



4-1-2013

# Soft-Power Triangulation for the Reclamation of a Prodigal Free Press

Maren Mildenhall

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

---

### BYU ScholarsArchive Citation

Mildenhall, Maren (2013) "Soft-Power Triangulation for the Reclamation of a Prodigal Free Press," *Brigham Young University Prelaw Review*: Vol. 27 , Article 9.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol27/iss1/9>

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact [scholarsarchive@byu.edu](mailto:scholarsarchive@byu.edu), [ellen\\_amatangelo@byu.edu](mailto:ellen_amatangelo@byu.edu).

## SOFT-POWER TRIANGULATION FOR THE RECLAMATION OF A PRODIGAL FREE PRESS

*Maren Mildenhall<sup>1</sup>*

*“Our country, if you read the ‘Federalist Papers,’ is about disagreement. It’s about pitting faction against faction, divided government, checks and balances.”*

Jonah Goldberg

Checks and balances form the backing within which American legal tradition is ensconced; ever-shifting, yet immovable by the same token. The ink in every jot of new legislation is diffused with that of codes already penned: none arise without regard to where they fit in with the body of established code. No law is an island. All are designed to work in unison to safeguard the essential rights of the citizens they serve.

That intricate interplay is in present jeopardy. The circumstances surrounding news coverage of the Zimmerman trial reveal an unprecedented pervasiveness of new forms of media that poses a dramatic potential threat to the rights of those accused of serious crimes. Lay citizens in possession of a little knowledge may broadcast their mis-

---

1 Maren Mildenhall is a Humanities majoring, aspiring attorney whose respect for the law is paralleled only by her sense of inadequacy in presenting its nuances and appreciation of the reader’s patience. Her editors deserve more eloquent praise than she is equipped to render. Nevertheless, she ineloquently thanks both for their stellar suggestions and willingness to lighten an often overwhelming workload. More specifically, Nick Jones deserves kudos for his uncanny ability to pinpoint exactly what a given situation requires and to communicate it matter-of-factly. Likewise, this article may well have met its end in a puddle of nervous tears without Randall Raban’s unflagging reassurances that it would not. From the bottom of her heart, she thanks them both.

interpretation of misplaced details to thousands of Twitter followers, Facebook friends, or enthusiasts of a given cause for an instant riot. The advent of social media has turned news reportage into a game of telephone in which any bias or inaccuracy is magnified by biased, inaccurate repetition by those with no obligation to be detached and objective. The broad discretion necessarily granted the news media to report the facts without flagrant contempt of factuality threatens conflict with the principle underlying Blackstone's formulation of innocence until proof of guilt. By blackening the name of the accused with the power of widely dispersed suggestion, the pool from which an impartial jury may be drawn is narrowed dramatically. This, in turn, effectively diverts the course of a trial by appealing to that very mob whose tide must be stemmed. While the repercussions of this [mis]information explosion are not yet known, it is in the best interest of the American legal system that the federal government should establish some mainstay to preserve the rights of those accused of malfeasance which have come under probable threat.

Although the framers of the Constitution could not possibly have foreseen such a remedy, the country needs a moderator of sorts; some agent to provide metacognition for the cogitating factions. Thus, it is proposed that a nonpartisan media watchdog agency comprised of well-established, well-reputed veteran newsmen be organized to establish a set of straightforward, navigable *guidelines* governing the code of integrity by which news agencies (as well as the moderating agency, itself) should be held by the public (if not by the very law which guarantees its autonomy). Focusing on the Zimmerman trial, this article will explore the ways in which mass media jeopardizes the right to a fair trial. Its needless injection of high-profile cases with ideological tension calls for the use of soft power to accomplish what hard power cannot and must not.

