reliance. Writing was at first pictorial, closely related to experience. Gradually it was developed to a greater degree of abstraction through the syllabic to the phonetic alphabet. The phonetic alphabet is unique in that the symbols (letters) and most of the sounds (words) to which they correspond are meaningless,¹¹ that is, they have no experiential connection with the reality they interpret. The contrast between the resonating tribal world of kinship and the visual modern world of separate individuals is largely a contrast between media of communication. The former encourages testing the validity of ideas against the totality of experience, while the latter encourages such testing against other ideas. The former imports a feeling of immediacy; the latter, neutrality.

The technological progression of western man's media of communication has been roughly as follows: the tribal world of immediate lived experience, the pictographic alphabet, the syllabic alphabet, the phonetic alphabet, the phonetic alphabet as written and the phonetic alphabet as printed. The tendency has been towards the uniformity, repeatability and separateness of the communicated unit.¹² The phonetic alphabet and print technology have been the makers of the western world. They have permitted western man to break up the multifaceted world of experience into uniform units over which control and change is made easier.¹³ The process has not been one simply of an unchanging man subjecting the physical world to his desires. It is one in which man himself has been changed by what he has accomplished.¹⁴ There has been no lack of theorists to warn western man of the dangers resulting from overspecialization. Studies of the dehumanization, alienation, or computeriza-

8. M. McLuhan, *The Gutenberg Galaxy* 18 (1962) [hereinafter cited as *Galaxy*].

9. *Id.* at 42.

10. *Id.* at 34.

11. *Id.* at 22; M. McLuhan, *Understanding Media* 83 (1964) [hereinafter cited as *Media*].

12. *Media* at 87.

13. *Id.* at 85.

14. *Id.* at 172-73.

tion of mankind abound in current literature.¹⁵ Human values are often seen as being crushed by an unfeeling technological giant which now seems to be developing according to a logic of its own, quite unconcerned with humanity's feelings or values.¹⁶ McLuhan's approach casts the problem in somewhat of a different light. It does not separate man from his technology, viewing technology either as man's faithful servant (the traditional view) or as his Frankenstein's monster (the current view). Instead it views technology as an extension of man.¹⁷ Given this assumption, the next step is to study man's most recent technological adaptations to see what effects, if any, they are having on the visually oriented print culture of the traditional West.

IV. ELECTRONIC TECHNOLOGY—EFFECTS OF NEW MEDIA

The Gutenberg era of print technology has been superseded by the electronic era.¹⁸ Electronic communication is instantaneous. It involves us in what is happening in the world around us¹⁹ without permitting us to step back and place the communicated event in its proper category. It retribalizes us, developing a sense-use ratio much more like that of tribal man than recent western man.²⁰ Other media of communication have been means of extending man's organs: his hands, his ears, his eyes.²¹ Electronic communication is a means of extending the central nervous system itself.²² It involves the total man more immediately in what is being communicated. For instance, television is a medium of low definition.²³ The T.V. image is mosaic.²⁴ It does not discriminate sharply; therefore it involves a greater interplay of all the senses. It is this broader use of the total sensorium, since it more closely approximates actual lived experience, that more directly involves man in what is being communicated.²⁵

One must not make the mistake of confusing the content of the media with the effect of the media, as traditional communication theory has

15. See, e.g., J. Ellul, *The Technological Society* (1964); E. Fromm, *The Sane Society* (1955); D. Riesman, *The Lonely Crowd* (1961). For a more exhaustive listing see *Man Alone: Alienation in Modern Society* (E. & M. Josephson ed. 1962).

16. J. Ellul, *supra* note 15, at 85-94.

17. "It is a persistent theme of this book that all technologies are extensions of our physical and nervous systems to increase power and speed." *Media* at 90. See also *Galaxy* at 5.

18. *Galaxy* at 31, 275.

19. *Media* at 347.

20. *Galaxy* at 45.

21. *Media* at 42.

22. *Id.* at 43, 348-49.

23. *Id.* at 22, 314.

24. *Id.* at 333-34.

