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THE MEDIA IN THE NEW MILLENNIUM: EXPLORING MYTHS AND MISCONCEPTIONS BEFORE SHOOTING THE MESSENGER

*Sandra F. Chance**

The press has a crisis of credibility. Many believe that the media increasingly violate basic standards of fairness, accuracy, objectivity, and respect for privacy in the rush to profit from sensationalizing sex, scandal, and violence. Criticism often turns into media bashing, as it has become almost derigueur to blame the media for all of society's ills. Some of the bashing is deserved. Much of it is not. The entire industry is often blamed for the excesses of a few. And, there is a widespread temptation to shoot the messenger who brings the bad news.

Often, this undeserved criticism flows from myths and misconceptions about the media. As we head into the new millennium, it is important to explore these misconceptions and myths before jumping on the media bashing bandwagon and shooting the messenger. After all, no messenger may ultimately mean no message.

Myth 1: The public is so disgusted with the press that they want the government and the courts to restrict the media's First Amendment protections.

Despite their concerns about the press, a recent survey demonstrates that sixty-six percent of Americans believe a free press is essential.¹ According to the 1997 Freedom Forum study, the First Amendment is alive and well, with ninety-three percent of Americans saying they would approve the First Amendment in a vote today.² On the whole, "Americans are wary of

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1. Ken Dautrich, *The Freedom Forum Poll, in* STATE OF THE FIRST AMENDMENT CONFERENCE REPORT 19, 20 (The Freedom Forum ed., 1997).

2. *Id.* at 20-21.

government restrictions, especially on First Amendment freedoms” and would not support efforts to amend the Constitution to restrict First Amendment freedoms.³ For example, more Americans today, sixty-three percent compared to thirty-nine percent in 1979, resent the government’s involvement in television programming.⁴

A strong majority believe First Amendment rights are not only important to American society, but also essential to a democracy.⁵ In addition, Americans decisively endorsed the idea that tabloid newspapers enjoy the same protection to publish as the mainstream press.⁶

There is, however, an important message for the media in this study. While there is a high degree of support for First Amendment rights in the abstract, support drops in response to specific examples.⁷ For example, while most people strongly supported press freedoms, they do not like the use of hidden cameras, or sexually explicit or offensive expression.⁸

According to Richard Wald, ABC News senior vice president, surveys do not tell the whole story, and while people may dislike the messenger, they like the message.⁹ For example, the public says they are tired of stories about President Clinton and Monica Lewinsky, but newspaper sales are up and so are CNN’s ratings.¹⁰ “If you believe surveys that ask people what they watch on TV, PBS is the highest rated network in the world. And ballet is huge.”¹¹ Additionally, the latest nationwide Pew Research Center for the People and the Press survey found that the public is both attracted to and repulsed by tabloid coverage of crime, scandal, and wrongdoing.¹² Almost half of the respondents reported watching tabloid news programs.¹³

Myth 2: Enforceable standards or a code of ethics for journalist would be effective.

Most notably, the U.S. Supreme Court understands that a responsible press cannot be legislated. In *Miami Herald v. Tornillo*, the Court stressed

3. *Id.*

4. *Id.*

5. *Id.* at 21.

6. *Id.* at 20.

7. *Id.*

8. *Id.* at 20-21.

9. Richard Wald, *What We Do Now*, COLUM. JOURNALISM REV., Mar./Apr. 1998, at 25, 26-27.

10. *See id.*

11. *Id.* at 27.

12. Pew Research Ctr. for the People & the Press, *Press “Unfair, Inaccurate and Pushy”* (visited July 24, 1998) <<http://www.people-press.org/97medrpt.htm>> (reporting results of the 1997 National Social Trust Survey).

13. *Id.*

that while “[a] responsible press is an undoubtedly desirable goal, . . . press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”¹⁴ The *Tornillo* Court reminded us that from the earliest days of our democracy, society had depended on a zealous free press to survive and consequently, has tolerated a certain level of outrageousness by the press.¹⁵ In *Rosenbloom v. Metromedia*, the Court was unequivocal in its support of an unfettered press, explaining that “[while in] an ideal world, the responsibility of the press would match the freedom and public trust given it[,] . . . from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse.”¹⁶

Our forefathers accepted the premise that freedom of the press meant tolerating excess. For example, in 1799, James Madison wrote:

Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.¹⁷

While the Court has staunchly supported the press, even when it has operated outside the nation’s “comfort zone,”¹⁸ the public has not. Responding to the public perception of the press as arrogant and irresponsible

14. 418 U.S. 241, 256 (1974).

15. *See id.* at 252.

