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# THE BETTER MEANS OF PRESERVING FREE EXPRESSION: THOUGHTS ON VIGILANCE, RESPONSIBILITY, STEWARDSHIP, JOURNALISM EDUCATION, AND THE DEMISE OF VALUE SYSTEMS

*Don E. Tomlinson\**

## I. INTRODUCTION

*The evidence is substantial that the state of the First Amendment is not good. Further, we must be mindful that where attitudes go, action is seldom far behind.<sup>1</sup>*

I believe the goal of everyone attending this symposium is the same: the preservation of free expression; on a *forever* basis, we need just as much of it as we can stand. So, in my view, it is not the goal of the speakers or attendees here that is different; the differences concern approaches to problem solving. As I learned early in my professional journalism career, problem solving begins by recognizing there is a problem. Some here may disagree, but I believe the very fact that we are all present at a major symposium titled *Media Law and Ethics Enter the 21st Century* suggests that indeed there are issues to be discussed. Some who will agree that issues exist might tell you that the problem to be solved is how to ensure the survival of free expression in the new century in the face of an American public which fails miserably to understand the First Amendment—and that, because of this failure, any

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1. Marta W. Aldrich, *First Amendment Center Poll Finds Public Support of Media Still Waning*, HOUS. CHRON., July 5, 1999, at 15A (quoting Paul McMasters, First Amendment ombudsman, First Amendment Center, Vanderbilt University).

"problem" concerning expression lies with the public and not with the media; in other words, the problem lies with the receivers of the messages and not with the transmitters of them. The answer to this "problem," many media law professors say, is to "educate" the public<sup>2</sup> so that the public will be "tolerant and accepting"<sup>3</sup> of the First Amendment.<sup>4</sup>

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2. Public education will not work for a number of reasons, not the least of which is that the would-be "educators" are not interested in education; rather, they are interested, I believe, in indoctrination—in influencing public opinion on the subject. There is a big difference in education and indoctrination. Their view of the First Amendment is absolutist or near absolutist, media apologetic in nature, and an example of political correctness at its worst. This approach demands that the public believe the media are upholding First Amendment values, a view that the public could not more clearly have rejected, as indicated by all the relevant polls of the last decade or so. The unfortunate truth concerning these educators' "education" of the public about the First Amendment in relation to media misbehavior is that, ironically, the educators have a very narrow view of First Amendment values, have little or no interest in a discussion of a more expansive view, and only barely tolerate more responsible views of the First Amendment presented in response by those being "educated." Such "educators" seem to think that if they can just "educate" the public at proper qualitative and quantitative levels, the public will come to "understand." I once worried about such "educational" endeavors, but no more. The public is much smarter than to buy into the influence-peddling approach to education on this (or any other) important issue concerning which their gut reaction is that the "education" makes no sense. The influenceable (in these contexts), I have discovered, mostly *want* to be influenced—and so they are, but they constitute a very small minority of the whole. The polls, I suggest, bear this out.

3. Very ironically to me (unless this argument is being made in the alternative, which itself is ironic), the other approach some educators press is acceptance or tolerance of irresponsibility. This approach to calming the public has even less chance of success than does public education by proselytization, because those who advocate this approach surely must accompany this view with some rational basis for *why* the public simply should be accepting or tolerant of media misbehavior. The problem, of course, is that these "educators" cannot provide the why because, in fact, there is little justification, most of the time, for such misbehavior. What the public would buy, I think, is acceptance or tolerance of *some* media misbehavior as an inevitable consequence of expression itself. Advocating acceptance and/or tolerance of media irresponsibility is fine, of course, but such advocacy bears little or no reasonable relation to actual solutions to the media credibility crisis. The solutions, it seems to me, are vigilance, responsibility, and stewardship—pure and simple.

4. As an educator, obviously I believe in education, but I do not believe in "education by proselytization" for a number of reasons—one of which is that, as indicated, it doesn't work. Earlier in my professional career, I feared it did work, but my fear was misplaced, grossly underestimating, as it did, the ability of students to recognize and deflect proselytization. The lingering downside to proselytization, however, is that, while students don't necessarily buy one-sided views, they don't get to hear as much, if any, discussion from other perspectives. Over the years in my career as a classroom instructor, many students have told me that their response to proselytizing professors was classroom silence; their thought, of course, being that grade anxiety is rampant but that it would be out of control if they openly disagreed with a proselytizing professor.

Prominent media defense attorney Bruce Sanford uses as the title to his recent book the injunction: "Don't shoot the messenger."<sup>5</sup> I was born in Mississippi, lived in Arkansas thirty years and in Texas for fifteen years now and what I've learned is this: "If the messenger needs shootin', fire away!" Please understand that it is not expression itself that needs a comeuppance; just some of the expressors. I call them "expression abusers."

Perhaps arrogantly—or perhaps accurately, given the views of some or most of the other First Amendment speakers at this symposium—I may stand before you today as the public's "default" representative in this discussion. Many persons in the media and many persons who write and philosophize about media free expression would have you believe that there need be no public debate concerning the nature of the First Amendment and free expression—for two reasons: 1) the media have the public's best interests at heart and so the media actually represent the public; and 2) the Framers of the Bill of Rights intended that expression be absolutely free from any sort of government intrusion or sanction; therefore, more irony, there need be no debate on the subject. Alas, however, the media do not represent the public; they

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Some journalism-professor panelists and/or speakers at this symposium expressed to me in a variety of contexts their polite wonderment at my statements concerning having worked on the *plaintiff's* side of some notable libel cases; i.e., how could a journalism school media law professor do such a thing? The simple answer, of course, is that I believe in the tort, and I believe no damage is caused to the First Amendment when "expression abusers" who have engaged in grotesque examples of actual malice are held accountable for their intentional tortious conduct. The more appropriate academic response, however, is that while I believe it is within the right of the professor as concerns academic freedom to be as First Amendment "one view" and as media apologetic in their journalism school media law classrooms as they like, I always have rejected classroom proselytization in favor of the view that *nothing* germane to the subject mater is so sacrosanct that it is beyond discussion and explanation in the classroom. Nothing pleases me more than for a media law student to ask me at the end of the semester to state my political ideology because it wasn't evident from classroom discussion. *Open* classroom discussion involves *real* freedom. So, which "side" am I on? I am on the non-absolutist "let's talk about it" side, and I guess that means I advocate free speech! Which side of free expression are the "one-view" professors on?

5. BRUCE W. SANFORD, *DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US* (1999). If enough people want to shoot the messenger to cause Mr. Sanford to write and thusly title an entire book, the thought comes to mind that there must be a reason the messenger fears being shot. Are the media to blame? Of course not! How could they be? Let's just shift the blame somewhere else and proclaim righteousness. As Morgan Freeman's character in Stephen King's *Shawshank Redemption* told Tim Burton's character when he first arrived in the prison yard, "Ain't nobody in here guilty. Just ask 'em. Everyone one of 'em will tell you 'my lawyer \_\_\_\_\_ed me.'"

never have. They simply cannot. In the context of a highly complex subculture, journalists represent themselves, their colleagues, their own agendas, their corporate bosses, and, to a lesser and lesser extent, the public. It is considerably more than a mild understatement to note that the media's view of free expression differs significantly from the public's view. It seems quite clear that the media are contemptuous of the public's view and that the public is contemptuous of the media.

