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SENSATIONALISM IN THE NEWSROOM: ITS YELLOW BEGINNINGS, THE NINETEENTH CENTURY LEGAL TRANSFORMATION, AND THE CURRENT SEIZURE OF THE AMERICAN PRESS

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INTRODUCTION

The media—a time capsule—captures our world in words and images as it is at this very moment. Today's newspaper tells us something about the world we live in, the local news captures the pulse of the town, and the radio shares the current headlines in between popular songs. The media not only reports the news to its current audience; it captures the moment for posterity. As it stands today, the media is in a position to maintain a distorted image of today's events for our ancestors. With sensational headlines and inaccuracies, the media has become a less credible source. Speculation in reporting leads to a speculative audience, which, in turn, diminishes the reliability of the news.

This brand of reporting was first witnessed, and was in its prime, at the end of the nineteenth century, during the heyday of "Yellow Journalism."[1] Characterized by "prominent headlines that 'screamed excitement,' . . . [a] 'lavish use of pictures,' . . . 'frauds of various kinds,' . . . a Sunday supplement and color comics, . . . [and] 'campaigns against abuses suffered by the common people,'"[2] Yellow Journalism served an entertainment, rather than educational, function. The media today embodies each of these characteristics and, if left to develop, will produce a meaningless press.

This Note aims to identify the legal, ethical, and public policy concerns inherent in the press today and their relation to the press of time past. Part I gives a brief history of Yellow Journalism, its definition, origins, and implications. Parts II and III

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1. *See generally* W. JOSEPH CAMPBELL, YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES 1 (2001) (describing nineteenth-century reporting practices).

2. *Id.* at 7.

examine two Supreme Court cases, *Near v. Minnesota*[3] and *New York Times v. Sullivan*,[4] which altered the legal environment in which the press operates. Part IV is then divided into three sections, each of which considers the impact of the sensational press in one of three areas: law, ethics, and public policy. Section A considers the case of Richard Jewell, a security guard who was originally implicated in the Atlanta Olympic Park bombing of 1996.[5] After significant media attention, Mr. Jewell was acquitted of all charges and brought suit against the media entities that accused him. Mr. Jewell's story exemplifies the legal state of the media today. Section B considers the ethical questions underlying the modern media, using the recent press attention on California Governor Arnold Schwarzenegger as a case study. Governor Schwarzenegger received press coverage during his campaign that some have labeled "unethical." This press coverage illustrates the contradiction between the ethical codes by which journalists purportedly live and the reality of their tactics. Finally, in Section C, this Note addresses the presidential election of 2000 and the role that the press played in its outcome. The public policy concerns surrounding this fiasco illustrate the larger public policy questions that result from the state of the press today. In its conclusion, this Note reiterates that the press is moving in a sensational direction, with detrimental effects. If the press is not restored to its informative roots, it may be worthless in a short time—an occurrence that will have negative effects on all facets of society.

I. SENSATIONAL ORIGINS: YELLOW JOURNALISM

The late nineteenth century witnessed the expansion of the sensational press. Media moguls, wielding the power of large corporations, used the resources at their disposal to sell newspapers and influence politics.[6] "Sensational news . . . involved people in what was going on in the world and so painted those events in a particular way as to assure that the public took a particular side based upon a specific sentiment regarding [those]

3. 283 U.S. 697 (1931).

4. 376 U.S. 254 (1964).

5. *See, e.g.*, PBS, *Olympic Park: Another Victim*, THE NEWSHOUR WITH JIM LEHRER, *at* http://www.pbs.org/newshour/bb/sports/jewell_10-28.html (last visited Apr. 16, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

6. Jonathan W. Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunication Acts*, 17 ST. JOHN'S J. LEGAL COMMENT. 11, 28 (2003).

events."[7] "[T]he new journalism"[8] took root during a period of turmoil in the United States and in the newspaper business.[9] The news was no longer in the hands of the individual publisher, but rather was a part of big business in corporate America. The two men often accredited with the rise of "the new journalism," Joseph Pulitzer of the *New York World* (the "*World*") and William Randolph Hearst of the *New York Journal* (the "*Journal*"), were bitter rivals.[10] In a heated battle for the consumer's dollar, the two media moguls printed exaggerated headlines and fabricated stories.

Their biggest rivalry, however, was not over headlines or bylines, but rather was against the cartoonist R.F. Outcault and his cartoon, the Yellow Kid.[11] Hearst, an avid fan of Outcault's cartoon "Hogan's Alley," envied Pulitzer's publication for its affiliation with Outcault and especially "Hogan's Alley['s]" main character, the Yellow Kid.[12] Unable to lure Outcault to the *Journal*, Hearst waged a publication war with Pulitzer by launching the *Journal*'s mascot, the Yeller Feller, and a cross-country bicycle race.[13] Wooed by Hearst's efforts, Outcault defected to the *Journal*.[14] Pulitzer, refusing to give up his trademark cartoon, hired another cartoonist to imitate the character, resulting in "a time [when] there were two Yellow Kids."[15] This widely-publicized feud led to the label "Yellow Journalism," which, in an effort to sell newspapers, the *Journal* and the *World* embraced with enthusiasm.[16]

While the symbol of Yellow Journalism was a cartoon child in a yellow robe, the hallmark of the period was political power. William Hearst disagreed with then-President McKinley's policy of "global non-interference," supporting Cuba's independence from Spain.[17] Hearst published a stolen private letter from the Spanish minister to Washington characterizing McKinley as "weak and catering to the rabble, and besides, a low politician."[18]

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7. *Id.*
8. CAMPBELL, *supra* note 1, at 25.
9. JOYCE MILTON, THE YELLOW KIDS: FOREIGN CORRESPONDENTS IN THE HEYDAY OF YELLOW JOURNALISM xiii (1989).
10. For a media depiction of the publishing war between Pulitzer and Hearst, see NEWSIES (Walt Disney Pictures 1992).
11. CAMPBELL, *supra* note 1, at 25.
12. MILTON, *supra* note 9, at 40–41.
13. *Id.* at 41.
14. *Id.* at 42.
15. *Id.* at 43.
16. *Id.* at 43.
17. Lubell, *supra* note 6, at 28–29.
18. *Id.* at 29.