On March 19, 2012, NBC reporter Jeff Burnside issued a report to the effect that an armed neighborhood watchman named George Zimmerman had, after a period spent following 17-year-old Trayvon Martin down a residential sidewalk, slain said teenager because he

suspected him of being a “black guy up to no good.”<sup>2</sup> A recording of the gunman’s conversation with a 911 operator just prior to the accident, aired on *Today* on March 27, was doctored by Burnside to give the impression that Zimmerman had equated the state of being “up to no good” with the condition of being black and had chosen to follow Martin on that premise.<sup>3</sup>

That Zimmerman was let off on a plea of self-defense was thus crafted to serve as evidence of institutional racism in the Sanford, Florida police department. The general public raised a great hue and cry when Martin’s parents circulated a petition on Change.org calling for Zimmerman’s prosecution,<sup>4</sup> and a Florida state attorney brought charges a month later. Numerous celebrities took to Twitter to publicly lament Martin’s demise and issue a call for racial justice.<sup>5</sup> Reverent Al Sharpton cited Martin’s death as proof of systematic racism in the U.S.<sup>6</sup> Representative Bobby Rush donned a hoodie and

- 
- 2 *NBC6 Zimmerman Edit Explanation*, NBC6 (Apr. 25, 2012), <http://www.nbcmiami.com/news/local/NBC6-Zimmerman-Edit-Explanation-148961305.html>.
  - 3 Jeff Burnside, *NBC Miami WTVJ Reporter, Fired Over Edited George Zimmerman 911 Call*, HUFFINGTON POST (Apr. 25, 2012), [http://www.huffingtonpost.com/2012/04/25/jeff-burnside-nbc-miami-wtvj-fired-george-zimmerman-edited\\_n\\_1453679.html](http://www.huffingtonpost.com/2012/04/25/jeff-burnside-nbc-miami-wtvj-fired-george-zimmerman-edited_n_1453679.html).
  - 4 Tracy Martin & Sabrina Fulton, *Prosecute the Killer of Our Son, 17-Year-Old Trayvon Martin*, CHANGE.ORG (Apr. 2012), <http://www.change.org/petitions/prosecute-the-killer-of-our-son-17-year-old-trayvon-martin>.
  - 5 Crystal Bell, *Trayvon Martin Celebrity Reactions: Spike Lee, Sherri Shepherd React to Florida Teen’s Death*, HUFFINGTON POST (Mar. 23, 2012), [http://www.huffingtonpost.com/2012/03/23/trayvon-martin-celebrity-reactions-shooting\\_n\\_1376065.html](http://www.huffingtonpost.com/2012/03/23/trayvon-martin-celebrity-reactions-shooting_n_1376065.html).
  - 6 *Al Sharpton at Trayvon Martin Rally: “We are Tired of Going to Jail for Nothing and Others Going Home for Something,”* HUFFINGTON POST, [http://www.huffingtonpost.com/2012/03/23/al-sharpton-trayvon-martin-rally\\_n\\_1374975.html](http://www.huffingtonpost.com/2012/03/23/al-sharpton-trayvon-martin-rally_n_1374975.html) (last updated Mar. 23, 2012, 9:24 AM).

sunglasses to speak to other House members about racial profiling.<sup>7</sup> President Obama made the statement that his son would “look like Trayvon.”<sup>8</sup> “Justice for Trayvon” is now the rallying cry of thousands who hold vigils,<sup>9</sup> wear hoodies,<sup>10</sup> and march<sup>11</sup> in his memory. Before it even got off the ground, the Zimmerman case was racially and politically charged practically to the point of no return.

Whether or not Zimmerman truly guilty is not the point being argued here. The profound trouble with the Zimmerman case and how it has been presented to the public is that pathos has been at the forefront of the issue from the very beginning.

## I. THE GROWTH OF THE POWER OF THE NEWS MEDIA

Although constitutional rights are necessarily “coequal” in that no single right may be permitted to override or submerge another,<sup>12</sup> the rights protected under the First Amendment are explicitly given a

