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Robert E. Drechsel

THE PARADOX OF PROFESSIONALISM: JOURNALISM AND MALPRACTICE

Robert E. Drechsel[*]

For 125 years, if not longer, many journalists and other media practitioners have either aspired to or claimed professional status. With its educational trappings, articulation of ethics, standards of good practice, and commitment to public service ideals, professionalism has been seen as essential for quality, legitimacy, credibility, and respect. The aspirations of media practitioners have been no different than those of workers in any other fields.

The media may only now be beginning to understand that costs accompany the benefits of professional status. Professionalism creates expectations not only among an occupation's practitioners, but among those it serves. Expectations and standards of good practice beget their obverse—concepts of malpractice. The media are learning that a broad range of communication problems can be understood as malpractice.

This essay ponders the linkage between professionalism and malpractice in the context of occupations generally and in the context of journalism specifically. It raises the question of whether pressure for increased legal liability is, ironically, one of the inevitable by-products of professionalization despite the fact that professionalization aims to give occupations greater autonomy.

In fact, professionalism seems inherently to become deeply entangled in regulation, albeit regulation based on standards that may be drawn largely from within the professions themselves. Professions or professionalizing occupations themselves often seem to be of two minds, simultaneously wanting substantial autonomy and yet seeking special protection or privileges backed by government power. Therefore, this essay attempts to put "communication malpractice" in the larger context of malpractice across occupations, and asks ultimately whether the First Amendment may not have blinded the media to the reality that what is happening to them is little different from what has happened to many other professions or quasi-professions.

To develop this idea, I draw first on the literature from the sociology of professions to lay out the meaning of profession and professionalization. I illustrate these concepts with examples from two fields, medicine and accountancy, and briefly describe the development of malpractice liability in those fields. Finally, I turn my attention to the

* Professor of Journalism and Mass Communication and Affiliated Professor of Law, University of Wisconsin-Madison. Ph.D., 1980, University of Minnesota.

development of professional aspirations in American journalism, noting how it has paralleled developments in other occupations, and concluding that concomitant pressure for expansion of liability for journalistic malpractice should come as no surprise.

For my purposes, it matters less whether journalism and other media occupations technically meet sociological or legal definitions of "professions" than whether media occupations can be seen as "professionalizing." Nor should First Amendment considerations be seen as rendering moot any attempt to categorize media occupations as professional (*e.g.*, arguments that because licensing is impossible, so is professional status). The First Amendment, after all, has been largely ignored in the context of malpractice regarding non-media occupations, even when communication is clearly involved. Additionally, it is dangerously easy for journalists to convince themselves that the First Amendment will or should shield them from liability for malpractice while simultaneously embracing professionalism. Indeed, the faltering public credibility of the media may be another manifestation of the impact of professional expectations going unfulfilled.

Ultimately, this essay concludes that the relationship between law and media professionalism is not what one might intuitively expect. Embracing the accouterments of professionalism—including commitment to high standards of practice, ethical behavior and public service—may invite as much legal entanglement as it avoids. Media practitioners need to come to grips with this paradox as other occupations have. While the First Amendment will continue to be a buffer for media workers, they ought not be surprised at pressure from their "clients" and constituents that will constantly test and occasionally overcome that buffer.

I. PROFESSIONALISM AND PROFESSIONALIZATION

Many occupations have aspired to professional status, and sociologists have long pondered the meaning of "professional" or "professionalism" and the process of professionalization. Professionalism can be seen as the ideology and associated activities in an occupational group whose members aspire to professional status, even though actual professional status may never be achieved.[1] But professional and other kinds of occupational behavior differ only relatively with respect

1. *See* Howard M. Vollmer & Donald L. Mills, *Editors' Introduction* to PROFESSIONALIZATION at viii (Howard M. Vollmer & Donald L. Mills eds., 1996).

to certain attributes common to all occupational behavior.[2] Professionalism is a matter of degree, varying in terms of such attributes as degree of generalized and systematic knowledge; orientation to community interest rather than self-interest; degree of self-control through internalized codes of ethics and voluntary associations controlled by work specialists themselves; and degree to which a system of monetary and honorary rewards primarily symbolizes work achievement and not individual self-interest.[3]