16. 403 U.S. 29, 51 (1971); *see also* *Cantrell v. Forest City Publ’g Co.*, 484 F.2d 150, 157 (6th Cir. 1973) (quoting the same language from *Tornillo*).

17. *Rosenbloom*, 403 U.S. at 51 (emphasis omitted) (quoting 6 WRITINGS OF JAMES MADISON 1790-1802, at 336 (Gaillard Hunt ed., 1906)).

18. *See* *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’”) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)); *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (“ “[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.” ’”) (quoting *Hustler Magazine*, 485 U.S. at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978))).

following Watergate and the Vietnam War, the industry adopted new codes of ethics.¹⁹ However, the renewed emphasis on industry codes appears not to have significantly improved press credibility.²⁰ Neither have attempts at outside regulation, like the National News Council, which was created in 1974, been successful.²¹ The now defunct council was an independent, private organization with no enforcement power.²² It investigated complaints of inaccurate and unfair news reporting and issued decisions based on its findings.²³

The National News Council never enjoyed the widespread support of the nation's journalism industry.²⁴ Journalists feared that the Council's findings would establish a common law of journalistic standards that could be used against the media in libel cases.²⁵ In addition, journalists were afraid the Council would restrict editorial freedom and lead to licensing of journalists.²⁶ As a result, the National News Council was disbanded after eleven years.²⁷

Industry associations, principally the American Society of Newspaper Editors (ASNE)²⁸ and the Society of Professional Journalists (SPJ),²⁹ have adopted broad codes of ethics for their members. While the codes lack specificity, supporters claim this is necessary to meet the daily needs of journalists.³⁰ They argue that these codes allow individual editors the latitude to make editorial judgments.³¹ In addition, vague codes allow for social or political views that fall outside the mainstream and protect against "potential homogenizing effects" on individual newspapers.³² However,

19. The Society of Professional Journalists (SPJ) adopted its own code in 1973, and the American Society of Newspaper Editors (ASNE) revised its code in 1975. Lynn Wickham Hartman, *Contemporary Studies Project: Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 638-39 (1987); see also JOHN L. HULTENG, *THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA* 15 (2d ed. 1985).

20. Hartman, *supra* note 19, at 639.

21. See Jonathan Friendly, *National News Council Will Dissolve*, N.Y. TIMES, Mar. 23, 1984, at B18; Philip Newman, *National News Council Folds*, UNITED PRESS INT'L, Mar. 23, 1984, available in LEXIS, News Library, Arcnws File.

22. Friendly, *supra* note 21, at B18.

23. Newman, *supra* note 21.

24. See Friendly, *supra* note 21, at B18.

25. Hartman, *supra* note 19, at 641.

26. *Id.* at 644.

27. DON R. PEMBER, *MASS MEDIA IN AMERICA* 401 (5th ed. 1987).

28. American Soc'y of Newspaper Editors, *Statement of Principles* (visited Oct. 21, 1998) <<http://www.ASNE.org/kiosk/archive/principi1.htm>>.

29. Society of Prof. Journalists, *Ethics in Journalism* (visited Oct. 21, 1998) <<http://www.spj.org/ethics/index.htm>>.

30. Hartman, *supra* note 19, at 641.

31. *Id.* at 641-42.

32. *Id.* at 642.

some critics believe that these codes are no more than “philosophical statements that provide little guidance to journalists faced with concrete problems.”³³ In addition, they remain unenforceable.³⁴

Many journalists oppose enforcement mechanisms because enforcement, even at an industry level, means a form of unacceptable regulation.³⁵ Journalists proudly defend their First Amendment heritage. According to a journalism professor who specializes in media ethics, journalists operate out of a sense of negative freedom, that is, freedom from control, whether by government, outside critics, or the industry itself.³⁶ In fact, journalists have a fundamental duty to remain independent of external forces that could pollute the channels of communication.³⁷

While many journalists oppose enforceable, specific industry codes, they support the use of individual newspaper codes.³⁸ One study on journalism codes of ethics found that more than one-third of the survey respondents who employed written codes had taken disciplinary action to enforce these rules for violations of plagiarism, continuing inaccuracies, and falsifying stories or sources.³⁹ Almost half the editors surveyed reported firing an employee who had violated the newspaper’s standard.⁴⁰ In addition, media ethics also are receiving increased attention in U.S. journalism schools in recent years.⁴¹ Journalists understand that “[e]thical journalism is better journalism.”⁴²

33. *Id.* at 639-40; see H. EUGENE GOODWIN, *GROPING FOR ETHICS IN JOURNALISM* 17 (2d ed. 1987); see also Robert C.L. Moffat, *Mustering the Moxie to Master the Media Mess: Some Introductory Comments in the Quest for Media Responsibility*, 9 U. FLA. J.L. & PUB. POL’Y 137, 146 (1998) (criticizing journalists for adopting a “generalized standard so watered-down as to be meaningless”).