- 
- 7 Lucy Madison, Dem Rep. Bobby Rush Escorted from House Floor for Wearing Hoodie in Honor of Trayvon Martin, CBS NEWS (Mar. 28, 2012), [http://www.cbsnews.com/8301-503544\\_162-57405846-503544/dem-rep-bobby-rush-escorted-from-house-floor-for-wearing-hoodie-in-honor-of-trayvon-martin/](http://www.cbsnews.com/8301-503544_162-57405846-503544/dem-rep-bobby-rush-escorted-from-house-floor-for-wearing-hoodie-in-honor-of-trayvon-martin/).
- 8 Krissah Thompson & Scott Wilson, *Obama on Trayvon Martin: “If I Had a Son, He’d Look like Trayvon,”* WASH. POST (Mar. 23, 2012), [http://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQApKPPVS\\_story.html](http://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQApKPPVS_story.html).
- 9 Stephen Hudak & Jon Busdeker, *Trayvon Martin Vigils: “We are All About Peaceful Nonviolence,”* ORLANDO SENTINEL (Mar. 25, 2012), [http://articles.orlandosentinel.com/2012-03-25/news/os-trayvon-martin-candlelight-vigil-20120325\\_1\\_candlelight-vigil-gated-community-skittles](http://articles.orlandosentinel.com/2012-03-25/news/os-trayvon-martin-candlelight-vigil-20120325_1_candlelight-vigil-gated-community-skittles).
- 10 JUSTICE FOR TRAYVON, <http://www.justicefortrayvon.net/index.html> (last visited Feb. 18, 2013).
- 11 Deepti Hajela, *Trayvon Martin “Million Hoodie March” Draws Hundreds in New York City*, HUFFINGTON POST, (Mar. 21, 2012), [http://www.huffingtonpost.com/2012/03/21/trayvon-martin-million-hoodie-march\\_n\\_1371403.html](http://www.huffingtonpost.com/2012/03/21/trayvon-martin-million-hoodie-march_n_1371403.html).
- 12 State v. Simants, 236 N.W.2d 794 (1975).

privileged position as the basis for the enjoyment of all other rights.<sup>13</sup> The implications for a high-publicity criminal trial are obvious: conflict between free press and the privacy of the accused is inevitable. However, the role of the press is sovereign and must not be abridged if the very fabric of freedom is to withstand. No matter how ineptly a journalist may cover a criminal trial, their responsibility to safeguard the rights of a defendant very often stifle cries that they're abusing their margin of error (unless their obvious dishonesty indicts them). As evidenced by Mr. Burnside's swift dismissal from NBC, newscasters are not exactly running riot across the television and computer screens of America. Yet, it must be wondered whether Burnside's swift removal is sufficient damage control in the age of sharing and resharing. The news media in an environment of social media is no longer the vessel of public information so much as a springboard for debatable topics.

While incontrovertible First Amendment is crucial in forestalling abuses of power on all sides, the media of today is not the media of 1787. The media today exerts a powerful influence beyond that of guardian of good conduct—that role, in fact, has been overwhelmed by those of demagogue, dramatist, and divider. Rather, the autonomy of the press coupled with its pervasiveness allows it to mobilize more people more quickly than ever before. This is, of course, old hat given the namesake of the Pulitzer Prize; but the overblown effects are not. The advent of the internet and the “Me Generation” (thanks to which a good number of people hear about major news stories from self-declared pundits on Facebook and/or other social media sites before they hear it from the source), it is not uncommon to be familiar with public opinion of a person or event without any acquaintance with the reasons for it. Many in the Twitterverse heard that Zimmerman was a racist before they heard he'd shot Trayvon Martin. Many still don't know that Zimmerman's neighborhood was experiencing robberies pell-mell at the time Martin was shot.

While the charge of racism broke no laws, the spirit of the Due Process clause came into question. The court found in *Estes v. Texas*

---

13 Murdock v. Pennsylvania, 319 U.S. 105 (1943).

that “the most fundamental of all freedoms”<sup>14</sup> is the right to be tried fairly for those crimes of which we are accused. The right to be justly dealt with in a court of law “must be maintained at all costs”<sup>15</sup> as tantamount to the very right to freedom. This freedom cannot be seized by the whims of either an individual accuser or by an unruly mob. All other rights are accessories to the right to life, liberty, and the pursuit of happiness and are rendered useless without that autonomy which facilitates their enjoyment. No action, no policy, no person that denies a person the right to fair treatment can have place in a civilized nation, not even when that detriment poses as righteous legality (or when it is technically sanctioned by law). In fact, a primary reason why freedom of speech and the press is considered sacrosanct is that it holds officials accountable for their treatment of the citizenry, including those accused of a crime. The moment press runs amok and jeopardizes the rights of the accused, it defies its own effectiveness as a safeguard of liberty.

This “most fundamental of all freedoms” faces a growing threat in not only the volume of influence occupied by mass media, but in the multitude of directions in which it exerts itself. “Trial by media” is hardly a novel concern; but the media is a force to be reckoned with in ways that defy the old doctrines as the potential audience for speech broadens and the potential power of its mouthpieces, as a consequence, expands. While the First Amendment has always clashed with others, the principles that once delineated the bounds of freedom of expression with reasonable clarity and somewhat predictable results are now stretched by its ubiquity. How, then, can one mitigate the effects of the ubiquitous media as justice so demands when its actions are governed by an obsolete set of standards that directly contradicts the demands of due process under novel circumstances? How can we accommodate the rights of the accused when the media wields such power without violating the letter of the law?

---

14     Estes v. Texas, 381 U.S. 532 (1965).

15     *Id.*

## II. PRETRIAL PUBLICITY AND THE ZIMMERMAN TRIAL

The Zimmerman debacle is a worst-case scenario of what happens when a mistake made by the news media takes control of the entire story: *Before the trial has even begun*, Zimmerman faces threats on his very life.<sup>16</sup> He has become familiar with the sting that accompanies bereavement of one's good standing in the community (and a very large community, in this case). In addition to the natural anguish a human being must experience after precipitating the death of another,<sup>17</sup> Zimmerman has a price on his head;<sup>18</sup> and he and his attorneys are receiving menacing messages en masse from anonymous sources, as well as being threatened on open online forums. Says Zimmerman's friend, Joe Oliver: "George has virtually lost his life, too."<sup>19</sup>

- 
- 16 Chris Francescani, "Trayvon Martin Shooter's Friend: George Zimmerman has 'Virtually Lost His Life, Too'", ABC NEWS (Mar. 27, 2012), <http://abcnews.go.com/US/trayvon-martin-shooters-friend-george-zimmerman-virtually-lost/story?id=16001811>.
- 17 Chris Francescani, *Trayvon Martin Shooter "Couldn't Stop Crying" After Shooting*, ABC NEWS (Mar.25, 2012), <http://abcnews.go.com/US/trayvon-martin-shooter-couldnt-stop-crying-shooting/story?id=15997075>.
- 18 Peter Grier, "New Black Panthers" Offer Reward for George Zimmerman. *Who are They?* CHRISTIAN SCIENCE MONITOR, (Mar. 27, 2012), <http://www.csmonitor.com/USA/2012/0327/New-Black-Panthers-offer-reward-for-George-Zimmerman.-Who-are-they>.
- 19 "George Has Lost His Life Too": Zimmerman in Hiding After Death Threats Over Trayvon Shooting, Lawyer Reveals, DAILY MAIL, (Mar. 27, 2012), <http://www.dailymail.co.uk/news/article-2121183>.



The criticisms of his neighbors,<sup>20</sup> coworkers,<sup>21</sup> and former fiancée<sup>22</sup> have been disseminated among innumerable strangers whose reception of the charges against him is untempered by any personal acquaintance. Again, this problem has haunted high-profile criminal trials for decades. What differentiates Zimmerman's case from others is the degree to which outright falsehood is to blame for public perception of him. In most cases, the so-called perpetrator of a crime is usually portrayed unflatteringly for a lack of other immediately available information (or a sufficient counterbalance), whereas the absence of symmetry in the way Zimmerman is viewed can be traced to a primordial misrepresentation of his motives.

It doesn't help in the least that this flaw has been replicated until the coding of the case as it has been presented to the public bears no resemblance to its original form. A stunning manifestation of the sort of journalistic sloth that jeopardizes the efficacy of the courtroom is seen in starkest clarity in an episode of *Real Time* wherein Bill Maher makes a case for Zimmerman's dishonesty under the guise of exploring the possibilities. After airing the footage of Zimmerman's arrival at the police station just after shooting Martin, Maher begins his suggestive build-up: "If you had a broken nose, your shirt would be filled with blood." (There is no blood, either on Zimmerman's face or on his shirt, in the footage shown.) "This is Mr. Zimmerman coming into the police station AFTER he said that his nose was broken, he had this big fight with this kid...I'm going to ask