Etzioni has tried to distinguish "professional" behavior on the basis that it is ultimately motivated by what the professional believes is right as opposed to what is approved by someone of superior rank.[4] Eliot Freidson sees educational requirements as a primary factor in defining a profession.[5] Others suggest additional criteria, such as an occupation's use of systematic theory, its authority, the existence of ethical codes, a distinct professional culture, a strong intellectual component to the work, the use of educationally communicable technique, tendency toward self-organization and altruistic motivation.[6]

Whatever the criteria for professional status, the process of achieving it is itself worthy of examination. Sociologist Harold Wilensky's classic description remains influential:

> [T]here is a typical process by which the established professions have arrived: men begin doing the work full time and stake out a jurisdiction; the early masters of the technique or adherents of the movement become concerned about standards of training and practice and set up a training school, which, if not lodged in universities at the outset, makes academic connection within two or three decades; the teachers and activists then achieve success in promoting more effective organization, first local, then national—through either the transformation of an existing

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2. *See* Bernard Barber, *Some Problems in the Sociology of Professions*, *in* THE PROFESSIONS IN AMERICA 17 (Kenneth S. Lynn ed., 1965).

3. *See id.* at 18. For another scaling approach, see WILBERT E. MOORE, THE PROFESSIONS: ROLES AND RULES 5-6 (1970).

4. *See* AMITAI ETZIONI, *Editor's Preface* to THE SEMI-PROFESSIONS AND THEIR ORGANIZATION at x-xi (Amitai Etzioni ed., 1969).

5. *See* ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 59 (1986).

6. *See, e.g.*, ABRAHAM FLEXNER, IS SOCIAL WORK A PROFESSION? (1915); William J. Goode, *The Theoretical Limits of Professionalization*, *in* ETZIONI, *supra* note 4, at 277; Ernest Greenwood, *Attributes of a Profession*, *in* PROFESSIONALIZATION 10 (Howard M. Vollmer & Donald L. Mills eds., 1996); Talcott Parsons, *Professions*, *in* 12 INT'L ENCYCLOPEDIA OF THE SOC. SCI. 536 (David L. Sills ed., 1968).

> occupational association or the creation of a new one. Toward the end, legal protection of the monopoly of skill appears; at the end, a formal code of ethics is adopted.[7]

Wilensky's characterization has been thoughtfully criticized, but the idea that professionalization is a process—sometimes successful and sometimes not—subject to study has been widely accepted.[8]

A. Two Examples: Medicine and Accountancy

One can see the concepts of professionalism and professionalization at work in the context of many occupations. For example, both medicine and accountancy have gone through a professionalization process in the United States. Medicine, of course, has long been regarded as a profession, but accountancy offers an interesting and useful example of how occupations can aspire to professional status and make substantial progress over a relatively short period of time. Accountancy is also interesting because its research and auditing functions parallel the investigative and watchdog roles of the press.

Medicine, some have argued, had fundamental professional attributes as early as medieval times,[9] and was subject to legal regulation as early as the thirteenth century.[10] But in the United States, the road to broadly recognized professional status for medicine was rocky for much of the first century of the republic. Anyone could offer what purported to be medical treatment, schools were shoddy, and medical societies were scattered and unable to exercise strong, uniform control. Although some licensing existed during the early years, the Jacksonian era and its anti-intellectualism swept away nearly all state medical licensing in the 1830s and 1840s, and it would be decades before meaningful licensing became re-established.[11]

As early as 1808, a medical society in Boston adopted a code of ethical behavior, with societies in several other cities following suit.[12] Reflecting "mainstream" practitioners' efforts to establish standards and

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7. Harold Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 145-46 (1964).

8. *See, e.g.*, Goode, *supra* note 6, at 275-76. *See also* Barber, *supra* note 2, at 23-24.

9. *See* VERN L. BULLOUGH, THE DEVELOPMENT OF MEDICINE AS A PROFESSION 108 (1966).

