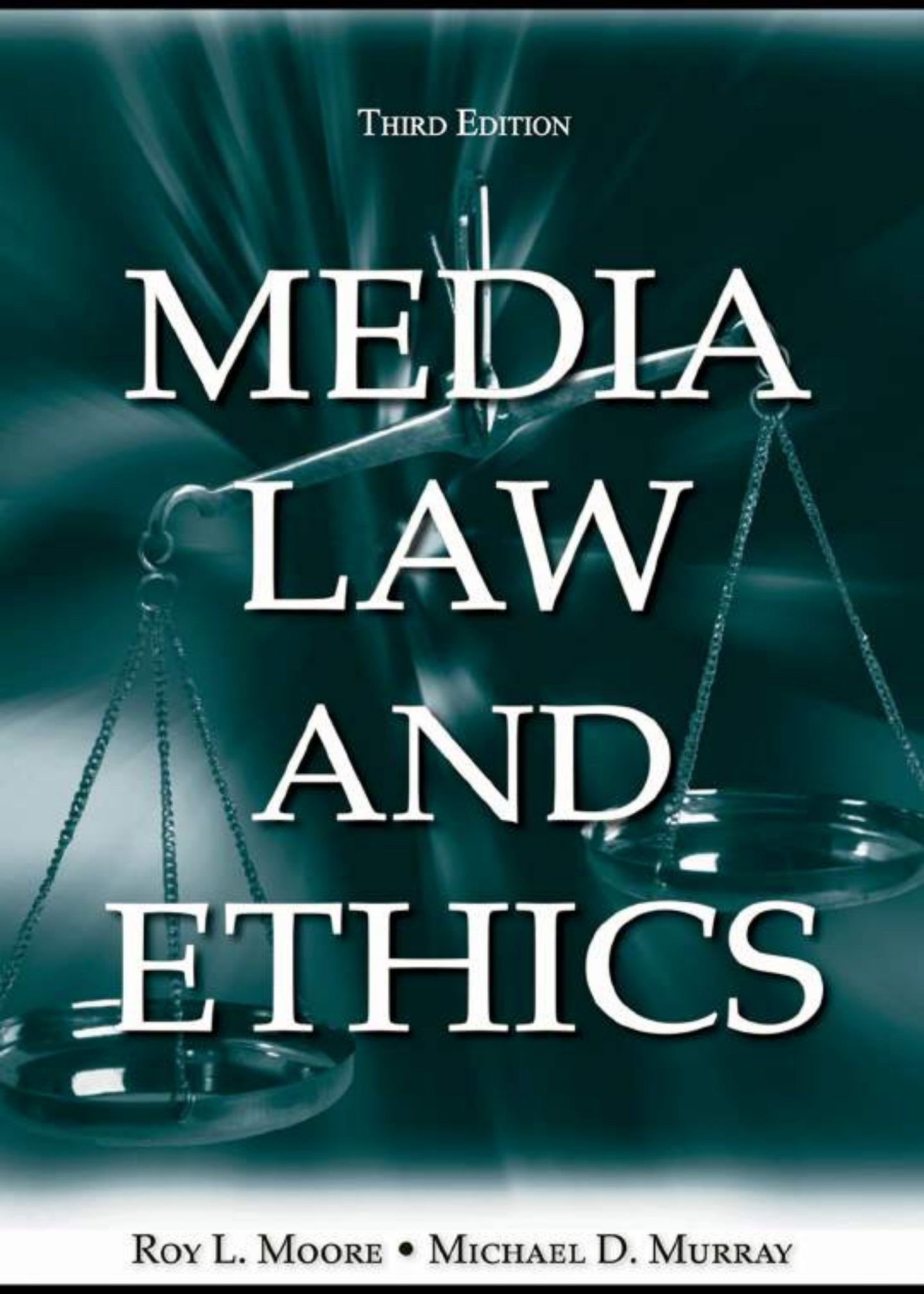


THIRD EDITION

The background of the cover features a pair of scales of justice, rendered in a teal color. The scales are positioned diagonally, with the pans hanging from a central beam. The lighting creates a dramatic effect, with rays of light emanating from behind the scales, giving them a three-dimensional appearance. The overall tone is professional and serious.

MEDIA  
LAW  
AND  
ETHICS

ROY L. MOORE • MICHAEL D. MURRAY

# Ethical Dilemmas, Issues, and Concerns in Mass Communication

*Mike Farrell\**

The First Amendment guarantees broad rights to journalists—the government can prevent publication of news only in extraordinary circumstances and journalists are virtually immune from criminal penalties for criticizing public officials. However, to the dismay of the media’s many critics, the First Amendment does not balance those rights by requiring journalists to be responsible. The First Amendment does not force journalists to be fair or balanced, to thoroughly research every story, to report a story within its context, or even acknowledge and apologize for errors.

Further, the First Amendment does not allow the government to license journalists. Doctors, lawyers, teachers, engineers, and other professionals generally face licensing requirements—they must meet certain education standards, agree to follow accepted procedures, and usually attend continuing education classes. If they fail to meet these standards, the government can yank their licenses and forbid them from practicing. No such requirements exist for journalists. Many journalism associations, including the Society of Professional Journalists and the Radio–Television News Directors Association, have ethics codes, but journalists do not have to belong to such organizations.

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The absence of these responsibilities and the performance of the media have undermined public support for the First Amendment and for journalists. A seemingly unending list of public opinion surveys has found that the public holds journalists and the press in low regard.

Forty-two percent of those surveyed for the Freedom Forum's 2004 annual report, "American Attitudes about The First Amendment," said the press has too much freedom.<sup>1</sup> A 1999 survey found that 21 percent of Americans think the press cares about people, down from 41 percent in 1985. Only 45 percent think the press protects democracy, nearly 10 points lower than in 1985.<sup>2</sup> An earlier study by the American Society of Newspaper Editors found some lessons about the credibility of journalists:<sup>3</sup>

1. The public and the press agree journalists make too many factual errors and spelling or grammar mistakes. Those errors undermine public confidence in newspapers.
2. The public believes that newspapers do not consistently demonstrate respect for and knowledge of their readers and communities. Readers believe that journalists are willing to hurt people just to publish a story.
3. The public believes that journalists' points of view and biases influence what stories are covered and how they are covered. The public feels that advertisers and people in positions of power maneuver the press to ensure that their viewpoints are presented. At the same time, the less powerful and the underprivileged have little voice. Commenting on that finding, *Editor & Publisher* said, "Americans are coming to the nearly unanimous conclusion that the press is biased, that powerful people and organizations can kill or steer news stories."<sup>4</sup>
4. Readers believe newspapers over-cover sensational stories because they are exciting and because they sell newspapers. Journalists have responded for years that they are simply giving readers what they want (which, they believe, is why sensational stories sell newspapers). In broadcast news, the similar theme, emphasizing sensational content: "If it bleeds, it leads," is often heard. These kinds of assumptions create circular arguments and negative feedback that fail to address the issues or settle the debate.
5. The public believes journalists are too quick to invade the privacy of individuals. The public says journalists should hold a story until facts can be double-checked for accuracy, the names of suspects should not be published until charges are filed, and long-ago transgressions of public officials should be overlooked.

All the surveys illustrate what journalists have long known—the public does not like the way a lot of journalists practice their profession. In an earlier study, University

of Oklahoma Professor Charles Self examined reasons behind public distrust of the media.<sup>5</sup> He listed four:

1. Insensitivity, arrogance and generally bad behavior on the part of journalists.
2. Stories that are inaccurate, incomplete, or reflect poor reporting practices.
3. Disapproval of the type of news that reporters write about and overall news judgment.
4. Disagreements over the task of news in the life of the reader: whether the most important task of a news report is to give facts objectively, explain the facts, or report all sides of a story fairly.

Media critics recognize that good journalism is difficult and journalists fall short of ethical ideals for a number of reasons that do not add up to deliberate lapses.

We do not mean to imply that journalists are a morally defective lot. American journalists, both print and electronic, are often fair, competent, even altogether virtuous. They are sometimes criticized indiscriminately, perhaps as a result of inflated expectations, and many of their failures are understandable in context. Given the catch-it-on-the-fly nature of daily journalism, it would be unreasonable to expect the total output of even a generally competent and fair-minded group of professionals to be uniformly satisfactory. Journalism being what it is, even the most virtuous journalists, operating from what they view as the best of motives, inevitably will produce some morally unsatisfactory results.<sup>6</sup>

In his book on media ethics, French professor Claude-Jean Bertrand wrote, “Paradoxically, the media are accused of every sin at a time when they have never been better.”<sup>7</sup> Still, Bertrand labels the media’s performance “mediocre.”

## The Bad Old Days

An ethical profile of journalists from 1850 to 1950 compiled by Fred Fedler found instances of reporters who accepted—and sometimes demanded—free theater tickets, liquor, and meals.<sup>8</sup> Another reporter who needed a raise to support his family was offered the opportunity to write the book review column and told he could sell the books he did not want.

Fedler’s research also found that reporters often resorted to deception to obtain information for stories: some posed as police officers. A New York City reporter obtained a firefighter’s uniform so he could inspect theaters and write a story about the poorly constructed dressing rooms and firetraps backstage. Some reporters were quick to eavesdrop, even showing up unannounced outside a hotel room to listen before seeking an interview. During the early part of the 20th century, some reporters accepted second jobs as press agents, while ambulance-chasing lawyers looking for clients constantly approached others. Fedler found one reporter who said he was

promised \$50 for each accident case he found and another \$50 if the attorney won the case. According to Fedler, the reasons reporters gave for behavior that was often illegal and certainly unethical included:

1. Beating the competition
2. Belief that obtaining the information was so important it justified any means
3. Fear for their jobs
4. Belief that other professions included people who also followed the same practices
5. Low salaries
6. Loyalty to their editors and newspapers
7. A culture that failed to condemn such practices as unethical
8. Bad examples set by many of the people they covered<sup>9</sup>

Even though reporters today work in a world with totally different ethical expectations, some journalists are far from satisfied with the way their craft is practiced. Magazine editor James Fallows warned that journalism must change or it will destroy itself and democracy. He reported, “Americans believe that the news media have become too arrogant, cynical, scandal-minded, and destructive.”<sup>10</sup>

Howard Kurtz, a media critic for CNN and the *Washington Post*, accused the media of arrogance and hypocrisy: “While news organizations make their living pointing fingers and hurling accusations, they are notoriously slow to ‘fess up to their own mistakes. With varying degrees of stubbornness, stupidity and arrogance, media executives often circle the wagons when their own actions come under scrutiny.”<sup>11</sup>

## The Credibility Factor

Stupidity and arrogance, however, are not the most troubling issues for journalists. The too-frequent lapses of ethical practice by those who call themselves journalists undermine public confidence in the news media. Obviously, when the public has little trust in the media, the effort to publish news the public finds credible becomes much more difficult.