Concerning "absolute" free expression, there is no evidence I find meaningful, instructive, or conclusive—either historical or modern—that the Framers of the Constitution and the Bill of Rights, the Congress, or any more than possibly one member of the United States Supreme Court in its entire history have believed in "absolute" free expression. In fact, there is considerable evidence to the contrary. I could cite the Sedition Act<sup>6</sup> of the late eighteenth century as an example of the idea that Congress did not view free expression as absolute, but I won't. Instead, I will cite a United States Supreme Court case from the late nineteenth century, a century in which there was virtually no Supreme Court discussion of the expression clauses of the First Amendment. Some might argue that the lack of discussion was because the Supreme Court understood—as a matter of course—that expression was intended by the Framers to be absolutely free and that, consequently, no discussion was needed. On the contrary, I think it is much fairer to argue, first, that expression issues simply didn't reach the Court much in the nineteenth century—hence, little discussion—and second, that when the issue of "absolute" free expression did reach the Court, the Court dismissed the idea with unequivocal language and great ease, suggesting strongly to me that the Court always had understood—as a matter of course—that expression was not meant to be—in fact, could not be—absolutely free. In this connection, I quote to you from *Robertson v. Baldwin*,<sup>7</sup> an 1897 Supreme Court opinion in a First Amendment case:

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply

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6. This statutory enactment, clearly a prior restraint on expression, expired before it was judicially challenged. While we, of course, do not know for sure what the Supreme Court of the time would have said about it, in *New York Times v. Sullivan*, Justice Brennan wrote: "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

7. 165 U.S. 275 (1897).

to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press . . . does not permit the publication of libels . . . or other publications injurious to . . . private reputation.<sup>8</sup>

The argument that any discussion of anything concerning media misbehavior and its effect on free expression is a veiled means of “doing away” with this cherished and essential freedom is as wrongheaded as is the use of this rhetorical device in the context of, say, welfare reform. Depending on the ideology of the would-be reformer, welfare reform often is characterized as a veiled means of eliminating government transfer payments altogether in favor of a “survival of the economically fittest” point of view. When used, this rhetorical device is but another example of political lying that does nothing to advance the debate on how best to assist the economically dependent in moving into the economic mainstream.

It is my view that the First Amendment should guarantee free expression to the following extent (which also is how I believe the expression clauses, as a unit, more or less now “read,” taking into account their interpretation by the United States Supreme Court in the twentieth century):

Neither the federal nor state governments nor any political subdivision thereof shall make any law, by legislative enactment, administrative rule or regulation, executive order, judicial ruling, or by any other method of governance, now known or later developed, which directly, indirectly, or effectively restrains expression, actual or symbolic, absent a compelling governmental interest in so doing.

Let it not be said, then, that I am “against” the First Amendment or free expression. In fact, because I believe my approach to its long-term preservation is *by far* the better idea, I believe I am an infinitely more reasonable advocate of free expression and its preservation than those who would tell you that what we must do to preserve free expression is educate ignorant Americans as to why lacing with arsenic the castor oil the public must ingest each day is a good thing.<sup>9</sup> The public, I think,

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8. *Id.* at 281.

9. One person present at the symposium approached me after this speech to tell

understands the castor oil; it's the arsenic that is indigestible—and life threatening. I think it is wise to remember that what is "giveth" can be "taketh" away—or, of course, limited. One simple lesson learned from our early twentieth century experience with "prohibition" is that the Eighteenth Amendment was repealed by the Twenty First Amendment.

It is my deepest belief that the American public is not "against" free expression as it currently exists in our legal system. It also is my deepest belief that the American public is becoming increasingly frustrated with that group most prominently entrusted with this basic freedom—the media.<sup>10</sup> To the extent the media argue that free expression is the right of all our citizens and not just the media—as meaning somehow that the media themselves are not at once our principal expressors and our principal problem—the argument is specious, in my view, and will draw no discussion from me. If First Amendment freedoms are ever severely limited or restricted, by or at the demand of the American public, it will be because the public had become too frustrated with the arsenic-laced exercise of these freedoms by the media—not by individual expressors or by expressors in general.

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me that s/he enjoyed my speech but that, unlike me, s/he was a First Amendment advocate, i.e., anyone not agreeing with her/his view of the First Amendment (that, e.g., media self-imposed responsibility simply is not a First Amendment value) cannot be a First Amendment advocate. It is this fuzzy, "one view," no-responsibility thesis concerning the First Amendment that is so mind-bogglingly irrational to the American public. One member of the public, a symposium-attending lawyer, told the assembled symposium speakers that so long as the media and their apologists held the "elitist" view that responsibility plays no role in free expression, they should become accustomed to the public's poor view of the media, never expecting it to change for the better.

It is incredible to me that anyone could listen to or read my remarks here and believe that I am an advocate of government regulation of the media. Never have I stated such a proposition; never have I harbored such an idea. Clearly, I am not a First Amendment absolutist and neither am I a media apologist. I believe that the First Amendment should be invaded *only* when the government's interest in so doing is *compelling*, a concept which has found considerable acceptance in constitutional law. For example, I have argued that the government would have a compelling interest in enacting a total ban on advertising from outer space. See Don E. Tomlinson & Rob L. Wiley, *Advertising from Outer Space: People Do Read Large Ads*, 47 FED. COMM. L.J. 535 (1995). My co-author disagreed, arguing that a total ban was wrong but that some regulation might be justified. It is not government regulation of the media I am after. I simply want the media to act more responsibly toward the First Amendment so that the public will not at some point be compelled to limit it or revoke it altogether and replace it with language specifically requiring responsibility.

10. See Cynthia Peterman, *Freedoms Being Eroded*, Hous. Chron., May 1, 2000, at 21A (letter to the editor) ("Statesmanship has given way to wily politicians, polls and a media which have lost all sense of accuracy, decency and objectivity. . . . Can't America see that our freedoms are slowly being eroded?")

Unfortunately, I believe it is safe to say that the public does not much like the media and that the media do not much care what the public thinks.

## II. THE PUBLIC'S VIEW OF THE MEDIA

*[T]he news media [are] in deep trouble with the American public.*<sup>11</sup>

The public's non-anecdotal view of the media mainly is embodied in the results of polls taken by various organizations at various times. The trend is that, with virtually each poll taken since about 1985, the media are in worse and worse trouble with the public.<sup>12</sup> At least two such polls were reported in 1999. In July 1999, the results of a survey sponsored by the First Amendment Center at Vanderbilt University were released. In that poll, 53% of those questioned said they believed the media have too much freedom, an increase of 15% since 1997.<sup>13</sup> Down from 80% in the 1997 survey, only 65% in the 1999 survey said newspapers should be able to publish freely without government approval of a story.<sup>14</sup> The survey also reported that a majority of the American public believed the media should not be allowed to endorse or criticize political candidates, use hidden cameras for newsgathering purposes, or publish government secrets.<sup>15</sup>

A poll of Texans reported in November, 1999, was notable regarding two specific true/false questions in the poll.<sup>16</sup> The first statement was: "There are times when the press should not be allowed to publish or broadcast certain things." The second statement was: "Freedom of the press should be protected under all circumstances." Mirroring the reported sentiments of the nation-at-large, 54% of Texans, in response to the first statement, said freedom of the press should be restricted, and only 38% of Texans, in response to the second statement, said freedom of the press should be protected.<sup>17</sup>

To me, these two poll questions are perfect examples of the disconnect that is one cause of journalists' reacting so apoplectically to

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11. Aldrich, *supra* note 1, at 15A (quoting Paul McMasters, First Amendment ombudsman, First Amendment Center, Vanderbilt University).

