

First Amendment Theories and Press Responsibility: The Work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker

By Elizabeth Blanks Hindman

Legal theorists have been interpreting First Amendment rights and protections for years, and most scholars interested in these theoretical presentations have been pleased with liberal interpretations because these interpretations allegedly offer expansive protections for freedom of the press. The work of the four major theorists examined here, however, offers something else as well: an underlying assumption of press responsibility, which could, if adopted by the court system, result in restrictions on freedom of the press. For the press, much is given in the First Amendment, but, apparently, much is also expected.

►The first amendment to the U.S. Constitution, according to the familiar liberal tradition, protects the press from intervention by government. Because that protection is so important to our system of democracy, it has been taken to mean that the press is free to do as it wishes, for to require it do to anything—to print certain information, to refrain from acting in a certain way—would irreparably damage its freedom. The press, it has been written, “has the right to be irresponsible.”¹ This interpretation of the First Amendment traditionally has been based on the “marketplace of ideas” model, articulations of which can be found in John Milton’s *Areopagitica*, John Stuart Mill’s *On Liberty*, and in Justice Oliver Wendell Holmes’ opinion in *Abrams v. United States*, where he wrote: “[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market...”² Thus, the ideal of the First Amendment, as presented by the marketplace model, is that speech and press are protected in order to aid society in the search for truth. A necessary consequence of that protection, however, is that the press cannot be forced to assist in that search.

The notion that society will be better off if expression is protected underlies traditional, or liberal, First Amendment theory. Although

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there are many varied theories of First Amendment protection under the overall liberal umbrella, all agree that protection of speech and press are rights carried by individuals. And all see speech and press as rights to be defended against the government. Those are two fundamental concepts brought to 20th-century liberal theories of the First Amendment, and they form the base upon which the four theories examined here rest. While all four in some way critique the marketplace of ideas model, each is based in some way upon that theory; each uses it as a reference point and as a foundation. And each, theoretically, subscribes to the idea that the press is free to be irresponsible. Yet as will be shown, each of the four theories has inherent expectations of press responsibility. But surprisingly, the "affirmative" theories of Zechariah Chafee and Thomas Emerson, which might be expected to exhibit definitive requirements of responsible behavior by the press, actually call for very little. Vincent Blasi and Edwin Baker, on the other hand, who might be expected to require less responsibility of the press than Chafee and Emerson, in fact demand a great deal more. All four, however, clearly outline minimum standards of responsibility for the press, standards that conflict with the traditional marketplace interpretation of the First Amendment.

That the First Amendment as interpreted by these four scholars can and does demand some responsibility of the press has tremendous potential impact upon the functioning of the media in the United States. The American court system tends to use traditional First Amendment interpretation to guide its rulings on the press. Thus the U.S. Supreme Court, like these four legal scholars, could find that the media are not free to do completely as they choose by relying upon the underlying assumption within First Amendment interpretation that the media should and can be required to act responsibly. First Amendment protection, as interpreted by these four theorists at least, is therefore perhaps not as strong as it might seem.

This article will examine four First Amendment theories, each grounded in the liberal, rights-based tradition of Milton, Mill and Holmes, to determine how these theories view press responsibility. Even in the midst of arguments favoring a free press, these theories present a picture of how the press ought to be—what purpose it has and what its responsibilities are. The claim here is not that the liberal tradition as a whole has a single binding theory of press responsibility; rather, it is that each sub-theory exhibits its own understanding of the roles and responsibility of the press.

The four First Amendment theories investigated are not meant to represent inclusively the liberal tradition for, with the exception of the shared foundation mentioned above, there is no truly representative theory. They do, however, represent various aspects of the liberal tradition. Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker were chosen primarily because each, within his general First Amendment theory, has written specifically on the press's constitutional protection and the role of the press in society.³

The Affirmative Theories—Zechariah Chafee and the Hutchins Commission

1. T. Glasser, "Press Responsibility and First Amendment Values," in Deri Elliott, *Responsible Journalism* (Beverly Hills: Sage Publications, 1986). Here Glasser is quoting journalist Vermont Royster.

2. 250 U.S. 616 at 630 (1919).

Perhaps the first affirmative theory of the First Amendment comes from the work of the Commission on Freedom of the Press—the Hutchins Commission—and specifically from Commission member Zechariah Chafee Jr. The Commission had been asked to examine the state of press freedom in the United States shortly after World War II. Chafee, by that time already a prominent First Amendment scholar, provided a legal voice on the Commission. *Government and Mass Communications*⁴ was originally published by the Commission in 1947 and provides an early articulation of the affirmative view of the First Amendment, reflecting the views of the Commission as a whole as well as of Chafee individually.⁵

Chafee's theory relies heavily upon the marketplace of ideas and its proposition that a free and open debate on public issues is a reason for First Amendment protection. He states his position early: "I share the general position of Milton and Mill about the great value of open discussion to society."⁶ Chafee believes that the government is to intervene on a limited basis to enable the marketplace of ideas to function as best it can. As with the economic market, government regulation of the media is needed to correct problems such as monopoly, supply and pricing so that consumers of information can make good decisions about their public lives.