This letter led to the resignation of the Spanish minister and increased pressure on McKinley to prove that he was not weak or low.[19] Both Pulitzer and Hearst sent correspondents, photographers, and artists—among them the noted artist Frederick Remington—to Cuba in order to understand the situation.[20] Upon arrival in Cuba, Remington wrote to his boss, Hearst, stating that there was no war and requesting recall.[21] Hearst denied the request, stating, "Please remain. You furnish the pictures, I'll furnish the war."[22] Hearst stood by his statement and was soon joined by other newspapers, politicians, and citizens. The rallying cry, "[R]emember the *Maine*!," echoed throughout the country.[23] Pulitzer and Hearst had reached their goals: "higher circulation, increased profits, and war."[24]

The Spanish-American War was not the only repercussion of the new sensationalism. Calls for an honest press arose. Free speech advocates began to emerge in defense of the newspapers' First Amendment rights, countered by the call for privacy rights. A now-classic article surfaced in the *Harvard Law Review* in 1890, entitled, "The Right to Privacy."[25] The authors of *The Right to Privacy*, the future Supreme Court Justice Louis Brandeis and colleague Samuel Warren, "criticized the press for 'overstepping in every direction the obvious bounds of propriety and of decency.'"[26] The authors noted, "Each crop of unseemly gossip,

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19. *Id.*

20. Small Planet Communications, *The Spanish American War*, *at* http://www.smplanet.com/imperialism/remember.html (last visited Apr. 16, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

21. *Id.*

22. *Id.*; *see also* Lincoln Cushing, *1898–1998: Centennial of the Spanish-American War*, *at* http://www.zpub.com/cpp/saw.html (last visited Apr. 16, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

23. The "Maine" was a battleship that was attacked while stationed in the Havana harbor. Desiring war with Spain—and increased circulation—Pulitzer and Hearst blamed the Spanish for the tragedy. Soon Americans were crying "Remember the *Maine*!" as a call to avenge both the "Maine" and American pride. Small Planet Communications, *The Spanish American War*, *at* http://www.smplanet.com/imperialism/remember.html (last visited Apr. 16, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

24. Gene Wiggins, *Journey to Cuba: The Yellow Crisis*, *in* THE PRESS IN TIMES OF CRISIS 103, 117 (Lloyd Chiasson, Jr. ed., 1995). For more information on the involvement of the press in the Spanish-American War, see John Baker, *Effects of the Press on Spanish-American Relations in 1898*, *at* http://www.humboldt.edu/~jcb10/spanwar.shtml (last visited Apr. 16, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

25. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

26. George P. Smith, II, *The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right*, 54 S.C. L. REV. 1, 5 (2002).

thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality."[27] Warren and Brandeis advocated the creation of a new tort to protect an individual's personality from the emerging sensational media.[28] Using English law as the basis of their argument, Warren and Brandeis stated that, because the common law affords copyright protection to artists, authors, and letter-writers in order to keep their works from going into the public domain, a similar right should be afforded individuals not to have their persona probed or published.[29] Similarly, Warren and Brandeis contended that Roman law provided damages for mental suffering due to an attack on one's honor, and, thus, the courts in the United States should provide a similar recovery based on the right to privacy.[30]

Recognizing that the right to privacy could not be absolute, the revolutionary article noted six limitations: (1) "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest";[31] (2) "[t]he right of privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel";[32] (3) an invasion of privacy by oral communication must be accompanied by special damages to qualify;[33] (4) "[t]he right of privacy ceases upon the publication of the facts by the individual, or with his consent";[34] (5) "[t]he

27. Warren & Brandeis, *supra* note 25, at 196.

28. *Id.* at 198.

29. *Id.* at 199.

30. *Id.* at 197–98, 205–07.

31. *Id.* at 214. Warren and Brandeis recognized the difficulties in applying this rule and gave an admittedly incomplete definition:

> In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.

Id. at 216.

32. *Id.* at 216. The right to privacy does not cover publications made in a court, legislature, or practically any public body. *Id.* at 216–17.

33. *Id.* at 217.

34. *Id.* at 218.

truth of the matter published does not afford a defence [sic]";[35] and (6) "[t]he absence of 'malice' in the publisher does not afford a defence [sic]."[36] Thus, the six limitations are that the right to privacy prohibits neither information of public interest nor information protected by libel or slander, that special damages must accompany an invasion of privacy by oral communication, that the right of privacy may be waived, and that it is not a defense that the information is true or that it was revealed absent malice.

As shown in subsequent sections,[37] the law has not fully adopted Warren and Brandeis' suggestions; however, their ideas have not escaped the attention of the courts of the United States. The application of this concept in the media has varied over time and is arguably at its lowest point today. Regulation of the media's power of speech has been the subject of numerous cases.[38] The following section addresses one of the principal cases discussing such regulation: *Near v. Minnesota.*[39]

II. EMPTY DOCTRINE: THE CONCEPT OF THE HONEST PRESS & *NEAR V. MINNESOTA*

In *Near v. Minnesota,*[40] decided in 1931, the Supreme Court of the United States established the doctrine of prior restraint,[41] striking down a Minnesota statute as an unconstitutional restraint on publication.[42] The statute in question provided that any person, as an individual or as part of an organization, engaged in publishing "an obscene, lewd and lascivious newspaper, magazine, or other periodical" or "a malicious, scandalous and defamatory newspaper, magazine or other periodical" is guilty of a nuisance and may be permanently enjoined from such behav-

35. *Id.* Redress under this law would be for damage to the right of privacy, not for damage to the individual's character. The law of libel and slander provides redress for damage to character. *Id.*

36. *Id.*

37. *See infra* Parts II and III.

38. *See, e.g.,* Bartnicki v. Vopper, 532 U.S. 514 (2001); Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994); Central Broad. Sys. v. Davis, 510 U.S. 1315 (1994); Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Fla. Star v. B.J.F., 491 U.S. 524 (1989); Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

39. 283 U.S. 697 (1931).

40. *Id.*

41. "A [prior restraint is a] governmental restriction on speech or publication before its actual expression. Prior restraints violate the First Amendment unless the speech is obscene, is defamatory, or creates a clear and present danger to society." BLACK'S LAW DICTIONARY 1212 (7th ed. 1999).

42. Near v. Minn., 283 U.S. 697, 723 (1931).

ior.[43] In addition, the "court is empowered . . . to punish disobedience to a temporary or permanent injunction by fine of not more than $1,000 or by imprisonment in the county jail for not more than twelve months."[44] Thus, the statute created a prior restraint, disallowing the publication of obscene or malicious newspapers by punishing anyone who would publish them with a fine and/or imprisonment.

Before concluding that the statute was an unconstitutional restraint of the media, the Supreme Court noted, "Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse."[45] This recognition of the limitations inherent in the freedom of the press echoes Warren and Brandeis's "right to privacy" argument.[46] While this recognition gives some credence to their contention, it simultaneously undermines their argument by removing the legislature's ability to control the invasion of privacy at the outset. The removal of this power, coupled with the preservation of legal action following publication, provides for protection of the right to privacy while also guarding First Amendment rights.

In addition to its recognition of the limitations on the power of the press, the purpose of the statute reinforces its alignment with Warren and Brandeis's "right to privacy."[47] The statute is "aimed at the distribution of scandalous matter as 'detrimental to public morals and to the general welfare,' tending 'to disturb the peace of the community' and [the incitement of] . . . 'assaults and the commission of crime.'"[48] The statute is not aimed at redressing private wrongs but at protecting the public good. The Supreme Court of Minnesota captured the purpose of the statute as follows:

> There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are

43. *Id.* at 702–03.

44. *Id.* at 703.

45. *Id.* at 708.

46. *See supra* Part I. The Supreme Court's recognition that freedom of speech and freedom of the press are not absolute bolsters Warren and Brandeis's right to privacy argument. Taken in tandem, it is apparent that there must be a balance between the freedom of the press and the right to privacy for individuals whom the press may exploit.

47. Near v. Minn., 283 U.S. at 709–12.

48. *Id.* at 709 (citation omitted).

> exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare.[49]

This statute, although directed at the protection of the public welfare, violated the First Amendment because it unreasonably limited freedom of speech. Uncertainty over whether certain statements would be considered lewd, malicious, or defamatory would certainly cause some individuals to err on the side of caution and forgo the speech in question. As such, the statute not only protects the public from lewd, malicious, and defamatory speech; it chills otherwise innocuous speech as well.