Journalism credibility is tied directly to the perception that journalists are ethical. Ethics is the study of morality, specifically the right and wrong of how journalists do their jobs. It involves defining the morally acceptable values of the individual, organization, profession, and society and using those values as a basis of human behavior.<sup>12</sup>

Ethics is related to duty—duty to self, duty to community, duty to profession, and duty in this case to the First Amendment. Ethical behavior involves a choice, sometimes choosing one good over another, sometimes choosing to do wrong in order to accomplish some good. For example, would it be ethical to get a job as a janitor in a courthouse so you could search for a report that might prove a prosecutor is accepting money to dismiss drunken driving charges? Taking bribes is certainly illegal and a violation of

the public trust. But are there ethical limits on how a reporter should gather the information needed to expose such behavior? Many times, the more important a story becomes, the more obstacles reporters encounter trying to gather the information for the story. At some point, a reporter who suspects something illegal or unethical is going on inside the government but cannot prove it may consider whether some surreptitious tactic is justified in catching someone who has been betraying the public trust. Journalism has been beset by ethical problems that have over the years eroded the credibility of journalists. Some examples of ethical issues arising in recent years follow.

In December 2004, at a meeting of Secretary of Defense Donald Rumsfeld and troops in Kuwait, a soldier asked Rumsfeld why some of the vehicles used by troops in Iraq lacked armor. A reporter for the *Chattanooga (Tenn.) Times Free Press* embedded with a Tennessee National Guard unit played a role in formulating the question. He also tried to make sure that the soldier was called upon during the question-and-answer session in which only soldiers were allowed to question the defense secretary. In his story about the soldier's question that made national headlines, the reporter failed to disclose his role in the incident.<sup>13</sup>

In September 2004, CBS News acknowledged it could not vouch for the authenticity of documents it used to support a *60 Minutes II* segment—repeated on the *CBS Evening News*—alleging that former military superiors of President George W. Bush had been asked to “sugarcoat” his performance evaluations during the Vietnam era. The documents also purported to show that as a young officer, Bush ignored direct orders to complete a physical exam. Almost immediately, document experts questioned the veracity of the documents used to support the allegations, supposedly written by his late squadron leader. It was pointed out, for example, that the memos appeared to have been created by a computer, not a manual typewriter from the 1970s. While Dan Rather, CBS News' then anchor, later apologized for the use of bogus memos as support, CBS President Andrew Heyward appointed an investigative committee to uncover how the hoax had taken place.<sup>14</sup>

In June 2003, the two top editors of the *New York Times*—Executive Editor Howell Raines and Managing Editor Gerald Boyd—resigned amid a scandal that developed the previous month when 27-year-old reporter Jayson Blair was exposed for journalistic fraud at the paper. In the same month, 43-year-old Pulitzer Prize-winning reporter Rick Bragg had resigned after being suspended for publishing a story under his byline that had been mainly reported by a freelance writer who was not credited. In a four-page investigative report, the *Times* revealed that Blair included fabrications, inaccuracies, plagiarism, and other serious errors in at least 36 of the 73 articles he had written for the newspaper during a six-month period. Under Raines and Boyd's leadership, only 14 months before they stepped down, the *Times* had won a record seven Pulitzers, all but one for its coverage of the terrorist attacks on September 11, 2001.<sup>15</sup>

Three of the nation's most respected newspapers—the *New York Times*, the *Washington Post* and the *Wall Street Journal*—agreed in 2000 to accept details about a proposed \$5 billion merger between two of the nation's major airlines provided they broke the story without calling outside sources for details. The deal fell apart when another media outlet broke the story using its own independent reporting.<sup>16</sup>

*The Cincinnati Enquirer* published a comprehensive expose on Chiquita, the banana company, accusing it of unethical business practices in Central America—bribing foreign officials, mistreating workers, and evading foreign laws—only to retract its stories days later, announcing it had paid Chiquita more than \$10 million because the story had been based, in part, on information stolen from the company voice mail system. What makes the story even more complicated ethically is that the lead reporter on the Chiquita story not only revealed the identity of his confidential source, he pleaded guilty in exchange for his testimony against the source, a former Chiquita lawyer who was accused of telling the reporter how to access the Chiquita voice mail.<sup>17</sup>

The top news executive of CNN acknowledged in an opinion piece in the *New York Times* that the television network had for years failed to report some of the atrocities its correspondents witnessed in Iraq under the regime of Saddam Hussein because he feared Saddam Hussein would close the Baghdad office. Eason Jordan wrote, for example, that he never reported that Saddam Hussein's eldest son had told him in 1995 that he planned to kill two of his brothers-in-law who had defected because he was sure the Iraqis would have responded by killing the Iraqi translator.<sup>18</sup> (A few months later Uday Hussein “lured the brothers-in-law back to Baghdad; they were soon killed.”)

The editor of the *Salt Lake Tribune* fired two reporters after he learned they received \$20,000 from the *National Enquirer* for selling the tabloid “salacious rumors” related to the kidnapping of Elizabeth Smart, rumors the *Tribune* never printed. After the firings, the editor also resigned because he said the newsroom had lost faith in him.<sup>19</sup>

NBC's *Dateline* reported that the gasoline tanks of GMC pick-up trucks built between 1973 and 1987 were prone to fire and explosion during accidents. As part of the 15-minute segment that aired November 17, 1992, *Dateline* showed an empty pick-up truck bursting into flames after a collision. NBC later acknowledged that the explosion viewers witnessed was staged. The gas tank was filled to the brim, the gas cap was defective, and a toy rocket had been rigged to ensure the tank exploded and was activated by a remote device just before the staged crash.<sup>20</sup>

In the aftermath of Hurricane Katrina, one of the worst natural disasters to hit the United States, the media were widely criticized for publishing and broadcasting incorrect information and uncorroborated rumors that officials later said delayed the relief efforts. Lt. Gen. Russel L. Honore, commander of Joint Task Force Katrina, told the *Washington Post* that reporters got bogged down trying to tell people how bad the situation was rather than “gathering facts and corroborating that information.” The *Post* also reported that officials told reporters that accounts of widespread looting, gunfire directed at helicopters, homicides, rapes, and life-or-death struggles at the Louisiana Superdome frequently turned out to be overblown and even untrue.<sup>21</sup>

In one of the most infamous disclosures, the Pulitzer Prize was withdrawn in 1981 from a *Washington Post* reporter after she acknowledged that an 8-year-old inner-city drug-addicted child she wrote about did not exist. One ethics scholar called it “the most famous hoax of the modern era.”<sup>22</sup>

But the presidential election in November 2000 proved to be one of the media's worst moments. The television networks prematurely predicted that then-Vice President Al Gore had won the electoral votes of Florida that would have ensured his election, only to withdraw that prediction two hours later after then-Texas Gov. George W. Bush on television told the networks and the nation that their prediction was wrong. Several hours later, the networks went the other way, announcing Gov. Bush had won Florida and the presidency, only to withdraw that prediction a short time later.

The debacle brought a reprimand from the Society of Professional Journalists. The co-chairman of SPJ's Ethics Committee, Gary Hill, a broadcast journalist, said journalists failed to follow a central tenet of SPJ's Code of Ethics: act independently. "Election night 2000 was another chance for the national media to reaffirm its central role in our democracy, and it was a chance for journalists to wrap themselves in glory, to regain some of their lost credibility, but it didn't work out that way," Hill said in an SPJ release.<sup>23</sup> It probably did not surprise a survey team for the Freedom Forum a few months later that 80 percent of those they questioned opposed the right of television networks to project winners of an election while people are still voting.<sup>24</sup>

Public confidence in the media—which seems to rely in great part on a perception that the media are ethical—is critical today, critical to the health of a democracy. Most information that citizens glean about public issues comes through the media either directly—they read newspapers or Internet Websites, watch TV news shows, listen to radio—or indirectly by talking with someone who read a story, saw a show, or listened to a program. The practice of a town turning out to hear a prominent citizen extol the virtues of his party's candidate for president or member of Congress is as much a part of history as the Model T Ford.

## The Foundation of Ethics

Discussion of journalism ethics should begin with the First Amendment and the theory of journalism it represents. While the courts have found that freedom of the press does not carry with it all the ethical responsibilities that its critics would like it to require, democracy requires a free press. As President Lincoln framed it in his Gettysburg Address in 1863, the theory of democracy is that government is "of the people, by the people, for the people."<sup>25</sup> Citizens established the government by ceding to it the authority to rule over them. Citizens participate in their government by electing those who will represent their convictions in the debates of important issues that require government actions. Finally, the government exists solely for the benefit of citizens, the governed, and not the governors.

The role journalists play in this citizen-based democracy is as essential as the role the courts play. The preamble to the Code of Ethics of the Society of Professional Journalists (see Appendix A) explains that the duty of journalists is to further justice and democracy "by seeking truth and providing a fair and comprehensive account of events and issues."



The media play major roles in a democracy. The first is the informative role. Journalists inform citizens of what is happening in the world, in the community, in their government. Citizens must understand the issues and the problems confronting society. They need to know what their elected representatives are doing about those problems. Another role is deliberation. The press publishes stories about issues and points of view so that they can be debated. A third is the agenda-setting role. The press calls attention to pressing public issues that editors and reporters believe should be addressed by government. A fourth is the watchdog role. The press examines critically what the governors are doing so that they do not abuse the trust of those who elected them.

## Inform and Entertain

The libertarian theory holds that the press functions as a political institution to inform and to entertain citizens. This is essential for democracy; for citizens to participate in their government, they must be informed of the issues, the actions of their governors, and the outcomes of government's decisions. The press also allows the government to speak to citizens. The president can address a community luncheon and speak to not only the 500 people in the hall but also to the entire nation via the press. The governor addresses the state legislature, and the next day newspaper readers all across the state can learn what he said.

The informative role is essential in a democracy for citizens to play their proper role in their government and for their individual well-being. How would citizens know a city government was going to raise the payroll tax if the press didn't report it? Surely no one thinks that city officials would send a letter to taxpayers inviting them to city hall to express their opinions about raising taxes. Most city councils would shudder at the thought of 500 people coming to a council meeting to debate an issue. The idea that New York City could host a town meeting to debate a tax increase is far from reality. The city does not have a stadium or meeting hall large enough to house even a small share of its millions. How would citizens know that a deadly disease had broken out in the United States if the media did not report it? It is difficult to protect yourself against some danger if no one has informed you about the danger. Providing information is the most basic function of the press.

## The Marketplace of Ideas

In a democratic system of government like the United States, the free expression of ideas is essential. Hidden behind the political infighting of the Republican and Democratic parties are basic differences in the philosophies of those parties. For example, Democrats generally believe that government can help solve societal problems. Republicans generally believe that individuals singly and collectively can do a better job of that. Debating those philosophies is the essence of American politics.

The press functions as a forum in which political parties and others can debate important issues and how they should be addressed. Essential to this role is the

independence of the press from government. Freedom of the press, as embodied in the First Amendment and interpreted by the courts, is essential because government officials usually have some stake in the outcome of a public debate and because giving government exclusive access to the channels of communication—as happens in authoritarian governments—necessarily forces other voices and ideas to seek underground media.