From the general affirmative First Amendment theory Chafee outlines a specific role that the press should play in a 20th-century democracy, as well as clear guidelines on press responsibility. Ultimately, however, Chafee's findings on the press's role amount to little more than an ideal, and his specific suggestions for enacting press responsibility outline what already existed in his time.⁷

According to Chafee's affirmative theory, the role of the press is public service. In fact, much of *Government and Mass Communications* is devoted to an explanation of why the media are not fulfilling that role, which, Chafee argues, has happened because of the ownership of the media: "The means of production are owned and controlled by private groups who are not the servants of the people, not ultimately representative of their interests, and therefore do not fit into a coherent concept

3. The works examined here were chosen because of their focus on freedom of the press as opposed to freedom of expression in general. Chafee's 1947 work, for example, was chosen over his more famous *Free Speech in the United States*, because *Government and Mass Communications* is a publication of the Commission on Freedom of the Press (the Hutchins Commission), of which Chafee was a member. One cannot do work on 20th-century understandings of press responsibility without at least a nod toward the work of the Hutchins Commission, especially when the mid-20th century's leading First Amendment scholar has written for the Commission on the connection between press responsibility and the First Amendment. And while Emerson's general theory of the First Amendment is crucial to the examination of his work, the focus here is on his concept of affirmative views of the First Amendment, though admittedly this ignores a great deal of his philosophy. Blasi's "checking value" is used rather than his newer concept, the pathological perspective in First Amendment theory, because the checking value more clearly focuses on the press. And Baker's general critique of liberalism is overshadowed here by his work on his "liberty theory."

4. Z. Chafee, *Government and Mass Communications* (1947; rpt. 1965).

5. Unlike the more traditional liberal theories, which focus on the point at which expression is protected from government interference, affirmative theories focus on how government intervention itself can help bring about the First Amendment freedoms. Under this theory there are two primary reasons why government intervention is vital: First, it is the obligation of government to represent all citizens or to ensure that all are represented. Second, the values of free expression call for promotion of diversity, and government is required to aid in that promotion. But the government is not completely free in its intervention in the system of expression. While the government has a perfect right to participate in the system (as does any individual or group), its promotion of the system is strictly defined. The government is permitted to intervene only on a macro, or system- or medium-wide level, not a micro, or content-based level.

6. Z. Chafee, *supra* note 4, at 6.

7. While the Federal Communications Commission's Fairness Doctrine did not exist as a policy until 1949, two years after Chafee wrote, it was in the process of evolving as case law before and during the period of Hutchins Commission deliberations. In addition, the FCC, since shortly after its inception, had been concerned with fairness and variety on broadcast. See T. Carter, M. Franklin and J. Wright, *The First Amendment and the Fourth Estate* 4th ed. (1988), 613-614.

of public service.”⁸ Chafee repeatedly returns to the theme of public service, which is clearly the primary role of the press under his theory.

But “public service” could mean almost anything; in fact, any of the four theories covered here could use it as a definition of the function of the press, but each would mean something different by it. Chafee goes on to define it further, this time in language reminiscent of the marketplace of ideas. Newspapers and other news media, he suggests, can aid the public by “serv[ing] as better instrumentalities for the attainment and spread of truth on matters important in the kind of society we desire.”⁹ Chafee acknowledges that the press may not find truth, but that is not the issue. Rather, the role of the press is to expand society’s options for discussion. And the press need not expound on all topics—only those issues that will help create a society that “we” think is best are relevant. Unfortunately, Chafee explains neither who “we” are nor what the criteria are for that society.

One criterion for that society might be an acceptance of diversity, for the provision of diverse views is another role Chafee would have the press fulfill. In fact, much of his theory from his recommendations for a right of reply in the print media to his advocacy of fairness within broadcasting rests on the notion of diversity. He favors government intervention in broadcasting on the macro-level to create an overall diversity of issues and viewpoints, but micro-level intervention on the individual program level is unacceptable. People receive *enough* information from all the media, he argues. His quarrel is with the variety and quality of the information received. The press, therefore, does not need to increase the amount of information it passes to the rest of society. Instead, the press must now represent more fairly many additional viewpoints.

Chafee also has a clear view on the specific responsibilities of the press, which was accepted by the entire Commission on Freedom of the Press:

Today our society needs, first, a truthful, comprehensive, and intelligent account of the day’s events in a context which gives them meaning; second, a forum for the exchange of comment and criticism; third, a means of projecting the opinions and attitudes of the groups in the society to one another; fourth, a method of presenting and clarifying the goals and values of the society; and, fifth, a way of reaching every member of the society by the currents of information, thought, and feeling which the press supplies.¹⁰

The Hutchins Commission expands on these recommendations in the other works, so they will not be addressed here, except to the extent that they form the foundation for Chafee’s understanding of press responsibility. They are not a First Amendment theory, so Chafee devotes his work to supplying that perspective.

Despite his adherence to an affirmative theory of the First Amendment, Chafee sees a very limited role for government to play in the press system, except, of course, for broadcast regulation. He does suggest that if the print media do not uphold their responsibility to provide diversity, government could intervene to achieve, or at least aid in

8. Z. Chafee, *supra* note 4, at 16.

9. *Id.* at 172.

10. *Id.* at 584. See also Commission on Freedom of the Press, *A Free and Responsible Press* (1947).

achieving, that goal.¹¹ This does not mean that government could take over the mass media system; rather, the government could use one of three options Chafee outlines to decrease the concentration of power in the media industry, thus (theoretically) increasing diversity. First, the government could break up the media system into smaller, but still fairly large, units, thus increasing the number of owners. Second, the government could view the press as a common carrier of information and impose common carrier responsibilities, such as selling time at a fair price to anyone who can afford to pay. Third, the government could aid in creating rival media in situations where existing media operate as a monopoly.¹²