12. See SANFORD, *supra* note 5, at 20.

13. See Aldrich, *supra* note 1, at 15A.

14. See *id.*

15. See *id.*

16. See Clay Robison, *Intensified Attacks on Free Press Disturbing*, HOUS. CHRON., Nov. 28, 1999, at 2C.

17. See *id.*



such poll results. The first question, which asks whether the respondents believed there should be exceptions to absolute free expression, is not too badly worded and reflects only the truth that expression is not—cannot be—absolutely free. The second question, however, is wretchedly framed because it asks, flat out, whether the respondents believe in absolute free expression. That only 38 percent of Texans indicated their belief in absolute free expression indicates, to me, only that the other 62 percent of Texans are frustrated with the media and not that they believe in an authoritarian media system. Such a view is silly; unfortunately, it is perpetuated by question designers who should not be question designers and by journalists who respond to the results of such bad question-asking with greater and greater degrees of animosity. Among a reporter's primary duties is interviewing; that is, question-asking—question-designing, if you will. So why cannot journalists commenting on poll results recognize the disconnect and take to task the question designers rather than simply defaulting to the idea that the American public is stupid?

Some anecdotal evidence concerning the public's view of the media is worth mentioning, especially when it issues from a former journalist or someone with more than a consumer's connection to journalism. Such is the case with Christopher H. Pyle, who teaches constitutional law at Mount Holyoke College and who, importantly in this context, is the author of a controversial book which investigated and detailed how the military surveils (or at least surveilled) civilian politics in the 1970s and 1980s.<sup>18</sup> Mr. Pyle believes the media are impairing their own ability to engage in meaningful investigative journalism, such as the Ida Tarbell/Upton Sinclair muckraking-type which occurred around the turn of the twentieth century and the Watergate investigative-type of Bob Woodward and Carl Bernstein in the early 1970s.<sup>19</sup> Mr. Pyle wrote:

During both of those periods, it was possible to think of the press as playing an important role in the constitutional system of checks and balances—a role worthy of First Amendment protection. No longer. The irresponsibility and mean-spirited triviality of “gotcha” journalism in the 1990's has eroded confidence in the press . . . . If [“]gotcha[”] journalism advanced debate over important issues, it might be excusable. But it doesn't promote civic discourse; it strives only to

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18. See Christopher H. Pyle, *Irresponsible Journalists Are Jeopardizing Serious Investigations by the Press*, THE CHRON. OF HIGHER EDUC., Jan. 7, 2000, at B9-B10.

19. See *id.* at B9.

expose the private indiscretions of public persons to snickering commentary.<sup>20</sup>

Clearly, the public has little respect for the media, and the situation is worsening with each poll and with each new highly critical article from a formerly journalism-friendly person.

### III. THE FEDERAL JUDICIARY'S VIEW OF THE MEDIA

Though she quite likely would not recall what I am about to share with you, I had the pleasure of being a classmate of United States District Judge Susan Webber Wright of the Eastern District of Arkansas—then Susan Webber—at the University of Arkansas School of Law in Fayetteville in 1974-75 when she was a senior and I was but a lowly freshman. The next year, I transferred to the UALR School of Law, and Susan Webber went east to spend a year earning an LL.M. In the third year of this short saga, my senior year, I had the further pleasure of being taught Agency and Partnership by her after she joined the faculty of the UALR Law School.<sup>21</sup>

As we all know or should know, Judge Wright presided over *Jones v. Ferguson, et al.*,<sup>22</sup> the *et al.*, of course, being William Jefferson Clinton of Arkansas, the sitting President of the United States. Among other notable rulings in the matter, Judge Wright was compelled to deal with the desire by the media to unseal discovery evidence previously sealed by her.<sup>23</sup> The original Confidentiality Order concerning discovery evidence was entered by Judge Wright when she found herself “[f]aced with intense and often inaccurate media coverage of virtually every aspect of this civil case.”<sup>24</sup> My purpose here is not to discuss the arguments concerning unsealing the information nor her ultimate ruling.<sup>25</sup> My purpose is to share with you from her ruling her obvious

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20. *Id.* at B9-B10.

21. I seem to recall my grade in her course, but I do not think I will share that bit of information with you. I might also add here that I had a course at UALR that same year taught by the now just recently retired Dr. Robert Wright, who became Susan Webber's husband during the time both were members of the faculty. The course was Land Use. What I remember from that course was the extent to which the difficulty level rose when the professor wrote the casebook (and when he had a pure doctorate in law).

22. 12 F. Supp. 2d 931 (E.D. Ark. 1998).

23. *See id.* at 932.

24. *Id.*

25. She ruled that parts of the discovery evidence should be unsealed and that other parts should remain sealed. *See id.* at 935.

disdain for the media in the circumstance. In his book *Don't Shoot The Messenger*, Bruce Sanford called her language "seeth[ing] with contempt for the [media]."<sup>26</sup> She wrote:

Many in the media have shown no restraint in their willingness to place [highly] personal information in the public domain despite the pain it may cause. Driven by profit and intense competition, gossip, speculation, and innuendo have replaced legitimate sources and attribution as the tools of the trade for many of these media representatives. Stories are apparently no longer subjected to critical examination prior to being printed. Indeed, the printing of a story in one publication is itself now considered newsworthy and justification for its reprinting in other publications, without critical examination for accuracy and bias. Thus, stories without attribution and based on gossip, speculation, and innuendo fly through media outlets with blinding speed only later to be placed in context or subjected to clarification and/or retraction, as the case may be.<sup>27</sup>

Another recent district court opinion also found the court railing at media conduct. The opinion was written by United States District Judge Walter Smith of the Western District of Texas, Waco Division, in his denial of a motion for summary judgment by media defendants in what amounted to wrongful death and personal injury actions brought by survivors of federal agents killed in the Branch Davidian siege and by some of the injured but surviving federal agents.<sup>28</sup> The suits, later settled,<sup>29</sup> were based on the idea that various media members and others acted irresponsibly when they, in effect, revealed to the Branch Davidians that the raid was imminent, thus allowing David Koresh and his followers the opportunity to prepare for the erstwhile secret invasion, proximately causing the deaths of several federal agents and the injuries of several other federal agents.<sup>30</sup>

Judge Smith was without apology in his view of the situation.

Clearly, demanding that the press act *responsibly* in such a unique situation will not "chill" first amendment rights, no more so than demanding that any individual citizen act responsibly. Nor will it interfere with normal, run-of-the-mill press investigations. . . .

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26. SANFORD, *supra* note 5, at 9.

27. *See Jones*, 12 F. Supp. 2d at 934-35.

28. *See Risenhoover v. England*, 936 F. Supp. 392, 392-403 (W.D. Tex. 1996).

29. *Waco Raid Lawsuit Is Settled*, NEW ORLEANS TIMES-PICAYUNE, Oct. 23, 1996, at A5. Several of the ATF agents who died or were injured made their homes in New Orleans.

30. *See Risenhoover*, 936 F. Supp. at 392-403.

[C]ommon sense would dictate that a reporter on the scene would do everything possible to avoid detection when covering what is known to be a secret law enforcement operation. Instead, the media arrogantly descended on the Compound as if the First Amendment cloaked them with immunity from acting as reasonable individuals under the circumstances. Their actions are particularly egregious when considered in light of the fact that they knew how dangerous Koresh and his followers were.<sup>31</sup>

The two cases quoted from above certainly are not typical cases, and by no means do I purport to suggest that Judge Wright's and Judge Smith's view of the media in those circumstances is necessarily typical of their views or of the federal judiciary's view of the media, but I do find their comments instructive because of their belief that the media has an obligation to act responsibly.

With respect to the United States Supreme Court, the "responsibility" idea was discussed in *Gertz v. Robert Welch, Inc.*,<sup>32</sup> a 1974 case in which the Court delineated the difference between the standard of care, in the context of libel, owed by the media to private persons as opposed to public persons.<sup>33</sup> The Court clearly indicated in *Gertz* that the media do not possess—and could not possess—an indefeasible right to engage in libel in every circumstance, because to grant such a right would be to deny the responsibility that all Americans have to "ordered liberty."<sup>34</sup>

The need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose [because] the individual's right to the protection of his own good name "reflects no more than our basic concept of the

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31. *Id.* at 408-409 (emphasis supplied).

