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Mustering the Moxie to Master the Media Mess

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NEWS MEDIA RESPONSIBILITY INTRODUCTORY CRITIQUE

MUSTERING THE MOXIE TO MASTER THE MEDIA MESS: SOME INTRODUCTORY COMMENTS IN THE QUEST FOR MEDIA RESPONSIBILITY

*Robert C.L. Moffat**

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A little over a year ago when I first suggested the topic of this issue to the editors of the *Journal of Law and Public Policy*, I thought that one reason supporting the proposal was the timeliness of the subject. I could not have possibly foreseen how media responses to the events of the past year would receive even more banner headline attention than in the past. Moreover, I certainly could not have anticipated that there would be charges that in some cases media representatives had instigated or at least partially contributed to some of the biggest tragedies of the year. I think it is important to point out the genesis of the idea to make it clear that this issue of the *Journal* did not originate as a response to the tragic death of Princess

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Diana,¹ to the media orgy over Monica Lewinsky,² or any other particular blot on the media copybook.³ Instead, the idea came from a growing sense of unease, discomfort, and outright alarm at the burgeoning public mistrust of the journalistic community. After all, democracy is from the outset dependent upon the free flow of reliable information and opinion.⁴ As all the contributors to this issue agree, sound journalism is essential to the success of our democratic experiment. Our challenge is to see what steps are needed to encourage a return to sound journalistic practices.

In the view of contemporary journalistic practice, the panel of experts assembled here would be considered unsatisfactory in that it lacks balance. What journalists would mean by that is that all sides of the issue are not represented.⁵ Our contributors include a journalist, a media lawyer, a philosopher who specializes in the ethics of professions, and a law professor who focuses on issues concerning the media. Personally, I see the topic as an important aspect of public policy, a subject in which I have a strong interest. In other words, we have two advocates for unrestricted freedom for the media and two neutral observers of the scene. In case any reader has just arrived here from Myanmar, China, outer space, or any other place where

1. A tiny sampling of the media reaction is instructive. *New York Times* columnist William Safire retorted that the “[f]ault for Di’s death is Fayed’s.” William Safire, *Fault for Di’s Death Is Fayed’s*, GAINESVILLE SUN, Sept. 8, 1997, at 6A. *Boston Globe* columnist Ellen Goodman lamented the hostility to the media generated by the tragedy. Ellen Goodman, *In the Heavens with James Dean*, GAINESVILLE SUN, Sept. 8, 1997, at 6A. A well-known professor of media law in the University of Florida College of Journalism worried at considerable length on the front page of the Sunday Issues Section of the *Gainesville Sun*. Sandra Chance, *Will Diana’s Death Bring Foolish Laws?*, GAINESVILLE SUN, Sept. 7, 1997, at 1G.

2. The media seemed to worry even more about public reaction to media coverage of the “Zippergate” scandal. *Washington Post*, *Media Feel the Sting of Public Backlash*, GAINESVILLE SUN, Feb. 12, 1998, at 7A. *New York Times* columnist Russell Baker chimed in: “The media is in trouble with this one.” Russell Baker, *The Media Is in Trouble with This One*, GAINESVILLE SUN, Feb. 1, 1998, at 3G. He concluded: “Whatever the outcome of the scandal, the press and television figure to be big losers in the long run.” *Id.* Scripps Howard News Service columnist Martin Schram bemoaned the scandal-mongering mainstream press for allowing their normal standards of verification to slide. Martin Schram, *In the Race for Headlines*, GAINESVILLE SUN, Jan. 28, 1998, at 15A.

3. Cox Newspapers columnist Tom Teepen worries about creeping repression of the media in response to public unhappiness with media coverage of celebrities and possible involvement in tragedies such as the death of Princess Diana. Tom Teepen, *Don’t Throttle Press to Curb Itself*, GAINESVILLE SUN, Sept. 10, 1997, at 10A.

