

**The First Amendment as License and Limitation:
The Supreme Court Addresses Principles of Journalism Ethics
(1947-2005)**

by
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ABSTRACT

JOHN C. WATSON: The First Amendment as License and Limitation: The Supreme Court Addresses Principles of Journalism Ethics (1947-2005) (Under the direction of Ruth Walden)

This is a study of the intersection of law and ethics as they address the professional practice of journalism. When the United States Supreme Court had occasion to address journalism's five fundamental ethical principles in cases decided from 1947 through 2005, its rulings were supportive of these principles in general, but not universally so, or in all their particular applications. In some respects, the Court created a legal basis for rendering some principles practical nullities and undermined others so significantly that some ethical prescriptions are perhaps less likely to be followed by professional journalists of the 21st century and beyond. This study identifies the following as the five principles and directives of journalism ethics: tell the truth, respect privacy, report the news, protect sources and maintain independence.

This study has found that in some instances, the Court has denigrated journalism's most cherished principles in deference to other ideals the Court has found more important.

To my mother, Clementine Watson (1926-2004),
whose first paying job was picking cotton in Alabama,
whose best paying job was at a factory in New Jersey,
whose most important job was raising and educating her nine children to make sure
they never had to pick cotton or work in a factory.

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CHAPTER ONE

Introduction

For nearly a century, journalism critics have been warning the American news media that if they do not practice their craft ethically and with a greater sense of social responsibility, they risk having the law impose ethics or other systems of moral control on them. One of the most articulate and well-reasoned of these warnings was sounded in 1947 by the Commission on Freedom of the Press. This privately assembled panel of thirteen intellectuals was led by University of Chicago Chancellor Robert Maynard Hutchins and usually is referred to as the Hutchins Commission. It conducted a two-year study of the American mass media and issued criticism and warnings in a report titled “A Free and Responsible Press, A General Report on Mass Communication: Newspaper, Radio, Motion Pictures, Magazines and Books.”¹ Similar but less expansive criticism that focused primarily on the news media’s handling of their responsibilities to the larger society and warnings about government action to remedy irresponsible journalism were made by the Warren Commission in 1964,² the Kerner Commission in 1968,³ and The Twentieth Century Fund Task Force in 1972.⁴

¹ COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (Robert D. Leigh ed., 1947).

² REPORT OF THE WARREN COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY (N.Y. Times ed. 1964).

³ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books 1968).

⁴ THE TWENTIETH CENTURY FUND, Inc., A FREE AND RESPONSIVE PRESS: THE TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL (1973).

This dissertation seeks to determine whether or to what extent the passage of time has proved those warnings to be portents. Clearly the law has not been used to impose ethical standards on the news media on a wholesale basis. Unlike many other nations, the United States does not have a formal code of journalistic responsibility enshrined in law or an agency to oversee the practice of journalism, nor are journalists required to be licensed or otherwise accredited. Any such attempt by the government to regulate journalists' conduct undoubtedly would violate the First Amendment.

But there have been instances in which the law has been used to require or encourage ethical conduct by journalists or to permit punishment of unethical behavior. A classic example was a Washington Supreme Court decision in 1997 that allowed a newspaper to impose sanctions on a reporter for violating the newspaper's ethics code provisions that promoted objectivity by banning apparent conflicts of interest.⁵ Perhaps the most publicized example occurred in 1991 when the U.S. Supreme Court ruled that journalists who break promises of confidentiality to sources can be subject to liability under state law.⁶ When the case was remanded to the Minnesota Supreme Court, that body upheld a jury award of \$200,000 to the confidential source whose identity had been revealed by the journalists who had promised him anonymity. Another example occurred in 1981 when a Washington state judge required reporters to sign an agreement to abide by the state's voluntary bench-bar-press guidelines for ethical court coverage before he would allow them access to a pretrial hearing.⁷

⁵ *Nelson v. McClatchy*, 131 Wash. 2d 523 (1997), *cert. denied*, 522 U.S. 866 (1997).

⁶ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

⁷ *Federated Publications, Inc. v. Swedburg*, 633 P.2d 74 (1981), *cert. denied*, 456 U.S. 984 (1982).

Examples also exist in statutory and administrative law. Most states have retraction statutes that limit the damages libel plaintiffs can win if acceptable corrections are published by the defendants.⁸ These statutes provide strong incentives for the news media to follow the ethical practice of publishing corrections when errors are discovered. Broadcast regulation has included many attempts to legislate ethical journalistic behavior, ranging from Federal Communication Commission bans on staging and distorting the news⁹ to the agency's rule that requires broadcasters to inform callers when their telephone conversations are being taped for on-air use.¹⁰

However, the government on occasion has undermined ethical journalism and even refused to impose ethical standards as legal imperatives. The U.S. Supreme Court, for example, has refused to permit punishment of media that do not follow the ethically based and widespread journalistic practices of withholding the names of sexual assault victims and concealing the identities of juveniles who break the law.¹¹ In 1979 the U.S. Supreme Court found a Florida law unconstitutional because it sought to mandate balanced coverage of political candidates.¹² And in a hotly debated libel case that was decided by the Supreme

⁸ See, e.g., N.C. Gen. Stat. 99-2 (1999); Ariz. Rev. Stat. Ann 12-653.02 (West 1991); N.D. Cent. Code §32-43-05 (1995).

⁹ See, e.g., Hunger in America, 20 F.C.C. 2d 143 (1969); WBBM-TV, 18 F.C.C. 2d 124 (1969); Star Stations of Indiana, 51 F.C.C. 2d 95 (1975).

¹⁰ *In re* Amendment of Section 1206: Broadcast of Telephone Conversations, 65 P&F Rad. Reg. 2d 444 (1988).

¹¹ *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

¹² *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1979).

Court in 1991, *Masson v. The New Yorker Magazine, Inc.*,¹³ the Court refused to rule that any and all deliberate alterations of direct quotations constituted knowing falsification.¹⁴

Such examples of efforts to use the law to require or promote ethical behavior by the news media seem to indicate that, at least to some extent, the consequences foretold by the Hutchins Commission and other journalism critics have come to pass. But the degree to which journalism law and ethics have been conjoined by judicial fiat is not known.

Accordingly, the core purpose of this dissertation is to determine the extent to which this merger has occurred. To that end, this study will review the Supreme Court rulings handed down since the Hutchins Report warnings to identify and examine instances in which the Court has ruled on legal issues that implicate ethical standards of journalism. Some of these rulings punish, mandate or protect journalism practices that are matters of ethical principle. Some have made rights of access to information dependent on acquiescence to ethically based preconditions, or penalized deviation from ethical standards or allowed deviations without legal sanctions. In order to determine the extent to which Court rulings have imposed, affirmed or undercut fundamental ethical principles of journalism, this study analyzes Court rulings that address the fundamental ethical principles as established and promoted in ethics codes created by news media organizations themselves.

The following review of the literature relevant to the issues examined in this study is provided as an orienting background and to demonstrate how this dissertation contributes to a greater understanding of these issues.

¹³ 501 U.S. 496 (1991).

¹⁴ The Court has ruled since *New York Times v. Sullivan*, 376 U.S. 254 (1964), that knowing falsification or reckless disregard for the truth constitutes actual malice, which is the standard of fault the Court requires public official plaintiffs and public figure plaintiffs to prove before they may prevail in libel lawsuits.

Review of the Literature

The scholarly literature that informs this study crosses disciplines and has been categorized for review in two segments: (I) writings on the legal philosophies and theories that focus on the connection between law and morality, and (II) studies that examine some aspect of the larger issue of how law has imposed ethical strictures on journalism practices.

Law and Morality

This dissertation's examination of the law's effect on journalism ethics enters the realm of legal theory and requires grounding in natural law doctrine and legal positivism before moving to other related and often derivative theories that address the relationship between law and morality or law and ethics. Among the central tenets of natural law doctrine are the assumptions that law is naturally preexisting in the proper conceptions of what is right and wrong, that people in a state of nature untainted by dishonesty or other base drives would follow these principles, and that legislators and judges must rediscover these principles by rational processes. Legislation or court rulings that purport to be law but that are subsequently determined to be immoral are not law and are invalid. Natural law devotees accordingly assume that valid law is moral and that there is a necessary link between law and moral values.¹⁵ Legal positivists, however, insist on maintaining a separation of the two, yet concede that in practice law is a coercive force often imbued with a moral element.¹⁶ Judges who administer the law, according to the positivists, should do so without making moral value judgments.

¹⁵ See generally M. J. DETMOLD, *THE UNITY OF LAW AND MORALITY* (1984).

¹⁶ See generally *POSITIVISM TODAY* (Stephen Guest ed., 1996).

Positivism defines law as rules of behavior actually enacted and administered by duly designated authority. The validity of these laws is determined by verifying whether they have come into being through the proper process. This process, even when properly followed, can produce immoral or amoral law, according to positivism. It is therefore necessary to avoid the presumption that law and morality are necessarily linked lest bad laws remain unchallenged.¹⁷

Proponents of journalism ethics usually assume a stance compatible with the positivist position on the relation of law to morality and also insist on maintaining a clear distinction between practices that are legally permissible and those that are ethical.¹⁸ Law and ethics are normative systems that affect how journalism is practiced, but law delineates minimums of behavior while ethics establish behavioral ideals that journalists should strive toward, according to journalism ethicists Jay Black, Sandra Davidson and others.¹⁹ Merging journalism ethics and journalism law, blurring or eliminating the distinction between them, arguably could cause confusion about how journalism should or must be practiced and whether its norms are those established by lawmakers or journalists.

However, legal theorist Samuel Enoch Stumpf, whose writings often reflect natural law doctrine, would disagree with the journalism ethicists who claim that law sets minimum standards of behavior and ethics strive for better. In a book published in 1966 Stumpf asked rhetorically:

¹⁷ *Id.* at ix.

¹⁸ JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* 14 (2nd ed. 1995); Sandra Davidson, *Media Liability Cases Raise Legal and Ethical Questions*, MEDIA L. NOTES, Winter 1998, at 1, 2.

¹⁹ BLACK ET AL., *supra* note 18, at 14; Davidson, *supra* note 18, at 2.

Does the concept of law necessarily imply a concern with only the minimum standards of behavior, leaving to morality the task of making men moral? Historically this question has been answered for the most part in the negative. . . . Whether the law will be used narrowly [to set minimums] or widely [for moral standards] is not a matter of the meaning or nature of law but a consequence of a society's decision about its use. . . . [I]n the United States the law has gradually absorbed many areas of behavior which were previously considered the proper province of morality.²⁰

Stumpf argued that law is often a codification of morality and ethics and that there is a necessary connection between law and moral values. “[T]hose who fashion the law, for the most part, believe that the substance of law is either required by moral considerations or at least by the general welfare of the community.”²¹ When court edicts confirm society's moral and ethical values, the public considers these laws to be most valid, Stumpf reasoned. Legal theorist James Fitzjames Stephen agreed with Stumpf about the necessary connection between law and morals: “The main subject with which law is conversant is that of rights and duties, and all the commoner and more important rights and duties presuppose some theory of morals.”²²

Moreover, the Supreme Court, in its role as the final arbiter of the validity of American law, “cannot avoid confronting from time to time this moral dimension of law.”²³ Stumpf defined that moral dimension as the part of a court's ruling that rests on arguments and conceptions of what is proper, right, good, and desirable as opposed to what is improper, wrong, bad or undesirable. “The moral element in an opinion has the effect of

²⁰ SAMUEL ENOCH STUMPF, MORALITY AND THE LAW 233-34 (1966).

²¹ *Id.* at 234.

²² James Fitzjames Stephen, *The Doctrine of Liberty in Its Application to Morals*, in MORALITY, HARM, AND THE LAW 31 (Gerald Dworkin ed., 1994).

²³ *Id.* at 6.

contrasting an action, a given conduct, or a particular law as it ‘is’ with what it ‘ought to be’ in terms of moral as compared with legal standards,” Stumpf wrote.²⁴

And in a statement reminiscent of the warning the Hutchins Commission made to journalists, Stumpf observed that “if men do not perform voluntarily their moral obligations these obligations must be enforced by the law.”²⁵ Although this statement is most often cited with reference to criminal law, it appears equally relevant in civil lawsuits and administrative regulation cases that involve news media practices.

Nonetheless, Stumpf cautioned society to maintain a clear distinction between law and morality if it hopes to remain free, open, and susceptible to democratic change. “There is the constant danger that if the association of law with morality is too close, then the law will become the substitute for our moral standards; and if the law is our moral standard, we have lost the possibility of a moral criticism of the law.”²⁶ Such a loss would be particularly costly when the laws at issue deal with free speech and free press issues because it is the speech that is considered wrong, immoral, or unethical that most often needs protection.

This fundamental issue of the relationship between law and morality is also addressed by the various instrumentalist theories of law that define laws as tools “devised to serve practical ends, rather than general norms laid down by officials in power [or by] secular embodiments of natural law.”²⁷ Pragmatic instrumentalism, a uniquely American theory of law that Cornell Law School Professor Robert Samuel Summers introduced in the early

²⁴ STUMPF *supra* note 20.

²⁵ *Id.* at 234.

²⁶ *Id.* at 219.

²⁷ ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20 (1982).

1980s,²⁸ takes issue with some principles of natural law theory and legal positivism yet shares the positivists' view of law as a coercive force and echoes their insistence on a "sharp separation between law and morals. Otherwise, or so the positivists believed, there would be confusion and uncertainty about what the actual law was A sharp separation of law and morals was also thought to facilitate the pointed criticism of law," Summers wrote.²⁹

Pragmatic instrumentalism, as defined by Summers, examines the nature of law, the theory of law making by courts and legislatures, the interpretation and application of law, and the "study of law as a complex reality."³⁰ This legal theory provides a framework for this study's examination of legal treatments of ethical issues affecting the practice of journalism.

Although Summers' theory of pragmatic instrumentalism lacks an extensive historical background, is not as widely recognized as legal positivism or natural law doctrine, and has not achieved their status,³¹ it pulls together the writings of eleven prominent American legal theorists dating from the early 1900s.³² It is particularly relevant to this dissertation because the American theorists' ruminations about the nature and purposes of legislation and adjudication became influential around the same period as the

²⁸ *Id.*

²⁹ AMERICAN LEGAL THEORY xv (Robert Samuel Summers & Arthur L. Goodhart eds., 1992).

³⁰ *Id.* at i.

³¹ See, e.g., Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984).

³² The major philosophers and legal theorists Summers identified as pragmatic instrumentalists are Joseph Walter Bingham, Felix S. Cohen, Walter Wheeler Cook, John Dewey, Jerome Frank, John Chipman Gray, Oliver Wendell Holmes, Jr., Karl N. Llewellyn, W. Underhill Moore, Herman Olliphant, and Roscoe Pound.

Hutchins Commission began its work, according to Summers, who also identified commission member Harold D. Lasswell as a pragmatic instrumentalist.³³

The theory's precepts help explain how and why law might seek to impose journalism ethics or otherwise affect them. These precepts are drawn from sociological jurisprudence, legal realism, and pragmatism, and generally conclude that law exists primarily as a means to achieve particular social goals directly or indirectly. Moral and ethical behavior may be among these goals. Pragmatic instrumentalism is also a sociological study of law that questions whether courts can provide value-free adjudication as envisioned by the early positivists.

Cornell Law School Professor Michael S. Moore, in a critical assessment of Summers' theory published in the *Cornell Law Review*, said pragmatic instrumentalism shunned earlier theories of mechanical jurisprudence and legal formalism that interpreted statutes by relying on their plain meaning without reference to the motivation of the legislators.³⁴ The instrumentalists "ignored any preexisting meaning (ordinary or otherwise) of legal standards, and instead assigned such standards a meaning in light of the desirable consequences attainable by that assignment."³⁵ Accordingly, pragmatic instrumentalists condemned adjudication that applied the philosophical precepts of natural law. Moore's criticism included the observation that legal theorists Karl Llewelyn and Jerome Frank, whom Summers identified as pragmatic instrumentalists, "sometimes seemed to argue that legal decisions are nothing but value judgments, that the existence of legal rules makes no

³³ SUMMERS, *supra* note 27, at 22.

³⁴ Moore, *supra* note 31, at 1007.

³⁵ *Id.*

difference to legal decision making except in the rhetoric employed after the fact to rationalize a decision reached on other grounds.”³⁶

Pragmatic instrumentalism was not merely influential as the Hutchins Commission completed its work but was dominant and a “colossal influence” in America, according to Summers’ account.

Americans also came to think of law as a means to social goals – as a body of social instruments to be used by legal architects to combat the Great Depression, . . . to construct the regulatory state and the welfare state. . . . And most of the legal profession conceded that not only the legislatures made law. Courts made law too.³⁷

Summers also asserted that during the 1930s and 1940s pragmatic instrumentalism “was our most influential theory of law in jurisprudential circles, in the faculties of major law schools, and in important realms of bench and bar. Many of its tenets continue to be influential in the 1980s.”³⁸ Moore, despite his criticism, agreed with Summers “that the ideas of the pragmatic instrumentalists heavily influenced our contemporary legal theory.”³⁹ Summers credited the influence of pragmatic instrumentalism with the philosophical readjustment of the Supreme Court in the 1930s that began to accord constitutional validity to social engineering and regulatory legislation that it previously had found unconstitutional.⁴⁰ Calling the readjustment a victory of “instrumentalism over formalism,” Summers saw the influence extend through the 1940s and change the Court’s interpretation of statutes from a

³⁶ *Id.* at 1009.

³⁷ SUMMERS, *supra* note 27, at 275.

³⁸ *Id.* at 11.

³⁹ Moore, *supra* note 31, at 1011.

⁴⁰ SUMMERS, *supra* note 27, at 276.

plain-meaning approach to an effort to determine the intended purposes of the individual laws. This influence permeated the law school textbooks and law reviews as well, Summers argued. The influence waned somewhat in the 1950s, but there was a resurgence in the 1980s, he wrote.⁴¹

The preceding discussion of legal theories and philosophies outlines the evaluative and prescriptive concepts that will be crucial to this dissertation. Natural law and legal positivism are the two major philosophical approaches to study the relationship between law and morality. Natural law's presumption that laws are necessarily moral may help explain the outcome of a clash between law and ethical canons of journalism because, as a prescriptive philosophy, it has the potential to affect how judges may decide such conflicts.

For example, some members of the U.S. Senate expressed concern about the influence of natural law doctrine in 1991 during confirmation hearings for Supreme Court Justice Clarence Thomas because he had previously espoused a belief in natural law. The senators were concerned that such a belief in a higher natural moral authority would affect how Thomas would interpret the Constitution.⁴² Natural law also provides a perspective for this study's evaluation of legislation that affects journalism practices.

Positivism, which developed largely as a rebuttal of natural law theory, concentrates on the actual operation of law. Positivism recognizes the frequent infusion of morality into the making and administration of law but condemns the practice. It thereby provides this study with a basis for recognizing and critically evaluating the moral component of U.S. Supreme Court rulings that seek to protect or penalize journalism practices that involve

⁴¹ *Id.* at 277.

⁴² Linda Greenhouse, *Etching a Portrait of Judge Thomas*, N.Y. TIMES, Sept. 15, 1991, at 1.

ethical issues. Positivism recognizes that law can be moral or immoral and the fact that a law's embedded moral code conflicts with the moral or ethical code of journalism does not mean the legal code should necessarily prevail to supplant or otherwise alter the journalists' code.

Pragmatic instrumentalism, however, provides the primary theoretical framework for this study because it focuses on and acknowledges that social and moral goals are sought by law, a perspective that is essential to this study's assessment of whether, or to what extent ethical standards have been converted into legal imperatives. Pragmatic instrumentalism recognizes that law is largely made by courts and questions whether courts can adjudicate without making value judgments. Its influence was prominent during the late 1930s and 1940s as the idea of socially responsible journalism gained widespread currency through the Hutchins Commission, which included pragmatic instrumentalist Harold D. Lasswell. This legal philosophy made a resurgence during the 1980s as journalism ethics and socially responsible journalism were hotly debated in courts and other public arenas. Among the more recent prescriptive iterations of this philosophy is the work of Richard A. Posner, who advocates pragmatic adjudication in constitutional cases, an approach to law that encourages judges to consider how their rulings will affect society.⁴³ It is a legal philosophy that is driven by policy considerations and finds no necessary connection between law and morality while recognizing that both operate on the same spheres of human behavior. First Amendment scholar Matthew D. Bunker has succinctly indicated how the philosophy is implemented. "Pragmatic adjudication . . . eschews precedent for precedent's sake,

⁴³ See, e.g., RICHARD A. POSNER, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).

preferring to identify case-by-case results that will improve social conditions rather than worship at the altar of *stare decisis*,” he wrote.⁴⁴

Imposing Ethical Strictures Via Law

A search of the existing literature that addresses the legal imposition of ethical strictures on journalism practices has not revealed any single published work that matches the scope and focus of this dissertation. There are law review articles, case notes, journalism trade magazine articles and studies that discuss court rulings or administrative agency edicts in cases that involve journalism ethics, but they generally treat a single case or a small group of cases. A substantial number of researchers have addressed the larger issue of mass media ethics. In fact, there is a scholarly journal devoted to this research stream,⁴⁵ but studies of the intersection of journalism ethics and the law are limited. No one has published a thorough analysis of United States Supreme Court rulings from 1947 through 2005 to assess how the Court has resolved legal disputes that addressed the ethical practice of journalism, or whether it has converted ethical standards into legal imperatives, or in some sense affirmed or undermined ethical standards in journalism. David S. Allen, however, has published an endorsement of purposefully combining law and ethics in First Amendment adjudication.

Writing about the First Amendment and discourse theory in *Communication Law and Policy* in 1999, Allen called for the merger of law and ethics to improve journalism.⁴⁶

⁴⁴ MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 163 (2001).

⁴⁵ J. OF MASS MEDIA ETHICS.

⁴⁶ David S. Allen, *Merging Law and Ethics: Discourse Legal Theory and Freedom of Expression in Hurley*, 4 COM. L. & POL’Y 403 (1999).

Allen's article focused primarily on a Supreme Court decision that overturned a Massachusetts Supreme Judicial Court ruling that would have required a private organization to allow gay and lesbian pride advocates to march in a holiday parade in Boston.⁴⁷ He complained that the ruling failed to protect the right of a disempowered group to participate in the public marketplace of ideas. Allen called the ruling a rejection of discourse legal theory and the precepts of Jurgen Habermas.⁴⁸ Allen argued that "discourse theory, by connecting law and ethics, carves out a more protective standard for disempowered groups."⁴⁹ Allen ultimately addressed an issue also raised in this study, the role the law plays in shaping journalism ethics. "Discourse theory refuses to separate law from ethics and recognizes the importance of the courts, and government, in aiding in the creation of a just society."⁵⁰ By unanimous vote, the Court said a Massachusetts law that forced the private group to allow the gay activists to march in its parade would violate the group's First Amendment rights. Habermas would condemn that finding, according to Allen, because "Habermas sees the media as being entitled to constitutional protections only when fulfilling a discursive mission."⁵¹

Other scholars specifically sought to determine whether ethical standards of journalism have become legal imperatives or otherwise have been affected by Court rulings. In separate works, scholars Elizabeth Blanks Hindman, Brian C. Murchison, Jeff Storey, W.

⁴⁷ Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

⁴⁸ See generally JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1981).

⁴⁹ Allen, *supra* note 46 at 405.

⁵⁰ *Id.* at 430.

⁵¹ *Id.* at 414.

Wat Hopkins, Laurence Alexander, and Don E. Tomlinson have addressed that issue directly in a limited manner or indirectly in an expansive manner. Hindman's study was the most extensive, covering 1931 through 1996, but focused only on U.S. Supreme Court rulings in relation to the social responsibility theory of the press, a valuable but indirect approach to the issue of journalism ethics.⁵² Hindman addressed the intersection of journalism ethics and high court rulings when she wrote, "Supreme Court decisions articulated, if sometimes indirectly, connections between legal and moral responsibility."⁵³

Hindman's study was an effort to determine if, when, and how the Supreme Court applied social responsibility theory in cases involving the mass communication media. Social responsibility theory posits that the press has a moral and ethical duty to do what is right, proper, and good for society. If those duties are fulfilled, the press earns rights that are assured and protected by law.⁵⁴ This theory was advanced and popularized by the Hutchins Commission. By using this theory as a framework for her study, Hindman's work was, in many respects, a study of mass media ethics and law.

Hindman cited instances in which the Court created media case law through rulings that were based on the moral principles of social responsibility, but the justices did not overtly state the moral or ethical premises they were rejecting or enforcing.⁵⁵ This covert application and infusion of moral principles she addressed reflected what Stumpf referred to

⁵² ELIZABETH BLANKS HINDMAN, *RIGHTS VS. RESPONSIBILITIES: THE SUPREME COURT AND THE MEDIA* (1996).

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 18.

⁵⁵ *Id.*

in an assessment of judge-made law: “The conclusion is unmistakable – that a moral element permeates the judicial process.”⁵⁶

Hindman indicated that individual justices on the Supreme Court shared the Hutchins Commission’s conclusion that press freedom was conditioned on the media meeting their social responsibilities – that with freedom come obligations to society – and that at times the media had “engaged in practices which the society condemns.”⁵⁷ Hindman, however, did not detect any consistent definition or application of the theory of social responsibility in the 65 years of Supreme Court opinions she studied but concluded that the Court had applied variants of the concept in making some rulings in media cases. The principle of social responsibility was adopted at varying times by conservative and liberal justices alike, but each camp applied it differently, she wrote.

[D]uring the Warren Court era, social responsibility was equated with liberal goals, primarily, providing equal opportunity. However, toward the end of the time period studied, the media’s social responsibility came to mean acting morally. . . . In both definitions, the media had responsibilities, but the character of those responsibilities changed significantly.⁵⁸

Hindman argued that the Supreme Court, in many instances, was building a model of responsible media behavior by protecting some practices and exacting a toll for others. This model, carrying the imprimatur of the Court, came to be seen as the proper model not only by the lay public, but by journalists themselves, she said. “By setting limits on media behavior and expounding on the media’s role in society, the Court influences notions of

⁵⁶ STUMPF, *supra* note 20, at 43.

⁵⁷ HINDMAN, *supra* note 52, at 150 (footnotes omitted).

⁵⁸ *Id.*

media responsibility held by the public and by media practitioners.”⁵⁹ In reaching that conclusion Hindman raised the issue of whether journalism standards of conduct should be determined by the government through its courts, by the general public, or by journalists.

A 1994 law review article’s title, “*Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*,” indicated that indeed such standards had been created by U.S. Supreme Court rulings.⁶⁰ The text, however, was confined to rulings in *New York Times v. Sullivan* and its progeny that arguably established newsgathering norms and dealt with a myriad of libel issues.⁶¹ This article and study, which were the work of a team of journalism and law professors led by Brian C. Murchison as part of the 12-year Iowa Research Project, concluded that the *Sullivan* ruling allows and encourages judges to decide how journalists should practice their craft as professional purveyors of truth. In this manner, justices and lower court judges have been creating professional norms for journalists, the article argued. “[T]he *Sullivan* rule has spawned a de facto set of judge-made standards that covers all aspects of journalistic behavior.”⁶² The article ultimately condemns the *Sullivan* rule for imposing a legal standard for libel that is actually a “permissive norm.”⁶³

Courts have moved purposefully into the practice of creating norms for journalists, attorney and former journalist Jeff Storey wrote in a 2001 law journal note. After analyzing a new journalism ethics code developed by the Gannett media corporation against the

⁵⁹ *Id.* at 1.

⁶⁰ Brian C. Murchison et al., *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N. C. L. REV. 7 (1994).

⁶¹ 376 U.S. 254 (1964).

⁶² Murchison, *supra* note 60 at 12.

⁶³ *Id.* at 22.

backdrop of court rulings on a variety of journalism practices, Storey concluded that the courts “have taken it upon themselves to define [journalism] norms like ‘responsibility’ and ‘fairness.’”⁶⁴

W. Wat Hopkins also addressed journalism norms while examining libel standards in a 1985 monograph⁶⁵ that assessed the effects of the Supreme Court’s ruling in *Gertz v. Robert Welch, Inc.*⁶⁶ He examined ten years of court rulings since 1974 when the Supreme Court determined that negligence was the minimum standard of fault that a private plaintiff must prove in order to prevail in a libel lawsuit.⁶⁷ Hopkins’ study, in part, was a discussion of who should determine the standards for good, right, and proper journalism. Establishing such standards became essential once the Court ruled that libel plaintiffs must prove that journalist defendants failed to follow standard journalism practices. “Who will determine what the proper standard of professional conduct is within any medium?” Hopkins asked.⁶⁸ Will it be the public as a jury using the “reasonable person” standard? Or will it be journalists using a “journalistic malpractice” standard? Hopkins favored the latter course. His study did not explicitly examine the link between the Court’s legal standard and an ethical standard but did so by implication.

Other scholars have directly addressed the issue of ethical standards that have been transformed by court edict into legal imperatives, but most have done so on a limited basis

⁶⁴ Jeff Storey, Note, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L. J. 467, 494-95 (2001).

⁶⁵ W. Wat Hopkins, *Negligence 10 Years After Gertz v. Welch*, JOURNALISM MONOGRAPHS, Aug. 1985.

⁶⁶ 418 U.S. 323 (1974).

⁶⁷ Hopkins, *supra* note 65.

⁶⁸ *Id.* at 2.

as Alexander did in 1996.⁶⁹ Alexander's research dealt primarily with three federal court rulings in 1991 and 1992 against journalists and other mass communication practitioners who had been sued for actions that involved ethical principles.⁷⁰ His study, published in the *Newspaper Research Journal*, dealt with ethical issues involving source confidentiality, altered quotes, and dangerous advertising. Alexander recognized that "there has always been some commingling of ethics and law. In many instances, the legal limitations have defined the ethical territory – when the law stopped, the ethics of editors and news managers took over."⁷¹ Alexander expressed concern that the role of the professional journalist was being usurped by the courts in at least three areas: source confidentiality, the use of quotes, and accepting advertising. He concluded that the courts' increased recognition of causes of action based on ethical claims threatened to increase litigation against the news media.

Alexander's examination of confidentiality focused on the U.S. Supreme Court's ruling in *Cohen v. Cowles Media Co.*, which allowed a news source who had been promised confidentiality to recover civil damages from newspapers that intentionally broke their promises of confidentiality to him.⁷² The ruling was the first in which a court allowed recovery for such a claim against journalists, and an ethical matter previously left to journalists' discretion was thereby converted into a legal issue, Alexander wrote.⁷³ "By removing the First Amendment barrier for aggrieved news sources to sue for breach of

⁶⁹ Laurence B. Alexander, *Ethical Choices that Become Legal Problems for Media*, *NEWSPAPER RES. J.*, Winter/Spring 1996, at 49.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 501 U.S. 663 (1991).

⁷³ Alexander, *supra* note 69, at 50.

promise, the court can effectively force journalists to perform in an ethical manner by keeping their promises of confidentiality or face the consequences in court.”⁷⁴

When source confidentiality was exclusively an ethical issue, journalists could decide with legal impunity when it was proper to renege on the promised confidentiality, Alexander explained. In *Cohen v. Cowles Media Co.*, the journalists decided that the subject matter disclosed in confidence was less newsworthy than the fact that the disclosures had been offered to the press in an effort to undermine the political campaign of an opponent. Although the decision to disclose the source in this case was widely condemned by journalists and scholars, some journalism ethicists found there was sufficient cause to warrant breaking the promise of confidentiality.⁷⁵ But the Court, by countenancing the resulting lawsuit, provided a penalty that could arguably influence the choice journalists make when next faced with such an ethical choice.

Similarly, until the libel ruling in *Masson v. The New Yorker Magazine, Inc.*,⁷⁶ journalists could consider altering quotations as solely an ethical issue and remain confident of being immune to legal sanctions for their decisions in most instances, Alexander argued. Although some journalists consider quotation marks to be a signal or promise to the reader that the words of a news source are being reprinted verbatim, Alexander and others have

⁷⁴ *Id.* at 51.

⁷⁵ See Daniel A. Levin & Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources After Cohen v. Cowles Media Company: A Survey of Newspaper Editors*, 24 GOLDEN GATE U. L. REV. 423 (1994), for a sample of the widespread condemnation of the decision to burn the confidential source. But there were others who defended the decision to reveal the confidential source in *Cohen v. Cowles*. Among the most prominent of them is Louis W. Hodges, a widely respected professor of journalism ethics who called the decision “morally defensible.” See Louis W. Hodges, *Should We Disallow Punitive Damages Against News Media Defendants?* at <http://journalism.wlu.edu/ethics/hodgeslect.htm> (Page updated Monday Jan. 14, 2002 1:43 PM).

⁷⁶ 501 U.S. 496 (1991).

observed that this promise is often broken.⁷⁷ Quotations are routinely altered slightly to correct grammar or to clarify their meaning. Journalism's ethical purists disapprove of the practice and say that when alterations are deemed necessary, a paraphrase should be used instead of wording girded by quotation marks. The Supreme Court ruled in *Masson* that a jury would decide when an altered quotation became libelous, and thereby made an ethical issue a legal matter that would sometimes penalize journalists, Alexander contended.

Alexander also cited the *Soldier of Fortune* cases as examples of ethical problems that became legal matters. Although these are primarily commercial speech cases, they are included in this review of journalism ethics studies because they raise questions about the media's potential for inflicting harm on the public, an ethical issue that journalists also confront. These cases were lawsuits filed against *Soldier of Fortune* magazine because it published advertisements placed by people who held themselves out to be killers for hire. The ads led to contract murders in two cases, *Braun v. Soldier of Fortune Magazine, Inc.*,⁷⁸ and *Eimann v. Soldier of Fortune Magazine, Inc.*⁷⁹ In a third case, *Norwood v. Soldier of Fortune Magazine, Inc.*,⁸⁰ the plaintiff was shot but survived. In *Braun*, the most recent of the cases, the Eleventh Circuit Court of Appeals upheld a \$4.3 million award against the magazine. "Prior to [*Braun*], courts had been reluctant to impose liability on publishers for this category of advertising," Alexander wrote as he explained why a \$9.4 million award had been overturned in *Eimann*.⁸¹ The *Norwood* case was settled out of court.⁸²

⁷⁷ Alexander, *supra* note 69, at 52.

⁷⁸ 968 F. 2d 1110 (11th Cir. 1992) *cert. denied*, 506 U.S. 1071 (1993).

⁷⁹ 880 F. 2d 830 (5th Cir. 1989).

⁸⁰ 651 F. Supp. 1397 (W.D. Ark. 1987).

⁸¹ Alexander, *supra* note 69, at 54.

Tomlinson and Alexander agreed that deciding whether to accept such ads was an ethical decision which the press should make. Tomlinson's article was written before the *Braun* ruling was handed down and while the press was still relatively protected from civil liability for harmful ads. He criticized the press for presuming this protection meant it did not have to grapple with making proper ethical judgments about its potentially harmful behavior. "Using law as a justification for conduct which is morally irresponsible is morally irresponsible in itself," Tomlinson wrote.⁸³

Tomlinson was referring to the capacity of law to induce journalists to equate legally permissible conduct with ethically responsible conduct.⁸⁴ He argued that the proper ethical decision in the *Soldier of Fortune* cases would have been to refuse the ads once it became apparent that they caused catastrophic harm. He nonetheless concluded that the proper solution should not be derived from law but through better ethical decision making by publishers.⁸⁵

Each of the scholarly works reviewed in this section implicitly or explicitly revealed how law is invoked sometimes by those seeking redress for injury caused by unethical journalism. But as Alexander pointed out in his discussion of *Cohen v. Cowles*, it is more common that ethical transgressions are handled by the profession with little perceptible relief for the aggrieved. "At most there would be some concern within the journalism community .

⁸² Don E. Tomlinson, *Where Morality and Law Diverge: Ethical Alternatives in the Soldier of Fortune Cases*, 6 J. OF MASS MEDIA ETHICS 69, 70 (1991).

⁸³ *Id.* at 69.

⁸⁴ Hindman also refers to the tendency of law to define ethical journalism, HINDMAN, *supra* note 52 at 1.

⁸⁵ Tomlinson, *supra* note 82, at 79, 80.

... about the propriety of journalists violating [an ethical standard],” he wrote.⁸⁶ Media critics have often observed that expressions of “concern” are generally journalists’ only reaction when one of their own behaves unethically. Some scholars have claimed it is an inadequate response while others have said it is preferable to intervention by law or any other external mechanism proposed by some early journalism critics.

Summary and Conclusions

As the scholarly works reviewed in this section have demonstrated, inquiries into the intersection of law, morality and ethics are longstanding. They predate the existence of the United States and the First Amendment of its Constitution. The preceding review of the legal theories developed around this issue indicated a perhaps inevitable clash between the two systems of influencing human behavior. Writings about natural law and positivism indicated how the merger of law and morality creates confusion about which system should determine which practices are good and proper. Some authors have indicated that if law prevails, society would benefit, while others claim that when law trumps morality, catastrophic limitations on freedom may follow. Still other theorists said the merger is inevitable because legal rulings are always value-laden moral judgments. The instrumentalist theories accept the merger and claim law accordingly functions as a tool of society to achieve the ends it desires.

This review of the scholarly studies of court rulings in cases involving the ethical practice of journalism indicates that, unlike this study, nearly all have examined individual cases and discrete ethical principles instead of a series of cases and an array of principles over a long period of time. One scholar conducted a more expansive examination of court

⁸⁶ Alexander, *supra* note 69, at 50.

rulings in this area but focused on the more broadly defined social responsibility of journalists instead of the specific ethical or moral values embodied in professional codes of ethics. The review of the literature indicates a need for this study's long-term assessment of a large number of cases and this study's focus on specific ethical principles. This dissertation advances the dialogue about the propriety of the intersection of law and morality and the effect on the practice of journalism and the parameters of press freedom.

Research Questions

As indicated earlier, the goal of this dissertation is to determine whether journalism ethics and the law have been merged and whether or to what extent ethical standards of behavior have been imposed on the news media or undermined by Court rulings. To this end, this study will analyze relevant Supreme Court rulings in cases since the publication of the Hutchins Report in 1947.

To achieve its overall goal, this study will address the following research questions:

1. To what extent has the U.S. Supreme Court imposed ethical standards on the news media in what this study identifies as the primary or fundamental areas of concern addressed by press critics and journalism codes of ethics: truth, privacy and civic responsibility.
2. Have Court rulings tended to affirm or undermine the ethical values and practices promoted by journalism codes of ethics, or do they impose or suggest other values and standards of practice?
3. Have Court rulings eroded the distinction between law and ethics by establishing legal parameters for acceptable journalism practices?

4. What are the ramifications for press freedom if the government, through Supreme Court rulings, assumes a role in defining, enforcing, condoning, or otherwise sanctioning journalism values and defining what qualifies as an ethical journalism practice?

Method and Limitations

This is a qualitative, critical analysis to determine whether, or to what extent, the Supreme Court's treatment of cases that address core values of American journalism has transformed ethical standards into legal imperatives or practical nullities. This study postulates that this transformation occurs when the Court adds its influential imprimatur to values enshrined in journalism codes or undermines these values by penalizing or denying legal protection to journalists who perform in accord with them.

Only U.S. Supreme Court rulings and opinions are examined here because the Court is the ultimate authority on the constitutionality and hence the enforceability of any law that significantly affects the functioning of the American press. This study does not address efforts by executive and legislative bodies to impose ethics on the news media unless those issues arise in Supreme Court cases. The initial determination of which Court rulings were to be considered in this study was based on their inclusion in any volume of the *Media Law Reporter*.⁸⁷ Cases were excluded if they did not address journalism ethics issues, as will be defined shortly by this study, and as indicated by the *Media Law Reporter* Classification Guide. Excluded were those that focused primarily on advertising issues, circulation, the awarding or transferring of broadcast licenses, restricting monopolies, and other issues not

⁸⁷ The Bureau of National Affairs corporation has published the *Media Law Reporter* since 1976 and reprints the full text of state and federal court decisions in mass media cases. It is updated weekly and bound volumes are published annually. It has published U.S. Supreme Court decisions within the time frame of this study and is widely relied on by scholarly researchers and media law attorneys.

directly related to the ethical gathering and dissemination of news. These exclusions are identifiable under the Classification Guide headings and subheadings: “15. Commercial speech/advertising;” “II. Regulation of Media Distribution;” “IV. Media Ownership.” The cases selected for the most detailed analysis were those that prompted judicial consideration of issues that addressed the core values this study identifies as the primary concerns or fundamental principles of journalism ethics: truth and truth telling, respect for privacy, independence, news gathering, and protecting sources. The final three principles are analyzed as issues affecting journalists’ civic responsibility.⁸⁸ These five areas of concern encompass values this study has found to be recurring themes in published journalism criticism and the major journalism codes of ethics dating from seminal pronouncements in 1923 to the latest revisions in effect in 2005. These fundamental principles are identifiable in the Classification Guide headings and subheadings: “I. Regulations of Media Content, 5. Prior restraints, 8. Fair trial, free press, 11. Defamation, 13. Privacy, 17. Copyright, 20. Broadcast media regulation, 22. Student media regulation;” “III. Newsgathering, 35. Authority to gather news, 38. Access to records, 40. Access to places, 42. Access to people, 44. Statutory right of access, Restraints on Access to information, 55. Press Accreditation, 60. Forced Disclosure of Information, 65. Criminal or tortious newsgathering.

In addition to Court rulings, the argumentative briefs filed by the litigants and the *amici curiae* briefs filed in these cases are also primary source material for this study. These briefs usually focused directly on the practical consequences of a Court ruling and often assess the ethical values and free press principles raised by the cases.

⁸⁸ It should be noted that the term “civic responsibility” is not at all concerned with or related to “civic journalism.” Nor is it synonymous with the social responsibility theory of the press elaborated by Theodore Peterson in FRED S. SIEBERT ET AL., *FOUR THEORIES OF THE PRESS* (1956).

Cases decided since 1947, the year the Hutchins Report was issued, were identified in the *Media Law Reporter* using the criteria and processes explained above and then located for analysis in *U.S. Reports*. All of the citations to Supreme Court decisions refer to the text of the official Supreme Court reporter. This text was relied on to determine if the passage of time has validated the Hutchins Report's warning that the government might impose ethical reforms on journalists if journalists did not do so on their own.

The Hutchins Report is an important part of this study because it is widely credited with providing impetus for the ongoing efforts to make the practice of journalism more ethical and socially responsible. The report also was the product of a period in American history when the prescriptive legal theory of pragmatic instrumentalism was at the peak of its influence and encouraged the use of law to achieve social ends. Pragmatic instrumentalism, as explained earlier, is part of the theoretical framework for this dissertation.

Changing concepts of social responsibility and public criticism of journalism's shortcomings have impelled the evolution of American journalism codes of ethics from the seminal Canons of Journalism developed for the American Society of Newspaper Editors in the early 20th century to the highly detailed ethics guidebook created by *The New York Times* in the early 21st century. Despite periodic shifts in emphasis and the expansion of values espoused by the various codes over the course of nearly a century, this study identifies five fundamentals of journalism ethics that are common to nearly all of them: truth, privacy, independence, news gathering, and protecting sources. These fundamental principles encompass important ethical concerns but do not address them all. It is beyond the scope of this dissertation to analyze the interaction of law and every ethical principle embodied in every journalism code. This study is limited to analyses of Court rulings that engage any of

the five fundamental principles. These principles are identified here as fundamental based on a variety of factors, including their prominent placement in seven of the most influential journalism ethics codes dating from 1923 until 2005; their appearance as recurrent themes addressed in journalism ethics treatises and textbooks; their inclusion as points of criticism addressed by the Hutchins Report, the Warren Commission Report, the Kerner Commission Report, and the Twentieth Century Task Force report. These fundamental principles encompass the ethical values that were most consistently among the first five addressed in journalism codes since 1923 and continued to be included prominently in codes that were in effect in 2005.⁸⁹ The seven codes relied on most to identify these fundamental principles are the 1923 Canons of Journalism,⁹⁰ codes adopted by the American Society of Newspaper Editors (ASNE),⁹¹ Radio-Television News Directors Association (RTNDA),⁹² Society of Professional Journalists (SPJ),⁹³ Associated Press Managing Editors (APME),⁹⁴ The New

⁸⁹ The earliest journalism code of ethics, the 1910 Kansas Code of Ethics, was not used in this study to determine the fundamental principles of journalism ethics because it was found to be significantly less influential than the Canons of Journalism, which were developed in 1923 and used as a template for many subsequent journalism codes. The Kansas Code also did not immediately address journalism ethics, but began by focusing on advertising, circulation, and billing. News practices were the last issues addressed by the code. Nonetheless, if this study had used those portions of the Kansas Code that addressed journalism ethics, this study's identification of the fundamental principles would not have been affected because the code addressed the same principles the Canons did in 1923. *See* Kansas Code of Ethics, *reprinted in* NELSON ANTRIM CRAWFORD, *THE ETHICS OF JOURNALISM* 202-05 (1924).

⁹⁰ *See* Canons of Journalism, *reprinted in id.* at 183-85.

⁹¹ ASNE Statement of Principles, *available at* <http://www.asne.org/index.cfm?ID=888> (last updated Aug. 28, 2002).

⁹² RTNDA Code of Ethics and Professional Conduct, *available at* <http://www.rtna.org/ethics/coe.html> (last visited April 8, 2006).

⁹³ Society of Professional Journalists Code of Ethics, *available at* http://www.spj.org/ethics_code.asp (last visited April 8, 2006).

⁹⁴ Associated Press Managing Editors Code of Ethics Revised and Adopted 1995, *available at* <http://www.asne.org/index.cfm?ID=388> (last updated Feb. 17, 1999).

York Times Company,⁹⁵ and the Gannett Corporation's Newspaper Division.⁹⁶ None of these seven codes ranks the fundamental principles of journalism exactly as this study does, but all consistently indicated these principles were among the most important. The treatises and textbooks consulted to identify these principles included titles published as early as 1924 and as recently as 2001. Among them were the classic *The Ethics of Journalism*,⁹⁷ *Good News*,⁹⁸ *Journalism Ethics: A Reference Handbook*,⁹⁹ *Groping for Ethics in Journalism*,¹⁰⁰ the 1993 and 1999 editions of *Doing Ethics in Journalism A Handbook with Case Studies*,¹⁰¹ *Journalism Ethics: Philosophical Foundations for the News Media*,¹⁰² *Don't Shoot the Messenger*,¹⁰³ and *The Elements of Journalism*.¹⁰⁴

The first of these fundamental principles is truth or truth telling. It encompasses a devotion to accuracy and a commitment to never intentionally or negligently misstate facts. It also imposes an affirmative obligation on journalists to gather and report newsworthy information unless some countervailing principle or consideration would counsel otherwise.

⁹⁵ The New York Times Ethical Journalism Guidebook, *available at* <http://www.nytc.com/company-properties-times-coe.html> (last visited April 8, 2006).

⁹⁶ Gannett Newspaper Division, I. Principles of Ethical Conduct for Newsrooms, *available at* <http://www.gannett.com/go/press/pr061499.htm> (last visited April 8, 2004).

⁹⁷ CRAWFORD, *supra* note 89.

⁹⁸ CLIFFORD G. CHRISTIANS, *GOOD NEWS* (1993).

⁹⁹ *JOURNALISM ETHICS: A REFERENCE HANDBOOK* (Elliot D. Cohen & Deni Elliot, eds. 1998).

¹⁰⁰ H. EUGENE GOODWIN ET AL., *GROPING FOR ETHICS IN JOURNALISM* (1999).

¹⁰¹ JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES* (Sigma Delta Chi Foundation and the Society of Professional Journalists 1993) (3rd ed. 1999).

¹⁰² JOHN C. MERRILL, *JOURNALISM ETHICS: PHILOSOPHICAL FOUNDATIONS FOR NEWS MEDIA* (1997).

¹⁰³ BRUCE W. SANFORD, *DON'T SHOOT THE MESSENGER* (1999).

¹⁰⁴ BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* (2001).

In essence, the truth and truth-telling principle creates an affirmative duty to publish the news. The duty to tell the truth necessarily requires seeking the truth, which is identified among the five fundamental ethical principles also as news gathering.¹⁰⁵

All seven written journalism ethics codes relied on by this study address or enshrine truth or truth telling at the top of the documents. The opening sentence in the Canons of Journalism, for example, establishes the affirmative duty to seek out and publish the news as it states, “The primary function of newspapers is to communicate to the human race what its members do, feel and think.”¹⁰⁶ The Canons do not mention the accuracy component of the truth principle until the fourth enumerated principle, which says, “By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control or failure to obtain command of these essential qualities.”¹⁰⁷

Similarly, the preamble of the code adopted by SPJ in September 1996 advocates “seeking truth and providing a fair and comprehensive account of events and issues.”¹⁰⁸ The SPJ code lists first among its principles and standards of practice: “Seek Truth and Report It.”¹⁰⁹ Likewise, the preamble to the most recent iteration of the RTNDA code of ethics,

¹⁰⁵ See JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* 167 (1993). The authors state: “[I]t is important to recognize that the primary ethical obligation of journalism is to inform the public by seeking truth and reporting it as fully as possible.”

¹⁰⁶ See CRAWFORD, *supra* note 89 at 183.

¹⁰⁷ *Id.* at 184.

¹⁰⁸ Society of Professional Journalists Code of Ethics, *supra* note 93.

¹⁰⁹ *Id.*

which was adopted in September 2000, urges its members to “seek the truth, report it fairly and with integrity. . . .”¹¹⁰

Although the 52-page ethics guide published by *The New York Times* in 2003 does not overtly address the truth principle until page 7, it does so in the first paragraph of the enumerated duties on the page titled, “Our Duty to Our Readers.” The final paragraph on this page returns to the truth principle as it states, “Staff members who . . . *knowingly or recklessly provide false information for publication betray our fundamental pact* with our readers.”¹¹¹ Gannett’s code places truth and truth telling in the first two sentences of its statement of ethical principles: “We are committed to: Seeking and reporting the truth in a truthful way. We will dedicate ourselves to reporting the news accurately, thoroughly and in context.”¹¹² Truth and accuracy are addressed initially in Article IV of the American Society of Newspaper Editors’ statement of principles and again in Article VI.¹¹³ Truth telling appears early and as an important value in the preamble to the Associated Press Managing Editors Code of Ethics while accuracy is prominent in the first sentence of specific reference to a journalism principles.¹¹⁴ The second sentence says: “Truth is [the good newspaper’s] guiding principle.”¹¹⁵

The second concept identified by this study as a fundamental principle of journalism ethics is privacy. Structures against invasions of privacy are prominently and repeatedly

¹¹⁰ RTNDA Code of Ethics and Professional Conduct, *supra* note 92.

¹¹¹ The New York Times Ethical Journalism Guidebook, *supra* note 95 (emphasis added). This website provides access to the guidebook in PDF format, which displays it on 52 numbered pages.

¹¹² Gannett Newspaper Division, I. Principles of Ethical Conduct for Newsrooms, *supra* note 96.

¹¹³ See ASNE Statement of Principles, *supra* note 91.

¹¹⁴ See Associated Press Managing Editors Code of Ethics, *supra* note 94.

¹¹⁵ *Id.*

addressed in each of the seven codes and many books and reports that assess journalism practices. Repeated references to privacy within these works indicate the principle's importance as well as its amorphous definition. Many of these references did not use the word "privacy" or its variants, but nonetheless referred to privacy interests. This study defines these interests as matters that if publicly disclosed or discussed would cause emotional distress including embarrassment or shame, or expose a person to potential emotional or physical harm. The 1923 Canons of Journalism addressed the privacy principle under the headings of "Fair Play" and "Decency" and somewhat vaguely caution that a "newspaper should not invade private rights or feelings without sure warrant of public right."¹¹⁶ An ethics handbook developed for the Society of Professional Journalists in 1993 grappled with the parameters of the privacy principle by referring to a sampling of the privacy provisions of newspaper codes from across the United States. These indicated that privacy was often at issue when a non-public person was involved: "[P]rivate citizens . . . are frequently surprised, and sometimes upset, when they are approached by reporters or find themselves written about. This is especially true in tragic situations."¹¹⁷ The handbook continued with references to "a rape victim or a witness in possible danger" and a "person's mental or physical infirmities, sexual preferences or the like."¹¹⁸ Another excerpt referred to "stories and pictures that have the potential to be offensive to great numbers of readers."¹¹⁹ Privacy concerns, as reflected in these excerpts, are addressed under the heading, "Minimize Harm," in the Society of Professional Journalists' ethics code that was in effect in 2005. It

¹¹⁶ See CRAWFORD, *supra* note 89 at 185.

¹¹⁷ JAY BLACK ET AL., *supra* note 101 at 179 (quoting the PHILADELPHIA INQUIRER ethics code).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 180 (quoting the SPOKANE SPOKESMAN-REVIEW AND CHRONICLE).

advises journalists to: “Be sensitive when seeking interviews or photographs of those affected by tragedy or grief. Recognize that private people have a greater right to control information about themselves than do public officials.” It concludes that “only an overriding public need can justify intrusion into anyone’s privacy.”¹²⁰

The final three concepts identified in this study as fundamental principles of journalism ethics are independence, news gathering, and protecting sources. They are addressed as frequently and prominently as truth and privacy in the codes and ethics literature, and are grouped together in this study as matters of civic responsibility. These are also the principles this study has found most dependent on expansive readings of the First Amendment for legal protection and ethical justification.

The independence principle encourages journalists to pursue the truth and make news judgments that are not coerced or motivated by personal, business, or governmental interests. Independence and the ethical directive to gather news and disseminate it are principles that are essential to the basic watchdog function of American journalism. Protecting sources is similarly important to the watchdog function because sources, whether confidential or attributed, are indispensable to news gathering. This study identifies these three principles as the most dependent on First Amendment protection because in following these principles, journalists sometimes purposely reject their civic responsibility and become subject to legal penalties. The term “civic responsibility” does not appear in any of the codes consulted for this study, but the concept as defined here is embedded to some degree in all of them and is a central concern of much of the published press criticism. On the most basic level, civic responsibility refers to the journalists’ duty to comply with the law or break it as a matter of

¹²⁰ Society of Professional Journalists Code of Ethics, *supra* note 93.

moral or ethical principle. It broadly addresses matters of public policy. Code provisions that urge reporters to conceal or reveal confidential sources even when served with court subpoenas, for example, are addressing a matter of civic responsibility. It is a principle that deals with the journalists' obligations to the duly constituted authority structures of the body politic.

Concepts identified here as fundamental principles of journalism often overlap and merge in the codes. News coverage of a rape trial, for example, may raise ethical issues covered by the truth telling and privacy principles, as well as civic responsibility. The journalistic behaviors and practices covered by the five fundamental ethical principles clearly overlap in many Supreme Court cases treated here. Those rulings will be analyzed using each applicable principle as a framework.

Justification

As journalists' interest in and dedication to the ethical practice of their profession waxed, waned, and altered focus during the twentieth century and the early years of the twenty first century, public criticism of and dissatisfaction with the morality of journalistic practices also rose and fell, but never fully abated. It would be unreasonable to presume that in a highly politicized democratic society this dissatisfaction would not be manifest in some manner. This dissertation is important because it seeks to determine whether that dissatisfaction has been expressed or remedied in U.S. Supreme Court rulings on issues that involve the ethical practice of journalism. While the First Amendment is a powerful barrier to government intrusions into the operations of the press, it does not provide absolute

protection, and not every government action that affects the press can be construed to violate its freedom.

The preceding review of the scholarly literature in this area reveals that other studies have examined how law has addressed the ethical practice of journalism, but most often they reviewed one case or a small category of cases. None has sought to analyze Supreme Court rulings rendered since the Hutchins Report for specific instances in which fundamental ethical principles of journalism were converted into legal imperatives or otherwise affected by these Court edicts. Some studies have interpreted legal edicts as moral treatments or ethical imperatives, as this study seeks to do, but they have done so on a smaller, more restricted basis.

A review of the scholarly literature that focuses on the intersection of law and the ethical practice of journalism has not revealed any study that analyzed Supreme Court rulings from 1947 through 2005 that addressed specific principles of journalism practices. This study will do that in the hopes of determining whether journalism ethics are being established by Supreme Court justices instead of by journalists. Such government intrusion would raise concerns about whether the free press guarantee of the First Amendment is being circumvented. This study provides an expansive view of the interaction of law and journalism ethics over nearly six decades and identifies trends that may help chart the future of journalism practices.

This chapter introduced and provided an overview of the study. The second chapter is a historical review and analysis of the extra-legal mechanisms used in the effort to upgrade the ethical practices of journalists. These mechanisms include codes of ethics and news councils. The chapter necessarily examines the work of the Hutchins Commission and

includes a review of scholarly critiques of its effects on American press practices. This chapter also briefly examines the criticism and suggestions for improvement of journalism made by the Warren Commission, the Kerner Commission, and The Twentieth Century Fund Task Force in their respective critical reports on the press to promote the ethical, socially responsible practice of journalism. The chapter includes an assessment of the National News Council's efforts to provide a semblance of enforcement of ethical standards in journalism and concludes with an examination of trends exhibited by a sampling of journalism ethics codes dating from 1910. The subsequent chapters will analyze how U.S. Supreme Court rulings in press cases since 1947 have affirmed or undermined journalism's fundamental ethical principles.

CHAPTER TWO

Making Journalism Ethical: Codes, Commissions, and Councils

When Senator Alan Simpson publicly berated radio journalist Nina Totenberg in 1991 for publicizing Anita Hill's allegations of sexual harassment against U.S. Supreme Court nominee Clarence Thomas, he "brandished his copy of [a journalism code of ethics] as though it were a crucifix," wrote a *Washington Post* reporter.¹ In that singular act, the Republican from Wyoming simultaneously demonstrated the worth of the codes and their fundamental weakness. Their worth was in providing Simpson with a professional standard for judging Totenberg's conduct. Their weakness was the fact that his verbal assault was the most severe sanction she was likely to face, if indeed she had violated any ethical principle.

These twin issues of worth and weakness have been recurring themes for journalism practitioners, their critics, and media scholars who have sought to improve the profession. Codes of ethics were devised to improve the quality of American journalism and temper its excesses, and therein lay their worth. But they were widely resisted and generally denied enforcement power, even by those who admitted there were major flaws in the means employed to identify, gather, and disseminate news. The resistance was often grounded in fears that enforcement would cost the press some measure of freedom and ultimately prove destructive to the profession.

¹ Joel Achenbach, *Oh, That Code of Ethics*, THE WASH. POST, OCT. 19, 1991, at D1.

This chapter is a chronological examination of the direct, subtle, and failed attempts at enforcement. It covers the extra-judicial efforts of journalists, as well as private and government-appointed commissions, to identify journalism's moral and professional failings and craft remedies for them. As a foundational prelude to this dissertation's central purpose, examining high court rulings that address journalism ethics issues, this chapter reviews a variety of journalism practices that were particularly problematic during selected periods of history. This review looks at the non-judicial corrective and enforcement mechanisms suggested or actually employed.

The chapter begins with an assessment of the seminal attempts of journalists to address unsavory press practices and elevate the standards of practice in their field by adopting codes of ethics. This assessment then moves to the Hutchins Commission Report and the major scholarly critiques of this privately assembled panel, which was arguably the single most influential effort to reform the practice of journalism. Some of the concerns raised by the Hutchins Commission in the 1940s were echoed in government reports issued by the Warren and Kerner commissions in the 1960s and in the privately funded report of The Twentieth Century Fund in the 1970s. These reports also are reviewed here as part of an assessment of how these panels may have influenced refinements in journalism practices, affected the development of codes of ethics, and prompted the creation of the National News Council as an institutionalized monitor and scold for the press.

American journalists have engaged in self-evaluation and other campaigns to improve themselves since they were colonists in the 18th century.² By the middle of the 19th century these efforts had progressed to the point that at least one group of journalists, the Missouri

² See, e.g., DAVID A. COPELAND, COLONIAL AMERICAN NEWSPAPERS: CHARACTER AND CONTENT (1997).

Press Association, was calling for professional schools of journalism and ethics codes to establish and maintain professional-level standards for the press.³ One of the association's leaders even proposed a list of ethical guidelines in 1876, according to journalism historian Stephen A. Banning.⁴ Nonetheless, scholars usually cite the adoption of the Canons of Journalism in 1923 by the American Society of Newspaper Editors (ASNE) as the start of the first major undertaking to professionalize and establish ethical guides for newspeople.⁵ The canons served as the template for a host of ethics codes adopted by newspapers and journalism associations throughout the 1920s. Indeed, Sigma Delta Chi, an organization of journalists later known as the Society of Professional Journalists, adopted the canons as its own in 1926.

Codes of ethics have been the tool most widely used by the professional media to improve journalism practices, though their effectiveness has been questioned frequently. The systematic development of ethical standards for journalism, as indicated by the creation of codes, was spurred by the public expression of concerns about issues of professionalism and self-evaluation at the start of the 20th century. This ongoing effort to upgrade journalism through codes and other mechanisms is reviewed here chronologically in the general time frames that saw surges in this type of activity. The review begins around the start of the 20th century and moves through the Progressive Era, the Jazz Age, and the early 1930s. It

³ See Stephen A. Banning, *The Professionalism of Journalism: A Nineteenth-Century Beginning*, 24 JOURNALISM HIST. 157 (Winter 1998-1999).

⁴ *Id.* at 161; see also HAZEL DICKEN GARCIA, JOURNALISTIC STANDARDS IN 19TH CENTURY AMERICA (1989).

⁵ JAY BLACK & JENNINGS BRYANT, INTRODUCTION TO MASS COMMUNICATION 597 (3rd ed. 1992). An article in the January 1922 *Atlantic Monthly* severely criticizing journalism practices galvanized Casper S. Yost into having the code written. See Jane S. McConnell, *Defining Journalism's Role in Society: Ethics Codes' Chronicle of Responsibility* (2002) (unpublished paper presented at the Association for Education in Journalism and Mass Communication Annual Conference, Miami, Fla.)

continues into the 1940s, the immediate post-Hutchins Commission Report years from 1947, and into the 1950s. This review moves into the mid-1960s through the 1970s, a time frame referred to here as the “activist period” because it spans the Civil Rights movement, the anti-Vietnam War movement, the Watergate scandal, and widespread public dissatisfaction that prompted efforts to improve press practices. This review ends with what this study calls the “new millennium period” from the late 1990s into the 21st century, which saw significant changes in the approaches to setting ethical guidelines for journalists. This study’s analysis of the evolution of written codes of ethics then gives way to an extended treatment of the efforts of Hutchins Commission, the Warren and Kerner commissions, and the National News Council to identify, criticize, and correct journalism’s lapses.

Early Codes of Ethics

Ethical considerations that engaged journalists during the aforementioned time frames did not seem essential to the press of the American colonial period. This may have been so because newspapers were usually the funded creations of politics, dedicated to furthering the aims of various political factions and defeating their opponents. Service to the general public was an inferior ethical priority to these early publications, or as Robert S. Fortner indicated in a 1978 study, perhaps that service was just perceived differently.⁶

[I]n the formative years of the nation’s history the press was perceived to be ethical – or moral – to the extent that it upheld its responsibility to be a corrective influence on government. . . . The press was to seek liberty, truth and virtue; to do so was to be, *ipso facto*, ethical.⁷

⁶ Robert S. Fortner, *The Self-Conscious Image and the Image of an Ethical Press*, 5 JOURNALISM HIST. 46 (Summer 1978).

⁷ *Id.* at 47.

Public service defined in this manner was an intended byproduct of newspaper criticism of its political opposition. Journalist-critics would reveal truths that would help readers make better political choices. It is significant that in these early years when bias was a fundamental tenet of journalism, truth was already a revered principle. Truth remains the profession's paramount ethical value centuries later, even though partisan bias was cast down long ago and replaced by objectivity as a fundamental value.

Political control of newspapers diminished in the 1830s with the advent of the penny press and increasing reliance on advertising as the primary source of funding.⁸ By the early 1900s, newspapers no longer depended heavily on political partisanship for their survival and were free to criticize government policy and practice irrespective of the party in power and defend the public from injustice from every quarter. The reliance on advertising as the primary funding source meant newspapers had to maintain high circulation to attract paying advertisers. This required appealing to a larger pool of readers, many of whom were less educated than the typical newspaper subscribers of earlier eras and unwilling or unable to spend more than a nominal amount for the newspaper. Many were attracted by sensationalism and other engaging styles of news presentation, including the “new journalism,” which featured advocacy and writing styles that mimicked classic and popular literature. The new journalism also embraced a gory, adventure-novel approach to crime reporting. By the end of the first decade of the 20th century, however, there was a burgeoning movement away from this style of journalism and toward professionalism and a system of ethics.

⁸ See GERALD BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* (1992); DAN SCHILLER, *OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM* (1981).

“This period may have been the high water mark of journalism ethics, paralleled perhaps only by post-Watergate self-analysis [of the 1970s],” observed journalism ethicists Jay Black and Jennings Bryant.⁹ But the ethics of this period, they explained, were directed inward and focused on moral responsibility to the community of journalists. This sense of responsibility to the profession is borne out by the wording in the early journalism associations’ codes, but statements professing responsibilities and duties to the public and the society as a whole are equally obvious in those codes.¹⁰

The Kansas Editorial Association adopted a code of ethics in 1910, which was the first developed for a journalism organization, and it indicated that political bias had been soundly rejected in favor of objectivity: “News is the impartial report of the activities of mind, men and matter which do not offend the sensibilities of the more enlightened people.”¹¹ A decade later concerns about journalists’ conduct had moved higher on the public agenda, and codes of ethics began to proliferate amid criticism of bad journalism practices. “A great deal of media criticism existed in the 1920s as thoughtful journalists recognized public disaffection with media excesses, and called for commitments to journalism’s professional status,” observed Black and Bryant.¹²

Mounting public outcries against urban newspaper sensationalism, fakery, and articles about crime and sex that appealed to the readers’ senses instead of their intellect prompted calls for the creation of journalism schools and college courses to teach the discipline and advanced the quest for professionalism. The call and move toward

⁹ BLACK & BRYANT, *supra* note 5, at 596.

¹⁰ See NELSON ANTRIM CRAWFORD, *THE ETHICS OF JOURNALISM Appendix A* (1924).

¹¹ Kansas Code of Ethics (1910), *reprinted in id.* at 206.

¹² BLACK & BRYANT, *supra* note 5, at 596.

professionalism in journalism were evident across the United States from the early 1900s and into the Jazz Age of the 1920s. *Journalism Bulletin*, the predecessor of the scholarly *Journalism Quarterly*, was founded during this period and called for “the establishment of professional schools to raise the dignity and status of journalism,” wrote Clifford G. Christians, Quentin J. Schultze, and Norman H. Sims in an article published in 1978.¹³

That public backlash also prompted unprecedented numbers of journalists, at their individual newspapers and as members of press associations, to achieve and ensure professional levels of performance by developing codes of ethics during the Jazz Age.¹⁴ The term “jazz journalism” was coined to identify some of the unsavory press practices that enjoyed a heyday in urban centers at the turn of the century. The codes developed during this period expressly rejected these practices. The Canons of Journalism, for example, swore off news accounts that provided “incentives to base conduct, such as to be found in details of crime and vice.”¹⁵ They also insisted, “Headlines should be fully warranted by the contents of the articles they surmount.”¹⁶ Similarly, the Oregon Code of Ethics for Journalism declared, “Through this code we desire to take a position against so-called sensational practice.”¹⁷

Nonetheless, press critic Bruce Evensen discounted the press reform activities of the Jazz Age as improperly motivated and therefore of little true moral worth.¹⁸ He cited as an

¹³ Clifford G. Christians et al., *Community, Epistemology and Mass Media Ethics*, 5 JOURNALISM HIST. 38 (1978).

¹⁴ See Harvey Saalberg, *The Canons of Journalism: A 50-Year Perspective*, 50 JOURNALISM Q. 731 (1973).

¹⁵ Reprinted in CRAWFORD, *supra* note 10, at 185.

¹⁶ *Id.* at 184.

¹⁷ *Id.* at 191.

¹⁸ Bruce Evensen, *Journalism's Struggle over Ethics and Professionalism During America's Jazz Age*, 16 JOURNALISM HIST. 54, at 54-63 (1989).

illustrative example the American Society of Newspaper Editors' failure to use its newly created Canons of Journalism to discipline a prominent member, *Denver Post* editor and co-owner Fred G. Bonfils, for glaring violations. The relevant canons said: "A journalist who uses his power for any selfish or otherwise unworthy purpose is faithless to a high trust;" and "Freedom from all obligations except that of fidelity to the public interest is vital."¹⁹ Bonfils was implicated in a conflict of interest that allowed him to enrich himself by dropping his newspaper's coverage of the Teapot Dome political scandal. Bonfils threatened to sue if ASNE took any action against him. After a period of negotiation, he was allowed to resign from ASNE without sanction. An effort to empower the association to enforce the canons created a groundswell at its annual convention in 1929 but ultimately failed. ASNE's constitution was reworked in 1932 to allow the expulsion of members for misconduct, but violation of the canons was not specifically mentioned as the type of misconduct that would warrant dismissal.²⁰

From the outset, the final full sentence in ASNE's Canons of Journalism openly announced that the association lacked authority to enforce its guidelines but expressed hope that violators would "encounter effective public disapproval or yield to the influence of a preponderant professional condemnation."²¹ Evensen explained ASNE's reluctance to impose other sanctions as a function of its members' realization that if they used the canons to discipline each other, they could suffer a competitive disadvantage because non-member newspapers were not similarly encumbered. Evensen recounted the arguments of ASNE

¹⁹ Canons of Journalism (1923), *reprinted in* CRAWFORD, *supra* note 10, 183-85.

²⁰ *See* Saalberg, *supra* note 14, at 733-34.

²¹ Crawford, *supra* note 10, at 185.

members who claimed that a newspaper's primary mission was to make money and ethics had no bearing on its ability to do so. "Men who saw themselves as 'gentlemen of the press' may have passionately debated professionalism during the Jazz Age in the spirit of great reformers," Evensen wrote, "but in the end it was a language limited by the logic of the marketplace."²²

Journalists failed to have the public perceive them as professionals in the 1920s because they would not police themselves, according to Evensen's article, which cited studies indicating that the public expected professionals to enforce their codes of conduct instead of waiting and hoping for voluntary compliance. The Kansas Code of Ethics, which was adopted by the Kansas Editorial Association in 1910, was among a handful that suggested enforcement by firing. "No reporter should be retained who accepts any courtesies, unusual favors, opportunities for self gain, or side employment from any factors whose interests would be affected by the manner in which his reports are made," the code said.²³

Enforcement apparently has been a recurring concern from the earliest discussion of journalism ethics through the creation and subsequent revisions of ethics codes. *The Arbitrator*, a Jazz Age periodical, promoted journalism ethics but suggested that law be used to install and police them.²⁴ One six-page article in *The Arbitrator* also suggested that a "public literary defender" be elected to monitor press practices and that commissions be created to impose sanctions such as fines for wayward journalism. Nelson Antrim Crawford, a journalism scholar of the time, said, "[S]uch suggestions are obviously absurd," but he did

²² Evensen, *supra* note 18, at 61.

²³ CRAWFORD, *supra* note 10, at 210.

²⁴ *Can Truth be Enforced?*, THE ARBITRATOR, July 1919 at 6.

not similarly demean a suggestion that journalists be licensed by state boards as a means of maintaining enforceable high standards.²⁵

Christians, Schultze, and Sims claimed external controls were rejected by Jazz Age journalists because they believed they had a duty to their profession and not to the public or society at large.²⁶ Accordingly, proponents of ethical reform during this time frame sought to achieve these ends voluntarily, without goads, on their own, and without outside help. By the mid-1930s, agitation for improved standards in journalism had quietly stalled. ASNE's adoption of punitive sanctions in 1932 for improper behavior by its members may have been journalists' last significant self-policing action during that decade.

As the 1920s and 1930s gave way to the 1940s, according to journalism historian Margaret Blanchard, "press critics had moved from the Progressive ideal of having the press reform itself from within to the New Deal view of having the press reformed from without – by the federal government."²⁷ She cited press critic Will Irwin's proposal for legal intervention to improve journalism as indicative of the mounting calls for government involvement in press conduct during the New Deal years as concerns about service to the public became paramount. Legal intervention into the monopoly business aspects of journalism was the primary thrust of Irwin's proposal, but the suggestion eased the way for consideration of laws that affected ethical issues as well.

Leon Nelson Flint, writing in 1933 on the use of law and licensing to enforce ethical norms in journalism, saw the former as impractical, but the latter was deemed worthy of

²⁵ See CRAWFORD, *supra* note 10.

²⁶ Christians et al., *supra* note 13, at 40.

²⁷ Margaret A. Blanchard, *Press Criticism and National Reform Movements: The Progressive Era and the New Deal*, 5 JOURNALISM HIST. 33 (1978).

some consideration.²⁸ Through the 1930s and into the 1940s, the public became so disenchanted with journalists' behavior that government intervention, which appeared to be producing positive results when applied to other social problems of the time, apparently did not seem like a bad idea to many. Even Morris L. Ernst, an attorney for the American Newspaper Guild, which represented newspaper reporters, called for extensive government intervention into newspaper operations.²⁹ His suggestions were geared primarily to the business aspects of the press but influenced popular discourse on journalism ethics.

Blanchard said the implementation of Ernst's suggestions was thwarted to some degree by the release of the Hutchins Commission Report in 1947, which condemned a number of unethical, common press practices and found the press's effort to reform itself sorely deficient. The report acknowledged the noble intent of the early ethics codes but found them largely useless and unenforceable as it praised the few that had provisions allowing the expulsion of malefactors or the imposition of other sanctions.³⁰ Although the Hutchins Commission Report is perhaps the best remembered effort to reform journalism in the 1940s and is considered a highlight of the revived interest in higher standards for journalism, it did not start this era's revival of press-reform activity. Journalism reform had fallen off the public agenda after the frenzy of activity at the start of the century, but it resumed in the mid-1940s before and after the Hutchins Report was issued.³¹

²⁸ LEON NELSON FLINT, *THE CONSCIENCE OF THE NEWSPAPER* (1925).

²⁹ Blanchard, *supra* note 27, at 54.

³⁰ COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* (Robert D. Leigh ed., 1947) [hereinafter HUTCHINS COMMISSION REPORT].

³¹ See *THE RESPONSIBILITIES OF JOURNALISM* (Robert Schmuhl ed., 1984).

Modern Codes of Ethics

This revival was manifest in activity by a number of journalism associations, perhaps none more significant than Sigma Delta Chi, currently named the Society of Professional Journalists, and a nascent group of broadcast journalists, which would become the National Association of Radio News Directors. A majority of the Sigma Delta Chi Committee on Press Ethics was inspired in 1949 to ask the full membership to add enforcement powers to the ethics code it had adopted more than two decades earlier. “[T]he weakness of codes is their lack of enforcement powers,” the majority said in an explanatory statement quoted in *Editor & Publisher*.³² The committee wanted the organization to consider the proposal at the national convention scheduled for later that year. Members would have voted on whether to create an impartial review board to consider claims of ethical violations brought against its members and empower it to use expulsion as a penalty, but “the proposal was tabled and referred to a committee for further study,” according to the magazine.³³ When Sigma Delta Chi finally did revamp its code of ethics more than two decades later, the proposal was absent. A non-punitive enforcement provision had taken its place.

For broadcast journalists working during the 1940s revival, the most significant activity may have been the approval of a package of resolutions at the founding of the National Association of Radio News Directors in 1946. This was the precursor to the Code of Standards for radio journalism that was adopted in 1947. The resolutions sought to curb the sensationalism that had become common in radio news as well as the practice of allowing advertising to meld into and affect news reports. The resolutions accordingly said radio news

³² *Sigma Delta Chi Tables Code Providing Penalties*, EDITOR & PUBLISHER, Nov. 19, 1949, at 7.

³³ *Id.*

reports “should remain within the bounds of good taste;” news should be an autonomous unit at radio stations; and the news director “should be directly responsible only to his journalistic principles and ideals, and to the general manager of the station.”³⁴

The Code of Standards refined NARND’s early resolutions to establish a sense of social responsibility. “The news director’s first responsibility is to the people,” the code said. It further sought to build a firewall between advertisers and the news by insisting, “Commercials should be separated definitely from the news context and NARND recommends that a different voice be used.”³⁵ When the group held its national convention in 1950, it was well on the way to becoming the Radio Television News Directors Association (RTNDA) because of the rise of television. But in revising its code the group remained true to the founding principles and sought to establish clear lines of demarcation between news and commentary, as well as to eliminate unnecessary racial labeling in news reports. On this latter point the revised code said, “The race, creed or color or previous status of an individual in the news should not be mentioned unless it is necessary to the understanding of the story.”³⁶

Significant alterations appeared when the code was recast in 1966.³⁷ Among them were a name change to the RTNDA Code of Broadcast News Ethics, recognition of conflicts of interests as a high-priority problem, recognition of a duty to respect human dignity and privacy rights, a directive to “actively censure and seek to prevent violations of these

³⁴ See Vernon Stone, *Evolution of the RTNDA Codes of Ethics*, at <http://web.missouri.edu/~jourvs/rtrcodes.html> (last visited March 17, 2006).

³⁵ 1947 NARND Code Of Standards, *reprinted in* Jack Shelley, “Somehow It Works!” *RTNDA Communicator*, Oct. 1990, at 86.

³⁶ Stone, *supra* note 34.

³⁷ *Id.*

standards,” and provisions to control journalists’ conduct during trial coverage. The last provision was added to the code the same year as the U.S. Supreme Court released its ruling in *Sheppard v. Maxwell*,³⁸ which sharply criticized the conduct of journalists covering the murder trial of Dr. Sam Sheppard. The caution about racial labeling remained largely intact in that revision. RTNDA next updated its code in 1973. At that time, lessons from the burgeoning women’s liberation movement caused the code’s timeworn references to “newsmen” to be changed to “journalists.” The strident enforcement and censure provision of the prior code survived the updating as did the provision limiting racial identifications and calling for responsible trial coverage and courtroom conduct. RTNDA was part of a massive movement that erupted nationwide in the 1970s to update journalism ethics codes.