32. 418 U.S. 323 (1974).

33. *See id.* at 347.

34. *Id.* at 341.

essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”<sup>35</sup>

#### IV. THE MEDIA'S VIEW OF THE MEDIA

*We in the media wring our hands over [the steady and substantial decrease in what the American public thinks of the media], but [we] often seem curiously disinclined to connect [the public's attitude toward the media] with any actions of our own.*<sup>36</sup>

Often, in my view, the media commit the offenses and then blame dissatisfaction with the media on the public's inability to comprehend the First Amendment. There are at least a few members of the media, however, who seem to understand where the blame mostly lies. One of them is Geneva Overholser of the *Washington Post*. She fears that “growing public dissatisfaction seems to be moving beyond an economic response toward a legal one.”<sup>37</sup> To indicate her understanding of this phenomenon, she cited the Clinton-Lewinsky scandal. “Those most involved in covering the scandal,” she wrote, “largely continue to think of it as a great journalistic moment. . . . But unfairness and imbalance, insufficient sourcing, meanness in tone and spirit and hugely disproportionate play loom much larger.”<sup>38</sup>

Overholser favorably quotes Paul McMasters, First Amendment ombudsman at the First Amendment Center at Vanderbilt University, on the public's view of the media.

A variety of studies, surveys, and focus groups document a real resentment of the press and its practices among Americans, who characterize the news media as arrogant, inaccurate, superficial, sensational, biased and bent. Worse, they apparently believe that the press is part of the problem rather than part of the solution.<sup>39</sup>

The media, Overholser notes, is supposed to have a tough hide when criticized because the larger issue is the free flow of information; having a tough hide, however, provides no excuse for ignoring criticism

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35. *Id.*

36. Geneva Overholser, *Media Distrust: Americans Express a Growing Dissatisfaction with Press*, DALLAS MORNING NEWS, Aug. 29, 1999, at 51.

37. *Id.*

38. *Id.*

39. *Id.*

and engaging in "shabby behavior."<sup>40</sup> The shabby behavior should stop, she writes, and a "nurturing" process should begin.<sup>41</sup>

[T]oo often these days, we just look as if we're ignoring criticism in order to go on behaving shabbily. The result is erosion of the support that makes freedom of the press possible. The public makes a simple bargain with the press. As long as you nurture rather than undermine democracy, we will back you. Individually or collectively, we have to uphold our end.<sup>42</sup>

In a speech in March 2000, at Notre Dame, ABC's Ted Koppel discussed responsibility and stewardship in journalism. He said:

[T]he community of journalists has a greater obligation than ever before to lead by example. Information [disseminated] on all the media is now so voluminous that it tends toward the chaotic. . . . Traditional journalism requires a sorting out of good information from bad; of the important from the trivial. That sort of commitment and expertise may be out of fashion, but the need for it is greater than ever before. . . . [N]ever publish or broadcast a story before you are comfortable with its accuracy. Remember that some things seem important and other things are important. . . . Establish a set of guiding principles for yourselves [and] stick to them. Emphasize honesty, fairness, decency.<sup>43</sup>

Journalism professors may not be a part of the media, but most of them once were, and some of them, too, are beginning to wonder how to teach students about journalism in the face of the journalism of today. One such professor, after citing a litany of media indiscretion, wrote: "[I]t's little wonder that opinion polls report that a majority of Americans seriously mistrust the news media, feel that reporters regularly distort the news and care more about attaining fame and celebrity than reporting accurately, and rank journalists with lawyers as among the least-respected professionals in our society."<sup>44</sup>

David Broder, symposium keynote speaker and nationally syndicated columnist, said in his address that the next generation of

40. *Id.*

41. See Overholser, *supra* note 36, at B6.

42. *Id.*

43. Ted Koppel, *Journalism: It's As Easy As ABC*, The Red Smith Lecture in Journalism, University of Notre Dame (Mar. 2000).

44. Neil Henry, *Journalism Education: A Lost Cause?*, THE CHRON. OF HIGHER EDUC., Sept. 25, 1998, at B8. Mr. Henry was at the time of the publication of the referenced article an acting associate professor of journalism at the Graduate School of Journalism at the University of California at Berkeley.

journalists would do well to remember a mantra tacked to the wall of the legendary Chicago-based *City News* wire bureau, which read: "If your mother says she loves you, check it."<sup>45</sup> Broder also said: "A lot of that caution and skepticism that was ingrained in generations of journalists who were trained that way is, I think, frankly missing today. And among other things, that lack of training shows in the lack of caution about judgments that are being made constantly in the new media."<sup>46</sup>

Once in awhile, it is the case that a journalist—more irony—is himself or herself the "victim" of a libelous publication and ends up suing. Such is the case of Mike Snyder, a Fort Worth, Texas, veteran television news anchor who was (very probably) libeled in—of all things—a book on media ethics.<sup>47</sup> The book, *Doing Ethics in Journalism*, was published jointly by the Society of Professional Journalists and the Poynter Institute for Media Studies.<sup>48</sup> Its authors were noted media ethicists Jay Black, Ralph Barney, and Bob Steele.<sup>49</sup> In the book, Snyder was accused of making numerous campaign appearances with then-Texas gubernatorial candidate George W. Bush, acting as master of ceremonies.<sup>50</sup> The book also stated that Snyder had said in interviews concerning the Bush situation that he thought he should be able to do as he pleased with his time off.<sup>51</sup>

The truth: 1) his single transgression was that he once attended a Republican Women's picnic at which candidate Bush made an appearance (Snyder later apologized and was suspended for two weeks without pay); 2) he was interviewed by no one concerning that incident, either at the time or by the book's authors or researchers; 3) he never acted as emcee or introduced Mr. Bush anywhere; 4) he was neither a campaign volunteer nor a paid staffer.<sup>52</sup> Naturally, Snyder was upset, so he inquired of the book's authors as to where the information came from.<sup>53</sup> The authors' reply was that their researcher remembered gathering information from media sources but that five years later no such documentation could be located.<sup>54</sup> Snyder then asked the two organiza-

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45. David Broder, *The New World of News Media*, 23 U. ARK. LITTLE ROCK L. REV. 25, 29 (2000).

46. *Id.*

47. See Michelle Malkin, *TV News Anchor Learns How Ethics Isn't Done*, HOUS. CHRON., April 30, 2000, at 3C.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See Malkin, supra* note 47.

53. *See id.*

54. *See id.*

tions and the three authors to “correct the public record.”<sup>55</sup> After months of getting nowhere, Snyder filed a libel action.<sup>56</sup> He said: “They should have done what was right from the beginning, when they knew what they did was wrong.”<sup>57</sup> Journalists as libel plaintiffs—a strange notion indeed! I suppose it reflects the adage that all is well until *your* ox has been gored.

Several years ago, two dozen or so “leading” journalists formed an organization called the Committee of Concerned Journalists and wrote a “Statement of Concern.”<sup>58</sup> The following are excerpts from the statement:

Revolutionary changes in technology, in our economic structure and in our relationship with the public, are pulling journalism from its traditional moorings. As audiences fragment and our companies diversify, there is a growing debate within news organizations about our responsibilities as businesses and our responsibilities as journalists. Many journalists feel a sense of lost purpose. There is even doubt about the meaning of news, doubt evident when serious journalistic organizations drift toward opinion, infotainment and sensation out of balance with news. . . . Journalists share responsibility for the uncertainty. Our values and professional standards are often vaguely expressed and inconsistently honored. . . . Change is necessary.<sup>59</sup>

#### V. THE MEDIA'S VIEW OF THE PUBLIC

Just as surely as the inevitability of death and taxes, the media waste no time in responding to the polls that show their approval rating to be several orders of magnitude lower than that of my other profession—lawyering. Earlier in my professional life, the typical media response to such poll results was that the First Amendment is really important and that a better job should be done by the media in explaining why free expression is good and government prior restraint is bad. Sometimes, and to some extent, this is still the case. In its July 7, 1999, editions, the *Houston Chronicle* editorialized, after reporting poll results it didn't like, that:

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55. *Id.*

56. *See id.*

57. *Id.* (quoting Mike Snyder).