4. But, as Deborah Tannen observes, the overly critical posture of the media dries up the flow of information by discouraging potential sources from being more forthcoming. DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* 68 (1998).

5. Deborah Tannen is scornful of the media practice that “the best way to cover news is to find spokespeople who express the most extreme, polarized views and present them as ‘both sides.’” *Id.* at 3.

they are unaccustomed to press freedom, I should hasten to explain that our lineup of contributors should not be taken as representative of the debate. Critics of the media abound. Indeed, such criticism is so widespread and so voluble that we who worked on putting this issue together had no worry that any reader would be misled by the absence of a critic of the media. If any reader feels the absence of that perspective, allow me to suggest a look at Chapter Three of Deborah Tannen's most recent book.⁶ Her criticism is far from the most damning available, but it should more than make up for the absence of a media critic in our modest collaboration here.

How much endangered is our reliance on a free, unfettered, and reliable media? On May 13, 1998, NBC's Emmy-award winning television drama *Law and Order* focussed on the murder of a newspaper gossip columnist by one of his targets. The prosecutors lost the case, despite a confession by the killer. Seedy journalistic tactics were highlighted by the defense as they persuaded the jury to return a verdict of the lowest degree of manslaughter available. A premeditated murder was accorded a slap on the wrist, because the victim was seen by the jury as deserving the fate he literally dared *his* victims to wreak upon him. Was the drama shocking? Will there be outcry from a public enraged at the sympathetic portrayal of the murderer? Should we anticipate even mild protest at making the journalist the unattractive victim? The standing of journalists in the opinion of the public is now so low that we need not anticipate *any* media discussion of the episode. Even Ted Koppel who likes to focus ABC's *Nightline* on issues of media behavior and ethics from time to time can be expected to let this opportunity pass him by. Outrage at some aspect of media behavior has become too commonplace to deserve notice unless the occasion is truly outrageous.

I. ADDRESSING (OR AVOIDING?) THE CHALLENGE OF MEDIA LIBERTY

Against this backdrop of antipathy toward the media, I note a certain sense of whistling through the graveyard by those who give no quarter in their defense of what presently passes as journalism. Jane Kirtley, our lone journalistic contributor to this issue, offers an unabashed apologia in defense of the media along just such lines. Typically, however, her defense is cast, not of the media as such, but as a vindication of the First Amendment. On the importance of First Amendment protections, she will get no argument from this quarter.⁷ Moreover, I have no doubt that her reminder of the

6. She titles Chapter Three: "From Lapdog to Attack Dog: The Aggression Culture and the Press." TANNEN, *supra* note 4, at 54-94.

7. Any advocate of a free press should be concerned about reports of governmental efforts to intimidate the media. For example, the Associated Press reported that the White

worldwide threats to freedom of the press are a salutary corrective to any temptations we might feel toward complacency.⁸

However, my qualms begin at her title: "The First Amendment: An Inalienable Right or a Privilege to be Earned?" Just how "inalienable" a set of rights does the First Amendment protect? In addition, there seems to be a subtle shift from the assumption of inalienable rights to the immutability of the interpretation of the First Amendment. Quite correctly, she observes that the government cannot impose ethics on journalists, although private persons and groups may seek to do so. The danger that courts or other governmental bodies may then give legal import to voluntary ethical codes concerns her greatly, so much so that she denies that such a thing could happen under the First Amendment. But that is where the immutability problem rears its ugly head. She worries about legislative attempts to alter *New York Times v. Sullivan*,⁹ but what guarantee is there that the Court may not narrow, distinguish, or even overrule that or other First Amendment cases? Constitutional lawyers in the United States are fond of quoting the phrase "the Supreme Court reads the newspapers."¹⁰ That cliché reminds us not only that the Court too feels the influence of popular opinion, but also that members of the Court may share the feelings of other public figures that standards of journalistic ethics do not seem to be worthy of as much protection as they might once have thought.