Chafee, however, finds problems in these options. He does not elaborate on the third option but argues that the first would give too much power to the government, for we would have to trust the government to choose which media groups are irresponsible and thus in need of splitting. This would leave the media open to the danger of discrimination. At first glance, the second proposal seems much more sensible, given the role of the press under Chafee's affirmative theory. Again, the government's role would have to be limited to avoid the dangers mentioned above. But even this limited involvement, at least with the print media, is too much for Chafee. The ideal behind making the press into some type of common carrier is to increase diversity within the press—a lofty goal, Chafee admits. But that implies government involvement in content choices, and “what started as a high moral ideal becomes an ugly rule of law.”¹³ While it may be acceptable for government to require media to sell their product to anyone willing to pay a reasonable price, as the Supreme Court ruled in *Associated Press v. United States*,¹⁴ any narrower intervention is undesirable, for three reasons. First, Chafee asks, which specific media organizations would fall under common carrier status and thus be required to provide diversity? The *New York Times* would be a logical candidate, he admits, but what about specialty publications or those with an admitted bias, such as the *New Republic*? Should they, too, be forced to print a variety of viewpoints? Second, if government were to require such responsibility on the part of the media, it would have to define responsible behavior specifically, for it would be unfair to punish media for violating vague rules. And yet, such specific rules would be unworkable. Third, government intervention in content would require subjective standards on the part of the government, for example, in the areas of editorial selection, interpretation of events and so on. This would lead, Chafee maintains, to “editorial suppression,” precisely what the government does not want.¹⁵

So, though government intervention at a broad level is acceptable and, in the case of broadcasting, even desirable, content-based intervention, even with the goal of increasing diversity, will only hurt the press and consequently the marketplace of ideas. Where does this leave press responsibility, then? Chafee sees press responsibility as absolutely cru-

11. While Chafee believes, for example, that forcing newspapers to retract statements is unconstitutional (“it may very well be a serious invasion of liberty of the press to compel a newspaper to publish as true what the editor believes to be false.” Z. Chafee, *supra* note 4, at 177), he argues that requiring a right of reply, in which the person claiming to be wronged by the press is given space to reply to that wrong, is well within constitutional bounds.

12. Z. Chafee, *supra* note 4, at 618.

13. *Id.* at 628.

14. 320 U.S. 1 (1945).

15. Z. Chafee, *supra* note 4, at 633.

cial, but he cannot advocate legally enforced responsibility. As a result, Chafee's goal is still for the press to be a public servant, but the media themselves will have to take charge of implementing that goal. Public service, Chafee writes, "represents a moral and professional obligation of the press, not a legal obligation. The law can take us only a little way toward the ideal of fairness to all."¹⁶ The law and courts cannot enforce responsible behavior, except in very specific instances such as in cases of libel, invasion of privacy and so on. Perhaps Chafee sums up his entire theory at the end of his discussion of press responsibility:

I question whether law can impose more than a low minimum of fairness and decency upon the instrumentalities and frame reasonable regulations for the orderly flow of their output through the channels of communication to citizens. Compulsion cannot stop any tendency toward meaninglessness and vulgarity, and it will do more harm than good as a remedy for the uncertainty that truth will prevail over error. The only direct cure for these evils lies in the internal ideals of the enterprises. Organized outsiders can improve these ideals by persuasion and approval, but not by force or extensive financial support.¹⁷

The Affirmative Theories—Thomas Emerson

Thomas Emerson, like Chafee, outlines in his theory an affirmative conception of the First Amendment based on the assumption that the marketplace of ideas has somehow not served us well enough.¹⁸ To Emerson, economic forces, which limit access to forums of expression for many, have severely infringed on the core values of the First Amendment. The marketplace of ideas, Emerson maintains, cannot function effectively in a system where the opportunities for widespread expression (the media) are available only to a few. The system of freedom of expression needs improvement, and his affirmative theory, based on the assumption that the First Amendment protects individual self-fulfillment through expression, is dedicated to that goal.

Like Chafee, Emerson maintains that government intervention in broadcasting is acceptable while similar intervention in the printed press is not. But unlike Chafee, who expects responsible, professional behavior even from the non-regulated print media, Emerson would give the print media more protection under the First Amendment than it now enjoys. In fact, Emerson's theory requires less responsibility on the part of the press than did the Supreme Court in 1970 (when Emerson first outlined his theory), and than does the Supreme Court today, at least in the areas of libel and privacy. This seems to contradict Emerson's affirmative view of the First Amendment, but apparently he has no difficulty reconciling his expectations of press responsibility with his views on these areas of the law.

When Emerson first articulated his affirmative theory, *Curtis Publishing Co. v. Butts*¹⁹ was the ruling libel case with regard to what

16. *Id.* at 643.

17. *Id.* at 717.

18. See Emerson, "The Affirmative Side of the First Amendment," 15 *Ca. L. Rev.* 795 (1981); T. Emerson, *The System of Freedom of Expression* (1970); and T. Emerson, *Toward a General Theory of the First Amendment* (1963). Emerson's theory of the First Amendment is more broadly based than Chafee's, for he finds four primary values within the amendment, values that provide the basis for protecting freedom of expression. First, Emerson maintains, freedom of expression aids in individual self-fulfillment or autonomy. Second, it helps in advancing both individual and collective knowledge. Third, it is crucial in providing opportunities for all citizens to make informed decisions, and fourth, it helps achieve a stable society.

types of plaintiff must prove actual malice to win a libel suit against the media.²⁰ Emerson questions the wisdom of the public figure rule, suggesting that, as would become law for a brief time beginning with *Rosenbloom v. Metromedia*,²¹ a public issues test would be a more logical way to apply the actual malice standard. But not only would Emerson protect the press with a public issues test, he would go even further to protect all statements of the press. His “full protection” theory of freedom of expression, he argues, automatically makes libel nonexistent as an actionable tort. Emerson does agree that if laws against libel must exist, the actual malice rule is a good test, at least “in preference to one affording less protection to the system.” But, he continues, “the actual malice rule is inadequate...to protect the system of freedom of expression.”²² The Supreme Court’s actual malice rule, while it requires little in the way of press responsibility, does require some. Press organizations that print statements with reckless disregard for the truth or, worse, knowing those statements are false, can be punished. Emerson, on the other hand, would do away with all libel law, and consequently with even minimum expectations of responsible behavior by the press.