Just as the journalism community had been galvanized into a frenzy of self-improvement activity by widespread and often justified public criticism of its practices in the early 1900s, history repeated itself in the early and mid-1970s.³⁹ As before, another type of “new journalism” had arisen with interpretive advocacy and literary elements at the fore. Journalists of the 1970s faced the same pressures as their fellows in the early 1900s, but arguably there was more threatening public and government-based criticism from activist, special interest groups as well as the administration of President Richard M. Nixon and his vice-president, Spiro T. Agnew. Unethical newsroom practices had proliferated amid efforts to maintain newspapers’ historically high profit margins and the transformation of television news into a profit-making venue that was often run as an entertainment enterprise. In

³⁸ 384 U.S. 333 (1966).

³⁹ See Richard P. Cunningham, *Putting Ethics into Code Difficult Task Through Decades*, QUILL, May 1996, at 42.

response, journalism codes of ethics were created, debated, and updated at an unparalleled rate during the 1970s across the United States by press groups and in individual newsrooms.⁴⁰

The revival prompted Sigma Delta Chi, the Society of Professional Journalists (SPJ), which had been using the Canons of Journalism it copied from ASNE in 1926, to create its own professional standards in 1973. The new SPJ standards included an enforcement provision of sorts that said, “Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople.”⁴¹ This enforcement provision, as weak as it was, was rare among the codes drafted by national press associations. The great bulk of them rejected enforcement. Conversely, individual newsroom codes, just as they had in the early 1900s, largely made adherence a condition of continued employment. Nonetheless, the SPJ code of ethics was one of the most progressive and widely imitated pronouncements of journalism standards of the period.

In 1975, two years after the SPJ revisions, ASNE revamped the Canons of Journalism and renamed them the “ASNE Statement of Principles,” as the association altered its approach to setting journalism standards. The opening statement in the old canons described the document as a “means of codifying the sound practice and just aspirations of American journalism.”⁴² ASNE’s new opening statement described the document “as a standard encouraging the highest ethical and professional performance.”⁴³ While the earlier provisions openly admitted a lack of enforcement power and indicated what “should” be done, the 1973

⁴⁰ See John P. Ferré, *Codes of Ethics: Efforts to Promote Image of Professionalism*, in HISTORY OF THE MASS MEDIA IN THE UNITED STATES 143 (Margaret A. Blanchard ed., 1998).

⁴¹ Sigma Delta Chi Code of Ethics (1973), *reprinted in* PHILIP MEYER, ETHICAL JOURNALISM: A GUIDE FOR STUDENTS, PRACTITIONERS, AND CONSUMERS 252-54 (1987).

⁴² American Society of Newspaper Editors, Canons of Journalism, *reprinted in* MEYER, *supra* note 41, at 247.

⁴³ American Society of Newspaper Editors Statement of Principles, *reprinted in* MEYER, *supra* note 41, at 249.

version did not mention enforcement at all but did include one statement of what journalists “must” do. “Pledges of confidentiality to news sources *must* be honored at all costs,” it said.⁴⁴ National codes of this era were uniformly hortatory and did not provide enforcement of any consequence.

SPJ revised its code in 1984 and again in 1987. The latter revision, however, jettisoned the enforcement clause that had been added in 1973. Journalism professor Richard P. Cunningham, who had worked with the National News Council and was the reader representative at the *Minneapolis Tribune*, criticized the omission. “As the pressure on the press appeared to diminish in the ’80s the Society, with the encouragement of its legal advisers, canceled the enforcement clause,” he wrote.⁴⁵ The 1987 code instead provided: “The Society shall — by programs of education and other means — encourage individual journalists to adhere to these tenets.”⁴⁶ When SPJ’s code was revised again in 1996, the statement that most resembled an enforcement clause said journalists should “expose unethical practices of journalists and the news media.”⁴⁷

ASNE’s 1975 Statement of Principles, which was an ethics code in the form of a conceptual statement of working principles, became the common template for journalism codes of the late 1980s, through the final decade of the 20th century, and into the start of the new millennium. They largely eschewed specific behavioral strictures that were typical of the codes written from the early 1900s through the early 1980s. Until the ASNE model began to

⁴⁴ *Id.* at 250 (emphasis added).

⁴⁵ Cunningham, *supra* note 39, at 42.

⁴⁶ Society of Professional Journalists, Sigma Delta Chi, Code of Ethics (1987) *reprinted in* JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES* (1993), at 4-6.

⁴⁷ Society of Professional Journalists Code of Ethics (1996) at http://www.spj.org/ethics_code.asp (last visited March 17, 2006).

dominate, codes of ethics usually were laundry lists of behaviors that were prohibited or encouraged. Journalism professor and ethicist Ralph Barney, who helped write a major revision of the SPJ code in the early 1990s, has been a longtime critic of detailed codes and advocate of abstract guiding principles and has been quoted saying these detailed codes “are almost insulting for thoughtful people, but they are useful for ignorant people.”⁴⁸ Fellow scholar Clifford G. Christians criticized those older codes for being incomplete, bereft of “solid theoretical foundations,” and thereby fostering ad hoc decision making. “By default we promote situationalism, become less decisive about right and wrong, more easily accommodated to expediency,” he wrote.⁴⁹ Christians’ most damning observation, and the claim that is most relevant to this study, is that law might be usurping the role of ethical guidelines.

The overall trend is toward legalization. Not everyone, obviously, reduces the moral to the legal; but lacking a complete set of principles we have *de facto* allowed the law to provide our constraints. The blatantly illegal is clearly unethical in most systems, yet all authorities uniformly distinguish legal requirements and ethical obligations. That distinction has virtually disappeared in practice.⁵⁰

He called for a “renewed emphasis on ethics as a discipline and a normative science of conduct” to allow journalists to regain control of the determination of what is right, moral, and ethical for their profession.⁵¹

⁴⁸ Alicia C. Shepard, *Legislating Ethics*, AM. JOURNALISM REV., Jan.-Feb., 1994 at 39. Barney was responding to questions about proposed revisions to the Associated Press Managing Editors ethics code in 1994, but he addressed the general practice of creating codes with specific behavioral strictures.

⁴⁹ Clifford G. Christians, *Fifty Years of Scholarship in Media Ethics*, 27 J. COMM. 19, 25 (1977).

⁵⁰ *Id.* at 26.

⁵¹ *Id.*

The older traditional journalism codes, which specifically identified proper and unacceptable practices, were once considered viable means of improvement. Scholars of journalism ethics were now advocating statements of allegiance to abstract moral principles. Some critics, particularly Christians, claimed codes that lacked a theoretical foundation undermined consistent ethical behavior and might, in effect, abandon the field to the strictures of law.

Journalism ethicists Jay Black and Ralph Barney expressed a preference for a “more general and abstract consideration of ethics and morality” that offered “a far greater hope for improving the media than any considerations of ethics codes might offer.”⁵² In addition to this preference for abstract principles, the authors expressed a deeper dissatisfaction with ethics codes:

They have few if any teeth; they are both unenforced and unenforceable. They are incumbent upon members [of professional organizations] only, and the only sanction that can be applied against a member is expulsion from membership, sometimes a small penalty. The codes tend to be bland statements drawn up in response to public disenchantment with media operations. At best, they are a stopgap of semiserious self-regulation in the hope that somehow their platitudes will satisfy both public critics and government’s temptation to regulate.⁵³

Black and Barney argued in a 1985 article that ethics codes were of some use to the novice journalist but were essentially worthless to veterans and “probably should be relegated to framed wall hangings for any journalists who have advanced beyond their internships.”⁵⁴ The

⁵² Jay Black & Ralph D. Barney, *The Case Against Mass Media Codes of Ethics*, 1 J. MASS MEDIA ETHICS 27, 29 (Fall-Winter 1985-86). *Id.* at 29.

⁵³ *Id.* at 27.

⁵⁴ *Id.* at 28.

authors criticized the ineffectiveness of codes and claimed their impotence was intentional because the media did not want to create any trouble for themselves.⁵⁵

Codes and Lawyers

Internal and external pressure for press reforms waned during the late 1980s, and activism diminished. Many critics claimed that concerns about law caused the dilution of ethics codes as they were revised and updated. Nearly all journalism associations' codes of ethics in effect during this period recommended enforcement by peer pressure, though some individual newspapers indicated that their journalists who did not follow their codes would face disciplinary action. The strong disciplinary stance embodied in the RTNDA code remained unique for a while among the major press associations, but it was softened in 1987 in accord with the advice of RNTDA lawyers who said the association could be sued if the enforcement provision was actually invoked. The revised clause said members should "[a]ctively encourage observance of this Code by all journalists."⁵⁶ The change was hailed and condemned simultaneously. A member of the ethics committee, writing in the *RTNDA Communicator*, praised the 1987 version's less strident enforcement provision. "[A] voluntary membership association cannot act as a prosecutor of its members. This is especially true in a First Amendment business such as ours, in which any spectre of official censure creates serious problem," Jeff Marks wrote.⁵⁷ Journalism professor John M. Kittross

⁵⁵ *Id.*

⁵⁶ Stone, *supra* note 34.

⁵⁷ Jeff Marks, *New, Improved, . . .*, RTNDA COMMUNICATOR, Aug. 1987, at 21, *reprinted in* Stone, *supra* note 34.

referred to the new enforcement provision as a “wishy-washy pledge” and said, “[O]ne of the hallmarks of a profession is a code of ethics and teeth with which to enforce it.”⁵⁸

When the Society of Professional Journalists rewrote its Code of Ethics in 1996, it followed the ASNE statement-of-principles model, as did many codes developed at the end of the 20th century. It focused on guiding principles such as: “Seek truth and report it” and “Minimize harm.” Codes of this genre leave it to individual journalists to apply the stated principles to the specific facts of an ethical dilemma immediately before them. Journalists must decide on a case-by-case basis what behavior would best comport with the ideals embodied in those principles. This format for ethical guides is a framing mechanism that avoids enforcement issues by largely avoiding specific references to prohibited behavior. The 1995 incarnation of the Associated Press Managing Editors (APME) Code of Ethics proved to be an exemplar of this format as it stated: “The good newspaper is fair, accurate, honest, responsible, independent and decent. Truth is its guiding principle.”⁵⁹ Rare specific strictures did not condemn bad behavior but used advisory language such as, “The newspaper should not plagiarize words or images.”⁶⁰ During the two years that APME spent debating the code, efforts were made to inject specific directives about practices and words of condemnation for lapses. But, as a trade magazine reported in the midst of the discussions, the association’s lawyer opposed that type of language because it could prove troublesome if a member were sued for behavior at odds with it.⁶¹ APME’s wording was a distinct departure from the

⁵⁸ John M. Kittross, *Old Ethics Code Better*, RTNDA COMMUNICATOR, Sept. 1988, at 6, *reprinted in* Stone, *supra* note 34.

⁵⁹ APME Code of Ethics Revised and Adopted 1995, at <http://www.apme.com/ethics/> (last visited March 17, 2006).

⁶⁰ *Id.*

⁶¹ See Mark Fitzgerald, *A Debate About Ethics Code*, EDITOR & PUBLISHER, Oct. 9, 1993 at 9.

approach embodied in this passage in the 1923 Canons of Journalism: “By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy.”⁶² That level of strident advocacy of proper behavior remained in press association codes to some degree as late as the 1973 version of SPJ’s ethics code, which said: “There is no excuse for inaccuracies or lack of thoroughness.”⁶³ Although the 1980s generally saw codes infused with merely advisory statements, the code developed by the Public Radio News Directors Incorporated (PRNDI) in 1984 was a notable exception. It included specific directions such as: “All errors of fact, bias, or omission must be corrected immediately,” “Honor legitimate requests to hold or embargo newsworthy material provided in advance,” and “Require all news employees, independent contractors, producers, editors, talent, aides, and volunteers under member direction to adhere to these standards. And upon acceptance of these standards, members should advance them by personal action.”⁶⁴ PRNDI’s assertive ethical stance may be attributable to its unique status. It has all the trappings of an association of professionals such as RTNDA or SPJ, but its code functions more like those developed by individual news organizations, which generally have been more strident and specific than associations in their ethical pronouncements and codes.

Professor John M. Kitross was among a large number of scholars who complained during that period about the influence lawyers and the law were having on journalism’s written ethical standards. “One should always consider advice from lawyers, but never should allow them to do your thinking,” he advised. “What good is an association or

⁶² Canons of Journalism, *supra* note 19.

⁶³ Society of Professional Journalists Code of Ethics (1973), *reprinted in* MEYER, *supra* note 41, at 252.

⁶⁴ PRNDI Code of Ethics (1984), *reprinted in* ALAN G. STAVITSKY, INDEPENDENCE AND INTEGRITY: A GUIDEBOOK FOR PUBLIC RADIO JOURNALISM 79-80 (1995).

profession that avoids the possibility of a lawsuit, but loses its purpose and principles?” he asked.⁶⁵ Lawyers became increasingly involved with journalism’s ethical issues during the 1980s and were pivotal in structuring written ethical codes or, as some claimed, suppressing them. Veteran newsman and journalism professor Philip Meyer, writing in 1987, commented on the intrusion of lawyerly concerns into journalism ethics. “Newspaper lawyers have sometimes advised their clients against maintaining any kind of written ethical standards. A libel plaintiff seeking to prove malice might use a departure from the written code as evidence of malicious intent,” Meyer wrote.⁶⁶ This apprehension that codes would be used against their creators in the legal arena was widespread and led one scholar to claim that it had created a “chilling effect on journalistic codes of ethics.”⁶⁷ Critics claimed abandoning written codes under that rationale could leave some journalists ethically adrift. Meyer complained that it was “sacrificing a major moral advantage for a minor tactical benefit.”⁶⁸

As a result of nearly two decades of press associations toeing the legal line with the wording of their codes of ethics, a 2001 law journal note that reviewed the codes concluded, “There is little in the codes of conduct written by national journalism organizations that can hurt the press in court.”⁶⁹ As the 20th century drew to a close, the apparently widespread belief in the 1980s that ethical codes posed a legal risk to journalists was being questioned but not wholly abandoned. Veteran media attorney and SPJ counsel Bruce W. Sanford said in

⁶⁵ Kittross, *supra* note 58.

⁶⁶ MEYER, *supra* note 41, at 172.

⁶⁷ See Ferré, *supra* note 40.

⁶⁸ MEYER, *supra* note 41, at 172.

⁶⁹ Jeff Storey, Note, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 474 (2001).

a 1994 article that, as far as he knew, no libel plaintiff ever advanced his case by pointing out that a journalist had violated a written code of ethics.⁷⁰ He nonetheless advised the authors of codes to avoid stating hard and fast rules. Sanford was quoted nearly a decade later similarly saying, “[P]laintiffs’ lawyers try to use codes against news organizations or reporters but it doesn’t work.”⁷¹ Conversely, veteran media attorney John Bussian, a lobbyist for the North Carolina Press Association, said there is a real risk that codes will be turned against journalists in court. “[Codes] can become a roadmap to proving the media defendant’s liability,” he said.⁷² Journalism ethics expert Bob Steele of the Poynter Institute for Media Studies questioned some of the most respected media lawyers in the United States about the dangers ethics codes presented to journalists in court and found the issue was still being debated in 2003. Nonetheless, lawyers on both sides said any written code should address generalities instead of specifics or absolutes.⁷³ Sanford still insisted: “Codes are not very helpful if they are watered down and so general as to be meaningless. Sometimes specifics are instructional.”⁷⁴

National Public Radio’s code-like approach to setting ethical standards in 1995 produced a guidebook with a unique blending of the *de rigueur* general statements of principle with extensive, specific explanatory notes. For example, in the chapter titled “Fairness Accuracy & Balance,” the NPR guidebook elaborated on the principle of truth

⁷⁰ Bruce W. Sanford, *Codes and Law: Do Ethics Codes Hurt Journalists in Court?* QUILL, Nov. 4, 1994, at 43.

⁷¹ Bruce W. Sanford, *quoted in* Bob Steele, “Ethics Codes: The Lawyers’ Take” *at* http://www.poynter.org/content/content_print.asp?id=18920&custom= (Posted Jan. 30, 2003).

⁷² John Bussian, *quoted in* Steele, *supra* note 71.

⁷³ Steele, *supra* note 71.

⁷⁴ *Id.*

telling by explaining, “Journalists seek the truth, both the facts and the ‘truth behind the facts.’” It went on to advocate objectivity as a value but explained quite specifically: “[W]e prefer to speak of it in terms of ‘fairness, accuracy and balance.’ Objectivity as it has been traditionally defined refers to the demand that journalists keep their personal biases, emotions and other ‘subjective factors’ out of their reporting.”⁷⁵

By 2000, ethics codes promulgated for individual newsrooms were following the trend toward generalities and were more commonly titled codes of conduct or codes of professionalism and ethics. They were much less strident than the newsroom codes written throughout most of the 20th century and closely mirrored the generalized statements of principles of the press association codes. But the two most recent and perhaps the most influential newsroom codes, those created for the Gannett newspapers in 1999 and *The New York Times* in 2003, embodied a rededicated focus on specifics. They embraced absolutes and liberally used explanatory examples as the NPR guidebook had in 1995.

Gannett even used the assertive, imperative language of the earliest journalism ethics codes, eschewing “should” and “ought” for “will.” After setting forth a foundation principle such as, “Seeking and reporting the truth in a truthful way,” the Gannett code proclaimed: “We will be honest in the way we gather, report and present news. . . . We will keep our word.”⁷⁶ Notwithstanding the widely accepted lawyerly premise that ethics codes should avoid absolutes and statements of specifics, Gannett often went into specific detail about how

⁷⁵ ALAN G. STAVITSKY, INDEPENDENCE AND INTEGRITY: A GUIDEBOOK FOR PUBLIC RADIO JOURNALISM 12-14 (1995).

⁷⁶ Gannett Newspaper Division Principles of Ethical Conduct for Newsrooms *available at* <http://asne.org/ideas/codes/gannettcompany.htm> (last visited March 17, 2006).

the principles were to be implemented. When it addressed using unnamed sources, for example, one bulleted item said:

Make clear to sources the level of confidentiality agreed to. This does not mean each option must be discussed with the source, but each party should understand the agreement. Among the options are: a. The newspaper will not name them in the article; b. The newspaper will not name them unless a court compels the newspaper to do so; c. The newspaper will not name them under any circumstances. All sources should be informed that the newspaper will not honor confidentiality if the sources have lied or misled the newspaper.⁷⁷

This was followed up with a caution: “Do not make promises you do not intend to fulfill or may not be able to fulfill.”⁷⁸ While Gannett’s code seemed to fly in the face of conventional lawyerly advice on the wording of ethics codes, it was not unmindful of the law. The provisions quoted above were clearly framed to prevent the consequences suffered by two Minnesota newspapers after they were successfully sued by a confidential source whose identity they revealed.⁷⁹ They also appeared cognizant of the narrow U.S. Supreme Court majority ruling in a consolidated opinion covering cases in which three journalists unsuccessfully sought to resist subpoenas and protect confidential sources.⁸⁰

The New York Times’ Code of Conduct for the News and Editorial Departments was titled “Ethical Journalism” and filled more than 50 pages. Its directives were so specific and plentiful, it included an index to help employees navigate through them. It did not mince words about enforcement. After explaining the high value placed on the publication of truthful information and condemning plagiarism, for example, it bluntly stated: “We will not

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

⁸⁰ See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

tolerate such behavior.”⁸¹ It also forthrightly addressed one aspect of the conflict of interests issue that proved so troublesome during the 1980s and 1990s; it said *New York Times* journalists were free to vote but added, “Journalists have no place on the playing fields of politics.” Just as the wording of provisions in its Gannett counterpart showed awareness of potential legal consequences for unethical behavior, the *Times* code took pains to ward off a repeat of the 1998 Chiquita e-mail scandal⁸² that had badly damaged the reputation of Gannett’s *Cincinnati Enquirer* and cost it \$10 million to settle the civil claims made by Chiquita. It said its staff “must obey the law in pursuit of news . . . [and] may not purloin data,” and it specifically included “databases and e-mail or voice mail messages” as it explained the term “data.”⁸³ The code also made an uncommon distinction between what the law would allow but what the *Times* would forbid as unethical. “Staff members may not record conversations without the prior consent of all parties to the conversation. Even where the law allows recording with only one party aware of it, the practice is a deception,” the code said.⁸⁴

When the *Times*’ code was publicized in January 2003, there was criticism of its hard line stance on some issues, but Bob Steele praised the document, saying, “The New York Times’ standards are tough, and they should be.” He also complimented the code for its “specific guidance.”⁸⁵

⁸¹ The New York Times, *Ethical Journalism*, available at <http://www.poynterextra.org/extra/ethics.pdf> (last visited March 17, 2006).

⁸² See BRUCE W. SANFORD, DONT SHOOT THE MESSENGER 1-6 (1999).

⁸³ The New York Times, *supra* note 81.

⁸⁴ *Id.*

⁸⁵ Bob Steele, *Inside The New York Times’ Revised Code* available at http://www.poynter.org/content/content_print.asp?id=17330&custom= (posted Jan. 16, 2003).

Despite the perception of ethics codes as a means of implementing ethical journalism practices, their effectiveness has not been determined. As codes of ethics proliferated across the industry through the 1970s and 1980s, their effectiveness and worth were debated in scholarly and professional circles at an unprecedented rate. A study published in *Journalism Quarterly* in 1984, for example, indicated that codes of ethics did not directly influence whether a journalist would behave ethically or unethically.⁸⁶ It concluded that codes are primarily symbolic efforts to demonstrate that a news organization is making a serious effort to behave in a “professional, accountable manner.”⁸⁷ A study published two years later in the *Journal of Mass Media Ethics* reported that “the extent of unethical behavior [among journalists] is disturbing” but observed that newspapers with written codes of ethics “were more likely to take a stricter view of what constitutes an ethics violation than newspapers without codes.”⁸⁸ It nonetheless indicated that the news media were actively enforcing ethical conduct within their newsrooms by firing or otherwise punishing those who violated the codes but generally did not inform the public of the enforcement.⁸⁹ Without such disclosures, the ability of enforcement to increase public confidence was arguably lessened.

Journalism scholar Edmund B. Lambeth advocated rigorous adherence to ethical principles that transcended the notions of a socially responsible press that gained currency in

⁸⁶ David Pritchard & Madelyn Peroni Morgan, *Impact of Ethics Codes on Judgments by Journalists: A Natural Experiment*, 66 JOURNALISM Q. 934 (1984).

⁸⁷ *Id.* at 941.

⁸⁸ Survey, *Newsroom Ethics: How Tough is Enforcement?* 2 J. MASS MEDIA ETHICS 7, 11 (Fall-Winter 1986-87).

⁸⁹ *Id.* at 8, 11.

the wake of the Hutchins Commission Report.⁹⁰ He defined journalism as “a craft with professional responsibilities.”⁹¹ Like Black and Barney, he eschewed the type of codes of ethics that proliferated during the 1970s and 1980s, and urged the promotion of ethical behavior through an eclectic system of journalism ethics that “reflect working principles rather than mere platitudes or ossified collections of dos and don’ts.”⁹²

No study has conclusively confirmed the effectiveness of journalism ethics codes, but many scholars and practitioners have insisted that they need enforcement powers. Even the vaunted Hutchins Commission Report apparently considered codes a potentially effective tool for press reform and self-control but treated them with disdain after recounting the ineffectiveness of ASNE’s Canons of Journalism, which contained an enforcement mechanism, in the Fred G. Bonfils scandal.⁹³

The Hutchins Commission considered enforceable codes of ethics created by journalists a means of improving press performance only because it saw them as instruments of self-correction that did not put press freedom at risk. However, when self-correction failed, other means had to be considered. “[T]he maxim holds good that self-correction is better than outside correction, so long as self-correction holds out a reasonable and realistic hope, as distinct from lip service to piously framed paper codes.”⁹⁴ The commission attributed the failure of codes to journalists’ unwillingness to substitute a socially responsible definition of constitutional press freedom for the archaic libertarian notion that constitutional

⁹⁰ EDMUND B. LAMBETH, *COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION* (2d ed. 1992).

⁹¹ *Id.* at ix.

⁹² *Id.* at 23.

⁹³ HUTCHINS COMMISSION REPORT, *supra* note 30, at 74-75.

⁹⁴ *Id.* at 126-27.

freedom included the privilege to behave badly. The Hutchins Commission found that press attitude unacceptable and concluded, “Today, this former legal privilege wears the aspect of *social irresponsibility*.”⁹⁵

The Hutchins Commission Report imprinted this social responsibility theory of the press on the public consciousness. The commission was not the originator of this theory but apparently articulated it better than any who had come before. A major tenet of the social responsibility theory, according to many scholarly interpretations, holds that journalists’ rights under the First Amendment of the U.S. Constitution are linked to if not dependent on their responsibility to further the best interests of the larger society instead of the limited interests of their profession. This conditioning of rights upon responsibilities provided a philosophical foundation for converting journalism standards of practice into legal imperatives.

Critics of the theory have claimed it sacrificed press freedom and moved toward authoritarianism. “The underlying assumption of social responsibility is that moral and ethical commandments dictate journalistic excellence (even if authoritarian control is needed to uphold such laws) instead of the individual reasoned choices of reporters and editors,” wrote Scott Lloyd in the *Journal of Mass Media Ethics*.⁹⁶ Clifford G. Christians, writing in the *Journal of Communication*, also found fault with the social responsibility theory and claimed, “[P]rinciples based on this ideology remain undefined and its ethical sophistication limited.”⁹⁷

⁹⁵ *Id.* at 131 (emphasis added).

⁹⁶ Scott Lloyd, *A Criticism of Social Responsibility Theory: An Ethical Perspective*, 6 J. MASS MEDIA ETHICS 199, 200 (1991).

⁹⁷ Christians, *supra* note 49, at 19.

The Hutchins Commission

The socio-political environment created in the United States by World War II led to the formation of the Hutchins Commission in 1942 and unavoidably affected the direction and content of the report it issued. It was a privately funded effort to address the need for ethical standards of conduct in the news media although the commission's study and report covered other mass media as well. Since its release in 1947, the report has had a substantial effect on the implementation of ostensibly progressive media practices and often has framed discussions of press freedom and press responsibility. The report was not the sole cause of the emergence of these issues and the development of these trends in professional practice, but they became more widespread or were discussed more often after the report addressed them. Many subsequent changes in mass media practices reflect concerns and suggestions made in the commission's discussions of press freedom and its explication of the press's duties.

The 13-member commission⁹⁸ was formed and funded by Henry R. Luce, editor-in-chief of *Time* magazine. Encyclopedia Britannica also contributed funding. The panel was led by Robert M. Hutchins, chancellor of the University of Chicago, and conducted its studies of the mass media from early 1944 through 1946. Luce was alarmed by the monopolization of the American news media by a few conglomerates, the power of the mass media as recently demonstrated by the role propaganda played in Adolf Hitler's rise to power in Nazi Germany, and the indiscriminate melding of news and entertainment by news organs.

⁹⁸ The members of the commission were Robert M. Hutchins, Zechariah Chafee Jr., John M. Clark, John Dickinson, William E. Hocking, Harold D. Lasswell, Archibald MacLeish, Charles E. Merriam, Reinhold Niebuhr, Robert Redfield, Beardsley Ruml, Arthur M. Schlesinger, and George N. Shuster.

Luce complained that the newspapers of his day were anathema to a democratic society because they filled their pages with sensationalism and vulgarity, according to media scholar Stephen Bates.⁹⁹

Luce's assessment of the press was in accord with that of Harold Lasswell, a political scientist best remembered for his studies of mass communication, but who also served on the Hutchins Commission. Bates revealed that eight years before the commission issued its report and warning, Lasswell had publicly suggested legislation as a remedy for journalists' excesses.¹⁰⁰ This notion that the law was a viable means of making journalists practice their craft ethically was not limited to scholars from outside the field and was not uncommon among some journalists of the 1940s and earlier. H. L. Mencken, while editor of the *American Mercury*, is reported to have expressed a lack of faith in the ability of journalists to perform ethically without the coercion of law and to have dismissed codes of ethics as useless and "moonshine." Journalism Professor Leon Nelson Flint, in a journalism ethics casebook published in 1925, quoted Mencken as saying:

"If American journalism is to be purged of its present swinishness and brought up to a decent level of repute . . . it must be accomplished by the devices of morals, not by those of honor. That is to say it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted. Perhaps the most practicable of those forces is legislative enactment. . . ."¹⁰¹

In a similar vein more than two decades before the Hutchins Commission Report was issued, Walter Lippmann avoided advocating the legal imposition of ethics but nonetheless warned, "If publishers . . . do not face the facts and attempt to deal with them, some day

⁹⁹ STEPHEN BATES, *REALIGNING JOURNALISM WITH DEMOCRACY: THE HUTCHINS COMMISSION, ITS TIMES AND OURS* 5 (1995).

¹⁰⁰ *Id.* at 10.

¹⁰¹ LEON NELSON FLINT, *THE CONSCIENCE OF THE NEWSPAPER* 388-89 (1925).

Congress, in a fit of temper, egged on by an outraged public opinion, will operate on the press with an ax.”¹⁰²

Commission member Edward Hocking, a Harvard philosophy professor, favored government intervention to impose ethics on the news media. Bates quoted a 1945 conference speech in which the professor argued:

“[T]he government has final responsibility for the work of the press insofar as the press presents to citizens the truth without which they cannot make responsible political judgments. . . . We cannot leave to private agencies alone the ultimate responsibility for the service of news – for this essential phase of public education in our world today [is] . . . a public service so vital that it cannot be left to the caprice of the marketplace; the government must step in.”¹⁰³

Commission member Zechariah Chafee Jr., a Harvard professor who developed a solid reputation as a free press champion, provided counterpoint to Hocking’s advocacy of government controls on the news media. Chafee opposed Hocking’s efforts to turn moral responsibilities into legal duties, but by the time the Hutchins Commission completed its study and issued its report, the two scholars’ positions had moved toward each other. Their accommodation was illustrated by a statement Bates attributed to Chafee: “[T]oo much social control over the media of communication may destroy freedom, . . . [yet] mere emphasis on competitive freedom . . . may lead to increasing disproportions of power to the point where freedom is destroyed.”¹⁰⁴

The Hutchins Commission began its work during an era when newspaper owners openly refused to don the restraints of self-imposed ethics and did not hesitate to declare that

¹⁰² WALTER LIPPMANN, *LIBERTY AND THE PRESS* 47 (1920).

¹⁰³ Bates, *supra* note 99, at 12.

¹⁰⁴ *Id.* at 13.

they were businessmen producing a commodity and owed nothing to society at large except the delivery of a newspaper in exchange for payment, Bates said. Blanchard described it as a time when newspaper owners were acutely protective of the proprietary rights of their businesses and insisted that the First Amendment should protect those interests as surely as it protected editorial content from prior restraint.¹⁰⁵

Their claim to exemption from the government controls that other businesses were subject to flowed from an interpretation of the First Amendment that canonized the press as the only private business specifically referred to in the Constitution. Among the exemptions newspapers sought through this line of reasoning was freedom from laws protecting the unionization of employees and restraining the formation of monopolies.¹⁰⁶

The administration of President Franklin D. Roosevelt, aided by a series of U.S. Supreme Court rulings, had made many aspects of newspaper operations subject to government regulation. These rulings undermined the newspapers' proffered interpretation of freedom of the press, Blanchard explained. "Freedom of the press was being defined as the right of the people to obtain information necessary for survival in a rapidly changing world, not as a right of publishers to operate without consideration of the people's needs."¹⁰⁷

The commission fielded a number of radical proposals for government control of the press that were ultimately rejected by the panel, Bates reported. Among the most extreme was an idea advanced by commission member Beardsley Ruml, a businessman who was chairman of the Federal Reserve Bank of New York and chairman of the H.R. Macy's

¹⁰⁵ Margaret A. Blanchard, *The Hutchins Commission, The Press and the Responsibility Concept*, JOURNALISM MONOGRAPHS, May 1977, 3-6.

¹⁰⁶ See *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Associated Press v. United States*, 326 U.S. 1 (1945).

¹⁰⁷ Blanchard, *supra* note 105, at 4.

Corporation. He recommended that a federal agency be formed to regulate newspapers. Bates described the proposal as a “licensing scheme for the press” that would have created an agency akin to a Federal Communications Commission for the print media.¹⁰⁸ Lasswell similarly suggested direct government intervention in the form of a public utilities commission to diversify editorial content in communities dominated by one newspaper.¹⁰⁹ Commission member Archibald MacLeish, a poet and Librarian of Congress, proposed that the government ensure a diversity of editorial voices by forcing newspapers to serve as common carriers.¹¹⁰ A commission staff member suggested authorizing criminal prosecutions against newspapers that knowingly published false information.¹¹¹

Chafee successfully opposed each of these proposals while acknowledging that the problems they addressed must be tended to. He insisted that the solutions must be less destructive of freedom. The remedy the commission’s summary report proposed for many of these problems was the formation of a non-governmental agency to monitor the press. “After lengthy, probing discussions, [the commissioners] had concluded that the law was a blunt and easily abused instrument, one that should be used only as a last resort,” Bates wrote.¹¹²

The commission can be credited with foreshadowing, if not directly inspiring, the creation of a variety of means of monitoring and improving the practice of journalism. These means included local, regional, and state press councils; the National News Council, which endured for 11 years; and the hiring of ombudsmen at significant numbers of newspapers

¹⁰⁸ Bates, *supra* note 99, at 13.

¹⁰⁹ *Id.*, at 14.

¹¹⁰ *Id.*

¹¹¹ ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 104 (1947).

¹¹² Bates, *supra* note 99, at 17.

around the United States. These all can be traced to the commission's call for the news media to police themselves and engage in mutual criticism to establish and maintain socially responsible standards of professional conduct through peer pressure.¹¹³ Professionalism was among the goals the report urged the press to pursue, and it was one of the reasons the report endorsed the inclusion of a broad liberal arts component in journalism education. Such an education would also give reporters a larger world view and an ability to place events in a larger context and recognize their significance. It would also increase journalists' competence, independence, and effectiveness. This educational trend grew after the Hutchins Report was issued and now has been institutionalized by the Accrediting Council on Education in Journalism and Mass Communication Education at nearly every major school or department of journalism in the United States.¹¹⁴

The public journalism or civic journalism movement that began in the mid-to-late 1990s can be traced to the commission's assertion that the press is an essential element of a functioning democracy. Public and civic journalism advocates seek to make journalism nurture democracy and reconnect the populace to public life.¹¹⁵ In a similar vein, the commission's report invigorated the decades-old trend among media scholars to theorize about the media's role in maintaining the uniquely American style of democracy.

In an effort to expand the realm of expression protected by the First Amendment, the commission advocated the inclusion of virtually all mass communication media in the definition of the press insofar as rights and responsibilities were concerned. Radio, television,

¹¹³ HUTCHINS COMMISSION REPORT, *supra* note 30, at 66.

¹¹⁴ See Accrediting Council on Education in Journalism and Mass Communication Program Information Center at <http://www2.ku.edu/~acejmc/FULLINFO.HTML> (last visited March 17, 2006).

¹¹⁵ See generally DAVIS MERRITT, PUBLIC JOURNALISM AND PUBLIC LIFE (1995); JAY ROSEN, GETTING THE CONNECTIONS RIGHT: PUBLIC JOURNALISM AND THE TROUBLES IN THE PRESS (1996).

and the movies were part of the press, the report indicated, and these media eventually were accorded many of the same free speech rights as newspapers and books.¹¹⁶ The emergence of diversity as an ethical issue for the media also can be traced to the report's recommendations.¹¹⁷ The report's concern about the effects of concentrated ownership of the mass media continues to be echoed in contemporary media criticism.¹¹⁸ Federal laws that were ratified decades later to prevent a single entity from owning the electronic and print media in one market would have been praised by the commission.¹¹⁹ Other trends such as the widespread industry practice of publishing corrections, the proliferation and legitimization of media criticism from within the media,¹²⁰ the continued inclusion of social responsibility themes in media codes of ethics,¹²¹ and other directives designed to improve mass media behavior also can be traced to the commission's recommendations. Its insistence that advertising be separated from news, if not implemented throughout the media, has at least

¹¹⁶ The U.S. Supreme Court ruled in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), that movies were not protected by the First Amendment, but reversed its position nearly four decades later in *Burstyn v. Wilson*, 343 U.S. 495 (1952). See IRA CARMEN, *MOVIES, CENSORSHIP AND THE LAW* (1966); LUKAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987).

¹¹⁷ See, e.g., Society of Professional Journalists Code of Ethics, available at http://www.spj.org/ethics_code.asp (last visited March 17, 2006). [hereinafter SPJ Code]; RTNDA Code of Ethics and Professional Conduct, available at <http://www.rtna.org/ethics/coe.html> (last visited March, 17 2006). [hereinafter RTNDA Code]; Gannett Newspaper Division, I. Principles of Ethical Conduct for Newsrooms, available at <http://www.gannett.com/go/press/pr061499.htm> (last visited March 17, 2006). [hereinafter Gannett Principles].

¹¹⁸ See, e.g., C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839 (2002); Barbara W. Hartung, *Attitudes Toward the Application of The Hutchins Report on Press Responsibility*, 58 JOURNALISM Q. (1981).

¹¹⁹ See, e.g., 47 C. F. R. §73.3613 (a) (1) (1995). But see Telecommunications Act of 1996. Pub. L. No. 104, which removed many of the earlier bans on the consolidation of ownership of the electronic media; David Lieberman & Paul Davidson, *Five Ways FCC Altered the Media Landscape*, USA TODAY, June 3, 2003 at B3; Comment, *The Silence of the Lambs: Who Speaks for Journalism Before the FCC*, COLUM. JOURNALISM REV. JAN.-FEB., 2003 at 4.

¹²⁰ See, e.g., BRILL'S CONTENT, a magazine published from 1998 until 2001 to critique news media performance; Tom Goldstein, *Wanted: More Outspoken Views; Coverage of Press is Up, But Criticism is Down*, COLUM. JOURNALISM REV., NOVEMBER-DECEMBER, 2001, at 144.

¹²¹ See SPJ Code, RTNDA Code, Gannett Principles, *supra* note 117.

fostered a widespread view that such commingling is unethical and contributed to the widespread trend of labeling advertising as such when it might appear to be news. Among the most successful trends supported by the commission's suggestions were the organization of non-profit institutions to communicate with the public to augment educational needs not served by traditional media and the creation of academic-professional centers of advanced study, research, and publication in the field of communication. Among these are the Pacifica Foundation, the Pew Charitable Trust, the Freedom Forum, and the Poynter Institute for Media Studies.

Many of the aforementioned trends also have been fostered by other notable sources, such as some early journalism codes of ethics and published works of journalism criticism that predate the commission, but they are fundamentally in accord with the commission's list of the things society requires of the press.¹²² The commission said the press should present:

1) "A truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning."¹²³ This idea is anchored to the notion that the press should not fabricate information and should rely on credible, authoritative sources for the information it disseminates. Opinion should be clearly identified as such and not presented as fact. Facts alone can misrepresent the truth, the commission advised. Its report accordingly spread and legitimized to some extent the trend toward interpretive reporting and putting news in context with the appropriate background instead of perpetuating the limited stenographer's approach to journalism that purported to simply present facts in an objective fashion.

¹²² HUTCHINS COMMISSION REPORT, *supra* note 30, at 20-29.

¹²³ *Id.* at 21.