- 
- 20 Trymaine Lee, *George Zimmerman Neighbors Complained About Aggressive Tactics Before Trayvon Martin Killing*, HUFFINGTON POST, (Mar. 12, 2012), [http://www.huffingtonpost.com/2012/03/12/george-zimmerman-trayvon-martin\\_n\\_1340358.html](http://www.huffingtonpost.com/2012/03/12/george-zimmerman-trayvon-martin_n_1340358.html).
- 21 Matthew Lysiak, *George Zimmerman Lost Job as Party Security Guard for Being Too Aggressive, Ex-Co-Worker Says*, NEW YORK DAILY NEWS, (Mar. 29, 2012), <http://www.nydailynews.com/national/george-zimmerman-lost-job-party-security-guard-aggressive-ex-co-worker-article-1.1053223>.
- 22 Jeff Weiner, *Trayvon Martin: New Details in George Zimmerman Domestic-Violence Petitions*, ORLANDO SENTINEL, (Mar. 21, 2012), [http://articles.orlandosentinel.com/2012-03-21/news/os-george-zimmerman-domestic-violence-20120321\\_1\\_petitions-documents-injunctions](http://articles.orlandosentinel.com/2012-03-21/news/os-george-zimmerman-domestic-violence-20120321_1_petitions-documents-injunctions).

a very basic question.” After painting himself as a hitherto impartial spectator, Maher ends on a crescendo: “Aren’t we all convinced from that tape that this guy is a big, fat, f\*\*\*ing liar?”<sup>23</sup> His guests and audience meet his smashing climax with laughter (apparently neither realizing that a broken nose need not necessarily be bloody<sup>24</sup> nor imagining that Zimmerman may have cleaned himself up before being questioned), and a superficial analysis of the situation is treated as a commonsense observation: If it makes sense to Bill Maher that a broken nose entails blood, than no evidence to the contrary is to be taken seriously. The consequences that follow when an inexperienced assessment is presented as authoritative can only grow in magnitude with media pervasiveness.

The broadcast of the faulty recording was a mistake. Its perpetuation under such flimsy premises could not be mistaken for objectivity, and the fact that Maher broadcasted the doctored recording as opinion does not exempt him from from defamation. A cynic might even characterize the media coverage in this case as a means for partisans to exact larger social justice in the event that the courts disagree with their assessment of Zimmerman. What is clear is that, whether or not Zimmerman is guilty of second-degree murder or even a hate crime, his opponents are building their claims on a foundation that is, as yet, unsteady.

The verdict in any trial will ideally be arrived at “only by evidence and argument in open court, and not by any outside influence [in the form of] public print.”<sup>25</sup> However, widespread attention to a case is, as yet, little understood even by psychologists, let alone those responsible for conducting voir dire (the process by which bi-

---

23 *Bill Maher Calls Zimmerman a Liar, Blames Liberals for Surrendering on Gun Laws*, HUFFINGTON POST, (Mar. 31, 2012), [http://www.huffingtonpost.com/2012/03/31/bill-maher-calls-zimmerma\\_n\\_1393573.html](http://www.huffingtonpost.com/2012/03/31/bill-maher-calls-zimmerma_n_1393573.html).

24 Mayo Clinic Staff, *Broken Nose*, <http://www.mayoclinic.com/health/broken-nose/DS00992> (last visited Feb. 18, 2013).

25 *Patterson v. Colorado*, 205 U.S. 454 (1907).

ased jurors are filtered out).<sup>26</sup> If court proceedings could be skewed in the way that public opinion is swayed, it is probably not to the side of justice. Although provisions are made for the defendants of propagandized trials, their effectiveness has been a matter of debate for decades because there is no clear-cut standard for evaluating the effects of media coverage. It is very difficult to prove a link between even a clear presumption of prejudice and a prejudiced jury because of the traditional faith the justice system invests in the jury selection process and their consequent conviction that *voire dire* should be sufficient to ensure adequate fairness.<sup>27</sup> Subjective criteria like the passage of time<sup>28</sup> and the nature of a crime<sup>29</sup> have been used to determine whether or not impartiality is even a likely possibility and dismissed on the assumption that jurors will react in a certain way to certain types of evidence. Furthermore, those means which must be exhausted before an appeal on that order can be made depend heavily on the honesty and personal insight of potential jurors during an inquisition into their neutrality.<sup>30</sup> While media frenzy may have an effect upon a juror that the jurors, themselves do not gauge, the methods at hand do not address this problem.