First Amendment scholar Richard Labunski argues that the protection given freedom of expression by American courts is essential to democratic government. According to Labunski, “The special position that the First Amendment is granted in our system is recognition of the paramount importance of the free exchange of ideas to self-government. Freedom of speech and press provisions of the First Amendment are designed to prevent interference with the exchange of information if citizens are to make intelligent decisions when choosing public officials and shaping policy.”<sup>26</sup>

The forum for political debate—the so-called marketplace of ideas—represents the democratic ideal that in political debate, many voices will be heard and no voice will be silenced in the search for truth. The assumption is that in the end, the best idea will prevail in the debate. The marketplace of ideas, while not an American creation, has been elevated to the capstone of democracy and individual liberty by a long string of judicial decisions. This metaphor is based on the assumption that if citizens are to be seen as governing through those whom they elect, citizens must be informed. According to James Madison, who played a central role in the constitutional convention and the drafting of the Bill of Rights, political speech is a means to further the ideal of deliberative democracy.

The marketplace of ideas is rooted in the work of John Milton in his 1644 work *Areopagitica*. This passage underscores Milton’s objection to a 1643 act of Parliament that required government licensing before something could be published, a process of overt censorship:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple, who ever knew Truth put to the worse, in a free and open encounter.

Milton’s theory, labeled the self-righting principle, was simple: expose people to the truth and to false arguments and the truth will win out every time. So strong is truth, Milton wrote in *Areopagitica*, that truth needs no authoritative champion in the marketplace of ideas. No reason existed for government censorship because lies would always be exposed and ultimately discounted. It must be noted, however, that Milton, like many Americans, felt free speech had its limits. He did not want it extended to those who disagreed with his religious beliefs.

British philosophers John Locke and John Stuart Mill advanced Milton’s theories of censorship. Mill insisted that freedom of thought, discussion, and investigation were goods in their own right, and that in the end, the open exchange of ideas benefits society above all else. Mill, considered by some the father of liberalism, argued that repression may interfere with society’s ability to seek truth. First, if the

censored opinion contains truth, its silencing will lessen the chance of discovering that truth. Second, if each conflicting opinion contains part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth. Third, even if the accepted opinion contains the whole truth, the public tends to hold it as a prejudice unless forced to defend it. In Mill's view, expressed in his classic book, *On Liberty*, every idea has some societal value and therefore deserves protection from the government. According to Mill:

If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.

Those ideals came to America along with the principles of censorship. James Franklin, the older brother of Benjamin Franklin, served jail time in 1721 for what he published in his newspaper, *The New England Courant*. Later, after Franklin condemned the powerful clergy of Boston for their medical policy during a smallpox epidemic, his newspaper was closed. Franklin was forced to flee despite his published protest that it was undemocratic to punish a printer for publishing the opinions of men different from the opinions of those in authority. His brother also weighed in on the issue. In the first edition of his *Pennsylvania Gazette*, Ben Franklin published his "Apology for Printers," in which he invoked Milton's self-righting principle as a reason his readers should not resort to violence because they disagreed with things published in his newspaper.

Nearly 300 years later, Milton's self-righting principle was recast into a 20th century metaphor and introduced into American jurisprudence. The marketplace of ideas today, despite numerous criticisms, guides American thought and Supreme Court decisions about the First Amendment freedoms of expression.

U.S. Supreme Court Justice Oliver Wendell Holmes introduced the idea of the marketplace of ideas in a decision, albeit a dissenting one, in a World War I free speech case. Holmes, in one of the most famous high court reversals of philosophy, changed his position in just a few months. He moved from writing a majority decision upholding the repression of free expression to writing a dissenting opinion that advocated for greater meaning for the First Amendment. That principle was known as marketplace of ideas.<sup>27</sup>

But the marketplace theory is often criticized. One of the major objections has been that the theory is utopian and impractical because of the barriers to having everyone's voice heard in the market. Other commentators question whether Holmes' analogy is a fitting one and whether a free trade in ideas is likely to identify the best course of action. Critics ask whether the marketplace is truly representative

when the voice of the poor is hard to hear because of monopolistic practices, unequal distribution of resources, and limitations of communication technology. But other weaknesses are also apparent. If people cannot hear the debate or understand the arguments, or if people cannot articulate ideas in order that they can be understood, the marketplace does not function well.

As many critics have observed, while the First Amendment protects the media from government control, the media have become almost partners with government, so closely are journalists tied to reporting the actions of government through the eyes of the very officials who make those decisions. Despite these weaknesses, the role of the press in maintaining a forum for public debate is a key ingredient to the freedoms enjoyed by Americans. That role also makes the First Amendment essential.

## Agenda Setting

A third important role is agenda setting, the power of the media to broadcast and publish stories about issues, resulting in widespread public attention to those issues. Stated another way, it is not the power of the media to tell citizens what to think but to tell citizens what to think about.

Journalist Walter Lippmann, a scholar of public opinion and propaganda, noted in the 1920s that ordinary people had limited opportunities to see important events first-hand and they were thus dependent on the media to provide them accounts of these events. In *Public Opinion*, Lippmann wrote about “The World Outside and the Pictures in our Heads.” His thesis was that the media serve as the principal connections between what transpires in the world and the pictures of those events drawn in our heads.

Professors Maxwell McCombs and Donald Shaw, then at the University of North Carolina, coined the term “agenda setting.”<sup>28</sup> They studied voter information sources during the 1968 presidential election featuring Richard Nixon, the Republican; Hubert Humphrey, the Democrat; and George Wallace, the independent. McCombs and Shaw selected 100 undecided voters in Chapel Hill, North Carolina, and personally interviewed each of them during a three-week period before the election. They were asked, “What are you most concerned about these days? That is, regardless of what politicians say, what are the two or three main things that you think the government should concentrate on doing something about?” Five main themes—foreign policy, law and order, fiscal policy, public welfare, and civil rights—emerged as the major concerns.

The researchers then analyzed the subjects of the election campaign news stories in the nine media outlets—five newspapers, two network TV news broadcasts and two weekly news magazines—that served Chapel Hill. What they found when they compared the two lists was that the concerns of the voters almost identically matched the subjects of the media reports.<sup>29</sup> The study, of course, had its weaknesses, but it was ground-breaking. Some 350 studies on agenda-setting effects of the media have been published since. Those studies support the theory that a strong

correlation exists between what the media tell those who are watching and reading is important and what eventually becomes an issue the public recognizes as important.<sup>30</sup> Agenda-setting theory was a major turning point in communications research because it focused the attention of researchers on the process by which the media play a significant part in generating a common culture.

The gate-keeping function of the media is a corollary; i.e., from the many happenings of a day, the media choose events, issues, and people and present them as the most important information for the news consumer on that particular day. Reporters and editors every day choose what events they will report and what events they will ignore. They are faced daily with more stories to cover than time in which to cover them. Most reporters have “to do” lists of stories already assigned to them by editors or lists of ideas of their own. Assignment editors daily receive press releases by mail, by fax, and by electronic messaging, in effect urging news coverage of some announcement or event. Government hearings, commission meetings, and legislative sessions abound. And the judiciary offers an endless stream of human stories that are told through court filings, indictments, arraignments, and trials. The dilemma is not one of finding enough to fill a news hole or telecast; the dilemma is having enough reporting and editing time to prepare stories.

It is an oversimplification to say, however, that the media decide alone or in isolation what the news is. Politicians use the media as well to help set the public agenda by serving as sources for news stories and by convincing reporters of the importance of certain issues. Indeed, political actors anticipate what actions and words will increase the chance that journalists will cover a story and tailor their actions accordingly. The three separate branches of government and the actors in both political parties use the media to send signals to each other and fight their ideological and political battles. There is a significant reason that Washington overflows with men and women whose jobs are to serve as media representatives for elected officials and government agencies. Agenda setting allows the media to call attention to issues needing public attention that otherwise might go unaddressed. Nursing home abuses and deteriorating education systems are only two of the issues that have been spotlighted over the years by the media.

## Watchdog Function

The press reports on the government. It is as simple as that. A basic rule of human behavior is that when people believe they are accountable, they do a better job. Or, put another way, power corrupts. When public officials think no one is looking, they are capable of abusing their power. When a city government passes a budget, a good reporter will examine that budget to see how the money is going to be spent. By reporting what she finds, she helps ensure that the city government is accountable to the taxpayers. When police arrest a suspect and he appears in court with a couple of black eyes, reporters will ask how it happened. Police abuse is not unheard of, although force is sometimes necessary in subduing people. And prisoners do fight with other prisoners.

Another watchdog role involves uncovering conflicts of interest. The Washington media today pay a great deal of attention to the connections of people and special

interest groups who help fund election campaigns and the types of legislation elected candidates support. Congressional budget bills are examined so that reporters can find deep in the fine print special interest legislation that benefits someone who made sure the budget chairman received thousands of dollars in campaign contributions.

The number one example of the watchdog function is the scandal known as Watergate. Reporters traced what appeared to be nothing more than a minor burglary in the Democratic offices in the Watergate Hotel all the way to the office of the president, and Richard Nixon stepped down as the nation's chief executive.

The roles of the media in a democracy were pointed out by the Supreme Court of the United States in 1966:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.<sup>31</sup>

If the First Amendment does not demand that journalists carry out their responsibilities in an ethical manner, the relationship of journalism and democracy certainly does. The essential roles journalists play require them to be ethical. Citizens must be informed in a democracy; if those citizens do not find the media credible or if the media do not report in an ethical manner, democracy as it exists in the United States will be in trouble.

What also should not be overlooked here is that journalists play a significant role in American political life and that they wield a powerful tool. After almost 100 years of research on the effects media have on its readers or viewers, scholars are divided on the extent of that impact. Lippmann's "pictures in our heads" statement is worth enlarging. The media help people construct their view of the world through the images portrayed in newspapers and on the television news. In fact, the media are responsible for the perceptions most people have of the world beyond their own experiences.

If the media focus disproportionately on crime, if they splash murder after murder on the front page or at the top of each newscast and fail to point out that the number of murders is actually 25 percent lower than at the same time last year, news consumers grow more concerned about safety and critical of their city leaders who are failing to deliver on their pledges of safe communities. If the media focus their coverage on white leaders, white business officials, white schools, and the white community, readers and viewers will fail to understand they live in a diverse community. Even those who refuse to read newspapers or show no interest in television news will learn of these perceptions through their families, friends, and coworkers who do pay attention to the media.

## Why Journalism's Ethical Problems Are Different

Ethical problems are not the province only of journalists. Public officials, lawyers, doctors, the clergy, law enforcement professionals, scientists, and educators all encounter ethical dilemmas. Two factors, however, make journalism ethics different.

First, journalists alone are able to shape public values and mold public opinion about the values to which they should be held on a broader scale. The media cover and comment on the ethical dilemmas and lapses of others daily as part of their job. This is critical because certain elements of the press have tended to have undue influence. And lapses by the *New York Times* and *60 Minutes*, for example, two of the most respected elements of the American mass media, have led to widespread dissent and second-guessing. For the media, however, no "other" voice critiques its work in a way that can influence public opinion to the same extent. Politicians who take on the media do not often succeed. Media purists argue that the media should critique themselves and report on their own lapses. But the media's poor performance on Election Day 2000 received little public airing as the media rushed to cover the unsettled election between George W. Bush and Al Gore.

Second and conversely, the choices lawyers, doctors, police, prosecutors, and the others make as results of the dilemmas they face come under public scrutiny only occasionally. While politicians and business people may commit their ethical lapses behind closed doors, the media's lapses are often plastered across the front page or recounted on the evening news. As a result of the pervasive reach of media today, the public has become increasingly suspicious of the way reporters and editors do their jobs. As one media ethics text points out:

How well journalists have met their responsibilities is a judgment call open to scrutiny with the production of every story. The primary news critics—the subjects and consumers of the resulting news story—do not hesitate to voice judgments about the rights and wrongs of journalistic action. Thus, the practice of journalism ethics begins. No other professional behavior is as open to scrutiny by those working in the profession, those who are used by the profession, and those who consume the final products.<sup>32</sup>

The cry for journalistic responsibility is not new. It dates back decades. In response to concerns about the printed press, the Hutchins Commission, comprised of an impressive array of scholars and experts, issued a report in 1947 that listed five requirements for a responsible press. "The five requirements (listed below) suggest what our society is entitled to demand of its press," the report said.<sup>33</sup>

- "A truthful, comprehensive and intelligent account of the day's events in context which gives them meaning." In other words, the media's reporting must be accurate. Reporters and editors must also be trained and competent, able to choose the most authoritative sources for a story and to separate fact from opinion.
- "A forum for the exchange of comment and criticism." The media must view themselves as carriers of public discussion, willing to publicize viewpoints that are contrary to their own.

- “The projection of a representative picture of the constituent groups in the society.” The media should portray society as the pluralistic mix that it is, not ignoring members of any race, gender or religion. At the same time, reporting should not fall into stereotypical roles.
- “The presentation and clarification of the goals and values of the society.” The media, recognized for reporting heavily on the failings of people and government, should assume an educational role in clarifying the ideas toward which a democratic community should strive.
- “Full access to the day’s intelligence.” Citizens in a modern society require vast amounts of information. That information should not be available only to a few but the media should widely disseminate it.

The report of the Hutchins Commission was not welcomed by the media. The report concluded that the press must be accountable if it was to remain free.<sup>34</sup> Journalists, of course, believe that the First Amendment guaranteed the press would remain free of government controls. But one result of that report was the creation of newspaper ombudsmen, employees of newspapers who critiqued the newspapers’ performance and listened to and evaluated complaints from readers and those who were subjects of stories.

Another factor in the public’s perception of unethical media is related to the growing breadth of media outlets. As the 20th century dawned, the public depended solely on the newspapers for news. Twenty years later, along came radio and stations began reporting the news. Thirty years after that, television was born and owners soon found they could make money producing news. Cable television came next, and around-the-clock news resulted, along with competition with and among the three major television networks.

Soon entertainment news filled the network line-ups. The century ended with the birth of the Internet and the capacity for almost anyone to set up a Web page filled with “news,” even if some of that news is, as critics maintain, biased opinion masquerading as news.

Online journalists often work far outside the code of ethics that more traditional journalists and media outlets endorse. Still, they claim to be “media” and the public does not always draw a line when expressing disgust with the ethics of those who provide information. People with conservative philosophies rail against what they perceive as the liberal bent of some media outlets while people with liberal philosophies rail against what they perceive as the conservative bent of others.

## Approaches to Ethics

A number of approaches exist for ethical decision making. One system classifies the approaches as teleological and deontological. Teleological principles measure the ethical nature of a decision by weighing the alternatives, considering the consequences and speculating about the outcomes. The ethical decision is the one that produces the greater good, presumably for the most people, or alternatively, the greater good for the decision



maker. Stealing is not wrong when it means a starving child gets food. Lying is not wrong if it means a would-be killer is misled about the whereabouts of an intended victim.

Journalists go about their work reporting and editing with the intent of serving society, providing information they believe is essential for citizens in the representative form of government of the United States. One of the attractions of this form of ethics is its process. It assumes journalists are thinking people who carefully weigh alternatives and choose courses that are most beneficial to society or the community. It exalts the role of a journalist.

But critics argue that a teleological approach requires some form of omniscience. The decision maker must be able to accurately predict the outcomes of the choices in order to make the right decision. For example, reporter Smith learns that police have figured out that a serial killer lures victims from a particular park and strikes only on the third Friday of the month just after sundown. Police beg the reporter not to print this information because it will warn the killer that police have figured out his *modus operandi*. But not printing the story also means that unsuspecting park goers are at risk. If the reporter cooperates with police and the serial killer is caught before another victim dies, then not running the story appears to have been the right decision. But if the killer strikes the next time on the second Friday and lures a victim from the same park, or strikes a victim on the third Friday in a different section of the park, the reporter's decision had a horrifying outcome. Even if withholding the information ultimately led to the serial killer's capture, the death of an additional victim makes the reporter's decision not to warn the public at best highly problematic and at worst a blatant betrayal of the reporter's public trust.

On the other hand, if the reporter prints the information and the serial killer begins luring victims from another park because he knows the police are on to him, the reporter has again acted in a way that appears to have contributed to the deaths of others.

Another teleological dilemma occurs if the reporter learns the *modus operandi* from a regular source, a police investigator who discloses the information during a conversation he believes is confidential as similar ones have been in the past. Now the reporter must decide whether the greater good is served by betraying the confidence of a source with the intention of warning the public and scooping the competition or by protecting the source and relying on the police to prevent another murder.

But what if the reporter recognizes that this scoop would likely bring a pay raise as newsroom evaluations are just around the corner? The reporter must decide whether the greater good outweighs his possible advantage, regardless of the consequences to the investigator or the seemingly unlikely result that someone's life could be in danger.

By its nature, journalism (and the journalist, by extension) is supposed to serve the public, so any ethical dilemma in which a reporter or editor chooses personal gain ahead of societal good is not ethical journalism, even if it might be good for the career of the reporter. And that is another major weakness of the teleological approach.

By contrast, the deontological approach looks not at the results but at the nature of the act itself. It holds that some activities are inherently wrong. To lie, to deceive, to kill, to steal, for example, are all wrong. The deontological approach is generally grounded in faith or religion, in the belief that God has fixed some behavior as

wrong and transmitted that decree to human beings through sacred writings such as the Bible, the Torah or the Koran, or a religion's prophets.

In turn, a journalist sees his duty as doing that which is right in the pursuit of the story. For a deontologist, the end never justifies the means. It is wrong to lie, so a reporter should never give someone his word that he will keep information confidential and then print it. At the same time, journalists believe they have an obligation to present the news, not to withhold it. If publishing or broadcasting a story has unpleasant consequences, the outcome is outside the journalist's responsibility. The public depends upon the media to report information and report it accurately. Journalists are not in the business of keeping secrets from the public.

A journalist who follows the deontological approach would present the information to the public that the police had figured out how the serial killer operates *unless* he had received the information in a confidential manner. Even then, he would struggle to convince the source to allow him to write the story so that the public could be warned of the danger.

Journalism is not a profession practiced by bodies lacking consciences, souls, or values. A reporter's own values are put to a test time after time in ethical dilemmas.

Many reporters studied to be journalists because of deep personal commitments to truth, justice, freedom, and humanitarianism. Some of the nation's most revered journalists such as Edward R. Murrow are associated with these traits and values. Those personal values form the basis of a reporter's ethical behavior. In many ways, journalism could be more ethical if it could be limited to people who shared deep commitments to ethical values.

In any event, deontology and teleology are simply approaches. They are not even sure-fire methods of resolving ethical dilemmas. Sometimes, as Edmund Lambeth points out in his book on journalism ethics, the approaches can lead journalists to the same result but for different reasons.<sup>35</sup> And for the most part, these approaches provide only a way to reason through a dilemma. Many ethical situations call for journalists to evaluate outcomes, set priorities, and strive to be fair. It is seldom an easy call.

## Ethics Codes

One result of the ethical dilemma journalists often faced was the development of codes of ethics. The first American code was developed in 1910 by the state press association of Kansas, a code that applied to both editors and publishers.<sup>36</sup> The Canons of Journalism were adopted in 1923 by the American Society of Newspaper Editors, just after embarrassing revelations about the role of some journalists in the Teapot Dome Scandal under the administration of President Warren G. Harding. Since that time, a number of professional organizations have developed codes, as have many newspaper publishing and broadcasting groups. The former are simply advisory. You are not likely to be kicked out of the Society of Professional Journalists or the Radio–Television News Director's Association for an ethical violation. Media owners can be much more aggressive in enforcing their codes. For example, running for political office will almost certainly mean that a journalist loses his or her reporting or editing job.

## A Reporter's Duty

The codes usually begin by talking about the role of journalism and the duties of a journalist. "(P)ublic enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty" (see Appendix A: Society of Professional Journalists Code of Ethics).

"The National Press Photographers Association . . . acknowledges concern and respect for the natural-law right of freedom in searching for the truth and the right to be informed truthfully and completely about public events and the world in which we live" (see Appendix B: National Press Photographers Association Code of Ethics).

"The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. . . . The American press was made free not just to inform or serve as a forum for debate but also to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government" (see Appendix C: American Society of Newspaper Editors Statement of Principles).

"The responsibility of radio and television journalists is to gather and report information of importance and interest to the public accurately, honestly, and impartially" (see Appendix D: Radio–Television News Directors Association Code of Broadcast News Ethics).

## The Journalist's Code

Each code addresses the most important issues in a different way.<sup>37</sup> The Society of Professional Journalists' code addresses the responsibility of a journalist *to seek truth and report it*, stressing the obligation to report accurately, test the accuracy of sources, seek out all sides diligently, identify sources "whenever feasible," not use undercover or surreptitious means except if it is the only alternative to obtain information deemed vital to the public. The second paragraph urges journalists *to minimize harm*, showing compassion and sensitivity toward those affected by grief and tragedy, urging the use of good taste, exercising caution before identifying juveniles who are accused of sex crimes or are victims of sex crimes or before identifying those who are suspected of crimes before formal charges are filed, and balancing the right of a criminal to a fair trial with the right of the public to be informed. The third paragraph advises journalists *to act independently*, avoiding conflicts of interest or disclosing any that are unavoidable, refusing gifts or favors, and being diligent to hold those in power accountable for their actions. The final paragraphs suggest that journalists should *be accountable* to their readers and to each other, suggesting journalists should acknowledge mistakes promptly and correct them, expose unethical practices of other journalists and media, and live by the same high standards to which they hold others.

The American Society of Newspaper Editors' statement of principles parallels the SPJ code on many issues. It addresses the independence of journalists and

the requirements for truth and accuracy, balanced reporting, and fair play. It also includes a paragraph addressing freedom of the press.