34. Hartman, *supra* note 19, at 640.

35. *Id.*

36. *Media and Law Enforcement with Emphasis on the Richard Jewell Case: Hearing Before the Subcomm. on Terrorism, Technology and Gov’t Info. of the Senate Comm. on the Judiciary*, FDCH Political Transcripts, 1996 WL 750516 at *76 (statement of Dr. Jay Black, Professor of Media Ethics, University of South Florida) [hereinafter *Media and Law Enforcement*].

37. See *id.* at *77.

38. See PHILIP MEYER, *EDITORS, PUBLISHERS AND NEWSPAPER ETHICS: A REPORT TO THE AMERICAN SOCIETY OF NEWSPAPER EDITORS* 60 (1983); Hartman, *supra* note 19, at 642.

39. Hartman, *supra* note 19, at 651.

40. *Id.*

41. See Edmund B. Lambeth et al., *Role of the Media Ethics Course in the Education of Journalists*, *JOURNALISM EDUCATOR*, Autumn 1994, at 20, 20-21. According to this study, the number of ethics courses has increased by 56% in the past decade. *Id.* at 20. Seventy percent of accredited schools responding to a survey on ethics courses reported offering an ethics class. *Id.* at 21. In addition, ethics modules are included in numerous journalism courses. *Id.* at 20.

42. PHILIP PATTERSON & LEE WILKINS, *MEDIA ETHICS: ISSUES AND CASES* 1 (2d ed. 1994).

Myth 3: Americans no longer trust the media.

A recent Gallup Poll revealed that Americans generally have a high level of trust in many of the major sources of news and information and continue to rely on traditional hard news sources.⁴³ The survey also showed that broadcast news has higher credibility than print, and prime-time television newsmagazines are both popular and highly trusted, as are local television news shows.⁴⁴ Although national newspapers like *The New York Times* and *The Washington Post* are revered and respected by the country's elite, CNN garners the highest trust ratings, followed closely by local television newscasts.⁴⁵

While many Americans still trust the media, the public's assessment of the press has grown increasingly negative in recent years.⁴⁶ Men criticize the press more often than women, with young men "extremely" critical of the press.⁴⁷ More Republicans believe news organizations favor one side than Democrats or Independents.⁴⁸ Affluent respondents and college graduates also are more critical of the press.⁴⁹ Traditional news sources, that is, local and national newspapers and weekly newsmagazines, ranked significantly lower in credibility.⁵⁰ National print newsmagazines were ranked as least credible.⁵¹

A Gallup poll revealed that Americans rank journalists with business executives, building contractors, and real estate agents as "average" on its integrity scale.⁵² Journalists ranked ahead of senators, congressmen, and car salesmen and have maintained this ranking consistently over the past twenty-three years.⁵³ Lawyers, whose rankings have dropped dramatically during the same time period, rank just ahead of car salespeople in terms of negative integrity ratings.⁵⁴

43. See Frank Newport & Lydia Saad, *A Matter of Trust*, AM. JOURNALISM REV., July/Aug. 1998, at 30, 30.

44. *Id.*

45. *Id.* at 31-32.

46. Pew Research Center for the People & the Press, *supra* note 12.

47. *Id.*

48. *Id.*

49. *Id.*

50. Newport & Saad, *supra* note 43, at 32.

51. *Id.*

52. Leslie McAneny & Lydia Saad, *Honesty & Ethics Poll: Pharmacists Strengthen Their Position as the Most Highly Rated Occupation* (visited Dec. 3, 1998) <<http://198.175.140.8/poll%5Farchives/1997/971213.htm>>.

53. *Id.*

54. *Id.*

Myth 4: Everybody knows the media is biased, with a distinct liberal bias.

A 1998 Gallup poll asked Americans to evaluate the major news sources as having a liberal or conservative bias,⁵⁵ that is, do they believe the sources are “fair and impartial.”⁵⁶ More respondents believed that the media was biased, rather than fair and impartial.⁵⁷ However, the study revealed many Americans believe the media have conservative as well as liberal biases.⁵⁸ While the perception of a liberal bias is somewhat stronger for national news sources, “those who see either left- or right-wing bias in print or [television] essentially cancel each other out.”⁵⁹

Press objectivity is often the focus of the critics.⁶⁰ Journalists are often criticized for being biased.⁶¹ At the same time, they are frequently criticized when they try to balance all perspectives.⁶² Ultimately, there is no way for the media to win the press objectivity argument. For example, journalists are criticized for always focusing too much on the same sources and experts and then criticized for trying to “balance” stories by asking “kooks” to give the other side of the story.⁶³ These criticisms fail to recognize the media’s attempt to act responsibly by seeking out other voices and assumes the readers or viewers cannot evaluate the reliability of the sources and make their own determinations.

Some commentators argue that complete objectivity actually hinders the realization of ethical and independent journalism.⁶⁴ For example, when the press adopted a “just the facts” system of reporting in the 1950s, news was defined by what public officials wanted the public to know.⁶⁵ This approach led journalists to report Senator Joseph McCarthy’s wild accusations of communist influences in the government, the military, academia, and the entertainment industry as factual.⁶⁶ Once broadcast journalist Edward R. Murrow had crossed this barrier of objectivity, Joseph McCarthy

55. Newport & Saad, *supra* note 43, at 33.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See Moffat, *supra* note 33, at 144.

61. See *id.*

62. See *id.* Professor Moffat concludes that “the tendency of contemporary journalism to *balance* all perspectives, no matter how ridiculous the alternatives offered, provides a huge target for . . . contempt.” *Id.*

63. See *id.*

64. See Jason P. Isralowitz, Comment, *The Reporter As Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 223 (1992).

65. See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 167-69 (1978).

66. Isralowitz, *supra* note 64, at 276.

was ultimately exposed and discredited.⁶⁷

Ultimately, the press got tired of being lied to, and the public got weary of a complicit press.⁶⁸ Presenting the "other side" of an issue became an important element of journalism.⁶⁹ The press learned that without skepticism, without questioning what public officials were saying, they were simply puppets of manipulative public officials.⁷⁰

Myth 5: The media are not concerned about the credibility crisis.

Winning the trust of the American people is the immediate challenge for journalists, whose credibility has been weakened by declining public trust. The decline has been caused by a lack of accuracy on names, numbers, and dates; high-profile stories that may, in fact, be non-stories; an unwillingness to apologize when wrong; burying corrections; and needless intrusiveness.⁷¹ Regaining this trust is made even more difficult with the appearance of the newest news dispenser, the Internet, which "makes a journalist out of anybody who has a modem."⁷² Some traditional journalists say the Internet values speed and sensationalism above accuracy, and this hurts their credibility.⁷³

Recently, the ASNE began a three-year project to examine how to increase the print media's credibility.⁷⁴ The ASNE Journalism Credibility Project includes research partnerships with eight newspapers that will study credibility issues in their communities and implement solutions.⁷⁵ The Freedom Forum has launched a multi-million dollar effort to improve fairness and accountability in the press.⁷⁶

Journalists are being encouraged to examine the reasons for the growing chasm between the public's perception and journalists' perceptions of how professional the press is in fulfilling its obligations.⁷⁷ Some of the solu-

67. *Id.*

68. SCHUDSON, *supra* note 65, at 171-82.

69. *See id.* at 171-76.

70. *See id.* at 167-69.

71. *See* Jack Tinsley, *Credibility Conversation Spotlights Obstacles*, AM. EDITOR, May 1998, at 4, 4.

72. Sandy Rowe, *Out of the Credibility Crisis*, AM. EDITOR, May 1998, at 10, 11.

73. *Id.*

74. *See* American Soc'y of Newspaper Editors, *ASNE Journalism Credibility Project* (visited Nov. 11, 1998) <<http://www.asne.org/works/jcp.jcp1.htm>>; Jacqueline Sharkey, *The Diana Aftermath*, AM. JOURNALISM REV., Nov. 1997, at 18, 20.

75. American Soc'y of Newspaper Editors, *ASNE Launches Journalism Credibility Initiative* (visited Dec. 4, 1998) <<http://www.asne.org/kiosk/editor/97.july-aug/movel.htm>>.

76. The Freedom Forum, *Free Press/Fair Press* (visited Dec. 4, 1998) <<http://www.freedomforum.org/fpfp/welcome.asp>>.

77. *See* Rowe, *supra* note 72, at 11.

tions, according to one of the country's leading journalists, include adopting the highest journalistic standards; taking the high road by refusing to play up the trivial, the perverse, and the bizarre; and clearly communicating these high standards to readers.⁷⁸

Adding to this credibility crisis have been recent revelations of journalistic fabrications and falsehoods at some of the country's leading newspapers. For example, *The Cincinnati Enquirer* renounced a series of stories alleging suspect business practices at Chiquita Brands International, paid a \$10-million settlement, and fired one of the reporters.⁷⁹ *The New Republic* fired one of its associate editors and writers after learning that he had fabricated numerous articles for the magazine.⁸⁰ *The Boston Globe* recently fired two reporters for fabricating news stories and information contained in their columns.⁸¹ CNN retracted its story that the U.S. military used nerve gas in a mission to kill U.S. defectors during the Vietnam War, stating: "Nothing is more important to a news organization than its reputation for accuracy, fairness and responsibility."⁸² The news network reported taking "vigorous steps" to strengthen internal procedures to assure that similar mistakes do not occur.⁸³ While occurrences of inaccuracy and fabrications are immensely embarrassing for the media, public disclosure may ultimately increase the media's credibility.

