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Robert E. Drechsel

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## ARTICLES

### MEDIA ETHICS AND MEDIA LAW: THE TRANSFORMATION OF MORAL OBLIGATION INTO LEGAL PRINCIPLE†

ROBERT E. DRECHSEL\*

“Law is the great civilizing agent that it is . . . because it is a working partner with the advancing ethical sense of the community,” the philosopher William Ernest Hocking wrote in 1937.<sup>1</sup> Ten years later, as a member of the Commission on Freedom of the Press,<sup>2</sup> Hocking was to write what remains the definitive statement of the social responsibility theory of the press<sup>3</sup>—a theory premised on the idea that the press has come to play so essential and important a role for individuals and society that it has “lost the common and ancient human liberty

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\* Professor and Director, School of Journalism and Mass Communication, University of Wisconsin-Madison. B.A., M.A., Ph.D., University of Minnesota. The author wishes to acknowledge his research assistant, Stacy Huang, for her invaluable assistance with statistical analysis of survey data. He also wishes to thank his colleague, Professor Jack McLeod, for inviting the author to participate in the larger study of which the data reported here are a part.

1. William E. Hocking, *Ways of Thinking About Rights: A New Theory of the Relation Between Law and Morals*, in *2 LAW: A CENTURY OF PROGRESS* 242, 258 (1937).

2. The Commission, created at the behest of Henry R. Luce and funded primarily by Time, Inc., consisted of Robert M. Hutchins, Zechariah Chafee Jr., John M. Clark, John Dickinson, William E. Hocking, Harold D. Lasswell, Archibald MacLeish, Charles E. Merriam, Reinhold Niebuhr, Robert Redfield, Beardsley Huml, Arthur M. Schlesinger and George N. Shuster. Its goal was to inquire into the present state and future prospects of freedom of the press. It issued its report and several companion volumes in 1947 after holding 17 meetings, studying 176 documents and hearing testimony from 58 individuals connected with the press and more than 225 representatives of industry, government, and private agencies concerned with the press. *COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS* v-vi (1947).

3. WILLIAM E. HOCKING, *FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE* (1947).

to be deficient in its function. . . ."<sup>4</sup> As the Commission concluded, "the important thing is that the press accept the public standard and try for it. The legal right will stand if the moral right is realized or tolerably approximated."<sup>5</sup>

Such linkage of moral obligation and legal rights has led more than one commentator to worry that, especially to the degree that the news media themselves embrace the concept of social responsibility, they may unwittingly be inviting the incursion of law into what heretofore have been ethical questions.<sup>6</sup> These critics fear that by aggressively espousing specific ethical standards of professional conduct, the media may be implying that they have accepted concomitant legal duties.<sup>7</sup> Therefore,

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4. COMMISSION ON FREEDOM OF THE PRESS, *supra* note 2, at 131.

5. *Id.* The commission concluded that the press has a responsibility to provide a

truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning; . . . a forum for the exchange of comment and criticism; . . . a means of projecting the opinions and attitudes of the groups in the society to one another; . . . a method of presenting and clarifying the goals and values of the society; and . . . a way of reaching every member of the society by the currents of information, thought, and feeling which the press supplies.

*Id.* at 20-21.

6. For a summary of this concern and a review of litigation bearing on it, see Robert E. Drechsel, *Media Malpractice: the Legal Risks of Voluntary Social Responsibility in Mass Communication*, 27 DUQ. L. REV. 237 (1989). The social responsibility ethic is manifest in a variety of news media ethics codes. "The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time." AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES (1975) (emphasis added). "The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust." SOCIETY OF PROFESSIONAL JOURNALISTS CODE OF ETHICS (1987) (emphasis added).

7. See, e.g., JOHN C. MERRILL, *THE IMPERATIVE OF FREEDOM* (1974); William W. Van Alstyne, *The Hazards to the Press of Claiming a 'Preferred Position'*, 28 HASTINGS L.J. 761 (1977); Ronald Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. OF BOOKS, Dec. 4, 1980, at 49; Gilbert Cranberg, *Searching for 'Fault': Libel Judges are Setting Standards for the Press*, WASH. JOURNALISM REV., Sept. 1989, at 42; see also Connie Bruck, *The Mea Culpa Defense: How CBS Brought on the Westmoreland Suit—and Sacrificed One of Its Own*, AM. LAW., Sept. 1983, at 82; Paul A. Weiss, *Who's Watching the Watchdog?: Self-Evaluative Privilege and Journalistic Responsibility in Westmoreland v. CBS, Inc.*, 7 COMM./ENT. L.J. 149 (1984).

it ought not be surprising to see increasing efforts in litigation to expand the legal obligations of the press.<sup>8</sup>

Two cases decided by the United States Supreme Court during 1991 have brought new urgency to this concern. In *Cohen v. Cowles Media*,<sup>9</sup> the Court held that the First Amendment does not bar a promissory estoppel action against the news media for violating a promise of confidentiality to a source.<sup>10</sup> And in *Masson v. New Yorker Magazine, Inc.*,<sup>11</sup> the Court held that a journalist can be held responsible in a libel action for placing quotation marks around words a source has never spoken, if the meaning conveyed results in a "material change" from what the source actually said.<sup>12</sup> More directly than any others to date, these cases remind journalists that the boundary between law and ethics is fragile, ambiguous and arbitrary. Heretofore, the questions of when a journalist might break a promise and how much liberty a journalist may take with a source's words have fallen largely within the realm of journalism ethics. Indeed, as they searched for arguments, the courts and litigants in both *Cohen* and *Masson* cited the literature of media ethics.<sup>13</sup>

This article suggests that journalists themselves bear responsibility for muddying the boundary between law and ethics. But its larger goal is to move beyond the qualitative perspective from which most writers have pondered the confusion of the media's moral and legal responsibilities.<sup>14</sup> To do so, the article begins with the assumption that if the media themselves accept the role of public trustees, it would seem inevitable that the public would also expect the media to play such a role.

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8. For numerous examples of such pressure for increased recognition of legal duties, see Drechsel, *supra* note 6, at 252-72. See also Juliet Lushbough Dee, *Media Accountability for Real-Life Violence: A Case of Negligence or Free Speech*, J. COMM., Spring 1987, at 106; Robert E. Drechsel, *Media Tort Liability for Physical Harm*, 64 JOURNALISM Q. 99 (1987); George E. Stevens, *Newspaper Liability for Harmful Advice*, NEWSPAPER RES. J., July 1982, at 46.

9. 111 S. Ct. 2513 (1991).

10. *Id.* at 2516.

11. 111 S. Ct. 2419 (1991).

12. *Id.* at 2433.

13. See *infra* notes 47-49 and accompanying text.

14. See also J. HERBERT ALTSCHULL, *AGENTS OF POWER: THE ROLE OF THE NEWS MEDIA IN HUMAN AFFAIRS* 301-05 (1984). One empirical study has examined newspaper editors' opinions about whether having written ethics standards might increase their vulnerability to legal actions. See Lynn Wickham Hartman, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637 (1987). About a fourth of the editors expressed such concern. *Id.* at 653. See generally sources cited *supra* note 7.

Then it uses survey research in an effort to see whether there is evidence that members of the public associate what they consider the moral obligations of the press with their willingness or reluctance to protect the press's legal freedom.<sup>15</sup> If such a relationship exists, it will support the critics of social responsibility theory, and indicate that litigation attempting to expand the boundaries of the media's legal duties may represent more than the clever legal maneuvering of lawyers in aberrant cases. Indeed, it would suggest that the public not only embraces social responsibility theory, but also may be confusing moral obligation with legal obligation.<sup>16</sup>

The article begins by elaborating briefly on the *Cohen* and *Masson* cases as examples of how the news media may be becoming increasingly legally bound by the ethical standards and public trusteeship model they espouse. Then the article turns to a survey of public attitudes about the media's moral and legal obligations in an effort to see to what degree the public is willing to legally enforce what it considers the news media's ethical obligations. Finally, the article argues that, given the media's own acceptance of social responsibility theory and the public's willingness to use legal coercion to enforce its view of the media's moral duties, the outcomes of such cases as *Cohen* and *Masson* should come as little surprise.

### I. COHEN AND MASSON: MORAL AND LEGAL OBLIGATION INTERTWINED

Journalists have long, loudly and publicly proclaimed the sanctity of confidential reporter-source relationships. Indeed, a recent national survey found that nearly four out of five

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15. The article uses the terms "press," "media," and "news media" interchangeably. It also uses the terms "publish" and "publication" generically to apply to dissemination by print or electronic media.

16. A number of other studies have gathered data on the public's views of media responsibility and on the public's support for press freedom. For an excellent summary, see D.C. WHITNEY, *THE MEDIA AND THE PEOPLE* (1985) (working paper from Gannett Center for Media Studies, New York). The empirical literature on political tolerance is considerable, but has paid surprisingly little attention to specific issues involving freedom of the press. See, e.g., John Immerwahr & John Doble, *Public Attitudes Toward Freedom of the Press*, 46 *PUB. OPINION Q.* 177 (1982); HERBERT McCLOSKEY & ALIDA BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983); SAMUEL A. STOFFER, *COMMUNISM, CONFORMITY AND CIVIL LIBERTIES* (1955); W. Cody Wilson, *Belief in Freedom of Speech and Press*, 31 *J. SOC. ISSUES* 69 (Spring 1975). Nor have these studies looked for relationships between the public's views of the media's moral obligations and public tolerance for press freedom.

American newspaper editors believe that journalists should have an absolute right to refuse to reveal the names of sources to whom confidentiality has been promised.<sup>17</sup> In less absolute terms, the general public apparently agrees.<sup>18</sup> In *Branzburg v. Hayes*,<sup>19</sup> however, the Supreme Court rejected journalists' argument that the First Amendment shields them from having to reveal confidential names and information to grand juries conducting good faith criminal investigations.<sup>20</sup>

*Cohen v. Cowles Media* raised the complementary issue of whether the First Amendment shields a journalist from liability where the journalist has broken a promise of confidentiality to a source. Cohen, a political operative, had given reporters damaging information about an opposing political candidate on the condition that he not be identified. When two newspapers broke their reporters' promises and publicly named him, his employer fired him and he sued the newspapers for breach of contract and fraudulent misrepresentation.<sup>21</sup> A jury awarded \$700,000 damages.<sup>22</sup> The Minnesota Court of Appeals ruled that fraudulent misrepresentation had not been proved, and struck that portion of the damages.<sup>23</sup> But it affirmed the \$200,000 awarded for breach of contract.<sup>24</sup> The Minnesota Supreme Court struck the remaining breach of contract award on grounds that there was no contract: "The law, however, does not create a contract where the parties intended none. . . . The parties understand that the reporter's promise

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17. ROBERT O. WYATT, *FREE EXPRESSION AND THE AMERICAN EDITOR* 5 (1991) (survey results presented to the American Society of Newspaper Editors) (copy on file with the author). Wyatt's findings are similar to those of earlier research. See, e.g., DAVID WEAVER & CLEVELAND G. WILHOIT, *THE AMERICAN JOURNALIST* 127 (1986) (national survey of 1,001 journalists finds only 5% of respondents agree that it may be justified to breach a promise of confidentiality to a source). But see PHILLIP MEYER, *ETHICAL JOURNALISM* 208-09 (1987) (national survey finds that 71% of editors and 51% of newspaper staffers agree that confidentiality may be violated in "unusual circumstances, as when it is learned the source lied to the reporter").

18. WYATT, *supra* note 17, at 13 (available from the American Society of Newspaper Editors Foundation, Washington, D.C.). The national, random sample of 1500 American adults found that 36% would grant the press an absolute right to maintain confidentiality and another 42% would grant such a right "sometimes." *Id.*

19. 408 U.S. 665 (1972).

20. *Id.* at 667.

21. 111 S. Ct. at 2516.

22. *Id.*

23. *Id.*

24. *Id.*

of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract."<sup>25</sup>

The Minnesota Supreme Court, however, did not stop with its analysis of contract liability. On its own, it raised the question of whether the newspapers might be liable under a theory of promissory estoppel—the doctrine holding that “a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise.”<sup>26</sup> Despite its refusal to address the reporter-source relationship in contract terms, the court was willing to do so under the rubric of promissory estoppel<sup>27</sup>—despite the court’s concession that doing so would require judges to second-guess journalists on such questions as whether a source’s name was newsworthy or necessary for making a story fair and balanced.<sup>28</sup>

Nevertheless, the court found that imposing liability for promissory estoppel would violate the First Amendment in this instance largely because the promise and its breach occurred in the “classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign.”<sup>29</sup>

The United States Supreme Court placed *Cohen* in a category of cases holding that laws of general application do not violate the First Amendment merely because they may incidentally affect the news media’s ability to gather and report news.<sup>30</sup> The Court also distinguished *Cohen* from cases immunizing the press from liability for publishing truthful information of public concern.<sup>31</sup> It did so on grounds that rather than define the type of content that would trigger liability, Minnesota’s law of promissory estoppel “simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information

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25. 457 N.W.2d 199, 203 (1990). The court concluded that “to impose contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship. . . .” *Id.*

26. *Id.* at 203-04.

27. “There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state’s interest in enforcing the promise to the source outweighs First Amendment considerations. . . .” *Id.* at 205.

28. *Id.*

29. *Id.*

30. 111 S. Ct. at 2518.

31. *Id.* at 2519.

are self-imposed."<sup>32</sup> Then, the Court returned the case to the Minnesota Supreme Court so that it could consider, the First Amendment aside, whether a promissory estoppel claim had been established.<sup>33</sup>

*Masson v. New Yorker Magazine, Inc.*, by contrast, stemmed not from violation of an explicit promise, but from alleged violation of one of journalism's cardinal principles: journalists "should guard against inaccuracies, carelessness, bias or distortion through either emphasis or omission."<sup>34</sup> The result was a suit in which Jeffrey Masson, a psychoanalyst who had become the focus of controversy over certain of his views about Sigmund Freud, sued *The New Yorker* and author Janet Malcolm for libel. In question was an article which contained a number of statements presented as verbatim quotation of remarks Masson made in interviews with Malcolm but which he denied having made.<sup>35</sup> These quotations, Masson alleges, falsely depicted him as arrogant, dishonest and unprofessional.<sup>36</sup>

Masson conceded that he was a public figure for purposes of his libel action.<sup>37</sup> This status compelled him to prove that Malcolm published the defamatory quotations with actual malice—either with knowledge that they were false or with reckless disregard for the truth.<sup>38</sup> Masson therefore argued that, corrections in grammar and syntax aside, "publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice."<sup>39</sup>

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32. *Id.* Of course, this might be seen as a direct transformation of the ethical into the legal. The ethical judgments made by both the source and the journalist at the time of their interaction literally sets terms that become legally enforceable.

