KILLING THE MESSENGER

100 YEARS OF MEDIA CRITICISM

« REVISED EDITION »

Tom Goldstein

Killing the Messenger

100 Years of Media Criticism

REVISED EDITION

EDITED BY

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Preface

Enlighten me now, O Muses, tenants of Olympian homes. For you are goddesses, inside on everything, know everything. But we mortals hear only the news, and know nothing at all.

With these elegant but depressing words from the *Iliad*, Walter Lippmann and Charles Merz began a withering near book-length assessment of how the *New York Times* botched its coverage of the Russian Revolution. Their article, which appeared in the *New Republic* in 1920, was a stunning indictment of the *Times*, meticulously demonstrating how the country's leading newspaper (then, as now) disserved the public by biased and incomplete reporting that was "nothing short of a disaster." Lippmann and Merz bashed the purveyors of news, though they were hardly antiestablishment firebrands. (Merz eventually became editor of the *Times*'s editorial page, and Lippmann, the leading columnist of his generation, often turned down opportunities to work at the *Times*.)

Their critique is part of a rich—and largely forgotten or ignored—body of press criticism that has flourished sporadically during the last hundred years or so. The sins of the press—and they are plentiful—have hardly gone unnoticed, particularly in the early part of the last century and in the turbulent 1960s and 1970s. Criticism of the press is part of the give and take and ultimately makes the press healthy.

The early critics—Will Irwin, Frederick Lewis Allen, Upton Sinclair, George Seldes, and Walter Lippmann—were biting, outrageous, and irreverent, setting a standard of readability that later critics have been pressed to match.

These critics offered different perspectives on many of the issues that bedevil the press today—how the concentration of media ownership affects access to the public, how the media inadequately police and explain themselves, how reporters could be better trained, how bias in reportage may be unavoidable, and how the press sensationalizes, on the one hand, and censors itself, on the other.

For this volume I interpret criticism broadly—it comes not only from those professional critics but also from an eclectic, quirky group, including politicians (Theodore Roosevelt, Spiro Agnew, and Daniel P. Moynihan), a humorist (Leo Rosten), formal commissions (the Hutchins Commission and the Commission on Civil Disorders), a novelist (John Hersey), a professor of French history (Robert Darnton) and a newspaper proprietor (Joseph Pulitzer).

As a young publisher in St. Louis in the 1870s, Joseph Pulitzer expanded the notion of what was public by printing the tax returns of hundreds of citizens. Some were rich, some were poor. Pulitzer wanted to find out whether they were honest. In the twilight of his speckled career, Pulitzer endowed the school of journalism at Columbia, and in a powerfully argued essay articulated why journalism ought to be taught in a university setting—a proposition that still stirs controversy more than a century after it appeared.

In a pattern that would be repeated for a hundred years, much of the enduring criticism of the press comes from those who are not of the press but outside it. At the very time Pulitzer as publisher was expanding the public at the expense of the private, Louis Brandeis was practicing law in St. Louis. He then moved to Boston, where he became a partner of Samuel Warren. They published an article in the *Harvard Law Review* that became the foundation of the law of privacy.

A generation later William Allen White, known as the Sage of Emporia, Kansas, editorialized in no uncertain terms about why he would print news about drunks but not about divorces. Four of his editorials appear in this collection, along with the original Warren/Brandeis article.

A century ago Theodore Roosevelt complained that reporters, including some who had elevated him to near heroic status, had overstepped their bounds. In a disparaging analogy he compared these "reckless" journalists to the Man with the Muckrake in John Bunyan's *Pilgrim's Progress*.

In 1911 Will Irwin, a former newspaper reporter and editor of *McClure's Magazine*—one of Roosevelt's prime targets—chronicled in bold detail in a fourteen-part series the abuses of the press, appealing for a new role for journalism: "an electric light in a dark alley." (Walter Lippmann expanded on that metaphor in his groundbreaking 1922 book, *Public Opinion*, comparing the

press to a "beam of a searchlight that moves restlessly about, bringing one episode and then another out of darkness into vision.")