The renunciation of censorship and the adoption of the doctrine of prior restraint parallel the British system, described by Blackstone:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.[50]

Blackstone supports a system wherein all individuals may speak on any topic they choose; however, some speech may be subject to subsequent punishment. He notes that "[t]he liberty of the press is indeed essential to the nature of a free state," but recognizes that liberty lies in the freedom to make a statement, not freedom from punishment for the damage those statements may cause.

Since Blackstone's time, the British have enacted another measure to protect the general welfare: the 1981 Contempt of Court Act.[51] This act has no counterpart in American jurisprudence; however, such an act would curtail a significant amount of the sensational reporting that occurs in relation to high-profile trial proceedings.

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49. *Id.* at 710.

50. *Id.* at 713–14.

51. Joanne Armstrong Brandwood, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1432 (2000).

> The 1981 Act established strict liability for any publication "addressed to the public at large . . . [which] creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." Because proceedings must be "active" for statutory strict liability to apply, press restrictions are only in force from the time a suspect is arrested (or a warrant is issued) until the proceedings end (with an acquittal, conviction, or administrative termination). The motivation of the publisher is irrelevant, and the statutory defense of "innocent publication" is available only if the publisher was unaware that proceedings were active.[52]

This provision in British law has been touted as a replacement for voir dire in the courts of the United States;[53] however, voir dire does not, and cannot, remove the exposure that members of a jury have had to press commentary on court proceedings.

The establishment of prior restraint, coupled with the preservation of punishment for abuse by the media, drew a relatively equal balance between the First Amendment right to freedom of speech and the protection of the general welfare. This balance allowed the press to exercise free speech through publication while protecting victims of that publication through the judicial process. In addition, it placed the practice of sensationalism in perspective, allowing journalists to publish what they saw fit while still providing a remedy in the event that the publication exceeded its boundaries. This balance was disturbed by the Supreme Court of the United States in *New York Times v. Sullivan*, which will be considered in the ensuing section.[54]

III. A CONDONING COURT: *NEW YORK TIMES V. SULLIVAN*

This section reveals the evolving jurisprudence surrounding the balance of freedom of speech with personal privacy. It analyzes the landmark case of *New York Times v. Sullivan*,[55] which further limited the individual right to privacy and expanded the right of the press to publish sensational information without ramifications.

New York Times again brought before the Supreme Court of the United States the enduring issue of the media's freedom of speech and publication. The Court considered what protections

52. *Id.* at 1432–33.
53. *Id.* at 1432.
54. *See infra* Part III.
55. 376 U.S. 254 (1964).

public persons are afforded as against the media.[56] This case, which arose from the publication of an advertisement in the *New York Times*, established that public persons are not afforded the same protections from media attention as private individuals.[57]

Recognizing that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker,"[58] *New York Times v. Sullivan* condoned the practice of sensationalism in the modern press.

Although a libel case, *New York Times v. Sullivan* exacerbates right to privacy concerns because libel and the right to privacy are necessarily intertwined. A cursory examination of three pertinent definitions illuminates the validity of this statement: (1) libel is "[a] defamatory statement expressed in a fixed medium";[59] (2) defamation is "[t]he act of harming the reputation of another by making a false statement to a third person";[60] and (3) the right of privacy is the other side of the libel/defamation coin. The right to privacy constitutes "[t]he right of a person and the person's property to be free from unwarranted public scrutiny or exposure."[61] As these definitions illustrate, any decision that decreases the scope of defamation laws simultaneously reduces an individual's right to privacy because there is a smaller cause of action against someone that impinges upon that right. When the law sanctions the publication of false information (by removing consequences for its publication), the press loses its incentive to preserve an individual's right to privacy.

The Court in *New York Times v. Sullivan* condones the reporting of false information, stating:

> The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." . . . As Madison said, "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."[62]

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56. *Id.* at 283.
57. *Id.*
58. *Id.* at 271.
59. BLACK'S LAW DICTIONARY 927 (7th ed. 1999).
60. *Id.* at 427.
61. *Id.* at 1325.
62. 376 U.S. at 271.

Constitutional protection does not turn upon truth or social utility; however, truth and social utility are integral components of a reliable and practical press. People consult news sources, not for their entertainment value, but for the information they provide about events around the world. If these sources could not be relied upon for their truth, they would be rendered sources of entertainment, consulted purely for recreation. Likewise, social utility is an integral component of news reporting. Media outlets inform the public about past, present, and future events; facilitate social, economic, and political activity; and inspire improvement and communication in society at large.

"The fundamental purpose of television news is to stimulate debate, educate, inform, challenge, and touch the viewer emotionally and viscerally."[63] It is implicit that, if education and information are two fundamental purposes behind the media, the news—by necessity—must provide truthful information. Likewise, that the media is responsible for educating and informing the public suggests that television news should contribute to social utility as education vastly improves society. Therefore, although the Court's holding, that "constitutional protection does not turn upon . . . truth,"[64] is not counter to the fundamental purpose of news, the Court's failure to recognize the importance of truthfulness in reporting is inconsistent with that fundamental purpose.

Also, although it cannot be refuted that "[s]ome degree of abuse is inseparable from the proper use . . . of the press,"[65] the Court does not define either "proper use . . . of the press," or the level of abuse at which the press loses its credibility. Although it is not the function of the Court to create the standards of media credibility, the media looks to the law to create boundaries within which it must function. The Court's assertion that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'"[66] not only condones erroneous statements but also suggests that freedom of expression and debate cannot be achieved without them. The media functions to broadcast fact-based information. Debate emanates from opinions based on fact, not from the dissemination of false information. In protecting "'half-truths' and 'misin-

63. Leslie Ann Reis, *The Rodney King Beating—Beyond Fair Use: A Broadcaster's Right To Air Copyrighted Videotape as Part of a Newscast*, 13 J. MARSHALL J. COMPUTER & INFO. L. 269, 273 (1995).

64. 376 U.S. at 271.

65. *Id.*

66. *Id.* at 271–72.

formation,'" the Court endorses sensational journalism. As such, *New York Times* sets a legal, ethical, and public policy precedent that underlies today's sensational press.

IV. A SECOND SENSATIONALISM: THE MODERN PRESS

Yellow Journalism developed at a tumultuous time in American history. Without legal, ethical, or public policy precedent as to the roles and obligations of the press, nothing will discourage the media from using sensationalism to attain economic and political success. Although such legal, ethical, and public policy precedent exists today, sensationalism has returned and has profoundly affected each of these spheres. This Section discusses the sensationalism inherent in today's press and the legal, ethical, and public policy questions raised thereby. These issues are presented and analyzed via three case studies: (1) the Richard Jewell Olympic Park bombing investigation; (2) the election of, and surrounding media attention to, Governor Arnold Schwarzenegger of California; and (3) the 2000 presidential election fiasco. Each of these case studies illustrates the trend toward sensationalism in the modern press and examines the legal, ethical, and public policy implications.