25. *Id.* at 334-35.

tended to do.²⁶ The content of a new media, in fact, tends to be the old media.²⁷ Television imagines itself as a newspaper of the air waves, communicating the news but doing it on a broader scale and more instantaneously. The very concept of "news," however, implies a contrast between the established order of the reader's point of view and the new events, the news, happening around him. Television does not permit such an abstraction from the reported event, but demands involvement. The furor over the riots at the 1968 Democratic National Convention in Chicago was a function of the T.V. coverage that involved people in what was happening but did not readily lend itself to taking sides. The demonstrators were obnoxious; the police were brutal. Having a situation seen as it happens is generally ambiguous. Viewers were disturbed about what happened because television involved them but did not permit a neat placing of the event into preconceived categories of the right to dissent or of law and order. The result was an outcry against the media—something must have been wrong with the reporting for the end result to have been so ambiguous. This is not to say that television reporting cannot be consciously biased; it is merely to say that it can more effectively report an ambiguous situation, without taking sides. The content of two media, then, may be much the same; in times in which the shift is being made from one type of dominant media to another, this is usually the case.²⁸ If one studies only the content, however, he misses the real significance of the change—the different ways of thinking and experiencing reality brought about by the new technology.²⁹ The medium is the message.³⁰

The social turmoil in our society, as evidenced in the dissatisfaction of the Negro and certain of our young, may best be understood as a function of the shift from one dominant mode of communication to another.³¹ The lineal visual culture of print is being replaced by the all-inclusive integral culture of electronic communication. Black culture, already more closely akin to tribal culture than the culture of the traditional West, is more readily adaptable to the new electronic culture than is the culture of the majority. Black power and black separatism reflect a mode of conscious awareness which de-emphasizes equality as defined in the abstract, *e.g.*, equal protection of the law, and emphasizes involvement and participation—equality as it is actually experienced. Student dissent is the voice of the T.V. generation come of age. Television has encouraged

26. *Id.* at 19-20.

27. *Id.* at vii, 52.

28. *Id.* at 55.

29. *Id.* at vii, 53.

30. "The Medium is the Message" is the title of the first chapter of *Understanding Media*. See also M. McLuhan & Q. Fiore, *The Medium is the Message* (1967).

31. M. McLuhan & Q. Fiore, *War and Peace in the Global Village* 79 (1968).

a mode of thinking and experiencing reality that demands involvement and participation and which cannot be contented with abstract legalistic explanations of social problems. The T.V. generation is more prone to approach a problem in terms of its truth or falsity as measured against total lived experience and less likely to accept an explanation in terms of categories and relationships to other ideas.³² Their formal education has encouraged thinking from a defined point of view—the aloof examination of data separated from the thinker's experience for purposes of inspection—but their informal education via television has encouraged thinking verified by total experience. The point-of-view thinking encouraged by the old media, when combined with the participatory thinking encouraged by the new media, can result in a combination that is highly volatile.³³

The growing dissatisfaction with the legal system which seems to have suddenly emerged in these two groups is reflected on a larger scale in the crime rate. The gradual increase from 1944 has suddenly begun to rise dramatically. It has been felt for some time that the legal system, as a rule-defining and rule-enforcing system, is not quite relevant to present day social needs. As people begin to think more in terms of actual lived experience and less in terms of abstract rules, such a system appears even more irrelevant. Critics of the penal process who point to the social causes of crime and critics of procedural reform who point out that the technicalities of due process have nothing to do with whether the crime was actually committed are both saying the same thing: even if we admit that rules have been violated, this does not show what will be the most appropriate response for the good of society. Print technology encouraged a legal system which thought in terms of pre-defined rules and procedures and steps to be taken if these are violated. Electronic communication encourages a social system which thinks simply in terms of the most appropriate response to social phenomena.

V. PRINT TECHNOLOGY AND THE PRESUPPOSITIONS OF THE AMERICAN LEGAL SYSTEM

The entire history of western thought may be viewed as the process of overcoming the bias imposed upon the western mind by writing and print technology. Thinkers whose ideas lend themselves to writing tend to have a greater proportionate influence than those whose ideas do not, simply because the former's ideas are more likely to be written down for later generations. Plato is able to dominate later western thought be-

32. For an explanation of the difference between categorical and structural knowledge, or between classified knowledge and pattern recognition, see McLuhan's introduction to H. Innis, *The Bias of Communication* viii (1951) [hereinafter cited as Innis].