10. *See* Thomas Percival, *The Moral Regulation of Physicians by Civil Authority, in* PERCIVAL'S MEDICAL ETHICS 14 (Chauncey D. Leake ed., 1927).

11. *See* DONALD E. KONOLD, A HISTORY OF AMERICAN MEDICAL ETHICS 7 (1962).

12. *See id.* at 2.

control both qualifications and entry into the occupation (not to mention to de-legitimize and drive out practitioners of alternative medicine), the American Medical Association ("AMA") was founded in 1847. It immediately adopted a code of ethics that represented a response to Jacksonian attacks and an effort to regain patient confidence.[13] By the mid-1850s many local societies formed and adopted the AMA Code.[14] Medical education was strengthened substantially in the last quarter of the nineteenth century, and significant advances were made in medical techniques. Licensing was re-established, and standards became more uniform.

By the early twentieth century, the AMA turned directly to state legislation, not ethics, to attack practices by those it regarded as quacks.[15] In fact, in 1903, the AMA abandoned any enforcement of ethics and declared that its new "Principles of Medical Ethics" was simply an advisory document.[16] By then, however, the AMA had achieved true national unity and control over the medical profession from the local level up.[17] American doctors had achieved the primary trappings of professional status: specialized education, intellectual and technical expertise, self-organization, a public service orientation, an ethics code, and substantial control of their field and entry into it.

Accountancy offers a more recent example. Indeed, until 1896, there were no certified public accountants in the United States. The rise of public accountancy paralleled the development of publicly owned corporations and the concomitant need by investors for independent, objective financial information. The American Association of Public Accountants was formed in 1887 with only thirty-one members, but further growth in the occupation was stimulated by such developments as the new income tax and the creation of the Federal Trade Commission, the Interstate Commerce Commission, and the Federal Reserve Board.[18] In 1896, New York became the first state to provide statutorily for exclusive certificates for CPAs upon successful examination.[19] The *Journal of Accountancy* began publication in 1905,[20] and already in the

13. *See id.* at 1.
14. *See id.* at 12.
15. *See id.* at 31-32.
16. *See id.* at 69.
17. *See* ROSEMARY STEVENS, AMERICAN MEDICINE AND THE PUBLIC INTEREST 29 (1971).
18. *See* JOHN L. CAREY, THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL 2, 6-7 (1969).
19. *See id.* at 44.
20. *See id.* at 52.

1920s, at least some accountants were acknowledging that they had obligations to the public as well as to their clients.[21] College instruction in accounting was instituted and by 1916, accounting "academics" formed an organization of their own.[22] About the same time, the Association of American Accountants was restructured into the American Institute of Accountants, in part so it would have the power to make and enforce ethics rules.[23] Additionally, after being assigned a share of the blame for the economic collapse of the 1930s, accountants embraced ethical standards in hopes of avoiding stronger government regulation.[24] By 1960, a standard, national CPA exam had been established.[25]

Standards developed within the occupation itself came to be known as generally accepted accounting principles ("GAAP") and, ultimately, generally accepted auditing standards ("GAAS"). These standards covered the presentation of financial data and procedures for verifying its accuracy and completeness. In 1936 the now dominant American Institute of Certified Public Accountants ("AICPA") was formed.[26] Like doctors, accountants had traveled a path that included development of a strong organization, certification standards, higher education requirements, and ethical principles.

B. Malpractice and Professional Standards: Medicine and Accountancy

1. *The Rise of Malpractice Actions in Medicine*

Malpractice actions against physicians in the United States were rare until the 1840s, when they suddenly exploded. Historians attribute the explosion to such seemingly contradictory factors as the strong anti-professional sentiment during the Jacksonian period, which made those physicians who hoped to improve medicine via licensing appear to be acting against the public interest; the frequently bad performance of poorly-trained physicians; intra-professional rivalry which led physi-

21. *See id.* at 252-53.
22. *See id.* at 261.
23. *See id.* at 228.
24. *See* CAREY, *supra* note 18, at 247.
25. *See* JAMES DON EDWARDS, HISTORY OF PUBLIC ACCOUNTING IN THE UNITED STATES 306 (1960).
26. *See* DAN L. GOLDWASSER & M. THOMAS ARNOLD, ACCOUNTANTS' LIABILITY 1-2 to 1-4 (1996).

