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Responsibility in the Media

Hugh Stevens

RESPONSIBILITY IN THE MEDIA

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> Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true, than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches, to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.
>
> James Madison

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.
>
> Chief Justice Warren Burger

I. INTRODUCTION

Are news organizations responsible? Superficially, the answer is simple: "Some are, some aren't." End of discussion.

But what do we mean when we speak of "a responsible press"? Is it possible to make a meaningful distinction between the "noxious branches"

* Attorney, Everett, Gaskins, Hancock & Stevens; J.D., University of North Carolina, 1968; B.A., University of North Carolina, 1965. The author wishes to acknowledge the research assistance of Mary Pelz, an honor student at the University of North Carolina's School of Journalism and Mass Communication.

of the news media and those that yield "proper fruits"?

Does the press have any "responsibilities"? If so, what are they? Who defines them? Is the press living up to them? If not, what, if anything, can be done to make the press more "responsible"?

These questions are anything but simple. Some luminaries of U.S. history have attempted, without much success, to answer them. Indeed, merely to raise them is to embark on something of a fool's errand. Anyone who is congenitally frustrated by inquiries that lead only to quandaries and conundrums probably would be well advised to leave these questions alone. But they are worthy of our consideration because they lie at the heart of our attempt to understand what freedom of the press is all about.

II. WHAT DO WE MEAN BY "A RESPONSIBLE PRESS"?

Because responsibility, like beauty, is in the eye of the beholder, public opinion is sharply divided over whether the press is responsible. Our views of press responsibility are shaped not only by which news outlets we read, watch, or listen to and by our cultural and political biases but also by our concept of responsibility. For example, 52% of those questioned in a 1996 poll said that, in general, the news media abuse the freedom of the press guaranteed by the First Amendment.[1] Eighty percent said the news media "often" invade people's privacy.[2] By a margin of 63% to 25%, however, the same respondents thought the press helps "American democracy" rather than hurts it.[3] In another poll, an overwhelming majority, including 65% of the Democrats polled, said news organizations did the right thing during the 1996 presidential campaign in withholding information about Bob Dole's alleged extramarital affair.[4]

One's views about press responsibility often reflect simple self interest. In 1995, *The News & Observer* of Raleigh, N.C. published "Boss Hog," a series of reports about the growth and influence of the swine industry in North Carolina.[5] The series won the Pulitzer Gold Medal for Public Service[6] and blazed a trail of public consciousness that led directly to the

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1. THE CENTER FOR MEDIA AND PUBLIC AFFAIRS, PUBLIC'S PERCEPTIONS OF THE MEDIA (1996).

2. *Id.*

3. *Id.*

4. The Pew Research Center for the People & the Press, *Press "Unfair, Inaccurate and Pushy"* (visited Mar. 24, 1998) <http://www.people-press.org/97medmor.htm> (reporting the results of the Nat'l Social Trust Survey, 1997).

5. Joby Warrick & Pat Stith, *New Studies Show Lagoons Are Leaking Groundwater, Rivers Affected by Waste*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 19, 1995, at A1. This was the first article in a series on the swine industry in North Carolina.

6. Craig Whitlock, *N & O Hog Series Takes Top Pulitzer Public Service Prize Rewards Stories on Park Industry*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 10, 1996, at A1.

state legislature's passage of significant new environmental regulations.[7] In the eyes of many readers (and the Pulitzer prize committee), "Boss Hog" was journalism at its most responsible, but North Carolina's major pork producers paid for hundreds of radio and television advertisements that attacked the series as "irresponsible."[8] Similarly, many public health officials have hailed the news media's role in raising public awareness of AIDS and the prevention of its transmission, but others have condemned the coverage on the grounds that it gives unwarranted publicity to antisocial behavior.