33. *Media* at 49.

cause his writings reflect a blending of two cultures over which he forms a bridge.³⁴ Plato lived at a time in Greek culture that marked the transition from the oral Homeric culture to a culture based on writing.³⁵ When Plato so violently objected to "poets" in *The Republic*,³⁶ it was not because he was against cultural improvement, but because poets fostered a way of thinking and experiencing reality that was at odds with the more scientific mode of reasoning that he favored.³⁷ Writing meant that Plato had to visualize his ideas. There was a tendency to make them separately existing realities.³⁸

Later western thinkers were to assert definitely that ideas were entities that exist separately and apart from us.³⁹ Hegel, at the other end of classical western philosophy from Plato, still was subject to the same bias. When we visualize the process of thought, it appears as a dialectical process. That is, we have one thought, a countervailing thought, and a perhaps uneasy synthesis of the two which serves as a basis for the next step in the process. Hegel, however, instead of saying that our thought tends to be dialectical and letting it rest at that as Plato had done, said that reality was a dialectic.⁴⁰ The western habit of writing, whereby our technology forces us to experience our ideas as outside ourselves and separate, still imposed its bias on Hegel. The question of whether ideas are separate is one that emerges from thinking visually or spatially.⁴¹ Western thinkers since Hegel have by and large rejected the notion of the separateness of ideas, but for the most part have remained unaware of the technological reasons which brought about the notion.

Our social and legal institutions were formed at a time when the mind of the West was still subject to the bias imposed by print. The same technology which induces us to look upon our ideas as separate and immutable induces us to think that there can be laws which are neutral and equally applicable to everyone. If one views ideas or laws as outside himself, they may be neutral and equal. If one views ideas or laws as they occur in experience, all neutrality or equality becomes relative. Just as thoughts become relative to the thinker when tested against actual experience, laws when so tested become relative to the subjects involved

34. Innis at 10. Media at vi-vii. See also E. Havelock, Preface to Plato (1963).

35. Innis at 10; E. Havelock, supra note 34, at 291-94.

36. Great Dialogues of Plato 405 (W. Rouse transl., E. Warmington & P. Rouse ed. 1956).

37. E. Havelock, supra note 34, at ch. 1 (Plato on Poetry).

38. Great Dialogues of Plato, supra note 36, at 505-06 (Phaedo).

39. For a general discussion of the tendency see J. Dewey, *The Quest for Certainty* 21-23 (1960).

40. See Hegel Selections 421-22 (J. Loewenberg ed. 1929).

41. "The theory of knowing is modeled after what was supposed to take place in the act of vision." J. Dewey, supra note 39, at 23.

in the legal process. To say that everyone shall pay a tax of \$1,000 per year or be imprisoned is perfectly neutral and equal on the printed page. As soon as it is applied to society, however, it becomes absurd. Any abstract law tested against actual experience, that is, when studied as it is actually to be applied, will reveal the unequal results of uniform treatment. As technological changes induce people to think more in terms of actual experience and less in terms of abstract ideas, the ideal of neutrality and equality loses its hold. It becomes at best an ideal appropriate in some situations and inappropriate in others.

Print technology has imposed its bias not only on social and legal institutions, but also upon the social philosophy upon which those institutions are based. Print technology, by separating the thinker from what is being thought, has brought about science and control of the physical world. Early man did not experience himself as separate from his environment, but as an integral part of it. Gradually he learned to distinguish himself from his environment.⁴² The growth of consciousness is brought about by making distinctions—between one's self and one's environment, and between various aspects of the environment. The distinction between various aspects of the environment is the beginning of its control. The next step is the discovery of its repeatable characteristics. This discovery is made immeasurably easier by the invention of a recording device such as writing, which permits the preservation of at least some form of experience. A written description of a past event allows comparison with a similar event in the present. Writing removes the event being described from lived experience and gives it a more or less arbitrary symbol. The meaning that symbol communicates to a later reader will depend upon his experience and what he associates with that symbol. The more neutral the symbol, the more this problem is obviated. Mathematics is the most neutral symbol; it simply takes the most basic process of consciousness, making a distinction between one thing and another, and applies the principles of absolute neutrality, uniformity and repeatability.⁴³ The processes of writing, printing, mathematics and scientific reasoning have given western man control over the world by permitting him to separate himself from it, to remove a problem from his experience and to put it before himself for visual inspection, relating it to other similarly abstracted ideas to test them for consistency.

By emphasizing the visual, writing as a technology of communication is adapted to control of the external environment. It tends to make one lose sight of the original question of the ends for which the environment

42. A. Hallowell, *Behavioral Evolution and the Emergence of the Self, in Evolution and Anthropology: A Centennial Appraisal* 56-57 (1957).