cians to denigrate each other's practices; and dramatic technological advances which inflated expectations in both physicians and patients.[27]

Ironically, the best educated and most successful physicians were most likely to be sued. They were victims of the rising expectations that accompanied the new, advanced procedures they used, and they were more likely to be aggressive in attempting these new procedures. Now the very textbooks and advanced manuals they produced could be used in court against them as standards from which they could be accused of deviating.[28]

Improvements in medical education, the re-institution of licensing, and the strengthening of the AMA did not reduce malpractice litigation. Although some antipathy toward physicians eased, medical technology continued to advance and raise expectations. Americans became more materialistic and even more concerned with physical well-being while lawyers' use of contingency fees expanded access to legal services.[29]

2. *The Rise of Malpractice Actions in Accountancy*

Meanwhile, the first malpractice cases against accountants began to appear in the twentieth century precisely as their professionalization picked up steam, with most cases involving complaints about some aspect of the auditing function.[30] The legal standard of conduct expected of accountants came to be the standards established by the occupation itself, and these included both standards of practice and ethical standards set forth in the codes of professional conduct of the American Institute and state societies.[31] Liability today is no longer limited to those with whom accountants have contractual relations, but has been widely recognized as extending to third parties who rely on accountants' representations—to all persons an accountant reasonably should foresee might obtain and rely on her reports.[32]

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27. *See* KENNETH A. DEVILLE, MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA: ORIGINS AND LEGACY 224-26 (1990).

28. *See* JAMES C. MOHR, DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA 113-15 (1993).

29. *See* DEVILLE, *supra* note 27, at 227-29.

30. *See* WARREN FREEDMAN, MALPRACTICE LIABILITY IN THE BUSINESS PROFESSIONS 20 (1995).

31. *See* GOLDWASSER & ARNOLD, *supra* note 26, at 2-3.

32. *See* Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L.J. 1309, 1332 (1991).

Both medicine and accountancy thus illustrate Wilensky's professionalization paradigm. In both disciplines workers became concerned about standards of training and practice. We see training established at the university level. We see organizations formed to further occupational interests, adoption of formal ethics codes, and, ultimately, government protection of the monopoly of skill. And eventually we see alleged breaches of the standards set by the occupations themselves become the basis for allegations of malpractice. As professional standards rose and competence increased, so did legal pressure. As the occupations looked to government for recognition and protection of special status and to their own practitioners and organizations to develop and enforce uniform standards, they simultaneously gained and sacrificed autonomy. Some accountants, for example, did this quite self-consciously. In 1912, the *Journal of Accountancy* suggested that it would be desirable for accountants to be held legally responsible for losses sustained by investors where an accountant failed to use reasonable care.[33]

II. PROFESSIONALIZATION AND JOURNALISM

Professionalization and journalism have been linked in the United States since at least the late 1860s when General Robert E. Lee established a journalism program at Washington College.[34] The first textbook for journalists was published in 1872 and explicitly called the occupation a profession.[35] The president of Cornell University urged establishment of a journalism program there in the mid-1870s, again under the rubric of professional education, although the plan never came to fruition.[36] As early as 1875, a brochure reporting the results of a survey by a New York newspaperman of some twenty-seven prominent journalists frequently used the word "professional" in regard to journalists and asserted that "[d]uring the last twenty years journalism has become prominent, if not preeminent, as a profession."[37] The president of the Missouri Press Association proclaimed during a speech

33. *See* CAREY, *supra* note 18, at 80-82.

34. *See* Stephen A. Banning, *The Professionalization of Journalism: A Nineteenth-Century Beginning*, 24 JOURNALISM HIST. 161 (1998-99); *see also* SIDNEY KOBRE, DEVELOPMENT OF AMERICAN JOURNALISM 532-36 (1969).

35. *See* DE FOREST O'DELL, THE HISTORY OF JOURNALISM EDUCATION IN THE UNITED STATES 19 (1935).

36. *See id.* at 22.