While it seems unlikely that we can reach a consensus about what constitutes a "responsible" press, we might come closer to an agreement about conduct by the news media that is "irresponsible." Surely, there would be nearly unanimous condemnation of a Miami television station that ignored a hurricane bearing down on South Florida, of a local newspaper that failed to tell its readers who was running for the city council, of a television network that revealed the identity of a CIA operative working undercover in Libya, and of a reporter who fabricated a story out of whole cloth. The fact that such behavior is almost unimaginable[9] demonstrates that although some issues pertaining to press responsibility may be black and white, or nearly so, the debate about press responsibility primarily occurs in a vast grey area.

III. DOES THE PRESS HAVE ANY RESPONSIBILITIES? IF SO, WHERE DO THEY COME FROM?

One reason that people have such diverse views about whether the press is responsible is that they are not sure what the news media's responsibilities are, or whether they even exist. Judging the performance of the press, or anyone else, in the absence of defined goals or expectations is not only difficult, it is irresponsible. But if we want to find out what we reasonably should expect of the press, where do we look? Where can we find a "job description" for a news organization?

One place to look, of course, is where Americans quite naturally look for an explication of their rights and responsibilities: the Constitution.

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7. *See* Joby Warrick, *Hog Spills Change Lawmakers' Views*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 6, 1995, at A1.

8. *See, e.g., Big Lobbyists No Longer Hog the PR Show*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 2, 1997, at B3.

9. Fabricated stories do find their way into print from time to time. Probably the best known is "Jimmy's World," Janet Cooke's Pulitzer Prize-winning but entirely fictitious story about an eight-year-old heroin addict that was published in *The Washington Post* on September 28, 1980. *See* Daniel A. Levin & Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources After* Cohen v. Cowles Media Company*: A Survey of Newspaper Editors*, 24 GOLDEN GATE U. L. REV. 423, 461 n.123 (1994).

A. *Does the Constitution Impose Any Responsibilities?*

This much is certain: as the late Chief Justice Burger observed in the portion of *Miami Herald Publishing Co. v. Tornillo* quoted in the epigraph of this essay, the Constitution does not explicitly impose any responsibilities on the press.[10] Thus, again, the above question can be answered superficially with a simple "no."

Many journalists and scholars, however, have interpreted the First Amendment as embodying an implied bargain, whereby the press was set free in return for its assuming certain obligations, such as the duty to provide the people with the information they need to participate in the democratic process. One exponent of this view is Eugene Patterson, the Pulitzer Prize-winning editor emeritus of the *St. Petersburg Times*, who has posited that "the grantors expected the press to obligate itself to pay certain dues to the democracy that freed it from obligation to others."[11] This theory underlies references to the press as "the fourth branch of government"[12] as well as criticism of the press for inadequate or superficial coverage of public issues.[13] It is an elegant and plausible theory, and one which I myself once embraced, but there is scant evidence for it. The Founding Fathers may have *hoped* that the press would demonstrate its collective gratitude for the First Amendment's unprecedented gift by according first priority to the illumination of public issues, but there is little reason to think they expected such a response, and they surely did not require it.

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10. 418 U.S. 241, 256 (1974).

11. Eugene Patterson, The First Amendment Does Indenture the Press with Companion Obligations, Address at the Ewing Lecture on Values in Journalism, Terry Sanford Institute of Public Policy, Duke University (Apr. 3, 1992) (transcript available at the Sanford Institute Library). The "obligations" with which Mr. Patterson perceives the press to be "indentured" are the obligation to defend the First Amendment against any attempt to limit it, and the obligation to "do its job." *Id.*

12. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 273 (1985).

> [T]he press enjoyed a preferred position in the American constitutional scheme because of its special relationship to popular government. The electoral process would have been a sham if voters did not have the assistance of the press in learning what candidates stood for and what their records showed about past performance and qualifications. A free press was becoming indispensable to the existence of a free and responsible government. . . . A free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances . . . .

Id.

13. *See, e.g.*, THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 18 (1947) [hereinafter *The Hutchins Commission Report*] (predicated on the supposition that the press was granted special freedom so that it could serve democracy, and that if the press shirks its responsibilities to make democracy work, its freedom may be curtailed).