Past defendants have, of course, been able to prove that they were not given a fair trial; but only when the cause for concern is as clear and exaggerated as when  $\frac{2}{3}$  of the jury confess to a belief in the guilt of the accused from the start,<sup>31</sup> the trial was almost literally transformed into a press conference,<sup>32 33</sup> or a film of the de-

---

26 Bruschke, Jon, & William E. Loges, *Free Press vs. Fair Trials: Examining Publicity's Role in Trial Outcomes*, N.p.: Lawrence Erlbaum Associates, 2004, at 74-5.

27 *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

28 *Patton v. Yount*, 467 U.S. 1025 (1984).

29 *Skilling v. United States*, 130 S. Ct. 2896 (2010).

30 *Murphy v. Florida*, 421 U.S. 794 (1975).

31 *Irvin v. Dowd*, 366 U.S. 717 (1960).

32 *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

33 *Estes v. Texas*, 381 U.S. 532 (1965).

fendant's confession was released.<sup>34</sup> There is not much that can be done about jurors who place too much faith in their own fairness or who are outright lying in the hope of seeing justice as they know it done regardless of what they might be shown to the contrary. In a case so racially and politically charged as Zimmerman's, it requires little imagination suppose that some would see their selection to the jury as a mandate to convict. There is some evidence to suggest that even individuals who have formed an opinion about a case can be swayed by what they are shown in court;<sup>35</sup> but what effect can this have when the question to be resolved in trial has, in the mind of the community, become one of validating the evil of hate crimes, and not of deciding whether Zimmerman is, in fact, guilty of one? The power of the news media as it now exists is historically unparalleled. Is traditional voir dire equipped to handle an increasingly saturated jury pool?

### III. A DANGEROUS NEW PRECEDENT?

One need not even be selected to serve on a jury to turn the tide of justice, anymore—that Zimmerman faces charges at all is largely due to the 2 million signatures Martin's parents gathered on the Change.org petition and presented to the Attorney General of Florida. It might be a little premature to say, at this point, that the influence of this online petition could extend to the outcome of any future trial in this particular instance. It is not, however, out of line to say that it could. Indeed, it would hardly be the first time that external forces have influenced court proceedings.

Take, for example, this case: during the summer of 2011, 16-year-old Savannah Dietrich passed out while drinking at a party. While unconscious, she was sexually assaulted and photographed. The pictures bearing record of her rape were distributed at her high school, and Dietrich brought her attackers to court. Following the trial, the students responsible were given a plea bargain, and she was placed under a gag rule and threatened with 180 days in jail if she named the

---

34 Rideau v. Louisiana, 373 U.S. 723 (1963).

35 Brusckhe and Loges, *supra* note 26, at 74.

boys who assaulted her. Enraged, Dietrich published their names on her Twitter account, declaring that it was her civic duty to warn others. On July 23, 2012, a Change.org petition was created to persuade the authorities to drop the charges against her. A week and more than 100,000 signatures later, the charges were dropped. Reads the triumphant Change.org email: “One lawyer even told reporters that all the attention from Savannah’s supporters on the internet made filing the charges just not worth it—no wonder, when the petition received attention from MSNBC and the Associated Press, to name a few.”

What does the legal victory-by-viral have to do with George Zimmerman? Simply, it illustrates one unequivocal, highly consequential fact: that in an age of social media and involvement, pretrial publicity has more power than ever.

#### IV. LEGAL SAFEGUARDS AGAINST EXCESSIVE PRETRIAL PUBLICITY

This power threatens the presumption of innocence that, since long before the founding of the nation, has been the bedrock of America’s rights-driven legal system. This principle has been staunchly upheld in courtrooms throughout the country from the Constitution’s birth. Although the 6th and 14th Amendments guarantee the individual accused of a crime a “speedy and public trial” and “due process of law,” there are forces at work outside the legal system that increasingly threaten to frustrate the goals of justice. These forces can no longer be sheltered beneath the umbrella of the First Amendment as competing interests; in a time when the power of an omnipresent press reaches such heights and takes such a variety of forms, it is crucial that its role in a legally egalitarian society be reexamined. When the freedoms guaranteed by a First Amendment supersede the interests protected by other laws, they defeat their own purpose. To quote Judith Lichtenberg, “Unlike freedom of speech, to certain aspects of which our commitment must be virtually unconditional, freedom of the press should be contingent on the degree to which it promotes certain values at the core of our interest in

freedom of expression generally.”<sup>36</sup> While freedom of speech is the inherent right of a being to express and question opinions, the news media are bound to dispassionately report matters of public concern. The freedom of the press promotes a free nation if it fulfills its duty to liberate fact from rumor, not when it uses its power to overwhelm fact with hearsay or to quash truths it perceives as unacceptable.

Zimmerman is receiving the public trial promised by the Sixth Amendment, but benefits from that fact as much as if he were being tried in secret. What makes this problem so incredibly pernicious is the fact that justice, in this instance, is under attack by her own devices. The safeguards—public trials by jury, free press, due process—that have been so meticulously positioned to forestall miscarriage of justice have divided against themselves to jeopardize the liberties they were originally put in place to protect. “Such examples,” continues Lichtenberg, “look from the outside like a betrayal by the media of the First Amendment’s purpose, as lives and liberties are destroyed in pursuit of stories that sell.”<sup>37</sup>

This is not to say that the First Amendment and its proponents act as a blight upon fair trials. For instance, the Fourteenth Amendment guarantee of due process as mentioned in the Sixth Amendment relies heavily upon the exercise of freedoms ensured by the First Amendment for its potency. Without media coverage of criminal trials, there is nothing to preserve a trial’s fairness except for the consciences of judge and jury. The Framers never intended for the defendant in a criminal trial to have total privacy; only that their guilt would not be falsely established *sub rosa*. The publicity surrounding criminal trials, therefore, is not only not inherently defamatory, but desirable for the ultimate protection of the defendant.

However, the free speech mechanism is, today, far more powerful than the Framers could have envisioned: all news, once published, is fair game for social media sites, blogs, snarky television personali-

---

36 Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFFAIRS 329, 329-55 (1987).

37 Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment’s Purpose, Law and Contemporary Problems*, 71 LAW & CONTEMP. PROBS. 15, (2008).

ties, etc. All news, factual or corrupt, is easily accessible to almost all citizens the moment it sees the light of day. On the other hand, all news is not created equal: Many people do not continue to follow a story to its conclusion after the initial headline, assuming their first exposure to a story was not from a tertiary source (Twitter posting, Facebook status, or other probably partial commentator). Before a retraction of a faulty report can be issued, the original report has already circulated to more people than the retraction is likely to reach; and the primacy effect dictates that the first impression of a case will be the one that sticks, even without regard to the explosion of reactions to the first news drowning it out. To some extent, this cannot be avoided. The exercise of a free press requires that some leeway be granted to its agents. On the other hand, journalists should be mindful of the unprecedented power of their words and hesitate before making a statement that could destroy someone's post-trial life (or end it pre-trial). Unfortunately, this is not what a journalist is paid to do. The material demands of the journalist must, therefore, be reconciled somehow with the demands of the public for accuracy.

## V. THE NECESSITY OF INCENTIVIZING TRUTH

Because the influence of the media is greater now than it has ever been, greater care should be taken to see that reputations are not needlessly endangered. Anti-defamation statutes exist for this purpose, but they cannot prevent the permanent damage that results when sloppy journalism brands someone a racist murderer. What's more, journalistic wiggle room has historically made defamation lawsuits extremely difficult. It seems, therefore, that accuracy cannot be legally enforced.

The post facto remedy of a defamation lawsuit, even if it should succeed, is a consolation prize at best to people like Zimmerman whose lives have been irreparably overturned. Ideally, such travesties would be altogether preventable. However, the only alternative is to directly influence the media, itself by incentivizing accuracy.

How, though, does a hard-power entity like the law go about making changes in an independent force like the news media without either arrogating too much power for itself or limiting the pow-

er of the press in a way the Constitution does not (and should not) currently allow? Preferably, the strategic application of soft power would serve to incentivize meticulous reporting to bring into harmony the lofty aim of informing the citizenry and the material goal of making a profit. How, though, does the federal government apply soft power as a hard-power institution? How, too, could it use that soft power to incentivize accuracy?