37. *Id.* at 29.

in 1879 that "editing newspapers is as much a profession as practicing law or medicine."[38]

The trend to professionalization grew more prominent during the first two to three decades of the twentieth century, in part as a response to what some have characterized as a crisis of public confidence.[39] Indeed, journalism was only one of many occupations that sought to professionalize in the early 1900s, a trend quite compatible with the growth of progressivism.[40] The now dominant trade magazine, *Editor & Publisher*, began publication in 1901, and immediately began championing professional status for journalists.[41] Media ethics codes began to proliferate,[42] and university programs in journalism began to grow. When Joseph Pulitzer endowed the Journalism School at Columbia University in 1904, the university itself issued a statement asserting that the new school would rank with existing professional schools of law, medicine, engineering, architecture, and teaching.[43] Educators formed their own first organization in 1912, building ultimately to the development of an accreditation system for college and university programs in the mid-1940s.[44]

Sigma Delta Chi and Theta Sigma Phi, the forerunners of today's Society of Professional Journalists, were formed in 1909.[45] The American Society of Newspaper Editors organized in 1923 with a constitution emphasizing professional purpose:

> To promote an acquaintance among members, to develop a strong professional esprit de corps, to maintain the dignity and rights of the profession, to consider and perhaps establish ethical standards of professional conduct, to interchange ideas for the advancement of professional ideals and for the more effective application of professional labors, and to work collectively for the solution of common problems.[46]

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38. Banning, *supra* note 34, at 161.

39. *See* Douglas Birkhead, *The Power in the Image: Professionalism and the 'Communications Revolution'*, AM. JOURNALISM, Winter 1984, at 11.

40. *See* Margaret A. Blanchard, *Press Criticism and National Reform Movements: The Progressive Era and the New Deal*, 5 JOURNALISM HIST. 34 (1978).

41. *See* Mary Margaret Cronin, *Profits, Legitimacy and Public Service: The Development of Ethics and Standards in New York City's Newspapers*, 78 n.4 (1992) (unpublished Ph.D. dissertation, Michigan State University, on file with the Michigan State University Library).

42. *See id.* at 271.

43. *See* O'DELL, *supra* note 35, at 60-61.

44. *See* PAUL L. DRESSEL, LIBERAL EDUCATION AND JOURNALISM 34 (1960).

45. *See* WILLIAM MEHARRY GLENN, THE SIGMA DELTA CHI STORY 161 (1949).

46. Casper S. Yost, *Professional Organization, in* AN INTRODUCTION TO JOURNALISM:

So taken with the importance of professionalization was one of the organization's founders that he declared:

> Journalism has taken its place among the great professions. Its influence is universally recognized. It has become a necessity of modern life and modern progress. Its development is one of the wonders of our age. It pervades all civilization and makes a constant impress upon human thought and achievement everywhere. Yet it is in fact so new that it is only now beginning to realize within itself that it is not a mere aggregation of individuals pursuing a common vocation, but an entity, whose rights must be guarded, whose integrity must be maintained, and whose responsiblities must be recognized, by its individual parts.[47]

Calls for licensing of journalists can be found as early as 1910 to 1920, by journalists as well as by politicians, and with virtually no recognition that licensing might raise First Amendment issues.[48] No less a luminary than William Allen White was quoted as saying:

> Until the people of this country get it well in their heads that journalism is a profession which must be licensed and controlled, as the medical and legal professions are licensed and controlled, there can be no freedom of the press which is not liable to great abuses . . . . When the newspaper is socially controlled as medicine and law are, the freedom of our newspaper will be an asset. As it is, our freedom is a liability.[49]

Walter Lippmann called for journalism to move toward greater professionalism and worried that if journalism did not improve itself, Congress might intervene with greater regulation.[50] Also in the twenties and early thirties, the first books on journalism ethics appeared, strongly championing the ideal of journalism as a public trust, and praising the development of ethics codes.[51]

AUTHORITATIVE VIEWS ON THE PROFESSION 49 (Lawrence W. Murphy ed., 1930).

47. CASPER S. YOST, THE PRINCIPLES OF JOURNALISM at v (1924).

48. *See* NELSON ANTRIM CRAWFORD, THE ETHICS OF JOURNALISM 141-43 (1924).