B. *Did the Founding Fathers Understand "Freedom of the Press" as Impliedly Conferring Any Responsibilities?*

One of the most stunning but uncontrovertible facts about the concept of freedom of the press is that although it has attracted the attention and energy of countless scholars and commentators during the past 200 years, especially since World War I, the Founders apparently did not devote even five minutes to a discussion of it during the congressional deliberations leading to the Bill of Rights.[14] On August 13, 1789, the House of Representatives took up James Madison's proposal for what is now the First Amendment. Robert Goldwin describes what happened (or rather, what did not happen) as follows:

> Madison [spoke] the words "freedom of speech and of the press" twice in the course of the deliberations, but just in passing. No one else . . . so much as uttered those words, let alone discussed them, at any time. . . . No one spoke about the importance of a free press in a democratic republic and whether there might have to be any measures to control or protect the press; no one discussed the advantages, or the dangers, or the limits of freedom of speech . . . .
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> There was, in fact, no discussion of any of the issues that have become so important in First Amendment and Fourteenth Amendment constitutional law. On all these great themes, the authors of the First Amendment were completely silent.[15]

We cannot know what was said when the debate moved to the Senate, because at the time the Senate's proceedings were closed to the public and were not reported.[16] There is no evidence that the senators devoted any more time than their brethren to discussing the meaning of "the freedom of speech, or of the press."[17] Zechariah Chafee, whose *Freedom of Speech*[18] is one of the most influential works in the First Amendment canon, said, "The truth is, I think, that the framers had no very clear idea as to what they

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14. *See* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 224 (1965).

> Strangely enough, the greatest uncertainty about the meaning of the amendments has developed where the wording seems most clear and definite: in the command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." These were the protections most vociferously demanded by the people. Nobody in Congress challenged them and they were approved without discussion.

Id. (alteration in the original).

15. ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 124 (1997).

16. *Id.* at 159.

17. *Id.*

18. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 3 (1920).

meant by 'the freedom of speech or of the press.' "[19] Thus if we would understand whether the members of the First Congress had in mind any duties or responsibilities of the press when they presented North Carolina, Rhode Island, and the original eleven states[20] with Madison's amendment, we must look elsewhere.

The ten amendments that we have come to know as the Bill of Rights were ratified on December 15, 1791.[21] Seven years later in response to the Alien and Sedition Acts, Madison and other authors of the First Amendment broke their silence about the meaning of freedom of the press. The Sedition Act of 1798 made it a crime, punishable by up to two years in prison and a fine of $2000, to publish any writing that "defamed or traduced" the Congress, the President, or any federal court or judge.[22] By passing the Sedition Act in the face of the First Amendment's unambiguous prohibition on federal laws abridging freedom of speech and press, the Federalist-controlled Congress provoked the philosophical inquiry and debate that the First Congress had eschewed.[23] Leonard Levy has said that "the statute provoked American libertarians to formulate a broad definition of the meaning and scope of liberty of expression for the first time in our history."[24] The foremost of those "American libertarians," of course, were Madison and Jefferson.[25]

The Federalists attempted to justify the Sedition Act by arguing that the First Amendment was not intended to replace or expand the English common law concept of "freedom of the press," which was generally understood to mean only that the press was free from "previous restraints."[26] Madison,

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19. Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 895, 898 (1949) (reviewing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948)).

20. North Carolina and Rhode Island had not ratified the Constitution. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 290 (1990). *See generally* John P. Kaminski, *Rhode Island: Protecting State Interests, in* RATIFYING THE CONSTITUTION 368 (Michael Allen Gillespie & Michael Lienesch eds., 1989); Michael Lienesch, *North Carolina: Preserving Rights, in* RATIFYING THE CONSTITUTION, *supra*, at 343.

21. LEVY, *supra* note 12, at 266.

22. 1 Stat. 596, 596-97 (1845); *see* BRANT, *supra* note 14, at 250.

23. Delineation of the domestic and international political climate that precipitated the Alien and Sedition Acts is beyond the scope of this essay. Many excellent sources are available for persons interested in a fuller explanation. BRANT, *supra* note 14, at 237-270; LEVY, *supra* note 12, at 220-281. For an especially unique and comprehensive account, see RICHARD N. ROSENFELD, AMERICAN AURORA (1997).