As noted above, the legal environment has evolved to accommodate sensational behavior by the press.[67] While remedies are available ex post,[68] this is often inadequate due to the irreparable character damage that has already taken place to the individual. The chronicle of Richard Jewell, accused and absolved of committing the 1996 Atlanta Olympic Park bombing, serves as a prime example of the effect that media dissemination of false information can have on an individual's life.[69] While Mr. Jewell obtained economic damages via litigation, this money will never substitute for the permanent damage that the allegations and media attention wrought.[70] This permanent damage is, in part, caused by the lack of a legally sanctioned set of ethical standards for the press. Rule 11 of the Federal Rules of Civil Proce-

67. *See supra* Parts II and III.

68. *Ex post* remedies include economic damages and any rehabilitative measures agreed to during settlement negotiations.

69. *Victim's Rights Amendment: Hearing on S.J. Res. 6 Before the United States Senate*, 105th Cong. (1997) (statement of Elisabeth Semel, Nat'l Ass'n of Crim. Def. Law.), *available at* http://www.criminaljustice.org/TESTIFY/ test0012.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

70. Mike Godwin, *The Drudge Retort: Is Matt Drudge Guilty of Libel*, REASON MAGAZINE, *available at* http://reason.com/9802/fe.godwin.shtml (last visited Apr. 16, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

dure establishes a legal sanction for ethically questionable conduct by attorneys.[71] The media would benefit from a similar legal standard for ethical practices.

In the absence of a legal standard for ethical media practices, many organizations have adopted ethical codes of their own.[72] These ethical codes, although widely disseminated and publicized, in practice seem often to be overlooked. A timely example of the contradiction between these purported ethical codes and unethical practices in modern journalism surfaced during the recent California recall election.[73] Five days before the election, the *Los Angeles Times*[74] ran a story alleging the sexual harassment of numerous women over the past few decades by then-candidate, and now-Governor, Arnold Schwarzenegger. The timing and release of this story stimulated public debate over the ethics of journalism.[75] These questions regarding the ethical standards of the press contribute to the larger issue of sensationalism in the media.

Where legal restrictions and ethical conventions fail, public policy may dictate restraints on media sensationalism. Where the media's misuse of information has adverse public policy consequences, it must be questioned which is more important: freedom of the press or preservation of democracy. The presidential election debacle of 2000 illustrates this point.[76] The release and reporting of East Coast exit polling information—and subsequent speculation regarding the victor in those regions—prior to

71. FED. R. CIV. P. 11(c).

72. *See, e.g.*, Associated Press Managing Editors, *Ethics Code, at* http://www.asne.org/index.cfm?ID=388 (last visited Apr. 16, 2005) ("The newspaper should uphold the right of free speech and freedom of the press and should respect the individual's right to privacy."); Dow Jones, *Code of Conduct, at* http://www.asne.org/index.cfm?ID=3555 (last visited Apr. 16, 2005) (stating, "it is an essential prerequisite for success in the news and information business that our customers believe us to be telling them the truth"); Radio-Television News Directors Association, *Code of Ethics and Professional Conduct, at* http://www.rtnda.org/ethics/coe.shtml (last visited Apr. 16, 2005) ("Professional electronic journalists should operate as trustees of the public, seek the truth, report it fairly and with integrity and independence, and stand accountable for their actions.").

73. Gary Cohn et al., *Women Say Schwarzenegger Groped, Humiliated Them*, L.A. TIMES, Oct. 2, 2003, at A1.

74. *Id.*

75. Gary Gentile, *Newspaper Symposium Discusses Media Ethics, Schwarzenegger Stories*, DESERT SUN, Dec. 7, 2003, at A13, *available at* http://www.thedesertsun.com.

76. For various opinions on the media coverage of political campaigns and elections, see PBS, *Covering Election 2000: A Media Watch Special Report, The NewsHour with Jim Lehrer, at* http://www.pbs.org/newshour/media/election2000 (last visited Sept. 23, 2004).

the conclusion of voting on the West Coast resulted in skewed election results.[77] Having heard that a candidate had already prevailed, many individuals on the West Coast forfeited their opportunity to vote, thus altering the outcome of the election. These individuals, who were previously interested in casting a vote for their candidate, did not do so because they thought that their effort would not make a difference. Those who were going to vote for the individual who was projected to have won did not vote because they did not think that their vote was necessary, and those who were going to vote for the candidate projected to lose did not vote because they felt that the vote would not be enough to help their candidate prevail. In addition, many scholars argue that the media influenced the Supreme Court's decision in *Bush v. Gore*,[78] the case which ultimately decided the victor in the 2000 election. These actions by the press had a vast impact on the political, social, and economic environment of the United States, creating immense public policy concerns. These same public policy concerns arise from many other media presentations and will continue to do so as long as sensationalism prevails.

A. *Sensations in Law: The Richard Jewell Case*

Richard Jewell, a one-time law enforcement official turned security guard, was transformed from average citizen to hero to villain in the span of one newsday.[79] Shortly before the Atlanta Olympics, Anthony Davis Associates, a Los Angeles security firm, hired Jewell to provide security for the AT&T Pavilion at Centennial Olympic Park.[80] During his shift in the early morning hours of July 27, 1996, Jewell discovered a bomb before detonation, notified others, and assisted in the ensuing evacuation of the area.[81] The subsequent explosion claimed two lives and injured more than one hundred people.[82] Heralded as a hero in the

77. *NewsHour with Jim Lehrer: Examining Election Night* (PBS television broadcast, Feb. 13, 2001), *at* http://www.pbs.org/newshour/bb/media/jan-june01/anchors_2-13.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

78. 531 U.S. 98 (2000).

79. *See, e.g.*, Dean Chang & Helen Kennedy, *His Goal Was To Be a Hero Cop*, DAILY NEWS, Aug. 1, 1996, at 2; Editorial, *From Hero to Villain to Ordinary Citizen*, CHI. SUN-TIMES, Aug. 23, 1996, at 35; Mike Lopresti, *Suspect or Hero: My One-on-One Encounter*, USA TODAY, July 31, 1996, at 2A; Kathy Scruggs & Ron Martz, *FBI Suspects 'Hero' Guard May Have Planted Bomb*, ATL. J. CONST., July 30, 1996, at 1X.

80. *See* Chang & Kennedy, *supra* note 79, at 2; Scruggs & Martz, *supra* note 79, at 1X.

81. *In re* Four Search Warrants, 945 F. Supp. 1563, 1564 (N.D. Ga. 1996).

82. *Id.*

press, Jewell appeared on the television morning show circuit and offered interviews to newspapers and magazines.[83]

Within seventy-two hours of the original reports, Jewell became a suspect and the media took hold, painting a new picture of the once-celebrated guard: "Richard Jewell . . . fits the profile of the lone bomber. This profile generally includes a frustrated white man who is a former police officer, member of the military or police 'wannabe' who seeks to become a hero."[84] Newspaper accounts reported that Jewell "approached newspapers . . . seeking publicity for his actions."[85] They also revealed that Jewell had been fired from his last job for being "an overly aggressive police officer who enjoyed the limelight."[86] Richard Jewell was no longer a private citizen; he was a convicted man in the public eye.