The broadcasters' code also addresses many of the same issues, stressing the need to be "balanced, accurate and fair," as well as free from conflicts of interest. Broadcasters are warned to clearly label opinion and commentary, an effort to ensure that viewers and listeners understand where news begins and ends. They are also urged to air the materials of other broadcasters only with permission.

The ethics code of the National Press Photographers emphasizes the responsibility of photographers "at all times to strive for pictures that report truthfully, honestly and objectively." It also includes a statement about manipulation of photographs: "[W]e believe it is wrong to alter the content of a photograph in any way that deceives the public."

## Being Ethical

Ed Lambeth, who originated a national workshop on the teaching of ethics in journalism, outlined five ethical principles for journalists:

- Be truthful, which covers being unbiased, accurate and competent.
- Be just, which means being fair, treating with caution highly emotional issues and examining government decisions to see that they are just to others.
- Be free, which covers a reporter's autonomy from government and other social sources such as advertising and business and "use" by any source.
- Be humane, which involves assisting others and is defined as "the very minimum that one human owes another."
- Be a good steward, which Lambeth defined as "the responsibility to manage his life and property with proper regard to the rights of others. . . ." To this end, journalists must guard the rights of free press and speech for, as Lambeth points out, "These rights belong to all, though they are exercised more frequently by the press than others."<sup>38</sup>

## Ethical Issues

The list of issues that have created ethical problems for the media is endless.

On September 11, 2001, four jets were hijacked in the United States almost simultaneously. One crashed into the Pentagon in Washington, D.C., and a second crashed in southeastern Pennsylvania after passengers overwhelmed the hijackers. The other two jets were flown into the twin towers of the World Trade Center. Filled with jet fuel for transcontinental flights, the planes brought an inferno to the buildings, killing more than 2,800 people. Some of those trapped on the upper stories chose to jump 100 stories to their death rather than be burned to death. A picture of several people jumping appeared in newspapers, and video of the action was shown several times on television. The pictures brought cries of sensationalism

from readers and viewers, but their use was defended on the grounds that the faces of the jumpers were indistinguishable. The media also argued the pictures conveyed the horror experienced by those trapped in a way that words could not.

The events of that day led President George W. Bush to declare war against terrorists, ultimately leading to invasions of Afghanistan and Iraq. Flags flew everywhere and patriotism surged throughout the country. A debate began over how patriotic the media should be. At the University of Missouri in Columbia, the university-owned NBC affiliate station debated whether anchors should be permitted to wear American flags on their lapels during delivery of the news. Some newspapers published flags on their mastheads or even a full-page flag that could be displayed in a window. Reuters would not allow reporters to refer to the September 11 hijackers as terrorists. In the face of criticism, CNN decided to balance reports of civilian casualties in Afghanistan with reminders of the death toll in the United States on September 11.<sup>39</sup>

One of the greatest outrages inflicted by the American system of justice also brought shame on the media in March 2006. Michael Nifong, a prosecutor in North Carolina armed with little evidence, publicly tarred the reputations of three Duke University lacrosse players and boldly proclaimed that a young black woman, a stripper paid to attend a team party, had been raped. He called the lacrosse players “hooligans.”

Kelly McBride, who writes about media ethics for the Poynter Institute, described what happened as the media learned about the story: “Commentators and pundits on television, in print, on the radio and, of course, on the Internet then magnified an already distorted reality by shouting over each other. In their attempt to shed light, they lit a fire of public scorn.”<sup>40</sup>

The Duke students were indicted even as Nifong’s case was imploding. Justice was served a year later when he resigned his office and was disbarred. If Nifong was the perpetrator, he had accomplices. “Fueled by Nifong, the media quickly latched onto a narrative too seductive to check: rich, wild, white jocks had brutalized a working-class, black mother of two,” according to “Justice Delayed,” written by Rachel Smolkin, managing editor of the *American Journalism Review*.<sup>41</sup> Broadcasters and newspaper columnists talked and wrote as if the players had already been convicted. Because the accused would not grant interviews, most of the coverage was totally unbalanced.

Ignoring the lessons of the 1996 Centennial Olympic Park bombing, in which media outlets identified incorrectly a security guard who was the hero of the bombing as the focus of the investigation, reporters continued to write stories based on Nifong’s overblown and baseless accusations. In the *American Journalism Review* retrospective, several editors stressed the need to more skeptically evaluate statements made by investigators and prosecutors.

A television investigation that has raised ethical questions is NBC’s “To Catch a Predator.” *Dateline*, the network’s news magazine, collaborated with Perverted Justice, whose members pose as children on the Internet to identify adult predators. The news team essentially created a sting. Perverted Justice members entered Internet chat rooms, engaged men looking to have sex with young teens and set up an encounter. Waiting at the house where the men were lured was *Dateline*. After the

encounter was filmed and the suspect shamed and interviewed, he walked outside where he was arrested.

Two questions have arisen. First, is it proper for journalists to work essentially as an arm of law enforcement? For one episode in Greenville, Ohio, police deputized members of Perverted Justice so that the evidence they gathered could be used in court. McBride, the ethics specialist for the Poynter Institute, told the *Los Angeles Times*, “By working with a group that has been deputized, *Dateline* is essentially partnering with local law enforcement. Even if the outcome is a desirable outcome, in the long run it undermines their ability to serve as a watchdog.”<sup>42</sup>

The other issue that has raised ethical issues is the money that *Dateline* has paid Perverted Justice to assist in the sting. NBC’s senior producer of the segments, Allan Maraynes, said that the network had no qualms about the expenditure. “We’ve raised the public’s consciousness of a very serious issue,” he told the *Washington Post*. “We think we’ve created a model [for reporting on Internet pedophilia] that accurately reflects what happens in real life.”<sup>43</sup>

In its 2004 post-election survey, the Pew Research Center for the People and the Press found increasing voter anger over what voters see as the media’s unfair treatment of political candidates. Almost four in ten of those surveyed believed the media were unfair to Republican candidate George W. Bush, while three in ten felt the media were unfair to Democratic candidate John Kerry. Both unfair measures are 10 percentage points higher than those cited for Bush and former Vice President Al Gore in 2000.<sup>44</sup>

Those perceptions were probably buoyed by a report issued in June 2007 by MSNBC that it had found 143 journalists who had given money to political candidates since 2004.<sup>45</sup> Some news organizations have ethics codes that prohibit contributions to candidates or working on behalf of the candidates. Some news organizations do not.

In response to the story, the Kentucky Republican Party issued a call for the dismissal of the copy desk chief for the *Lexington Herald-Leader*, who donated \$250 to the campaign of 2004 Democratic presidential nominee John Kerry. The editor of the newspaper said the employee had not violated the newspaper’s policy and would not be fired. She also said the newspaper would review its policy on political contributions.<sup>46</sup>

The Society of Professional Journalists, one of the nation’s oldest and largest journalism-advocacy organizations, said journalists who give money to candidates violate the society’s ethics code, which says the news media should “abide by the same high standards to which they hold others.”

Hagerstown, MD, reporter Andrew Schotz, chairman of SPJ’s ethics committee, said, “Contributing to a political cause clearly damages the credibility of anyone who professes to be a detached reporter of events . . . (I)t’s disturbing to see that so many journalists don’t see the problem here. It’s also unfortunate that so few media organizations have communicated a clear policy to their employees, if they even have a policy at all.

“Ethical journalists sacrifice rights of activism and affiliation that the public at-large has. The degree to which we excuse ourselves from community involvement remains a personal choice and a workplace policy. But we encourage journalists to

think through their commitments before they make them and to err on the side of neutrality,” Schotz said in SPJ’s press release.<sup>47</sup>

Some ethical issues are dealt with routinely by journalists.

## Plagiarism

Plagiarism is using the work of another and representing it as your own. The ethics committee of the American Society of Newspaper Editors reported in 1986 that one of every six editors encountered plagiarism in the newsroom. But plenty of more recent examples exist. Two distinct issues are involved. One is taking material published elsewhere and using it as your own. Sometimes this involves copying a statement a news source made to a reporter and publishing it as though the statement were made to another reporter. Sometimes it involves taking and publishing material already published by one media outlet when a reporter simply does not have time to research and write the information on deadline. In any case, stealing material from another reporter or publication is always unethical. The *American Journalism Review* in March 2001 reported on these plagiarism revelations of the media:<sup>48</sup>

1. *The Sacramento Bee* fired political reporter Dennis Love a few weeks after the 2000 election for plagiarizing and fabricating material in his stories on the presidential campaign. He acknowledged “borrowing” material from *U.S. News & World Report*, *USA Today*, the *Boston Globe*, and the *Dallas Morning News*.
2. Medill News Service reported it could not verify information in two stories reported by a student journalist. *American Journalism Review* reported that newspapers where the student interned—the *San Jose Mercury News*, the *Philadelphia Daily News*, and the *San Francisco Examiner*—could not locate sources from stories the intern wrote.
3. The *Detroit News* admitted it lifted a paragraph from the pages of a suburban newspaper.
4. The *San Jose Mercury News* fired an intern for plagiarizing material from the *Washington Post* and the *San Francisco Chronicle*.
5. *Business Week* fired Marcia Stepanek, a 20-year reporter, because she plagiarized material from the *Washington Post*.
6. *South Carolina Sun’s* feature editor resigned after evidence was found that she plagiarized material in her weekly books column and cooking column.
7. In May 1998, the *New Republic* fired Stephen Glass and later reported it found evidence that he fabricated material in 27 of the 41 articles he wrote for the magazine.

Plagiarism obviously is more widespread than these examples. In newsrooms already strapped by financial constraints that have reduced their reporting and editing staffs, it is almost unthinkable that a staff member might be assigned to check stories for

material lifted from other publications or to call sources in stories to confirm that they were interviewed by the newspaper's reporter.

The second plagiarism issue is fabrication, inventing a person or a story. The most famous case is "Jimmy's World," the story for which Janet Cooke, a 26-year-old reporter for the *Washington Post*, won the 1981 Pulitzer Prize. The story described the life of an 8-year old inner-city heroin addict. Washington police could not locate the boy after an extensive search, and Cooke refused to tell police where they could find him because of her pledge of confidentiality. When the prize was announced, reporters found holes in Cooke's resume, which led to questions about her story. There was no Jimmy; she claimed he was a composite of the lives of inner-city drug addicts she had found in her reporting. The newspaper returned the Pulitzer, and Cooke was out of work.

Unfortunately, other notable instances of fabrication exist in the annals of American journalism. Patricia Smith, an award-winning columnist for the *Boston Daily Globe*, resigned in 1998. Questions were raised about 52 columns she wrote. She admitted to an editor that she invented four of the characters who appeared in her columns.<sup>49</sup>

Smith, of course, is not the first columnist who has written about people who did not exist. The late Mike Royko, a legendary Chicago columnist, used the device regularly; the difference is that readers knew Royko's foils were fictional. Patricia Smith passed off her characters—just as Janet Cooke passed off her character—as living, breathing people.