43. *Galaxy* at 176; *Media* at 110, 113.

is to be controlled.⁴⁴ In a hostile environment, the question of ends is not difficult—immediate survival is inevitably the guiding factor. In a society where the environment has been brought under one kind of control or another or where there are at least the means to do so, the question of ends becomes more crucial. The problem is not so much whether we can control the environment, but whether we can control what we should do with the environment. The problem is a political and legal one involving control of the human world, rather than simply control of the physical environment. Control of the human world, whether it be self-imposed or imposed by another, demands an understanding of our modes of conscious awareness and how they are formed. We are just now beginning to understand this process. The question then becomes how this understanding is to be used, for control self-imposed by a majority or for control imposed by the few who understand the process.⁴⁵

Our social and legal institutions are for the most part ill-equipped to deal with this problem. They were formed in a period of history of western thought in which it was assumed that man was a creature separate and apart from his physical environment, capable of changing that environment to his benefit without being essentially changed himself. The ideal legal system was thus thought to be one which would allow the greatest freedom to individuals in developing that environment, remaining neutral and stepping in only when necessary to settle disputes.

VI. THE DILEMMA

The root assumptions of our legal system are neutrality and equality. Once it is realized that men may be changed by technological advances, the assumption of equality is brought into question. In a democracy, once the assumption of equality is brought into question, the assumption of neutrality must necessarily also be questioned. Once technological change has destroyed the balance of equality, the organizing forces of society cannot remain neutral. Steps must be taken to restore the balance for the benefit of social order as a whole. Thus, western political thought finds itself caught on the horns of a dilemma. Its assumptions of neutrality and equality are being sorely tested by technological developments that are destroying the modes of consciousness upon which these assumptions are based. Increasing understanding of the processes of consciousness raises the possibility that control of society by those who have such understanding may become more effective. Faced with such developments, the natural tendency is to attempt to find ways to stop them. If the clock

44. "Literate rationalistic man had relinquished the power of vision in order to manipulate matter . . ." M. McLuhan & Q. Fiore, *supra* note 31, at 60.

45. The problem is probably most clearly set forth in such novels of social criticism as A. Huxley, *Brave New World* (1960) and G. Orwell, 1984 (1965).

could be turned back to a time when such understanding and control of the processes of consciousness were not possible, the problem could be largely obviated. However, simply because the values on which our social system is based were appropriate at a previous stage of technological development does not mean that we should try to use our current knowledge of technological development to preserve those values. We cannot, for instance, consciously use print technology to inculcate print values in the populace and expect a return to these values. The values were what they were because they were imposed spontaneously by their technology without our knowing it. It would be hypocrisy to use conscious methods of control of other men's minds in the name of equality and freedom. Blissful ignorance is like innocence; one cannot go back to it after it has been lost. It is part of the genius, and part of the tragedy, of the growth of consciousness that it cannot force itself back into a previous stage; it can only learn from it.⁴⁶

On the other hand, it will not do to conclude that, because social and legal institutions are subject to a bias imposed by the technology prevailing at the time of their creation, the institutions must inevitably be replaced by institutions based upon the bias imposed by the latest technology. Rather, a conscious social decision should be made to take advantage of the best in each. Social and legal institutions geared to facilitating control of the physical environment may now have to shift to become institutions geared to facilitating control of the mental environment. Such a shift need not be a rejection of basic western values. To say that men should take conscious control of the processes that control their own consciousness is in fact an affirmation of the most basic of western values, the belief, bordering on the naive, that men through their conscious choices can control their own destiny. Some of the temporary manifestations of this belief, which we now look upon as basic values, will almost undoubtedly be shaken and perhaps will be rejected in the process. This should not deter the questioning of those values to see if they can be adapted to the present social situation. It will be well to remember the words of Holmes: "To have doubted one's own first principles is the mark of a civilized man."⁴⁷ Perhaps the same may be said of an entire civilization.

46. "When philosophy paints its grey monochrome, some shape of life has grown old, and it cannot by this unrelieved grey be made young again, but only known. The owl of Minerva takes wing only as the twilight falls." G. Mure, *The Philosophy of Hegel* 183 (1965).

47. Holmes, *Ideals and Doubts*, 10 *Ill. L. Rev.* 1, 3 (1915).