The media frenzy surrounding Jewell brought instantaneous debate over the appropriateness of media tactics. The *Dallas Morning News* immediately ran a story entitled, "News Slathering: Packaging of Tragedies Brings Glut of Coverage."[87] Noting that "the cable news networks, with their 24-hour-a-day holes to fill, have again had to figure out what to report when there is nothing new to report,"[88] the article addresses what it terms "the repackaging of time and reality."[89] Ed Turner, CNN's executive vice president of news gathering, was quoted as stating, "The dictates of time mandate misjudgments."[90] What Mr. Turner failed to say is that these misjudgments have real impact on the lives of many individuals, particularly Richard Jewell. While CNN's story is gone in the blink of an eye, "Mr. Jewell's life is forever changed."[91] As the article notes:

> Due process is a thing of the past; even while carefully wording reports with reminders that Mr. Jewell hasn't been charged with anything, the media have found him guilty of fitting an unflattering profile . . . . If he is innocent, how does Mr. Jewell get his reputation back, who is responsible

83. *See* Greg Boyd, *The Lynching of Richard Jewell*, EYE WEEKLY (Nov. 28, 1996), *at* http://www.eye.net/eye/issue/issue_11.28.96/news_views/media.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

84. Scruggs & Martz, *supra* note 79, at 1X.

85. *Id.*

86. *Id.*

87. Tom Maurstad, *News Slathering: Packaging of Tragedies Brings Glut of Coverage*, DALLAS MORNING NEWS, Aug. 1, 1996, at 27A.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

> for destroying it and how do we keep it from happening again (or at least again and again)?[92]

Seeking the restoration of his character and economic compensation, Richard Jewell turned to the courts of law.[93]

Many of Jewell's lawsuits resulted in cash settlements, avoiding litigation completely.[94] Other lawsuits traveled through the justice system.[95] Although originally brought to clear his name, the litigation soon became something more, as illustrated by Jewell's attorney, L. Lin Wood Jr.: "We're going to sue everyone from A to Z . . . . This litigation is not about principle. It's about compensation for injury done."[96] In December 1996, Jewell received a $500,000 settlement from NBC.[97] Jewell's claim concentrated on comments made by anchorman Tom Brokaw on the air after Jewell was named a possible suspect in the July 27, 1996, bombing.[98]

Jewell filed another libel suit in January 1997 against the *Atlanta Journal-Constitution*[99] and Piedmont College,[100] where Jewell once worked as a campus security guard.[101] Jewell agreed to drop the lawsuit against Piedmont College under the undisclosed terms of an out-of-court settlement.[102] Although Piedmont may have contributed information to the article, it was not the information that was truly questionable in the instant case.

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92. *Id.*

93. *See generally* Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175 (Ga. Ct. App. 2001); Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348 (S.D.N.Y. 1998); *In re* Four Search Warrants, 945 F. Supp. 1563 (N.D. Ga. 1996).

94. *See, e.g., Report: Richard Jewell To Get More Than $500,000 from NBC: Cleared Olympic Bombing Suspect Reported 'Very Satisfied'*, CNN INTERACTIVE (Jan. 3, 1997), *at* http://www.cnn.com/US/9701/03/olympic. bombing/index.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter *Jewell To Get More Than $500,000*].

95. *See, e.g.*, Jewell, 555 S.E.2d at 175.

96. *Jewell to Get More Than $500,000, supra* note 94.

97. *Id.*

98. *Id.*

99. *Olympic Bomb Libel Suit To Proceed: FBI To Interview Overlooked Witness*, CNN INTERACTIVE, Jan. 28, 1997, *at* http://www.cnn.com/US/9701/ 28/ olympic.bombing/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

100. Piedmont College is a liberal arts college with approximately two thousand students located about seventy minutes from Atlanta in Demorest, Georgia. *See* Piedmont College, Piedmont Facts, *at* http://www.piedmont.edu/ prospect/index.html#facts (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

101. *Olympic Bomb Libel Suit To Proceed, supra* note 99.

102. Carol Woodford, *Richard Jewell Reaches Monetary Settlement with Former Employer*, ONLINEATHENS.COM, Aug. 27, 1997, *at* http://www. athensnewspapers.com/1997/082797/0827.a2jewell.html.

Jewell was first identified as a suspect in the Centennial Olympic Park bombing in a special July 30, 1996, edition of the *Atlanta Journal-Constitution.*[103] The article, entitled *FBI Suspects 'Hero' Guard May Have Planted Bomb,* stated that Jewell fit the profile of the lone bomber, sought media recognition as a hero, and refused to open the door when *Atlanta Journal-Constitution* reporters came knocking.[104] Other articles and litigation followed.[105]

The Court of Appeals of Georgia decided the appeals of two cases on October 10, 2001—*Atlanta Journal-Constitution v. Jewell* and *Jewell v. Cox Enterprises, Inc.*[106] *Atlanta Journal-Constitution v. Jewell* arose from the trial court grant of Jewell's motion to compel reporters' sources.[107] The reporters countered with an unsuccessful motion seeking a protective order precluding discovery of the reporters' confidential sources.[108] Following the reporters' refusal to obey the motion to compel, the trial court found them in contempt.[109] The appellate court vacated both the order requiring disclosure of the reporters' sources and the contempt order, remanding the case to the trial court for the judge to "balance the requesting party's specific need for the material against the harm that would result by its disclosure."[110]

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103. *Olympic Bomb Libel Suit To Proceed, supra* note 99.

104. Scruggs & Martz, *supra* note 79.

105. *See* Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348 (S.D.N.Y. 1998); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175 (Ga. Ct. App. 2001); Jewell v. Capital Cities/ABC, Inc., No. 97 Civ. 5617 LAP, 1998 WL 702286 (S.D.N.Y. Oct. 7, 1998). For articles written on Jewell's alleged participation in the bombing, see *supra* note 79.

106. *See Jewell,* 555 S.E.2d at 175. These cases were consolidated on appeal. In his ruling, Judge Johnson aptly describes the circumstances under which these cases arose:

> These cases arise from coverage by the Atlanta Journal-Constitution of the 1996 bombing in Centennial Olympic Park and Richard Jewell's involvement in that incident. The initial media coverage of the Olympic Park bombing portrayed Jewell as a hero for his role in discovering the bomb, alerting authorities, and evacuating bystanders from the immediate vicinity, no doubt saving lives. Subsequently, however, the Federal Bureau of Investigation (FBI) focused its investigation on Jewell. The resulting media coverage of the criminal investigation caused Jewell and his family considerable anguish, while converting Jewell's status from hero to suspect. The investigation ultimately cleared Jewell of any involvement in the bombing. And through subsequent media coverage of the investigation, his role in these events has once again been depicted as the positive role it was originally believed to be.

Id. at 178.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 180.

In vacating these orders, the appellate court sanctioned both the concealment of reporters' sources and disobedience to the trial court's orders. The court's refusal to enforce the orders not only kept Jewell from the knowledge of where the press reports originated but also prevented him from seeking redress from the origin of those reports. The court's refusal sets a precedent, sending a message to future informants that their identities will not be disclosed and, thus, can report any information, true or false, without repercussion.