What has made plagiarism such a widespread offense today is the Internet. Newspaper stories are available nationwide within moments of publication of the printed versions. Now a reporter in Los Angeles writing a story about anthrax found in a Senate office building can read what a reporter wrote about the story in Washington. But the availability also makes it more likely that plagiarists will be caught. *AJR* reported that the *Sacramento Bee* searched the Internet for a review it published about a Shania Twain concert. The newspaper reported it popped up on about 100 Web sites, most of them fan sites and music pages.<sup>50</sup>

The practice of "borrowing" from other reporters is as wrong as cheating on an exam in a college class. However, differentiating between plagiarism and research is often difficult. Events in a news story can't be copyrighted like a novel. And it is fairly easy to rewrite information in your own words. Here are situations reporters sometimes face:

1. Using material from a newspaper's own library of previously published stories. Reporters should paraphrase the material rather than quote it verbatim. It is also appropriate, if the material was original and not re-reported repeatedly, to introduce the material by writing that the newspaper reported the material on the date it was published. This avoids any implication that the reporter whose byline appears on the new story originated this information.
2. Using material from a wire service. Newspapers routinely localize national and state stories from wire services. This involves finding



local aspects of the story or local examples. Even if more than half of the information is produced by the newspaper, the wire service should be credited in the body of the story with a trailer at the end that makes it clear information in the story was produced by the wire service.

3. Using the work of a fellow reporter without giving the reporter credit. News outlets have different standards for how this is handled, but if plagiarism means taking someone else's work and claiming it as your own, then reporters who contribute to any degree deserve credit—either a joint byline or a credit at the bottom of the story.
4. Using material from other publications. Reporters should first try to confirm this information. However, if the source is not available or deadlines make independent confirmation impossible, then reporters and editors should choose either not to use the information or to credit the media outlet that reported the information.
5. Using unedited news releases or news videos. The companies and individuals who send them out are delighted to see them on the air or in print and are not likely to complain. But reporting requires independent work, and accepting at face value material from a source without checking it is a violation of the trust between a newspaper and its readers or a broadcaster and the audience. Running such items without checking them also puts the media at risk of becoming victims of a hoax. It is not hard today with faxes and computer graphics to mimic a company letterhead and invent a press release.
6. Using old stories or columns a second time. Recycling material is certainly not a new problem. Newspapers routinely republish the classic "Yes, Virginia, There Is a Santa Claus" column. Ethically, the only problem is passing old material off as new. Readers have a right to know they are reading recycled material, and they probably are not going to object to reading old columns when a columnist goes on vacation or sick leave if they are told that is what they are reading.

## Accepting Gifts and Trips

The issue here is receiving anything as a gift that would tend to make a reporter or editor feel he or she owes the source something. Even something that creates good will for the source should be suspect. Reporters should never allow sources to buy them food or drinks or "sponsor" coverage. It sends the wrong message. Media outlets should give reporters expense money if they expect reporters to have lunch regularly with sources or attend all-expenses-paid meetings in exotic locales.

Reporters and editors should never accept gifts from sources for Christmas, other holidays, or birthdays. Yes, Christmas may be the season for giving and good will, but the reporter will then find it uncomfortable after he accepts a tie from the mayor to write about the mayor's inflated expense account if the tie is one of the items on the tab. It once was not uncommon for a reporter to come back from city hall the week before Christmas with bottles of liquor from the mayor, city manager, or county judge. Today, conduct like that is considered highly unethical.

These gifts may or may not be given in expectation of favorable coverage. Even if that is not the case, it will be hard to explain to a media audience that a reporter was not influenced favorably by a gift. And if the mayor has an opponent in the next election, the opponent would certainly be angered if he learned about the gift and would interpret it as evidence the reporter is too cozy with the incumbent to cover the race fairly.

The appearance of impropriety is just as dangerous to the credibility of a journalist as impropriety. Journalists must not only act ethically; they must also appear ethical.

The scale may be dramatically different, but the principle is akin to an issue journalists raise all the time about the relationships of candidates, campaign contributions, and the influence those contributions have on officials' positions. As is always the case with ethical issues, it is not enough to be accurate, fair, and balanced. A reporter must also appear accurate, fair, and balanced. That makes ethical conduct even more critical. Ralph Otwell, former managing editor of the *Chicago Sun-Times*, summed up the issue for *Editor & Publisher* in an article in 1974.

But in the performance of our journalistic jobs there is more than a conscience to be served; it is not enough to know down deep inside that you are not being bought or influenced, that the "freebie" has not dulled your critical senses or lulled your watchful vigilance. The conflict of interest might not be felt on the inside . . . but it may be imagined or perceived on the outside. And there is the rub . . . the point where self-image and self-confidence end and public confidence begins.<sup>51</sup>

The problem involves more than beat reporters eating lunches paid for by city council members. What is the effect if the sponsors of major sporting events throw a press party complete with food and drink the night before an extravaganza? Or if the television networks make television stars available for interviews weeks before the fall program season begins? Or if airlines initiate international flights by offering local reporters free rides on maiden voyages? Or if food companies supply food editors with new lines of frozen entrees for tasting? This is not a new problem. Consider this statement almost 20 years ago by Charles Long, then editor of the *Quill*, the SPJ magazine:

There's nothing new about the "freebie game." It is being played all the time and shows up in hundreds of different places and with varying sets of rules. Freebies—meaning token as well as expensive gifts, tickets to events large and small, junkets to simple and exotic places—have been floating in and about newsroom operations for as long as there has been a way of saying thanks for good publicity.<sup>52</sup>

One of the biggest examples of the freebie game was Disney World's invitation in 1986 to thousands of journalists to go to Florida to celebrate the park's 15th anniversary and the Constitution's 200th birthday. Some 5,000 journalists (each could bring one guest) generated lots of free publicity for Disney. The junket cost about \$7.5 million and a financial arm of the Walt Disney Co. paid \$1.5 million of that. All areas of the tourist industry—hotels, convention bureaus, even state and local governments—kicked in. Journalists who insisted on paying for part of it were billed \$150 and some paid their own ways. Disney estimated that television and radio crews broadcast more than 1,000 hours of coverage while they attended the park's anniversary. Disney's media relations division also supplied plenty of press releases to the reporters, talk show hosts, travel writers, radio disk jockeys, and magazine writers to read on the plane rides home.<sup>53</sup>

## Checkbook Journalism

Another practice that journalists frown on is purchasing information; such an accusation generally is regarded as a slur. It is not, however, an obsolete practice.<sup>54</sup> In the spring of 2001, ABC News tested a claim of a former New York City police commissioner that many rapists go unidentified because law enforcement departments lack the money to pay for DNA tests. The network paid for Baltimore's police department to have evidence scientifically analyzed in 50 rape cases. As a result, four men were charged in unsolved cases involving rape and murder. A man who had been imprisoned for three months was released, exonerated by the DNA analysis. Attempts by some broadcast stations to uncover illegal activity by setting up independent "sting" operations have sometimes backfired and raised ethical and legal questions.

Another outcome was the result of information purchased by Larry Flynt, publisher of *Hustler Magazine*. In October 1998, Flynt placed an ad in the *Washington Post* offering up to \$1 million to the person who could provide evidence that a member of Congress had carried on an adulterous affair. Before the year ended, Flynt had the evidence he sought. Rep. Bob Livingston, R-La., who already had been chosen to serve as Speaker of the House of Representatives, abruptly resigned.<sup>55</sup>

## The Reporter's Privilege

No issue straddles the worlds of journalism ethics and media law more than the issue known as reporter's privilege. Journalists believe they have an ethical duty to protect the identities of sources to whom they pledge confidentiality—they have given their word and they must keep it. The SPJ Code of Ethics speaks to that obligation:

Always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.

Journalists argue that they should be allowed to protect the identities of confidential sources because often a pledge of confidentiality is the only way the media are able to tell stories. Even though the Supreme Court ruled that all citizens have duties to tell whatever they know to a grand jury, journalists argue that doing so will hurt the public by diminishing the ability of journalists to fulfill the watchdog role of the

media. The First Amendment is not a private right of journalists to be above the law; it is a right given to ensure the continued function of the media on behalf of the public, intending that the public will be exposed to more information about the conduct of government at all levels as a result.

Many journalists have refused to reveal the identities of their sources even when ordered to do so by judges who believe the law requires the journalists to testify about what they know before a grand jury or in a libel trial. Using a confidential source can prove problematic for a journalist if a lawyer comes knocking on the door with a subpoena in hand, demanding to know the identity of an informant. Here are some examples.

Marie Torre, the entertainment columnist for the *New York Herald-Tribune*, reported comments in 1957 of an anonymous CBS executive that singer-actress Judy Garland said libeled her.<sup>56</sup> Garland sued CBS, and when her lawyer deposed the reporter, Torre refused to reveal her source and was found in contempt of court. Torre, who had two small children, spent 10 days in jail, but Garland never learned the identity of her critic from the reporter. Torre was one of the first journalists to win national attention for refusing to identify a source.<sup>57</sup>

National Public Radio legal affairs correspondent Nina Totenberg and *Newsday* reporter Tim Phelps were asked in 1992 by a special independent counsel how they received a copy of a confidential affidavit sent to the Senate Judiciary Committee. The document outlined law professor Anita Hill's claims of sexual harassment against then-U.S. Appeals Court Judge Clarence Thomas. The memo surfaced during hearings for Thomas, who had been nominated for the Supreme Court of the United States.<sup>58</sup> The reporters refused to answer; the independent counsel threatened contempt, but the reporters sat silent. U.S. Senators Wendell Ford, D-Ky., and Ted Stevens, R-Alaska, the chairman and ranking member of the Senate Rules Committee, rebuffed efforts of the independent counsel to hold the reporters in contempt of Congress.<sup>59</sup>

Wally Wakefield, a 74-year-old retired elementary school teacher who covered high school sports for a Minnesota weekly newspaper, was fined \$200 per day for refusing to identify his source in a story that reported the firing of a high school football coach. The coach's contract was not renewed after accusations of misconduct and maltreatment of players surfaced, according to court records. The state Supreme Court ordered Wakefield to identify his source after the coach sued the school district for libel, but Wakefield refused. Reporters in Minnesota raised about \$24,000 to pay the fine.<sup>60</sup> The former coach and the school board settled their lawsuit out of court in 1994, stopping the fine for Wakefield at \$18,200.<sup>61</sup>

The battle over confidential sources escalated after the turn of the century. The most publicized was intertwined with the U.S. invasion of Iraq. The CIA dispatched Joseph C. Wilson IV, a former ambassador, to Niger in February 2002 to investigate whether Iraq had tried to buy uranium in that country. The uranium issue was part of the Bush administration's justification for the invasion of Iraq. After U.S. troops toppled Saddam Hussein, Wilson wrote an opinion piece published by the *New York Times* on July 6, 2003, arguing that President Bush misled the country because Wilson had found no evidence that Iraqi agents had gone to Niger.<sup>62</sup> A week later,

*Chicago Sun-Times* columnist Robert Novak wrote that administration sources had told him Wilson was chosen for the trip because of the influence of his wife, Valerie Plame, a CIA agent.<sup>63</sup>