What is perfectly clear is the fact that constitutional jurisprudence is in a constant state of flux, growing here, narrowing there. I have shown elsewhere in some detail that strains of constitutional development may be viewed as paradigms, which occupy the stage for a period of time and are later superseded by new, sometimes dramatically different, developments.¹¹ In the light of that and many other studies, it is foolhardy to assume that constitutional adjudication is likely to remain static for any significant period

House did exactly that, when Mrs. Clinton ordered "a taxpayer-financed analysis of what she felt was biased reporting" by the lead Whitewater reporter for the *Washington Post*. *Mrs. Clinton Urged Report on Reporter*, GAINESVILLE SUN, Feb. 15, 1998, at 6A. Russell Baker comments that the media will have no friends left, given long-standing conservative harping at the liberal bias of the media combined now with the constant sniping of Clinton's friends at the supposed determination of the press to be a part of the conservative conspiracy to "get" the President. Baker, *supra* note 2, at 3G.

8. But "[i]t is not death, or torture or imprisonment that threatens . . . American journalists; it is the trivialization of our industry." Richard Reeves, *The Media: What's Up?*, GAINESVILLE SUN, Nov. 2, 1997, at 3G (quoting enthusiastically from a speech by Ted Koppel to the annual dinner of the Committee to Protect Journalists).

9. 376 U.S. 254 (1964).

10. The original quotation is somewhat different. "[N]o matter whether th' constitution follows th' flag or not, th' supreme court follows th' iliction returns." FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1900).

11. Robert C.L. Moffat, *Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction*, 37 U. FLA. L. REV. 297-341 (1985).

of time. Even the great positivist and cynic Oliver Wendell Holmes began his work on *The Common Law* by advising us:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹²

Journalists may be faulted for their prejudices. We should likewise fault judges for theirs. But the biases of judges may over time change the ground rules upon which journalists operate. And journalists should not forget that they are not immune to the impact of such developments.

All of the above does not even hint at the Hohfeldian problem. It is popular to speak, as Ms. Kirtley does, of "rights" protected by the Constitution, even of "inalienable" rights. Indeed, it is widely believed that Americans have developed a preoccupation with rights.¹³ But are these constitutional protections properly called rights? The analytical apparatus developed by Wesley Newcomb Hohfeld in his *Fundamental Legal Conceptions* makes Ms. Kirtley's distinction between rights and privileges.¹⁴ But his scheme seems to work best in the analysis of private law relations between two parties. When one turns to public law or the interests of third parties, Hohfeldian analysis grows fuzzy.¹⁵ In the case of the First Amendment, we have both problems. It is clearly a matter of public law, and in most cases, we have at least three parties to the dispute. For example, we might have the government, a journalist, and a party aggrieved by the journalist in some way. Journalists usually think of this situation as one in which they worry that the government might compel them to provide a "right of reply" to the aggrieved party. But if the aggrieved party buys up the medium that employed the journalist and fires him, the First Amendment is not affronted. No "right" of the journalist to a free press has been abridged.

By the same token, if the aggrieved party takes over another media outlet

12. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1951) (1881).

13. See, e.g., MARY ANN GLENDON, *RIGHTS TALK* (1991); RICHARD E. MORGAN, *DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME* (1984); *THE FRAMERS AND FUNDAMENTAL RIGHTS* (Robert A. Licht ed. 1992); *HOW DOES THE CONSTITUTION SECURE RIGHTS?* (Robert A. Goldwin & William A. Schambra eds. 1985).

14. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1978) (Walter Wheeler Cook ed. 1919).

15. I have treated this topic more extensively in Robert C.L. Moffat, *Consent in Medical Research: A Rapporteurial Critique*, in *CONSENT*, BEIHEFT NF 12, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 212-21 (Sargent ed. 1979).

and captures the audience by out sensationalizing the journalist, the journalist can make no constitutional objection to his outlet being driven out of business so that it no longer has a voice. I find Hohfeldian analysis unreliable in constitutional situations, but it is clear that in Hohfeldian terms it would often be more accurate to speak of First Amendment privileges than of rights. That is because those who disagree with the journalist have “no right” to interfere, but by the same token the journalist has “no right” that they should cease efforts to outshout him. So far as Hohfeld is concerned, both parties have a First Amendment privilege to try to promulgate their respective views with correlative “no rights” in the other to prevent them in their efforts.

II. SHOULD JOURNALISTS PAY ATTENTION TO SOCIAL RECIPROCITY?

Similar comments might be addressed to the remarks of Hugh Stevens in his “Responsibility in the Media.” Although he describes himself as a media lawyer, his view of press responsibility is somewhat less partisan than Ms. Kirtley’s. Yet at bottom he agrees with her that the First Amendment imposes no duty of responsibility on the media in exchange for the protection it provides the media.¹⁶ As a technical matter, they are both correct. What they may overlook, however, is assumptions that may be made by the public, governmental bodies, and the courts that there should be some kind of quid pro quo. Are there, in other words, expectations of tacit reciprocities?¹⁷ The importance of that question lies in the fact that if journalists ignore the expectations of others they may find themselves surprised by developments in the legal arena. If other participants in the public forum perceive a reciprocal duty on the part of the media to act responsibly in return for the benefit of constitutional protections, the failure of the media to perform their end of the tacit bargain could have dire consequences. So, while media defenders are technically correct to rely on the current state of constitutional law and disclaim any obligation to act responsibly, perhaps that view is shortsighted. It might be wiser to teach journalists that they have an unwritten obligation to act responsibly. They could be taught the valuable

16. Gregory Kane of the *Baltimore Sun* lauds the federal court of appeals ruling that the First Amendment did not protect the publishers of a manual for hit men from liability for the foreseeable consequences of their publication. Gregory Kane, *Shattering Free-Speech Limits*, GAINESVILLE SUN, Dec. 2, 1997, at 11A. Moreover, he laments the lack of responsibility displayed by the publishers. *Id.* The predictable responding letter to the editor expressed outrage at the notion that there should be any limits on free speech. Christopher Carney, *There Can Be No Compromise on the Civil Rights of Man*, GAINESVILLE SUN, Dec. 12, 1997, at 10B.

17. See LON L. FULLER, *THE MORALITY OF LAW* 19-27 (rev. ed. 1969).

lesson that acting in accordance with a moral obligation can forestall the creation of a legal obligation to act perhaps in even less attractive ways.¹⁸

Stevens does offer some insights into media law that amount to a qualification of some of Ms. Kirtley's alarms. He confides in us that in his experience legal considerations do not often play a significant role in the selection of journalistic content. Other factors are more important most of the time. That observation is consistent with studies that have been done in other areas of business life. In general, business people give nonlegal considerations much greater weight than legal ones.¹⁹ Stevens shares with us his conclusion that the supposed chill that the laws of libel and privacy²⁰ have upon the delivery of news is greatly exaggerated. However, he does agree with Ms. Kirtley regarding the importance of *New York Times v. Sullivan*.²¹ He believes that many stories now are published that pre-Sullivan libel law would have stopped in their tracks. That conclusion raises an interesting question. Has the expansion of First Amendment press protection made journalists less careful, more sloppy, thus leading indirectly to the excesses we currently witness? Perhaps there will after all turn out to be a tradeoff between press freedom and press responsibility. If the media cannot succeed in convincing the public that it can police itself, the tacit reciprocity mentioned above may emerge in reimposed limitations on the scope of journalistic freedoms.

Stevens and Kirtley do agree that the only available remedy for journalistic excesses is criticism of what we find objectionable, coupled with the refusal to pay for trash.²² I fervently hope that the courts do not feel the need to prove them wrong. But in order to avoid that nightmare, journalists must find the capability to put the media house in order. Is the training journalists receive helping to prepare them for such efforts? There is certainly much contemporary criticism of the media from which willing

18. For further treatment of the interactive relationship between moral and legal obligation, see Robert C.L. Moffat, *Obligation to Obey the Law: Substance and Procedure in the Thought of Lon Fuller*, 1 INT'L J. APPLIED PHILOSOPHY, Fall 1983, at 33.

19. The classic study was done by Stewart Macauley. Stewart Macauley, *Noncontractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV., Feb., 1963, at 55.

20. Universal Press Syndicate columnist William F. Buckley seems ambivalent regarding proposals for greater protections of privacy. William F. Buckley, *Curb the Press? Stop the Presses?*, GAINESVILLE SUN, Sept. 15, 1997, at 4A. *Boston Globe* columnist Ellen Goodman expresses concern at the contrast between the lurid media coverage of Marv Albert's legal troubles and their sudden sense of privacy when it came to failing to identify his accuser. *Media's Restraint a Little Uneasy*, GAINESVILLE SUN, Sept. 27, 1997, at 9A.

21. 376 U.S. 254 (1964).

22. Scripps Howard News Service columnist Martin Schram thinks that "[o]nly consumers can put an end to tabloid sleaze." Martin Schram, *Only Consumers Can Put an End to Tabloid Sleaze*, GAINESVILLE SUN, Sept. 3, 1997, at 11A.

journalists might receive fruitful instruction.²³ One indicator of prospects for reform from within might be the extent to which such critical materials are employed to positive effect in the training of journalists. On the other hand, if such criticism is used negatively to demonstrate how the media is threatened in order to build a siege mentality, prospects for reform from within grow dim. Is that void likely to attract intervention from the courts or other governmental agencies?

III. DEALING WITH JOURNALISTIC BIAS

Professor Elliot Cohen considers two established approaches to journalistic objectivity. The first is the attempt to be objective. This method turns out to be impossible, in part because journalists become robots simply repeating the input from valid news sources.²⁴ A further problem is the difficulty of making an objective determination of which news sources are valid. One reaction to those difficulties is to abandon objectivity in favor of an all out subjective stance. Ironically, the journalist remains caught in the necessity of reporting all perspectives that come within reach. The principal difference is that the reporter is now free to add her own biases as part of the multiple perspectives being offered. The difficulty is that there remains no basis for choosing more reliable over less reliable perspectives. Indeed, the tendency of contemporary journalism to *balance* all perspectives, no matter how ridiculous the alternatives offered, provides a huge target for the contempt of Deborah Tannen whose recent book was mentioned previously.²⁵ In pursuing this mindless quest for balancing, journalists will invite a representative of the flat earth view to "balance" the input of a scientist reporting on the latest findings by the Mars probe. We should not find it surprising that Professor Cohen, a philosopher dedicated to the pursuit of logic, also rejects the subjective approach.

Instead he proposes what he calls "rational subjectivity." This approach accepts the impossibility of perfect objectivity, but rejects the flight into pure subjectivity. He accepts the necessary presence of bias but believes that it can be reduced by journalistic adherence to logic and rationality. In this view, although logic cannot produce one demonstrably right answer,

23. Much of it can be found among media columnists as many of these footnotes exemplify. *E.g.*, Derrick Jackson, *Will the News Media Ever Find Their Conscience?*, GAINESVILLE SUN, Sept. 4, 1997, at 9A.

24. All too often, of course, the media may simply be a conduit for news releases from important persons or institutions. For example, the charge is made that our local newspaper quotes the opinions of the President of our university without obtaining other views. Charles Montgomery, *Talking Back: Sun Being Spoon-Fed*, GAINESVILLE SUN, Nov. 3, 1997, at 4A.

25. She states: "The conviction that there are two sides to every story can prompt writers or producers to dig up an "other side," so kooks who state outright falsehoods are given a platform in public discourse." TANNEN, *supra* note 4, at 11.

rationality can be employed to cull less persuasive arguments from ones that are more persuasive. In this regard, Cohen's argument parallels developments in legal reasoning. There too it was once thought that there was a stark choice between the formal logic of conceptualism and the skeptical subjectivity of the radical legal realists. More recent developments have turned lawyers' attentions to the informal logic of argumentation as a means of persuasion of the legal audience.²⁶

Cohen's main focus, however, is not on argumentation as such, but on the variety of biases lurking to derail the journalist's quest for rationality. In that regard, he makes perhaps his most interesting point. Since awareness of unconscious bias is one of the most important protections against falling prey to irrationality, one might expect careful attention to be devoted to these biases in schools of journalism. Shockingly, that is not the case. Study of such common sources of bias is routinely omitted from the journalistic curriculum. The result is that fledgling journalists do not receive training that might help them learn to avoid the use of common stereotypes.²⁷

Such an awareness, Professor Cohen believes, would enable journalists to disclose information concerning the background for the generalizations they offer. That information would in turn provide the reading public with a useful basis for judging potential bias in the transmission of information. Such background information would be particularly useful in evaluating "news" that has been sensationalized. The practice of sensationalizing news may have become so commonplace that such bias information would be of almost constant use. In seeing journalistic efforts as a constant drive to present news as a "battle" between opposing forces, Tannen shares the concern that the media is failing to provide the reliable information we should be entitled to expect from them.²⁸

IV. OFFERING CONSTRUCTIVE SUGGESTIONS

Professor David Logan in his " 'Stunt Journalism,' Professional Norms, and Public Mistrust of the Media" provides the most comprehensive assessment of the problems besetting the media and survey of possible responses to those challenges. His article does not have space to include all

26. The work of the late Chaim Perelman is a prime example. *E.g.*, CHAIM PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* (1977); see Moffat, *supra* note 11, at 312-16 for an extended discussion and critique of his contribution.

27. For further exploration of the overriding significance of stereotypes in one setting, see Robert C.L. Moffat, *Working Girls and Boy Toys: Disclosure of Gender Role Stereotypes*, in *LAW AND THE CONFLICT OF IDEOLOGIES: NINTH ROUND TABLE ON LAW AND SEMIOTICS* 185-98 (Roberta Kevelson ed. 1996).

28. Tannen states: "Because of the belief that fights — and only fights — are interesting, any news or information item that is not adversarial is less likely to be reported." TANNEN, *supra* note 4, at 30.

the contemporary problems of the media, but he makes a good start. He discusses the blurring of the line between news and entertainment and the seamless mixing of soft and hard news.²⁹ These alarming developments are due to the fact that news has come to be viewed as a profit center in the bean counter driven consolidation of media centers into media giants which in turn are amalgamating into mega- and multi-media empires. "Newspersons" have become headline entertainers and are compensated accordingly, *if* they can maintain satisfactory audience share ratings.³⁰

These developments have serious consequences. Professor Logan expresses alarm at the growing hostility to the media, in part reflected in the expanding jury verdicts obtained by targets of the media. That growth in hostility is due in part, he believes, to the hypocrisy which the public increasingly perceives in the frequent media double standard: embracing undercover tactics for the media which they find outrageous when deployed by others. Professor Logan's reason for being so concerned about the growth of mistrust is that he believes the loss of credibility by the media equates to growing cynicism on the part of the public, since they do not feel that they can trust the information that is being offered to them.³¹ In such circumstances, viable public input in the ongoing debate on public policy is bound to be ineffective. In short, the problems of the media are problems for our democracy.

What is to be done? Would improved education of journalists help? Professor Logan points out the tendency of journalists to belittle the classroom. How about increasing efforts to generate a meaningful code of ethics for journalists? Professor Logan details the way in which the journalists have rejected specific standards to regulate their use of deception, even when those standards were proposed by their own organization's leadership. Instead, they adopted a generalized standard so watered-down as to be meaningless.

This failure points to a larger problem. Professor Logan details the reasons that journalism is not a profession. As he notes, one of the characteristics of a profession is its dedication to the discipline of its members according to a code of ethics imposed by the members of the

29. This problem has become so widely noted that it has even made it into Dr. Laura Schlessinger's advice column. To the question whether there is any difference between gossip and news media, she responds, "Your concerns are well founded. I believe that because the news media is highly competitive, public people's lives are exploited for gossip in order to boost ratings, viewership and readership." Dr. Laura Schlessinger, *Dr. Laura*, GAINESVILLE SUN, Dec. 4, 1997, at 2D.

30. See, e.g., Richard Reeves, *Now, the Nightly Entertainment*, GAINESVILLE SUN, May 16, 1997, at 12A.

31. Deborah Tannen notes that when pollsters ask why the media are disliked, respondents make the negativity of the press the most important reason. TANNEN, *supra* note 4, at 53.

profession upon themselves. Journalists claim that they have been reticent about adopting serious codes of ethics and the self-discipline that accompanies them, because they are afraid that courts might use their ethical standards as a basis for judging their behavior. That fear is reasonable. Courts, along with the rest of us, tend to take seriously the failure of a member of a group to live up to the announced standards of that group.

But is journalistic fear of greater legal interference worth the unfettered freedom that eschewing ethical standards is believed to bring? If journalists adopted a serious code of ethics and disciplined their members accordingly, it is quite possible that courts would develop constitutional doctrine toward a two-tiered First Amendment analysis. In that analysis, greater deference would be paid to journalistic behavior that met the ethical standards. Behavior that did not would be subject to increased scrutiny. Such a development is the leading feature of Ms. Kirtley's worst nightmare. But is that development worse than the legal reaction we might anticipate if courts and the public view *all* journalists as untrustworthy schemers who are eager to use the most disgusting methods of deception in order to produce the most sensationalized, and therefore profitable, result?

Professor Logan believes that media self-regulation is the only possible hope for improvement in the standing of the media in the public eye. Although he believes that there are several alternatives for self-regulation that would avoid legal implications, it remains to be seen whether journalistic antipathy to anything that even smells like regulation can be overcome. Although Professor Logan believes that regulatory standards that include no disciplinary measures could help to restore public confidence in the media, I am doubtful. I am afraid that journalists have fostered so strong a public cynicism that regulations without teeth would be perceived as mere window dressing, as a weak effort at public relations.³² In short, the public would see it as "spin," a cynical term which journalists have made a part of the public vocabulary. Such toothless efforts might have had a chance for success in an earlier, more innocent, age. But we have lost our innocence, and the media bear a major responsibility for that loss.

I believe that the situation has grown so serious that only measures with teeth have a chance to do the job. The adoption of real regulation does increase the chance that such standards may come into play in future litigation. But the alternative is to leave things as they are. That means that ethical journalists along with the rest are subject to the danger that courts or

32. Molly Ivins takes the media to task for their shoddy reaction to Ted Turner's pledge to donate \$1 billion to United Nations humanitarian agencies: "When the largest single gift anyone has ever given is greeted with contempt, cynicism, personal attacks and an insult to one's wife, why would anyone bother to give money to a good cause?" Molly Ivins, *Media Snipes at Ted Turner's \$1 Billion Humanitarian Gift*, GAINESVILLE SUN, Oct. 1, 1997, at 15A.

legislatures will respond to the public mistrust of the media by cutting back on current protections. Surely, the activities of the *National Enquirer* deserve closer scrutiny than those of the *Wall Street Journal*.

But legal restrictions should not be the only source of worry. The *Law and Order* episode mentioned at the beginning raises an important unexamined question. Should journalists worry about private individuals taking matters into their own hands? When the law fails to protect, vigilante justice can sometimes be the response. Would it be prudent for journalists to worry about their targets employing self-help? In the present state of low public esteem for journalists, could a real person wreaking vengeance on a tormenting journalist anticipate sympathetic jury treatment? The possibility is not unimaginable.