24. LEVY, *supra* note 12, at 282.

25. *Id.* at 282-308.

26. As with the circumstances that gave rise to the Sedition Act, any attempt at a complete elucidation of the arguments over the scope of "freedom of the press" at common law and over the Constitution's effect on the common law lies outside this essay. Ironically, one of the better explanations of the Federalist position can be found in Madison's *Report on the Virginia Resolutions of 1798*, because one of Madison's most effective rhetorical techniques was to lay out his adversary's arguments and then offer as many refutations to

who was not serving in Congress in 1798, was kept abreast of the debates leading to the Sedition Act's passage by letters from Vice President Thomas Jefferson,[27] one of which characterized it and the Alien Act as "so palpably in the teeth of the Constitution as to sh[o]w [the Federalists] mean to pay no respect to it."[28]

Madison's and Jefferson's formulation found voice generally in the famous resolutions, passed by the Kentucky and Virginia legislatures,[29] that opposed the Alien and Sedition Acts and particularly in Madison's *Report on the Virginia Resolutions of 1798*, which was adopted by the Virginia General Assembly on January 7, 1800.[30] In his *Report*, Madison rejected the Federalists' limited interpretation of freedom of the press and posited a broadly libertarian view.[31] He argued that the federal government had no authority to punish common law offenses, that the First Amendment was intended to supersede the common law with respect to freedom of speech and press, that the First Amendment's prohibition on federal laws abridging freedom of expression was absolute, and therefore, that the Sedition Act was extraconstitutional.[32] In the process, he said a bit, but only a bit, about the press.

For example, Madison's remark about the inevitability of press abuses and the need to preserve its "noxious branches" lest the entire tree wither, is followed by his observation that

> to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression; . . . to the same beneficent

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them as possible. James Madison, *Report on the Virginia Resolutions of 1798* (Jan. 7, 1800) [hereinafter, Madison, *Report*], *in* 17 THE PAPERS OF JAMES MADISON 307, 326-351 (David B. Mattern et al. eds., 1991). Madison apparently developed this technique while a student at the College of New Jersey (now Princeton), where "disputation," debate, and disquisition were significant components of the curriculum. *See* KETCHAM, *supra* note 20, at 25-50. Madison employed the technique with particular effectiveness in his *Memorial and Remonstrance Against Religious Assessments* (1785), the tract whereby he stirred opposition to Patrick Henry's proposal for a tax to support the Protestant clergy in Virginia. James Madison, *Memorial and Remonstrance Against Religious Assessment* (June 20, 1765), *in* 8 THE PAPERS OF JAMES MADISON 295-306 (Robert A. Rutland et al. eds., 1973).

27. The story of Jefferson's and Madison's correspondence over a half-century is told in ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION (1950).

28. Thomas Jefferson, Letter to James Madison (June 7, 1798), *in* 8 THE WORKS OF THOMAS JEFFERSON 431, 434 (Paul Leicester Ford ed., 1904).

29. KETCHAM, *supra* note 20, at 395-97.

30. *Id.* at 397.

31. *Id.* at 396-97.

32. *Id.* I use this term, rather than "unconstitutional," because we have come to equate the latter term with judicial review of legislative acts — a power that did not come to fruition until 1803.

> source, the United States owe much of the lights which conducted them to the rank of a free and independent nation; and which have improved their political system, into a shape so auspicious to their happiness.[33]

Had sedition acts been systematically deployed against the press, he continued, "might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?"[34]

For Madison, this passage, tempered as it is with rueful acknowledgements of the shortcomings of the press, is high praise. He says, in effect, that if the British authorities had been on their toes they could have used the common law of sedition to prevent the American Revolution, and that without a vigorous press the Constitution might never have come to pass.[35] Even so, Madison does not predict that the press will continue to have such a "beneficent" influence, nor does he suggest that the press will be any less "chequered with abuses" if the First Amendment is read literally than if the Federalists' crabbed view prevails.[36] In this passage Madison is defending not the practices of the press, but the principle of *freedom of the press*.[37] In this regard, he anticipates Justice Holmes' brilliant one-sentence summary of what the First Amendment is all about: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."[38]

In sum, the available evidence suggests that Madison, the man who was most responsible for the First Amendment, did *not* see it — either when it was proposed and ratified or later, when it was under attack — as imposing any obligations or responsibilities on the press. Viewed in this light, freedom of the press is not part of a bargain, but a gift with no strings attached.