33. *Id.* at 2520. The Court did observe that the Minnesota Supreme Court might find its state constitution to shield journalists from promissory estoppel claims. *Id.*

34. CODE OF ETHICS OF THE ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION (1975).

35. See *Masson*, 111 S. Ct. at 2424-28.

36. Masson's specific allegation of defamation is best stated by the court of appeals. See 895 F.2d 1535, 1536 (9th Cir. 1989). The ways in which fabricated verbatim quotation might create defamatory meaning are addressed by the Supreme Court in a more general sense. Such a quotation might attribute an untrue factual assertion to the speaker, or, regardless of the truth of the factual matters asserted within the quoted statement, the attribution may harm reputation "because the manner of the expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold." 111 S. Ct. at 2430.

37. 895 F.2d at 1537.

38. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

39. *Masson*, 111 S. Ct. at 2431.



The court of appeals held that actual malice will not be inferred so long as the altered or fabricated quotations are either rational interpretations of ambiguous remarks or do not change the substantive content of unambiguous remarks the plaintiff actually made.<sup>40</sup> The Supreme Court adopted a different standard: "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a *material change in the meaning conveyed by the statement.*"<sup>41</sup> The Court then applied this standard to the quotations in question, found that the alterations could support a finding of actual malice, and reversed the appellate court judgment in favor of the defendants.<sup>42</sup>

*Cohen* and *Masson* split the journalistic community itself. In *Cohen*, journalists testified for both sides.<sup>43</sup> In *Masson*, a group of journalists and journalism professors filed an amicus brief on behalf of *Masson*. They argued in part that the press receives constitutional protection because it serves as a conduit for diverse views, and that permitting deliberate misquotation of public figures would corrupt the marketplace of ideas.<sup>44</sup> They also filed with the Court a variety of materials to demonstrate current standards of professional practice in journalistic quotation.<sup>45</sup> The respondents specifically challenged the usefulness of such material, arguing that it demonstrates differences of opinion regarding professional practice that should not be debated in the context of libel litigation.<sup>46</sup>

Litigants and judges in both cases also cited directly to the literature on journalistic ethics. For example, the Minnesota Supreme Court in *Cohen* drew on a Columbia Journalism Review article for examples of situations in which it might be ethical to breach promises of confidentiality.<sup>47</sup> In *Masson*, a dis-

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40. 895 F.2d at 1539.

41. *Masson*, 111 S. Ct. at 2433 (citations omitted) (emphasis added).

42. *Masson*, 111 S. Ct. at 2434-37. The Court's conclusion does not, of course, constitute a finding that Malcolm did falsify any quotations. *Masson* was appealing a grant of summary judgment to the defendants. Therefore, his allegations were assumed to be true for purposes of the motion, and the Supreme Court merely held that *Masson* had offered evidence sufficient to create a jury question as to whether there was actual malice. *Id.* at 2434-35.

43. See Brief of Petitioner at 7-9, *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991) (No. 90-634).

44. Brief Amicus Curiae of Certain Journalists and Academics in Support of Petitioner, *Masson v. New Yorker Magazine*, 111 S. Ct. 2419 (1991) (No. 89-1799).

45. *Id.*

46. Brief for Respondents at 21, *Masson v. New Yorker Magazine*, 111 S. Ct. 2419 (1991) (No. 89-1799).

47. 457 N.W.2d at 202 n.4.

senting judge on the court of appeals—one whose views were ultimately vindicated by the U.S. Supreme Court decision—drew extensively on the literature of journalism ethics, textbooks on reporting, and *The New Yorker's* own internal policies to support the proposition that fabricating direct quotation violates professional standards.<sup>48</sup> “I am unable to construe the first amendment as granting journalists a privilege to engage in practices they themselves frown upon,” he wrote.<sup>49</sup>

*Cohen* and *Masson* by no means represent the first time the Supreme Court has opened the door to putting legal sanction behind journalistic ethics. To some degree, the actual malice standard itself does so. It compels examination of the defendant's legal fault, which often can be established only by the compounding of circumstantial evidence.<sup>50</sup> Such evidence may well include allegations that the defendant inexplicably failed to take precautions that most journalists would regard among their most fundamental obligations—seeking additional sources where existing sources have an obvious bias, for example, or trying to verify an inherently improbable allegation, or contacting the sources best positioned to know the truth.<sup>51</sup>

But it was the development of libel law beginning with *Gertz v. Robert Welch, Inc.*<sup>52</sup> that most directly injected journalism's heretofore moral obligations into the law of libel. In *Gertz*, the Supreme Court permitted states to allow private-figure libel plaintiffs to win upon a showing of fault less than actual malice.<sup>53</sup> The standard of choice has become negligence.<sup>54</sup> By requiring proof of failure to use due care, the negligence standard invites arguments that such failure is demonstrated by journalists' failure to follow their own professional standards. Plaintiffs have subpoenaed the news media's ethics codes and internal policies, as well as internal investiga-

48. 895 F.2d at 1549-63 (Kozinski, J., dissenting).

49. *Id.* at 1562.

50. “[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989).

51. See *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Harte-Hanks Communications*, 491 U.S. at 689-93.

52. 418 U.S. 323 (1974).

53. “[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Id.* at 347.

54. For perhaps the most up-to-date listing of standards developed by the states, see 1 COMMUNICATIONS LAW 1990 145-52 (Practicing Law Institute Course Handbook). See also William Watson Hopkins, *Negligence 10 Years After Gertz v. Robert Welch*, 93 JOURNALISM MONOGRAPHS 1 (1985).

tions of mistakes.<sup>55</sup> Indeed, several legal writers have assumed that allowing the press to use its own standards of professional conduct as a yardstick for measuring legal fault will actually help the press.<sup>56</sup>

The press itself has long argued for extensions of First Amendment rights based on the idea that it is a vital public servant—a surrogate or trustee for the public. Professor Timothy Gleason, for example, sees the so-called “watchdog” rationale for freedom of the press as having emerged in significant part from newspapers’ efforts to gain more protection from libel suits in the nineteenth century.<sup>57</sup> The same, broad trusteeship argument underlies journalists’ claims ranging

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55. See, e.g., Richard P. Cunningham, *Who Said What About Whom?*, QUILL, Mar. 1985, at 7, 8 (reporting attempt by plaintiff’s attorney to use critical columns by newspaper’s ombudsman to establish fault); *Does Your Newspaper Have A Code of Ethics?*, ASNE BULL., Dec. 1987, at 8 (newspaper reports having its ethics policy subpoenaed twice); *Westmoreland v. CBS*, 601 F. Supp. 66 (S.D.N.Y. 1984) (network’s internal investigation of procedures followed in preparing allegedly defamatory documentary is not inherently privileged from plaintiff’s discovery). One recent study found that newspapers’ written standards have been used in very few reported cases. See Hartman, *supra* note 14, at 656. Even if admitted as evidence, such evidence is likely to be of limited value in establishing actual malice, although it may be more relevant in negligence cases. *Id.* at 665. Another study, after analyzing 947 libel cases decided between 1976 and 1990, has concluded that:

Out of the body of . . . libel cases is emerging a body of journalistic standards that the press ignores at its peril. Ironically, standards that press groups regard with such dread, and shun as too dangerous to compose for voluntary adherence, are being created—and enforced—by an arm of the government with power to levy severe penalties for non-compliance.