How would the media respond? They always give front page attention to harm that befalls journalists. A jury slap on the wrist to the target who reacted violently to the journalist could be expected to receive even greater attention. In the midst of all that media frenzy, no journalist would notice the widespread publicity that was being given to the idea that victims of the media *could* have their revenge. Journalists would unwittingly educate the public in self-help. The possibility of violent reaction to the media snowballing in such a fashion is something we can imagine. Compared with such a scenario, media self-regulation with enforcement seems like a preferable alternative. And it would still seem clearly preferable even if adoption of a real code of ethics meant that judicial protection of the media evolved in the direction of two-tiered First Amendment analysis.

V. JOURNALISM AND THE PRIME DIRECTIVE

All watchers of any of the many versions of *Star Trek* know that the prime directive of the explorers of new worlds is that they must not interfere with the development of the civilization that they observe. Journalists sometimes imagine that they adhere to such a neutral observer stance, but our experience is that what they do can have profound impacts on the society, just through the information, opinions, and values they convey. What is more, we know that modern aggressive newsgathering techniques often create situations for the purpose of manufacturing "news." All of the controversial tactics of undercover operations and other deceptions that pass for "investigative" reporting fall into this same pattern.³³ In other words, journalists have become about as involved in the newsmaking process as is possible.

33. Yet precious little investigation is going on. More than 40% of reportage consists only of opinion, analysis, or speculation. Much of the rest is only dissemination of press releases, information obtained without newsgathering effort. Richard Reeves, *ATM News: No Reporters, Lots O' Cash*, GAINESVILLE SUN, Feb. 22, 1998, at 3G.

Neutral observation is a distant memory for which we may feel nostalgia when listening to the comments of Daniel Schorr on National Public Radio's *All Things Considered*. Notably, he is always careful to label his thoughtful contributions as his personal views.

Could a prime directive be reimposed? I do not believe that the genie can be put back into the bottle. Ironically, aggressive journalism means that any self-help efforts by journalistic targets would receive maximum publicity. Is it even impossible to imagine some journalists paying to witness an aggrieved target taking revenge on the other journalists who had offended him? The feeding frenzy³⁴ can easily turn upon itself as the paparazzi shadowing Princess Diana's car discovered to their dismay.³⁵

Journalists are fond of responding to criticism of their activities by pointing out that they only reflect the society they observe. That defense is disingenuous, of course, because they also help to create that society by the messages — true, false, and misleading — with which they saturate it. It is clearly true that a large audience would tune in to watch a distraught parent blow away the paparazzi believed to be responsible for their child's death. We know that is true, because of the ability that the media has demonstrated for finding a market for sensationalism.³⁶ No doubt that same audience would tune in to witness journalists being slaughtered, the more violently the better. Such a show would surely out draw staged fights such as those on similar programs: "professional wrestling" or Jerry Springer. If journalists continue to say that they are only reflecting society, we can expect the downward spiral to continue. If society is to improve, journalism must. The time has come for journalists to realize that, by adopting an enforceable code of ethics, they can not only clean up the image of journalism but can contribute significantly to the improvement of society as well. Media responsibility in part means accepting responsibility for the social consequences both of media behavior and of misbehavior.

34. The problem has grown so notorious that even the editorial page editor of our small-town local paper now worries about pack journalism. Ron Cunningham, *Running with the Pack Is Fun — and Seductive*, GAINESVILLE SUN, Feb. 1, 1998, at 3G.

35. E.g., A.M. Rosenthal, *They Have Blood on Their Hands*, GAINESVILLE SUN, Sept. 4, 1997, at 8A (*New York Times* column).

36. Some journalists are entirely unapologetic regarding media excesses in covering celebrities, even including the late Princess Diana. See Dan Lynch, *No Sympathy for Spotlight Seekers*, GAINESVILLE SUN, Sept. 4, 1997, at 9A (*Albany Times Union* column).