58. Committee of Concerned Journalists, *Statement of Concern* (visited Apr. 16, 2000) <[www.journalism.org/statement.html](http://www.journalism.org/statement.html)>.

59. *Id.*



The poll does seem to make clear that too few Americans have even a working knowledge of the First Amendment. Forty-nine percent of those surveyed could not name a single freedom . . . guaranteed under the amendment. It stands to reason that those who do not understand the First Amendment would be less protective of its ideals. . . . These results should prompt all those who love this country to redouble their efforts against attempts to chip away at individual liberties.<sup>60</sup>

The only hint that the problem is "media misbehavior" is evidenced in a question asked by the paper's editorial board in the editorial itself. "Does the survey show that people are dissatisfied with the quality of news reporting or that they simply believe movies are too violent and daytime television is out of control?"<sup>61</sup> I call that blame-shifting at the highest level imaginable.<sup>62</sup> But even a well-bartended recipe of public

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60. *Too Free? Poll Should Prompt Lovers of Freedom to Redouble Efforts*, HOUS. CHRON., July 7, 1999, at 20A. I wish such editorialists would be more truthful about "individual liberties" as related to the First Amendment. What they mostly are interested in, I think, is the "institutional" liberty they enjoy in the name of individual liberty. And while the American public at large may not be able to state with much accuracy the components of the First Amendment, the thinking (voting) public nonetheless has an instinctive view, in my opinion, of right and wrong in the context of media freedom and responsibility. The media's "we are free and not responsible" view of the First Amendment leaves the public with but a dichotomous choice—accept or reject the proposition. I fear that the public is on its way to rejection if its only choice is a digital on-off one. The media's seeming fear that self-imposed responsibility would lead to gross government regulation of the media reflects to me that the thinking public has a better sense of the values inherent in the First Amendment than the media do. The media, as one symposium attendee noted, constitute the single institution in American society that has no or virtually no legal accountability. Their accompanying refusal to self-impose any real form of accountability is not rational to the thinking public; rather, it is elitist, arrogant, condescending, unappreciated, unwanted and wrong! Apparently, it is the media who require education—not the public.

61. *Id.*

62. "Blame-shifting" is not just by and from the news media and directed toward the entertainment industry. It also occurs within the news media. For example, Clay Robison, Austin bureau chief of the *Houston Chronicle*, wrote in a November 28, 1999, column that "every time [he saw] another public opinion survey doubting the wisdom of allowing free expression by the media, [his] skin thin[ned] a bit." Robison, *supra* note 16, at 2C. The news media, he wrote, "are guilty of mistakes, misjudgments and excesses that damage our own credibility," but that as between the print media and the electronic media, the real problem lay with the electronic side of things. *Id.* Robison continued:

[I]t may be helpful for pollsters to try to distinguish between the public's opinions of the print and the electronic media. There may not be a wide difference in public perception between the two, but there often are significant differences between how newspapers and most television or radio stations and networks report and present stories. . . . [M]istakes that occur in

education with a twist of blame-shifting apparently was not enough for one member of the *Chronicle's* editorial board. About two weeks later, in the July 19 editions of the *Chronicle*, associate editor and editorial board member Frank Michel, referring to the same poll results, said: "No way to sugarcoat this: [What the American public thinks] is dumb and downright horrifying."<sup>63</sup>

My favorite recent outcry was authored by James Lileks, a journalist who writes about politics and culture for Newhouse News Service. The following are excerpts from his article on this subject published on the MSNBC website in July 1999.<sup>64</sup> It was titled: *This Just In: People Are Dumb*.<sup>65</sup> The subhead read: "A new poll says a majority of Americans believe the news media abuse the First Amendment."<sup>66</sup> Lileks wrote:

Polls, we know, can be made to say anything. Their results usually have a remarkable resemblance to the views of the organization that asked the questions. . . . [E]very so often, [though,] you read a poll that confirms your deep suspicions: People are stupid. Achingly, painfully dim, dense as a neutron star shoved into a bus-station locker. Either that, or poll-takers survey only farm animals and 3-year-olds. . . . Consider a recent poll on the Bill of Rights that[,] lo, a majority of Americans believe the news media abuse the First Amendment, and 35 percent of Americans believe media should not be able to publish a story without government approval. Winch your chin up off your sternum, and let us repeat: Nearly four out of ten citizens believe that this Web site shouldn't publish unless the government smiles on every sentence. You want to ask these dunces how the government should approve stories. . . . It gets better. The survey found [that] a majority of the lowing herd believes the press shouldn't criticize political candidates or spill government secrets.<sup>67</sup>

When I read reactionary, intemperate remarks like these, I have a deep-seated desire, because of my upbringing by great parents—and in

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both print and electronic media . . . are magnified by 24-hour television news coverage, which encourages correspondents involved in live coverage of a disaster or political controversy to hurriedly broadcast the latest rumor around the country, often without a shred of substantiation.

*Id.*

63. Frank Michel, *Just Title It "Dog Bites First Amendment"*, HOUS. CHRON., July 19, 1999, at 20A.

64. See James Lileks, *This Just In: People Are Dumb* (visited July 12, 1999) <[www.msnbc.com/news/287272](http://www.msnbc.com/news/287272)>.

65. *Id.*

66. *Id.*

67. *Id.*

the fine community of Little Rock, I might add—to believe that such remarks were made tongue-in-cheek, that he could not possibly be serious. Re-readings of this diatribe, however, reluctantly cause me to conclude that Mr. Lileks does not have his tongue in his cheek; no, it seems firmly in his mouth. I agree with him on one subject, however: polls conducted by organizations with agendas (such as those possessed by some journalists and media organizations) “can be made to say anything.”<sup>68</sup> Mostly, though, from my experience with polls that reach seemingly fantastic results, the pollsters are not corrupt; instead, they simply are inept at survey-question design. When their ill-framed questions touch a nerve, the result, as in polls concerning the public’s view of the media and free expression, is statistics which make it appear to folks such as Mr. Lileks that the public wants “pinch-lipped censor[s] in every newsroom, seated on a raised platform heaped with tribute, peering with soulless eyes over every line, every cartoon, every story about a city council meeting.”<sup>69</sup>

In truth, the public wants nothing of the sort; the public is simply frustrated—frustrated with the arsenic sneaked into the castor oil, with the media telling us all the while that this concoction is good for us and that we should not complain because we are far too stupid to know what is good for us, anyway. The public does not want the repeal—or even a tightening—of the law of free expression, nor does it want a government censor in any newsroom. What the public wants is for the media to use a little common sense, to be less concerned with their rights—what they *can* do—and more concerned with ideas such as fairness; in other words, what they *should* do. The arrogance—and ignorance—of journalists such as Mr. Lileks apparently has become overwhelming to a majority of the American public. Rather than a self-righteous and pity-party response to such polls, Mr. Lileks would do better, in my view, to spend his time doing something positive regarding the preservation of free expression. He should consider the following ideas.

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68. *Id.*

69. *Id.*

## VI. VIGILANCE

*[The public's view that] the press has too much freedom . . . is a humbling reminder that fundamental rights of expression can disappear if the press and public are not vigilant.*<sup>70</sup>

What does "vigilance" mean? Does it mean being on the lookout only for incursions or full-scale invasions from without, such as by the government, or is it that plus a wary eye being cast by the media on the public and an equally wary eye being cast by the public on the media? To me, it is the latter. Obviously, the media and the public should be vigilant as concerns a government, especially a Supreme Court, which might, out of some newfound intelligence that authoritarianism is the better idea, freedom/responsibility the worse, set the First Amendment on its ear. But cannot havoc of equal or worse proportion be wreaked from within?

The media should be wary of the public in the sense that problems in a relationship are never completely one-sided. As Bruce Sanford put it:

The media alone cannot be blamed for [their] credibility problems with the public. As in a troubled marriage, the public itself contributes to the disintegrating relationship at the same time as it points the finger at a ubiquitous, annoying media. These contributions come from shadowy corners of our lives—our endless prurient interest, our moral confusions, our lazy, unthinking and undifferentiating way of approaching prepackaged news, our tolerance of declining educational standards and our preference for clarity (and simple answers) in a world of nuance and complexity.<sup>71</sup>

Obviously, however, the public should be at least equally wary of the media. Sure, the parents of a teenager with a new driver's license are benefitted by the freedom of no longer having to act as chauffeur, but an irresponsible teenager can create considerable mayhem behind the wheel. Therefore, while the benefit to the parents—freedom—is terrific, they would do well to be perpetually vigilant to some degree or the other, lest the irresponsibility potential turn into actuality and grossly outweigh the freedom of having been relieved of chauffeuring duties.

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70. Aldrich, *supra* note 1, at 15A (quoting Ken Paulson, executive director of the First Amendment Center at Vanderbilt University).

71. SANFORD, *supra* note 5, at 9.

The media also should be vigilant *vis-a-vis* their mega-corporate owners. One of the more recent and more notable examples of the corporate fox guarding the journalistic henhouse concerns ABC and the Walt Disney Company. Since 1996, ABC has been "a relatively small, financially struggling division of the mammoth Walt Disney Company."<sup>72</sup> In 1998, two *ABC News* producers heard that Disney's Magic Kingdom in Florida might be having a problem with pedophilia at the theme park and that the Disney organization might be covering up the problem, so they asked for, and received, permission from the head of *ABC News* to look into the potentially explosive situation.<sup>73</sup>

After an investigation, a story was prepared for broadcast on ABC, but shortly before it was to be aired, it was killed by the head of *ABC News*.<sup>74</sup> Questions immediately arose with respect to any Disney influence in killing the story,<sup>75</sup> and, in most minds, I think, these questions largely were answered through public statements made by Disney CEO Michael Eisner, who said, just days before the story was killed: "I would prefer ABC not to cover Disney. . . . I think it's inappropriate for Disney to be covered by Disney. . . . [B]y and large, the way you avoid conflict of interest is to, as best you can, not cover yourself. . . . We don't have a written policy . . . [but] ABC News knows that I would prefer [that it] not . . . cover Disney."<sup>76</sup> The story never ran, though it did, for example, receive extensive indirect coverage in the *Brill's Content* article about the killing of the story by ABC.<sup>77</sup>

According to a 2000 survey conducted by the Pew Research Center for the People & the Press and the *Columbia Journalism Review*, "[f]our in ten journalists say they purposely avoided newsworthy stories or softened the tone of stories to benefit the interests of their own news organization."<sup>78</sup> The survey also indicated that "[a]bout a third [of the

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72. Elizabeth Lesly Stevens, *Mouse\*ke\*feer*, *BRILL'S CONTENT*, Dec. 1998/Jan. 1999, at 94-103.

73. *See id.* at 94-95.

74. *See id.* at 94.

75. *See id.*

76. *Id.*

77. *See id.* at 94-103.

78. *Media Poll: Many Admit Softening Stories*, *HOUS. CHRON.*, May 1, 2000, at 6A. In a controversy concerning the proposed dismantling of a newspaper joint-operating agreement, the editor and publisher of the *San Francisco Examiner* admitted in court that he once offered favorable journalistic treatment in the *Examiner* to Willie Brown, the mayor of San Francisco, in return for Brown's support on the dismantling issue. *See Newspaper Execs Testify Selves Into Trouble*, *HOUS. CHRON.*, May 3, 2000, at 4C.

reporters surveyed] said they avoided stories at least sometimes to avoid . . . embarrassing an advertiser.”<sup>79</sup>

Vigilance, however, requires much more than the casting of wary eyes by the various stakeholders each on the others. It requires that discovered transgressions be voiced and voiced loudly. This is, of course, more difficult for the public because the media own the principal means of mass communication, notwithstanding the recent and somewhat democratizing effect of cyberspace.

## VII. RESPONSIBILITY

*Elegies for the good old days are always suspect, but standards of responsible journalism have declined.*<sup>80</sup>

“Responsibility” means “expected or obligated to account for something or to someone; . . . the ability to distinguish between right and wrong and to think and act rationally and hence be accountable for one’s behavior.”<sup>81</sup> The history of the media responsibility idea and the various theories of the press may be found in many places,<sup>82</sup> but surely no better summary of it exists than is found in a 1994 law review article by Dr. Amit Mukherjee on the subject of international protection of journalists.<sup>83</sup> In this section, I have paraphrased liberally from this writing.

The idea of responsibility as an inherent and integral part of media freedom first received serious attention in the United States in 1947 when the private Hutchins Commission on Freedom of the Press issued its findings.<sup>84</sup> The Hutchins Commission criticized the libertarian ideal of absolute media freedom as irresponsible and self-serving, suggesting instead that certain obligations be imposed upon the media, using as its justification the then-accepted notion that, in the absence of accepted responsibilities, rights cannot meaningfully exist.<sup>85</sup> But how did we

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79. *Media Poll*, *supra* note 78.

80. Pyle, *supra* note 18, at B10.

81. WEBSTER’S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 1543 (2d ed. 1983).

82. See, e.g., WILBUR SCHRAMM, *RESPONSIBILITY IN MASS COMMUNICATION* (1957).

83. See Amit Mukherjee, *International Protection of Journalists: Problem, Practice, and Prospects*, 11 ARIZ. J. INT’L & COMP. L. 339 (1994). At the time this article was published, Dr. Mukherjee, who holds a Ph.D. in political science from Syracuse, was on the political science faculty at the University of Latvia. See *id.*

84. *Id.* at 364.

85. See *id.*

come to the libertarian idea in the first place? Had the question always been libertarianism versus social responsibility? Decidedly not.

During the seventeenth and eighteenth centuries, when mass communication began to become significant in Europe, the attitude of governments toward the press was authoritarian.<sup>86</sup> Practicing the profession of journalism was not a right but a privilege granted by the sovereign.<sup>87</sup> Publishers owed their existence to the government, and the government therefore insisted on unequivocal support from publishers so as to accomplish the single most important goal of virtually any government: the maintenance of the consent of the governed.<sup>88</sup> If publishers could not be counted on voluntarily in helping to maintain the consent of the governed, then at least the government could prevent them from acting as a liability in this regard.<sup>89</sup> Consequently, many, though not all, publishers were loathe to publish anything not approved by the government;<sup>90</sup> to do otherwise was considered irresponsible, even dangerous.<sup>91</sup> To effectuate these ideas, European law provided for an extensive system of control by various forms of criminal punishment, licensing, and other types of censorship, all without any regard for notions of fairness and due process.<sup>92</sup>

The occurrence of the enlightenment in the eighteenth century in Europe and America brought with it a belief in reason and human progress and a questioning of tradition and authority, giving rise to libertarian justifications for free expression.<sup>93</sup> The libertarian idea manifested itself in the constitutional and/or statutory guarantees of free expression now found in all the liberal democracies, but the struggle was neither quick nor easy, and, some might say, has not yet nearly reached its zenith—which would be absolute free expression.<sup>94</sup> When the transformation from authoritarianism to libertarianism began to occur, governments quickly came to the view that the pendulum was about to swing too far, so they did what governments often do; they paid lip service to the transformation by complying with the new philosophy

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86. *See id.* at 368.