In an essay in 1922 Frederick Lewis Allen, probably best remembered for *Only Yesterday*, his best-selling history of the 1920s, chronicled the failures of the press: inaccuracies in news reports, the fallibility of eyewitness testimony, bias in the selection of news, and the timidity of journalists in dealing with entrenched interests.

These same themes were dealt with in a far more polemical way by Upton Sinclair, who had gained early fame from his muckraking novel, *The Jungle*, an unblinking report on the filthy conditions in the Chicago meat-packing industry

Sinclair took the name for his 1919 best seller *The Brass Check* from a method of payment in brothels. The book contains accusations that the press prostituted itself in the name of big business, a theme dwelt upon a generation later by George Seldes in his books and newsletter, *In fact,* which sold an astonishing 100,000 copies at its height—a feat unequaled by any other journalism review.

By Sinclair's time, a transformation of journalism was under way. The besotted, barely literate, not terribly ethical reporters of the 1928 play *The Front Page* gave way to a more sober, better-educated, and more serious press corps—a change insightfully documented by Leo Rosten, a young sociologist who later in life became known for his authoritative book about a very different specialty, *The Joys of Yiddish.*

Last century's most beloved critic was A. J. Liebling, who, fresh from a tour as a World War II correspondent, triumphantly revived for nearly two decades the Wayward Press column in the *New Yorker* (a feature started in 1927 by the humorist Robert Benchley). Like Irwin, Sinclair, Seldes, and the august Hutchins Commission on Freedom of the Press before him, Liebling targeted corporate concentration of the press as a pivotal issue. Money, wrote Liebling, "is not made by competing among newspapers, but by avoiding it."

In this instance the critics certainly may have been asking the right question, but the criticism has not led to the desired effect: the media are surely more consolidated now than any time in the last century.

Liebling had the field of press criticism almost exclusively to himself. In the late 1940s the Hutchins Commission had also called for more criticism of the press—a plea that fell mostly on deaf ears.

That changed in the 1960s, a decade the print press lost some of its authority and television news matured, a decade when the press was unshackled from long-held constraints in reporting about public officials (thanks to the

Supreme Court's ruling in *Times v. Sullivan* in 1964), a decade of profound social and political tumult—and a decade that led some of the best journalists to search for new forms ("new journalism" emerged) and for others to become politicized.

Once again, outsiders were often more daring and penetrating in their criticism than the press itself. Using language rarely used by journalists in appraising their own performance, Richard Nixon's vice president, Spiro Agnew, called reporters "nattering nabobs of negativism" in a memorable, if over-the-top, display of alliteration. Agnew was as unsubtle as Roosevelt was subtle, but his hyperbole became the rallying cry of the liberal media critique that continues to flourish more than a generation later. In *Commentary*, Daniel Patrick Moynihan, then in the Nixon White House, spoke derisively of reporters as "charter members of the adversary culture."

Robert Darnton, who served briefly as a reporter before pursuing a career as a French historian, studied the cultural mores of the *New York Times*, where reporters in the 1960s made up details as they needed them and wrote for one another's approval rather than for the audience.

Another take on journalists' adherence to facts is offered by John Hersey, who wrote both high-quality journalism and fiction. Hersey memorably demarcates the line between journalism and fiction. In journalism, the license must read: "None of this is made up."

The pieces included here—essays, speeches, columns, excerpts from books, and reports—reflect the period in which they were written, but, I think, they are helpful to contemporary readers. What is remarkable is the prescience of these early critics. The selection of these pieces is necessarily idiosyncratic, and space considerations and ownership rights necessarily dictated what was available. The first edition of this collection was published eighteen years ago. Since then, the volume of press criticism has grown substantially, particularly with the availability of the Internet, and this, too, inevitably affected which pieces I picked. I deleted a few selections from the first edition and added several new ones in order to elucidate issues that continue to resonate today.

Contents

Part 1

Reporting on Public and Private Matters

The boundary between what is private and what is public is ever shifting and elusive. In the context of news gathering, a constellation of questions is raised, cutting to the bone of how journalists decide what is newsworthy.