In the area of privacy, Emerson would extend press protection even further. While he acknowledges that the privacy right “establishes an area excluded from the collective life...[and] based on the premises of individualism,”²³ he would protect the media’s right to publish material violating individual privacy in almost every instance. Despite the fact that much privacy law recognizes, at least implicitly, Emerson’s first value of self-fulfillment or autonomy, he argues that the First Amendment cannot distinguish between information that is of “great or small social value or is important or unimportant to the exposition of ideas.”²⁴ In other words, the division of newsworthy—and thus protected—statements from non-newsworthy statements within the area of privacy bothers Emerson. Courts and the press should not have to distinguish protected and non-protected publications along this vague and ever-changing line. The line between acceptable and unacceptable invasion of privacy, he suggests, cannot be drawn until the private information protected “touch[es] the inner core of intimacy.”²⁵ Emerson would protect only private information concerning such personal, intimate activities as childbirth and sexual relations from the press. Here, too, the responsibility expected of the press is minimal, if not nonexistent. And here, too, Emerson expects less of the press than do current laws, at least in most states.

That Emerson places no burden of responsibility upon the print media seems surprising, given his stance on affirmative interpretations of the First Amendment. He, however, sees it as logical, for the near-absolute protection he gives the press simply mirrors the near-absolute protection he gives to the system of freedom of expression in general. If one were to look only this far into his theory of press protection, Emerson would appear to hold libertarian views. But he does demand

19. 388 U.S. 130 (1967).

20. In *Curtis* and its companion case, *Associated Press v. Walker*, the Supreme Court extended the actual malice rule to include public figures as well as public officials.

21. 403 U.S. 29 (1971).

22. T. Emerson, *System*, *supra* note 18, at 533.

23. *Id.* at 545.

24. *Id.* at 556.

25. *Id.* at 557.

affirmative action on the part of the government. The law and legal institutions, he maintains, should be used to correct the unfairness of the system of freedom of expression, for that system does not allow a full hearing of non-mainstream points of view: "Search for the truth is handicapped because much of the argument is never heard or heard only weakly...the problems in this area do not involve want of power, or concern over the limitations imposed by the First Amendment, but issues of performance."²⁶ It appears here that Emerson does have expectations of the media, for he maintains that the media's performance itself somehow injures the marketplace of ideas. He reconciles this stance with his full protection theory of expression by separating print and broadcast media.²⁷ Print media are given the fullest protection under his theory while broadcast media must endure regulation to achieve the goals of the affirmative interpretation of the First Amendment. Those goals, Emerson suggests, are first, to create diversity in expression contained in the media, and second, to allow more groups and individuals access to the media. To achieve these goals, three areas of broadcast regulation are permitted: regulation of ownership and control of broadcast facilities, regulation to achieve "variety and relevance," and regulation to control access to broadcasting facilities.²⁸

Emerson grounds his differential treatment of print and broadcast media in the familiar argument about the relative scarcity of broadcast facilities in relation to print outlets. Emerson points out that the scarcity involved here is physical, not economic. The government cannot intervene to correct economic scarcity, but the government is required to distribute physical resources fairly. Emerson here holds essentially the position the Supreme Court outlined in *Red Lion Broadcasting v. FCC*,²⁹ in which the Court ruled that the First Amendment right in broadcasting belongs not to the licensee but to the public; thus the licensee can be required to be fair and to allow access to his or her facilities. Broadcasters, then, can be "forced" to be responsible, or at least responsible behavior is expected of them. And responsibility is defined by Emerson as upholding what he perceives to be four values inherent in the First Amendment—self-fulfillment, advancement of knowledge, creation of an informed citizenry and establishment of a stable society. Emerson promotes a double standard when it comes to expectations of press responsibility, for the print media can use the four values to rationalize irresponsible behavior, while broadcast media are expected to uphold them. Nevertheless, he sees this apparent contradiction as acceptable, even necessary, for despite his affirmative stance, he writes, "forcing newspapers to cover all 'newsworthy' events and print all viewpoints . . . is likely to undermine such independence as the press now shows without achieving any real diversity."³⁰

The Checking Value—Vincent Blasi

The checking value as outlined by Vincent Blasi is perhaps the most "typical" of the First Amendment theories discussed here, if there can

26. *Id.* at 628, 632.

27. *Id.* at 653.

28. *Id.* at 655-656.

29. 395 U.S. 367 (1969).

30. T. Emerson, *System*, *supra* note 18, at 671.

be such a thing.³¹ While it is not a fully developed theory, it is grounded in one of the First Amendment's key goals: the right of citizens to criticize their government publicly. It is similar to the third of Emerson's First Amendment values, the need for individuals to gain as much knowledge as possible in order to make informed decisions about public matters; thus it, like parts of the affirmative theories above, is a descendant of the marketplace model of the press. Blasi has updated this concept, however, by using Justice William Brennan's statement in *New York Times v. Sullivan* that "the national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...."³² The checking value, therefore, protects the press when it attempts to expose abuse of power in public officials.³³

As in the other theories discussed so far, government has a specific role within the checking value. Here that role is, not surprisingly, quite different than in Emerson's or Chafee's affirmative theories. Because the checking value is based on a press animosity toward government, it views government intervention into the system of expression as extremely dangerous—at least in most circumstances. Even though Blasi believes that the marketplace metaphor likely will not lead to truth, he uses it as a rationale for the checking value, for he maintains that government intervention in that marketplace is "likely to exacerbate rather than ameliorate the preexisting distortions, thereby adding still another hindrance to the quest for truth."³⁴ Even though truth is not likely to be found, the search becomes far more difficult with government interference. Still, Blasi acknowledges the criticisms of the system leveled by the affirmative theorists and agrees that some limited access regulation might be positive. Because individuals, as well as the press, have the right to criticize and to hear criticism, opportunities for access might further that goal.

Of the four theories examined here, Blasi's checking value offers the clearest, narrowest definition of the role of the press. The media, Blasi writes, are to be "critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public."³⁵ While the role of the press under the checking value is clear, the responsibility of the press is less so, for Blasi seems to require different levels of press responsibility in different situations. He specifically develops the press's role and responsibility within the realms of defamation, newsgathering and public access to the press.

First, as mentioned earlier, Justice Brennan's opinion in *New York Times v. Sullivan* provides the best Supreme Court articulation of the

31. Blasi, "The Checking Value in First Amendment Theory," 3 *A.B.A. Found. Research J.* 521 (1977). See also Blasi, "The Pathological Perspective and the First Amendment," 85 *Colum. L. Rev.* 449 (1985).

32. *New York Times v. Sullivan*, 376 U.S. 254 at 270 (1964).

33. The checking value did not magically appear with the *New York Times* decision. Blasi maintains that, even though the Supreme Court has rarely consciously viewed it as a fundamental part of the First Amendment, the checking value has a significant legal and political history. It was likely the "single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment." (Blasi, "Checking Value," *supra* note 31, at 527.) Opposition to the Sedition Act of 1798 was couched in checking value terms by people like James Madison, author of the Virginia Resolution condemning the Sedition Act, and by early First Amendment theorists Tunis Wortman and St. George Tucker. Blasi, "Checking Value," *supra* note 31, at 537. See also T. Wortman, *A Treatise Concerning Political Inquiry and the Liberty of the Press* (1800, rpt. 1970); and L. Levy, *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* (1966). It has its roots, Blasi explains, in the work of John Locke and Cato, both of whom feared the abuse of power by government officials, and in the writings of early colonial pamphleteers. Blasi, "Checking Value," *supra* note 31, at 530, 533.

34. Blasi, "Checking Value," *supra* note 31, at 550.

checking value. Not surprisingly, Blasi enthusiastically supports the Court in *New York Times*. The press should be protected from most suits based on criticism of public officials, he contends, for that is the primary role of the press in our society. Still, even within this near-absolute protection for the press, Blasi exhibits certain expectations of press behavior. For example, he writes that the checking value does not require an absolute protection of the press. The actual malice standard is desirable, for the public needs to know that the press has some accountability. If the press is accountable to no one, Blasi suggests, it will have little or no credibility, and thus will fail in its checking function. Some responsibility, therefore, is required of the press, even within the heart of the checking value. In addition, a much greater level of responsibility is required of expression beyond the checking value. For example, defamation about the private life of public officials would not be protected, unless it were directly related to an abuse of public power.

Second, Blasi would protect the press in newsgathering situations, at least when journalists are called upon to testify about confidential sources. Here the journalist's responsibility is to the checking value itself or, perhaps more importantly, to her or his sources. In fact, the checking value would protect absolutely the privilege of journalists who refuse to divulge names of their government sources of information. Blasi justifies this on the grounds that often the only way to obtain inside information about government officials is to promise confidentiality to other government employees. To undermine that promise not only would be irresponsible, it would harm the future of the checking function itself. The checking value protects journalist's privilege for two other reasons as well. First, Blasi suggests, the independence of the press would be damaged if journalists were required by the government to testify about confidential sources and information, and independence from the government is key to the checking function. Second, protected privilege might enable the press to report more accurately on marginal groups, thus benefitting all of society.³⁶

Finally, Blasi discusses public access to the press in relation to the checking value. And as long as public access does not interfere with the checking function of the press, Blasi favors at least a limited access by the public to the press (he makes no distinction between print and broadcasting as do the other theorists). He bases this argument on the question of press responsibility—if the press is not adequately representing various viewpoints, then those viewpoints have a right to represent themselves, at least in a limited sense. If the checking function would be served by “outsiders who do not share the biases of professional journalists about what is ‘out of bounds,’” then those outsiders need a chance to speak.³⁷ In addition, Blasi also favors access if it enables individuals to participate more fully in debate on public issues. Yet he would in some instances leave decisions on access to the press: “[W]hether granting access to outsiders will serve the partisan campaign, and if so precisely what format of access will best do so, are tactical questions that are better left to be decided by the news organization itself on a discretionary basis than by means of a legislative or judicial

35. *Id.* at 541.

36. *Id.* at 604.

37. *Id.* at 623.

generalization."³⁸

Blasi, however, seems not to have made up his mind. Several pages later he writes, "the print media should not enjoy total immunity from access regulation"³⁹ and argues that in one-newspaper towns monopoly of the media is more dangerous even than government intervention to regulate public access. In addition, Blasi supports certain types of access to all media, not just monopolies. Narrowly defined right of reply statutes are acceptable, for they do not injure the editorial judgment of the press. And Blasi goes further: requiring media to sell editorial advertising is "constitutionally compelled" because this type of access is "an effective medium for the ventilation of unconventional viewpoints."⁴⁰ If the press does not serve the various viewpoints within public discussion, if it shirks this responsibility, Blasi believes, the press can and should be legally forced to provide access.

He also makes some general statements about press responsibility throughout his work. Like Chafee, Blasi hopes that the press itself creates a sense of responsibility, that it "develops an internal ethos that emphasizes such qualities as independence, vigor, innovativeness, and public responsibility"⁴¹ based on the independence of the press from government. Journalistic autonomy is a fundamental part of Blasi's notions of press responsibility, for by recognizing the media's independence, society will encourage the media to think of themselves as a crucial part of society, which will provide another set of checks and balances on government. This in turn will lead, Blasi believes, to a lessening of the profit motive in the media, coupled with an increase in the media's understanding of their responsibility to society.

While press independence is important, and would be harmed by government intervention, that independence is limited. For example, to allow the press to violate common standards of ethical behavior in the name of journalistic autonomy would set the press apart from the rest of society, which would, in turn, harm the checking function, Blasi believes. Therefore, the checking value interpretation of the First Amendment would allow sanctions on the press for unethical behavior in newsgathering, even if those sanctions would themselves make upholding the checking function more difficult.

Finally, the press's autonomy is limited by the concept of responsibility itself, for whether or not the press is upholding its checking function through investigative reporting, ethical newsgathering and adequate presentation of information to the public is of "constitutional concern." The system of mass communication and the functions that it serves, Blasi writes, are a limited and valuable resource that is much too important to be left simply to the decisions of the media alone. The press must be responsible in what it does, for if it is not, our society and governmental system will not survive and flourish.

The Liberty Theory—Edwin Baker

Edwin Baker's liberty theory is primarily a theory of speech protection focusing on the value of autonomy or self-fulfillment. In outlining his theory, Baker criticizes the suppositions of the more traditional lib-

38. *Id.* at 624.

39. *Id.* at 631.

40. *Id.* at 629.

41. *Id.* at 587.

eral theories, including the marketplace concept, whose fundamental flaw, he argues, has been a separation of ends and means. This separation, which Baker terms the "independence thesis," has caused many liberal theorists to ignore a fundamental role that speech plays in human life because they count as worthwhile only the results of free expression, not the process of expression itself.⁴²

Many legal philosophers use the independence thesis to determine the scope of protection of speech and press under the First Amendment, producing theories that value instrumental, goal-oriented speech over symbolic, process-oriented speech. Baker, however, proposes a theory—the liberty theory—that would value the latter. Based on the idea of individual autonomy, the liberty theory would protect "all expressive conduct, whether or not intended to communicate propositions or attitudes to others, that involves self-expression or attempts at creation, unless the conduct operates coercively, physically obstructs others' activities, or otherwise interferes with others' legitimate decisionmaking authority."⁴³ Baker's theory protects the speaker in the act of speaking, rather than the speech and its content. In this it differs significantly from, for example, Blasi's checking value, which protects expression precisely because of its content.

Though Baker's liberty theory, which is derived from the first amendment's speech clause, applies to individuals who work for and who own the mass media, it does not apply to the press as an institution.⁴⁴ Nevertheless, Baker outlines a theory of press protection based upon the First Amendment's press clause. As mentioned, under the speech clause individual speakers within the media have, theoretically at least, the same speech rights as anyone else. But the press as an institution has only what Baker calls defensive rights, which are protections against government regulation, "polic[ing] the boundary between government and the press in the way that principles of federalism or separation of powers provide some autonomy for various decisionmaking centers, and in the way that individual rights protect individual autonomy from certain forms of government intrusion."⁴⁵ Defensive rights, which include protection from search and seizure of material, testimonial privileges and protection from regulation, are distinguished from offensive rights, which include special access to information and other positive rights. The press clause protects defensive rights, Baker

42. See E. Baker, *Human Liberty and Freedom of Speech* (1989); Baker, "Process of Change and the Liberty Theory of the First Amendment," 55 S. Cal. L. Rev. 293 (1962); Baker, "Press Rights and Government Power to Structure the Press," 34 U. Miami L. Rev. 820 (1980); and Baker, "Scope of the First Amendment Freedom of Speech," 25 UCLA L. Rev. 964 (1978). Historically, Baker suggests, conduct and expression have been divided into two categories: symbolic or communicative conduct, stressing the process of communication, and instrumental or purposive-action conduct, stressing results of communication. The second category, which predominates in our current way of thinking, views communication as a means to a particular end—for example, a better society or a well-informed populace. Symbolic communication, on the other hand, is communication for its own sake—the telling of a story or painting of a picture. Most theories of protection of speech focus on the instrumental category, Baker notes, even though both types of communication are needed for meaningful human existence. Theories protecting instrumental communication, Alexander Meiklejohn's self-government thesis, for example, tend to view First Amendment rights primarily as protecting "effective" speech, speech that accomplishes, or at least has, a goal.

43. Baker, "Process of Change," *supra* note 42, at 333.

44. The liberty theory protects speech because of speech's self-fulfillment value. But speech made for reasons of profit—such as commercial speech—Baker argues, cannot be protected under the liberty theory, for the profit motive supersedes other speech motives. In other words, the profit factor inherent in commercial speech does not allow those involved in the production of the speech the freedom to say what they wish. Thus this type of speech denies the personal values and choices of those speaking and does not respect the liberty of the individual. Yet, Baker acknowledges, the press, too, operates for profit, so absent another argument the profit-oriented press cannot be protected under the liberty theory. Fortunately, the media, unlike non-media commercial speakers, are saved by the press clause, which grants special protection for this specific type of speech.

45. Baker, "Press Rights," *supra* note 42, at 840-841.

maintains, but not offensive rights or special speech rights, which include the right to disseminate information, specifically protection from gag orders, prior restraint and defamation proceedings. The press has only defensive rights because of its institutional nature. Offensive and speech rights would allow the institutional press to be irresponsible, to violate individual liberty, which because of the liberty theory it cannot do.

An examination of Baker's notions about the press and the liberty theory shows a clear picture of the press's role and responsibilities. Baker emphasizes two roles or functions that the press under his theory plays in society: first, the press offers a check on the abuse of power by the government, and second, the press provides a nongovernmental source of information and entertainment.⁴⁶ Baker sees the role of the press as primarily instrumental; that is, the press is protected not for its own sake, as in the case of speech, but because it provides a good to society through the serving of its two functions.