Jewell v. Cox Enterprises Inc.[111] addressed "whether Jewell, as the plaintiff in this defamation action, [was] a public or private figure, as those terms are used in defamation cases."[112] In the original action, the trial court found that Jewell was a public figure for purposes of the defamation action.[113] In its analysis, the appellate court applied *Gertz v. Robert Welch, Inc.*:[114] "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures . . . ."[115] Utilizing a three-prong test established by the Eleventh Circuit,[116] the Court of Appeals found that Jewell was, in fact, a public figure.[117] The court noted:

> Jewell granted ten interviews and one photo shoot in the three days between the bombing and the reopening of the park, mostly to prominent members of the national press. While no magical number of media appearances is required to render a citizen a public figure, Jewell's participation in the public discussion of the bombing exceeds what has been deemed sufficient to render other citizens public figures.[118]

Although Jewell placed himself in the public discussion, he did so in his role as a hero, not as a suspect. The media also interviewed other individuals hailed as heroes, none of whom

111. This case was consolidated with *Jewell*, 555 S.E.2d at 175.

112. *Id.* at 183.

113. *Id.*

114. 418 U.S. 323 (1974).

115. *Jewell*, 555 S.E.2d at 183 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)).

116. *Id.* at 183–86 ("Under this test, the court must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy.") (citing Silvester v. American Broadcasting Cos., 839 F.2d 1491, 1494 (11th Cir. 1988)).

117. *Id.* at 186.

118. *Id.* at 184.

were investigated and exposed in the media in such an invasive manner.[119] It is bad public policy to send the message that any individual who participates with the media—where their actions were heroic or simply ordinary—will be subject to intense, life-altering scrutiny from that point forward. Ordinary investigation by law enforcement officials should not warrant unrelenting media attention—with or without previous participation in the media.

Richard Jewell also filed a $15 million[120] suit in federal court against the *New York Post* (NYP Holdings, Inc.),[121] alleging that the newspaper libeled him in connection with his alleged responsibility for the Olympic Park bombing and with respect to his prior work history and job performance.[122] The court held that some of the statements could be construed as defamatory, and, therefore, were actionable.[123] The court stated that "[p]eople reading statements published in a newspaper tend to view such statements as statements of fact, not of opinion, particularly when the statements do not appear on an editorial or op-ed page."[124] In addition, the court noted that "[a] newspaper column is the product of some deliberation, not of the heat of a moment,"[125] implying that reporters understand the implications of their reports and the effects they have on the lives of the subjects thereof.

The headlines, photographs, and articles in question characterized Jewell in the following ways: (1) the July 31st column portrayed Jewell as "a *fat, failed* former sheriff's deputy who spent most of his working days as a school crossing guard, and yearned to go further";[126] (2) the July 31st article stated that Jewell "was overly enthusiastic about his police duties and liked the limelight";[127] (3) the August 1st article and headline referenced "a

119. Georgia Bureau of Investigation agent Tom Davis and officer Steve Blackwell were also hailed as heroes for their attempts to evacuate the area prior to the bomb exploding in Centennial Olympic Park. *Law Officers' Quick Thinking May Have Averted More Tragedy*, CNN INTERACTIVE, July 27, 1996, *at* http://www.cnn.com/US/9607/27/park.explosion.heroes/index.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

120. *Jewell Sues New York Post for Libel*, CNN INTERACTIVE, July 24, 1997, *at* http://www.cnn.com/US/9707/24/briefs/jewell.lawsuit/index.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

121. Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348 (S.D.N.Y. 1998).

122. *Id.* at 356.

123. *Id.* at 383–87.

124. *Id.* at 379.

125. *Id.* at 380 (citation omitted).

126. *Id.*

127. *Id.* at 383.

source close to the probe" stating that they were "pretty confident" that it was him;[128] (4) the August 1st cartoon indirectly referenced Jewell by portraying the Olympic security office interviewing high-profile terrorists;[129] and (5) the August 2nd article quoted "a law enforcement source" referring to Jewell: "If he's not the guy, he's one sick puppy."[130]

These statements, aggregated or taken individually, contributed to the public denigration of Jewell's character. The law has thus far labeled Jewell a public figure for purposes of litigation, heightening the burden of proof required to prevail against the media. As a result, the media is legally permitted to disparage Jewell and other "public figures," and these figures are without redress. This behavior, permitted under the law, contributes to the sensationalism in the modern press and the trend toward a new Yellow Journalism. Without fear of consequence, the media will be more apt to print or record items of questionable validity. In this scenario, the media had nothing to lose and everything to gain from running a dubious story—the media outlet would not have been held accountable for running the story (regardless of its veracity) and circulation would have increased.

B. *Ethical Sensations: Governor Schwarzenegger*

Like Richard Jewell, California Governor Arnold Schwarzenegger has been denigrated in the media. As a public figure, Governor Schwarzenegger is functionally without legal remedy. Where such legal remedies fail, history has taught us to look to ethical tenets.[131] Although laudable, these tenets are often inconsistent with current journalistic practices and serve only a public relations function.

Arnold Schwarzenegger—bodybuilder turned movie star turned politician—was ridiculed at the outset for his political aspirations, but he proved himself to be a contender as the governor's race progressed. Five short days before the California

128. *Id.*

129. *Id.* at 385.

130. *Id.* at 386.

131. Numerous publications have their own ethical codes. For a listing with access to a sample of these, see American Society of Newspaper Editors, *Codes of Ethics, at* http://www.asne.org/ideas/codes/codes.htm (last updated Sept. 2, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); *see also* American Society of Newspaper Editors, *Statement of Principles, at* http://www.asne.org/index.cfm?ID=888 (last updated Aug. 28, 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); Society of Professional Journalists, *Code of Ethics, at* http://www.spj.org/ ethics_code.asp (last visited Sept. 23, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

gubernatorial election, the *Los Angeles Times* published allegations that Schwarzenegger had groped numerous women.[132] The article quoted one of the women (who accused Schwarzenegger of touching her breast) as follows: "Did he rape me? No . . . . Did he humiliate me? You bet he did."[133] Simply by placing the question of rape in the article, the journalists associated Schwarzenegger with a rapist, thereby destroying his character. Regardless of whether he was guilty of groping the woman, he was not being accused of rape and, thus, should not have been associated with it in print.

The article also alleged that Schwarzenegger tried to remove a co-worker's clothing each time he met her in an elevator, that he harassed a secretary in a sexual manner, and that he made a lewd and inappropriate comment to a waitress.[134] The article named only two of the six accusers, stating that they "told their stories on condition that they not be named."[135] Hiding the identities of the other four, the article nevertheless quoted these accusers, allowing nameless, faceless sources to make devastating claims. While these claims alone may not be ethically questionable, when coupled with the timeliness of the report, the newspaper's ethics and reliability become an issue.