John Soloski, *Libel Law and Journalistic Malpractice: A Preliminary Analysis of Fault in Libel Litigation 4* (1991) (paper presented to the annual convention of the Association for Education in Journalism and Mass Communication, Boston) (copy on file with the author).

56. See, e.g., Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449 (1984); Hopkins, *supra* note 54, at 18; Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 343 (1985); David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 466-67 (1975). There is some evidence to support this view. An analysis of recent libel cases has found that the media are seldom held to be negligent if they can show they have followed accepted journalistic practices. Soloski, *supra* note 55, at 18.

57. TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT* 13 (1990). The “watchdog concept” is the idea that the news media deserve special protection from being sued for publishing matters of public concern because the media have a social duty to gather and report information about the operation of government and other matters of public interest. *Id.* at 4.

from the right to withhold confidential information<sup>58</sup> to rights of access to places, people and documents.<sup>59</sup>

Likewise, discussion and debate over alternatives to litigation for resolving disputes between the public and the press are premised on the assumption that the press ought to be accountable in some way for its actions.<sup>60</sup> Although alternatives to litigation may be preferable in the sense that they at least partially distinguish between obligation in the moral sense and in the legal sense, they nevertheless highlight the view that the news media bear significant obligations to individuals and to society.

To summarize, through arguments and issues presented in litigation; through the debate over media accountability; through non-legal mechanisms for making the media accountable; and through the media's own ethical statements, policies and rationales for self-importance, the news media appear largely to have accepted the mantle of social responsibility if not public trusteeship. It should hardly be surprising, therefore, if the general public has high expectations of the news media.

For the news media, the vocabularies of law and ethics can be perilously similar. "The law is full of phraseology drawn from morals," Oliver Wendell Holmes long ago pointed out, "and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds."<sup>61</sup> Benjamin Cardozo described the evolution from morality to law as follows:

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58. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

59. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (press has no first amendment right of access to prisons and jails beyond access rights of general public); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (press and public have qualified first amendment right to attend criminal trials); *Press-Enterprise Co. v. Riverside County Superior Court*, 464 U.S. 501 (1984) (press and public have qualified first amendment right to attend voir dire in criminal cases); *Press-Enterprise Co. v. Riverside County Superior Court*, 478 U.S. 1 (1986) (press and public have qualified first amendment right to attend pretrial hearings in criminal cases).

60. *See, e.g.*, *BEYOND THE COURTROOM: ALTERNATIVES FOR RESOLVING PRESS DISPUTES* (R. Kaplar ed., 1991); *MEDIA FREEDOM AND ACCOUNTABILITY* (Everette E. Dennis et al. eds., 1989). The literature on media ethics has exploded during the past decade, and has become too massive to cite briefly.

61. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897). Holmes cited "rights," "duties," "malice," "intent," and "negligence" as examples of such phraseology. *Id.* at 460. More recently,

[T]he judge stretches a point here in response to a moral urge, or makes a new application of a precedent there. Before long a new tradition has arisen. Duties that had been conceived of as moral only, without other human sanction than the opinion of society, are found to be such that they may effectively and wisely be subjected to another form of sanction, the power of society. The moral norm and the jural have been brought together, and are one.<sup>62</sup>

It is quite reasonable, therefore, to expect that if the moral and legal merge easily in the judicial mind, the same happens among journalists and the public. Journalists' and public views of media morality matter because to the degree that they may be seen as inputs or resources in judicial decision-making, they may facilitate the process of legalizing moral principles. We have already noted how journalists, as amici, as litigants and in their roles as journalists may be encouraging the transformation of certain professional standards into legal standards. We turn now to the general public and to the question of whether there is a relationship between the public's beliefs about the moral obligations of the press and the public's support for the press's legal freedom.

## II. THE PUBLIC, MEDIA ETHICS AND MEDIA LAW

If there is no relationship between the public's views of the media's moral and legal obligations, we can assume that law and ethics occupy separate dimensions in the public mind. And if so, we can assume that at least some of the fears of critics of social responsibility theory—namely that voluntary social responsibility may boomerang and become an invitation to legal coercion—may be unfounded. But if there is a relationship between what the public considers to be the press' moral obligations and willingness to support legal controls on the press, the critics' concerns will gain credibility.

To gather data to address these issues, 300 randomly selected residents of Dane County, Wisconsin, were surveyed

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Samuel Stumpf has warned that "if the association of law with morality is too close, then the law will become the substitute for our moral standards; and if the law is our moral standard, we have lost the possibility of a moral criticism of the law." SAMUEL E. STUMPF, *MORALITY AND THE LAW* 219 (1966).

62. BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 43 (1928). See also HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW* 94 (1987) (moral ideals and postulates about individuals and society affect the courts' social vision).

by telephone in the fall of 1990.<sup>63</sup> They were asked how important they consider various roles played by the press, how large a gap they see between the press roles they highly value and the actual performance of the press, and what moral or ethical obligations they believe the press to have. Then they were asked to what degree they will tolerate legal freedom for the press at the expense of other important interests.

#### A. *Press Roles and Press Freedom*

Table 1 shows the list of news media roles that was presented to the respondents. Respondents were given 10-point scales, then asked to indicate how important they considered each role and how good a job they thought the media were doing in fulfilling it. The higher the score, the more important the role and the better the performance of the media.

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63. The sample was drawn in a two-stage process. First, telephone numbers were systematically sampled from the county telephone directory; second, a variant of standard added-digit dialing procedures was used to ensure access to unlisted numbers. Interviews were conducted by trained graduate students and seniors enrolled in a research methods course. All interviews were authenticated. Students living in university housing units were excluded from the sample. The sample was relatively young (median age of 39), well-educated (median of 15 years of education) and balanced in terms of gender (57% female). Median household income fell in the range of \$20,000 to \$30,000.

TABLE I  
NEWS MEDIA ROLES: IMPORTANCE AND PERFORMANCE

Role	Mean Score for	
	Importance <sup>a</sup>	Performance <sup>b</sup>
To give people a daily account of what's happening in the world.	9.18	7.45
To provide a forum for a wide range of viewpoints on important issues.	8.51	6.03
To take clear positions on issues to guide citizens' decisions.	5.62	5.58
To help people play active roles in community controversies.	7.02	5.48
To be a watchdog over the behavior of government and government officials.	8.03	6.45
To promote projects that aid economic development in the community.	7.37	5.84

(n = 300)

Notes:

<sup>a</sup> Respondents were asked, "For the following list of goals that people have suggested the news media *should* try to accomplish, would you tell me how *important* you think it is as a goal?" Respondents then applied a 10-point scale ranging from "not important at all" to "extremely important."

<sup>b</sup> Respondents were asked, "For the same list of goals of the news media, I'd like you to tell me how good a job the news media do." Respondents then applied a 10-point scale ranging from a "poor job" to an "excellent job."