Because of its instrumental and institutional nature, the press does not fall under the protection of the liberty theory, and in fact, Baker suggests, the press has no real right to First Amendment protection. Instead, he sees the protection offered the press as a privilege, not a right, although certain defensive rights derive from the privilege of constitutional protection. The press only has protection because of the public interest involved, not because of some inherent status that it might claim. For example, several times Baker refers to the privileges offered the press, which he sometimes calls "special rights": "Any justification of special rights will presumably emphasize the importance of enabling the press to serve [its] functions...The privilege proposed for the press is premised on the need to promote an investigative role that provides information to the public."⁴⁷ Clearly, these are not rights possessed by the press with which it is free to do as it chooses. Instead, these privileges are based upon an implied standard of press performance—the press has privileges only because of its role in society.

Here Baker is making a significant statement concerning press responsibility, although he does not make his argument in those terms. His theory of press protection can be contrasted with more traditional liberal theories, which maintain that because of the constitutional protection given the press, no real demands can be made upon its performance. Under these understandings of press protection, the wording of the First Amendment prohibits any interference with the press, including, of course, expectations of accountability or responsibility. This view of the First Amendment is best summed up in the often-paraphrased words of Justice Hugo Black, in several Supreme Court decisions: "No law means no law."

Though Baker's theory implies that press protection is tied to press responsibility, he never addresses the question that logically follows: if these privileges are based on certain expectations of the press, what happens if the press does not meet these expectations? If the press did not, for example, provide the check on abuse of power from government officials or worse, if it should become a mouthpiece of the government, would the privileges of protection disappear? Or if the press did

46. Baker, "Press Rights," *supra* note 42, at 829, 864; *Human Liberty and Freedom of Speech*, *supra* note 42, at 229.

47. Baker, "Press Rights," *supra* note 42, at 829, 852.

not sufficiently provide information and entertainment, would that cause a denial of protection? Theoretically, following Baker's reasoning, yes—if the press did not uphold its functions as outlined, its protection would be denied. Clearly, protection of the press rests on the responsibility it shows in performing its functions.

Yet, obviously this conclusion raises some difficulties. Where would the line be drawn between responsible and irresponsible behavior? Would individual media organizations exhibiting irresponsible behavior lose their privileges, or would the entire American media system have to fail in its duties for privileges to be denied? If the press were not adequately checking abuse of power, how would we even know? More importantly, who would decide when the line of irresponsibility had been crossed? Obviously these are difficult, perhaps unanswerable questions. Certainly even to attempt to answer them would require a much more detailed development of Baker's theory.

Other aspects of Baker's press theory also imply certain expectations of press responsibility. His distinction between defensive rights, offensive rights and special speech rights indicates certain boundaries that the press may not cross, or at least that it may not cross with constitutional protection. In Baker's theory only defensive rights are given to the press under the First Amendment, for only these rights are essential for the press to fulfill its function. Offensive rights, on the other hand, while they also might be useful to the press in satisfying its role, are not granted because they could be used to violate the liberty of individuals. Defensive rights protect the press, while offensive rights would give opportunities to the press. And the press does not have special speech rights because such rights imply a right to disseminate information. This right is denied to individuals under Baker's theory, and he argues that therefore the press should not claim it, either: "[T]here are no grounds to allow the press to say things that individuals are forbidden to say."⁴⁸ The press (and public), then, has no right to protection from libel litigation or prior restraints.

Admittedly Baker is suggesting only that the press should have no special privileges in communicating information that do not belong to the public at large. But implicit here in both offensive rights and special speech rights is the concept that the press, like private individuals, should not harm the liberty of others, at least in a limited sense. The press has certain rights, true, but its rights do not go beyond those of the public, and members of the public are certainly held accountable by law for their actions. Thus, by implication, the press, too, must be held accountable for its actions, particularly when those actions result in injury to the autonomy of an individual. Here again Baker's press theory yields an expectation of press responsibility.

In addition, the liberty theory itself provides some insight into the press's role and responsibility. Of course, the press does not fall under the liberty theory, but theoretically it may be held accountable to it, at least in some circumstances, such as the above example of defamation. Under the liberty theory a fundamental value of the First Amendment is protection of the autonomy of individuals. Individual speech is protected until it becomes coercive or physically intrudes upon the autonomy of

another. In Baker's words, "the integrity and autonomy of the individual moral agent must be respected."⁴⁹ And, he continues, speech (which could, of course, be the speech of individual members of the press) that disregards the "integrity of another's mental processes is not protected."⁵⁰

Thus, there are three types of speech that are not protected under the First Amendment: "1) speech involved in an actual or attempted taking or physical injury to another's person or property; 2) speech designed to disrespect and distort the integrity of another's mental processes; 3) speech not chosen by the speaker and which, therefore, cannot be attributed to the speaker's manifestation of her substantive value."⁵¹ Most likely, the press would not be involved in speech of the first type. But it certainly has been involved in the second type, which appears quite similar to speech covered in the "intentional infliction of emotional distress" tort that has recently become more prevalent within media law. Clearly, here is another example of expected responsible behavior: the press (and individuals) cannot inflict emotional distress on individuals, or in any way mentally injure another person. The third type provides some protection for the press as speaker, for here and elsewhere Baker notes that a right of access to the press, as outlined in the affirmative theories, is not protected under the liberty theory, for to allow an outside individual access to the press would violate the right to speak of those within the organization.⁵²

Even the independence thesis can be read as containing an understanding of press responsibility. One failure of the liberal tradition in Western thought, Baker argues, is its separation of ends and means. Under a view of ends as more important than means, the results of communication are emphasized, while the process of communication is virtually ignored. This can be applied directly to press activity, with a resulting understanding of acceptable press behavior. In gathering and presenting material, the press must constantly be aware of the means used, for, as Baker points out, under the liberty theory bad means cannot yield good ends. Thus, if the press engages in deception, even to gain access to material that would genuinely help the public, the result is unacceptable under the liberty theory—good ends can only be attained through good, ethical means. Given the choice, then, between fulfilling its constitutional role and behaving unethically, the press must forgo its role. Here responsibility is not to the function the press plays in society; instead, responsibility is to the unity of means and ends.