2) “A forum for exchange of comment and criticism.”¹²⁴ The commission cannot be credited with initiating the institutionalized practice of publishing of letters to the editor and the creation of op-ed pages or the point-counterpoint format of public discussion in the mass media, but it noted the social worth of these practices that add more voices to those routinely presented by the media. Advocacy of these types of input arguably led to their perpetuation in the current incarnations as on-line responses, telephone call-in features for newspaper readers as well as radio and television audiences. Views and information that run counter to the mainstream also should be included in the news pages and other media sites not devoted to advocacy, according to the report. Here was where the report recommended that the media serve as common carriers. This was not meant in the legally restrictive sense of common carriers, which are compelled to provide universal access, but in accord with the principle that more voices should be enabled to participate in public discussion. Also, sources of information should be identified so the consumer can make judgments about their worth or usefulness. These concepts are embodied in the current notions of fairness and balance that sometimes supplement or supplant objectivity as ethical values in journalism.

3) “The projection of a representative picture of the constituent groups in the society.”¹²⁵ The commission recognized that information provided by the mass media affects an audience’s judgments about people, particularly minorities or others with whom they do not have sufficient contact for making personal assessments. As a result, projections of these groups must be accurate lest the media contribute to a perversion of judgments. Media images that are repeated and emphasized must be representative and reflect the humanity common to all people that will nurture understanding and respect, the commission’s report urged. These principles and values have been expressed in media stylebooks and operating guidelines for decades as part of a continuing effort to eliminate stereotyping and assure

¹²⁴ *Id.* at 23.

¹²⁵ *Id.* at 26.

diversity in personnel and news copy orientation. This impetus to accurately represent all of America's constituent groups in the media is an underlying motivation and rationale for affirmative action hiring and promotion in the media. This course of action ideally allows members of these constituent groups to help paint the pictures that appear in the media and influence media owners' decisions that affect how these groups are portrayed.

4) "The presentation and clarification of the goals and values of the society."¹²⁶ With this provision the commission identified the mass media as some of the most powerful educational tools and assigned them the responsibility of informing the public about such American values as free speech and equality as defined by the U.S. Constitution. News events should be presented, where appropriate, in a manner that indicates how these values and others germane to the American way of life are adhered to or deviated from by newsmakers. "The Commission believes in realistic reporting of the events and forces that militate against the attainment of social goals as well as those which work for them," the report said. This principle was most visibly embodied for a time in the morality codes developed for comic books, motion pictures, and television.¹²⁷

5) "Full access to the day's intelligence."¹²⁸ A modern industrialized democracy requires that all of the people have access to as much of the latest information as possible even if they do not make use of it all, the commission said. The information should be available for whenever the consumers decide to use it to assert their right and power to make decisions for themselves, thereby giving substance to the democratic value of government by consent. This rationale has been the basis for the news media's efforts to secure ever wider

¹²⁶ *Id.* at 27.

¹²⁷ See, e.g., The Television Code of the National Association of Radio and Television Broadcasters at <http://historymatters.gmu.edu/d/6558> (last visited March 17, 2006); Comics Code, at http://www.psu.edu/dept/inart10_110/inart10/cmbk4cca.html (last visited March 17, 2006).

¹²⁸ HUTCHINS COMMISSION REPORT, *supra* note 30, at 28.

legal rights of access to information about the operation of the government and other matters of public interest and concern.

Although the Hutchins Commission did not create the social responsibility theory of the press, it expounded and justified the concept better than those who had previously addressed the issue and those, like the members of the Warren and Kerner commissions, who addressed the concept afterward.¹²⁹ The commission's report reflected the popular, but now questioned though not wholly discarded, conviction that the press and other mass media can be controlling influences on the public's attitudes and behavior. It was an understandable conviction in light of the contemporary example provided by the apparent effects of Adolf Hitler's propaganda machine on the German public from the late 1930s onward. Given their belief in the awesome power of the press, the commission members apparently felt compelled to urge that such a powerful social force be used responsibly and directed away from evil or selfishly profitable ends and toward goals that would benefit the public.

Complicating matters was the commission's apparent faith in the American New Deal government's ability to engineer solutions to social problems by making other powerful elements of society, such as the business community, function more responsibly. It was a complication because the U.S. Constitution championed freedom of the press from government control even when the government was viewed favorably as a powerful ally in the commission's effort to redirect an irresponsible press. This conflict over the role of the

¹²⁹ The formal pronouncement of the social responsibility of the press as a normative concept was made by Theodore Peterson in FRED S. SIEBERT ET AL., *FOUR THEORIES OF THE PRESS* (1956). He acknowledged the premise was rooted in the work of the Hutchins Commission.

government in the reformation of the press emerged as a major issue in the discussion of press responsibility and freedom.¹³⁰

The problems inherent in the commission's avowed mission to improve the press and safeguard its freedom have continued to plague efforts to create standards of behavior for the press. There always appears to be a risk of repression whenever judgments of right or wrong are made about the press. Indeed it was the New Deal business reforms that ultimately forced the press to accept that the First Amendment did not bestow upon it complete immunity from all forms of government regulation. The U.S. Supreme Court ruled in 1937 that the Amendment did not place the press beyond the reach of laws of general application.¹³¹

Issues of media freedom, responsibility, and legal accountability often came to the fore in the ensuing interpretations of the Hutchins Commission Report. A common interpretation had the commission asserting that press freedom is conditional, that failure to exercise that freedom responsibly could lead to its suspension or destruction. An example of this is the report's assertion that "[a] man who lies, intentionally or carelessly, is not morally entitled to claim the protection of the First Amendment."¹³² This philosophy was embedded in state laws for many decades in some states where the courts imposed strict liability for libelous, false statements of fact. Its death knell was sounded in 1964 when the U.S. Supreme Court nationalized libel law in its *New York Times v. Sullivan*¹³³ ruling and extended First

¹³⁰ See, e.g., Robert E. Dreschel, *Media Malpractice: The Legal Risks of Voluntary Social Responsibility in Mass Communication*, 27 DUQ. L. REV. 237 (1989); Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 CARDOZO ARTS & ENT. L. J. 697 (1995); ELIZABETH BLANKS HINDMAN, RIGHTS VS. RESPONSIBILITIES: THE SUPREME COURT AND THE MEDIA (1997).

¹³¹ *Associated Press v. NLRB*, 301 U.S. 103 (1937).

¹³² HUTCHINS COMMISSION REPORT, *supra* note 30, at 87.

¹³³ 376 U.S. 254 (1964).

Amendment protection to even careless or negligent false statements when the plaintiff was a public official.

Despite its view that factual errors published by the media did not warrant First Amendment protection, the commission recognized that libel law curtailed freedom of the press and, therefore, sought other remedies for those defamed. It suggested the institutionalization of a right of reply for the injured party as an alternative to libel lawsuits. The report expressly rejected legislative solutions, but not judicial remedies for the problem of knowingly published falsehoods. It supported right-of-reply statutes and claimed there was no constitutional barrier to such laws.¹³⁴ The U.S. Supreme Court disagreed and in *Miami Herald Publishing Co. v. Tornillo*, struck down a Florida right-of-reply statute.¹³⁵

Scholars who have studied the Hutchins Commission Report on Freedom of the Press have made a variety of assessments of it. While most agree that it was seminal to the development of modern news media mores and conceptions of press freedom and responsibility, some have questioned its worth. Stephen Bates appears to be the most critical of the report, its effects, and the men who compiled it. His 1996 assessment of the report, “Realigning Journalism with Democracy,”¹³⁶ will serve as the point of departure in the following comparison of various other scholars’ views. Bates faintly praised the report as a landmark in the history of press criticism and an impassioned indictment of the mass media. But he broadly demeaned it by labeling it “a flawed success as an analysis” and a

¹³⁴ HUTCHINS COMMISSION REPORT, *supra* note 30, 79-106.

¹³⁵ 418 U.S. 241 (1974). *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (finding the fairness doctrine constitutional even though it established a right-of-reply in the broadcast media).

¹³⁶ Bates, *supra* note 99.

“magnificent failure” as a call to action.¹³⁷ The press was unreceptive to the report, he claimed, and it was, therefore, a “reformist flop” that “influenced academic thinking about journalism but not journalism itself.”¹³⁸

Margaret Blanchard, however, had made a different assessment in an earlier study.¹³⁹ She indicated that some prominent members of the press were quite receptive to the report and its call to action was heeded in some quarters. She, unlike Bates, found the report to be important to the industry and credited the Hutchins Commission with laying the groundwork for many of the changes in the practice of journalism that emerged decades later.

Blanchard, Bates, and other scholars noted that some elements of the press heaped harsh criticism upon the report and its authors immediately after it was issued. Opponents of the report “outnumbered and outshouted” its supporters, according to Bates’ assessment.¹⁴⁰ He cited the antagonistic responses of *Editor & Publisher* and *Journalism Quarterly* as examples of the tenor of press reaction. Blanchard also cited the two publications but said their take was not typical. Complimentary responses, like those published by *The Guild Reporter* and the *Nieman Reports*, were more common, she wrote.¹⁴¹ Blanchard also observed that the tenor of the response varied among the various segments of the press and often depended on whether the response was intended for in-house consumption by other members of the press or whether it was directed to the general public. In-house criticism was generally harsher, Blanchard said, although not uniformly so. The journals of the working press, such

¹³⁷ *Id.* at 3.

¹³⁸ *Id.*

¹³⁹ See Blanchard, *supra* note 105.

¹⁴⁰ Bates, *supra* note 99, at 22.

¹⁴¹ Blanchard, *supra* note 105, at 29-41.

as *The Guild Reporter*, the *Nieman Reports*, and Sigma Delta Chi's *Quill* generally praised the report's recommendations, Blanchard explained. She also observed that while the tenor of the press response to the report's recommendations varied, it was more consistently critical when it addressed the composition of the commission and the quality of its workmanship.

Bates' assertion that the report did not affect journalism is contrary to Blanchard's finding that it had a positive impact on the newspaper industry. She supported her assessment by citing activities to improve the press that were initiated in the months and years immediately following publication of the report. Among these were the inauguration of CBS Views the Press and the Associated Press Managing Editors beginning a program of written critiques of the Associated Press service, which eventually produced the Red Book and improved reporting and writing.¹⁴² The report also affected and improved newspapers and journalism in general by providing editors with a philosophical framework for reform and the basis for defining a new role for the press, Blanchard said.¹⁴³

Jane S. McConnell agreed with Blanchard on the worth of the Hutchins Report and in her 1997 study called its central principles "the cornerstone for one of the major normative theories of the press of the mid-twentieth century."¹⁴⁴ That theory was popularized by Theodore Peterson in 1956 as the social responsibility theory of the press.¹⁴⁵ He credited the Hutchins Commission with doing a great deal to make social responsibility a new, integrated theory instead of an appendage to the traditional libertarian theory of the press. Unlike Bates,

¹⁴² See *id.* at 48-50.

¹⁴³ *Id.*

¹⁴⁴ Jane S. McConnell, *Choosing a Team for Democracy: Henry R. Luce and the Commission on Freedom of the Press*, 14 AM. JOURNALISM 148, 149 (Spring 1997).

¹⁴⁵ Peterson, *supra* note 129.

who said the Hutchins Report did not affect journalism, Peterson said some aspects of social responsibility had made their way into journalism practices. Bates and Peterson were in accord in typifying the press response to the report as generally negative, but Peterson and other scholars insisted that the press was not hostile to what he saw as the report's primary assumption – that the press has social responsibilities.¹⁴⁶

Jerilyn S. McIntyre saw the Hutchins Report moving beyond social responsibility. In a 1979 study, she said the commission developed the idea of press accountability, which she defined as a term that “subsumed responsibility and implied standards for a systematic survey of press performance.”¹⁴⁷ In some respects, her observations about the commission's report presaged those Bates made nearly two decades later questioning the worth of the report. McIntyre and Bates made several similar observations about the commission and its report, although his criticisms were sharper. She said the report was not a landmark in a practical sense because the mechanisms for carrying out its recommendations were not immediately established.¹⁴⁸ Bates similarly found fault in the commission's failure to immediately set up a press council to review media performance.¹⁴⁹ McIntyre acknowledged the report's influence as a philosophical statement of the importance of press responsibility just as Bates did. She seemed to be saying in less pointed language what Bates said in 1996: the report influenced thinking about journalism but not the practice of journalism.¹⁵⁰

¹⁴⁶ *Id.* at 83-87.

¹⁴⁷ Jerilyn S. McIntyre, *The Hutchins Commission's Search for a Moral Framework*, 6 JOURNALISM HIST. 54, 55 (Summer 1979).

¹⁴⁸ *Id.* at 63.

¹⁴⁹ Bates, *supra* note 99, at 26.

¹⁵⁰ McIntyre, *supra* note 147, at 63.

However, in a study published in 1987,¹⁵¹ McIntyre's position was clarified, or perhaps even changed, to the point that it was decidedly at odds with Bates' observations on several points. For example, on the first page of "Repositioning a Landmark: The Hutchins Commission and Freedom of the Press," she said the themes and recommendations of the report had indeed affected the professional practice of journalism and academic training for it.¹⁵² She also seemed to add to or refine her judgment about the "landmark" status of the report. Whereas her previous assessment had said the report was not a landmark in the practical sense, her subsequent assessment found it to be a "landmark attempt to develop policy for the agencies of mass communication."¹⁵³

McIntyre's 1987 study also displayed a closer alignment with McConnell's assessment when she wrote that the ideal of accountability had become a major normative concept in media ethics since the Hutchins Report was issued. She was again in step with McConnell when she asserted that this concept of press accountability was intended as a guide to policy and a practical proposal to deal with specific social conditions.¹⁵⁴ McIntyre's insistence that the report was a practical proposal is central to the difference she had with Peterson and others who identified the commission's definition of social responsibility as a philosophical paradigm. McIntyre said instead that the commission was making a practical proposal to guide policy and not merely engaging in a philosophical colloquy akin to Peterson's discussion of social responsibility. McIntyre described the enduring legacy of the

¹⁵¹ Jerilyn S. McIntyre, *Repositioning a Landmark: The Hutchins Commission and Freedom of the Press*, 4 CRITICAL STUD. MASS COMM. 136 (1987).

¹⁵² *Id.* at 136

¹⁵³ *Id.* at 138.

¹⁵⁴ *Id.* at 137.

Hutchins Report as its ability to draw “attention to the connection between the continuing problems of mass communication in a modern democratic society.”¹⁵⁵ She nonetheless concluded as she had in her prior study that the commission may have failed to articulate “immediately workable solutions” to the problems with the press.¹⁵⁶

The social responsibility theory of the press, while not providing the solutions some sought, was generally recognized as one of the Hutchins Report’s major contributions to the continuing discourse about the mass media. When Blanchard revisited the report in a 1998 article, she called the responsibility notion idealistic and said the commission’s vision of a responsible press did not meet the needs of the press or the public.¹⁵⁷ In this second look at the report, Blanchard focused on its recommendation that the media provide greater access for more voices and its presumption that this would be more socially constructive than the 1940s trend of media monopolization and concentrated ownership that she claimed might preclude a true diversity of viewpoints and sources of information. The proliferation of the Internet in the 1990s provided greater access and diversity, just as the colonial press provided what she described as the paradigm for the commission’s vision. But she concluded that communication on the Internet had not proved to be socially constructive because it consists of college-educated people communicating with each other and isolating themselves from group interaction and from those parts of society that do not have the financial means to gain access to the conversation. She accordingly suggested that much of the commission’s concept of press responsibility should be jettisoned and replaced by a new approach that is

¹⁵⁵ *Id.* at 153.

¹⁵⁶ *Id.*

¹⁵⁷ Margaret A. Blanchard, *Reclaiming Freedom of the Press: A Hutchins Commission Dream or Nightmare?* 3 COMM. L. & POL’Y 371 (1998).

better grounded in contemporary reality and recognizes that new technology's tendency to individualize and Balkanize communication is more socially harmful than the old shibboleth: media concentration.

Blanchard's 1998 assessment of the report concurred at times with those published by Bates and McIntyre in that all three identified the commission as elitist in some respects. Bates repeatedly condemned the commission's elitism.¹⁵⁸ McIntyre identified nearly all of the members as "connected in some way with a rather small circle of elite Eastern universities."¹⁵⁹ She wrote about the commission's proclivity to suggest that the press be repaired by elites or expert authorities.¹⁶⁰ She disagreed, however, with Bates' claim that the commission was an ivory tower collection of academics. McIntyre said its members were "dedicated to the public service ideals that had taken hold among intellectuals from the Progressive era onward."¹⁶¹

Bates referred to the commission as the "professoriate" because so many of its members were academics.¹⁶² Four were social scientists and none was a journalist, but several had experience "in or near journalism," Bates said.¹⁶³ He and others found fault with the commission's failure to include at least one journalist on its roster and said that failure contributed to the ineffectuality of the report because journalists' world view differed from

¹⁵⁸ See Bates, *supra* note 99, at 8, 9, 25, 27, 28.

¹⁵⁹ McIntyre, *supra* note 144, at 138

¹⁶⁰ *Id.* at 139.

¹⁶¹ *Id.* at 139

¹⁶² Bates, *supra* note 99, at 8-9.

¹⁶³ *Id.* at 9.

that of the academic intellectuals.¹⁶⁴ Bates and Peterson agreed that the commission had an unflattering view of the general public, and accordingly, Bates said, it suggested recourse to the university elite to solve several of the problems it identified in the press.¹⁶⁵ The public was seen as lethargic, loath to use reason, unlikely to compel the press to solve its problems, and unlikely to defend the press against encroachments on its freedom.¹⁶⁶

The Hutchins Commission Report has to be considered in any study of the tension between efforts to improve journalism practices and press freedom because of its effort to rejustify the free press rights enjoyed by the print media and extend them to all the mass communication media. It is perhaps best known and often criticized for its affirmation of the theory that free press rights are conditioned on the responsible exercise of those rights in pursuit of public service. The commission described its report as an inquiry into the current and prospective freedom of the press. It concluded that the free press was not in any immediate danger of extinction, but the continuation of irresponsible practices would cause that freedom to be eroded by a government that would be forced to intervene.¹⁶⁷ This amounted to a warning to the media that if they did not clean up their act they would lose the freedom to perform it. By articulating this theory of press responsibility, the report added the press itself to the roster of villains that threatened the free press. This roster previously had been dominated by government, but the report cast government as an instrument of the public will. It said a public outraged by irresponsible press practices would compel its government

¹⁶⁴ *Id.* at 8, 27.

¹⁶⁵ *Id.* at 27.

¹⁶⁶ *Id.*

¹⁶⁷ HUTCHINS COMMISSION REPORT, *supra* note 30, at 80.

to take action against the press.¹⁶⁸ This idea of press responsibility encompassed a vision of press freedom and the First Amendment that was newly emerging in that period of American history. As Blanchard noted, the commission was not alone in making this anti-libertarian assessment. She said the Supreme Court had begun “to define the First Amendment as the right of the people to obtain information necessary for survival in a rapidly changing world and not as a right of publishers to operate without consideration of people’s needs.”¹⁶⁹ Libertarians had construed freedom of the press to be an absolute bar against government interference in press operations. As Peterson observed, freedom of expression under social responsibility theory was not an absolute right as it was under libertarian theory. The right to free expression had to be “balanced against the private rights of others and against vital social interests.”¹⁷⁰ Based on the premise that only a responsible press warranted protection, the commission indicated that First Amendment rights were conditional.

History has shown that the press does not always behave responsibly as a matter of course but may do so when held accountable for irresponsible behavior. History has also shown that accountability often comes at the expense of freedom. This was the major dilemma the Hutchins Commission struggled with because freedom of the press is a fundamental principle of the U.S. Constitution. The commission advocated self-imposed accountability as a stopgap against the threat of government intervention, which was considered the worst solution because it would cause loss of freedom. Responsibility has come to be equated with accountability and enforcement. Just as enforcement presumes a

¹⁶⁸ *Id.* at 131.

¹⁶⁹ Blanchard, *supra* note 105, at 4.

¹⁷⁰ Peterson, *supra* note 129, at 97.

power to impose sanctions, the exercise of power presumably limits the freedom of whatever is subjected to it. The commission proposed self-regulation with the public's participation in a press monitoring agency whose only enforcement power would be peer pressure and the clout of public opinion. Press responsibility and freedom would be ensured through voluntary review by practitioners and their clients, the commission hoped. It proved to be a dashed hope.

Historians may eventually interpret the Hutchins Report as a formal rejection of the belief in the marketplace of ideas theory of free expression. As some scholars have observed, the report rejected the idea that the primary purpose of a free press is the search for truth and substituted a social role. The idealistic notion that truth would emerge victorious from a public arena where a variety of truths were pitted against each other was set aside by the report's more pragmatic instrumentalism. A gullible or distracted public might be dangerously misled before truth would emerge, according to this more contemporary take, and the press had to be redirected without relying on the public and the marketplace to perform some self-righting function that might be beyond their capacity.

More than a half-century after the Hutchins Report was released to the public, mass media scholars and practitioners have not reached consensus on its worth and effects. As noted earlier, journalism historian Margaret Blanchard concluded that the report "provided a philosophical framework for reform" of the news media and "provided the goals for future aspirations."¹⁷¹ But Stephen Bates judged the report to be flawed and a failure.¹⁷² Media commentator Everette Dennis observed that the document was "holy writ" to some because it

¹⁷¹ Blanchard, *supra* note 105, at 51, 52.

¹⁷² Bates, *supra* note 99, at 3.

“scoped out and posed solutions for . . . public communication years ahead of its time.” He also noted that in some quarters the report was considered to be “the work of impractical dreamers (or worse) who meddled where they shouldn’t have and whose ideas are best forgotten.” Nonetheless, Dennis recognized the Hutchins Report as a historically important artifact that “has lived on in the minds of those who care about fair, ethical, and responsible media.”¹⁷³ Journalism scholar Elizabeth Blanks Hindman has credited the commission with formulating the social responsibility theory of the press¹⁷⁴ although other scholars have found evidence that the theory had been bandied about in journalism ethics discussions for at least two decades before the commission was formed.¹⁷⁵

The Warren and Kerner Commissions

Since its articulation in the Hutchins Commission Report, social responsibility has emerged as a fundamental philosophical framework for judging and guiding the performance of the mass media. An appeal to social responsibility was inherent in the Warren Commission’s 1964 assessment of press behavior in the immediate aftermath of the assassination of President John F. Kennedy¹⁷⁶ and the Kerner Commission’s criticism of the press in 1968 for failing to report properly on the African-American communities in the United States.¹⁷⁷

¹⁷³ Everette E. Dennis, *The Hutchins Commission - Fifty Years Later*, opening address at conference on “Freedom and Responsibility in a New Media Age,” at the Cary M. Maguire Center for Ethics and Public Responsibility, Southern Methodist University, Dallas, Tex. (Feb. 18, 1997) (transcript available at Cary M. Maguire Center for Ethics and Public Responsibility).

¹⁷⁴ BLANKS HINDMAN, *supra* note 127, at 150.

¹⁷⁵ *See, e.g.*, THE RESPONSIBILITIES OF JOURNALISM, *supra* note 31.

¹⁷⁶ REPORT OF THE PRESIDENT’S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964) [hereinafter THE WARREN REPORT].

¹⁷⁷ THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1988) [hereinafter THE KERNER REPORT].

President Lyndon B. Johnson created the Warren Commission with the appointment of Earl Warren, chief justice of the United States, as chairman of the President's Commission on the Assassination of President John F. Kennedy. It was charged with investigating Kennedy's assassination and the ensuing murder of Lee Harvey Oswald, the assassination suspect. The Warren Report, as those findings came to be known, included criticism of press practices in the coverage of Oswald and a claim that the press contributed to the circumstances that led to his death. Journalists were faulted for publicizing misinformation and details of the case that attorneys claimed would have jeopardized Oswald's ability to receive a fair trial. Overzealous journalists were said to have undermined police efforts to keep Oswald safe, though the police were also heavily criticized. "The Commission believes, however, that a part of the responsibility for the unfortunate circumstances following the President's death must be borne by the news media," the report said.¹⁷⁸ In a section titled "Responsibility of News Media," the Warren Commission cited "a regrettable lack of self-discipline by the newsmen" and suggested that "the demand for information must be tempered by other fundamental requirements of our society."¹⁷⁹ It also called for the creation of codes of professional conduct but explicitly indicated that this was not a job for journalists alone; the government and the people also should play a role. "The burden of insuring [sic] that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne, however, by State and local governments, by the bar and ultimately by the public."¹⁸⁰

The Kerner Commission was also created by President Johnson. Formally titled The National Advisory Commission on Civil Disorders, it was formed in 1967 to examine the causes of the riots and disorder that ignited a number of major urban centers across the

¹⁷⁸ THE WARREN REPORT, *supra* note 176, at 240.

¹⁷⁹ *Id.* at 242.

¹⁸⁰ *Id.*

country in the summer of that year. Ohio Governor Otto Kerner was named chairman of the 11-member panel, which issued a report filled with criticisms and suggestions to the press that were eerily reminiscent of those made in the Hutchins Report, but not nearly as expansive.

Chapter 15 of the Kerner Report's 17 chapters was devoted entirely to "The News Media and the Disorders" and focused on the news media's coverage of the disorders as well as the profession's long-term treatment of racial minorities. The report is best remembered for its overall conclusion that the United States was becoming two societies: one black, one white, separate and unequal. But in Chapter 15 the commission concluded "the news media have, we believe, contributed to the black-white schism in this country."¹⁸¹ Journalism was faulted for failing to tell the stories of the black experience in America and accordingly was found to have disserved its majority audience as well as the minorities who also were its audience. The report condemned the white press that "repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society."¹⁸²

The Kerner Report recommended hiring, training, and promoting blacks into positions that would add integrity and depth to coverage of black communities. It called for the creation of a privately funded Institute of Urban Communications to provide this training and to monitor news media performance in these areas of deficiency. The institute would praise or condemn the media as warranted, just as the Hutchins Commission had suggested in its call for a private panel to monitor journalism practices. These suggestions are often cited as the origin of the minority journalism training programs at Columbia University and the

¹⁸¹ THE KERNER REPORT, *supra* note 177, at 383.

¹⁸² *Id.* at 366.

Maynard Institute for Journalism Education.¹⁸³ The Kerner Commission went to great pains to state it was not calling for any infringement on press freedoms, but it did insist on press responsibility, just as the Hutchins Commission had more than two decades earlier.

National News Council

The Hutchins Commission's broad endorsement of social responsibility in journalism included a specific call for the creation of a private body to monitor the press. It recommended that a news council be formed "independent of the government and the press to appraise and report annually on media performance."¹⁸⁴ It was not until August 1, 1973, however, that the National News Council was formed with funding provided primarily by The Twentieth Century Fund and the Markle Foundation.

The immediate impetus for the council was a task force report that had been commissioned to address the concerns expressed by the trustees of The Twentieth Century Fund for "preserving the freedom of the press and improving its performance."¹⁸⁵ Accordingly, in 1971 The Twentieth Century Fund Task Force was charged with exploring the feasibility of a press council in the United States that would monitor the performance of the news media. "The Members of the Task Force devoted considerable thought to the sanctions the council should be able to apply before coming to the realization that . . .

¹⁸³ See Thomas Lee, "Kerner plus 30: Still Separate, Still Unequal," The ASNE Reporter Online, (Apr. 3, 1998) available at <http://www.asne.org/98reporter/friday/race.html> (last updated Jan. 31, 2000).

¹⁸⁴ HUTCHINS COMMISSION REPORT, *supra* note 30, at 101.

¹⁸⁵ M.J. Rossant, *Foreword* to THE TWENTIETH CENTURY FUND, Inc., A FREE AND RESPONSIVE PRESS: THE TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL (1973) [hereinafter A FREE AND RESPONSIVE PRESS].

‘sunlight is the most powerful disinfectant’ The council would rely only on publicity to lend force to its findings,” wrote the fund’s director, M. J. Rossant.¹⁸⁶

The council came into existence during one of the recurring periods in American history in which the press doubted its ability to remain free. The political climate of the 1970s was rife with suspicion of the press and fears that press freedom was under increasing threats of government suppression. Veteran journalist Ronald P. Kriss, who worked through the period as senior editor of *Time* magazine, described it as a time when the media were under attack by the White House and the courts. Television stations’ licenses were at risk “unless they scrubbed out of their news programs all the ‘elitist gossip’ and ‘ideological plugola’ fed to them by the networks,” Kriss said. Across the nation “subpoenas were being issued wholesale to reporters,” and “judges were applying gag rules to more and more trials.”¹⁸⁷

There were indications that this was a time when there was little reason to expect the free press would be protected by an American public who had scant respect for it. A Harris Poll found that public confidence ratings for news in magazines, newspapers, and television at that time were so poor that only advertising and organized labor were ranked lower.¹⁸⁸ Liberals, radicals, and conservatives alike were threatening reprisals against what they perceived as the news media’s blatant, widespread bias against their positions and in favor of their respective opposition.

¹⁸⁶ *Id.* at vi.

¹⁸⁷ Ronald P. Kriss, *The National News Council at Age One*, COLUM. JOURNALISM REV., Nov./Dec. 1974, at 33.

¹⁸⁸ *Id.*

“A free society cannot endure without a free press and the freedom of the press ultimately rests on the public understanding of, and trust in its work,” the task force said in the opening page of its report.¹⁸⁹ To foster this public understanding, the report called for a private, independent, national mechanism for handling complaints about the accuracy and fairness of news reporting. It was to be available to the public as well as journalists themselves, who were often their own most ardent critics. The council was also to report on matters that threatened press freedom, but that function was largely obscured by its role as a monitor of press practices.¹⁹⁰ Indeed, the name originally suggested by the task force for the council was “Council on Press Responsibility and Press Freedom.”¹⁹¹

The report anticipated that some journalists might see the council as a mechanism for inciting greater public hostility toward the press or for curtailing its freedom through criticism. To the contrary, the report insisted, the council was designed “to make press freedom more secure by providing an independent forum for debate about media responsibility and performance, so that the debate need not take place in government hearing rooms or on the political campaign trail.”¹⁹² The council was to be an alternative to costly and time-consuming litigation.

The council functioned for eleven years, applying and perhaps establishing ethical criteria for journalism through a program of periodic review and constructive public criticism. With public criticism as its only enforcement tool, the council was opposed or

¹⁸⁹ A FREE AND RESPONSIVE PRESS, *supra* note 185, at 3.

¹⁹⁰ *But see* NATIONAL NEWS COUNCIL, IN THE PUBLIC INTEREST III: A REPORT BY THE NATIONAL NEWS COUNCIL (1984). (The council is credited with publishing 34 reports and statements in support of First Amendment rights.)

¹⁹¹ A FREE AND RESPONSIVE PRESS, *supra* note 185, at 6.

¹⁹² *Id.* at 5.

ignored by large and influential news media institutions from its inception until its demise in 1984.¹⁹³ The council included journalists and non-journalists, and fielded complaints from people who found fault with the way news was gathered or presented. The council initially focused only on complaints made against the national print news media, but it gradually revised its procedures so that it also covered the electronic media and initiated investigations on its own. It required complainants to promise not to use any of the council's findings or pronouncements in any subsequent legal action. It investigated 227 complaints and determined whether they were justified. In making these determinations, the council did not use any particular journalism ethics code as a guide to judging journalists' actions. Its determinations were worded in a style that mimicked appellate court decisions; they included explanations and rationales for the findings, used the term "upheld" when a complaint was found valid and even included concurring and dissenting opinions by individual members of the council.¹⁹⁴ Council findings were initially distributed by the Associated Press, but for most of the council's existence the findings were printed in *The Columbia Journalism Review*.

Norman E. Isaacs, an experienced journalist who led the National News Council for six years, insisted there was an urgent need for the council to help journalists establish professional standards in the late 1970s and into the 1980s because the public had no reason to appreciate the worth of a free press and would be loath to defend it against the onslaught of criticism from government officials. He accordingly concluded that journalism ethics were

¹⁹³ When the Hutchins Commission Report recommended the creation of a body to function as a news council, the idea was rejected by many news organizations, including *The New York Times* and the CBS television network, which claimed a free press should not be monitored by any group. Others approved the idea and argued that such oversight would improve journalism and forestall the imposition of outside controls. See NORMAN E. ISAACS, *UNTENDED GATES: THE MISMANAGED PRESS* 99-112 (1986).

¹⁹⁴ See, e.g. *National News Council Report*, *COL. JOURNALISM REV.*, JAN./FEB. 1978 at 67-78.

important to the country as a whole. “[T]he only way democracy can work successfully is through a value system that puts honorable public service in the reporting of events as accurately as possible, interpreting them honestly and analyzing them fairly. That kind of journalism can win back the confidence of the citizenry,” he wrote.¹⁹⁵

From 1976 until 1982 the National News Council achieved its highest level of effectiveness, according to chroniclers of the organization’s work.¹⁹⁶ That was because it was the period when Isaacs was its chairman. Isaacs had been editor of the *Louisville Courier-Journal* and the *Louisville Times*, a contributor to and leader of the *Columbia Journalism Review* and president of the American Society of Newspaper Editors. During his tenure, the council criticized or praised the major news organizations in accord with its findings, and the council gained some respect as a protector of free-press principles despite the fact that few knew it existed.¹⁹⁷ After Isaacs left the post, the council’s problems with media support, scant public awareness, and insufficient funding moved from the background to the foreground, forcing it into a spiraling decline that culminated in the council’s executive board vote on March 22, 1984, that dissolved the organization.¹⁹⁸

The conditions that prompted the creation of the National News Council — a fundamental lack of public trust in the news media and the perceived erosion of support for press freedom — remained unabated at the council’s death and appeared to worsen in some respects during the next decade. In the mid-1990s, some high-profile journalists began to

¹⁹⁵ *Id.* at 224.

¹⁹⁶ *See, e.g.*, PATRICK BROGAN, SPIKED: THE SHORT LIFE AND DEATH OF THE NATIONAL NEWS COUNCIL (1985).

¹⁹⁷ *Id.* at 168-75.

¹⁹⁸ *Id.* at 73-86.

publicly mourn the news council's death and campaigned for its resurrection.¹⁹⁹ Television journalist Mike Wallace, a fixture on the CBS news magazine, *60 Minutes*, galvanized the brief movement with a speech at Harvard in 1995 and followed up some months later by writing an article on the issue for a prominent trade magazine.²⁰⁰ The effort to revive the council caused a number of trade magazines to print articles exploring the idea, but it revived opposition as well. An article in *Editor & Publisher* indicated support from the president of the Society of Professional Journalists,²⁰¹ and the *American Journalism Review*²⁰² reported substantial public support for the news council idea. Editor Joseph Lelyveld of *The New York Times* reiterated his paper's opposition to the council.²⁰³ A year later, little was written about Wallace's suggestion as the movement to revive the National News Council had apparently quietly ended.

Some of the concerns that suppressed the writing of journalism ethics codes and softened the strictures of many codes that were written also were raised in opposition to news councils. *New York Times* editor A.M. Rosenthal, for example, criticized the National News Council in 1981, claiming that by fostering public and professional scrutiny and criticism of the press to make it function more professionally, it was easing the way for government

¹⁹⁹ As early as 1991 some intellectuals and practicing journalists had suggested recreating the National News Council. See, e.g., EVERETTE E. DENNIS & JOHN MERRILL, *MEDIA DEBATES, ISSUES IN MASS COMMUNICATION* (1991); Debra Gersh, *Resurrect the National News Council?* *EDITOR & PUBLISHER*, May 8, 1993, at 12; John Hughes, *Could a Press Council Improve Journalism?* *CHRISTIAN SCIENCE MONITOR*, Feb. 17, 1994, at 19.

²⁰⁰ Mike Wallace, *Why My Mind Has Changed About the Value of a National News Council*, Speech Delivered for Goldsmith Awards Ceremony at the Joan Shorenstein on Press, Politics and Public Policy, Harvard University (Mar. 9, 1995) available at <http://www.news-council.org/archives/95wal.html> (last visited March 17, 2006); Mike Wallace, *The Press Under Fire*, *QUILL*, Nov./Dec. 1995, at 20.

²⁰¹ M.L. Stein, *Revive the News Council?* *EDITOR & PUBLISHER*, Mar. 29, 1997, at 8.

²⁰² Alicia C. Shepard, *Going Public*, *AM. JOURNALISM REV.*, April 1997, at 29.

²⁰³ Evan Jenkins, *News Councils: The Case for and Against*, *COL. JOURNALISM REV.*, March/April 1997, at 39.

restrictions on the free press. “Peer pressure can lead to regulatory pressure,” Rosenthal warned.²⁰⁴ Just as the specific strictures of an ethics code might be used against a journalist at trial, news council decisions could similarly be cited in a courtroom effort to discredit a journalist’s actions, former wire service editor Clay Haswell claimed in a debate about councils.²⁰⁵ Codes and councils came to be seen as threats to press freedom.

Agitation for a national news council appeared to have been laid to rest at the end of the 20th century, but a tiny number of state and regional news councils continued to function, although not always for very long. Foremost among them is the Minnesota News Council, which was founded in 1971, two years before its nationwide counterpart, and still survives.²⁰⁶

Summary and Conclusion

Since the earliest days of the American republic, journalists have been periodically pressured by their peers and the public to improve their professional performance. During the past century, internal and external criticism has prompted the creation of a limited variety of mechanisms to establish and maintain ethical professional standards for the practice of journalism. Ethics codes have been the most enduring and widely used of these, despite the fact that their efficacy has been questioned from the outset and never proved. Approaches to ethics codes have varied with the social, political, and legal climate of the periods that produced successive calls for press reform, but debates about the worth and dangers of codes have been a constant accompaniment.

²⁰⁴ David Shaw, *News Councils Attempt to Monitor*, L. A. TIMES, SEPT. 24, 1981, at A17.

²⁰⁵ See M.L. Stein, *News Councils, Threat or Salve*, EDITOR & PUBLISHER, Oct. 19, 1997, at 15.

²⁰⁶ See Minnesota News Council, at <http://www.news-council.org/> (last visited March 17, 2006).

Enforceable codes have been the means of improvement suggested most often, but not exclusively, by those outside the profession; they have been opposed most often by those within. Journalists have never widely agreed to allow anyone, even themselves, to compel ethical or professional behavior. As a result, the only codes that consistently claimed any enforcement power were those produced for individual newsrooms and treated as conditions of employment. The codes produced by professional associations of journalists historically have articulated the highest ideals but carried no compelling power beyond the assumption that peer pressure is the best way to serve those ideals without diminishing or even threatening journalists' constitutionally endowed freedom.

Journalists and some free press advocates have had a long-standing fear that enforceable ethics codes or codes that specifically defined professional standards of practice would serve as a blueprint or precedent for the eventual imposition of legal limitations on press freedom. That fear, which is not without a basis in America's legislative history, has counseled against putting codes in writing and caused written codes to be expressed so vaguely at times that they provided little guidance or merely implied the existence of standards. The latter approach was devised to allow press defense lawyers leeway to maneuver around written codes or discount them as fleshless hopes if they were used by opponents in court to show how far journalists had strayed from professional standards and ethical practices.