The individual roles, however, can be combined into categories to create larger indices. Aided by factor analysis, we categorized the items into an "informing role" index and an "activating role" index.<sup>64</sup> The former is the more passive role of providing descriptive coverage of issues or events and providing a forum for opinion; the latter is the more active role of providing opinion leadership. The "informing role" index measures the value respondents place on the media's role as providers of daily accounts of events and as fora for a wide range of viewpoints. The "activating role index" measures

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64. Factor analysis is a statistical technique useful for finding underlying patterns in sets of variables or items. In essence, it permits the researcher to group individual items into larger indices with some confidence that the individual items are empirically and, presumably, conceptually related to each other. Factor analysis of the role items led us to discard two of the individual items when we created our role indices. The informing role index thus consists of two items: "to give people a daily account of what's happening in the world" and "to provide a forum for a wide range of viewpoints on important issues." The activating role index consisted of the remaining two items: "to take clear positions on issues to guide citizens' decisions" and "to help people play active roles in community controversies." Technical results of the factor analysis may be obtained from the author.

support for the media's role as opinion leaders who help people play active roles in community controversies.

Support for these two roles may affect support for press freedom. To the degree that people highly value the informing role, they may be supportive of press freedom because they do not want legal restrictions to impede the flow of information and viewpoints central to this function. In this context, a strong relationship between moral obligation—measured here by support for the informing role—and legal obligation may be harmless and even functional for support for press freedom. However, to the degree that people highly value the activating role, more ambivalence seems likely. On the one hand, valuing the activating role may be associated with support for press freedom because legal restrictions may discourage the media from playing a more participatory role in public affairs. On the other, legal restriction may be more palatable if it furthers interests one believes the press itself ought to be furthering.

In any event, valuing the informing role of the press ought to be associated with stronger support for press freedom than valuing the activating role. And, in general, the more strongly people value an informing role for the press, the more supportive they should be of press freedom.

Just as central to the relationship between moral and legal obligation, however, is the question of how well people believe the press is performing in valued roles. We might logically expect people who think the press is performing poorly on roles they value to be less supportive of press freedom. They will be more likely to support government intervention that might punish the press for poor performance and/or encourage better performance. Indeed, this is one of the premises underlying social responsibility theory—government intervention may be necessary if the press fails in significant ways to uphold its moral obligations.

Since we had measures of both the importance respondents attached to various roles and their rating of the media's performance in these roles, it was possible to create what might be called a "performance gap" variable. We did this by comparing the value respondents placed on various roles with the rating respondents gave to the media's performance in those roles. Conceptually, we were most interested in those respondents who valued particular roles highly but were dissatisfied with how well the press was fulfilling them. Thus, operationally, we were interested in respondents who were above the mean on the importance they attributed to any given role but below the mean on how good a job they saw the media doing in



performing that role. These were the respondents to whom a "performance gap" would seem to be meaningful. Respondents who thought the press was satisfactorily performing roles they valued, or was either adequately or inadequately performing roles they did not value, could be considered either satisfied or uninterested. In any event, we then created a larger "performance gap" index by simply adding respondents' "performance gap" scores on all of the roles about which they were asked.<sup>65</sup> Then we could compare performance gap scores with support for press freedom.

### B. *Ethical Obligations and Press Freedom*

Survey respondents were also presented with a list of moral obligations often associated with the news media, and asked to rate the importance of each of them on a 10-point scale. Table 2 shows the list and the respondents' mean rating of each. The higher the rating, the more obligated a respondent considers the media to be.

Just as the role items were combined to create larger indices, several of the moral obligation items were combined to create two larger indicators.<sup>66</sup> One is the broad ethical obligation to be a neutral conduit of information and viewpoints. The other is the obligation to avoid negative consequences that might result from what the media disseminate. The former might be called a "conduit" index, the latter an "impact" index. A high score on the "conduit" index reflects the view that the media are obligated to provide balanced treatment of all groups and viewpoints, and to keep reporters' and editors' personal views out of the news. A high score on the "impact" index reflects the belief that the media have a strong ethical obligation to take into account the impact of their actions on individuals and society.<sup>67</sup> For example, a person might con-

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65. To be more precise, for each possible role we divided respondents into four groups: those above the mean on role importance but below the mean on performance; those above the mean on role importance and above the mean on role performance; those below the mean on role importance but above the mean on role performance; and those below the mean on role importance and below the mean on role performance. These four were then given one of two values and collapsed into two groups—the "dissatisfieds" and the "satisfieds/uninteresteds." We then summed these values across all of the roles.

66. Again, factor analysis was used as an aid. As a result of the factor analysis, several of the individual items were excluded from the resulting indices. Technical results of the analysis are available from the author.

67. The items in this index included the obligations to avoid using stories that might lead to conflict in the community, to mobilize support for

sider the media highly obligated to avoid disseminating material that could cause a person to do something harmful or to cause social conflict.

TABLE 2  
SUPPORT FOR NEWS MEDIA ETHICAL OBLIGATION

Obligation	Mean*
To avoid using stories that might lead to conflict in the community.	4.56
To mobilize support for the government's policies in times of crisis.	6.16
To avoid stories that could stimulate a person to try something dangerous.	5.70
To have balanced treatment in covering all groups and points of views.	8.60
To keep the personal views of reporters and editors out of the news columns.	7.88
To investigate the practices of local businesses even if it might cause loss of jobs.	6.95
To act as a representative of the public in seeking access to newsworthy information and events.	8.13
To publish relevant information about public figures even if the information is highly personal.	5.35
To gather information only by nondeceptive means.	7.03

(n = 300)

\*Respondents were asked, "Regardless of any *legal* issues that might be involved, to what degree are the news media *morally* or *ethically* obligated to do each of the following things?" Respondents then used a 10-point scale ranging from "not obligated at all" to "very much obligated."

Support for the idea that the media are obligated to be neutral conduits would seem to be naturally associated with support for press freedom, or at least for freedom from restrictions that might interfere directly with the conduit role. Belief that the media are obliged to be concerned about their impact may be associated with willingness to tolerate legal controls designed to discourage the media from disseminating material that might have negative consequences, or willingness to punish the media for harmful consequences. Therefore, if moral obligation is linked to legal obligation, we would expect that the stronger people's support for "impact" obligations, the more likely they will be to support legal restrictions aimed at preventing or punishing negative consequences. We might also expect support for conduit obligations to be associated with stronger support for press freedom than support for impact obligations, although this would not necessarily suggest

the government's policies in times of crisis, and to avoid stories that could stimulate a person to try something dangerous.

that moral and legal obligation are unlinked. Rather, it may suggest that respondents consider legal rights to be necessary to ensure adequate performance of ethical duties.

### C. *Support for Press Freedom*

Respondents were asked about their support for press freedom by offering them a series of specific scenarios and asking them, from a legal standpoint, whom they would support in each. Table 3 shows the items and the results. The items were intended to tap into a variety of common conflicts between press freedom and other important values. Among the competing values were privacy and emotional tranquility, reputation, national security, national unity, public safety and individual safety.

Two indices were created after factor analysis. One index taps the degree to which respondents support the legal right of the press to publish material critical of the government or public officials. Another measures respondents' willingness to support freedom to criticize those not involved in government. Willingness to support freedom of the press against claims of national security was measured with the item asking respondents whether they agreed that the news media should be allowed to publish classified information unless there is proof of certain and serious harm.

Willingness to support press rights against the privacy and emotional tranquility of private individuals was examined by presenting respondents with a scenario involving the right of the media to publicize the name of a sexual assault victim obtained from public records. Respondents were asked whether they would support the media in litigation where the victim was granted a prior restraint on dissemination of the name, and whether they would support the media if the victim sued for invasion of privacy. The responses to the two items were then treated as individual indicators of support for press freedom.

TABLE 3  
SUPPORT FOR PRESS FREEDOM

Item	% Yes	% No	% Depends
It ought to be a crime for the media to publish editorials sharply critical of a president's military strategy during wartime.	17	75*	4
The media should be allowed to publish editorials suggesting that if the government is unable to act in the people's best interest, we ought to do away with the constitution and try communism.	40*	50	4
A popular politician who made wholesome family life part of his political image should be able to collect damages from the news media who accurately report that he was having an extra-marital affair during the campaign.	16	74*	7
A magazine publishes a phony advertisement portraying a nationally prominent fundamentalist minister as a drunkard who had an incestuous relationship with his mother. The minister should be allowed to collect damages from the magazine even if no reader would take the advertisement as literally true.	54	25*	10
A person who is criticized in articles or editorials disseminated by the news media should have a legal right to have a free and unedited reply appear in the same media that disseminated the criticism.	85	7*	6
The news media should be allowed to publish the contents of a classified government document leaked to the media by a government employee unless the government can provide overwhelming proof that national security will be harmed.	62*	25	9
The government ought to be able to punish a highly popular newspaper columnist who, in his morning column, urges readers to arm themselves and use physical force to stop a Ku Klux Klan march later that day.	36	46*	12
A television network should be held legally responsible for damages if a child is hurt while copying something dangerous he or she has seen in the network's programming.	24	59*	15
A newspaper publishes stories saying that your state senator has taken bribes. The stories turn out to be false. The senator should be able to win the libel suit against the newspaper unless the newspaper can prove the stories are true.	75	12*	9
Suppose a reporter for a television station serving your community examines court records that are legally open to public inspection and thereby obtains the name of a 17-year-old rape victim. Now suppose the victim discovers that the station has her name and obtains a court order forbidding the station from broadcasting her identity. Would you support the television station's <i>right</i> to broadcast the information?	6*	90	2
Now suppose the victim doesn't know the station has her name and that the station broadcasts it. The victim sues the TV station for invasion of privacy. If the woman sues for invasion of privacy, do you think the television station should pay damages?	76	12*	8

(n = 300)

\*: Responses interpreted as support for press freedom. Percentages do not add to 100% because respondents who failed to answer or said "don't know" were not included.

Finally, a crude overall index of support for press freedom was created by summing respondents' scores on all of the items pertaining to support for press freedom. The higher the total score, the more a respondent supported press freedom.

### D. Controls

As a safeguard against finding spurious relationships, controls were imposed for several other variables that might be expected to affect support for press freedom. Among these were gender, age, education, social ideology,<sup>68</sup> degree of community involvement<sup>69</sup> and media use.<sup>70</sup>

### III. RESULTS

Table 4 shows the results of a regression analysis of the relationship between the control variables and support for press freedom, and between the moral obligation variables and support for press freedom.<sup>71</sup> The betas indicate the degree of relationship between variables after controlling for the effects of the other variables.<sup>72</sup> The  $R^2$  numbers indicate the percent-

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68. Ideology was measured with the following question: "The terms 'liberal and conservative' may mean different things to different people depending on the kind of issue one is considering. In terms of social issues and people's behaviors, would you say you are . . . [choices given were very liberal, liberal, somewhat liberal, moderate, somewhat conservative, conservative, very conservative]."

69. Community involvement was measured by asking respondents whether, "over the past few years," they have ever done the following: attended a city council meeting, hearing or legislative meeting; circulated a petition for something you were interested in; contributed money to a political or public interest campaign; worked with others in a group on some local problems or issues; spoken up at public meeting; contacted a government office or a government official.

70. Media use was measured by asking respondents how often they read newspapers or watch television news and how attentive they are to various types of material in newspaper and television news. A variety of other possible control variables were rejected after preliminary analysis suggested that they were of little value. Among them were respondents' like or dislike of journalists, their degree of personal experience with journalists, their previous litigation experience and general contentiousness, and income.

71. Multiple regression is a statistical technique that allows the researcher to see the effect on a dependent variable resulting from change in an independent variable, while controlling for the effects of other variables. For example, regression allows us to see how much of the impact on overall support for press freedom is explained by, say, the "performance gap" variable after we have taken into account the effect of all the control variables.

72. The beta allows an inference about the impact on one variable of changes in another. For example, it would enable us to predict the amount of change in support for press freedom that would occur as a result of varying the value placed on the informing function. Though suggestive, the betas resulting from regression analysis may still not indicate causation. The "simple r" is the so-called "zero-order" Pearson correlation coefficient. It measures the strength of the relationship between two variables *before* taking into account the impact of other variables. A correlation coefficient is *not* a measure of causality. A positive coefficient indicates that as the value of one

**TABLE 4**  
**PREDICTING SUPPORT FOR PRESS FREEDOM BY MEDIA**  
**ROLE, PERFORMANCE GAP AND MEDIA**  
**OBLIGATION (HIERARCHICAL**  
**REGRESSION ANALYSIS)<sup>a</sup>**

Predictors	OVERALL SUPPORT			SUPPORT FOR RIGHT TO BROADCAST NAME OF ASSAULT VICTIM			SUPPORT MEDIA IN PRIVACY SUIT BY ASSAULT VICTIM		
	simple r	beta	incr. R <sup>2</sup>	simple r	beta	incr. R <sup>2</sup>	simple r	beta	incr. R <sup>2</sup>
<b>CONTROLS</b>									
<b>Demographics</b>									
Sex (male)	-.00	-.06		.04	.02		.04	.04	
Age	-.13*	-.13*		-.12*	-.12*		-.03	-.03	
Education	.29**	.30**	10.2*	.07	.06	2.0	.00	-.00	0.2
<b>Ideology &amp; Activity</b>									
Ideo. Conservatism	-.23**	-.17**		-.11	-.08		-.01	-.01	
Community Invlmmt	.17**	.10	3.5**	-.02	-.04	0.8	.02	.02	0.1
<b>Media Use</b>									
Newspaper Use	.13*	.06		-.00	-.02		-.01	-.01	
Television Use	.03	-.03	0.3	-.01	.03	0.1	-.03	-.02	0.1
<b>Media Role</b>									
Informing	.09	.02		-.03	-.05		.04	.05	
Activating	-.04	-.02	0.1	.02	.04	0.4	-.01	-.01	0.2
Performance Gap	.10	.03	0.1	-.08	-.09	0.8	.00	-.00	0.0
<b>Media Obligation</b>									
Impact	-.31**	-.22**		-.01	.03		-.07	-.07	
Conduit	.16**	.11*	5.3**	-.00	-.00	0.1	.12*	.14*	2.1*
<b>SUPPORT FOR RIGHT OF PRESS TO PUBLISH</b>									
Predictors	CRITICISM OF GOVERNMENT			CRITICISM OF OTHERS			CLASSIFIED DOCUMENTS		
	simple r	beta	incr. R <sup>2</sup>	simple r	beta	incr. R <sup>2</sup>	simple r	beta	incr. R <sup>2</sup>
<b>CONTROLS</b>									
<b>Demographics</b>									
Sex (male)	.01	-.06		-.04	-.04		.08	.07	
Age	-.15*	-.15**		.05	.05		.01	.01	
Education	.36**	.37**	15.5**	-.02	-.01	0.5	.12*	.11	1.8
<b>Ideology &amp; Activity</b>									
Ideo. Conservatism	-.21**	-.13*		-.06	-.07		-.16**	-.15*	
Community Invlmmt	.18**	.08	2.2*	.03	.04	0.6	.14*	.11	3.1**
<b>Media Use</b>									
Newspaper Use	.18**	.11		.04	.07		.10	-.01	
Television Use	.03	-.05	0.8	-.00	-.06	0.4	.13*	.13	1.4
<b>Media Role</b>									
Informing	.19**	.11*		-.12*	-.14*		.05	-.01	
Activating	-.13*	-.10	2.2*	.15**	.13*	3.5**	.11	.10	0.9
Performance Gap	.11	.04	0.2	-.04	-.06	0.4	.12*	.08	0.7
<b>Media Obligation</b>									
Impact	-.28**	-.18**		-.04	-.04		-.14*	-.10	
Conduit	.24**	.19**	5.8**	-.12*	-.14*	2.0	.02	-.02	0.9