87. *See id.*

88. *See Mukherjee, supra* note 83, at 368.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* at 369.

94. *See Mukherjee, supra* note 83, at 369.

in form but not in substance, causing a delay in implementing a libertarian approach to expression that, with the aid of intervening ideas, has lasted through the present time.<sup>95</sup>

There are, of course, three divergent interests in the conflict: those of the media, those of the government, and those of the people.<sup>96</sup> The government and the media are strong entities engaged in a power struggle,<sup>97</sup> both claiming to represent the interests of the people.<sup>98</sup> The media claim that they protect the rights of the people by monitoring the performance of the government and by providing a forum for the citizenry to voice its views.<sup>99</sup> The government claims that, as the formal representative of the people, its duty is to see that the media do not harm the interests of the people by endangering national security, telling lies, invading privacy, and so on.<sup>100</sup> As the Hutchins Commission wrote in the late 1940s:

The modern press itself is a new phenomenon. Its typical unit is the great agency of mass communication. These agencies can facilitate thought and discussion. They can stifle it. They can advance the progress of civilization or they can thwart it. They can debase and vulgarize mankind. They can endanger the peace of the world; they can do so accidentally, in a fit of absence of mind. They can play up or down the news and its significance, foster and feed emotions, create complacent fictions and blind spots, misuse the great words, and uphold empty slogans. Their scope and power are increasing every day as new instruments can spread lies faster and farther than our forefathers dreamed when they enshrined the freedom of the press in the First Amendment to our Constitution.<sup>101</sup>

Professor Pyle thinks media conglomerates and negative political campaigners have a lurid alliance. What they do, they do for different reasons, but the effect, he says, is the same.

Today, media conglomerates care little about whose reputations they harm, whose privacy they invade, or what work they disrupt. Their objective is to boost ratings or circulation, and with them revenues from advertising. The[se] journalistic jackals have their counterparts

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95. *See id.* at 370.

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See Mukherjee, supra* note 83, at 370.

101. *Id.* (internal citation omitted).



in political attack dogs who would rather defeat an adversary by exposing his sex life than by debating his ideas.<sup>102</sup>

It is the investigative side of journalism that Professor Pyle mostly is concerned will be affected by any diminution in free expression that comes from media irresponsibility. Apparently, he believes "routine" journalism will not suffer but that the media's ability to conduct meaningful investigations could be severely impaired.<sup>103</sup>

There's good reason to be concerned about what irresponsible journalism is doing to privacy as well as to the capacity of the press to conduct serious investigations. The demand for profits, however, seems increasingly to override the ethical and professional standards of reporters and their editors. That's troubling because the need for serious investigative journalism will come again. When it does, we can only hope that some protections for the investigators and their confidential sources will remain.<sup>104</sup>

It is imperative that the "responsibility" norm be returned to journalism. Without it, no amount of effort in other veins will save free expression as we know it today and as we have known it in our constitutional history. The clarion call must go out. In the main, there is no "fairness" or "responsibility" requirement in the First Amendment, but that is not the point. Hiding behind the First Amendment while firing word missiles, for whatever reasons, indiscriminately about has carried the day in courts of law, but, as in being hoist on one's own petard,<sup>105</sup> the media are failing miserably with the public. Without the return of responsibility to journalism, it is but a matter of time until the law—even constitutional law, which is at some point a creature of the people—will be reshaped to reflect the people's will. Sadly, whether any reshaping is based on sheer ignorance or keen insight will be irrelevant, as will fault, blame, and other such concepts.

In my view, any reshaping will be just that: a reshaping—a serious tightening of the responsibility idea coupled with a big dose of prior restraint. Imagine the spectacle of the government routinely seeking and

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102. Pyle, *supra* note 18, at B10.

103. *See id.*

104. *Id.*

105. *See* Robert B. Reich, *Gore About to Be Hoist on Clinton's Own Petard*, Hous. CHRON., Mar. 16, 2000, at 31A. ("A petard is a small bell-shaped bomb that was used to breach a medieval gate or wall. Occasionally, a person who set one off didn't get out of the way in time and, as the saying goes, was hoist on it.") The concept of being hoist on one's own petard was introduced to me in the early 1980s by my friend and mentor, attorney Leffel Gentry of Arkansas, now deceased.

obtaining injunctions against expression it thinks it would not like and that it thinks might occur. Imagine the spectacle of a restructured law of libel that would place plaintiffs in the preferred position—the position in which media defendants have sat since 1964. Imagine the chill wind that would blow across the desert of expression that would follow any serious tightening of the law of free expression. It is not too late. Responsibility is the key.<sup>106</sup>

### VIII. STEWARDSHIP

*From the person to whom much has been given, much will be expected.*<sup>107</sup>

Because we live and die, what we have is under our control only for a relatively short time.<sup>108</sup> The position this puts us in is that of being stewards. A steward is a person who is in charge of something that belongs to someone else or a lot of someone else.<sup>109</sup> Stewardship can be defined as all that a person does, all the time, with all that that person has.<sup>110</sup> Republican government is the capacity of democratically-constituted citizens to govern themselves.<sup>111</sup> Stewardship is the expression of this capacity in the form of competence, vigilance, responsibility, and accountability for sustainability—and has application in many forms of human endeavor, from religion to environmentalism.<sup>112</sup> An appropriate sense of stewardship, in my view, is central to the preservation of free expression. The idea of stewardship is reflected

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106. As the Committee of Concerned Journalists states:

[S]ome core principles of journalism are enduring. They are those that make journalism a public service central to self government. They define our profession not as the act of communicating but as a set of responsibilities. Journalism can entertain, amuse and lift our spirits, but news organizations also must cover the matters vital to the well being of our increasingly diverse communities and foster the debate upon which democracy depends. The First Amendment implies obligation as well as freedom.

*Statement of Concern*, *supra* note 58.

107. This is a standard decree in Christianity. See generally PETER BLOCK, *STEWARDSHIP: CHOOSING SERVICE OVER SELF-INTEREST* (1993).

108. See A.T. Mollegan, Jr., *Stewardship* (visited Mar. 16, 2000) <[www.users.aol.com/stewardship/hint3.htm](http://www.users.aol.com/stewardship/hint3.htm)>. Mr. Mollegan is the former co-chair of the national Episcopal Standing Commission on Stewardship and Development. See *id.*

109. See *id.*

110. See *id.*

111. See Margaret A. Shannon & George Francis, *Working Group on Governance and Stewardship* (visited March 16, 2000) <<http://www.ublawn.buffalo.edu/org/governance/default.htm>>.

112. See *id.*

in many media codes; it's just that the various media codes are not adhered to very well by the media—either in the sense of individual or institutional compliance or in the sense of sanctions employed for violations by journalists who belong to the private-sector organization which promulgated the code.

Whether such codes are at all effective, clearly the idea of stewardship is reflected in them, such as in the preamble to and in Articles I and II of the Statement of Principles of the American Society of Newspaper Editors, which provide:

PREAMBLE: The First Amendment, protecting freedom of expression from abridgement by any law, guarantees to the people through their press a constitutional right, and thereby places on newspaper people a particular *responsibility*. Thus journalism demands of its practitioners not only industry and knowledge but also the pursuit of a standard of integrity proportionate to the journalist's singular obligation. To this end the American Society of Newspaper Editors sets forth this Statement of Principles as a standard encouraging the highest ethical and professional performance.