No single demand for professional standards, press reforms, or systematic criticism of the press has had as much influence on journalism discourse and practice as the Hutchins Commission Report. Two government commission reports, issued by the Kerner and Warren commissions as they addressed other issues, criticized particular press practices and offered

corrective suggestions, but their influence pales dramatically in comparison with the Hutchins Commission Report. That document was not the first or the last to call for professional-level training for journalists, higher standards for gathering and disseminating news, and systems of self-correction, or to recognize a social responsibility to the public. The report warned the press that if it did not exercise its First Amendment rights in a socially responsible manner, the law would be empowered by public dissatisfaction to force the press into socially responsible behavior by curtailing its rights.

The Hutchins Report's proposal for a non-governmental news council to field the public's complaints about the press and encourage socially responsible practices through peer pressure lay fallow for more than a quarter of a century. When the National News Council experiment was eventually tried, it ended in failure after eleven years. That experience was an indication that not even a purely private joint effort by journalists and the public to encourage ethical behavior by means no more coercive than public criticism could generate continuing widespread support among journalists. The fears that attended the creation of ethics codes attached to the news council as well. Notable among them was the apprehension that councils were forerunners to the imposition of legal strictures on journalism's freedoms. It is ironic that codes and news councils were initially conceived as a means of warding off government efforts to regulate journalists into moral propriety but came to be feared as an entrée to government regulation.

The proliferation of the social responsibility theory of the press, as espoused by the Hutchins Report, may well prepare the public to accept or even ask for legal controls on the press because it is an instrumentalist concept. This may help explain why press defense lawyers have been so fearful of written codes. Ethics codes for any profession are

based on notions of social responsibility. Codes are premised on a determination that a particular field of endeavor is so important to the public that society must require high standards of performance. Those who crafted journalism ethics codes and proposed news councils understood that credible journalism was necessary to create the informed electorate that is so essential to a properly functioning democracy. Accordingly, high standards of journalism had to be established. And if journalists did not set and abide by them on their own, pragmatic instrumentalist theory says the people and the law they craft to serve them would do the job by default. Journalism standards crafted by non-journalists, according to some scholars, are likely to differ from those journalists would set for themselves.²⁰⁷ Lawyers and jurists have been crafting journalism standards for years, according to veteran attorney and journalism advocate Lee Levine.

I have for a long time bemoaned the fact that the legal standards that comprise the laws of libel and invasion of privacy, and now the law of newsgathering, have been crafted in a manner that often displays a breathtaking ignorance of the realities of daily journalism. The result has been that journalistic conduct is governed, in a very real sense, *by rules crafted not by news professionals, but by lawyers and judges* -- rules that make little or no sense, that create all the wrong incentives, and that are too often based, not on careful consideration of professional standards, but on a kind of judicial hysteria emanating from the facts of a particularly egregious case.²⁰⁸

In many instances, judges' criticisms or affirmations of journalism standards have been grounded in the Hutchins Report's take on the social responsibility of the press. Although the report is specifically mentioned in only two U.S. Supreme Court opinions,²⁰⁹ the analyses in

²⁰⁷ See Sandra Braman, *Public Expectations of Media Versus Standards in Codes of Ethics*, 65 JOURNALISM Q. 71 (1984). See generally BRUCE SANFORD, DON'T SHOOT THE MESSENGER (1999) (Both authors point out how the public's notions of ethical journalism are sometimes at odds with journalists' notions).

²⁰⁸ Media attorney Lee Levine, *quoted in* Steele, *supra* note 71 (emphasis added).

²⁰⁹ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323, 399 (1974).

the following chapters of this dissertation finds the concept frequently in rulings dealing with truth, privacy, and other fundamental principles of journalism ethics.

CHAPTER THREE

Truth and Truth Telling: First Principle and Prime Directive

The canon of truth telling is fundamental to American journalism and is perhaps the profession's universally embraced ethical principle. Virtually every American code of journalism ethics and statement of ethical principles enshrines truth telling as a preeminent value. When the Hutchins Commission completed its landmark study of mass media in the United States and issued its influential report on press responsibility in 1947, it too lauded the value of truth telling. When it compiled a list of what society required of the press, a "truthful account" of the day's events was foremost. "The first requirement is that the media should be accurate," the report said. "They should not lie."¹ Nearly a half century later, when journalism ethicists Jay Black, Bob Steele, and Ralph Barney formulated guiding principles for the Society of Professional Journalists, they began the list with: "Seek truth and report it as fully as possible."²

Truth telling is also the issue most frequently at the heart of rulings made by the U.S. Supreme Court in cases that deal with matters that are also addressed by the principles of journalism ethics. With few exceptions, the Court's rulings involving truth telling were made in libel cases because a libel complaint in the United States necessarily includes an allegation that a reputation-damaging publication is not true. In *New York Times Co. v. Sullivan*,³ which

¹ COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 20 (Robert D. Leigh ed., 1947) [hereinafter HUTCHINS COMMISSION REPORT].

² JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 7 (1993).

³ 376 U.S. 254 (1964).

is widely considered the most important libel ruling handed down by the U.S. Supreme Court, the axiomatic value of truth telling was undermined when the Court crafted a rule of law to protect *The New York Times* from liability for publishing statements that were not true. The new rule decreed that public officials who sue for libel must prove the defamatory statement was published with actual malice. That meant the publisher knew the statement was false or published the statement with a reckless disregard for whether it was false. A series of subsequent cases extended the rule to public figures who sue for libel.⁴

The ruling in *Sullivan* was generally hailed by the major news media in 1964 as a benefit to journalism, and none immediately saw it as a threat to one of the profession's fundamental principles. *Newsweek* magazine, for example, called the ruling "a decision that greatly strengthens American journalism."⁵ *Time* magazine saw the ruling not only as a boon for journalism, but a victory for the people as well. "The decision granted the U.S. citizen dramatic new immunity in the exercise of his classic right to sound off against his chosen leaders," the magazine said.⁶ A *Washington Post* editorial similarly praised the ruling but also addressed the ethical issues of fairness and truth telling, which were implicated in the ruling. The editorial's tone nonetheless seemed hopeful. "Among private citizens and the media which serve them, these opinions will be read with a new sense of the responsibility that our system imposes upon citizens themselves, and the media through which they speak, for fairness and restraint and for conformity to the truth in the presentation of public issues."⁷

⁴ See *Associated Press v. Walker*, 388 U.S. 130 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁵ *Libel Landmark*, NEWSWEEK, March 23, 1964, at 74.

⁶ *Libel Go Ahead and Say It!* TIME, March 20, 1964, at 78.

⁷ *Criticizing Public Servants*, WASH. POST, March 10, 1964, at A16.

An examination of the *Sullivan* ruling is integral to the larger purpose of this study, which seeks to determine whether the Supreme Court's legal edicts are creating a judicial version of a code of ethics for journalists. The case is also crucial to this chapter, which focuses on U.S. Supreme Court rulings that address truth-telling issues and determine whether they bolster or undermine the value that journalism ethics assigns to truth. This study does not equate ethics with law but recognizes both as societal constructs that assign values to human behaviors as a means of identifying them as proper or improper, and right or wrong. Though clearly not synonymous, law and ethics share the goal of encouraging proper behavior and discouraging that which is not.

Truth-telling behaviors have been vital issues in the American law of libel since truth was deemed to provide an absolute legal defense to the tort.⁸ By making libel a tort compensable by money damages, the law was positioned to function as an affirmation of the ethical value assigned to truth telling. By permitting the imposition of such legal sanctions on those who do not tell the truth, libel law affirmed and underscored the value of truth. Libel law has empowered the truth with the ability to ward off the legal imposition of money damages for reputation-damaging statements. Since the *Sullivan* ruling, however, falsehood is also sometimes protected. In cases involving public plaintiffs, falsehood that is not known to be false or is not the result of a reckless disregard for the truth, is treated as the legal

⁸ Truth did not become an absolute defense to libel on any particular day but did so gradually through a series of court rulings and legislative enactments across the country. When the U.S. Constitution was ratified, the English common law had been grafted onto American common law, and truth was already well established as a defense to civil libel, according to Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964). The landmark criminal libel trial of newspaper printer John Peter Zenger (Attorney General v. John Peter Zenger, 17 Howell's State Trials 675 (1735)) in colonial New York was a seminal case in the American colonists' break from the English common law tradition of not allowing truth as a defense to criminal libel. New York, Virginia, and Massachusetts were among the first to allow truth as a common law defense. Statutes followed in the early 1800s, and New York ultimately embodied the defense in its constitution. *See generally* CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS (1971); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN (1986).

equivalent of truth and is accordingly endowed with the equivalent ability to provide protection from liability. In short, falsehoods that are published without actual malice are as free of liability as the truth is. With *Sullivan* and its progeny, the Court established one standard of care for journalists attempting to tell the truth about a private person and a second, lesser standard for statements about public officials and figures. Under the *Sullivan* standard, if journalists publish false, defamatory statements about a private person as a result of negligence, they are liable. To incur liability to a public person, the law says the journalist must have knowingly or recklessly published the false defamatory statement. This study has not found any journalism ethics code that makes such distinctions.

Unlike the Court's rulings in *Sullivan* and its progeny, journalism codes of ethics and statements of ethical principles have been consistently more stringent in assigning culpability for failures to tell the truth. The 1975 code of ethics adopted by the Society of Professional Journalists, for example, said, "There is no excuse for inaccuracies or lack of thoroughness."⁹ The Supreme Court, as this study will demonstrate, has accepted some excuses.

This chapter begins with a two-part examination of the genesis, rationale, and impact of the Court's ruling in *Times v. Sullivan*. It examines the ruling as a statement of legal precepts that further political and social goals and enhance the constitutional guarantee of a free press. The second part of the examination is an attempt to determine whether the Court's pursuit of these values and goals produced a ruling that is inimical to the high value journalism ethics codes assign to truth seeking and truth telling.

This discussion of the Court's pursuit of social goals in the *Sullivan* ruling is guided by the theory of pragmatic instrumentalism, which claims that social engineering and other

⁹ Society of Professional Journalists, Sigma Delta Chi, Code of Ethics, *reprinted in* PHILIP MEYER, ETHICAL JOURNALISM 253 (1987).

moral or social concerns may be an unavoidable component of court rulings and an important motivation for them. The discussion also assesses the potential practical impact of the actual malice rule that was imbedded in American libel law by the *Sullivan* decision. The actual malice rule created two distinct legal standards of care for attempts to tell the truth and two standards of culpability for failures to do so. Journalism ethics recognizes but one.

From the ruling in *Sullivan*, this chapter moves to a three-part consideration of the truth-telling canon in the ensuing line of libel cases that expanded or limited the legal principles that *Sullivan* established. The next section of this chapter examines cases in which the Supreme Court addressed truth-telling values outside the libel arena.

Times v. Sullivan: Undervaluing Truth

Truth telling is an essential function of journalism, which is defined here as fact-based mass communication presented in a news medium. Fact-based commentary is included in that definition. Some Court rulings examined here were made in cases in which journalists were not parties, but the rulings address issues covered by journalism ethics. The ruling in *Sullivan* is the perfect example. No practitioners of journalism as defined above were involved in the publication of the libelous statements that were at issue in the case. It was the performance of *The New York Times*' advertising staff, not its journalists, that generated the legal controversy, but the ruling has always been applied to journalism and the truth-telling issues addressed by journalism ethics.

Neither the *Sullivan* ruling nor any other Court opinions examined here reveal an overt effort to undermine or bolster journalists' avowed devotion to truth or any other ethical principle. Nonetheless, the Court has made legal pronouncements that intrude, perhaps

unavoidably, into areas this study identifies as matters of journalism ethics. The Court has often explained these rulings as efforts to protect the free press rights established by the U.S. Constitution to enable the press to perform its proper role in the maintenance of the American system of democracy. These excursions into journalism ethics were arguably motivated by the Court's need to reach and resolve legal issues. But they also can be explained generically as judicial activism to serve social goals, or for the more specific purposes of this study, they can be interpreted as exercises in pragmatic instrumentalism as defined by Robert Samuel Summers.¹⁰

Summers, a Cornell law professor whose theory of pragmatic instrumentalism was introduced in 1982, postulates that court rulings and other embodiments of law are tools “devised to serve practical ends.”¹¹ He sees law as a means to achieve particular social goals directly or indirectly, and he questions whether any court adjudicates without interjecting value judgments. Judges, according to pragmatic instrumentalist theory, determine the result or social effect they want cases to have and then dress their rulings in the legalisms necessary to support and justify them. Viewed through this theoretical framework, the ruling in *Times v. Sullivan* can be seen as much an expression of the Supreme Court's commitment to achieving racial integration and social justice as it was a reaffirmation of American free press principles.

In pursuing social justice, the Court declined plaintiff L. B. Sullivan's invitation to decide the case in a manner that would have affirmed the value journalism ethics ascribe to truth. It also declined the opportunity to promote this aspect of social responsibility in the

¹⁰ See generally ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

¹¹ *Id.* at 20.

press – a goal endorsed by the Hutchins Commission with the proviso that the press reform itself with codes of ethical behavior without interference by courts or other arms of government. A socially responsible press is one that hews closely to the truth-telling principle, according to the commission. And such a press presumably would not have two government-sanctioned standards of truth telling – one rigorous and the other considerably less so.

The publication that ultimately led to the landmark ruling in *Times v. Sullivan* was a paid advertisement placed in *The New York Times* to solicit support in the battle to achieve racial integration and social justice in Alabama. The case landed at the Supreme Court’s doorstep because the ad contained reputation-damaging statements that were not true, and Alabama’s highest court found that failing to be a sufficient reason to make the newspaper liable for monetary damages.

Sullivan, an elected city commissioner in Montgomery, Alabama, filed a libel lawsuit against *The New York Times* after it published a full-page advertisement on March 29, 1960, that claimed Montgomery police officers had misused their authority and that government officials were persecuting Dr. Martin Luther King Jr., a leader of the Civil Rights Movement then under way in Alabama. Sullivan claimed the advertisement damaged his reputation because he was the city’s commissioner of public affairs and therefore in charge of the police department. The ad listed supporters and participants in the movement and bore the title “Heed Their Rising Voices.” Its ten paragraphs of text stated that thousands of black students were conducting non-violent demonstrations in an effort to secure the civil rights extended to all Americans by the U.S. Constitution. These students’ efforts were being met by “an

unprecedented wave of terror,” according to the ad.¹² It also claimed that in Montgomery, “truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus.” The ad later said:

[T]he Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times for “speeding,” “loitering” and similar “offenses.” And now they have charged him with “perjury” — a felony under which they could imprison him for ten years.¹³

Sullivan had laid out a claim of libel per se under Alabama law. The newspaper’s most effective defense would have been truth, but that defense was unavailable because the ad’s statements were not scrupulously true. Alabama law allowed truth as a defense only if the statements at issue could be proven true in all their particulars.¹⁴ Supreme Court Justice William Brennan’s opinion in the case observed early on, “It is uncontroverted that some of the statements contained in the two paragraphs are not accurate descriptions of events which occurred in Montgomery.”¹⁵

Brennan cited at least eight factual misstatements in the ad’s ten paragraphs. Alabama’s Supreme Court found Sullivan’s libel claim had been sufficiently proven and accordingly affirmed a jury award of \$500,000 in damages. Central to the Alabama ruling was its high court’s reliance on prior U.S. Supreme Court statements in seven cases indicating that the Constitution did not protect libelous publications.¹⁶ Brennan, however,

¹² *Sullivan*, 376 U.S. at 257.

¹³ *Id.* at 257-58.

¹⁴ *Id.* at 267.

¹⁵ *Id.* at 258.

¹⁶ *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961); *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266

observed that none of those cases approved the use of libel laws to punish criticism of public officials' official conduct and that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."¹⁷ Brennan saw the lawsuit as providing a government official the means to punish those who had criticized his job performance. This view apparently was not altered by the fact that falsity tainted the particular criticism at issue.

Sullivan's attorneys saw the case as a potential threat to the value of truth and a person's ability to protect his reputation. This was reflected in a brief they filed with the Court after it agreed to hear the *Times*' appeal from the Alabama Supreme Court. That brief framed the issues in a manner that supported the journalism canon of truth telling. The question Sullivan's attorneys said the Court had to decide was: "Does a newspaper corporation have a constitutionally guaranteed absolute privilege to defame an elected city official in a paid newspaper advertisement so that the corporation is immune from a private common law libel?"¹⁸

Deeper within the brief, Sullivan's attorneys hammered away at the potential damage a *Times* victory could inflict on the value of truth:

If the *Times* prevails, any false statement about any public official comes within this protected category. . . . The constitution has never required that states afford newspapers the privilege of leveling false and defamatory "facts" at persons simply because they hold public office. The great weight of American authority has rejected such a plea by newspapers.¹⁹

(1952); *Pennekamp v. Florida*, 328 U.S. 331, 348-49 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

¹⁷ *Sullivan*, 376 U.S. 254, 268-69.

¹⁸ Brief for Respondent at 1, *Sullivan* (No. 39).

¹⁹ *Id.* at 22-23.

After dwelling on the need to preserve the value of truth and a single standard for it, the brief attempted to head off apparent efforts by the *Times* and several supportive groups to entwine the case with the social justice issues that were at the heart of the Civil Rights Movement. Rulings the Court had made in the decade leading up to the *Sullivan* case helped the movement achieve important goals, and the Sullivan camp had sufficient reason to believe the Court's sentiments lay with these social goals, which were identical to those touted by the *Times* ad.²⁰

Others who have studied that period of Supreme Court adjudication have remarked on the Court's apparent sentiments and willingness to direct the outcome of this social issue controversy. Constitutional law scholars Henry J. Abraham and Barbara A. Perry, for example, described the Court's landmark ruling in *Brown v. Board of Education of Topeka*, which outlawed racial segregation in public schools, as "one of the most far-reaching in our history in terms of its social impact. It catalyzed the issue of racial discrimination. . . . Conscious of its position as a national moral goad, the Court had led."²¹

Sullivan's lawyers were apparently fearful the Court would again take the lead, and they attempted to impress upon the tribunal that this was a relatively straightforward libel case and not a vehicle for advancing or resolving the racial and social issues that the *Times* and its amici curiae were trying to imbed in the case. Sullivan's brief referred to written arguments submitted by the *Times* and its supporters that went "outside the record" of the case and took pains to inform the Court that similar libel lawsuits had been filed by the rest

²⁰ The most noteworthy of these cases found racial segregation of the public schools to be unconstitutional. *See* *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²¹ HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT* 336 (7th ed. 1998).

of the Montgomery City Commission against various news media.²² The *Times* supporters, particularly the *Washington Post*, indicated that these lawsuits were an attempt by Alabama officials to use libel law as a weapon to forestall integration, thwart social justice, and undermine the Civil Rights Movement by punishing the media that furthered such goals by publication.²³

Pursuant to the effort to frame the libel lawsuit as part of a concerted effort to deny civil rights to blacks in Alabama, the *Washington Post's amicus* brief informed the Court that lawsuits demanding aggregate damages in the millions of dollars had been filed against the *Times*, not only by the three incumbent Montgomery commissioners but by a former commissioner and the governor as well. The Post's brief laid out details of what it construed to be a conspiracy of libel lawsuits:

Nor were these litigations merely isolated instances. On the contrary, they appear to have been part of a broad attempt by officials in Alabama to invoke the libel laws against all those who had the temerity to criticize Alabama's conduct in the intense racial conflict. Thus, seven libel suits were commenced in Alabama against the New York Times based on an article written by Harrison Salisbury concerning racial conflict in the State; and at least five Alabama officials filed libel actions against the Columbia Broadcasting System, based on its coverage of the conflict.²⁴

The brief accordingly framed the central issue facing the Court as a determination of whether the federal Constitution allows a state to use its libel law to "suppress and punish expressions of support for the cause of racial equality" and deny dissidents access to the mass media.²⁵

²² Brief for Respondent at 52, *Sullivan* (No. 39).

²³ Petition for Certiorari at 19, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

²⁴ Brief of the Washington Post Company as *Amicus Curiae* in Support of Petitioner, at 7-8, *Sullivan* (No. 39).

²⁵ *Id.* at 1.

This was essentially the view expressed by Brennan when he wrote the decision embodying the Court's unanimous reversal of the Alabama judgment against the *Times*.

Brennan wasted no time in revealing how he framed the issue. The first paragraph of the 33-page opinion said, "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."²⁶ He ultimately determined that the state had wielded power beyond the limits permitted by the U.S. Constitution. "We hold that the rule of law applied by the Alabama courts is constitutionally deficient."²⁷

Alabama's application of libel law in this case was likened to the enforcement of criminal seditious libel, a practice the Court found abhorrent and constitutionally impermissible. A comparison of Alabama law with the seditious libel laws of colonial America was highlighted in an *amicus* brief the *Chicago Tribune* submitted to the Court.²⁸ Seditious libel imposed criminal punishment on those who criticized the government. In that government exists only in the personae of the individuals who staff it, criticism of government, under Alabama's application of the "of and concerning" element of libel law,²⁹ constituted criticism of those individuals, according to Brennan's reasoning. Criticism of government became personal criticism that made the critic vulnerable to a libel suit. As a result, libel lawsuits had been transformed into sedition prosecutions that substituted civil

²⁶ Sullivan, 376 U.S. at 256.

²⁷ *Id.* at 264.

²⁸ Brief of the Tribune Company as *Amicus Curiae* at 10-15, *Sullivan* (No. 39).

²⁹ Libel plaintiffs must prove the defamatory statement at issue is of or about themselves. That is, the statement identifies them in a defamatory context. *See generally*, ROBERT D. SACK, SACK ON DEFAMATION §2.9.1 (3rd ed. 1999).

damages for criminal penalties. Either route could be expected to impermissibly suppress or chill public commentary on government, Brennan concluded.

However, a libel lawsuit, unlike a criminal prosecution for sedition, requires that the criticism or the allegations supporting the criticism be false. Truth would spare the critic. But the *Times*' criticism lacked a full measure of truth. Brennan, however, determined that "[t]he state rule of [libel] law is not saved by its allowance of the defense of truth."³⁰ Here Brennan's opinion brokered the value of truth to ensure greater protection for critics of government. He said, "[C]onstitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' . . . [E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . to survive."³¹

The Court decided that the First Amendment and the Fourteenth Amendment required additions to the list of elements government officials must prove when suing for defamatory statements about their official conduct. An official would hereafter be required to prove with clear and convincing evidence that the statement was false and the defendant had made it with "actual malice," which was defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."³²

The Court said the *Times* did not know that a number of statements in the ad were false. Even though the newspaper's files contained accurate accounts of the incidents falsely referred to by the ad, the Court said the failure to check those files was, in effect, excusable.

³⁰ *Sullivan*, 376 U.S. at 278.

³¹ *Id.* at 271-72 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 445).

³² *Id.* at 280.

The advertising department employees' failure to check the news files did not amount to a reckless disregard for whether the statements were true. The fact "that they relied on their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement" was sufficiently solicitous of the truth under the Court's new standard.³³ Alabama's top court had considered the ad department employees' actions to be a "cavalier ignoring of the falsity of the advertisement,"³⁴ and that tribunal had chosen not to allow deviation from the truth to be less culpable in such circumstances.

And so the Court set itself on the path of providing some falsity with much of the same legal protection given to truth in the arena of libel law. It decided that falsity must be tolerated to some degree in order to foster free speech. Falsehoods that were neither intentional nor reckless were protected as if they were truths in discussions of public officials' performance of their duties.

Actual Malice and Pragmatic Instrumentalism

A pragmatic instrumentalist seeking an ulterior basis for the *Sullivan* ruling could readily find evidence in Court papers to support a contention that the outcome was determined to a significant degree by the racial integration and social justice controversies that underlay the case and provided its historic framework. Sullivan's attorneys filed a brief that included a complaint about their opponents' deliberate efforts to align the case with the struggle over other social issues:

³³ *Id.* at 287. The *Times* employees also relied on a letter from civil rights activist A. Philip Randolph confirming the authorization of the ad's sponsors.

³⁴ *Id.* at 286.

In a desperate effort to secure review in this Court, the Times and its friends go outside the record and refer this Court to other libel suits pending in Alabama. With the exception of two brought by the other Montgomery commissioners, all are erroneously and uncandidly labeled “companion cases.” But the effort is as revealing as it is desperate. Clearly, petitioner feels that this case, standing on its own, does not present grounds for review.³⁵

In short, the *Sullivan* ruling is arguably an example of the Court using or creating law to further a social goal. The *Times* and its amici appealed to the Court’s apparent affinity for those social goals when they used legal briefs to play the pragmatic instrumentalist card – framing the case in a manner that offered the Court an opportunity to pursue its liberal agenda on another front. Sullivan’s attorneys played the same card, but it was geared to entice the Court to pursue the social goal the Hutchins Commission referred to as the “social responsibility of the press.” The concept of a socially responsible press has been a major justification and impetus for the creation of journalism codes of ethics. The brief submitted by Sullivan’s attorneys extolled truth as integral to a responsible press, especially in public discussions of social matters such as racial issues. “Surely in a field so tense, truthful statements by huge and influential newspapers are imperative,” the brief said.³⁶ It urged the Court to follow the lead of Alabama’s Supreme Court, whose ruling, if affirmed, could help make the press more responsible and solicitous of the truth. “The enormity of petitioner’s wrong is clear,” the brief argued. “Hopefully the decision below will impel adherence by this immensely powerful newspaper to high standards of responsible journalism commensurate with its size.”³⁷

³⁵ Brief for Respondent at 52, *Sullivan* (No. 39) (footnote omitted).

³⁶ *Id.* at 53.

³⁷ *Id.*

In the *Sullivan* case, the Court was in a position to make a ruling that could have prodded journalists toward greater allegiance to the ethical canon of truth. The Alabama courts had taken that step, although it is not argued here that journalism ethics were a consideration for the Alabama courts. By affirming the state court's ruling, the Court would have done what the Hutchins Commission had warned members of the press the government might seek to do. That warning was made repeatedly in the commission's report in a variety of guises. The following excerpt is typical. "In the judgment of the Commission everyone concerned with the freedom of the press and with the future of democracy should put forth every effort to make the press accountable, for if it does not become so of its own motion, the power of government will be used, as a last resort, to force it to be so."³⁸

The Court did not choose to use its power to make the press more accountable, but less so. It told journalists, in effect, that they did not have to be as careful in securing the truth when the reputation of a government official was at stake. It chose a path that exerts less force on journalists to be more responsible truth tellers than did the Alabama Supreme Court decision it overturned. The *Sullivan* case invoked the Court's power to allow or restrict civil penalties for failing to tell the truth. The Court chose the latter path.

Justice Brennan's majority opinion in *Sullivan* addressed more than the law of libel. It tackled fundamental social and political issues that have troubled the country for nearly two centuries. In pursuit of these larger issues, the Court did damage to the value of truth, which libel law had traditionally recognized and affirmed. Libel law had conferred upon truth the power to absolve those who made reputation-damaging statements. But in *Sullivan*, truth was denigrated in the process of providing greater protection to those who would criticize the

³⁸ Hutchins COMMISSION REPORT, *supra* note 1, at 80.

government. The creation and application of “actual malice” as a legal concept allowed some false criticism to be given the same protection as criticism based in truth. Truth became less important if the victim of a reputation-damaging misstatement was a government official. An uncompromising allegiance to truth, as advocated by journalism codes of ethics, was reworked in the law forum and identified as strict liability and constitutionally unacceptable because it impinged on free speech. The *Times* employees’ failure to verify the allegations against Sullivan became legally excusable. Falsehoods that were the result of incompetence, negligence, or accident, as opposed to intentional lies or reckless statements, were protected as if they were the truths. These effects of the treatment of truth are examined to a greater extent in the following section of the study, which reviews cases that have expanded some of the legal precepts established in the *Sullivan* ruling.

Sullivan’s Progeny

A central feature of the *Sullivan* ruling was the Court’s refusal to ascribe actual malice to the newspaper advertising department employees’ failure to verify the allegations made in the “Heed Their Rising Voices” ad. A comparable failure by journalists was not treated so tolerantly three years later when the Court ruled in another libel lawsuit, *Curtis Publishing Co. v. Butts*.³⁹ This was actually two rulings in two libel cases consolidated in one opinion because the legal issues presented were nearly identical. The second case was *Associated Press v. Walker*. Both cases required the Court to review libel judgments in which journalists had allegedly violated the truth-telling canon and thereby damaged the reputations

³⁹ 388 U.S. 130 (1967).

of plaintiffs who were not government employees or public officials, but who were deemed to be public figures.

The plurality ruling was a tentative step toward further expansion of the Court's protection of journalists' failures to tell the truth. The effort to extend the actual malice standard to published falsehoods about public figures did not attract a majority of the justices in *Butts*, but it would in a later case.⁴⁰ The *Butts* ruling also shows the Court making value judgments about journalistic conduct and practices that would make failures to tell the truth culpable. These were judgments about matters clearly within the ambit of journalism ethics. The Court reviewed the journalists' conduct – how they pursued truth – in both cases and granted protection in one when it determined the lapses were not bad enough to warrant culpability as actual malice or highly unreasonable conduct. It frowned on the journalism practices at issue in the other and accordingly found they did descend to a level that would make the journalists liable. The Court, therefore, affirmed that lower court ruling penalizing the journalists' conduct. As stated by Justice John Marshall Harlan in the *Butts* plurality opinion:

[N]either the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press.⁴¹

⁴⁰ The U.S. Supreme Court's most instructive discussion of public figures and the actual malice rule came in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴¹ *Id.* at 152-53.

With that avowed orientation, it appears that a plurality of the Court crafted a ruling that mimicked the role of journalism ethics if, as ethicist Louis Hodges says, ethics is concerned with what one “ought” to do.⁴²

A close reading of the *Butts* opinion reveals a Court determination that the journalists employed by the defendant *Saturday Evening Post* ought to have done a better job of verifying allegations of misconduct against Wally Butts, the athletic director at the University of Georgia. Butts sued for libel after the magazine published an article claiming he had conspired to cause his university’s football team to lose a 1962 game against the University of Alabama by providing the opposing coach with Georgia’s game plan and specific plays. In an article bearing the headline “The Story of a College Football Fix,” the *Post* published the allegations based on information provided by an insurance salesman who said he had accidentally overheard a telephone conversation in which Butts provided the Alabama coach with game plans. Harlan’s opinion noted that the *Post*’s journalists knew the salesman had been previously convicted on bad-check charges but did not test his credibility independently. Although there was no crushing deadline pressure to publish the story, the journalist assigned to write it was not an expert on the sport and the story was not offered to an expert to review before publication. The opinion also included references to the *Post*’s new shift in editorial policy to embrace “sophisticated muckraking” and suggested “the pressure to produce an expose might have induced a stretching of standards.”⁴³ The Court’s ultimate conclusion was that there was sufficient evidence “to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation

⁴² MEYER, *supra* note 9, at 18.

⁴³ *Curtis Publishing Co.*, 388 U.S. at 159.

and reporting ordinarily adhered to by responsible publishers.”⁴⁴ Here the Court found liability for the journalists’ failure to adhere to what it perceived to be responsible journalistic standards.

The journalists who were sued in *Walker* also were cited for deviating from their profession’s standards, but when measuring this failing against the same criteria applied in *Butts*, the Court did not find sufficient misconduct to deny constitutional protection to the false statements published by the Associated Press. In *Walker*, Edwin Walker, a former Army general who was known for his opposition to federally imposed integration, sued the Associated Press for libel. The news service had published dispatches about a riot at the all-white University of Mississippi that was sparked by the court-ordered admission of James Meredith, a black student. The dispatches claimed Walker had led students in a charge against the federal marshals assigned to escort and protect Meredith. In short, the dispatches described Walker committing a federal crime. A young correspondent filed the dispatches in rapid succession from the scene of the disturbances and told his editors they were based on what he had seen and heard. Walker denied leading or even participating in any charge against the marshals and said he had spoken with the students and urged them to remain peaceful. To support his version of events, Walker’s lawyers submitted to the Court an excerpt of the United Press account of the incident, which said he spoke to the students and urged them “to cease their violence.”⁴⁵ The jury that heard all of the conflicting testimony about the event also concluded that Walker had not taken control of the students or led them in a charge.

⁴⁴ *Id.*

⁴⁵ Answer to *Amicus Curiae* Brief of The Tribune Company at 11, *Associated Press v. Walker*, 388 U.S. 130 (1967) (No.150).

Nonetheless, the U.S. Supreme Court ruling noted that the Associated Press correspondent, unlike the source relied on by the *Saturday Evening Post*, had given the news agency “every indication of being trustworthy and competent.” The Court said the correspondent’s reports had “one minor ” inconsistency, but nonetheless concluded that the acts the correspondent attributed to Walker “would not have seemed unreasonable to one familiar with General Walker’s prior publicized statements on the underlying [integration] controversy.”⁴⁶ The Court ruled that “nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards.”⁴⁷

While a rational distinction can be made between the “publishing standards” or efforts to secure the truth by the *Post* and the Associated Press in these instances, pragmatic instrumentalists would note that *Walker*, like *Times v. Sullivan*, involved a lawsuit challenging the veracity of negative statements about a plaintiff opposed to racial integration and the Civil Rights Movement in the South. An *amicus* brief filed on behalf of the *Chicago Tribune* informed the Court that Walker, in a tactic reminiscent of the broad-based legal attacks against the media in *Sullivan*, had “filed 15 libel suits in 10 states.” He sued the Associated Press in seven separate suits, its subscriber newspapers in eleven, and sought damages in excess of \$33 million.⁴⁸ Walker’s lawyers, following the failed tactic of Sullivan’s lawyers four years earlier, tried, in effect, to convince the Court that making journalists more truthful was a more important social issue than civil rights and not an infringement on press freedom. They argued that allowing civil penalties in libel cases

⁴⁶ 388 U.S. at 158-59.

⁴⁷ *Id.* at 159.

⁴⁸ Brief for The Tribune Company as *Amicus Curiae* at 2, *Associated Press* (No. 150).

brought by public figures falsely depicted as committing criminal acts would benefit society and the press:

It would appear that the news media, itself, would seek to establish higher, rather than lower standards of integrity and accuracy in its reporting. If accuracy is difficult to obtain under present conditions, it would be infinitely worse if those who gather and disseminate the news for profit are relieved of financial responsibility for damages caused by their product.⁴⁹

The brief cast journalists as “news merchants” and accordingly described false news reports as defective products that injured the public. It urged the Court not to expand the *Times v. Sullivan* actual malice rule to shield the press from corrective punishment when public figures are defamed. The Court was not persuaded.

Harlan’s plurality opinion allowed a public figure plaintiff to prevail in a libel suit by proving that the defendant had engaged in highly unreasonable conduct that was an extreme departure from responsible publishing standards. This was a third standard of truth that ostensibly offered less protection to journalists than the *Times v. Sullivan* standard but was never endorsed by more than a four-justice plurality. Three concurring opinions provided the votes necessary to uphold the judgment against the *Saturday Evening Post* and set aside the judgment against the Associated Press. But the concurrences were in result only, not in rationale. Chief Justice Earl Warren’s concurring opinion supported the *Sullivan* standard of culpability and clearly rejected a third standard. Warren claimed there was “no basis in law, logic or First Amendment policy” for making a distinction between the standards of culpable falsehood required in libel cases brought by public officials and public figures.⁵⁰ The second

⁴⁹ Answer to the *Amicus* Brief of The Tribune Company at 17, *Associated Press* (No. 150).

⁵⁰ 388 U.S. at 163 (Warren, C.J., concurring).

concurring opinion was written by Brennan and joined by Byron White. The third was written by Hugo Black and joined by William Douglas.

Sifting through the views expressed in the four opinions, it becomes apparent that a majority of the Court, composed of the five justices who signed on to the concurring opinions, would permit a libel judgment for a public figure plaintiff only if a standard of fault equal to the *Times v. Sullivan* standard or even less supportive of the value of truth were applied. Two of the five, Black and Douglas, had argued that the First Amendment erased libel as a cause of action in the United States. Their standard was most protective of falsity. Warren, Brennan, and White cast their lot with the *Times v. Sullivan* standard. It was not until seven years later, in *Gertz v. Robert Welch, Inc.*,⁵¹ that the *Times v. Sullivan* standard emerged as unequivocally controlling in libel cases with public figure plaintiffs.

Expanding Protection of Falsehood

A series of libel rulings handed down in the few years immediately after *Times v. Sullivan* better defined the “actual malice” standard that gave public officials and public figures less protection than private people from false statements that damaged their reputations. These rulings also clarified who belonged in this class of public officials and public figures. The first of these cases, *Garrison v. Louisiana*, amplified and added to the *Times v. Sullivan* definition of actual malice by explaining that First Amendment protection was denied by that standard to false statements “made with a high degree of awareness of their probable falsity.”⁵² This unanimous ruling also made it clear that the standard applied

⁵¹ 418 U.S. 323 (1974).

⁵² 379 U.S. 64, 74 (1964).

not only to civil libel cases but also to the criminal libel charges at issue here. Although *Garrison* is cited here primarily for its role in the diminution of the ethical value of truth, it should be noted that the ruling also provided the Court with an opportunity to declare in dictum that truth was a defense against criminal libel in the United States although it traditionally had not been necessarily so. “Truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned,” the Court said.⁵³ While *Sullivan* had made it clear that some false statements about official conduct were protected, *Garrison* made it equally clear that statements about the private conduct of a government official were now subject to the same standard of protection. “[A]nything which might touch on an official’s fitness for office is relevant,” the Court said.⁵⁴

A government official was again the plaintiff in the 1967 case of *Beckley Newspapers v. Hanks*,⁵⁵ in which the Court better explained “actual malice.” It specifically distinguished it from the common notion of animosity and ill will and issued a reminder that the phrase from the *Sullivan* ruling, “reckless disregard” for truth or falsity, did not include the simple failure to investigate. This effort at clarification was further extended in *St. Amant v. Thompson*.⁵⁶ There the Court emphasized that a failure to investigate was not in itself culpable. It described actual malice as deliberate lying or publishing a statement while knowing that it probably was not true, or “when the defendant in fact entertained serious doubts as to the truth of his publication.”⁵⁷

⁵³ *Id.*

⁵⁴ *Id.* at 77.

⁵⁵ 389 U.S. 81 (1967).

⁵⁶ 390 U.S. 727 (1968).

⁵⁷ *Id.* at 731.

“[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing,” the Court said. The opinion even conceded that “[i]t may be said that such a test puts a premium on ignorance [and] encourages the irresponsible publisher not to inquire.”⁵⁸ Justice Abe Fortas found the ruling overly permissive of irresponsible conduct and unnecessarily protective of First Amendment values, but his was the lone dissenting voice.

The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensibilities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. . . . The occupation of officeholder does not forfeit one’s membership in the human race. . . . *New York Times* does not preclude this minimal standard of civilized living.⁵⁹

St. Amant’s libelous statements were protected in this case, not because he was simply repeating the false words of another, but because the target of those remarks was a public official and a lower standard of truth telling applied. In *Greenbelt Cooperative Publishing Association v. Bressler*,⁶⁰ the defendant journalist quoted false statements made by others, and again the target and subsequent libel plaintiff was a public official. But here, the meaning of a word became an issue because it was pivotal in determining whether the journalist had acted with the requisite actual malice that would permit the imposition of penalties. The continuing impact of the *Sullivan* opinion is evident here as the Court invokes the mandate to review factual determinations at the trial level when a free press issue is

⁵⁸ *Id.*

⁵⁹ *Id.* at 734 (Fortas, J., dissenting).

⁶⁰ 398 U.S. 6 (1970).

implicated. In the *Greenbelt* case, a jury had determined that a pivotal word used by a reporter had one meaning, and the Court determined it had another.