Notes:

\* :  $p \leq .05$     \*\* :  $p \leq .01$     n=300

a: The media role, performance gap and media obligation variables were entered into the regression equation separately after the controls were imposed.

age of variance in the various support-for-press-freedom measures accounted for by the control and moral obligation variables.<sup>73</sup> Where the betas and  $R^2$ 's are statistically significant—that is, where we can be reasonably certain that the results were not merely a matter of chance—they are marked with asterisks.

Clearly, the control variables are powerful factors in explaining overall support for press freedom, accounting for fourteen percent of the variation in that variable. Particularly influential are age, education and social ideology. Overall support for press freedom is especially strong among people who are younger, better educated, and consider themselves liberal on social issues.

The controls also explain nineteen percent of the variance in public support for the media's freedom to criticize government and public officials. However, social ideology is the only control variable significantly related to support for publication of classified documents. Again, liberalism is associated with support for such freedom. The controls explain virtually none of the variation in support for the news media in the privacy scenario involving the sexual assault victim, or in support for the press regarding the right of the press to criticize individuals who are not public officials.

#### A. *Media Roles and Performance Gap*

Support for the informing role of the press is positively associated with support for press freedom, but only in the context of the right to criticize government. Conversely, support for the activating role is associated with willingness to restrict the press's legal freedom to criticize government. These findings may suggest that support for opinion leadership by the media is surprisingly shallow—applicable largely to opinion that does not challenge the status quo—and that support for an informing role may also be narrower than one might expect. But most striking of all is the finding that, in the context of non-governmental criticism, support for the two press roles is related to support for press freedom in precisely the opposite way as expected: the activating role is associated with greater

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variable rises, the value of the other rises as well. A negative coefficient indicates that as the value of one variable rises, the other falls.

73. For example, Table 4 shows an  $R^2$  value of 10.2 in the relationship between the demographic controls and overall support for press freedom. This means that of the total amount of variation we observed in overall support for press freedom, just over 10% of it was explained by the demographic factors.

support for press freedom in this context, while the informing role is associated with opposition to press rights.<sup>74</sup>

One possible explanation lies in the items comprising the index used to measure support for criticism of non-governmental individuals. One of the items focused on whether a person criticized in the news media ought to have a legal right to reply in the same media. If a respondent disagreed with such an access right, we defined that as support for press freedom. However, it is entirely possible that respondents might have seen the access right as highly consistent with the informing role.<sup>75</sup> If so, the results suggest they are willing to favor legal coercion to enhance the informing role.

Setting the larger indices aside, an examination of the relationships between individual items suggests that in the vast majority of instances, respondents' valuing of press roles is not strongly related to their support for press freedom. Where there are reasonably strong relationships, they confirm the finding that the more respondents consider the press obligated to play an opinion leadership role, the less supportive they are of press freedom. For example, the more important respondents think it is for the press to promote projects that aid economic development, the less likely they are to support the press's right to criticize a president's military strategy in war or to support the press's right to advocate communism. Yet respondents' support for the "watchdog role" of the press has virtually no relationship at all to support for press freedom.<sup>76</sup>

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74. This seemingly anomalous result has its parallel in the relationship between the "conduit" ethical obligation and support for press freedom. As support for conduit obligations increases, support for the legal right to criticize government increases, but support for the right to criticize others decreases.

75. The Pearson correlations show a negative relationship between the right-of-reply item and both the informing role and conduit obligation. And if we examine relationships between individual items, we find a statistically significant and negative relationship between supporting the press on right of reply and valuing the role of giving people a daily account of what is happening in the world ( $r = -.16$ ,  $p < .05$ , after controlling for respondents' age, education, ideology and community involvement). Put differently, the more respondents value the "daily account" role, the more they favor a right of reply. Likewise, the more they believe the press is ethically obligated to provide balanced treatment to all groups and points of view—a component of the conduit obligation—the more they favor a right of reply. The data suggest that respondents may also have seen a right of access to the media to be consistent with conduit ethical obligations.

76. The only exception involves the press's right to publish classified information, which those who value the watchdog role are likely to support.



As for the impact of “performance gap,” no support was found for the expectation that the more dissatisfied people are with the performance of the press on roles they value highly, the less supportive they will be of press freedom. Perhaps this measure was too crude, and perhaps there was too little variance in respondents’ rating of some of the roles. Nevertheless, at least as performance gap was operationalized here, criticism of the media for failure to fulfill its social roles did not translate itself into willingness to use legal coercion against the press.

### B. *Ethical Obligations and Support for Press Freedom*

The “ethical obligation” variables proved more useful. With the exception of a negative relationship between conduit obligations and support for press freedom, the results were as expected. Where these moral obligation variables are concerned, there appears to be linkage between ethical and legal obligation. The ethical obligation variables explained a statistically significant amount of variation in support for press freedom in the majority of contexts.

There is support in the data for the proposition that the more strongly people believe the media are obliged to consider the impact of their actions, the more likely they will be to support legal restrictions aimed at preventing or punishing negative consequences. The stronger the respondents’ belief in impact obligations, the less they support overall press freedom, including the press’s right to criticize government and government officials. Valuing impact obligations, however, is unrelated to support for the right of the press to publish a sexual assault victim’s name, the right to criticize non-governmental individuals, or the right to publish classified documents.

The data quite strongly indicates that valuing conduit obligations is associated with support for press freedom more than valuing impact obligations. Across most measures, support for conduit obligations translated itself into support for press freedom. Whether one looks at the overall measure, at support for the press in the context of an invasion of privacy action by a sexual assault victim, or at support for the right to criticize government, the result is as expected.

The most striking anomaly occurs in the context of support for the right of the press to criticize non-governmental individuals. There, support for conduit obligations shows a significant and *negative* relationship to support for press freedom.<sup>77</sup> Again, there is reason to believe that the right-of-reply

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77. See *supra* notes 74-75 and accompanying text.

item made the results difficult to interpret, since opposing the media and favoring a right of reply might understandably be consistent with conduit obligations. Of course, this in itself may suggest that if people highly value what they consider the conduit obligations of the press, they are willing to use the law to further fulfillment of those obligations.

Analyzing individual item relationships adds further insight. It appears particularly clear that the more strongly respondents believe the press is obliged to avoid rocking the boat, the more willing they are to support legal control of the press. Those who consider the press strongly obligated to avoid using stories that might lead to community conflict are likely to favor punishment for the columnist who urges readers to physically stop a Klan march, to favor network liability for copy-cat injuries suffered by children, to oppose the right of the press to criticize the president's wartime strategy, and to oppose the media's right to advocate communism.<sup>78</sup> There is no relationship at all between the obligation to avoid community conflict and support for a right of reply, perhaps an indication that respondents valuing this moral obligation are more interested in squelching potentially inflammatory material than in resolving differences through debate.