Another way some journalists are attempting to reestablish their credibility is through "public" or "civic" journalism.⁸⁴ Believers in civic journalism argue that the time for the press to act merely as a mirror of events has passed.⁸⁵ Civic journalists declare an end to their neutrality on certain questions in order to come to grips with problems and turn themselves into advocates for the public's information needs.⁸⁶ Civic journalism includes efforts to encourage citizen participation, once considered beyond the pale of journalistic activity, through convening public meetings and

78. *Id.*

79. *Reporter Pleads Guilty in Theft of Voice Mail*, N.Y. TIMES, Sept. 25, 1998, at A16.

80. Joe Saltzman, *There Is No Place for Lying in Any Newsroom: False News Stories*, USA TODAY MAG., Sept. 1998, at 57.

81. Gerald P. Merrell, *Media Scandals Tarnish All Journalists; It's Been a Rough Year for the Fourth Estate*, THE SUN (Baltimore), Aug. 30, 1998, at 6C; Saltzman, *supra* note 80, at 57.

82. *CNN Retracts Tailwind Coverage* (visited Dec. 4, 1998) <<http://www.cnn.com/US/9807/02/tailwind.johnson/>>; Paul Glastris et al., *Are Press Standards Slipping?*, U.S. NEWS & WORLD REP., July 13, 1998, at 22.

83. *CNN Retracts Tailwind Coverage*, *supra* note 82.

84. Eric Black, *Media's New Status: Public Enemy No. 1*, STAR TRIB. (Minneapolis), Jan. 28, 1996, at 1A; Eric Black, *Public Enemy No. 1: The Media*, STAR TRIB. (visited Dec. 4, 1998) <<http://www.startribune.com/online/ddd/eblack/pres28.htm>>.

85. *See id.*

86. *See id.*

sponsoring debates.⁸⁷ The latest figures show that in less than three years, the number of newsrooms experimenting with civic journalism has grown from a handful to 171.⁸⁸ Still, the movement has critics within the profession who stridently maintain that the journalist's central mission is to gather the news, set priorities, and analyze, not to shape or direct events or outcomes.⁸⁹

Myth 6: The media are not held accountable.

When the press goes over the line, there is accountability. The courts have recently considered several cases involving questions of ethics and newsgathering techniques. In 1992, the ABC news program *PrimeTime Live* broadcast a report on allegedly unsanitary conditions at Food Lion grocery stores.⁹⁰ Food Lion, rather than filing the traditional, yet difficult to win, defamation lawsuit, successfully focused on the television program's newsgathering techniques. Food Lion sued the television network for intentional misrepresentation, deceit, fraud, negligent supervision, trespass, breach of fiduciary duty, respondeat superior, civil conspiracy, violations of federal wiretapping laws, unfair and deceptive trade practices, and RICO violations.⁹¹

The district court dismissed most of the claims, but allowed the trespass, fraud, and civil conspiracy claims to go forward.⁹² The court rejected ABC's argument that the claims should be dismissed on First Amendment grounds.⁹³ Citing the Supreme Court's holding in *Cohen v. Cowles Media Co.*,⁹⁴ the court held that the First Amendment does not protect the press when it violates generally applicable criminal or civil laws while engaging in newsgathering activities.⁹⁵ The jury awarded Food Lion \$1402 in actual damages and more than \$5.5 million in punitive damages.⁹⁶ A federal judge later reduced the award of punitive damages to \$315,000.⁹⁷ ABC appealed the order, claiming that the decision has a "chilling" effect on investigative

87. *Id.*

88. Mike Hoyt, *Are You Now, or Will You Ever Be, A Civic Journalist?*, COLUM. JOURNALISM REV., Sept./Oct. 1995, at 27, 28.

89. *Id.* at 29 (explaining the view of Jane R. Eisner, editorial page editor of *The Philadelphia Enquirer*).

90. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 812, 814, 816 (M.D.N.C. 1995).

91. *Id.* at 812.

92. *Id.* at 820.

93. *Id.* at 824.

94. 501 U.S. 663 (1991).

95. *Food Lion*, 887 F. Supp. at 821-22.

96. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 927 (M.D.N.C. 1997).

97. *Id.* at 940.

reporting and is an attempt to make an end-run around the First Amendment.⁹⁸

Twice within the last decade, the U.S. Supreme Court ruled on acceptable reporting techniques and journalistic ethics. In *Masson v. New Yorker*, psychoanalyst Jeffrey Masson, who was the focus of the magazine's feature story, sued author Janet Malcom, accusing her of fabricating quotations that defamed him.⁹⁹ The Supreme Court, showing great sensitivity to the daily newsroom problems of journalists, ruled against Masson and held that even a deliberate alteration of words does not constitute actual malice as long as the meaning of the statement is not materially changed.¹⁰⁰ This ruling suggests that the Court is willing to find a relatively low journalistic standard acceptable.

The Supreme Court held the media liable in a second ethics case, not because it failed to meet an acceptable journalistic ethical standard, but because it had breached a contract.¹⁰¹ In *Cohen v. Cowles Media Co.*, reporters for the *Minneapolis Star & Tribune* and the *St. Paul Pioneer Press Dispatch* broke promises of confidentiality to Cohen, a public relations consultant.¹⁰² When the newspaper printed Cohen's name, he lost his job and sued.¹⁰³ The Court ruled that the First Amendment did not protect the newspaper from laws of general applicability and transformed what had been generally regarded as a purely ethical obligation into a legally enforceable one.¹⁰⁴

Finally, the case some point to as opening the floodgates for media irresponsibility,¹⁰⁵ *New York Times v. Sullivan*,¹⁰⁶ has actually been turned into a license for government to scrutinize and regulate newsroom practices. According to Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press, with its decision in *Sullivan*, the Supreme Court granted "libel plaintiffs' lawyers virtually unlimited license to probe for evidence of actual malice."¹⁰⁷ Kirtley observes that this, in turn, "allow[s] judges to determine as a matter of law what proper journalis-

98. Scott Andron, *Round II Ready to Begin, Suit over ABC Report on Grocery Chain into Appeals and Fifth Year in Courtrooms*, THE QUILL, Apr. 1998, at 26, 26. Oral arguments were scheduled for May 1998, but as of early December 1998, no decision had been rendered by the Fourth Circuit. See *id.*

99. 501 U.S. 496, 499 (1991).

100. *Id.* at 517.

101. 501 U.S. at 665.

102. *Id.* at 665-66.

103. *Id.* at 666.

104. *Id.* at 670.

105. See Moffat, *supra* note 33, at 140-43.

106. 376 U.S. 254 (1964).

107. Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL OF RTS. J. 1069, 1085 (1996).

tic conduct should be.”¹⁰⁸

While the First Amendment is not a license to break the law, courts have consistently protected the right to gather news.¹⁰⁹ The struggle in the new millennium will be over how to protect the media and freedom of the press while holding journalists accountable when they break the law.

Myth 7: The First Amendment should not protect an irresponsible media.

It may come as a surprise to some, but the proposition that the press has a First Amendment right to be irresponsible and bother people is alive and well in the United States. Senator Patrick Leahy acknowledged this First Amendment right to be irresponsible during Senate hearings considering legislation to tighten the rules to protect against law enforcement leaks.¹¹⁰ Even a Supreme Court justice understands the importance of this First Amendment protection. During oral argument in a major First Amendment case, U.S. Supreme Court Justice Anthony Kennedy said, “That’s what the First Amendment is for, is to bother people.”¹¹¹

Critics are convinced that the very fabric of society will be irreparably torn if the prevailing First Amendment rule of protecting the media, even when they behave irresponsibly, continues to prevail.¹¹² According to self-described First Amendment absolutist Lyle Denniston, this assumption “betrays the supreme moral and cultural paternalism of those who wish to use the coercive power of government to regulate expression.”¹¹³ Implicit in this viewpoint is that the self-appointed moral superiors are capable of telling the difference between good and evil.¹¹⁴ According to Denniston, the morality that would be forced on society from the right would be white, conservative Christian, and middle class.¹¹⁵ From the left, it would be “politically correct” regarding women, blacks, and other minorities.¹¹⁶ Denniston believes that moral preferences imposed by whatever politically dominant viewpoint “would expunge aggressive news reporting and editorial commentary, censor the avant-garde in the arts, carve out space on the

108. *Id.*

109. *See* *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (observing that “without some protection for seeking out the news, freedom of the press could be eviscerated”).

110. *See Media and Law Enforcement*, *supra* note 36, at *102 (statement of Sen. Patrick Leahy during Senate subcommittee hearing on Atlanta Olympic bombing investigation).

111. Transcript of Oral Argument at *29, *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (No. 91-155, 1992 WL 687817).

112. Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351, 367 (1992).

113. *Id.*

114. *Id.* at 368.