ARTICLE I: *Responsibility*. The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. Newspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust. The American press was made free not just to inform or just to serve as a forum for debate but also to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government.

ARTICLE II: Freedom of the Press. Freedom of the press belongs to the people. It must be defended against encroachment or assault from any quarter, public or private. Journalists must be constantly alert to see that the public's business is conducted in public. They must be *vigilant* against all who would exploit the press for selfish purposes. . . .

*These principles are intended to preserve, protect and strengthen the bond of trust and respect between American journalists and the American people, a bond that is essential to sustain the grant of freedom entrusted to both by the nation's founders.*<sup>113</sup>

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113. ASNE *Statement of Principles*, (visited March 16, 2000) <<http://asne.org/kiosk/archive/princpl.htm>> (various emphases supplied).

This “essential bond” seems to me the very essence of free-expression stewardship, and I believe it is time for journalism organizations to pay more than lip-service to these vital ideas.

#### IX. JOURNALISM EDUCATION

“Journalism education” may seem strangely included in a list of terms such as vigilance, responsibility, and stewardship, but it is an integral part of the free expression preservation theme I am espousing here. I am a journalism professor at a large educational institution with a fairly large journalism unit. Of the roughly 800 journalism majors we have at any given time, less than five percent express any interest, when we ask them,<sup>114</sup> in a career that actually has to do with professional journalism (from this percentage figure I am excluding the students who indicate a desire only to be an anchorperson so they can “be on TV and read the news”). My department, I submit, is not that unusual in this regard; there is a serious national decline in the number of journalism students actually interested in real journalism.<sup>115</sup> So what does this odd and palpably sad fact have to do with the preservation of free expression? There are two points to make. First, to paraphrase Bob Dylan: “Where have all the journalism students gone? Gone to PR everyone.” Second, the media now are more and more populated by reporters with no academic journalism training at all. While I (and the First Amendment) certainly have no problem with such persons practicing journalism, it has changed the dynamic. Yes, they can learn reporting on the job, but their utter lack of exposure to educational experiences wherein all the concepts being discussed at this symposium are there for the learning, the questioning, the probing, can mean that such reporters have

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114. From time to time, we ask our majors such questions by informal survey instrument.

115. While I have no scientific evidence of this phenomenon (though it surely exists in some study somewhere), I have gathered much anecdotal evidence from conversations with colleagues nationally—and over a long period of time. A personal anecdote: a couple of years ago, I asked the 30 or so senior journalism majors who were taking a course in media ethics from me (and who one particular day, despite my best efforts, did not seem at all interested in the material) how many of them intended a career in any kind of reporting. All of two hands went up. One student said he was going to be a sports reporter if he could get a job in the major market where he wanted to work upon graduation; otherwise, he would go to graduate school in a different field (I wrote a grad-school letter of recommendation for him recently). The other response was even more to the point. That student said she needed to ask me a question before she could respond to my question. Her question? Was writing for a magazine considered reporting?

less, if any, real reverence for the ideals of journalism—largely, in my view, because they do not know what those ideals are.

I suspect that at those few journalism schools where most of the students actually want to become or continue to be reporters, such as the graduate journalism programs at the University of California at Berkeley and at New York's Columbia University, the problem can be expressed somewhat differently. The professor has willing and eager students, but he does not know what to tell them.

Why work to instill high-minded journalistic values in our students when we're sending them out to work in news media . . . whose executives seem more focused on . . . pleasing sensational-minded readers and viewers than they do about reporting important news? Indeed, why bother at all, at a time when the leading lights of the profession are spending their every waking hour combing through the most sordid details of Kenneth Starr's investigation of President Clinton's sex life? That spectacle disgusts and saddens my students far more than it inspires. Is this really what journalists do?<sup>116</sup>

The real question is whether journalism educators can, or even desire to, reclaim their territory. It would seem that many, if not most, journalism students want nothing to do with journalism and those few who do may for good reason be wavering on the subject. It is my view that one means of preserving free expression is for journalism educators to become more vigilant with respect to media misbehavior, to speak out on the subject, to do everything possible to encourage young persons to be interested in reporting and journalism careers in spite of media misbehavior, and to educate each new crop of journalism students in the finest traditions of real journalism so that journalism itself may be reclaimed.<sup>117</sup>

#### X. THE DEMISE OF VALUE SYSTEMS AND CONCLUSIONS

The Romans built an empire, and it fell. As American children become murderers, rapists, and parents, American civilization may be said to be in decline. If so, is this slowly but seemingly inexorably occurring cataclysmic event the fault of the media? Not entirely, by any means, but they are a major player with respect to these problems and

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116. Henry, *supra* note 44.

117. Of course, as long as academic journalism administrators are expected to seek heavy contributions from "the industry," it isn't likely that much such criticism will occur.

seem to have little internal interest in being a part of the solution. Clearly, media law does not require fairness, for example, and we all know that life is full of “unfairnesses,” but how do we “teach our children well,” to borrow from Crosby, Stills, Nash and Young, with our major institutional expressors constantly in our faces telling us they are not required to be fair? It is quite a spectacle, and it is inexcusable.

Throughout history, value systems have risen, reigned, and died. Why? Because the hard-won creation of a value system nonetheless may prove easier than its preservation—its survival. The First Amendment is an institution, a value system, integrally important among which values is the idea of responsibility; as indicated, with freedom, responsibility is inherent. When the shepherds of responsibility desert their flock to enjoy, and then abuse, the fruits of this freedom, then the very freedoms cherished, thus absent responsibility as an essential component, decline bit by bit, ultimately evaporating into the mist, leaving in their wake a different value system—one which may not cherish freedom at all.

Clearly, American media enjoy the greatest fruits of expressionistic freedom the world ever has known; at the seeming price in the latter half of the twentieth century, however, of abandoning responsibility and other such principles.<sup>118</sup> If the death or serious impairment of the institution comes, the blame will lie squarely at the feet of the shepherds, properly so, and not at the feet of “the people,” because, alas, the people—at least in the context of media representation—were meant to be third-party beneficiaries; under any circumstances, the people are not the shepherds of this cherished freedom (though, as I have indicated, they should take on more of this responsibility) and any culpability of

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118. In 1999 and 2000, the Committee of Concerned Journalists conducted a national survey of journalists. The results were atypical relative to history because—in addition to disaffection from public to media—“[j]ournalists now agree that something is wrong with their profession.” Bill Kovach et al., *A First Step to Change: A Commentary on the Findings* (visited April 16, 2000) <<http://www.journalism.org/surveycomment.html>>. According to the survey, journalists now:

believe that the news media have blurred the lines between news and entertainment and that the culture of argument is overwhelming the culture of reporting. . . . They also see problems of reporting the news fairly and accurately and avoiding sensationalism. . . . Concerns about punditry overwhelming reporting, for instance, have swelled dramatically. . . . A large majority of news professionals sense a degradation of the culture of news—from one that was steeped in verification and a steadfast respect for the facts toward one that favors argument, opinion-mongering, haste, and infotainment.

theirs relating to any death or serious injury the First Amendment may suffer will be minuscule indeed compared to media culpability for the sins of the media.

There is a beast among us—or to paraphrase John Dean—there is a cancer on free expression; it is *not* the public; it is the media—and the non-journalist beancounters who have come to infest the media countinghouses; that, however, is a highly worthwhile subject (barely touched in this writing) for another day or for another symposium. Thank you very much for the opportunity to express these heart-felt views.