That disputed word was used by a reporter for one of Greenbelt's weekly newspapers who covered public meetings at which a land developer, who was also a public official, was criticized for his tough negotiating tactics with the city over two pieces of land. As a result of these tactics, critics said the developer was blackmailing the city. The reporter accurately published these criticisms while knowing the developer had not committed blackmail, which is a crime. Bressler's attorneys argued that the alleged defamation met the *Times v. Sullivan* actual malice standard because the reporter referred to the developer as a blackmailer while knowing it was a false label. The Court disagreed, saying "blackmail" in this context did not mean the criminal act of blackmail. At least insofar as actual malice is concerned, a word does not necessarily mean what it says, the Court decided and reversed the libel judgment against Greenbelt. "Blackmail" was deemed "rhetorical hyperbole, a vigorous epithet," as the Court concluded, "No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bressler with the commission of a criminal offense."⁶¹

Justice White, however, disagreed. In a six-page concurring opinion, he wrote only four lines of concurrence. The rest read like dissent. Despite the Court's insistence that no reader could see the word "blackmail" in the newspaper articles and think it meant "blackmail," White noted that the jurors in the trial below had done precisely that. He also observed that journalists are trained and paid to be experts with words and should use their expertise to choose words better when they know that one usage could harm someone. "I see

⁶¹ *Id.* at 14.

no reason why the members of a skilled calling should not be held to the standard of their craft,” he wrote.⁶² In White’s view, the issues were accuracy and professionalism, and the professionally established ethical standard for truth telling should be the legal standard as well. White concurred in reversing the prior judgment only because it was based on an improper definition of malice.

White’s argument that journalists should be held to the standards of their craft would have applied quite well to the issues in *Time, Inc. v. Pape*.⁶³ Here, *Time* magazine was sued for libel by Pape, a Chicago deputy police chief who was portrayed in a magazine article as a person who led a squad of detectives who brutally violated the civil rights of a black family. *Time* based the article on a 1962 report by the U.S. Commission on Civil Rights, which detailed allegations of police brutality across the country. The article, however, falsely reported the allegations as facts or conclusions reached by the commission. In short, *Time* magazine had omitted the word “alleged” as it provided details of the incident in which Pape was implicated. The result was to present the allegations made by the black family as facts or findings by the commission. The primary legal issue the U.S. Supreme Court had to decide was whether the publication of mere allegations as facts (by omitting the word “alleged”) constituted actual malice as required by *Sullivan* in a libel lawsuit filed by a public official. The Court found the omission did not qualify as actual malice and reversed the lower court judgment against the magazine.

The opinion explaining the 8-1 ruling took issue with the determination by the Seventh Circuit Court of Appeals “that it was obvious that the omission of the word

⁶² *Id.* at 20 (White, J., concurring).

⁶³ 401 U.S. 279 (1971).

‘allegation’ or some equivalent was a ‘falsification’ of the Report” and that the “omission was admittedly conscious and deliberate.”⁶⁴ The Court found fault with the lower tribunal’s reasoning and said, “The question of ‘truth’ of such an indirect newspaper report presents rather complicated problems.”⁶⁵ *Time*’s article on the Civil Rights Commission’s report gave the magazine choices when it decided to depart from “full direct quotation of the words of the [report],” the Court said. “Time’s omission of the word ‘alleged’ amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities,”⁶⁶ the Court said before concluding that making a factually incorrect choice in such circumstances did not constitute actual malice. It was an error of judgment or interpretation, according to the Court.

It must be noted that the black family prevailed in a civil rights violation lawsuit filed against Pape, but that potential validation of the allegations published about him was not ostensibly relevant in the Court’s ruling in this libel case. There was no indication that the outcome of that case made *Time*’s article true. But the fact that this outcome was mentioned in a footnote of the opinion indicates that the Court was aware of it.⁶⁷ It also must be noted that the Court did not want the *Pape* decision to expunge “alleged” from the journalist’s lexicon. In a final cautionary note, the Court said, “Nothing in this opinion is to be understood as making the word ‘alleged’ a superfluity in published reports of information damaging to reputation.”⁶⁸

⁶⁴ *Id.* at 285.

⁶⁵ *Id.* at 286.

⁶⁶ *Id.* at 290.

⁶⁷ *Id.* at 283 n.1.

⁶⁸ *Id.* at 292.

Allegations of criminal conduct were also pivotal in the 1971 case of *Rosenbloom v. Metromedia*,⁶⁹ in which a plurality of the Court extended the constitutional protection of falsity beyond damaging statements made about public officials and public figures. Three justices voted to provide protection to reputation-damaging false statements about private figures involved in events of public or general interest. This meant the *Times v. Sullivan* actual malice standard had to be applied on the basis of the nature of the subject matter that led to the publication of the defamatory statement and not on the basis of the status of the plaintiff as a public person. If the subject matter was an event of public or general interest, three justices said, even private people would have to prove actual malice when suing for libel. Rosenbloom became involved in such an event when he was arrested and charged with possessing nudist magazines that Philadelphia authorities claimed were obscene. In reporting on the story, journalists used terms that were found to have falsely identified Rosenbloom as a “girlie book peddler,” a “smut distributor,” and a purveyor of “obscene” materials.⁷⁰ Rosenbloom filed a libel lawsuit against Metromedia’s radio station after he was acquitted of the charges and a finding that his materials were not obscene.⁷¹

Metromedia relied on truth and privilege as defenses. The latter defense was based on the fact that the information about Rosenbloom had been provided by a police captain and that it had been published with reasonable care.⁷² Three justices reasoned, however, that the pivotal issue was a determination of whether the actual malice rule should apply. In ruling

⁶⁹ 403 U.S. 29 (1971).

⁷⁰ *Id.* at 33-36.

⁷¹ *Id.* at 36.

⁷² *Id.* at 36-38.

that it did apply, the justices said the germination of that rule in *Sullivan* and its extension in *Butts* were not based so much on the status of the plaintiffs as public officials or public figures as on the coverage of public issues that were at the heart of the defamatory statements. “If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved,” the three justices said en route to focusing on the arrest and charges against Rosenbloom.⁷³ With this reasoning, the actual malice standard was applied. As a result, Metromedia’s failure to contact Rosenbloom about the accuracy of the charges or conduct any substantial investigation into the obscene nature of the magazines did not demonstrate the actual malice required to permit a judgment for Rosenbloom.⁷⁴

Justice Byron White wrote a separate opinion concurring in the result but criticizing the plurality opinion for deciding constitutional issues more broadly than required for the resolution of the case. “I am not convinced that we must fashion *a constitutional rule protecting a whole range of damaging falsehoods* and so shift the burden from those who publish to those who are injured,” he said.⁷⁵ Justice Harlan’s dissent was in accord with the sentiment White expressed in the preceding quote in that it also proposed a Court rule that would provide support for the truth-telling canon of journalism by “encouraging speakers to carefully seek the truth before they communicate.”⁷⁶ He would have required the journalists to exercise reasonable care in securing the truth, a standard which has been widely interpreted as allowing a private libel plaintiff to prevail by proving the defamatory falsehood

⁷³ *Id.* at 43.

⁷⁴ *Id.* at 40-57.

⁷⁵ *Id.* at 60 (White, J., concurring) (emphasis added).

⁷⁶ *Id.* at 70 (Harlan, J., dissenting).

was the result of negligence. Justices Thurgood Marshall and Potter Stewart also found fault with the judgment and complained about the danger created by the potentially unlimited expansion of the constitutional protection of falsity that it could presage. “This danger exists since all human events are arguably within the area of ‘public or general concern,’” they wrote.⁷⁷ A brief filed with the Court on behalf of Rosenbloom similarly warned that by applying the actual malice standard to this case the Court would subject every libel plaintiff to it. “[Rosenbloom’s] arrest was newsworthy, but then so is virtually anything the media choose to focus upon,” the brief argued. “Consequently, if Mr. Rosenbloom must show actual malice, then so must any private citizen suing for libel.”⁷⁸

Three years later, the Court took the opportunity presented by the case of *Gertz v. Robert Welch, Inc.*⁷⁹ to scale back *Rosenbloom*’s extension of protection to libelous falsehoods about private people. But at the same time it eliminated strict liability for libel published about this class of people and essentially determined that all libel plaintiffs would have to prove some level of fault. For plaintiffs who were private, non-public people, the level of fault would be at least in the nature of mistake or negligence. It should be noted, as indicated earlier in this chapter, at least one prominent journalism ethics code seemed to advocate strict liability for truth telling and dismissed any consideration of fault.⁸⁰

The *Gertz* ruling also helped better define who would be deemed a public figure. A primary issue in the case was whether a civil rights attorney hired to sue a police officer for killing a teen should be treated as a private person or public figure when he sued his

⁷⁷ *Id.* at 79 (Marshall, J., dissenting).

⁷⁸ Brief for the Petitioner at 14, *Rosenbloom* (No. 947).

⁷⁹ 418 U.S. 323 (1974).

⁸⁰ See Society of Professional Journalists, Sigma Delta Chi, Code of Ethics, *supra* note 9.

detractors for libel. A bare 5-4 majority of the Court found Gertz to be a private person and said he did not have to prove *Times v. Sullivan* actual malice to prevail.⁸¹ The standard to be applied in private libel plaintiff cases was to be at least negligence or reasonable care as each individual state chose.

Justice Harry Blackmun's concurrence created the Court majority in *Gertz*, and he endorsed the holding because he thought the Court should eliminate the ambiguity created by the *Rosenbloom* plurality opinion. "A definitive ruling is paramount," he wrote.⁸² Although he clearly did not fully endorse the *Gertz* opinion, he did not see it necessarily harming or benefiting the news media. "What the Court has done, I believe will have little, if any practical effect on the functioning of responsible journalism."⁸³ Justice Brennan, who wrote the *Rosenbloom* plurality opinion, disagreed and predicted negative effects on journalists as they would be forced to follow the truth-telling canon more closely for fear of running afoul of jurors empowered by the *Gertz* ruling to make determinations of negligence or reasonable care in the pursuit of truth. He wrote in dissent: "Under a reasonable care regime, publishers and broadcasters will have to make prepublication judgments about juror assessment of such diverse considerations as . . . the relative costs and benefits of instituting *less frequent and more costly reporting at a higher level of accuracy*."⁸⁴

⁸¹ It is worth noting that at the time of this ruling, Elmer Gertz had already defended two of the most famous murder suspects of the 20th century: Nathan Leopold and Jack Ruby. He also defended novelist Henry Miller against obscenity charges. See (Obituary) *Elmer Gertz, 93, Lawyer Who Defended Jack Ruby*, PLAIN DEALER (Cleveland, Ohio), April 29, 2000, at 9B.

⁸² 418 U.S. at 354 (Blackmun, J., concurring).

⁸³ *Id.*

⁸⁴ *Id.* at 366 (Brennan dissenting) (emphasis added).

Gertz repudiated Brennan’s three-justice plurality opinion in *Rosenbloom* that would have required the *Times v. Sullivan* standard in this case because the article defaming Gertz had been written about a matter of public or general interest. Two lower federal courts had followed the *Rosenbloom* precedent and rendered judgments in favor of the magazine. The majority opinion in *Gertz* also upended the rationale that had been used in *Rosenbloom* to eliminate the legal distinction between public and private libel plaintiffs.

A pragmatic instrumentalist interpretation of the *Gertz* opinion would focus on the arrangement of the parties on each side of the civil rights issue and proper journalism practices. As in *Sullivan*, the party that ultimately prevailed in *Gertz* was on the “right ” side of that issue. Gertz was the rights champion, who, as the plaintiff’s attorney in the civil rights violation lawsuit, was aligned against the white police officer who had killed a black teen.⁸⁵ As in *Butts*, the defendant news medium was on the “wrong” side of journalism practices. A brief filed by Gertz’s attorneys informed the Court that the offending publication was entirely devoted to the arch conservative political philosophy of the John Birch Society:

[T]he article [about Gertz] was rushed into print (in a monthly magazine) in the extraordinarily short time of 24 hours. This is the height of irresponsibility. Indeed, it was Stanley, [a magazine official] in light of his preconceived policy line of finding a Communist in every nook and cranny, who dispatched the author with instructions as to the kind of story he was to write — a story which was preconceived and concocted before one fact had been investigated. If the story had not agreed with this pre-conceived Communist-plot thesis, it would not have been printed at all. It was not that [the author] had a reputation for accuracy, but that he echoed Stanley’s Birchite viewpoint, which is completely contemptuous of the facts.⁸⁶

⁸⁵ See W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 9 (2003); *A Policeman in Chicago Is Convicted of Murder*, N.Y. TIMES, Aug. 30, 1968, at 15; *Policeman gets 14 years In Slaying*, WASH. POST, Nov. 16, 1968, at A3.

⁸⁶ Reply Brief of Petitioner at 9, *Gertz* (No. 72-617).

In *Butts* and *Gertz*, cases in which the media defendants lost, the Court arguably had reason to believe these news outlets were motivated by a purely financial or political agenda instead of the journalism paradigm. Accordingly, the Court did not shield the media defendants from civil liability.

Media defendants were shielded from civil liability in *Philadelphia Newspapers, Inc. v. Hepps*⁸⁷ by a Court ruling that did not turn on application of the actual malice rule but on the assignment of a burden of proof. The ruling can be seen as expanding the protection of falsehood because in one type of libel case the common law presumption that defamatory statements are false was ended. The Court gave private plaintiffs the burden of proving falsity in libel suits against media defendants when the defamatory statement was about a matter of public concern. The Court used its ability to assign the burden of proof to one party or the other to protect what the plaintiffs claimed were journalists deviating from the truth. Years earlier, in *Times v. Sullivan* and its progeny the Court had protected journalists by placing the burden of proving falsity on plaintiffs who were public officials or public figures irrespective of the subject matter of the defamatory statement.

Hepps, the primary stockholder of a chain of stores, sued Philadelphia Newspapers, Inc. when the *Philadelphia Inquirer* published a series of articles indicating that the store chain used ties to organized crime figures to influence various government agents to ensure the stores' ability to continue to legally sell alcoholic beverages. The plaintiff was deemed a private figure, but the allegations linking government officials to an influence-peddling scheme were deemed to be a matter of public concern. The Court accordingly required the plaintiff to bear the burden of proving falsity. “[W]e hold that the common-law presumption

⁸⁷ 475 U.S. 766 (1986).

that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern,” the opinion said.⁸⁸

A dissenting opinion written by Justice John Paul Stevens and joined by three others found the result “pernicious” and indicated that in conjunction with the strictures created by *Gertz*, it did nothing to foster good journalism. “[T]he only litigants – and the only publishers – who will benefit from today’s decision are those who act negligently or maliciously,” Stevens wrote.⁸⁹

An *amicus* brief filed with the Court by the American Civil Liberties Union and various news organizations and professional journalists’ groups had urged the Court to shift the burden of proving truth from the media defendants lest journalists be forced to “calculate not whether what they print is true, but rather whether they will be able to prove in court that what they print is true.”⁹⁰ An *amicus* brief filed by the American Legal Foundation, which described itself as a public interest legal center dedicated to ensuring that the media act in a fair and responsible manner in reporting news, sought to prevent a ruling that would “further insulate the media from liability.”⁹¹ The Court ultimately decided to provide the insulation. It reasoned that the placement of the burden of proof would sometimes determine the outcome of a libel suit. If placed with the defendant, truth would sometimes be punished when it could not be proved, as when the evidence is in equipoise. If placed with the plaintiff, falsity would escape punishment in the same situations and be thereby encouraged. The Court chose what it saw to be the lesser evil, as it had before, and determined that truth should never be

⁸⁸ *Id.* at 777.

⁸⁹ *Id.* at 780 (Stevens, J., dissenting).

⁹⁰ Brief of the American Civil Liberties Union at 1, *Hepps* (No. 84-1491).

⁹¹ Brief of *Amicus Curiae* The American Legal Foundation at 5, *Hepps* (No. 84-1491).

punished even if deviations from truth were thereby not effectively discouraged. From one perspective, the ruling could be seen as protecting the truth value by making sure it was not punished just because it could not be proven. But in protecting falsehood the ruling undermines the value of truth.

Limiting Protection of Falsehood

In *Time, Inc. v. Firestone*,⁹² the Court revisited the public figure issue with an opportunity to clarify the definition of that category of libel plaintiffs but produced a puzzling outcome. In writing about a divorce decree ending the marriage of an industrialist and a socialite, *Time*, a weekly national news magazine, incorrectly reported the grounds for the dissolution and falsely indicated that Mrs. Firestone was found to be an adulterer. The controlling issue was whether Firestone was a public or private figure. If public, the magazine's factual error would be legally "excusable" under the *Times v. Sullivan* actual malice standard. If private, the magazine could be liable for damages under a lesser standard such as negligence. The Court found Mrs. Firestone to be a private person because she had not thrust herself into a public controversy to influence the outcome as a limited or vortex public figure would. Nor was she deemed an all-purpose public figure who had assumed a role of "especial prominence" in society "other than perhaps Palm Beach society."⁹³

Mr. Firestone sought the divorce on two grounds: extreme cruelty and adultery. A Florida court granted his divorce request without specifying the grounds, and *Time* apparently reported the grounds to be those Mr. Firestone had presented to the court instead

⁹² 424 U.S. 448 (1976).

⁹³ *Id.* at 453.

of some others the court itself had provided. The Supreme Court noted a Florida appellate court's finding and condemnation of *Time*'s conduct as "a flagrant example of 'journalistic negligence,'" but said the finding of negligence or some level of fault had to be done at the trial level. Accordingly, the judgment against *Time* was vacated and the case returned to the state courts.

Justice Lewis Powell found "substantial evidence" that *Time* had not been negligent in reporting the divorce decree but nonetheless concurred in the majority ruling sending the case back to Florida.⁹⁴ Justice Brennan wrote a dissenting opinion that was easily susceptible to a pragmatic instrumentalist interpretation. He argued that news coverage of judicial proceedings had to be encouraged to further the values of the First Amendment, and accordingly, factual errors in court coverage should be given the special tolerance provided by the *Times v. Sullivan* actual malice rule. It was an argument reminiscent of the subject matter protection of negligent falsity that was condoned in *Rosenbloom*. Brennan also argued that journalists could be expected to and often did commit more factual errors in writing about legal issues because they do not have legal training. He attributed some of the errors to carelessness but said, "[A] great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy."⁹⁵ Mrs. Firestone's lawyers had argued that *Time* should have known that when the judge awarded alimony to her, it necessarily meant that her husband's claim of adultery had been set aside because Florida law denies alimony to adulterers.⁹⁶

⁹⁴ *Id.* at 470 (Powell, J., concurring).

⁹⁵ *Id.* at 478-80 (Brennan, J., dissenting).

⁹⁶ Brief of Respondent at 7, *Firestone* (No. 74-944).

Although the controlling issue in *Firestone* was the designation of the plaintiff as a private or public figure, its power depended on the fact that a designation of a libel plaintiff as public figure provided more protection to the defendant's deviations from truth. This protection grew from the requirement that public figures prove *Times v. Sullivan* actual malice — that the deviations were intentional or reckless. The Court's opinion in this case more tightly defined public figures and narrowed the class of people who would fit that definition. Libelous falsehood about those people now excluded from the class under the *Firestone* standard would be less protected.

The *Firestone* ruling seemed to imply that a defendant publication that circulated nationally, as *Time* magazine did, could enjoy the protection of the actual malice rule only when sued for libel by people who were national public figures, as distinct from people who were local public figures, such as Mrs. Firestone, who had attained special prominence only in local Palm Beach society. The ruling's concordinate implication is that if Mrs. Firestone had filed her libel suit against a local Palm Beach society magazine, her local prominence would have made her a local public figure and the actual malice rule would apply to the local defendant. That would mean the *Firestone* ruling limited the protection of the actual malice rule to those publications whose circulation matched the geographic area in which a libel plaintiff had achieved especial prominence. National publications would enjoy the rule's protection against national celebrities' libel lawsuits and local publications would enjoy greater protection against local celebrity plaintiffs. *Firestone* made it more difficult for libel defendants to claim public figure status for those who sued them.

The Court's ruling in *Hutchinson v. Proxmire* similarly shrank the class of public figures by excluding a scientist and libel plaintiff who had received federal funding for

scientific research at a state hospital.⁹⁷ *Wolston v. Reader's Digest Association, Inc.*⁹⁸ also narrowed the definition of public figure libel plaintiffs by establishing that mere association with a newsworthy event did not transform a private person into a public figure.⁹⁹ As a result, libel defendants had fewer opportunities to protect their factual errors with the actual malice rule. Some journalists saw their protection threatened again when the Supreme Court ruled in *Herbert v. Lando*¹⁰⁰ that a plaintiff who had to prove actual malice could gather evidence of the defendant's intention, attitude, and doubts about the veracity of what was published by questioning journalists about their thoughts and actions. In so ruling, the Court gave itself the means and opportunity to condone or condemn practices employed in the editorial process. To some, the ruling provided incentive for truth-seeking journalism. To others, it inhibited the publication of truth.

The Supreme Court ruled 6-3 that the actual malice rule “made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. ... Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.”¹⁰¹

⁹⁷ 443 U.S. 111 (1979).

⁹⁸ 443 U.S. 157 (1979).

⁹⁹ Iyla Wolston was peripherally involved in a newsworthy event when his aunt and uncle were arrested on espionage charges during the late 1950s, and he was subsequently found in contempt of court for failing to make a timely response to a subpoena related to the espionage case. When the Reader's Digest Association published a book in the 1970s that falsely identified Wolston as a Soviet agent and falsely said he had been indicted for espionage, he sued for libel. The Supreme Court ruled that he could not be considered a public figure simply because of his limited connection to the espionage case and therefore would not have to prove actual malice in his libel lawsuit.

¹⁰⁰ 441 U.S. 153 (1979).

¹⁰¹ *Id.* at 160.

Justice Brennan, architect of the actual malice rule, agreed with the majority that inquiries into the editorial process were permissible and not barred by editorial privilege. But he wanted them banned until after a prima facie showing that the publication was a defamatory falsehood. In a partial dissent, he cautioned that once journalists knew their prepublication discussions about news stories could be disclosed and used to secure damage awards in libel suits, they would be reluctant to conduct such discussions that might enhance accuracy and truth telling.¹⁰² His contention is analogous to the often-cited chill inflicted on the promulgation of journalism codes of ethics when attorneys inform their media clients that the codes could be used against them to prove they had strayed from their principles.¹⁰³ The majority pointedly disagreed with Brennan's argument, saying, "[W]e find it difficult to believe that error-avoiding procedures will be terminated or stifled simply because there is liability for culpable error and because the editorial process will itself be examined."¹⁰⁴ Indeed, the Court said, the potential sanction of a libel judgment would encourage such prepublication discussions to ensure veracity. In a passage that indicates Brennan's appreciation for the potential benefits and detriments of the Court ruling, he also validates a pragmatic instrumentalist view that the Court has a propensity to promote its vision of ethical journalism.

I fully concede that my reasoning is essentially paradoxical. *For the sake of more accurate information*, an editorial privilege would shield from disclosure the possible inaccuracies of the press; *in the name of a more responsible press*, the privilege would make more difficult of *application the legal restraints by which the press is bound*.¹⁰⁵

¹⁰² *Id.* at 194 (Brennan, J., dissenting).

¹⁰³ MEYER, *supra* note 9, at 17.

¹⁰⁴ 441 U.S. at 174.

¹⁰⁵ *Id.* at 196 (Brennan, J., dissenting in part) (emphasis added).

Similarly, Justice Thurgood Marshall’s dissent sought to maintain the law’s role in ensuring truthful journalism and condemned the chilling effect of inquiries into the editorial process. “Society’s interest in enhancing the accuracy of coverage of public events is ill-served by procedures tending to muffle expression of uncertainty.”¹⁰⁶

In a 1989 case, the Court made another ruling that lessened the actual malice standard’s ability to protect falsehood. The ruling in *Harte-Hanks Communications v. Connaughton*¹⁰⁷ focused on the quality of journalists’ efforts to find and report the truth. The Court judged the truth-seeking practices employed by the *Harte-Hanks* journalists to be so lacking that it affirmed a jury’s finding of actual malice. The Court decided the journalists had purposely avoided finding the truth. The Court seemed to base its ruling on its assessment of the journalists’ truth-seeking intent. The rulings affirmed the value of the intent to tell the truth, irrespective of whether the actual truth was told.

The case developed from a series of allegations published by the *Hamilton Journal Beacon* newspaper about a political scandal. The newspaper indicated that plaintiff Daniel Connaughton had dishonestly tried to discredit an opponent in a local election. These allegations were based on information from a source whose veracity was clearly suspect, according to the Court, and the newspaper did not make any credible effort to confirm the source’s statements or pursue readily available information that contradicted the source. The Court said these and related failures to investigate in pursuit of truth amounted to a “deliberate effort to avoid the truth.”¹⁰⁸ Such practices and the falsehood they spawned were

¹⁰⁶ *Id.* at 209 (Marshall, J., dissenting).

¹⁰⁷ 491 U.S. 657 (1989).

¹⁰⁸ *Id.* at 685.

not protected by the actual malice rule. In fact, the Court ruled that the trial court jury was justified in determining that such practices constituted actual malice.

One year later, the Court took a major step toward reducing the protection libel law provides to falsity when it determined that factual statements presented as opinion could be deemed defamatory when false. The Court's ruling in *Milkovich v. Lorain Journal Co.*¹⁰⁹ affirmed the value of truth by not allowing a false statement to fully escape penalty by masquerading as opinion. As a general rule of American constitutional law, pure opinion is incapable of being proved true or false and therefore is not subject to defamation lawsuits because the plaintiff must prove falsity.¹¹⁰ "Before *Milkovich*, all opinion was immune," according to law scholar Robert D. Sack.¹¹¹

High school wrestling coach Mike Milkovich sued the *Lorain Journal* for libel after the Ohio newspaper published a sports opinion column in which the author indicated that Milkovich had committed perjury while testifying at a judicial inquiry into an altercation at a wrestling match. An Ohio trial court granted summary judgment to the newspaper upon determining that opinion was not subject to defamation law. The U.S. Supreme Court, however, found the accusation of perjury was based on facts that could be proved true or false. A statement, even when expressed ostensibly as opinion, can be defamatory if based on false information, the Court said. "The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the [sports] column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."¹¹² The

¹⁰⁹ 497 U.S. 1 (1990).

¹¹⁰ See generally, SACK, *supra* note 29, §4.2.3.1 at 4-7.

¹¹¹ *Id.* at 4-18.

¹¹² *Milkovich*, 497 U.S. at 21.

Court reversed the Ohio Court of Appeals ruling that had affirmed the summary judgment for the newspaper. The reversal sent the case back to the state trial court for a determination of whether the accusation of perjury was true or false.

Although the *Milkovich* ruling was based on writing the newspaper identified as commentary and the ruling redefined libel law's impact on opinion, it belongs in this study because it falls within the definition of journalism as fact-based commentary and subject to the ethical obligation to tell the truth. A statement of ethical principles approved by the American Society of Newspaper Editors in 1975 said in part: "[C]ommentary should be held to the same standards of accuracy with respect to facts as news reports."¹¹³ This ethical principle was affirmed and arguably strengthened by the Court's ruling.

Since its ruling in *Times v. Sullivan*, the Supreme Court has crafted rulings in subsequent libel cases to refine the definition and applicability of the actual malice rule. The Court extended the rule's protection of some falsity to cases in which public figures were victims of misstatements of fact. There was also a failed attempt to dramatically extend the rule by making it applicable whenever a public issue was implicated. In several instances the Court began to focus on journalists' truth-seeking practices in determining whether the protective power of the actual malice rule would be invoked or if journalists would be held liable for shortcomings in the pursuit of truth. In a number of cases, notably *Curtis Publishing Co. v. Butts* and *Harte-Hanks Communication v. Connaughton*, the Justices sought to hold journalists to the ethical standards of their profession. But ultimately, in most cases, the Court showed greater obeisance to constitutional values than ethical standards. In cases where the Court recognized clearly that its rulings could foster truth telling or protect

¹¹³ American Society of Newspaper Editors Statement of Principles, Adopted by ASNE board of directors Oct. 23, 1975, *reprinted in* MEYER, *supra* note 9, at 249.

falsehoods, as in *Associated Press v. Walker* and *St. Amant v. Thompson*, it deferred to constitutional values. In these cases, the Court decided that it would not run the risk of allowing truth telling to be punished even if the rule it created to do so limited or restricted liability for failures to tell the truth.

The following section focuses on just one case because it presented the Court with its most recent and most pronounced conflict between the ethical principle of truth telling and the constitutionally protected values of free speech.

Masson v. New Yorker

Tension between the Court's and journalists' formulations of the ethical obligation to tell the truth was nowhere more acute than in the final case reviewed in this examination of Supreme Court libel rulings, *Masson v. The New Yorker Magazine, Inc.*¹¹⁴ Atypically, journalists were arrayed on both sides of the case because the legal issues overlapped an ethical question that had divided journalists into two opposing camps. That question, simply stated, was whether it was permissible to alter a quoted statement and still place it within quotation marks.¹¹⁵ One camp argued that quotation marks indicated an accurate, verbatim rendering of the words used by a speaker. The other said it was permissible to adjust the words within quotation marks to ensure an accurate rendering of the speaker's meaning even if the words were not rendered precisely as spoken.

Masson sued *The New Yorker* for libel because it published an article that he said falsely attributed statements to him that damaged his reputation by making him look foolish

¹¹⁴ 501 U.S. 496.

¹¹⁵ The argument among journalists about the ethics of altering quotes is presented in the following works: Christopher Meyers, *Blueprint of Skills, Concepts for Media Ethics Course*, 45 JOURNALISM EDUCATOR 26 (1990); JANE T. HARRIGAN & Karen Brown Dunlap, THE EDITORIAL EYE 114-15, 127-29 (2004).

and egotistical. At issue on the legal front was whether quotes allegedly fabricated or otherwise adjusted by a *New Yorker* writer were necessarily statements made with knowledge that they were false.¹¹⁶

The Court ultimately determined that altering a quote was not necessarily tantamount to writing a statement known to be false. As a matter of law, it was not knowingly writing a falsehood that would always constitute actual malice. The Court said a determination would have to be made that the altered quote was a “material alteration” of the speaker’s meaning before it could be found to constitute actual malice. It said the issue was one for a jury to decide.¹¹⁷ Journalists have yet to resolve the ethical issue.

Nearly all the briefs filed to influence the Court’s resolution of this case addressed the ethical canon of truth telling and the propriety of judicial determinations in the arena of journalism ethics. Although journalists filed briefs in support of and against the interests of the defendant *New Yorker* magazine, all those who argued in support of the magazine’s legal position took pains at some point in their arguments to condemn the fabrication of quotes. The *amicus* brief filed jointly by *Time* magazine, the American Society of Newspaper Editors, the National Association of Broadcasters, and others stated in its second paragraph: “*Amici* disapprove of deliberate alteration or fabrication of quotes.”¹¹⁸ The Association of American Publishers’ brief stated, “*Amici* are opposed to the bald fabrication of quotes as a matter of journalistic practice.”¹¹⁹ Although their statement was not offered until the ninth

¹¹⁶ 501 U.S. at 513, 517.

¹¹⁷ *Id.* at 521.

¹¹⁸ Brief of *Amici Curiae* the Time Inc. Magazine Company at 2, *Masson* (No. 89-1799) [hereinafter Time Magazine Brief].

¹¹⁹ Brief of Association of American Publishers, Inc. at 3, *Masson* (No. 89-1799).

page of their joint brief, the Reporters Committee for Freedom of the Press, the American Newspaper Publishers Association, the Society of Professional Journalists, and others said, “The inaccurate or altered quote is not a goal of good journalists.”¹²⁰ Accompanying these statements in most briefs was an acknowledgment that the smallest alterations were permissible but only for cosmetic effect, as in cleaning up grammatical errors. The briefs generally agreed that the problem with altering quotes was the potential for misstating facts by changing the speaker’s meaning. The Court’s ruling was in accord with this latter point as it indicated that in determining whether there was actual malice, determining whether there was a change in meaning was more relevant than changes in the literal wording of a quote. This legal determination is fundamentally at odds with the values expressed in the first code of journalism ethics developed and approved by the Kansas Editorial Association in 1910:

Lies. – We condemn as against truth: . . . (2) The publication of fake interviews made up of the assumed views of an individual, without his consent. (3) The publication of interviews in quotation, unless the exact, approved language of the interviewed be used. When an interview is not an exact quotation it should be obvious in the reading that *only* the thought and impression of the interviewer is being reported.¹²¹

A group identifying itself as Certain Journalists and Academics filed a brief ostensibly in support of Masson, but its argument focused on the harm that would be inflicted on journalism if the Court did not reverse a lower court ruling that the group saw as giving journalists an imprimatur to fabricate quotes. It criticized the Ninth Circuit’s ruling affirming summary judgment for *The New Yorker* and applying a “substantial truth” test that found the contested quotations to be a rational interpretation of what Masson said and therefore

¹²⁰ Brief of *Amici Curiae* Reporters Committee for Freedom of the Press at 9, *Masson* (No. 89-1799) [hereinafter Reporters Committee Brief].

¹²¹ Kansas Code of Ethics, written by Willis E. Miller, adopted by the Kansas Editorial Association in 1910, *reprinted in* NELSON ANTRIM CRAWFORD, *THE ETHICS OF JOURNALISM* 206 (1924) (emphasis in original).

protected by the First Amendment. “This rule would allow a writer to put his own words in a speaker’s mouth as long as the false words are close enough to what the speaker actually said. Under this ‘close enough’ standard, the reporter would be protected even if he deliberately falsified a quotation,” the group argued.¹²² The Certain Journalists brief never framed the issue in terms of ethics, but scrupulously kept to the language of law and First Amendment interests and seemed to indicate to the Court that good journalists did not need free press protections extended to a practice they abhorred. Protecting such a deviation is not essential to the operation of a free press, the brief said. “Indeed journalists who use quotation marks while substituting their voice for the speaker’s undermine the public debate that the First Amendment was designed to protect.”¹²³ Arguing that bogus quotes corrupt the marketplace of ideas, the brief urged the Court to return the determination of actual malice to a jury. And it did.

Unlike the Certain Journalists brief’s focus on the legal issues of the case, the written scholarly and professional takes on the case generally focused on the ethical issue. For example, a comment on the case published in the *Rutgers Law Review* after the circuit court ruling was titled, “Ninth Circuit Reveals Shocking Truth! No Protection for Public Figures Against Deliberate Fabrications by Media!”¹²⁴ A *Time* magazine article bore a similarly descriptive headline: “The Right to Fake Quotes: A journalist’s legal victory raises questions about ethics.”¹²⁵

¹²² Brief *Amicus Curiae* of Certain Journalists and Academics at 6, *Masson* (No. 89-1799).

¹²³ *Id.* at 3.

¹²⁴ 42 RUTGERS L. REV. 1133 (1990).

¹²⁵ TIME, Aug. 21, 1989, at 49.

While the ethical issue may have been unavoidable in a full examination of the case, journalists generally cautioned the Court to avoid basing its ruling on the ethical principles of journalism or journalism standards because it was improper for jurists to play such a role or use the law to punish or reward, bolster or undermine journalism standards. They claimed Masson and his supporters were trying to make the legal system the arbiter of journalism ethics and practices. Such incursions into journalists' domain were inappropriate and unwarranted, they argued. There were reminders that the Court had specifically rejected journalism standards as a gauge for setting legal or constitutional standards in defamation cases. "The first amendment does not protect only 'ethical' journalists," the Reporters Committee brief said.¹²⁶ The arguments also contended that journalism ethics were not matters of universal agreement in the profession and were typically in flux. As a result, they would be a poor basis for judicial determinations. "The continuing debate over what are proper journalistic ethics suggests that such standards are not useful measures of constitutional protections," the Reporters Committee brief said as it concluded that the First Amendment precluded any such tampering with the free press.¹²⁷ Indeed, the *Time* magazine brief reminded the Court of its own dictum: "[P]ress responsibility is not mandated by the Constitution."¹²⁸

The Court's ruling in *Masson v. New Yorker Magazine* appears free of wording that indicates any attempt to judicially endorse or in any sense sanction either ethical position on the propriety of altering quotes. But the ruling's practical effect on this issue, nonetheless,

¹²⁶ Reporters Committee Brief, *supra* note 117, at 7.

¹²⁷ *Id.* at 8.

¹²⁸ Time Magazine Brief, *supra* note 115, at 19 (quoting *Miami Herald v. Tornillo*, 418 U.S. 241, 256 (1974)).

may be powerful and, according to a pragmatic instrumentalist view, cannot be presumed to be without intent.

The ruling tells journalists that an altered quote, even if it thereby becomes defamatory, does not automatically invoke the wrath of the law as an indication of actual malice.¹²⁹ And so, the law does not support the camp of journalism ethics that condemns the alteration of quotes irrespective of motive or result. Consequently, that ethical rule is less compelling than it might have been, and the competing rule benefits from the Court's apparent affirmation. The ruling supports, or is at least closely compatible with, the camp of journalists who say it is permissible to alter words within quotation marks, provided the essential meaning is not changed. If the quoted statement remains substantially accurate after alteration, the Court will protect the author from legal liability.

Irrespective of its intention, the Court has thrown its weight to one side of a debate among journalists who are trying to set ethical standards for their profession. This case is particularly noteworthy in that respect and because it may have been the first time that significant numbers of journalists have openly acknowledged the impact legal edicts can have on the ethical practices within their profession. Journalists made overt ethical arguments in the *amici* briefs submitted to the Court in hopes of influencing its ruling.

The outpouring of ethical arguments to the Court may have been prompted by some journalists' fear of a Court-issued "pardon" for the apparently widespread practice of fakery, outright fabrication, and "filling in" that damaged the credibility of newspapers from the

¹²⁹ See 501 U.S. at 514, "We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment."

earliest days of the American republic and into the 21st century.¹³⁰ Fakery is the practice of creating tales and publishing them as if they were true news stories, and filling in is the practice of embellishing otherwise truthful news accounts with fictional details to make them more engaging, according to a 19th century press critic.¹³¹

These definitions apply quite well to the practices that created some of the major ethical scandals of the 1990s and early 21st century at *The New York Times*, *The New Republic*, and *USA Today*.¹³² Reporters for these publications embellished their false accounts of newsworthy events by creating sources and or fabricating quotes. They apparently steered clear of libel in doing so.

Treatments of Truth Beyond Libel

The great majority of Supreme Court rulings that addressed the value of truth and truth telling by journalists between 1947 and 2005 were made in libel cases, but these matters also were addressed in a handful of other proceedings. Among them were two false light cases. In both, the rulings closely followed the patterns established in libel cases. This was a result of the torts' similarity. As law scholar Robert D. Sacks explained: "The principal elements of the false light cause of action are similar to the elements of defamation: The

¹³⁰ See generally ALBERT HENNING, *ETHICS AND PRACTICES IN JOURNALISM* (1932); FRED FEDLER, *MEDIA HOAXES* (1989); LEON NELSON FLYNT, *THE CONSCIENCE OF THE NEWSPAPER* (1925); PAUL LANCASTER, *GENTLEMAN OF THE PRESS* (1992).