49. LEON NELSON FLINT, THE CONSCIENCE OF THE NEWSPAPER 401 (1925) (quoting William Allen White).

50. *See* WALTER LIPPMANN, LIBERTY AND THE NEWS 76-80 (Transaction Publishers 1995) (1919).

51. *See, e.g.*, CRAWFORD, *supra* note 48; FLINT, *supra* note 49; WILLIAM FUTHEY GIBBONS, NEWSPAPER ETHICS: A DISCUSSION OF GOOD PRACTICE FOR JOURNALISTS (1926); ALBERT F. HENNING, ETHICS AND PRACTICES IN JOURNALISM (1932).

In other words, by the mid-1920s at latest, the vocabulary of professionalism had entered journalistic discourse. Clearly, journalism was beginning the same professionalization process as other occupations. There was no looking back. In the mid-1940s, the Hutchins Commission on Freedom of the Press released its controversial report declaring journalism to have become a sort of public trust and articulating the idea that the media were obligated to behave in a socially responsible manner.[52] Although many journalists still did not think of themselves in the same sense as physicians or attorneys—and many still may not—the die was cast. The remainder of the twentieth century would see journalists become better educated—the vast majority in college and university journalism schools—as well as the development and revision of more codes of ethics. Although they had initially been critical of the Hutchins Commission's report, recommendations and characterizations of the press, journalists came to accept and even tout the idea that they occupy a position of enormous public trust and obligation as surrogates for the public and watchdogs for the public interest.

III. DEVELOPMENTS IN TORT LAW AND NEGLIGENCE

Just as journalism was beginning the professionalization process, significant change was coming to the law of torts and negligence. In fact, only in the latter part of the nineteenth century was the law of torts coming to be regarded as a discrete branch of law.[53] And only in the twentieth century was the law of torts to evolve into primarily a system for compensating injury rather than a system for discouraging misconduct.[54] Perhaps even more important was the evolution of the concept of legal duty into "the idea of a general duty, owed to all the world by all the world, but limited to those who were 'at fault'—the negligence principle."[55] In other words, the late nineteenth century saw the law of torts brought into harmony and conformance with the law of negligence.[56] Although late nineteenth century negligence principles seemed intended as much to limit liability as to expand it, over time

52. *See* THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

53. *See* EDWARD G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1979).

54. *See id.* at 62.

55. Edward G. White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 236 (1978).

56. *See id.*

negligence law took a path toward a more expansive, contextual definition of legal duty that was to become ready-made for expanding the idea of what constitutes malpractice. It opened the door, for example, to liability in the absence of "privity"—that is, in the absence of any special, contractual-like, relationship. Indeed, negligence law may have developed as it did in part to deal with an increased number of accidents involving strangers.[57]

Already by 1900, Jeremiah Smith was able to generalize that

> [T]here is no topic of the law in which lack of precedent is entitled to less weight than in negligence. Negligence is largely a modern conception, and the scope of the action is constantly widening. Legal remedy is allowed to-day as to various states of facts where no one would have dreamed of suing a century ago.[58]

Negligence thus became a sufficiently malleable concept to become a tort in itself as well as to constitute the standard of fault required by other torts. Its far-reaching "failure to use due care" standard, balancing of utility and risk, and openness to establishment of new legal duties open the door to actions for a broad range of harmful or dangerous behavior. It also invites comparison between defendants' conduct and standards of appropriate occupational behavior defendants themselves have articulated. Therefore, it should come as no surprise to see plaintiffs testing journalists' behavior not only in the context of such familiar torts as libel, but also in actions based on a broad variety of other theories, most of which invoke issues of negligence in one way or another.

IV. JOURNALISM AND THE IDEA OF MALPRACTICE

I have suggested something of the obvious: that the development of liability for malpractice is the dark side of professionalization, although not entirely unwelcome by some professionals themselves. Malpractice liability may even further the professionalization process by validating and highlighting occupational standards or criticizing their breach.[59] Should we not expect the same in journalism when it has manifested the characteristics of a professionalizing occupation? To be sure, pure self-interest motivates many efforts to restrain the press,

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57. *See* WHITE, *supra* note 53, at 16.