## VI. THE MACHINERY AT WORK

The ideal role of a news source under a representative government and the actions that promote the continued operation of a given news source are twain. The reliability of a news source is not what determines how many papers it will sell, how many viewers will tune in, or how much traffic its web site will attract. In addition to being bound to a certain code of conduct, newspeople are beholden to citizens for their existence and must, therefore, cater to the tastes of the same by reporting news that is relevant to their lives and/or generically interesting. The press cannot force-feed the public on civic involvement if what the public really wants is lurid crimes and the Kardashians; and there is no provision allowing any higher power to prescribe what sort of information should be run. Currently, public approval dangles a much larger carrot over the press than does duty to a state that does not and cannot exercise more than the barest control over it.

One promising solution would be the establishment of an independent media watchdog agency be established to evaluate the reportage of the most prominent news items and to issue reports to the American public on the quality of information they are receiving from their choice of news source. These reports would be based on published criteria to prevent corrupt dealings on the part of the committee, itself and to allow the public to judge the committee by those same criteria.

Media watchdog groups are old hat by now, but almost all of them are politically affiliated. News Busters and Media Research Center exist solely to point out bias in the liberal media; Media Matters bats for the Left. These groups are, predictably, widely dismissed



as fringe groups and are not given a great deal of credibility. A politically unaffiliated group with straightforward judging criteria—criteria which could be used to evaluate their own performance—could solve this. The publication of report cards on the public's sources of information would rechannel energies of public discourse into an examination of those same media sources, as well as the source of their examination. Free speech needs to be heightened, not curtailed if the problem of inaccurate reportage is to be solved without compromising the First Amendment.

The direct application of pressure from, say, law enforcement is likely to invite backlash and little else. However, an official media watchdog agency with authority to issue reports, but not to enforce ethical conduct would conceivably induce newsmen to reconsider their course by affecting public approval of that news agency. The government would have no hand in the watchdog's operation, but would, by establishing it, be fulfilling its end to promote accuracy in the media.

Any remedy for the status quo would necessarily have to be indirect without being underhanded. The current system is not corrupt, but out of balance; news sources are beholden to the dollar more than they are to promoting an informed populace that wants to be entertained as much as it wants honesty. In order to incentivize the accurate news reporting that will cast a spotlight on the government that is under scrutiny, one must put power [knowledge] in the hands of the citizenry to regulate the press with or without minimal aid from the very same government. For this to work, the citizenry must have a reason to police its own news sources. Making things easy, it seems the people already have one: For all the misinformation that is inevitably abroad in the land, the populace at least knows that there are flies in the soup it's being fed. According to a Gallup poll taken in September 2011, only 44% of Americans have fair to great trust in the mainstream news media, while 55% have serious misgivings, which seems to indicate that Americans will take the initiative to scrutinize the news media.

The public wants more than a horoscope and a crossword puzzle, but it is important to make sure that the right powers are ensuring that. The citizens of the United States are limited in their power

by the manner of information that they are fed by the news media. However, their interests are better served by a free press than by an endless stream of propaganda from an omnipotent Big Brother. Although citizens carry a tremendous amount of power, their application is limited by its indirectness.

The interaction of the powers of government, news media, and citizenry can be illustrated as a triad in which the three parties most involved in criminal justice exert forces upon one another. As this model indicates, each party is pressured and can apply pressure to the others, but there is nothing to moderate their interaction or to promote equilibrium among them. Currently, there is little to check the behavior/motivate strictly factual reporting by those in the news media except for the collective American wallet; the government has almost no power to influence the actions of the press (even where warranted). The power of public approval over the workings of government is mediated by the news media. Presumably, the aforementioned media watchdog agency could serve the purpose of promoting fair play among the warring powers and competing interests by directly incentivizing those actions which will indirectly lead to the equilibrium that benefits all involved.

## VII. CONCLUSION

Thus, the very devices that threaten a fair trial can be used to check the motions of the news media and, indirectly, that same consuming populace. There is no better time to put such a plan into action, now that the country at large is disillusioned with the media, poised for reform, and receptive to change. The First Amendment is not compromised by such a course; the demands of the Due Process Clause are satisfied; and the system of checks and balances on which the nation operates is revitalized to a more constructive end. Corruption cannot, of course, be prevented with absolute certainty, but the not quite peripheral outcome of creating a culture of scrutiny by the citizens would give more power to the same to choose their own medicine. If government must operate as a large, impersonal machine, human watchfulness is required to supervise that operation.