It can be a federal crime for a government employee to reveal the identity of a secret government agent. A special prosecutor was appointed and a grand jury empaneled to identify the source of that leak. A number of reporters were subpoenaed, among them Tim Russert of NBC's *Meet the Press* and Matthew Cooper of *Time* magazine.<sup>64</sup> Four months later, a federal judge held Cooper in contempt and ordered that he be jailed and fined \$1,000 per day until he testified. The judge suspended the penalties while Cooper appealed. NBC said that Russert had testified, but he had not been told about Plame's work for the CIA.<sup>65</sup>

*Washington Post* reporter Walter Pincus, who had covered national security and intelligence for the *Washington Post* for 30 years, gave a deposition about his conversation with his source; he refused to identify his source even though the source had identified himself to the special prosecutor.<sup>66</sup>

*New York Times* reporter Judith Miller, who never wrote about what sources told her about Wilson and Plame, also was subpoenaed, found in contempt when she refused to testify, and with Cooper appealed the judge's decision to the U.S. Court of Appeals.<sup>67</sup> After the Court of Appeals upheld the contempt decision and the Supreme Court refused to review it,<sup>68</sup> *Time* announced the magazine would turn over Cooper's notes to the prosecutor, a decision that brought howls of protest from journalists.<sup>69</sup>

Before Cooper went to jail, however, his source, presidential adviser Karl Rove, waived the confidentiality agreement.<sup>70</sup> Judith Miller, however, was sent to jail for 85 days before finally agreeing to testify after she had tangible evidence her source waived his right to anonymity. "If journalists cannot be trusted to guarantee confidentiality," she told Judge Thomas F. Hogan before she was taken into custody, "then journalists cannot function and there cannot be a free press."<sup>71</sup>

In the end, no one was indicted for revealing the name of a covert agent. However, Lewis "Scooter" Libby, chief of staff for Vice President Dick Cheney who had been Miller's source, was convicted of perjury before the grand jury investigating the leak.

A different outcome resulted from subpoenas issued reporters who published stories about Wen Ho Lee, a scientist at the Los Alamos National Laboratory in New Mexico. Lee, indicted on 59 counts of mishandling classified information and accused of transferring nuclear weapons technology to China, eventually pled guilty to one count and the other 58 were dismissed. A federal judge apologized for the way the government had treated him.

Lee sued the U.S. Department of Justice in 1999 contending the government had violated his privacy by telling reporters about his employment history, finances, travels, and polygraph tests.<sup>72</sup> He subpoenaed reporters for the *Los Angeles Times*, the *New York Times*, the *Washington Post*, the Associated Press, and CNN. (The CNN reporter later went to work for ABC News.) Lee's attorney sought to learn the sources of the information they had published or broadcast, but the reporters refused and were found in contempt. The U.S. Court of Appeals in Washington, D.C., upheld that ruling in June 2005.<sup>73</sup>

In a dramatic conclusion to the lawsuit, the government and five news organizations agreed to pay Lee more than \$1.6 million. Henry Hoberman, a senior vice president of ABC, explained this startling development. “The journalists found themselves between a rock and a hard place. Given the absence of a federal shield law and the consistently adverse rulings from the federal courts in this case, the only way the journalists could keep their bond with their sources and avoid further sanctions, which might include jail time, was to contribute to a settlement between the government and Wen Ho Lee that would end the case.”<sup>74</sup>

A television reporter was sentenced to six months of home incarceration for his refusal to identify the person who gave him a videotape that his station then broadcast. The federal judge who sentenced him said the only reason the reporter was not going to jail was concern about his health.

WJAR, a Providence, Rhode Island, affiliate of NBC, aired the tape on February 1, 2001. It showed a top aide to the city’s mayor accepting a \$1,000 bribe. At the time, the senior U.S. district judge had issued an order banning dissemination of the FBI tape by members of the prosecution and defense teams. The protective order was issued to ensure fair trials for the mayor and his codefendants, who were later tried and convicted.

Jim Taricani, a veteran investigative reporter who has won four Emmys, received the videotape from a defense attorney whose client pled guilty before the trial. The judge ordered a special prosecutor to investigate the source of the tape, but interviews with 14 people failed to uncover the source. The judge then found Taricani in civil contempt and fined him \$1,000 for each day he continued to refuse to name his source. Taricani paid a fine of \$85,000, for which his employer reimbursed him. When Taricani still refused to turn over the information, the judge held Taricani in criminal contempt.

Before the reporter was sentenced, the attorney who handed over the videotape came forward and admitted his role. He also admitted he lied under oath to the special prosecutor. The judge still sentenced Taricani to home incarceration.

Before his sentencing, Taricani said, “I wish all my sources could be on the record, but when people are afraid, a promise of confidentiality may be the only way to get the information to the public, and in some cases, to protect the well-being of the source. I made a promise to my source, which I intend to keep.”<sup>75</sup>

The most famous anonymous source remains Deep Throat, a confidential source relied upon by *Washington Post* reporters Bob Woodward and Carl Bernstein in their investigation of the burglary of the Democratic National Headquarters in the Watergate Hotel and the subsequent cover-up that eventually resulted in the resignation of President Richard Nixon in 1974. In the *All the President’s Men* movie, Deep Throat was portrayed as a shadowy image standing in a parking garage, smoking a cigarette, and listening as Woodward begs for help. All Woodward’s leads had gone dead. Finally, Deep Throat said, “Just follow the money.”

Three decades later, the shadowy figure in the parking garage who helped Woodward and Bernstein unravel the Watergate cover-up has unmasked himself.<sup>76</sup> Despite White House pressure on the *Washington Post*, the impeachment proceedings and related hearings in Congress, and years of inquiries and speculations, Woodward and Bernstein consistently refused to reveal Deep Throat’s identity. Mark Felt, former

deputy director of the FBI, was identified in June 2005 as Deep Throat by his family in an article in *Vanity Fair*. Felt, then 91, was identified in part because his family believed he deserved to be honored for his actions while he was still alive.<sup>77</sup>

When journalists debate the unnamed source issue, Deep Throat is a trump card against those who want to ban confidential sources from all publications and television broadcasts. It is safe to say that no anonymous source played a more pivotal role on the national stage by unveiling government secrets than Deep Throat.

## The Case for Protecting Sources

Reporters refuse to disclose their sources, often even when a court orders them to do so, on two grounds: ethical, because they gave their word that they would not, and legal, because they believe the law gives them a special privilege to protect their sources' identities. A privilege, according to *Black's Law Dictionary*, is a "particular and peculiar benefit or advantage enjoyed by a person, company or class, beyond the common advantages of other citizens." In tort law, according to *Black's*, it is "the ability to act contrary to another individual's legal right without that individual having legal redress for the consequences of that defense."<sup>78</sup>

The law has long recognized that certain relationships are so personal that they deserve protection against disclosure of confidential communication. The law recognizes that discussion between a husband and wife, a lawyer and a client, a clergyman and a layman, or a doctor and a patient are so personal that they warrant unbroken confidentiality. A husband cannot be forced to testify against his wife, a lawyer cannot be forced to testify as to what a client confided, and a priest cannot be forced to testify what a penitent confessed.

Journalists argued as early as the colonial period that the law should recognize another privilege: the journalist's privilege to protect the confidentiality of sources. Printers in that era provided confidentiality to many contributors. Some of them even resisted demands of the legislative branch to reveal sources' names. They argued that journalistic ethics and their own livelihoods required them to avoid revealing the identities of confidential sources.

The public interest in good government also required journalists to protect those sources because some stories could be told only if reporters promised confidentiality to those who had information about government corruption. By the end of the 19th century, Maryland's legislature enacted the first journalist's privilege by statute. Today, 31 states and the District of Columbia have enacted reporter shield laws and courts in other states have recognized reporter's privilege under their state constitutions.

The terms of the protection offered journalists vary from state to state. For example, the Minnesota Supreme Court ruled the state shield law did not prevent the court from fining Wally Wakefield when he refused to disclose his source to a former coach who sued for libel.<sup>79</sup> On the other hand, the Arizona shield law was invoked by a reporter for the *Phoenix New Times* when he received a subpoena from a grand jury investigating the arson of a number of homes. The reporter had

met one of the arsonists for an hour-long interview after promising not to reveal the arsonist's identity. The article was published,<sup>80</sup> and the grand jury subpoena followed. The state judge quashed the subpoena, ruling the state's shield law protected the reporter.<sup>81</sup> The arsonist was arrested some time later.

The case for a privilege to protect confidential sources is best made by Bruce Sanford, one of the nation's leading media lawyers and a staunch defender of the First Amendment.

It is termed a "reporter's" privilege, but the authority under which reporters refuse to divulge sources and information, more than any other privilege recognized by United States courts, is "the people's" privilege. Unlike privileges for private communications between husband and wife, attorney and client, or doctor and patient, the reporter's privilege protects actions and communications that are undertaken for the express purpose of improving the public's access to information.

The main purpose of any evidentiary privilege is to encourage openness in certain relationships where such openness is deemed beneficial to society. We as a society want people to be able to speak frankly with their doctors and spouses without fear that their words will be subject to scrutiny in a court of law. In no case is the benefit to society so direct as when sources feel free to share important information with the press, and through it, with the public.

In a country where we have many freedoms, this particular freedom is essential because the success of our democratic government rests on the ability of citizens to make informed decisions about matters of public concern. Without reporters being able to have confidential communications with leaders in politics, business and other fields, the public will be deprived of information about what is *really* going on in their government and their world.

The reporter's privilege is repeatedly challenged. In particular, many chafe at the idea that reporters should receive "special treatment" by being exempt from civic duties. In my view, these people miss the point. The reporter's privilege is about elevating the public discourse, not the press' stature. And when this privilege is not recognized, the public—not the press—are the real losers.

## The Seminal Case

The 1960s and 1970s were turbulent decades in the United States. Turmoil boiled over amid the civil rights struggles and the murder of their leader, the assassinations of a president and a presidential candidate, the protracted conflict in Vietnam, and the Watergate scandal. In that environment, many reporters relied on confidential sources to report stories that otherwise would have gone unreported. Chief among them, of course, was the Watergate investigation of reporters Woodward and Bernstein.



From this era came the seminal Supreme Court decision on the right of reporters to protect the confidentiality of sources. The decision came in the context of four merged cases—*In re Pappas*,<sup>82</sup> *Caldwell v. United States*,<sup>83</sup> *Branzburg v. Meigs*<sup>84</sup> and *Branzburg v. Hayes*<sup>85</sup>—recorded under the latter title.<sup>86</sup>

Paul Pappas was an investigative reporter–photographer for WTEV-TV in New Bedford, Massachusetts. He was covering civil unrest, including fires and “other turmoil” in progress in New Bedford in July 1970. The Black Panthers, a radical black group, allowed Pappas to enter group headquarters on the condition he would not report anything he saw or heard inside. Two months later, a grand jury investigating the violence subpoenaed Pappas to testify about what he had seen and heard at the Black Panthers’ headquarters. Pappas refused. He was found in contempt in state court, and the state supreme court upheld the decision. He appealed to the U.S. Supreme Court.