¹³¹ William H. Hills, *Advice to Newspaper Correspondents*, *THE WRITER*, November, 1887, at 194.

¹³² See Howard Kurtz, *USA Today Calls Work By Star Reporter Fake*, *WASH. POST*, March 20, 2004, at A1; Howard Kurtz, *N.Y. Times Uncovers Dozens of Faked Stories by Reporter*, *WASH. POST*, May 11, 2003, at A1; Greory Favre, *Press Confronts Breach of Trust, Twin Scandals Have Shaken Journalism*, *S.F. CHRON.*, May 2, 2004, at E2; STEPHEN GLASS, *THE FABULIST* (1993); JAYSON BLAIR, *BURNING DOWN MY MASTER'S HOUSE: MY LIFE AT THE NEW YORK TIMES* (2004).

[actionable] statement must be made public, it must be about the plaintiff, it must be unprivileged, and it must be false.”¹³³ Both torts generally affirm the value of truth by penalizing damaging falsehoods and distortions of the truth. Both seek to remedy damage caused by falsity, but an action for libel is based on damage to reputation. In false light the damage is to a person’s sensibilities.

Both torts are subject to the actual malice rule, which, as discussed earlier, protects some falsehoods from civil sanctions. In both, falsehoods that are neither deliberate nor reckless are provided significant protection. The Court attached the actual malice requirement to libel cases in *Times v. Sullivan* and has so effectively tied it to false light that the Restatement of Torts incorporates the gist of the actual malice rule in the definition of false light. It says the tort requires proof that the falsehood was published with knowledge that it was false or with a reckless disregard for whether it was false.¹³⁴ In libel cases, only plaintiffs who are public officials or public figures are required to prove actual malice. In false light cases, all plaintiffs must prove actual malice whenever the communication at issue involves a newsworthy matter.¹³⁵ By making the actual malice rule applicable to false light cases on the basis of subject matter, the Court appears to have made it potentially applicable more often and to a larger pool of plaintiffs. That pool presumably will include public officials and public figures because communications about these plaintiffs are highly likely to be considered newsworthy. That pool also would include private people involved in newsworthy events. This inclusion achieves essentially the expansion of the actual malice

¹³³ SACK, *supra* note 29, §12.3.1.1 at 12-13 (footnotes omitted).

¹³⁴ RESTATEMENT (SECOND) OF TORTS § 632E (1977).

¹³⁵ *See Time Inc. v. Hill*, 385 U.S. 374 (1974); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974).

requirement that a plurality of the Court sought for libel cases in *Rosenbloom v. Metromedia*.¹³⁶

Actual malice was made a prerequisite for recovery in false light cases by the ruling in *Time, Inc. v. Hill*,¹³⁷ which was the Court's first application of truth-telling standards to the tort. Hill sued *Life* magazine, which was owned by Time, Inc., for falsely indicating that a play about a family taken hostage by escaped convicts depicted the Hill family's own experience. Hill family members apparently were treated well by their captors, and there was no violence. But the *Life* article that prompted the lawsuit indicated there had been violence and that the family heroically resisted and fought to get free.

The Hill lawsuit relied on a New York privacy law that allowed a person to sue for appropriation and other forms of commercialization.¹³⁸ New York state courts applying the law recognized newsworthiness as an absolute defense to appropriation and placed newsworthy articles beyond the reach of the privacy statute. New York's highest court interpreted this law to permit invasion-of-privacy lawsuits against the publishers of articles that were not true. In a line of reasoning that apparently construed truthfulness as an essential element of newsworthiness, New York courts said the publication of a false article that used a plaintiff's name or likeness constituted appropriation or commercialization or, for the purposes of this discussion, false light. In false light cases, newsworthiness was not a

¹³⁶ See *supra* text accompanying notes 69-74. The ruling in *Time v. Hill* came between the Supreme Court's decisions in *Rosenbloom v. Metromedia* and *Gertz v. Robert Welch, Inc.*, as the Court was working to determine when a plaintiff should be required to prove actual malice.

¹³⁷ 385 U.S. 374 (1967).

¹³⁸ New York Civil Rights Law §§ 50-51 (McKinney 1998). This legislation is essentially an appropriation statute. New York's courts interpreted and applied it in a manner that allowed the filing of lawsuits for false light.

defense.¹³⁹ With this application of the law, New York courts assigned a high value to truth telling and protected journalists and their truthful, newsworthy articles from this civil cause of action. Once a journalist abandoned truth telling or engaged in fictionalization, however, this protection was no longer available. New York's courts applied the statute in a manner that supported the ethical value of truth telling in journalism and allowed civil sanctions for deviations from the truth.

In the instant case, New York's courts determined the Hill family was newsworthy, but the magazine's depiction of the family's ordeal was found to be fictionalized and false and, therefore, a commercial use not entitled to the newsworthiness defense. Accordingly, the trial court rendered a judgment for Hill. On appeal, the U.S. Supreme Court ruled that Hill could not prevail by merely showing the magazine depiction was false. The plaintiff was required to prove the falsity was the result of actual malice as defined in *Times v. Sullivan* for libel cases.

Justice Harlan, who concurred with the Court majority's determination that the New York decision in *Time v. Hill* should be overturned and the case remanded for further proceedings, dissented from its application of the actual malice standard. His dissent indicated that he placed a greater value on truth telling than the majority apparently had. Harlan argued that journalists should be held to a reasonable-care standard of truth telling in these cases instead of the actual malice standard, which protected all but the deliberate and reckless departures from the truth. "A constitutional standard which relieves the press of even

¹³⁹ See *Spahn v. Julian Messner, Inc.*, 18 N.Y. 2d 324 (1966).

this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself,” Harlan wrote.¹⁴⁰

Seven years later, in *Cantrell v. Forest City Publishing Co.*,¹⁴¹ the Court applied the actual malice standard it found applicable in *Time v. Hill* and ruled against a journalist defendant who was found to have deliberately and willfully abandoned the truth. Accordingly, the Court allowed the imposition of legal sanctions for false light. The journalist in *Cantrell* was sued for an article that was peppered with false statements and passages that could be described as “filling in.” These passages conveyed the journalist’s assessment and description of Margaret Cantrell in the aftermath of a family tragedy, but the passages were obviously fabricated because she was not present when the journalist visited her home. The Court called the passages “calculated falsehoods”¹⁴² and found them to be unprotected deviations from the truth.

With its rulings in *Time v. Hill* and *Cantrell v. Forest City Publishing*, the Court extended the applicability of the actual malice rule to cases beyond libel. False light, a privacy tort that somewhat resembles libel, was now subject to the rule,¹⁴³ and defendants were protected to an even greater extent than they were in libel cases. By extending the rule to false light cases in which the plaintiffs are private figures involved in newsworthy issues, the Court increased the circumstances in which journalists are allowed to be less faithful to the truth without fear of legal consequences. This may be explained by the Court’s

¹⁴⁰ 385 U.S. at 410 (Harlan, J. dissenting).

¹⁴¹ 419 U.S. 245 (1974).

¹⁴² *Id.* at 253.

¹⁴³ 385 U.S. at 387-90; 419 U.S. at 249-54.

comparative valuation of robust debate and the psychic injury claimed in false light cases.¹⁴⁴ Nonetheless, the two rulings did not value truth as highly as other principles. In these two false light cases, the Court focused on the quality or nature of journalists' truth-seeking conduct just as it had in some libel cases discussed earlier to determine whether the conduct warranted or forfeited the protection provided by the actual malice rule.¹⁴⁵

Between 1975 and 1989 the Supreme Court handed down four rulings that did not involve false light but were particularly supportive of truth telling. The rulings were made in civil suits and criminal prosecutions. *Cox Broadcasting Corp. v. Cohn*¹⁴⁶ was the first of this string of cases in which the Court consistently refused to allow the imposition of legal sanctions for the publication of truthful information. In *Cox Broadcasting*, the Court set aside a state civil judgment against the operators of a television station who were sued for broadcasting the name of a rape victim in violation of a Georgia law.

The Court said a major issue to be determined in the case was “whether the State may impose sanctions on the *accurate* publication of the name of a rape victim obtained from public records.”¹⁴⁷ It ultimately decided, “We are convinced that the State may not do so.”¹⁴⁸

In its 1978 ruling in *Landmark Communications, Inc. v. Virginia*,¹⁴⁹ the Court again affirmed the value of truth telling by refusing to allow journalists to be criminally punished for publishing truthful information about a court proceeding. The *Virginia Pilot* newspaper,

¹⁴⁴ 385 U.S. at 387-92.

¹⁴⁵ *Id.* at 391-94.

¹⁴⁶ 420 U.S. 469 (1975).

¹⁴⁷ *Id.* at 491 (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ 435 U.S. 829 (1978).

owned by Landmark Communications, had been indicted for identifying a state judge as the subject of a judicial fitness inquiry. State law made it a misdemeanor to identify those under review, but the newspaper chose to publish the name nonetheless. The newspaper claimed justification in that “the subject was a matter of public importance which should be brought to the attention of [its] readers.”¹⁵⁰ It urged the Supreme Court to render a ruling that would ensure “that truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment.”¹⁵¹ The Court, however, found it “unnecessary to adopt this categorical approach.”¹⁵² Instead, it portrayed the newspaper’s disclosure as free discussion of governmental affairs – precisely the type of activity the First Amendment was designed to protect. Accordingly, the activity was granted the highest level of legal protection, but not the absolute protection the journalists sought. The Court said there was a legitimate need for secrecy in inquiries about the fitness of judges, but that need was not so compelling as to justify suppressing a truthful report on those inquiries.¹⁵³

The Court paid homage to truth telling in *Landmark* just as it had in *Cox Broadcasting*, but truth alone did not control the outcome of the case. Instead, it seemed that the First Amendment mandate to ensure free discussion of governmental affairs was the dispositive factor. Nonetheless, the Court did indicate the high value it assigned to truth as it weighed the issues in the case.

¹⁵⁰ *Id.* at 832.

¹⁵¹ *Id.* at 838.

¹⁵² *Id.*

¹⁵³ *Id.* at 841-42.

In *Smith v. Daily Mail*¹⁵⁴ and *Florida Star v. B.J.F.*,¹⁵⁵ the Court ruled that a truthful publication would not be vulnerable to sanctions except in the most extraordinary circumstances. The Court's review of the prosecution of the *Daily Mail* and another West Virginia newspaper for violating a state law that made it illegal to publish the name of a juvenile suspect in a homicide concluded that "state action to punish the publication of *truthful information* can seldom satisfy constitutional standards."¹⁵⁶ Those standards required the government to prove that its punishment of the truth was necessary to "further a state interest of the highest order."¹⁵⁷

The ruling in *B.J.F.* ten years later showed the Court using the same strict standard to protect truth telling. That case reached the Supreme Court after the *Florida Star* newspaper had been successfully sued for publishing the name of a sexual assault victim. The Court set aside the judgment and ruled that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order."¹⁵⁸

The Court repeatedly cited the truthful nature of the information that triggered civil and criminal proceedings against the journalists in each of the final four cases discussed here, but the Court also sometimes found reason to protect the dissemination of this information because it came from public government records and insisted that this protection could only be removed by a state interest higher than those relied on in these instances. The Court

¹⁵⁴ 443 U.S. 97 (1979).

¹⁵⁵ 491 U.S. 524 (1989).

¹⁵⁶ *Id.* at 102 (emphasis added).

¹⁵⁷ *Id.* at 103.

¹⁵⁸ 491 U.S. at 541.

affirmed the value of truth in most of these cases by affording it a high level of protection from civil and criminal sanctions. In the libel cases, the Court generally found First Amendment values more compelling than the truth interest. In the other cases discussed here, the truth interest was upheld, but in each of these cases that interest was entwined with democracy-enhancing First Amendment values, which also were upheld.

In the six Supreme Court cases discussed in this section as treatments of truth beyond the libel context, the Court issued rulings that were not uniformly supportive of truth telling. In the two false light cases, *Time v. Hill* and *Cantrell v. Forest City Publishing Co.*, the Court applied the actual malice criterion and was as unsupportive of truth telling as it had been in libel cases, where that criterion was developed. With that criterion in place, journalists who knowingly or recklessly published false information were not protected. Journalists, such as those in *Hill*, who published false information but were not reckless or clearly trying to deceive, were protected. Journalists, such as the one in *Cantrell*, were not protected because they blatantly fabricated statements. However, the Court expanded the actual malice rule's sphere of protection of falsehood in false light cases by extending it to communication about newsworthy matters. In libel cases that protection was limited to communication about public officials and public figures.¹⁵⁹

The final four cases also addressed truth telling, but the Court also seemed to focus on assuring the unrestricted flow of information about crime and the justice system.

Nonetheless, truth was valued and highlighted in each ruling. These cases were decided

¹⁵⁹ Some state courts have extended the actual malice rule to libel cases involving matters of general public concern or newsworthy matters. *See, e.g.*, *AAFCO Heating v. Northwest Publications, Inc.*, 162 Ind. App. 671 (1974), *cert. denied*, 424 U.S. 913 (1976); *Walker v. Colorado Springs Sun Inc.*, 188 Colo. 86, *cert. denied*, 423 U.S. 1025 (1975); *Peisner v. Detroit Free Press*, 82 Mich. App. 153 (1978) (per curiam); *Green v. Northern Publishing Co.*, 655 P.2d 736 (Alaska 1982).

during a period from the mid-1970s through the 1980s when the Court issued a number of rulings that opened the courts and justice system to scrutiny by the press and the public. Prominent among them were *Nebraska Press Association v. Stuart*,¹⁶⁰ which made it more difficult for judges to legally bar journalists from reporting on court proceedings; *Richmond Newspapers v. Virginia*,¹⁶¹ which recognized the right of journalists and the public to attend criminal trials; *Globe Newspaper Co. v. Superior Court*,¹⁶² which forbade the automatic and categorical closing of criminal trials; and the two cases identified as *Press-Enterprise Co. v. Riverside County Superior Court*,¹⁶³ which opened jury selection and pretrial court proceedings to the press. The four cases reviewed here can be seen as part of the string of Court rulings opening up the justice system although the instant discussion focuses on the Court's frequent mentions of the truthful nature of the reporting on crime and the justice system as it justified the opening of the system to reporters.

Summary and Conclusions

This chapter examined U.S. Supreme Court rulings to assess how truth and truth telling – journalism's highest ethical values – fared in the Court's shifting hierarchy of values and goals. Starting with an examination of the Court's rulings in libel cases, the chapter showed the Court usually positioning truth and truth telling high among social and legal values, but rarely highest. The existence of libel as a cause of action in its 21st century form is in itself an homage to truth telling, but it was not always so. The history of libel law,

¹⁶⁰ 427 U.S. 539 (1976).

¹⁶¹ 448 U.S. 555 (1980).

¹⁶² 457 U.S. 596 (1982).

¹⁶³ The case often referred to as *Press-Enterprise I* is reported at 464 U.S. 501 (1984), and the case referred to as *Press-Enterprise II* is reported at 478 U.S. 1 (1986).

including the centuries prior to the time period examined in this study, reflects the ascendance and decline of a number of other competing values. From its inception and through common law applications, libel law valued reputation above other concerns and sought to protect it with civil and criminal sanctions. Initially, truth was not a prominent value in libel law, and a true statement that harmed reputation could be fully subject to civil or criminal penalties.

As truth came to be more highly valued, it became an absolute defense to libel, even when reputation suffered grievous harm. Falsehood, the lack of truth, became integral to the definition of libel. A reputation-damaging statement would support a libel claim only if it was false. In this sense, libel law extolled and protected truth telling. Libel law that imposed strict liability for the publication of false, defamatory statements was in effect, was perhaps the highest celebration of truth telling.

However, when the Supreme Court constitutionalized American libel law with its ruling in *Times v. Sullivan*, the place of truth and truth telling in the hierarchy of values and social goals fell a few notches. The ruling set the Court on the path of valuing free speech, democracy and social equality above truth telling. The Court required a finding of culpable fault in libel and created the actual malice rule in *Sullivan* to empower principles of the First Amendment and extend greater protection to free speech values. Along the way it protected some defamatory falsehoods. Since *Sullivan*, false defamatory statements about public officials are just as protected as true defamatory statements if the statement was made without knowledge it was false or without serious doubts about its truth. The creation of the actual malice rule indicated the Court had begun to focus less on truth and falsity per se in libel cases than on the fault and truth-seeking practices and conduct that created a defamatory

publication. Subsequent Court rulings extended the actual malice rule's protection to statements about public figures as well as public officials. The overall result was the devaluation of truth telling from the worth it had been assigned by common law. Sometimes overlooked in this transformation is the fact that as late as 1975 the Society of Professional Journalists was advocating the equivalent of strict liability for the failure to report the truth. This indicated a much higher valuation of the truth by journalists than the Court. Of course, under the code even under a strict liability standard there was no actual liability because the codes are unenforceable.

The Court expressly linked the actual malice rule to the furtherance of democratic principles that elevated the people above their governors. The ruling insisted that the people should be able to criticize their government officials without fear of civil or criminal reprisals even if their criticism turned out to be unfounded. Accordingly, recklessly false criticism and statements, if not known to be false when made, would be protected as if they were true. This would avoid a chilling of the democratic prerogative to speak freely about officials elected or appointed to government positions to serve the people.

Much of the expansion of the ambit of the actual malice rule was accomplished in cases that had no bearing on the government or its officials but involved public figures as libel plaintiffs. The early expansion occurred in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*. With its ruling in *Gertz v. Robert Welch, Inc.*, the Court firmly established that public figures who sued for libel would have to prove the same level of fault as any public official. These cases and *Connaughton v. Harte-Hanks Communications, Inc.* also saw the Court reviewing and judging journalism's truth-seeking practices. In *St. Amant v. Thompson*, another public figure libel case, the Court moved toward examining journalists'

state of mind to determine whether their truth-seeking and truth-telling practices warranted legal protection. The ultimate extension of that line of inquiry and its legal validation occurred in the *Herbert v. Lando* ruling.

Private people suing for libel shared some of the burden imposed on public officials and public figures after the Court ruled in *Philadelphia Newspapers, Inc. v. Hepps* that they too must prove the defamatory statement at issue is false if the defendant is a member of the media and the statement involved a matter of public concern. By reversing the common law rule and placing the burden of proving falsity on the libel plaintiff, the Court honored truth by providing greater assurance that truthful statements would be less likely to be penalized by a civil judgment. It simultaneously protected those falsehoods that could not be proved false and thereby devalued truth.

A number of rulings clearly indicated that truth telling was as highly valued by the Court as by ethical journalists. In *Milkovich v. Lorain Journal Co.*, for example, the Court announced that false statements labeled as opinion were not thereby exempt from libel law. This was an assertion of the value of truth telling and was in accord with a then-15-year-old statement of ethical principle made by the American Society of Newspaper Editors indicating that commentary should be as faithful to the truth as news reporting was. The *Milkovich* ruling did not mention the ASNE principle it affirmed, nor did it acknowledge that it had decided an ethical issue. In *Masson v. New Yorker Magazine, Inc.*, the Court again decided an ethical issue involving truth when it ruled that altering a quoted statement was not in itself knowingly creating a false statement. One camp of journalists claims such alterations are unethical and such a statement is necessarily untrue if it remains within quotation marks.

When the Court addressed truth-telling issues beyond libel cases it generally continued to place other values atop the hierarchy. Its treatment of truth telling in false light cases closely followed its treatment in libel. In cases involving journalists' coverage of crime and the justice system, the Court highlighted the worth of truth telling and praised it while generally ruling in favor of the journalists. Although falsity was not at issue in any of these later cases, the Court took pains to state its intention to protect truthful reporting even when some other values and social goals were compromised. For example, in *Smith v. Daily Mail*, *Florida Star v. B. J. F.* and *Cox Broadcasting Corp. v. Cohn*, journalists published the names of the principals in violation of law and social mores. And in *Landmark Communications, Inc. v. Virginia*, journalists violated the secrecy of a judicial inquiry. In each case, constitutional and free speech values were supreme in the Court's hierarchy and determined the outcomes, but the truthfulness of the reporting was made germane as the Court said the government would have to show a compelling need to suppress or punish accurate or truthful reports about crime and the justice system.

The pursuit of societal goals embraced by the Court also played a role in the libel rulings that created and expanded the actual malice rule, according to the pragmatic instrumentalist view that claims law promotes social and political values as well as moral and ethical propriety. The Supreme Court's willingness to craft legal doctrine to correct racial injustice in the South during the Civil Rights Movement had been demonstrated in cases prior to *Times v. Sullivan*. That orientation of the Court arguably played a role in the disposition of the landmark libel case because it was so closely tied to the same social, political, and moral issues. The ruling favored those who opposed unjust racial policies. Law briefs submitted on both sides addressed these issues as well as legal matters.

Similar issues were also prominent and influential in subsequent libel cases reviewed in this chapter and support a pragmatic instrumentalist interpretation of the Court rulings as instruments of social engineering, social justice, and the imposition of the Court's view of proper conduct for journalists. In *Walker*, for example, the losing party was an outspoken opponent of racial integration and social equality in the South. In *Butts*, the losing party was a publication that the Court noted had embarked on a new editorial policy of muckraking and was under pressure to produce an exposé that may have involved compromising the standards of good journalism. The *Gertz* ruling is subject to a pragmatic instrumentalist interpretation on two fronts. First, the prevailing plaintiff was an attorney representing a black family in a civil rights violation case. It was also a case in which the Court noted that the losing defendant magazine practiced improper journalism because it was not objective but reported from the far right-wing bias of the John Birch Society. *Time, Inc. v. Pape* involved a civil rights issue, but this one was in the North. The losing plaintiff was a Chicago deputy police chief accused of violating the civil rights of a black family.

The Supreme Court's valuation of truth and other principles or interests involved in the cases reviewed in this chapter were not in perfect accord with the high value assigned to truth by journalism codes of ethics. Issues raised by the cases required the Court to address the truth-telling ethic as it sought to promote press freedom, social equality, and other principles and values. Those values generally prevailed in the Court even when they did not fully support or even undermined journalism's ethical directive to tell the truth.

In the cases where Court rulings affirmed the value of truth and truth telling as set by journalism ethics, that ethical standard was strengthened by legal imperative, although apparently not as the result of any explicit judicial intent. But when the truth interest was

pitted against some other Court-supported interest, the Court decided which journalistic practices and conduct were proper or improper, or right or wrong in areas that journalism codes of ethics had already made such determinations. When truth telling competed with one of the Court's favored interests, truth lost. When the Court's interest and the truth interest were arrayed on the same side of a legal issue the Court had to decide, the ethical value of truth would be bolstered, but the value of truth did not appear to be the deciding factor. The Court, in effect, was creating an alternative code of behavior for journalists. A close study of the Court's disposition of cases indicates that some truth-telling practices were given the High Court's imprimatur and others were not. This may not amount to creating a code of ethics per se, but the similarity is striking. Placed in the context of this dissertation's fundamental mission, which is to determine whether the Supreme Court was creating a code of ethics for journalists, the answer with respect to the canon of truth telling has to be: it sometimes looked like it.

CHAPTER FOUR

Privacy: A Matter of Morality, Ethics, and Law

Invasion of privacy holds the distinction of being the only category of torts created with the specific purpose of holding journalists accountable for unethical practices. Judge Thomas McIntyre Cooley formally introduced the concept of privacy rights to American jurisprudence with the 1878 publication of *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*.¹ Magazine editor E. L. Godkin has been credited with making the first appeal to the general public for recognition of a right to privacy 12 years after Cooley's work was published.² But law scholars Samuel D. Warren and Louis D. Brandeis are most often credited with making privacy an established legal concept in the United States. In the same year that Godkin's article was published, Warren and Brandeis deftly provided the legal rationale and social policy justifications for subjecting journalists to civil and criminal penalties for invasions of privacy.³ Uncounted legions of others – scholars, demagogues, and common people alike – have contributed to the ongoing discussion of the nature, value, and parameters of privacy. Amid the dialogue, complaints about press intrusions upon what Cooley called the right “to be let alone”⁴ have been widespread and long-standing.

¹ Douglas S. Campbell, *Privacy*, in HISTORY OF THE MASS MEDIA 536 (Margaret A. Blanchard ed., 1998).

² E.L. Godkin, *Rights of the Citizen*, SCRIBNER'S MAGAZINE, July 1890, at 67, noted in DON R. PEMBER, PRIVACY AND THE PRESS 24 (1972).

³ Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

⁴ THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2nd ed. 1888).

Privacy earned an enduring place on the public agenda during the final decades of the 1800s as the public's taste for gossip and appetite for salacious, intimate details about the personal lives of others nurtured offensively intrusive practices often associated with yellow journalism. These tastes also contributed to the emergence of Jazz Age journalism during the early decades of the 1900s and what has been criticized as tabloid, sleaze, and insensitive journalism through the end of the 20th century and into the 21st. Newspapers that profited by pandering to these tastes invaded the privacy of the rich and poor alike and prompted such a surge of moral outrage in some quarters that legal and ethical strictures against intrusive and offensive publicity were created. Warren and his law partner Brandeis, who later became a U. S. Supreme Court justice, were among those outraged by such excesses in the press and published an elaborate condemnation in the *Harvard Law Review* in 1890.⁵ "The press is overstepping in every direction the obvious bounds of propriety and decency," Warren and Brandeis complained.⁶ Popular lore claims the article was prompted by intrusive press coverage of the Boston high-society wedding of Warren's daughter, but at least one scholar has disputed the accuracy of that tale.⁷ The article is credited with eventually influencing legislatures and judges to recognize privacy as a legal right and create four torts to protect it. A half century after the Warren-Brandeis article was published, another law scholar, Louis Nizer, still found some journalism practices so unreformed that he also complained in writing and sought to justify the use of legal process to restrain journalists' excesses:

The privacy doctrine is the law's answer to the abuses made possible by unrestrained and irresponsible operation of newspapers with their far-flung

⁵ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

⁶ *Id.* at 195.

⁷ PEMBER, *supra* note 2, at 24.

agencies for gathering information . . . and other mechanical devices by which it may soon be possible to know everything about everybody everywhere.⁸

Even a full century after Warren and Brandeis made their famous call for censure, other law scholars found reason to criticize journalism that offended their sensibilities and to call on the law for redress of these grievances. Georgetown University law professor Peter B. Edelman wrote in 1990:

Reports concerning the private lives of public figures have certainly reached an unprecedented low in terms of intrusiveness. A change in journalistic practices might ease the situation, but it seems fair to ask also whether such reporting should, under some circumstances, be subject to criminal or civil sanctions.⁹

Edelman was among a formidable number of 20th century law scholars who, in the tradition of Warren and Brandeis, urged that law be applied to solve the problems of what they considered to be a socially irresponsible and professionally unethical press. Such polemics are symptomatic of the public's disapproval of some journalism practices and willingness to consider using the law to correct them. This type of public remonstrance and demand for legal remedies is precisely what the Commission on Freedom of the Press, or Hutchins Commission, was cautioning the press and the public about in 1947 when its historic report warned:

[E]veryone concerned with the freedom of the press and with the future of democracy should put forth every effort to make the press accountable, for if it does not become so of its own motion, the power of government will be used, as a last resort, to force it to be so.¹⁰

⁸ Louis Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 559 (1941).

⁹ Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1230 (1990).

¹⁰ COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 80 (Robert D. Leigh ed., 1947).

The Warren-Brandeis article predated the Hutchins Commission's warning by more than a half century, but it inspired the creation of privacy torts that arguably were fashioned to make journalism more ethical by establishing legal liability for improper practices.¹¹ This creation of a category of tort law to solve this type of problem illustrates the pragmatic instrumentalist assertion that law is, in essence, a tool for solving social problems.

Journalists have tried to curtail socially intrusive practices within their craft since they began banding together in professional associations. As a result, privacy concerns have been reflected in virtually every major code of ethics developed by American journalists. These concerns, however, often have not been expressed explicitly and most recently, some codes have not even used the word "privacy."¹² This chapter examines how the codes addressed privacy issues and how U. S. Supreme Court rulings from 1947 until 2005 have valued privacy rights in cases that bear on journalism practices. A substantial portion of this examination of the Court's treatment of privacy rights is devoted to rulings in privacy tort cases, but the chapter is not limited to them. This chapter also includes an assessment of other civil and criminal cases in which matters of privacy, as delineated in the journalism ethics codes, were at issue.

The first section of the chapter examines how five of the most influential journalism ethics codes have addressed and identified matters the press should consider private. The second section reviews Supreme Court treatments of privacy rights in rulings from 1947 until 2005 that addressed the common law privacy torts false light and appropriation or their

¹¹ The four privacy torts are public disclosure of private facts, RESTATEMENT (SECOND) OF TORTS §652D (1972); intrusion, RESTATEMENT (SECOND) OF TORTS §652B (1972); appropriation, RESTATEMENT (SECOND) OF TORTS §652C (1972); and false light, RESTATEMENT (SECOND) OF TORTS §652E (1972). *See generally* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

¹² *See, e.g.*, ASNE Statement of Principles, <http://asne.org/kiosk/archive/principl.htm> (last updated August 28, 2002).

statutory counterparts. High Court treatments of the statutory counterparts of the intrusion upon seclusion tort during the same time frame are examined in the third section of this chapter.

Rulings on public disclosure of private facts are the fundamental focus of the fourth and fifth sections. The fourth section examines the Court's handling of cases in which lawsuits were filed on behalf of rape victims based on claims that their privacy was invaded when journalists publicly identified them. The fifth section examines the Court's handling of cases in which the privacy interests of juvenile crime suspects were at issue, and the sixth section reviews Court rulings on privacy issues in other contexts that have a bearing on journalism practices. Particular attention is given to Freedom of Information Act cases. This section also discusses cases in which the Court addressed privacy issues in other guises and cases that carried a privacy label but actually addressed other matters, such as physical safety. The final section summarizes the chapter's findings and draws conclusions.

Privacy in Journalism Ethics Codes

Journalists who found fault with some of their colleagues' handling of matters considered private sought to improve the practice of journalism by articulating ethical principles and standards of conduct.¹³ Two decades after the Warren and Brandeis article was published, the Kansas Editorial Association addressed the privacy issue in what is widely considered the first code of ethics adopted by an association of journalists. "No society

¹³ See MARION T. MARZOLF, *CIVILIZING VOICES: AMERICAN PRESS CRITICISM 1880-1950* (1991); Mary M. Cronin & James B. McPherson, *Pronouncements and Denunciations: An Analysis of State Press Association Ethics Codes from the 1920s*, 72 *JOURNALISM & MASS COMM. Q.* 890 (1995).

gossips or scandals, however true, should ever be published concerning [offenses against private morality],” the code said.¹⁴

Both seminal pronouncements, the Warren and Brandeis law review article and the Kansas ethics code, primarily addressed one type of privacy invasion – public disclosure of private information. Law scholar Rodney A. Smolla called it “the quintessential cause of action for invasion of privacy.”¹⁵ Defining what is private, however, has proved problematic for those who developed ethics codes as well as those who create and apply privacy law. Both seem at times to presume privacy is a moral absolute whose value and boundaries are so well known as to need no delineation and that people have an innate ability to know what is private and what is not. Scholars who have addressed privacy issues have found the boundaries much less certain. It is “an unusually slippery concept,” according to Yale law professor James Q. Whitman, and “embarrassingly difficult to define.”¹⁶ Scholars such as Frederick Schauer have identified privacy as a purely social construct that varies with time and among cultures.¹⁷ Others, including Professor Martin E. Halstuk, claim it has immutable, intrinsic worth and is a fundamental value.¹⁸ Privacy has been identified as essential to

¹⁴ Kansas Code of Ethics, *reprinted in* NELSON ANTRIM CRAWFORD, *THE ETHICS OF JOURNALISM* 202 (1924).

¹⁵ Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 *NOVA L. REV.* 289, 296 (2002).

¹⁶ James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L. J.* 1151, 1153 (2004).

¹⁷ *See* Frederick Schauer, *The Social Construction of Privacy*, in *JOURNALISM AND THE DEBATE OVER PRIVACY* 3 (Craig L. LaMay ed., 2003).

¹⁸ *See, e.g.,* Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and Accountability*, 1 *COMMLAW CONSPECTUS* 71 (2003); Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 *SETON HALL L. REV.* 371 (2003). *But see* Whitman, *supra* note 15; Anita L. Allen, *Why Journalists Can't Protect Privacy*, in *JOURNALISM AND THE DEBATE OVER PRIVACY* 69-85 (Craig L. LaMay ed., 2003), arguing that “it would be self-defeating for journalists to consider privacy protection a priority.”

personal dignity and individuals' ability to maintain a sense of self and to control when or whether to share themselves or information about themselves with others.¹⁹ As will be explained in greater detail shortly, American law generally has deemed a matter to be private if a reasonable person would be outraged or embarrassed by public disclosure of that matter or if the person asserting a right to privacy had a reasonable expectation of privacy with respect to that matter. If the matter is not a legitimate matter of public concern or is not newsworthy, it also is usually found to be private. The terms "reasonable" and "legitimate" are so elastic and relative that they are especially prone to criticism when applied to a set of circumstances because they may appear to be capricious and arbitrary.

The Kansas code of journalism ethics tried to protect privacy interests by proscribing news reports about offenses against "private morality," but it defined such reports only as those "most often centering around the family relation."²⁰ It allowed for less circumspection when reporting offenses against private morality if the individuals involved were celebrities or otherwise public people. But even the famous were to be treated somewhat gingerly in these cases, according to the code.

However prominent the principals, offenses against private morality should never receive *first-page position* and their details should be eliminated as much as possible. Certain crimes against private morality which are revolting to our finer sensibilities should be ignored entirely; however, in the event of their having become public with harmful exaggerations, we may make an elementary statement, couched in the least suggestive language.²¹

¹⁹ See generally CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE* (2000); *PRIVACY: A VANISHING VALUE?* (William C. S. J. Bier ed., 1980).

²⁰ Kansas Code of Ethics, *supra* note 13, at 207.

²¹ *Id.* at 208 (emphasis in original).

Despite its ground-breaking effort to protect privacy, the Kansas code's final paragraph conceded its shortcomings and encouraged the association to strive for greater clarity: "*Bounds of Publicity*. – A man's name and portrait are his private property and the point where they cease to be private and become public should be defined for our association."²²

When the American Society of Newspaper Editors developed its Canons of Journalism in 1923, it articulated ethical strictures protecting privacy more clearly than the Kansas code but did not provide an explanation of what matters were to be considered private. Nor did it provide a blanket condemnation of public disclosures of private information. Under the heading of "fair play," the canons advised: "A newspaper should not invade private rights or feelings *without sure warrant of public right as distinguished from public curiosity*."²³ More than a half century later, in 1975, the canons were revised and renamed "ASNE's Statement of Principles." These revisions remained intact as the principles were displayed on the ASNE website in 2005. Under the heading of "Fair Play," the ASNE principles said: "Journalists should respect the rights of people involved in the news, observe common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports."²⁴ Here again were references to privacy rights that were not explained as ASNE apparently presumed there was a common and knowable standard of decency.

²² *Id.*

²³ American Society of Newspaper Editors Canons of Journalism, *reprinted in* CRAWFORD, *id.* at 185 (emphasis added).

²⁴ American Society of Newspaper Editors Statement of Principles, *reprinted in* JOHN L. HULTENG, THE MESSENGER'S MOTIVES 21 (1985); ASNE Statement of Principles, <http://asne.org/kiosk/archive/principl.htm> (last updated Aug. 28, 2002).

The Society of Professional Journalists adopted the original ASNE canons in 1926 but developed and adopted its own code in 1973. That code was revised in 1984 and again in 1987. The 1987 version had become marginally more specific and made three recommendations without significantly clarifying what was meant by privacy:

Journalists at all times will show respect for the dignity, privacy rights and well-being of people encountered in the course of gathering and presenting the news. . . . The news media must guard against invading a person's right to privacy. . . . The media should not pander to morbid curiosity about details of vice and crime.²⁵

While the newer version added wording indicating that supplying details about vice and crime might be invasive of privacy, the general parameters of privacy rights remained undefined. The version of the SPJ code in effect in 2005 was adopted in September 1996 and addressed privacy issues under the general exhortation for journalists to minimize harm. The text had become a bit more detailed than its earlier versions and advised journalists to:

Be sensitive when seeking or using interviews or photographs of those affected by tragedy or grief. . . . Recognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy. Show good taste. Avoid pandering to lurid curiosity. Be cautious about identifying juvenile suspects or victims of sex crimes.²⁶

This incarnation of the code went furthest in providing specifics about what information was to be considered private. It identified intrusions upon grief and the publication of the names of juvenile crime suspects and sexual assault victims as potential violations of privacy. The code urged the use of sensitivity and caution in these areas. It also placed a higher value on

²⁵ Society of Professional Journalists, Sigma Delta Chi Code of Ethics 1984 *reprinted in* HULTENG, *id.* at 22, 23.

²⁶ Society of Professional Journalists Code of Ethics, http://www.spj.org/ethics_code.asp (last visited Aug. 1, 2004).

the privacy of a common person than a public official or celebrity and indicated that while privacy is highly valued, there may be times when other values would prevail.

When the National Association of Radio News Directors placed a forerunner of its ethics code in the NARND Resolutions adopted in 1946 and approved its first Code of Standards in 1947, there were no clearly identifiable references to privacy issues, but there was a directive to select and present news within the bounds of “good taste.”²⁷ This could have been generously interpreted to apply to privacy issues, but its intent was not clear and similarly oblique references appeared in a later revision of the code. By 1950 the organization was on its way to becoming the Radio Television News Directors Association, and its revised Code of Standards added a directive “to avoid sensationalism.”²⁸ Again this was a provision that could be applied to privacy, but not necessarily or exclusively. The word “privacy” did not appear until the 1966 RTNDA Code of Broadcast News Ethics was adopted. Article 4 of the code said: “Broadcast newsmen shall at all times display humane respect for the dignity, privacy and the well-being of persons with whom the news deals.”²⁹ Article 4 was retained essentially unchanged in the 1973 revision of the code, but the term “newsmen” was replaced by “journalists.” Revisions to the code in 1987 eliminated the arrangement by articles, and the provision dealing with privacy dropped the reference to “humane respect” but retained nearly all the preceding language of Article 4. In 2000, RTNDA again revised its code and the provisions dealing with privacy remained unchanged at the time of this study. They advised professional electronic journalists to:

²⁷ Vernon Stone, *Evolution of the RTNDA Codes of Ethics*, <http://www.missouri.edu/~jourvs/rtcodes.html> (last visited April 8, 2006).

²⁸ *Id.*

²⁹ *Id.*

Treat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy; Exercise special care when children are involved in a story and give children greater privacy protection than adults; [P]resent the news with . . . decency . . . *respect the dignity . . . of the audience* as well as the subjects of news.³⁰

These revisions broke no new ground in the references to respect, dignity, and children and generally mirrored the statements of other organizations of professional journalists. But when the code made reference to the dignity of the audience, it returned to a consideration of the privacy sensibilities of the receptors of media messages that was evident in the earliest newspaper codes but had been abandoned generally by the mid-20th century. This early privacy-related concern for the news subscriber is reflected in the following excerpts from newspaper ethics codes published in a leading text on journalism ethics in 1924. *The Detroit News* advised its reporters faced with a potentially sensitive article: “When in doubt think of a 13-year-old girl reading what you are writing.”³¹ Similarly, an ethical guide written by President Warren G. Harding when he was editor of *The Marion Star* informed reporters, “I want this paper to be so conducted that it can go into any home without destroying the innocence of any child.”³² Again these provisions could be more precisely identified as relating to issues of public sensibilities, morals, and matters of taste.