58. Jeremiah Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 193 (1900).

59. *See* LEE G. BOLLINGER, IMAGES OF A FREE PRESS 47 (1991).

compensate "victims," and regulate the media. But in a larger sense, many such efforts, the arguments they invoke and the principles to which they give life may be best understood under the rubric of professionalization and malpractice.

For example, there is obvious linkage between many of the principles of American libel law and professional standards.[60] Journalists and some scholars have explicitly favored judging legal fault in libel cases by a journalistic malpractice standard—i.e., according to whether the conduct leading to the libel represented a departure from generally recognized standards of appropriate conduct for journalists, including widely acknowledged standards of ethics.[61] Although the Supreme Court seems to have resisted such a standard overtly, at least where public figures are concerned,[62] such resistance may be more apparent than real. For even as the Court has wrestled with the question of what provides circumstantial evidence of actual malice, it has pointed to factors with a strong basis in contemporary journalistic norms—obviously biased or shallow sourcing, materially changing the meaning of a source's remarks, failure to use obviously vital sources, and so on.[63] And when negligence is the fault standard, even if the standard isn't explicitly journalistic malpractice, evidence as to departure from journalistic norms can easily enter as a judge and jury ponder the circumstances under which an alleged error occurred.[64] Courts have thus both modeled what they believe to be inappropriate media behavior and invited evidence as to appropriate journalistic conduct.

It is nearly impossible for journalists to make legal arguments without invoking the public interest they purport to serve. We see this clearly in arguments for the privilege to protect confidential sources and information, in claims for access to people and information, in the

60. *See* Brian C. Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 113 (1994). *But see* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169.

61. *See* RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977); Lackland Bloom Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247 (1985); Todd Simon, *Libel As Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 452-53 (1984).

62. *See* Harte-Hanks Comm. v. Connaughton, 491 U.S. 657, 665 (1989) ("[A] public figure plaintiff must prove more than an extreme departure from professional standards . . . .").

63. *See, e.g.*, Masson v. New Yorker Magazine, 501 U.S. 496 (1991); *Harte-Hanks*, 491 U.S. at 665; St. Amant v. Thompson, 390 U.S. 727 (1968).

64. *See* Bloom, *supra* note 61, at 344.

argument for strong protection against libel actions, and in resistance to actions for even the most unseemly news gathering methods. But claims that the public interest requires protection for journalists even when they clearly cause harm serve only to emphasize the public trusteeship role journalists have embraced. And in the relatively rare instances when journalists lose in court—and, not infrequently, when they win—unredeemed failure to serve the public interest may be prominently on display.[65] It is difficult to think of many occupations in which workers routinely claim that harming someone is nevertheless essential in the name of broader public service obligations. It is not an easy position to sell, at least to victims and to the public who are its supposed beneficiaries.

During the past two decades in particular, journalists have found themselves targeted with a broad new range of actions—"trash torts," as one commentator has described them[66]—seeking recognition of new legal duties, remedies for new kinds of harm, and application of theories of liability not heretofore attempted in a journalistic context. We see

65. *See, e.g.*, Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657 (1989) (finding actual malice of libel defendant who purposely ignored vital sources that seriously undermined story); Food Lion Inc. v. Capital Cities/ABC Inc., 194 F.3d 505 (4th Cir. 1999) (holding network liable for trespassing where journalists obtained jobs by falsifying resumes, then secretly shot videotape in workplace); Rice v. Paladin Enter., 128 F.3d 233 (4th Cir. 1997) (reversing grant of summary judgment in wrongful death action for contract killer's manual used to commit crime); Sharon v. Time, 599 F. Supp. 538 (S.D.N.Y. 1984) (finding publisher not immune from libel action against *Time* by former Israeli defense minister over allegations that he was responsible for killing of Palestinian refugees); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983) (reversing motion to dismiss in negligent disclosure action where plaintiff was terrorized by former assailant after newspaper published her name and address); *see also* George Ventura, *I Trusted A Reporter*, BRILL'S CONTENT, Feb. 2000, 85-91 (reporting that newspaper company paid $10 million settlement after reporter illegally entered company's voice mail system; confidential source sued newspaper for breach of confidentiality). *But see* Florida Star v. B.J.F., 491 U.S. 524 (1989) (finding no liability for newspaper publishing name of sexual assault victim while assailant was still at large).