Earl Caldwell was one of the black reporters who made his mark covering the civil rights era. A member of the *New York Times* national staff, he was assigned to cover the activities of the Black Panthers in Oakland, California. In a 1968 article, one 27-year-old Panther told Caldwell, “We’re young revolutionaries. We’re revolutionaries and we’re fighting a war. . . . We are ready to die for what we believe.”<sup>87</sup> J. Edgar Hoover, the long-time director of the FBI, labeled the Panthers the greatest threat to the internal security of the United States. A federal grand jury began investigating the group and subpoenaed Caldwell, ordering him to testify about his reporting and to bring with him his notes and any tape recordings of interviews with the Panthers. Caldwell refused, arguing that if he testified, his effectiveness as a reporter on the activities of the Black Panthers would be fatally compromised.<sup>88</sup> A federal district judge recognized a limited newsman’s privilege to protect his sources but said the grand jury could compel his testimony.<sup>89</sup> Caldwell appealed to the Ninth U.S. Circuit Court of Appeals. This time Caldwell won, but the government appealed to the Supreme Court.

The other two cases involved Paul Branzburg, a reporter for the Louisville *Courier-Journal*. In 1969, he wrote an eyewitness account of two men engaged in the manufacture of hashish from marijuana in a makeshift laboratory in south central Louisville. Branzburg reported that the pair hoped to produce enough of the illegal drug to net them up to \$5,000 for three weeks of work. The story concluded that the reporter promised the hashish makers that he would not identify them if they allowed him to observe what they were doing. He said to persuade the men to talk to him he even showed one of them a copy of the Kentucky reporter’s “shield law” to prove he could not be forced to reveal their identities.<sup>90</sup> Fourteen months later, the newspaper published a story under Branzburg’s byline detailing his observation of the use of marijuana in Frankfort as part of his effort to describe the drug scene in the state capital.

Local and federal narcotics agents read Branzburg’s stories and decided to break up the drug trade. When Branzburg was subpoenaed, he refused to reveal identities, arguing that the Kentucky reporter’s privilege statute,<sup>91</sup> the state Constitution, and the First Amendment to the U.S. Constitution protected his right not to identify his

informants. He was ordered to testify by state judges, and he appealed to the U.S. Supreme Court.

In 1972, the Supreme Court took up the issue.<sup>92</sup> The sole question before the Court, according to the majority opinion written by Justice Byron White, was “the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.”<sup>93</sup> In a 5 to 4 decision, the Court ruled that the First Amendment freedom of the press did not include the right of reporters to refuse to appear before a grand jury and answer its questions about criminal activity. The majority held that the public’s interest in law enforcement outweighed the concerns of the press. While journalists had been arguing that protecting sources was vital to their ability to inform the public, the courts had a long tradition of enforcing grand jury subpoenas.

The Supreme Court said as early as 1919 that testifying before a grand jury was recognized as a public duty except for the possibility that those subpoenaed could incriminate themselves in their testimony. “[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned.”<sup>94</sup>

The *Branzburg* majority did not agree completely, and the majority opinion was limited by the fifth vote. Justice Lewis Powell, while subscribing to the majority opinion, wrote his concurring opinion to emphasize what he believed was “the limited nature of the ruling.” He proposed a balancing test, suggesting judges who review reporters’ motions to quash grand jury subpoenas should balance freedom of the press against the obligation of all citizens to testify before the grand jury.<sup>95</sup> Justice Potter Stewart in a speech in 1974 characterized the decision as “considering Mr. Justice Powell’s concurring opinion, perhaps by a vote of four and a half to four and a half.”<sup>96</sup> And Justice Powell, dissenting in another case, commented that the *Branzburg* ruling did not leave reporters without First Amendment rights to protect the identities of their sources.<sup>97</sup>

The dissenters broke into two sides. Justice William O. Douglas insisted that the First Amendment provided reporters with an absolute and unqualified privilege to protect sources.<sup>98</sup> The others—Justices Stewart, William Brennan, and Thurgood Marshall—argued in an opinion written by Stewart that the Court was going to impose a governmental function on the media, an argument at which Justice Powell scoffed.<sup>99</sup> In his dissent, Stewart proposed a three-part test. The government would have to prove all three of these conditions or reporters would be allowed to protect the confidentialities of their sources:

- A probable cause exists that the reporter has information that is clearly relevant to a specific crime.
- The information sought cannot be obtained by alternative means less destructive of First Amendment rights.
- The state has a compelling and overriding interest in the information.<sup>100</sup>

Powell's opinion raised another question. What if the Court framed the decision in terms of this question: "Do journalists have a right to protect their sources by refusing to disclose their identity?" The answer to that question, it appears from the opinions, would have been "yes, under certain circumstances." Five of the justices—Powell, who concurred with the majority; Stewart, whose dissent was joined by Brennan and Marshall; and Douglas, who wrote a separate dissent—recognized some privilege for journalists in protecting confidential sources.<sup>101</sup> As a result, many courts have recognized some privilege for reporters in protecting their sources.

In the aftermath of the Court's decision, the American Society of Newspaper Editors and Sigma Delta Chi, a professional journalism society, called for Congress to pass legislation that would protect the confidentiality of journalists' news sources.<sup>102</sup> While the issue has been taken up several times, Congress never passed such legislation.<sup>103</sup> One of the obstacles has been agreement on its terms, including who could be considered a journalist and under what circumstances a journalist could refuse to testify. After the rash of subpoenas between 2001 and 2004, U.S. Senator Christopher Dodd, D-Conn., announced he would introduce legislation to create a federal shield law to protect reporters from federal subpoenas.<sup>104</sup> Dodd's bill went nowhere, but new proposals were introduced in both the House of Representatives and the Senate in 2005.<sup>105</sup> In 2007, the legislation was pending.

As is often the case, the court's decision left many questions unanswered with which lower courts have grappled with them. More than three decades after *Branzburg*, the Supreme Court has refused opportunities to take up the issue again, but the lesson of *Branzburg* and more recent cases is clear: reporters should consider carefully any request from a source who wants to provide information confidentially. Information that could be construed as damaging someone's reputation or related to criminal activity can lead a reporter to an unpleasant choice: go to jail or break a promise and reveal a source.

## The Real Impact

No chapter about journalism ethics could begin to detail all the ethical dilemmas that journalists encounter in their day-to-day work. Many of those dilemmas are decided quickly and easily by the reporter or photographer. Other issues are vigorously debated among reporters and editors. To most journalists, their ethical decisions are critical; they do not want to be viewed as unethical or do anything that would undermine the credibility of their newspapers, broadcast stations, or Internet sites.

For every bad decision that is made and written about, hundreds of right decisions are made; most of them are never acknowledged publicly. But every bad decision serves to further undermine the public trust in journalism, and that is bad for all journalists and also for democracy. Rising discontent with the media turns into lowered support for the First Amendment, and that means trouble for the American form of government. That is precisely why journalists must be ethical. The First Amendment may not require it; democracy does.

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57. Torre's story reported that one executive told her Garland balked at plans for a CBS special because of her inferiority problems and "because she thinks she is terribly fat." Garland sued the network for \$1.39 million and subpoenaed the journalist. Torre died in 1997. Her obituary quoted her family as maintaining she never told anyone, even them, who the source was. Nick Ravo, *Marie Torre, 72, TV Columnist Jailed for Protecting News Source*, *New York Times*, Jan. 5, 1997, A24. Dorothy Kilgallen, the gossip columnist, said she never expected anyone would go to jail for reporting that Garland had personal problems. Gerald Clarke, *Get Happy: The Life of Judy Garland* (Dell Publishing, 2001), 329.

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72. Christopher Lee, *Five Journalists Won't Name Sources; Wen Ho Lee Is Suing U.S. over Leaks from Spy Probe*, Washington Post, Jan. 11, 2004, A9.
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76. According to Bernstein, the identity of Deep Throat would not have been revealed until the source died. Brady Dennis, *Ex-Watergate Writer Laments 'Idiot Culture'*, St. Petersburg Times, Mar. 19, 2004, 3B.
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82. 358 Mass. 604, *aff'd*. 266 N.E. 2d 297 (1970).
83. 311 F. Supp. 358, 1434 (N.D. Cal.), *rev'd*. F.2d 1081 (9th Cir. 1970).
84. 503 S.W.2d 748 (Ky. Ct. App. 1971), *aff'd. sub nom.*, *Branzburg v. Hayes*.
85. 461 S.W.2d 345 (1971).
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87. Earl Caldwell, *Black Panthers, 'Young Revolutionaries at War,'* New York Times, Sept. 6, 1968, 49.
88. A. David Gordon, *Protection of News Sources: The History and Legal Status of the Newsman's Privilege* (1971), 93 (unpublished Ph.D. dissertation on file with University of Wisconsin Library).
89. *United States v. Caldwell*, 311 F.Supp. 358, 360 (1970).
90. Andrew Wolfson, *Paul Branzburg's Secret*, Courier-Journal (Louisville), Sept. 17, 1987.
91. "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected." Ky. Rev. Stat. 421.100 (1962).
92. *Branzburg v. Hayes*, 408 U.S. 665; 92 S.Ct. 2646; 33 L.Ed.2d 626; 1 Media L. Rep. 2617 (1972).
93. *Id.* at 682.
94. *Blair v. United States*, 250 U.S. 273, 281; 39 S.Ct. 468; 63 L.Ed. 979 (1919). In *Wilson v. United States*, 221 U.S. 361, 372; 31 S.Ct. 538; 55 L.Ed. 771 (1911), the Court upheld a lower court decision to hold in contempt a U.S. citizen who had been subpoenaed to appear before a grand jury and had fled to France to avoid the subpoena. That decision quoted Lord Ellenborough: "The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them." *Amey v. Long*, 9 East 484.
95. "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Branzburg*, at 709 (Powell, J., concurring).
96. Potter Stewart, *Or of the Press*, 26 Hastings L.J. (1974), 631. Reprinted in *Freedom of Expression: A Collection of Best Writings* (Kent Middleton & Roy M. Mersky, eds., 1981), 427.
97. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859–860; 94 S.Ct. 2811; 41 L.Ed.2d 514; 1 Media L. Rep. 2314. (Stewart, J., dissenting) (1974).
98. *Branzburg*, at 712, (Douglas, J., dissenting).
99. *Id.* at 725. "The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."
100. *Id.* at 743 (Stewart, J., dissenting.)
101. Douglas said the First Amendment provided an unqualified privilege for journalists to protect their sources. "It is my view that there is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury." *Id.* at 712.
102. Richard Phalon, *Congress Urged to Act on Issue: Law Is Sought to Protect Confidentiality of News Sources*, New York Times, June 30, 1972, 15.
103. Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 NYU Journal of Legislative and Public Policy 124, note 58 (2003).
104. Associated Press, *Federal Bill Would Protect Reporters*, New York Times, Nov. 20, 2004, A15.
105. Mike Pence and Richard G. Lugar, *Protecting the Press . . . and the Public*, Washington Post, Apr. 15, 2005, A25.