C. *Does the Law Impose Responsibilities?*

The law imposes responsibilities on newspeople and news organizations, just as it does on all other people and organizations. It is well settled that the press is not exempt or immune from laws of "general application."[39] News organizations, like other corporate citizens, must pay nondiscriminatory

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33. Madison, *Report*, *supra* note 26, at 338.
34. *Id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).
39. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991).

taxes,[40] comply with the antitrust laws,[41] and refrain from practicing discrimination.[42] News organizations must keep their promises, whether to pay for newsprint or to protect the confidentiality of a source.[43] Freedom of the press guarantees that people may publish and receive information, not that publishers and broadcasters may operate without any legal restrictions on their business operations.

That said, it is my experience, based on twenty years of representing and counseling news organizations, that legal considerations have a relatively minor influence on content, which is the focus of debates about press responsibility. To be sure, news organizations can and do publish or broadcast information that results in their being sued for libel or invasion of privacy, and occasionally for other claims or torts.[44] To be sure, such suits sometimes are successful, and occasionally a plaintiff actually collects a significant judgment. And to be sure, news organizations worry about being sued. Thus, they hire lawyers to review "dangerous" stories, and they hold consciousness-raising newsroom seminars at which lawyers try, usually with very modest success, to explain the arcana of modern libel law in two hours. Nevertheless (and I realize that as a "media lawyer" I am treading on the margin of heresy here), I think the "chilling effect" of libel and privacy law is exaggerated.

No doubt the fear of libel and privacy claims engenders some degree of caution and care, but I do not think that most journalists attempt to be "fair" or to "get it right" primarily out of a fear of being sued, any more than the average citizen refrains from shoplifting at the supermarket out of a fear of being caught. You are either an honest journalist or you are not, just as you are either an honest shopper or a thief. Most journalists try to be fair and try to get their story "right" for the same reason that your grandmother tries to season the Thanksgiving turkey perfectly: it's her handiwork, she wants to feel good about it, and she wants you to like it.[45]

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40. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581-82 (1983); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

41. Associated Press v. United States, 326 U.S. 1, 7 (1945).

42. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973).

43. *Cohen*, 501 U.S. at 668-69.

44. *See, e.g., id.* (holding that a newspaper may be liable under the doctrine of promissory estoppel); *Pittsburgh Press Co.*, 413 U.S. at 391 (holding that a publisher may be liable for claims of sex discrimination in an advertisement); Briggs v. Rosenthal, 327 S.E.2d 308, 311 (N.C. Ct. App. 1985) (holding that a newspaper may be liable for claims of intentional infliction of emotional distress).

45. This creative pride also accounts for a good deal of intranewsroom tension as reporters attempt to wrest more creative freedom, and more space or airtime, from editors and news directors. To extend the analogy in the text, imagine the atmosphere if grandma arrived to cook the Thanksgiving turkey at your house, only to find that you had bought the "wrong"

Moreover, several factors have rendered libel and privacy claims relatively less threatening to news organizations over the last few decades. When an Alabama jury returned a $500,000 verdict in favor of Montgomery City Commissioner L. B. Sullivan against *The New York Times*[46] in 1962, the size of the verdict, coupled with the fact that other verdicts of similar size seemed sure to follow, raised serious questions as to whether the *Times*, then wracked by strikes and hampered by small profits, could survive.[47] The "constitutionalization" of the law of libel that began with the *Times'* successful appeal[48] not only wiped out the immediate threat to that newspaper, it also has made it extremely difficult for any public official or public figure to prevail in a libel suit. Some observers have argued that protections provided by *New York Times Co. v. Sullivan* and its progeny are false gods, and that the constitutionalization of libel law did not make it less dangerous — just more complicated.[49] Although libel law has become more complicated and the legal fees incurred by the news media to defend libel suits have grown commensurately, in terms of risk assessment, which to my mind is the only proper role of lawyers in the editing process, the new but complicated body of law is infinitely preferable to the older, simpler one. *New York Times* and its progeny allow many stories to get into print, or on the air, that were not just "chilled," but were frozen out, by the common law of libel.