Conclusion

All four of the theories presented here find their roots in the larger liberal tradition. Each is based on the concept of individual rights, in this case, the right of free speech and free press. And each sees the limitation of government in general, and the separation of government from the media specifically, as a fundamental part of freedom of the press. Even though all of the theories recommend, or at least allow, some intervention in the media system, most would limit that intervention to a broad-based, content-neutral regulation of the broadcast media,

49. Baker, "Scope," *supra* note 42, at 1001.

50. *Id.*

51. *Id.* at 1002.

52. Baker, "Press Rights," *supra* note 42, at 859-861.

based on the argument of scarcity of the airwaves.

Beyond those underlying similarities, however, the four theories present different understandings of the role the press plays in our society, as well as expectations of press behavior. At first glance, it might have been assumed that the two affirmative theorists—Chafee and Emerson—would articulate the most developed concepts of press responsibility, for affirmative theories in general are based in part on the press's lack of responsibility in providing diversity. Yet Emerson and Chafee provided conceptions of press responsibility that differ little from current legal understandings of the issue, while the non-affirmative theorists—Blasi and Baker—presented more fully developed formulations of the responsibility of the press.

For Chafee and the Hutchins Commission, responsible behavior by the press is crucial. Yet Chafee maintains that responsible behavior cannot be legislated; thus press responsibility must come from the professional ideals and goals that the press ought to hold. Print media, while they should uphold the values of responsibility, could not be forced to behave ethically, while broadcast could. Chafee, in essence, has outlined the status quo.

While Emerson's general theory departs somewhat from the traditional marketplace concept, he, too, requires little in the way of press responsibility. The print media, in fact, fall under the protection of the four values of the First Amendment, thus they can be required to behave responsibly only in rare situations. In the areas of libel and privacy, Emerson expects less of the press than does current law in those areas, for he would absolutely protect libelous statements and nearly all invasions of privacy. Broadcasting, on the other hand, must uphold his four values and, therefore, can be required legally to behave responsibly.

Blasi's checking value, though not a full-fledged First Amendment theory, expects somewhat more of the press than do the two affirmative theories. In libel, Blasi agrees with the actual malice standard, thus requiring a minimum of responsible behavior. When a journalist is called upon to reveal confidential sources, under the checking value her or his responsibility is to the source or the checking value itself. Blasi goes further, outlining briefly some aspects of a theory of press responsibility. Access requirements are acceptable for print as well as broadcast; in fact, access rights are given precisely because the press has not responsibly represented all of society. And Blasi would allow sanctions against the press for unethical behavior.

For Baker, protection of the press is given as a privilege based on responsible behavior. The press has only derivative rights defending it against government regulation; it does not have special affirmative privileges. The press, like all speakers, cannot harm individuals either physically or mentally—again, this provides an example of certain expectations of responsibility. And under the independence thesis, the goals of the press must be met through ethical means.

Each theorist, then, has a definite conception of what press responsibility means, though they do not usually outline their expectations so clearly. Surprisingly, the affirmative theories, which on the surface appear to offer a new way of looking at the First Amendment, extend the most traditional (in the sense of what actually exists) views on press

responsibility, while Blasi and Baker propose more radical views. Yet none of the theorists presents a truly radical doctrine, proposing, for example, a statutory code of ethics that journalists must follow, or an absolute right of access by the public to all aspects of the printed media, or a requirement that the press do what it can to equalize power relationships in society, or to create a more just society. The suggestions and conceptions each offers, while differing somewhat in their scope and propositions, fall well within the bounds of traditional liberal theory.

Finally, what does all of this mean? As explained above, the traditional liberal view of the First Amendment suggests that the press cannot be required to do anything, certainly not behave responsibly. Yet these theorists, who provide four different perspectives from within that tradition, do have expectations of press responsibility. A clear conclusion, therefore, can be made: within the scope of traditional liberal First Amendment theory, commonly seen as providing freedom for the press to do as it wishes, there are certain expectations of press responsibility. These expectations, when drawn out of the various theories of the First Amendment put forth by legal scholars, show clearly that even with the protection of the First Amendment (and perhaps because of it), the press in the United States is not as free in its actions as might appear. There are constraints placed upon the press by traditional interpretations of the press clause, constraints that require a certain level of responsible behavior by the press.

To take this conclusion one more step, it seems likely, then, that the U.S. Supreme Court and lower state and federal courts, when they use traditional liberal theory to interpret the First Amendment, must also exhibit underlying expectations of press responsibility. While definite claims cannot be made here about the Supreme Court's understanding of press responsibility, there are many examples of the Supreme Court requiring responsible behavior of the press, examples similar to those found in the four theories examined above. Libel law as articulated by the U.S. Supreme Court and privacy law as outlined by many of the states both demand a minimum level of responsibility on the part of the press. And recently, in *Cohen v. Cowles Media Company*,⁵³ the Supreme Court made an explicit statement about press responsibility when it ruled that the First Amendment does not offer protection to newspapers that break a promise of confidentiality to a source. Clearly, then, as these four First Amendment theories show, despite the protections of the First Amendment press clause, the press in the United States can be, and on occasion is, required to exhibit responsible behavior.

53. 18 Med. L. Rptr. 2273 (1991).