This issue was raised in the wake of the publication by numerous other journalists, academics, politicians, and observers.[136] Schwarzenegger himself referred to the allegations as "campaign trickery."[137] Noting that none of these women ever objected to his behavior before, Schwarzenegger stated, "Now, all of a sudden, isn't it odd that three days and four days before the campaign, all of a sudden all these women want to have an apology?"[138] Schwarzenegger's campaign co-chairman blamed opponent Gray Davis for the recent media allegations.[139] Talking to

132. Cohn et al., *supra* note 73, at 1.

133. *Id.*

134. *Id.*

135. *Id.*

136. *See, e.g.*, Dale Wong, *Big Scandal Brewing at the Los Angeles Times?*, CHRONWATCH, Oct. 9, 2003, *at* http://www.chronwatch.com/content/ contentDisplay.asp?aid=4640&catcode=10 (on file with the Notre Dame Journal of Law, Ethics & Public Policy); Jill Stewart, *How the Los Angeles Times Really Decided To Publish Its Account of Women Who Said They Were Groped*, CAPITOL PUNISHMENT, Oct. 14, 2003, *at* http://www.jillstewart.net/php/issues/ issue1014.php (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

137. *Schwarzenegger Campaign Blames Davis*, CNN, Oct. 5, 2003, *at* http://www.cnn.com/2003/ALLPOLITICS/10/05/recall.main/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

138. *Id.*

139. *Id.*

supporters in San Jose, California, Davis addressed the allegations against his competitor:

> These are serious questions, which, if true, raise doubts about his ability to govern this state. You need to think about whether this is a risk California should take . . . . Should we recall a sitting governor who's committed no crime, who's not mentally incompetent and has done some very positive things over the last several years, for this other fellow about whom some doubts have been raised by some reputable papers?[140]

There is no evidence that Davis was in any way involved in the allegations, and the *Los Angeles Times* stated that no political rivals were involved in the story.[141] Regardless of whether Davis or another political rival was involved in the allegations, the allegations have damaged Schwarzenegger's character and caused him personal, if not political, injury.

This injury is not the result of partisan politics but rather is sensational journalism. Reacting to further publication by the *Los Angeles Times*, Schwarzenegger accused the newspaper of "outrageous yellow journalism."[142] Schwarzenegger's campaign spokesman, Rob Stutzman, stated that the *Los Angeles Times* "didn't contact the Schwarzenegger campaign for comment until just before the deadline of its first edition Friday night—not enough time, he said, to gather information from people who could rebut the charges."[143] This practice—notifying the article's subject before publication, but not within a reasonable time that the subject could rebut the allegations—is reminiscent of Yellow Journalism. This inadequate notification allows the media to report the story as it sees fit without any input from the subject thereof. In this way, the subject is made aware that the publication is forthcoming but rarely has the chance to examine or modify the story prior to its appearance in the publication. In addition, should the subject of the article complain, the media outlet can simply respond that notification was given and argue that if the corrections were important enough, the subject should have taken the time to make them. Thus, the media out-

140. *Id.*

141. *Schwarzenegger Apologizes to Women for Behavior*, CNN, Oct. 3, 2003, *available at* http://www.cnn.com/2003/ALLPOLITICS/10/02/recall. main/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

142. *Schwarzenegger Denies Fresh Allegations*, CNN, Oct. 5, 2003, *available at* http://www.cnn.com/2003/ALLPOLITICS/10/04/recall.main/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

143. *Id.*

let is able to make partially or fully inaccurate statements that harm the subject's image while maintaining its own image.

In the days following the *Los Angeles Times*' first article, the main news stories were not Schwarzenegger's alleged indiscretions and their implications on his political career; rather, the stories focused on the newspaper's handling of the allegations, its timing in releasing the story, and what these both reveal about journalism today.[144] Reports zeroed in on rumors from newspaper employees that the story "never appeared on the paper's internal or external publication schedules."[145] Reportedly, the article was not available to other *Los Angeles Times* employees until "Wednesday night, a few hours before it appeared on the *Times* Web site."[146]

In her article, *How the Los Angeles Times Really Decided To Publish Its Accounts of Women Who Said They Were Groped*, syndicated columnist Jill Stewart comments on *Los Angeles Times*' executive editor John Carroll's "justification for his decisions to run eleventh-hour bombshells that alleged Arnold Schwarzenegger had groped women."[147] She argues: "[M]y sources insist that Carroll made conscious decisions that delayed the story—decisions which a sophisticated journalist such as Carroll would realize could easily create publication delays that would make it too late for the Schwarzenegger camp to have time to credibly respond."[148] Stewart goes on to report that some staffers at the newspaper insist that the story was ready and should have been run two weeks beforehand.[149] In fact, in an interview with Stewart, a *Times* employee stated:

> Toward the end, a kind of hysteria gripped the newsroom. . . . By Wednesday before it was published, I counted not fewer than 24 reporters dispatched on Arnold . . . . What I know for a fact is that they could have published the story much, much earlier. . . . They had enough stories from his past, very early on, to have the story in the bag many weeks before they did.[150]

The same employee stated that "[t]here is absolutely no self-examination going on at the *Times*," calling the first article "pure tabloid" and stating that after the first "attack" story ran, the

144. *See, e.g.*, Wong, *supra* note 136; Stewart, *supra* note 136.
145. Wong, *supra* note 136.
146. *Id.*
147. Stewart, *supra* note 136.
148. *Id.*
149. *Id.*
150. *Id.*

newspaper ran "daily, unverified claims of groping against Schwarzenegger."[151] In addition, Dr. Paul Fick, author of *The Dysfunctional President*, echoes Stewart's concern about the *Los Angeles Times*' reporting: "[T]he suspect timing of the publication of the articles coupled with the apparent inordinate manpower (possibly 24 reporters), at best raises eyebrows, and at worst smacks of an obsessive vendetta."[152] An allegation that a journalist (or media outlet) is using its newspaper to fulfill a vendetta necessitates an investigation into the lack of impact that ethical codes have on curbing sensational journalism. The influence of ethical codes may come into question if one or two individuals—at one publication or numerous publications—are violating their tenets; however, if the newspaper as a whole is in violation, the question becomes whether the ethical codes are effective at all. In this scenario, it is important to examine alternative methods for eradicating sensationalist practices in the media.

C. *Sensationalizing Public Policy: The 2000 Election Fiasco*

In spite of the negative press, Arnold Schwarzenegger was elected Governor of California just five days after the story made front page news.[153] Thus, the question remains: What did the story really impact? The answer—ethics and public policy.

The public policy component of sensationalism, although visible in the Schwarzenegger situation, is perhaps best illustrated by the 2000 presidential election debacle. The media announced the winner in certain areas (based on exit polling information) prior to the closing of the polls in other areas, thereby encouraging some potential voters to go to the polls while discouraging others.[154] Absent these announcements, the results may have been vastly different. Likewise, the media became so involved in *Bush v. Gore*,[155] the Supreme Court case that ultimately decided the victor in the presidential election, that the outcome was arguably skewed as a result.

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151. *Id.*

152. *Id.*

153. Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. TIMES, Oct. 8, 2003, *available at* http://www.latimes.com/news/politics/ recall/la-100703recall_lat,1,1322486.story?coll=la-recall-center.

154. *See* MICHAEL H. CRESPIN & RYAN J. VANDER WIELEN, THE INFLUENCE OF MEDIA PROJECTIONS ON VOTER TURNOUT IN PRESIDENTIAL ELECTION FROM 1980–2000, *available at* http://www.msu.edu/~pipc/mediaturnout(revised).pdf (last visited Apr. 16, 2005). *But see* RUSSELL S. SOBEL & ROBERT A. LAWSON, THE EFFECT OF EARLY MEDIA PROJECTIONS ON PRESIDENTIAL VOTING IN THE FLORIDA PANHANDLE, *available at* http://www.be.wvu.edu/div/econ/work/pdf_files/01-07.pdf (last visited Apr. 16, 2005).