For instance, what is important about people—their age, religion, their marital status? What if they were adopted? What if they are gay? Is any of this the public's business? Does it depend on whether the person is in public life? Are candidates for president held to stricter scrutiny than candidates for other offices? Should important figures in the private sector be held to similar standards? Is there a statute of limitations for reporting on youthful indiscretions? Are the dead entitled to privacy?

There are few hard and fast answers to these questions, which have been examined in detail for more than a century. In this section, reprinted in its entirety (but without footnotes), is probably the most famous law review article ever written, the *Harvard Law Review* article by Louis Brandeis and Samuel Warren that became the foundation for the development of privacy. The two had been law partners in Boston at a time in which proper Bostonians regarded as a disgrace the appearance of their names in print. Legal historians long thought that this article had been inspired by Warren's indignant reaction to a gossip column reporting on his daughter's wedding breakfast. But this would have been utterly impossible: she was only six or seven when the article was written. Instead, the genesis of the article most likely lay more generally in Warren's deep-seated abhorrence of invasions of social privacy.

Their influential article, doubtless more cited in legal writings than actually read, has left a permanent imprint on jurisprudence and on journalism.

Alarmed by what they viewed as the increasing depravity of the daily press—a lack of "propriety and decency"—Brandeis and Warren took the view that the individual could be protected against unwarranted intrusions and publicity without fashioning new rules of law. Over the years journalists have tilted toward disclosure and away from the protection of the private lives of those in the public eye.

Also in this section is a sampling of editorials by William Allen White, a wise country editor who became friendly with the first generation of muckrakers. But little of his exposure to the faster pace and toughness of the muckrakers rubbed off on his local coverage. He was a booster of his hometown, Emporia, Kansas, and a censor of bad news. His office had a rule, for instance, not to publish details of local divorce suits. By his example, he demonstrated that journalists could show restraint. In these editorials he sets forth his quaint but principled philosophy of what is printable and what is not.

Finally, I have included a chapter from *Freedom of the Press,* by George Seldes, probably the most durable press critic of the last century. Beginning in the late 1920s, when he was past forty and with a career as an investigative reporter and foreign correspondent behind him, Seldes dedicated himself to correct what he felt was a deeply mistaken impression of the press.

"Newspapers, like kings, pretend they can do no wrong," he wrote in 1935 in *Freedom of the Press.* Its first subtitle was *For the Millions Who Want a Free Press.* He changed it to the more biting, *An Antidote for Falsehood in the Daily Press.* In his book, he poked into the inner workings of the press and emphasized that the threats to press freedom came not only from government but from the corrupting influences of business as well. In the chapter included here he describes how the press abused four of his contemporaries—Charles A. Lindbergh Sr., who ran for governor of Minnesota and lost; Charles A. Lindbergh Jr., the aviator; Robert M. La Follette, the Progessive Party leader; and Upton Sinclair, the novelist, pamphleteer, Utopian socialist, pacifist, and press critic who wrote *The Brass Check.*

Later Seldes started a journalism review, *In fact,* with its distinctive and defiant lower case *f,* which lasted for ten years. In many ways Seldes, who died in 1995 at age 105, was the link connecting most of the press critics in the past century. In his autobiography he acknowledged his debt to Will Irwin and Upton Sinclair. So, too, he influenced those who are now the elder statesmen of the current generation of critics. Nat Hentoff once called Seldes "the father of some of us all."

The Right to Privacy

SAMUEL WARREN AND LOUIS BRANDEIS

It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage.

—I. Willis, in Millar v. Taylor

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis.* Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of

From the *Harvard Law Review,* December 15, 1890

the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit,* was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource

of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread and broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, resulting in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency

to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow-men—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria.* Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury; but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on

which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public—in other words, publishes it. It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. Man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them. Yet in the famous case of *Prince Albert v. Strange* (1849), the court held that the common-law rule

prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise." Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.

That this protection cannot rest upon the right to literary or artistic property in any exact sense appears the more clearly when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection"; and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published." But these decisions have not been followed, and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of *Prince Albert v. Strange,* already referred to, the opinions both of the Vice Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined,