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Clay Calvert

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CREDIBILITY AND THE PRESS: 
A RESPONSE TO PROFESSOR LOEWY

CLAY CALVERT*

INTRODUCTION

It is useful to begin this response by reiterating and unpacking my thesis. It starts from the twin premises that press credibility today in the United States is dangerously low and that only a credible press can play a meaningful watchdog role for the public in checking government abuses of power. In order to enhance credibility with the public, I contend that newspapers should do the following: (1) openly explain their news agendas and judgments to readers, rather than keeping them secret and (2) require reporters to supply a small but very important piece of information to their readers, namely their political party affiliation. My theory is that the more information the public has about how news is produced and who is producing it, the more credible the press will be perceived in the public's eyes. As a result, the press will be better able to play the role of trusted watchdog. Parsed differently, if the public understands more about what it is reading and who is writing it, then such understanding will enhance the credibility of the press.

* Associate Professor of Communications & Law, Co-Director of the Pennsylvania Center for the First Amendment, and Interim Dean of the Schreyer Honors College at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California.
I. Too Many Mistakes, Too Little Credibility

With this in mind, I turn to Professor Loewy’s thoughtful response to my Article set forth earlier in this issue of the *First Amendment Law Review*. Initially, he suggests that the system is not broken, implying that all is well in the realm of journalism. Professor Loewy writes that cases such as Jayson Blair’s fictitious stories are “rare,” which may be true in the land of First Amendment theory. However, the events of just three months of 2005 illustrate that this simply is not the case. The following real-world examples show why, as University of Tennessee Law Professor Glenn Harlan Reynolds wrote in May 2005, “the news business is in trouble” and “public trust is plummeting.”

- In June 2005, the *Sacramento Bee* admitted that it found forty-three cases in which individuals named in columns by former writer Diana Griego Erwin “could not be authenticated as real people.” As one editor for the newspaper put it, “[i]t’s now apparent based on the evidence that Diana Griego Erwin wrote fiction in many of her Metro columns.”

- In May 2005, *Newsweek* issued a “retraction of an article that stated that American interrogators tried to rattle Muslim detainees by flushing a Koran down a toilet.” The problem was

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3. Loewy, *supra* note 1, at 50.
5. Id.
that *Newsweek* had relied only “on a single anonymous source who later backed off the account.”

- Additionally, in May 2005, reporter Tom Squitieri resigned from *USA Today* “after his editors said he lifted quotations from other newspapers without attribution.” That resignation “came 16 months after disgraced *USA Today* reporter Jack Kelley quit after an inquiry revealed he embellished, plagiarized and completely fabricated stories.”

- In April 2005, the *Detroit Free Press* suspended writer Mitch Albom, author of the sappy and syrupy *Tuesdays with Morrie*, after he wrote a column that:

> [D]escribed two former Michigan State basketball players, both now in the NBA, attending an NCAA Final Four semifinal game on Saturday [April 2, 2005]. The players told Albom they planned to attend, and Albom, filing Friday before the game, wrote as if the players were there, including that they wore Michigan State green. But the players’ plans changed and they never attended.

Albom later apologized for this factual fabrication, writing that “details are the backbone of journalism, and planning to be somewhere is not the same as being there.”

- Also in April 2005, the *Los Angeles Times* “dismissed a reporter after an internal inquiry could not verify the sources of some quotations and found numerous errors in an article about

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fraternity hazing and the death of a student at a state university."  

The newspaper's editor later wrote about reporter Eric Slater's story, stating that:

[T]he paper has concluded that the article fell far short of Times standards. Beyond the specific errors, the newspaper's inquiry found that the methods used in reporting the story were substandard. The quotations from anonymous sources and from two named sources, a Mike Rodriguez and a Paul Greene, could not be verified.

As these five examples illustrate, the so-called "system" to which Professor Loewy refers is broken. The press continues to lose credibility, following a path that the Project for Excellence Journalism called "a steady downward track," and at the same time, the First Amendment that protects the press does nothing to help.