155. Bush v. Gore, 531 U.S. 98 (2000).

Scholars have studied the effect of early projections on voter turnout in elections throughout the twentieth century.[156] One such scholar calls the election of the president, "news converted instantly and continuously into numbers."[157] Although the available data is inconclusive, speculation that media projections alter the results of democratic elections have public policy implications. The public outcry in response to media outlets projecting the outcome of the 2000 presidential election prior to the closing of all polling stations resulted in policy changes within the media outlets themselves.[158] In the 2002 election, CNN stated that it "[would] not use exit polls for projections in close races or to project a winner in a state until all the polls are closed in that state."[159] CBS News also implemented a policy "'of not projecting a winner until all polls in that state have closed.'"[160] Thus, where legal and ethical codes fail, public policy may impose restrictions on media sensationalism. Because the media is economically driven, negative reactions by customers to media actions will bring about change. Newspapers, magazines, and television networks operate in an extremely competitive market and quickly respond to any changes in the consumption of their products. As such, criticism by customers of sensational practices will bring about changes even where legal and institutional codes have failed.

The wider concern resulting from the 2000 presidential election coverage was the impact of the media on the litigation of the case, the Supreme Court's decision in *Bush v. Gore*, and the public's acceptance of the ultimate outcome. Less than two months after the Supreme Court announced its decision in *Bush v. Gore*, the American University Washington College of Law hosted a symposium entitled, *The Prime Time Election, From Courtroom to Newsroom: The Media and the Legal Resolution [of] the 2000 Presidential Election.*[161] The symposium, broken into several panels, gathered insight from numerous perspectives: print and television journalists who covered legal issues or were involved in the post-

156. *See* CRESPIN & WIELEN, *supra* note 154; SOBEL & LAWSON, *supra* note 154.

157. THOMAS B. LITTLEWOOD, CALLING ELECTIONS: THE HISTORY OF HORSE-RACE JOURNALISM 1 (1998).

158. The Reuters Election Night TV Daybook, The Reuters Television Daybook, Reuters Washington Daybook Report, Nov. 4, 2002, *available at* 2002 WL 24525459.

159. *Id.*

160. *Id.*

161. Symposium, *The Prime Time Election, from Courtroom to Newsroom: The Media and the Legal Resolution of the 2000 Presidential Election*, 13 CARDOZO STUD. L. & LITERATURE 1 (2001).

election coverage, attorneys involved in the post-election legal battle, and law professors who provided expert commentary during the media coverage or were interested in the ethical implications for those commentators.[162]

The first panel, composed of members of the media, addressed the unique aspects of reporting a legal story.[163] Roberto Suro, a staff writer for the *Washington Post*, agreed with symposium moderator, Professor Mark Niles, that in some ways the press becomes a tool of the kind of message that the politician is trying to convey.[164] To the extent that the public is getting information from the politicians, fed through the media and not the true law, this type of reporting will distort public acceptance of the outcome. The public, by and large, is not legally educated and therefore cannot objectively evaluate the information provided by either the politician himself or herself or the media outlet. Thus, the public evaluates the outcome through the prism of politics and media, which ultimately alters the public view of the outcome itself.

The second panel, consisting of lawyers involved in the litigation, considered the significance of the media attention on the case and how the media influenced the preparation for, and litigation of, *Bush v. Gore*. Gary Kohlman, an attorney at Bredhoff and Kaiser in Washington, stated, "[T]he media attention was definitely a factor [in *Bush v. Gore*]."[165] He noted that "[t]he more sensational our allegation was, the more likely that the media would start paying attention to our case, as opposed to some other case. So there's one area in which clearly I thought that the media influenced what was going on."[166] This statement indicates that not only did the media influence public perception of the litigation—it also influenced preparation of the briefs and the structure of the arguments. Kohlman summarized his opinion, stating: "I saw the media as just completely saturating the entire process—influencing the strategy that went into the case and influencing the dynamics that went on in the courtroom."[167] Because the media is economically driven, this filtration can be dangerous. The media presents information for public consumption in order to attract the greatest number of consumers. This goal is distinguishable from the goal of trial—

162. *Id.* at 3–4.
163. *Id.* at 4–35.
164. *Id.* at 18.
165. *Id.* at 39.
166. *Id.* at 40.
167. *Id.* at 41.

justice. Thus, the media's dominance of the proceedings and its role as a filter ultimately influenced the outcome of the case.

Tom Goldstein, an attorney that represented Vice-President Gore in the Supreme Court case, also saw the media as a force in the decision:

> I mean, my personal view—right or wrong—is that this case was won in the media when Sandra Day O'Connor saw, on CNN and NBC and every other place, the anarchy of lots of people screaming at people counting ballots and other people holding up ballots to the light, that this was very much to the mind of someone who is one of the tipping-point justices, when they looked at that and saw that. This is a crazy way to pick a president . . . . Those are nine real people. And several of them, I think, just thought that this was insane. I think the media is very important to that, because in many respects it was insane. And I think it made a huge difference.[168]

Goldstein's statement indicates that he felt that the case was decided long before the Supreme Court actually deliberated, as a result of the media coverage, which, if true, stands counter to the Founding Father's intentions and the Court's historical role in society.

The final panel, composed of law professors, addressed the ethical implications of "teliberation": "political deliberation among talking heads on television."[169] The professors suggested that this form of political commentary can be detrimental:

> [M]edia generally treat the person whom they are interviewing like a color of paint on an artist's palette. The color is put on the canvas only if it is useful in creating the painting. [The person is] not important to the reporter because of what [he or she has] to say. [The person is] important to the extent that [his or her] remarks mesh well with the story that [the reporter] is trying to tell.[170]

This view reinforces the notion that the media seeks to present a certain angle, whether or not that angle is accurate, to fulfill certain objectives: higher ratings, political aspirations, etc. The questions of illegitimacy that remain in the wake of the 2000 presidential election[171] demonstrate the importance of public policy in combating media sensationalism.

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168. *Id.* at 45.
169. *Id.* at 72.
170. *Id.* at 85.
171. *See, e.g.*, JOHN NICHOLS, JEWS FOR BUCHANAN: DID YOU HEAR THE ONE ABOUT THE THEFT OF THE AMERICAN PRESIDENCY? (2001).

CONCLUSION

The American press is under siege. Sensationalism, reminiscent of the Yellow Journalism of the late nineteenth century, permeates the fabric of today's media, leading to legal, ethical, and public policy concerns. The judiciary in *Near v. Minnesota, New York Times v. Sullivan*, and their progeny has removed legal incentives for responsible reporting—essentially taking the teeth out of the tiger. As a result, victims of media sensationalism must turn to ethical and public policy standards for protection. As noted above, these standards have provided some relief; however, to combat the ever-increasing sensationalism in the press, stronger and more deliberate action must be taken.

This action must culminate in journalistic accountability. Whether it takes the form of greater judicial scrutiny of court cases involving sensationalism or legislatively imposed fines, specific limits must be set and repercussions imposed upon violators. Thus far, efforts at self-regulation have failed to restore the press to its informative roots, necessitating renewed legal standards. If action is not forthcoming and effective, the press may be worthless in a short time—an occurrence that will have negative effects on all facets of society.