On the other hand, some of the relationships that would seem to be logically inevitable did not materialize. For example, valuing the obligation of the press to act as a representative of the public in seeking access to newsworthy information and events had very little relationship to support for any type of press freedom.<sup>79</sup> Nor was there any significant relationship between valuing the moral obligation to "publish relevant information about public figures even if the information is highly personal" and support for the media in a lawsuit brought by a popular politician who campaigns on family values and then has the media expose an extra-marital affair. And there was no relationship between valuing the obligation to "avoid stories that could stimulate a person to do something dangerous," and willingness to hold a network responsible for damages if a child is hurt while copying something dangerous that appeared in networking programming.

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78. The same general pattern appears in the relationship between these media freedom variables and support for the moral obligation to mobilize support for the government's policies in times of crisis, although most of these relationships are not as strong.

79. The only exception was such respondents' significant reluctance to side with a politician whose extra-marital affair was exposed by the media. It may be that none of the press freedom items directly tapped the access issue.

Of all the contexts, the sexual assault privacy scenario may be the most peculiar in that none of the control or independent variables show much relationship to support for the press in this type of situation. In part, this may be due simply to the fact that there may have been insufficient variance in that dependent variable. Ninety percent of the respondents would uphold the prior restraint on publication of the victim's name, and three-fourths would support the victim in a privacy action. Such results may suggest that respondents view privacy in the sexual assault context as entirely out of the realm of press freedom and incapable of being counterbalanced by any other interest. Nor is the study without methodological flaws. It may, for example, have been a mistake to have told respondents that a prior restraint had been granted before asking them about their support for the rights of the press. Although pretesting of the survey instrument revealed no problem, some respondents may have assumed that the issue was primarily one of whether to obey a court order, and not a press freedom issue at all. This may be exactly why more respondents supported a prior restraint than supported an action for damages.

In general, the fact that support for the media's legal rights varies considerably across different contexts emphasizes the multidimensionality of press freedom. Simply put, it means strikingly different things to different people, and different things to the same people under different circumstances.

### CONCLUSIONS

Is there, then, empirical evidence of a relationship between the public's views of the ethical and legal obligations of the press? As is often the case with social scientific work, the answer is a qualified "yes." The survey results contain sufficient evidence for concern. A good many of the most direct measures of respondents' feelings about the ethical obligations of the press were found to be related to their support or opposition to the press's legal freedom. Yet, we must be cautious about inferring causation in the relationships under study. We know that certain variables are related, but we can be less certain about the direction of influence. Logic would suggest that one first develops a view of how the media ought to behave and then applies such a belief when resolving a concrete problem of press freedom. But we cannot say with absolute certainty that the process does not work the other way around.

Even if there is such a relationship in the public mind between the moral and legal obligations of the press, a serious question remains: does it matter? *Cohen v. Cowles Media* and

*Masson v. New Yorker Magazine, Inc.* were not decided on the basis of public opinion polls. Nor is the First Amendment a monument to majoritarianism.

For an answer, we must return to William Ernest Hocking and the words with which this article began: "Law is the great civilizing agent that it is . . . because it is a working partner with the advancing ethical sense of the time."<sup>80</sup> Public views about the moral obligations of the press, combined with journalists' own articulation of these values, may indeed represent the "advancing ethical sense of the time." Although there is no overarching consensus among either the press or the public as to all of the ethical obligations of the press, it may be no mere coincidence that *Cohen* and *Masson* focused on alleged breaches in ethical principles about which there is widespread agreement.<sup>81</sup>

Further, there is evidence that, broadly considered, the Supreme Court is no less a majoritarian institution than popularly elected branches of government.<sup>82</sup> One major study recently concluded that three-fifths to two-thirds of the Court's rulings have reflected prevailing public opinion.<sup>83</sup> In two-thirds of the cases involving Bill of Rights or fourteenth amendment claims and in sixty percent of free speech/press cases, the Court has been found to be consistent with public opinion on the issues under review.<sup>84</sup>

80. Hocking, *supra* note 1, at 258.

81. See *supra* notes 43-49 and accompanying text.

82. THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 192 (1989).

83. *Id.* at 80-81. The percentage jumps to 76% in so-called "crisis times" cases—those relating to what the public considers the most important problems facing the country. *Id.* at 82, 88. Marshall reached these conclusions after comparing scientific, national polls with Supreme Court decisions between 1935 and 1986. *Id.* at 71-72. For other studies finding a relationship between public opinion and court decisions, see Cecilie Gaziano, *Relationship Between Public Opinion and Supreme Court Decisions: Was Mr. Dooley Right?* 5 COMM. RES. 131 (1978). See also Beverly B. Cook, *Public Opinion and Federal Judicial Policy*, 21 AM. J. POL. SCI. 567 (1977); James H. Kuklinski & John E. Stanga, *Political Participation and Government Responsiveness: The Behavior of California Superior Courts*, 73 AM. POL. SCI. REV. 1090 (1979); Robert E. Drechsel, *Accountability, Representation and the Communication Behavior of Trial Judges*, 40 W. POL. Q. 685 (1987); Charles H. Sheldon, *Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems*, 20 W. POL. Q. 341 (1967); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision-Making in the Post-New Deal Period*, 47 J. POL. 652 (1985); Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, 74 JUDICATURE 322 (1991). But see Herbert M. Kritzer, *Federal Judges and Their Political Environments: The Influence of Public Opinion*, 23 AM. J. POL. SCI. 194 (1979).

84. See MARSHALL, *supra* note 82, at 89.

One need not argue that there is a direct, unmediated relationship between public opinion and court decisions to assert that public opinion is part of the socio-cultural milieu within which judicial decisions are made, or a potential resource upon which decision-makers might draw.<sup>85</sup> Such would seem all the more likely where moral expectations of the news media, one of the major vessels of public opinion, are involved, and where journalists themselves publicly articulate, debate and defend the ethical standards of their occupation.

In the last analysis, *Cohen*, *Masson* and a good many other cases to come may be seen in part as the result—the cost, some might say—of the media's acceptance of the premises of social responsibility theory, of perceived or actual widespread public and media agreement about certain standards of journalistic behavior, and perhaps of journalists' failure to recognize the delicate nature of the boundary between ethics and law.

Hocking described the process concisely:

In brief, law falls in behind the advance of ethical reflection, attempting to make unanimous in behavior what ethical sense has made almost unanimous in motive, and in so doing (a) to make the motivation itself more nearly unanimous and (b) to transfer the released ethical energy to a new level of issues, which in turn will eventually become material for new law.<sup>86</sup>

Whether this development is good or bad is another question.

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85. See, e.g., James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision-Making*, 14 L. & SOC. REV. 343 (1980); Drechsel, *supra* note 83. For useful examples involving criminal prosecutors, see David Pritchard, *Homicide and Bargained Justice: The Agenda-Setting Effect of Crime News on Prosecutors*, 50 PUB. OPINION Q. 143 (1986). See also David Pritchard et al., *Prosecutors' Use of External Agendas in Prosecuting Pornography Cases*, 64 JOURNALISM Q. 392 (1987).

86. Hocking, *supra* note 1, at 258.