Like the Energizer bunny, the media just keeps on going and going and going, deceiving the public. Here a mea culpa, there a mea culpa, but then it is back to the same-old, same-old. The news media are protected all the while by the free press clause of the First Amendment from legal liability for what surely would be, at least in other professions such as law and medicine, the negligent supervision and retention of suspect employees. The bottom line

17. Loewy, supra note 1, at 43.
19. I have argued this point elsewhere in another article. See generally Clay Calvert & Robert D. Richards, Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 27 (2003) (arguing for and proposing "legal remedies for the readers of the New York Times to recover against the publication and Jayson Blair based on causes of action for fraud, general negligence, negligent supervision, and negligent retention"). That article
is that "[t]he media have endured a series of self-inflicted wounds and face a credibility gap."

II. THE IMPORTANCE OF PRESS CREDIBILITY

Press credibility, the concept that unifies the twin premises on which my theory is based, is of paramount importance in the real-world of journalism. As Rick Rodriguez, the executive editor of the Sacramento Bee, wrote about the Greigo Erwin incident noted above, "[w]e know that credibility with our readers is at the heart of what we do." He then added that "[n]othing means more to us than your trust and readership." This evaluation is evidence that credibility is indeed a compelling interest for journalists and the practice of journalism.

Furthermore, it is clear, as John Leo put it in a May 30, 2005 column examining the reasons why the press is failing, that "[s]omething has to change." My proposal for the Newspaper Credibility Enhancement Act offers up such a change to bolster credibility before mainstream newspapers drift into complete irrelevance despite the continued benefit of protection under the free press clause of the First Amendment.

The public's unenumerated First Amendment right to know and to receive speech helps to justify the Act. The more information the public has about journalism, the better off they will be. The press itself will be better off when readers return and circulation increases.

surely would shock (although certainly not awe) Professor Loewy as much as the one which gave rise to his response in this issue of the First Amendment Law Review.

21. See supra p. 59.
23. Id.
III. DOING SOMETHING IS BETTER THAN DOING NOTHING

I agree with Professor Loewy, and also think that the government does not have “the duty to prop up the press.” Likewise, the government does not have a duty to provide social assistance programs for the poor. However, if the founding fathers believed the press was important enough to single it out for constitutional protection, then surely it is still important enough today to take some small steps to try to resuscitate its meaningfulness.

Devoting one page once a week, or posting such information on a Web site, to explain one’s news agenda and judgment is not an arduous task, nor is identifying the political party affiliations of the reporters who write the stories. What does the press have to hide? Is making news like making sausage, a process better off not seen by those who would consume it? At least with sausage, there is no constitutional amendment with a clause preventing the abridgment of sausage production.

We do not know what the press has to hide. We do not know which stories it decides not to cover. Nor are we aware of the instances of self-censorship that go on in newsrooms to protect their own agendas. However, we do know that the press hides behind the First Amendment to shield off proposals such as the Newspaper Credibility Enhancement Act.

CONCLUSION

I fully acknowledge that the Newspaper Credibility Enhancement Act will not solve the many problems that plague today’s newspapers. However, in the spirit of narrow tailoring that my content-based remedy requires under the strict scrutiny standard of judicial review, I have drafted and proposed measures

25. Loewy, supra note 1, at 58.
27. See generally Cooper v. Dillon, 403 F.3d 1208, 1216-17 (11th Cir. 2005) (describing the strict scrutiny standard of review).
that require only minimal intrusion and interference in the editorial process. A little sunshine on the editorial process, however, might just go a long way. In contrast, the "much more laissez-faire" approach of Professor Loewy, which only addresses law professor-created hypotheticals, fails to offer any solutions to the real-world problem of press credibility. Instead, it keeps the mysteries of journalism closeted behind a wall of constitutional protection. Our democracy, evidenced by the special protection afforded by the First Amendment, has a vested interest in a trustworthy press to reliably report on the activities of government. The Newspaper Credibility Enhancement Act proposes a viable, albeit imperfect, strategy to start the process.

28. Loewy, supra note 1, at 58.