115. *Id.*

116. *Id.*

burgeoning electronic medium for some favored segment of society or for some majoritarian expression, and aggressively convert the media into a designated voice of official values."¹¹⁷

From the perspective of the First Amendment absolutist, the Constitution protects the freedom to make choices about expression, including the freedom to be irreverent, rebellious, experimental, fresh, original, audacious, and revolutionary.¹¹⁸ Therefore, absolutists argue, any use of coercive instruments of public control of expression is the functional equivalent of government licensing.¹¹⁹ The absolutist theory anticipates that sometimes the choices will be wrong and offensive, even hurtful.¹²⁰ It trusts, however, that when this happens, the community will be hardy enough to withstand the hurt and willing to pay the price.¹²¹

Myth 8: A two-tiered First Amendment analysis should be adopted to encourage ethical journalistic behavior.

Some proposals for encouraging the media to behave ethically include a two-tiered First Amendment analysis by the Supreme Court, in which "greater deference would be paid to journalistic behavior that [meets certain] ethical standards."¹²² Thus, the activities of *The National Enquirer* should be more heavily scrutinized than those of *The Wall Street Journal*, according to one of its proponents, law professor Robert Moffat.¹²³

However, this approach assumes that reporters for newspapers like *The Wall Street Journal* always act ethically and reporters for *The National Enquirer* do not. As noted earlier, some of the nation's leading newspapers have experienced unethical reporting within the last few months. Moreover, while *The Wall Street Journal* is an excellent newspaper, it also has the dubious honor of losing the largest libel verdict in history.¹²⁴ In 1995, Money Management Analytical Research of Houston, a securities firm, sued *The Wall Street Journal*¹²⁵ for libel, claiming the newspaper had forced the company out of business.¹²⁶ In 1997, the jury awarded \$200 million in

117. *Id.*

118. *Id.* at 359.

119. *See id.* at 359-60.

120. *Id.* at 359.

121. *Id.*

122. *See* Moffat, *supra* note 33, at 147.

123. *See id.* at 147-48.

124. Larry Reibstein, *One Heck of a Whopping: The Wall Street Journal Hit with a Huge Libel Award*, NEWSWEEK, Mar. 31, 1997, at 54.

125. *See* MMAR Group, Inc. v. Dow Jones & Co., 987 F. Supp. 535, 535 (S.D. Tex. 1997).

126. *Record Libel Award: \$222 Million; Wall Street Journal Vows Appeal of Texas Verdict*, CHICAGO TRIB., Mar. 21, 1997, at 12.

punitive damages against Dow Jones & Co., which publishes *The Journal*, and \$22.7 million in actual damages, and assessed \$20,000 in punitive damages against Laura Jereski, a *Journal* reporter.¹²⁷

While losing a libel verdict does not automatically impute unethical behavior, it should raise a cautionary red flag to those eager to classify and judge newspapers based solely on their reputation or their readership. Ethical journalists can still produce journalism that is utterly irresponsible or destructive. At the same time, some of the nation's most important stories have come from the use of unconventional or undercover techniques.

Myth 9: The legislatures will become so fed up with the media that they will place additional restrictions on the press.

While there have been numerous efforts to pass new restrictions on the press at the national and state level, most of them have failed. In fact, new protections for the press have been passed. For example, in 1998, Minnesota amended its journalists' shield law to protect both confidential and nonconfidential information.¹²⁸ Florida also broadened its protection for the state's news media, passing a shield law that protects both nonconfidential and confidential information.¹²⁹

In addition, following the death of Princess Diana, although some members of Congress rushed to introduce legislation that would create new criminal and civil penalties for "technological trespass," that is, the use of high-power visual or auditory enhancement devices by photographers and videographers,¹³⁰ the bills never got out of committee. This was partly because the media responded quickly with convincing evidence that existing laws against illegal behavior, like stalking and trespass, are working.¹³¹

Myth 10: Modern aggressive newsgathering techniques often create situations for the purpose of manufacturing the "news."

For the most part, investigative reporting is only a small percentage of what makes up the news. Generally, it does not involve undercover operations and other deceptive practices. It takes good, old-fashioned shoe leather, along with enormous amounts of time and financial investments. In fact, the high cost of investigative reporting accounts for its paucity.

127. *MMAR Group*, 987 F. Supp. at 540, 549-50; see *Record Libel Award*, *supra* note 126, at 12.

128. 1998 Minn. Laws ch. 357, amending MINN. STAT. §§ 595.023-.024 (1998).

129. 1998 Fla. Laws ch. 98-48 (codified as FLA. STAT. § 90.5015 (1998)).