If we are inclined to think of the libel protection glass as half empty, rather than half full, we would do well to remember that in 1907 the Supreme Court, in an opinion written by no less eminent a jurist than Oliver Wendell Holmes, Jr., upheld the contempt conviction of a Colorado editor who had criticized a judge.[50] The editor was not allowed to plead that his criticism was true, and Justice Holmes said true statements could be punished if they did social harm.[51] Viewed in light of this case and in light of the law of libel as it existed prior to 1964, the current state of the law reminds me of the southern lady who was asked how she was coming along in her Christian journey. "Well," she said, "I ain't what I ought to be, and I ain't what I'm gonna be; but anyway, I ain't what I was."

The influence of libel law on content also is tempered by the fact that far

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size and brand of turkey, the "wrong" type of stuffing mix, and the "wrong" herbs and spices. Both circumstances produce what I call the "If Only Syndrome," because both the reporter's and grandma's laments inevitably will begin with the words, "If only I could . . . ."

46. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

47. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 35 (1991).

48. *N.Y. Times*, 376 U.S. at 254.

49. *See, e.g.*, LEWIS *supra* note 47, at 200-18.

50. Patterson v. Colorado, 205 U.S. 454, 458-59 (1907).

51. *Id.* at 462-63.

more material is published and broadcast than can be scrutinized in advance, and by the fact that, as one leading libel lawyer has said, "most libel cases do not emanate from major exposes but from the routine stories whose seeming unimportance garner them little attention in the editing process."[52] Although the in-house lawyers for the major television networks and other national news organizations vet numerous stories, anecdotal evidence suggests to me that even these wealthy, high profile organizations subject a much lower percentage of their stories to prepublication legal review than readers and viewers might think. Moreover, weekly newspapers and other small news organizations collectively account for a great deal of media content, but many have limited access to prepublication review or to the money to pay for it. And even when a news organization attempts to take precautions, no one, not even the lawyers, can identify in advance what will cause someone to sue.

Much of what I have said above about the influence of libel law can also be said about the law of "invasion of privacy." The courts of various jurisdictions generally recognize four separate "invasion of privacy" torts:

> (1) the unauthorized appropriation of a person's name or likeness for commercial purposes;
> (2) intrusion into a person's solitude;
> (3) publication of truthful but embarrassing private facts; and
> (4) publications that portray a person in a "false light."[53]

The first of these torts usually arises in the context of advertising, and the second in the context of newsgathering. Therefore, only concerns about "private facts" and "false light" claims are likely to influence editorial decisions.[54]

"False light" is the most baffling of the four privacy torts. In theory, it involves a publication that places the plaintiff in a false light that is not defamatory, but that is highly offensive to a reasonable person.[55] In practice, false light is often difficult to distinguish from defamation. In fact, I once heard a colleague describe it to a trial judge as "a double first cousin of libel." Fortunately for the news media, the Supreme Court has long since defanged the tort by making it subject to the *N.Y. Times* "actual malice" standard.[56] Moreover, the highest courts of several states have expressly

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52. BRUCE W. SANFORD, LIBEL AND PRIVACY § 3.1, at 49 (2d ed. Supp. 1993).
53. *Id.* §§ 11.1 to 11.5, at 523-85.
54. *Id.*
55. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.12, at 126-54 (1997).
56. Time, Inc. v. Hill, 385 U.S. 374, 386-87 (1967). A statement is made with "actual malice" if it is made "with knowledge that it was false or with reckless disregard of whether

declined to recognize the tort on the grounds that it adds little or nothing to the law of defamation,[57] some commentators have suggested that it is a dying tort.[58]