66. *See* Charles C. Scheim, Comment, *Trash Tort or Trash TV?:* Food Lion, Inc. v. ABC, Inc., *and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN'S L. REV. 185, 185 (1998). *See also* Symposium, *Undercover Newsgathering Techniques: Issues and Concerns*, 4 WM. & MARY BILL OF RTS. J. 1005 (1996); Robert E. Drechsel, *Media Malpractice: The Legal Risks of Voluntary Social Responsibility in Mass Communication*, 27 DUQ. L. REV. 237 (1989); David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161 (1997); Marshall & Gilles, *supra* note 60.

actions now for simple negligence,[67] trespassing,[68] negligent and intentional infliction of emotional distress,[69] wrongful death,[70] breach of contract,[71] and tortious interference,[72] in addition to the standard libel and privacy claims. Many of these, too, might be seen not merely as efforts to end-run difficult libel and privacy defenses (which they certainly can be), but as attempts to bring law more closely into accord with obligations journalists have already embraced. Such a development would seem little different from increasingly successful efforts to hold other professionals legally responsible for violating occupational standards and expectations they have established.

V. CONCLUSION

Faced with stagnant or declining readership of newspapers, the trend toward "infotainment" and fewer resources for broadcast news, corporatization of media, and poll data consistently showing the public to be frustrated and angry with them, journalists have become deeply concerned about their public perception and support. Journalists seem to believe that with enough polls, focus groups, and self-criticism, they will be able to diagnose and respond effectively to the crisis of public confidence they feel afflicts them. They seem to assume that re-commitment to professional ethics and public service—more professionalism, in other words—are key to improving the situation. The rise of the public journalism movement and the formation of Committee of Concerned Journalists provide two examples.[73]

The assumption may be incorrect. It is conceivable, as Bruce Sanford argues in his recent book, that the public itself is blameworthy, shooting itself in the foot by often blaming journalists for doing exactly

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67. *See* Risenhoover v. England, 936 F. Supp. 392 (W.D. Tex. 1996); Cliff v. Narragansett Television L.P., 688 A.2d 805 (R.I. 1996).

68. *See* Food Lion Inc. v. Capital Cities/ABC Inc., 194 F.3d 505 (4th Cir. 1999).

69. *See* Hustler v. Falwell, 485 U.S. 46 (1988); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

70. *See* Rice v. Paladin Enter., 128 F.3d 233 (4th Cir. 1997); Kersis v. ABC Inc., 103 F.3d 129 (9th Cir. 1997) (unpublished); Cliff v. Narragansett Television L.P., 688 A.2d 805 (R.I. 1996); Hogan v. Hearst Corp., 945 S.W.2d 246 (Tex. Ct. App. 1997).

71. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

72. *See* Cook v. Winfrey, 141 F.3d 322 (7th Cir. 1998); Metabolife Int'l Inc. v. Wornick, 72 F. Supp. 2d 1160 (S.D. Cal. 1999); American Broad. Co., Inc. v. Gill, 6 S.W.3d 19 (Tex. Ct. App. 1999).

73. *See* Committee of Concerned Journalists, *Statement of Concern* (visited June 29, 2000) <http://www.journalism.org/statement.html>.

what they ought to be doing.[74] But it is also conceivable that public frustration stems in part from journalists not fulfilling expectations journalists themselves have fostered. Herein lies the paradox of professionalization. Never before have journalists been so well-educated, had so many sophisticated tools at their disposal, shown quite so much introspection about their work. From top to bottom, the overall quality of American journalists may never have been higher—more professional. Yet, unlike other professionalized occupations which have themselves had to confront crises in public confidence, as journalists do their jobs better, they may only make many of their constituents more angry.

74. *See generally* BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US (1999).