130. See Tony Mauro, *Paparazzi and the Press*, *THE QUILL*, July/Aug. 1998, at 26, 26-28.

131. See *id.*

For example, at *The New York Times* recently, four reporters spent fifteen months working on a project that revealed Columbia/HCA Healthcare Corp. was defrauding Medicare.¹³² The series resulted in federal officials storming Columbia's offices, fraud indictments against corporate executives, and an ongoing criminal investigation.¹³³ It was one of the decade's best examples of public-service journalism and cost the newspaper an estimated \$625,000.¹³⁴

Investigative reporting enjoys a long and rich tradition. For example, a century ago, a young newspaper reporter named Nellie Bly feigned insanity to get inside a Manhattan insane asylum so she could expose the horrendous treatment of the mentally ill.¹³⁵ Ida Tarbell wrote a scathing expose of Standard Oil, which ultimately resulted in the U.S. Supreme Court's decision to break up the monopoly.¹³⁶ Social reformer Upton Sinclair wrote his novel *The Jungle* to dramatize his investigative reporting of the nation's unsanitary meat processing plants.¹³⁷ The book, published in 1906, shocked the middle class and led to the first federal laws regulating the food and drug industries.¹³⁸

More recently, investigative journalists played a critical part in three epochal events in U.S. modern history: the civil rights struggle in the South, the Vietnam War, and the accumulated crimes known as Watergate that toppled the presidency of Richard Nixon. In each, reporters labored long and hard, often in the face of intense public disapproval, to get the real story behind the story. National interest was certainly advanced by the unremitting press coverage that became an essential element of those events. For the press, however, it was an uphill battle, evidence that public unpopularity is often the price for responsible journalism.

Apparently, though, the public has decidedly mixed feelings about the media and the way it covers the news. They applaud hard-hitting investigative reporting, but they bristle at the reporter who asks too many intrusive questions. In short, they want a vigorous watchdog press, but they do not like the noisy, barking that often accompanies it. The First Amendment requires that journalists be allowed to use somewhat offensive investigative methods, and where matters of public interest are at stake, they must be allowed a greater degree of offensiveness.

132. Roger Parloff, *How the Times Nailed a Health Care Giant*, BRILL'S CONTENT, Aug. 1998, at 100, 102.

133. *Id.*

134. *Id.*

135. MITCHELL STEPHENS, A HISTORY OF NEWS 240 (1997).

136. FRED J. COOK, THE MUCKRAKERS: CRUSADING JOURNALISTS WHO CHANGED AMERICA 65-96 (1972).

137. *Id.* at 97-121.

138. *Id.* at 120.

Myth 11: The media's First Amendment rights can be restricted without impacting on individual First Amendment rights.

Even our founding fathers knew that granting less First Amendment protection for media would mean less protection for individuals. In 1788, Thomas Jefferson wrote: "Our liberty depends on freedom of the press, and that cannot be limited without being lost."¹³⁹

The Supreme Court also has recognized the fallacy of allowing a double standard. In *Time, Inc. v. Hill*, the Court made it clear that the First Amendment guarantees are not for the press alone, but for the benefit of all.¹⁴⁰ The Court stated that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society."¹⁴¹ The First Amendment sponsors individualism, rebelliousness, and anti-authoritarianism, protecting the dissenters, the unorthodox, and the outcasts.¹⁴²

Democracy demands much, yet requires little. The price we pay for free speech and for a free press is tolerance for speech that is offensive, stupid, insulting, or just plain wrong. The Supreme Court envisioned this when it extended First Amendment protection to encourage "uninhibited, robust, and wide-open" discussions.¹⁴³ First Amendment freedoms protect individuals who want to criticize the government as much as it protects the press. Press rights and speech rights have been linked throughout history. The Court has consistently held that the press enjoys no greater rights than the public. Conversely, the public has no greater protection under the First Amendment. Those who propose restricting First Amendment rights for the press should consider the implications this would have for individual freedoms. A decision that would reign in an "arrogant" press could also make it harder for public-spirited citizens to speak out and criticize their government.

When the founding fathers wrote the Bill of Rights, they did not do it in a vacuum. Rather, they conceived the First Amendment in the midst of a wild, free-wheeling atmosphere of pamphleteering and slanderous attacks on individuals from all sides. Yet, they preferred the cacophony of voices, those frenzied assaults on personal dignity and honor, to the alternative, a deafening silence of controlled thought and speech. As we approach the new millennium, we should do the same.

139. *Machleder v. Diaz*, 801 F.2d 46, 49 (2d Cir. 1986) (quoting Letter to Thomas Currie (Jan. 28, 1786), reprinted in 9 THE PAPERS OF THOMAS JEFFERSON 215 (Julian P. Boyd ed., 1954)).

140. 385 U.S. 374, 389 (1967).

141. *Id.*

142. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 5 (1990).

143. *Sullivan*, 376 U.S. at 270.