By contrast, the tort based on publication of embarrassing "private facts" is widely recognized.[59] It apparently has been expressly rejected only by the Supreme Court of North Carolina, which held that its recognition would add unduly to the tension between the First Amendment and the common law of torts. In addition, the court held that the "private facts" tort would be of little practical value because it would largely duplicate or overlap with the tort of intentional infliction of emotional distress.[60]

The most problematical facet of the private facts tort is that publications become actionable if the facts disclosed are "highly offensive to a reasonable person," but even these kinds of facts may be published with impunity if they are sufficiently "newsworthy."[61] The vagueness and ambiguity of these standards present editors (and lawyers conducting prepublication review) with head-scratching conundrums and render the law virtually meaningless as a guide to risk assessment. Trying to discern what kinds of disclosure will or will not give rise to a successful private facts claim is akin to driving on a highway that has no posted speed limit. When the law cannot be translated into a meaningful standard, it has little direct influence on behavior.

IV. IS A "RESPONSIBLE PRESS" AN UNATTAINABLE IDEAL?

If neither the Constitution nor the law requires the press to be responsible to any meaningful or practical extent, what is society to do? Must we simply accept the fact that some elements of the news media will voluntarily assume responsibility for attempting to tell their readers and viewers what they need to know in order to be conscientious citizens, while others will greedily exploit the ignorance and fears of the least educated segment of the society? Must we gamble the future of our democracy on the thin hope that despite the influence of ratings-obsessed corporate managers, sufficient numbers of men and women of passion and principle will emerge to maintain the tenuous but critical link between a free press and a free people?

In large measure, I think the answer to the last two questions is "yes." Like Madison, I think democracy without an unfettered press is an empty

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it was false or not." *N.Y. Times*, 376 U.S. at 279-80.

57. *See, e.g.*, Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405 (N.C. 1984); Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994).

58. *See generally* Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364 (1989).

59. MCCARTHY, *supra* note 55, § 5.9, at 78.

60. Hall v. Post, 372 S.E.2d 711, 716-17 (N.C. 1988).

61. RESTATEMENT (SECOND) OF TORTS, § 652D, cmt. d (1981).

concept. Like him, I believe that where the press is free in theory but not in practice, as in Britain, for example, the underpinnings of democracy are weakened. Like Madison, I view the history of the press, "chequered as it is with abuses," in a generally positive light. Like him, I deplore the "noxious branches" of the news media, but I can conceive no principled way to prune these branches without damaging those that "yield proper fruits" — particularly since someone else's "proper fruits" may be my personal poison. Perhaps Judge Learned Hand said it best: "The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[62]

Although I share Chief Justice Burger's view that press responsibility cannot be legislated,[63] I do not think that fact necessarily condemns us to a future in which the country's best-selling publication is a television guide and the second is a titillating supermarket tabloid,[64] or a future in which millions of people cast their presidential ballots solely on the basis of passions and prejudices stirred up by television advertisements. The First Amendment may preclude society's acting politically to prod the press in a particular direction, but it does not prevent our acting individually, or corporately, to do so. To the contrary, it guarantees each of us a voice just as free as the voice of CNN, or the *National Enquirer*, or *The New York Times*, and the right to join our voice with others. It protects our right to participate in what Justice Brennan described as the "uninhibited, robust and wide-open" debate on public issues,[65] including the issue of whether the press is "responsible." If we will exercise that right — if we will assume our responsibility to speak out against perceived irresponsibility — we will make the multitude of voices larger and more diverse.

There are many ways to join the public debate about press performance, including letters to editors, calls to radio talk shows, and increasingly, postings on the Internet. In its simplest form, however, we can participate by changing the channel, declining to renew a subscription, and leaving the tabloids in their racks.

Will we join the debate? Will we raise our voices?

In short, will *we* be "responsible"?

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62. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).
63. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).
64. George Garneau, *Golden Tabloids*, EDITOR & PUBLISHER, Jan. 16, 1993, at 15.
65. *N.Y. Times*, 376 U.S. at 270.