The Associated Press Managing Editors Association’s was the last of the major associations of journalists to develop an ethics code, and the privacy references have undergone the least change. Its first code was adopted in 1975 and made only a boilerplate

³⁰ Code of Ethics and Professional Conduct, Radio-Television News Directors Association, <http://rtnda.org/ethics/coe.html> (last visited Aug. 1, 2004) (emphasis added).

³¹ See CRAWFORD, *supra* note 13, at 227.

³² *Id.* at 238.

reference to privacy as it urged journalists to “respect the individual’s right of privacy.”³³

When the APME code was revised in 1994 the privacy section was not changed, and that original wording remained on the association’s website in 2005.³⁴

Despite their often vague wording, the oldest and the most recently developed ethics codes expressed concern about the privacy rights of people who became part of news stories and sought to ward journalists away from intrusions. Although the language usually did not specifically define the privacy rights journalists ought to respect, they generally seemed to track the sentiments expressed by Warren and Brandeis and included references that distinguished between information that was public or private. These codes spoke to the potential injury to feelings and sensibilities, and other psychic injuries that tort law would ultimately seek to compensate. The privacy concerns expressed by journalism ethicists were consistent with the central concerns expressed in the Warren-Brandeis article and were most faithfully reflected in the common law privacy tort usually referred to as public disclosure of private facts. The *Restatement of the Law of Torts* explains this civil wrong:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.³⁵

During the 1970s and ’80s the codes made more references to public sensibilities, well being, personal dignity, and the idea of decency than they had during the earlier decades of the 20th century. There was an emphasis on accountability and how that would sometimes

³³ Associated Press Managing Editors Association Code of Ethics, *reprinted in* PHILIP MEYER, *ETHICAL JOURNALISM* 251 (1987).

³⁴ APME Statement of Ethical Principles, http://www.apme.com/about/code_ethics.shtml (last visited Aug. 1, 2004).

³⁵ RESTATEMENT (SECOND) OF TORTS §652D (1977).

require withholding information that might appear to pander to morbid curiosity about the misfortunes of others. The idea of accountability was firmly in place in the '90s as the central ethical directive to minimize harm was embraced by the Society of Professional Journalists. This decade also saw the codes acknowledging the legal standard for distinguishing between public people and private people and recognizing that a greater public need can trump the codes' prohibitions. Naming juvenile crime suspects and the victims of sex crimes, for example, was not absolutely prohibited if a journalist revealed the names for a purpose that served a greater public interest.

As the codes were developed and revised over the years, cautions about respecting privacy remained a staple, but there was no indication of a widespread effort within the profession to draw the boundaries of privacy more carefully. While some news media companies' ethics codes made specific references to the categories of privacy they would not violate, some press association codes did not use the word "privacy" at all. While privacy generally was deemed important, journalists, the public, and the courts had a hard time deciding what matters should be considered private.

Supreme Court Addresses False Light and Appropriation

As mentioned previously, the earliest journalism codes of ethics and the Warren and Brandeis law review article arguing for the recognition of privacy rights focused primarily on personal harm caused by the unwarranted publication of details about private lives. The article led to the creation of four privacy torts: public disclosure of private information, false light, appropriation, and intrusion. Each of these torts deals with some aspect of the privacy

interests that are addressed by the ethics codes. The U.S. Supreme Court addressed all four types of privacy invasion between 1947 and 2005, the time frame of this examination.

Privacy tort cases with news media defendants rarely made it to the Supreme Court. The first of them arrived 1967, and its disposition indicated that the Court was not likely to favor privacy rights over First Amendment rights. That case, *Time, Inc. v. Hill*,³⁶ was an appeal of a judgment in lawsuit for false light invasion of privacy, the public distortion of a person's image. False light plaintiffs must prove the defendant published false information about them that portrays them in a false light that is highly offensive to a reasonable person. False light and the other privacy torts do not seek to remedy injury to reputation as libel does but pursue compensation for psychic injury. False light resembles the public disclosure of private facts tort in that both address the publication of information that is highly offensive to a reasonable person and causes injuries such as humiliation and embarrassment. Because this harmful information also must be false, this tort closely resembles libel and is dealt with to a greater extent in Chapter Three, which is devoted to the Court's valuation of truth and truth telling. That chapter also examines the Court's ruling in *Time v. Hill* more extensively as it addresses truth-telling values. This chapter focuses on what the Court said about the privacy interests in that case.

James Hill sued Time Inc. because it published an article in *Life* magazine that falsely described a new Broadway play as a reenactment of an incident in which Hill's family was briefly held hostage by three prison escapees. Hill claimed the inaccuracies caused his family members psychic harms such as embarrassment as they tried to put the ordeal behind them. Even though the family was generally depicted as heroic, Hill sued, relying on a 1903 New

³⁶ 385 U.S. 374 (1967).

York civil rights law that purported to protect privacy by imposing criminal penalties and civil liability for commercial appropriation of a person's name or image. New York's courts interpreted this law so that the use of a person's name in connection with a news story was exempt. But the exemption was lost if an ostensible news report was false.³⁷ The law would consider the news usage of the name as a commercial use. With this interpretation, Hill prevailed at trial in a New York court. On appeal, the Supreme Court reversed the judgment ruling that the falsity must be the result of actual malice. This was the central holding of the case, but the Court also made other observations related to privacy interests. Among them was a determination that affects lawsuits for appropriation, the first of the privacy torts to be defined by statute. Justice William Brennan wrote the majority opinion, which said the fact that statements are published in a news medium that is sold for profit does not mean the publication is sold for "trade purposes" or is beyond constitutional protection. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment," the Court said.³⁸ The statute at issue in *Time v. Hill* made it a misdemeanor to appropriate the "name, portrait or picture of any living person" without permission "for advertising purposes or for the purposes of trade."³⁹ The Court ruling effectively exempted the news media and other media from appropriation claims based on informational or news usage of a person's name or likeness. The appropriation tort, while embodying protections of personhood and dignity

³⁷ Spahn v. Julian Messner, Inc., 18 N. Y. 2d 324, 328 (1966).

³⁸ 385 U.S. at 397 (notes omitted).

³⁹ *Id.* at 376 n.1.

common to the other privacy torts, is essentially a protection of privacy as a mercantile property.

Statements made by the Court's Justices in five separate opinions addressed a number of privacy issues presented by the case. Justice Hugo Black complained that the ruling may have "created a right of privacy equal to or superior to the right of a free press" because the Court had resorted to balancing the two interests to reach a decision.⁴⁰ He apparently did not believe the privacy right warranted such lofty treatment in this case. Conversely, Justice Abe Fortas complained that the ruling did not afford the privacy right its due respect. "I do not believe that the First Amendment precludes effective protection of the right of privacy," he wrote in dissent.⁴¹ He referred to privacy as one of the "great and important values in our society" and said it was "entitled to the Court's careful respect and protection." To bolster his case he cited Brandeis, a co-author of the seminal law review article on privacy, when he wrote as a member of the Court that "'the right of privacy is the most comprehensive of rights and the right most valued by civilized men.'"⁴² Justice William O. Douglas, in a separate concurring opinion, argued that Hill's claim to any right to privacy in this context had been eliminated by the fact that the newsworthiness of his family's ordeal had placed the incident into the public domain.⁴³ Justice John Marshall Harlan said in dissent that the case was "not 'privacy' litigation in its truest sense" because "[n]o claim was made that there was any intrusion upon the Hills' solitude or private affairs to obtain information for

⁴⁰ *Id.* at 400 (Black, J., concurring).

⁴¹ *Id.* at 412 (Fortas, J., dissenting).

⁴² *Id.* at 412 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting) (1928)).

⁴³ *Id.* at 401 (Douglas, J., concurring).

publication.”⁴⁴ His narrow view of privacy nonetheless indicated that he recognized the viability of intrusion as a privacy tort. “The power of a State to control and remedy such intrusion for news gathering purposes cannot be denied,” he wrote.⁴⁵ However, the Court did not review any pure intrusion cases during Harlan’s tenure. Cases raising intrusion issues came to the Supreme Court in 1999 and 2001 but in the form of lawsuits based on statutory violations and not common law torts.⁴⁶ These cases will be analyzed later in this chapter.

Seven years after deciding *Time v. Hill* the Court relied on it as the controlling precedent to direct a judgment in 1974 against a news media defendant in *Cantrell v. Forest City Publishing Co.*,⁴⁷ another false light case. The ruling did not dwell on the privacy interest beyond what was necessary to identify the cause of action as false light distortion. As discussed in Chapter Three, it concentrated on the applicability of the actual malice rule to the tort.

In 1977 the Court overturned an Ohio Supreme Court ruling in another privacy tort case that had a news media defendant and that purportedly relied on the *Time v. Hill* precedent. *Zacchini v. Scripps-Howard Broadcasting Co.*⁴⁸ was a pure claim of appropriation. A county fair performer who identified himself as a “human cannonball” sued when a television news program taped and broadcast his full 15-second performance despite

⁴⁴ *Id.* at 404 (Harlan, J., dissenting).

⁴⁵ *Id.*

⁴⁶ The U.S. Supreme Court addressed intrusions upon privacy issues in *Wilson v. Layne*, 526 U.S. 603 (1999), and *Hanlon v. Berger*, 526 U.S. 809 (1999), two “media-ride-along” cases in which journalists accompanied law enforcement officers in raids onto private property. The Court also addressed privacy issues in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), a case in which the content of illegally intercepted private phone conversations was publicized by the media.

⁴⁷ 419 U.S. 245 (1974).

⁴⁸ 433 U.S. 562 (1977).

his objections. The Supreme Court overturned an Ohio high court ruling that had found a First Amendment privilege that exempted bona fide news coverage of matters of legitimate public interest. *Time v. Hill* did indeed indicate that an action for appropriation was not constitutionally permissible against a news medium for coverage of a newsworthy matter if that coverage was truthful or if a legitimate effort had been made to ensure it was truthful. In *Time v. Hill*, the plaintiff actually wanted to be “let alone” in the original sense of privacy that Warren and Brandeis lent to the term in their influential law review article. Plaintiff Zacchini, however, did not want to be let alone; he wanted to be paid for the news program’s use of his right of publicity, which is oxymoronically, an offshoot of privacy law. But in *Zacchini*, the privacy right was, in effect, a property right closely akin to copyright. Justice Byron White, writing for a 5-4 majority, distinguished *Zacchini* from *Time v. Hill* in an opinion that concluded, “[W]e are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”⁴⁹ The ruling clearly indicated that the “newsworthiness privilege” did not fully subjugate all privacy interests to the Court’s First Amendment concerns as some scholars had feared.⁵⁰

Supreme Court Addresses Intrusion

Privacy interests also prevailed over First Amendment arguments in two Supreme Court rulings issued on the same day in 1999 that served as warnings to the news media that engaged in media ride-alongs, a common but intrusive news gathering practice that dates back to the 1920s. These rulings will be examined in this section as Court treatments of the

⁴⁹ *Id* at 575.

⁵⁰ See Edward J. Bloustein, *The First Amendment and Privacy*, 28 RUTGERS L. REV. 41, 54-69 (1974).

statutory counterpart of the common law intrusion upon seclusion tort. This section also will include an analysis of a 2001 Court ruling in a case that presented a statutory hybrid of the intrusion and public disclosure of private facts tort. In this latter instance, however, the free press interests prevailed over the privacy interests.

In both 1999 cases journalists accompanied law enforcement officers conducting raids or searches on private property. Although the journalists were not litigants in either case when it reached the Supreme Court, the profession was scolded for engaging in a practice that fell squarely within the definition of the intrusion tort. One justice warned of legal consequences if the practice continues.

A Maryland couple, Charles and Geraldine Wilson, were the petitioners in the first of these two cases, *Wilson v. Layne*.⁵¹ They sued a team of law enforcement officers from the U.S. Marshals Service and a Maryland police department for invading their privacy by bringing along a photographer and reporter from *The Washington Post* during an early morning raid inside the couple's home in 1992. Mr. Wilson was clad only in his underwear and his wife was in a nightgown as the officers accosted them and the journalists watched and photographed the confrontation. Even though the officers had a valid arrest warrant for the couple's son and the photographs were not published, the Court unanimously ruled the officers had violated the privacy protections of the U.S. Constitution. Chief Justice William Rehnquist concisely delivered the ruling:

We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.⁵²

⁵¹ 526 U.S. 603 (1999).

⁵² *Id.* at 614.

Rehnquist emphasized how the Fourth Amendment was crafted to reflect “the overriding respect for the sanctity of the home,”⁵³ but the Court ultimately decided that no damages for this affront would be awarded to the Wilsons because the officers were protected by qualified immunity. That immunity stemmed from the Court’s finding that the officers could not have reasonably known in 1992 that media ride-alongs were unconstitutional invasions of privacy under these circumstances even though there had been some state and lower federal court rulings to that effect. “[T]he constitutional question presented by this case is by no means open and shut,” Rehnquist wrote as he explained the unsettled state of the law in 1992.⁵⁴

Justice John Paul Stevens concurred in the Court’s finding of a privacy violation, but disagreed with the grant of immunity. In a dissent that parodied Rehnquist he issued a warning to police and the media that there would be legal consequences for future transgressions. “That the Court today speaks with a single voice on the merits of the constitutional question is unusual and certainly lends support to the notion that the question is indeed ‘open and shut.’”⁵⁵ Stevens ended with a cautionary note: “[T]he Court today authorizes *one* free violation of the well-established rule it reaffirms.”⁵⁶

A Montana couple, Paul and Erma Berger, filed the second invasion-of-privacy lawsuit referred to earlier that was decided by the U.S. Supreme Court on the same day as *Wilson v. Layne*.⁵⁷ Agents of the U.S. Fish and Wildlife Service, accompanied by Cable

⁵³ *Id.* at 610.

⁵⁴ *Id.* at 615.

⁵⁵ *Id.* at 620 (Stevens, J., dissenting).

⁵⁶ *Id.* at 625 (emphasis added).

⁵⁷ *Hanlon v. Berger*, 526 U.S. 808 (1999).

News Network reporters and a camera crew, executed a search warrant at the couple's ranch in hopes of finding evidence of illegal hunting or trapping. In this incident, the law enforcement officers and journalists did not enter the couple's home. Nonetheless, the Court's *per curiam* opinion cited its ruling in *Wilson v. Layne* and found the presence of the CNN journalists constituted a violation of the Fourth Amendment's privacy protections. This ruling went beyond *Wilson v. Layne* by extending the effective prohibition on media ride-alongs to sites that did not have the legal sanctity conferred upon the home. As in *Wilson*, however, the officers were granted qualified immunity and Stevens dissented. A case note in an influential law review suggested that those whose privacy has been violated by the joint actions of the police and journalists "may find that adding a deep pocketed media entity to the lawsuit against an immunized police officer is an attractive option. . . . [C]haracterizing media conduct as a civil rights violation vindicates a humiliating experience."⁵⁸ In fact, the Bergers had named CNN as a co-defendant in their lawsuit. The trial court granted CNN summary judgment, but the Ninth Circuit Court of Appeals reversed that judgment, and the U.S. Supreme Court refused to review that reversal.⁵⁹ In the end, the district court resumed control of the case on remand and denied CNN summary judgment and approved a sealed settlement of the case in 2001.⁶⁰ As a result, CNN was not a party when the case reached the U.S. Supreme Court.

Many of the largest American media companies and professional associations of journalists filed an *amici curiae* brief that covered both cases and argued that if the Court

⁵⁸ Hannah Shay Chanoine, Note, *Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment*, 104 COLUM. L. REV. 1356, 1380 (2004) (notes omitted).

⁵⁹ See *Berger v. Cable News Network, Inc.*, 129 F. 3d 505 (1997), *cert denied* 525 U.S. 961 (1998).

⁶⁰ See *Berger v. Cable News Network, Inc.*, No. CV 94-46-BLG-JDS (D. Mont Jan 26, 2001).

allowed the imposition of legal sanctions for media ride-alongs it would hinder journalists' ability to provide a window through which the public could see how government officials actually perform their duties.⁶¹ As it insisted that the presence of journalists during the execution of arrest and search warrants caused only an "incremental diminution of privacy," the media brief predicted that "this window will effectively be closed" by an adverse ruling by the Court.⁶² The brief expressed a greater fear of the Court's ultimate holding in *Berger* than its decision in *Wilson* because it affirmed the lower court's finding of a powerful privacy right in non-residential sites.

The Ninth Circuit's holding, if adopted by this Court, will have one certain consequence: To avoid the risk that they will be deemed to have violated the Fourth Amendment, law enforcement and other public officials performing their duties will simply bar the public through the news media, from observing their activities in a variety of settings. Such a regime will eliminate a class of news reporting that has contributed meaningfully to public scrutiny of official conduct.⁶³

The media brief focused entirely on the competing interests in the First and Fourth Amendments. It made no reference to the ethics of journalists who watch or photograph private people who might be in bed or in their underwear when government officials doing their jobs burst into their homes.

Media ride-alongs, in addition to posing a risk of illegal or unethical invasions of privacy, also appear to be derelictions of journalists' ethical duty to operate independently of government.⁶⁴ In both cases discussed here and in media ride-alongs generally, the journalists

⁶¹ Brief of *Amici Curiae* ABC, Inc. et al. in Support of Petitioners in No. 97-1927 and Respondents in No. 98-83, *Hanlon v. Berger*, 526 U.S. 808 (1999), *Wilson v. Layne*, 526 U.S. 603 (1999) (Nos. 97-1927, 98-83).

⁶² *Id.* at 2-3.

⁶³ *Id.* at 4.

⁶⁴ See Society of Professional Journalists Code of Ethics, *supra* note 24; Ann Woolner, *Media Getting Too Cozy With Law Enforcement*, USA TODAY, Mar. 24, 1999, at 25A.

arguably did not and do not function as watchdogs. Notwithstanding the arguments made in the *amici curiae* brief submitted by media groups, journalists on ride-alongs acted more like press agents for their law enforcement partners. One commentator on *Hanlon v. Berger* took the criticism even further by claiming, “CNN appeared to spurn journalistic integrity in favor of creating a propaganda video.”⁶⁵ In assuming the role of government press agent and propagandist, journalists do not perform the role assigned to them in the American constitutional scheme of checks and balances. It is, therefore, understandable that in these instances the First Amendment interests raised in these cases, which establish and support the journalist’s proper role, did not fare well when the Court balanced them against the asserted privacy interests. Two years later, however, in *Bartnicki v. Vopper*,⁶⁶ the Court faced a privacy case in which journalists and other media professionals did appear to live up to their constitutionally defined responsibilities. When the Court set about balancing the free press and privacy interests, the scales tipped against privacy.

Gloria Bartnicki, a union negotiator, and Anthony F. Kane, a Pennsylvania school union leader, petitioned the U.S. Supreme Court to overturn a lower court ruling against their claim that a radio program host and others in the media had invaded their privacy by publicizing the contents of their cellular telephone conversations. The conversations had been intercepted illegally by some unknown third party. Recordings of the intercepts wound up in the hands of the media. Federal and state anti-wiretapping statutes made it illegal to intercept phone conversation or disseminate the contents of those conversations, and allowed lawsuits

⁶⁵ Chanoine, *supra* note 56, at 1397.

⁶⁶ 532 U.S. 514 (2001).

against violators.⁶⁷ Accordingly, Bartnicki and Kane sued radio host Frederick W. Vopper and others for publicizing the conversations. The Third Circuit Court of Appeals found that those statutes as applied in these circumstances violated the First Amendment. In a 6-3 decision, the Supreme Court affirmed the circuit court's ruling.

Justice Stevens wrote the majority opinion and relied heavily on the fact that Bartnicki and Kane's intercepted conversations had not been intercepted by the media defendants. Of equal importance to Stevens was the determination that the conversations were about legitimate matters of public concern because they related directly to union contract negotiation tactics and the process of deciding how the public's money was to be spent. The privacy-invading media defendants were being faithful to their constitutional roles as watchdogs and disseminators of information about public concerns when they accepted the stolen material and publicized its contents. That the defendants accepted stolen information and publicized it knowing it was stolen was not a decisive element in the case, according to Stevens. He cited the precedent-setting decisions in "The Pentagon Papers Case," *New York Times Co. v. United States*,⁶⁸ *Florida Star v. B.J.F.*,⁶⁹ *Smith v. Daily Mail*,⁷⁰ and *Landmark Communications, Inc. v. Virginia*⁷¹ to show that the Court had declined to permit penalties against the media for publishing truthful information of public concern that the media had not caused to be stolen, but had otherwise acquired legally.

⁶⁷ See 18 U.S.C. §2510 *et seq.* (1968); 18 U.S.C. §25111 (1) (a) (1968); 18 U.S.C. §2520 (a) (1968); 18 Pa. Cons. Stat. §5725 *et seq.* (2000). These provisions are the statutory counterparts of the intrusion by electronic or mechanical means tort and the public disclosure of private information tort.

⁶⁸ 403 U.S. 713 (1971).

⁶⁹ 491 U.S. 524 (1989)

⁷⁰ 443 U.S. 97 (1979).

⁷¹ 435 U.S. 829 (1988)

The petitioners' arguments asserted privacy rights as legal and moral values that had been invaded by media malefactors who would provide a ready market for and therefore an incentive for more illegal and immoral intrusions if they were not held accountable by the law.⁷² The petitioners received a somewhat sympathetic response when they asserted that a democratic society needed to protect the privacy of communication to foster creative and constructive thought.⁷³ Those arguments failed to sway a majority of the Court. "In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance," Stevens wrote. "One of the costs associated with participation in public affairs is an attendant loss of privacy."⁷⁴

Stevens, in stating that the case presented "a conflict between interests of the highest order," seemed to indicate that individual privacy rights were on a par with First Amendment rights.⁷⁵ As such, the final balance between equals would be determined by an assessment of the particular facts of the case and generally limited to those facts, as indicated in the concurring opinion of Justices Stephen G. Breyer and Sandra Day O'Connor.⁷⁶ This concurring opinion affirmed the importance of protecting private speech, but indicated that the petitioners' intercepted speech was less private because it concerned a public matter and was uttered by public figures who should have a lesser expectation of privacy with respect to such speech.

⁷² Brief for Petitioners at 15, 16, 27, 30, 37, *Bartnicki v. Vopper*, 532 U.S. 514 (Nos. 99-1687, 99-1728).

⁷³ *Id.* at 31 ("In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas."); *Bartnicki v. Vopper*, 532 U.S. at 533 (acknowledging and repeating the quoted passage).

⁷⁴ 532 U.S. at 534.

⁷⁵ *Id.* at 518.

⁷⁶ *Id.* at 541 (Breyer, J., concurring).

Chief Justice Rehnquist's dissent, which was joined by Justices Antonin Scalia and Clarence Thomas, criticized the majority for making the matter "of public concern" a pivotal issue in the case when it is "an amorphous concept that the Court does not even attempt to define."⁷⁷ He also claimed the majority decision, which claimed to favor First Amendment interests over privacy interests, actually demeaned the First Amendment interest in private speech. "Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed," Rehnquist argued.⁷⁸ He said the majority had overridden the right to privacy and created a "newfound right to publish unlawfully acquired information of 'public concern.'" ⁷⁹

Supreme Court Addresses Rape Victim Privacy

Although journalism ethics codes and statements of principles generally have fallen far short of crystal clarity in their descriptions of matters that should be treated as private, their imprecise wording and use of generalities nonetheless have conveyed the basic message that information about sexual assaults and juvenile criminals should be treated cautiously or suppressed. Early references to sex crimes were couched in archaic expressions such as: "crimes against private morality which are revolting to our finer sensibilities" and "private morality and family relations." Later references can be inferred from wording that

⁷⁷ *Id.* at 542 (Rehnquist, J., dissenting).

⁷⁸ *Id.* at 555.

⁷⁹ *Id.* at 554.

encouraged “humane respect for dignity.” When the modern codes address juvenile crime and sexual assault victims, their references are sometimes quite direct, as demonstrated by the Society of Professional Journalists code, which says: “Be cautious about identifying juvenile suspects or victims of sex crimes.” It is significant that the code urges caution as opposed to outright avoidance in this area. The implication is that at times such matters may be newsworthy.

When the U.S. Supreme Court had occasion to address these issues, its rulings embodied a different set of directives and cautions about news media identifications of rape victims. Among the most influential of these was the ruling in *Cox Broadcasting Co. v. Cohn*,⁸⁰ the Court’s first direct treatment of a privacy issue involving public disclosure of a rape victim’s name. The case was a civil suit based on the common law invasion of privacy tort – public disclosure of private (and embarrassing) facts. Plaintiff Martin Cohn had sued the Cox Broadcasting Company’s Atlanta television station WSB-TV for invading his privacy by identifying his 17-year-old daughter, Cynthia, as a rape victim. Six high school boys were charged with raping the girl after a drinking party, and she died of suffocation. A reporter for Cox Broadcasting found the girl’s name listed in the indictments against the six boys. A Georgia criminal statute specifically banned the identification of rape victims in the mass media, but the Georgia Supreme Court would not permit the violation of the statute to be the basis for Cohn’s privacy lawsuit. It did, however, allow the lawsuit to proceed under Georgia’s common law tort of public disclosure of private information, which the United States Supreme Court said protects “the right to be free from unwanted publicity about his

⁸⁰ 420 U.S. 469 (1975).

private affairs, which although wholly true, would be offensive to a person of ordinary sensibilities.”⁸¹

When the case reached the U.S. Supreme Court on appeal from a Georgia ruling in favor of the plaintiff, Justice Byron White described the task before the Court as determining whether a state may constitutionally “extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime.”⁸² The Court ultimately decided that such state action was unconstitutional because it violated the First and Fourteenth Amendments.

Cohn’s lawsuit was an effort to discourage and punish the dissemination of unwanted and offensive publicity about what he considered his private affairs. In the terminology of the ethics codes, he arguably was seeking to hold the Atlanta television station accountable for pandering to the public’s morbid curiosity about the misfortunes of others. The Court ruling did not challenge the legal existence of privacy rights or the legitimacy of this invasion of privacy tort. It implicitly accepted the contention that “there *is* a zone of privacy surrounding each individual, a zone within which the State may protect him from intrusion by the press.”⁸³ But the ruling protected the presumptively invasive publication of the rape victim’s name because it was accurate information that already had been made public by placement in publicly accessible government records from which the journalists retrieved it. The lawsuit amounted to an encumbrance on the flow of information, and the Court found it intolerable.

⁸¹ *Id.* at 489.

⁸² *Id.* at 471.

⁸³ *Id.* at 487.

Because the gravamen of the claimed injury is the publication of information . . . the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.⁸⁴

Accordingly, the Court also found that when a person's zone of privacy is violated in such a manner, recourse cannot be found in law but perhaps from within the news media themselves. "In this instance, as in others, reliance must rest upon the judgment of those who decide what to publish or broadcast," the Court said.⁸⁵ Here the Court was neither endorsing nor overtly challenging a journalism ethics principle, but it was unable to stay clear of the crux of the ethical issue. The Court would not allow the imposition of civil penalties on practices that apparently violated an ethical stricture. The ruling, therefore, did not add legal strength to the ethicists' efforts to guide journalists toward proper behavior. Journalism's ethical stricture against naming rape victims suffered from a degree of ambiguity and vagueness that existed at the time of the *Cox Broadcasting Co. v. Cohn* ruling and may yet remain. There is no certainty that the stricture was intended to apply to a rape victim who was dead when publicly named by a journalist. Nor is it clear that the ethics provision was meant to protect the sensibilities of the victim's immediate relatives. Scholarly writings about the ethics of naming rape victims have been prolific but have focused on the stigma, revictimization, and other harms publication can inflict on rape survivors themselves and not their relatives.⁸⁶ Although American law generally limits privacy rights to the living, except

⁸⁴ *Id.* at 489.

⁸⁵ *Id.* at 496.

⁸⁶ See, e.g., Geneva Overholser, *Name the Accuser and the Accused*, POYNTERONLINE (July 23, 2003) at http://www.poynter.org/content/content_view.asp?id=42260; Shirley A. Wiegand, *Sports Heroes, Sexual Assault and the Unnamed Victim*, 12 MARQ. SPORTS L. REV. 501 (2001); Michelle Johnson, *Of Public Interest: How Courts Handle Rape Victims' Privacy*, 4 COMM L. & PL'Y 201 (1999); Deborah W. Denno, *The Privacy Rights of Rape Victims in the Media and the Law*, 61 FORDHAM L. REV. 1113 (1993); Jay Black, *Rethinking the*

in cases of appropriation,⁸⁷ the Court did not address the girl's death beyond a brief mention. It also did not question whether her father's own privacy rights were invaded by the publication of her name but implicitly accepted the the legal sufficiency of his standing to sue under state privacy law.

This ruling placed a higher value on the free press principles that promoted the flow of information. In one sense, it undermined the value of the right to privacy. "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man," the Court said.⁸⁸

Fourteen years later the Court again ruled in a case involving a civil suit based on a claim that a newspaper violated the plaintiff's privacy by publicly identifying her as a rape victim. The result in *Florida Star v. B. J. F.*⁸⁹ closely resembled the outcome in *Cox Broadcasting* as the Court found the awarding of damages violated the First Amendment. The ruling in *Cox Broadcasting* relied heavily on the fact that the rape victim's name had been published in a court record that a reporter used as a source. In *Florida Star* the name was found in a police report. The fact that publishing the name violated the *Florida Star* newspaper's own policy or ethics code and state law was not controlling. In a ruling carefully confined to other issues, the Court said:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State

Naming of Sex Crime Victims, 16 NEWSPAPER RES. J. 96 (1995); Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1020 (1991).

⁸⁷ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 778 (5th ed. 1984).

⁸⁸ 420 U.S. at 496.

⁸⁹ 491 U.S. 524 (1989).

may protect the individual from intrusion by the press *or even that a State may never punish publication of the name of a victim of a sexual offense*. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order.⁹⁰

In this particular instance, the privacy interests purportedly protected by the Florida law were the state's interest in preventing the public identification of rape victims. The fact that there were no provisions to prevent anyone other than the news media from naming rape victims were indications that these privacy interests were not of the highest order and the law protecting these interests was not sufficiently narrow to protect First Amendment interests. The holding indicated the Court's recognition of privacy rights just as the holding in *Cox Broadcasting* did. And just as it had in *Cox Broadcasting*, the Court ultimately valued free speech and truth above privacy. The privacy interest of rape victims and the justification for not identifying victims were explained by Anita Allen, a professor of law and philosophy, who described rape as "an act of physical violence which by its very nature is an affront to privacy."⁹¹ She argued that keeping victims' names secret gives them "a shield against media sensationalism and public abuse."⁹² Victims' privacy right arguments, however, did not move the Court from assigning the higher value to the free press interests in these cases.

While journalism ethics codes and the Supreme Court recognize and are solicitous of victims' privacy interests in rape cases, neither imposes an absolute ban on compromising those interests. The codes merely urge caution and a respect for human dignity and sensibilities when dealing with rape cases and, as indicated in the *Florida Star v. B.J.F.*

⁹⁰ *Id.* at 541 (emphasis added).

⁹¹ ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 156 (1988).

⁹² *Id.*

ruling, usually encourage journalists to refrain from publicizing the identity of rape victims. When *The Florida Star* violated its own ban against identifying a rape victim, it was of no legal consequence to the Supreme Court. Public policy considerations, such as the assertion that rape victims would be more likely to report the crime and participate in prosecutions if they knew they would not be publicly identified, also were of no significant consequence in the rulings. The Court made no specific distinction between privacy interests in rape cases and other sensitive matters but placed significant emphasis on whether this privacy-sensitive material was truthful and lawfully obtained or gleaned from public records or documents. The Court's disposition of *Cox Broadcasting* and *Florida Star* can be interpreted as establishing a general rule that says publication of such material is protected by the Constitution even when it offends ordinary sensibilities. These rulings did not affirm the privacy values as articulated in the codes, nor did they directly undermine them. The Court affirmed the existence of privacy rights and was careful to say it had not ruled out the possibility that state law might protect those rights in some instances. However, those rights cannot be protected or their violations penalized at the expense of free press values. First Amendment values outstrip privacy values in rape victim identification cases, the Court has decided. As a result, the Court has not added its influence to the codes' efforts to make journalists more scrupulous in protecting rape victims' privacy rights.

Supreme Court Addresses Juvenile Privacy

The values, principles, and rationales that support the rulings in *Cox Broadcasting* and *Florida Star* are consistent with Supreme Court rulings in two cases involving news media identifications of juveniles accused of committing crimes. *Oklahoma Publishing Co. v.*

*District Court*⁹³ was the first of these and required the Court to determine the constitutionality of a state court order barring the news media from publishing the name of an 11-year-old boy charged with fatally shooting a railroad switchman. A reporter had been allowed to attend juvenile court proceedings for the boy and thereby learned his name. A photograph was taken of the boy as he left the court, but the news media were enjoined by an Oklahoma trial court order forbidding them to publish his image or his name. The order was sustained by the Oklahoma Supreme Court but reversed as unconstitutional by the U.S. Supreme Court. Reversal was compelled by its decisions in prior cases including *Cox Broadcasting*, the Court said. The *Oklahoma Publishing Co.* ruling cited *Cox Broadcasting* as binding precedent for the principle that the Constitution does not allow a state to bar the news media from “truthfully publishing information released to the public in official court records.”⁹⁴ When the state conducted juvenile proceedings with journalists present, that act was deemed to be the equivalent of releasing the boy’s identity to the public.

Two years after the *Oklahoma Publishing Co.* ruling, the Court heard *Smith v. Daily Mail Publishing Co.*⁹⁵ and refused to permit the prosecution of two West Virginia newspapers that had been indicted for publishing the name of a juvenile crime suspect in violation of state law. The law’s effort to conceal the child’s identity was characterized in arguments to the Court as a means of keeping the boy’s transgressions secret, or private, and was essential to his rehabilitation. The Court found those goals and interests inferior to free press values. Reporters had legally monitored police radio transmissions, interviewed witnesses, police

⁹³ 430 U.S. 308 (1977).

⁹⁴ *Id.* at 310 (citing *Cox Broadcasting*, 420 U.S. 469, 496 (1975)).

⁹⁵ 443 U.S. 97 (1979).

officers, and a state prosecutor to discover the name of a 14-year-old boy accused of fatally shooting a classmate. Citing its holding in *Oklahoma Publishing* as particularly influential, the Court said, “If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.”⁹⁶ It concluded that “[t]he sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile defender . . . [to] further his rehabilitation.”⁹⁷ The statute also fell short because it failed to serve that asserted interest in that it applied only to newspapers and not other media.

Although the *Smith v. Daily Mail* Court specifically found “there is no issue here of privacy,”⁹⁸ law scholars have consistently considered privacy a central issue in the case.⁹⁹ Language in the opinion indicated that when legally acquired truthful information that might otherwise be considered private is a matter of “public significance, then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order.”¹⁰⁰ In using the term “public significance” to refer to the homicide charge against the boy, the Court appeared to be accepting the argument made by the Chicago Tribune Company in an *amicus* brief that said in part: “Juvenile crime today is

⁹⁶ *Id.* at 104.

⁹⁷ *Id.*

⁹⁸ *Id.* at 105.

⁹⁹ See Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1202 (1990); ROBERT D. SACK, SACK ON DEFAMATION 12-56 (3rd ed. 1999); Dianne B. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 313 (1983).

¹⁰⁰ *Smith v. Daily Mail*, 443 U.S. at 103.

on a sharp up-surge and is a subject of ever-increasing public concern and scrutiny. . . . In short, the juvenile justice system more than ever before is news – important news.”¹⁰¹

When the Court reviewed *Globe Newspaper Co. v. Superior Court*,¹⁰² it found a case that combined issues of juvenile privacy and rape victim privacy although these matters were not raised as privacy torts or explicitly referred to as privacy issues by the Court. Nonetheless the case involved privacy issues as defined by journalism codes of ethics in that they dealt with affronts to human sensibilities and matters that engendered embarrassment when publicized. Privacy interests were again trumped by free speech values in the case as the *Globe Newspaper Co.* challenged the constitutionality of a Massachusetts statute that required state judges presiding over rape trials to automatically close the courtroom to journalists and the general public whenever a juvenile victim was to testify. The statute was designed to encourage child victims of rape to pursue criminal charges against their attackers and to protect the privacy interests of the child victims. The Court characterized the latter purpose as protecting “minor victims of sex crimes from further trauma and embarrassment.”¹⁰³ While the Court found these interests highly important, it did not find them sufficiently compelling to prevail against the competing First Amendment interest in keeping the criminal courts open. Just two years earlier the Court had issued a landmark ruling in *Richmond Newspapers, Inc. v. Virginia*,¹⁰⁴ which established a presumptive First Amendment right of the public and the press to attend criminal trials. This presumption that trials should be open was not absolute but could be overcome in any individual trial with a

¹⁰¹ Brief for Chicago Tribune Company as Amicus Curiae at 2, *Smith* (No. 78-482).

¹⁰² 457 U.S. 596 (1982).

¹⁰³ *Id.* at 607.

¹⁰⁴ 448 U.S. 555 (1980).

case-by-case determination of a compelling need. The *Richmond Newspapers* ruling was the controlling precedent in *Globe Newspaper Co.* The Court said closure of trials based on a case-by-case assessment of a compelling need could be constitutional, but automatic and mandatory closures as provided for in the Massachusetts statute were not. Another fatal infirmity of the statute was its facial ineffectiveness in protecting the child victims' privacy interests. The statute did nothing to prevent reporters from gleaning the victims' names from trial transcripts or getting them from court personnel and other sources.¹⁰⁵

The Court has consistently determined that the privacy and secrecy interests of juvenile law breakers and rape victims, at least insofar as criminal court proceedings are concerned, are generally inferior to free press interests. Even when privacy interests are bolstered by public policy considerations such as the need to foster the rehabilitation of juveniles and encourage rape victims to report the crime and testify in the prosecution, the Court has maintained a presumption that these privacy interests are inferior. It nonetheless has continued to allow for the possibility that in an individual case the privacy interest can prevail if it is proved to be an overriding concern.

Extending the Shield of Privacy

The preceding sections of this chapter have reviewed the Supreme Court's handling of public disclosure of private information as a tort and as a central issue in other legal contexts related to journalism practices. Assessments also were made of Court treatments of other intrusive press practices. The chapter now moves to an examination of the Court's handling of general privacy interests in other cases that involve news media interests but are not directly based on any privacy tort or their statutory counterpart.

¹⁰⁵ 457 U.S. at 610.

During the late 1970s and the 1980s the Court issued a spate of rulings that revealed varied valuations of privacy interests even though the opinions were grounded in other issues. In some cases decided during this period, particularly those involving the application of the privacy-protecting provisions of the Freedom of Information Act, the Court's delineation of the bounds of privacy was often at odds with privacy parameters established by common law and journalism ethics codes. In these instances, the privacy interest often was valued more highly than it was in the tort cases.

In 1982, *U. S. Department of State v. Washington Post*¹⁰⁶ required the Court to construe the privacy interests embodied in an exemption to the Freedom of Information Act - that allowed federal agencies to withhold records from the public if the disclosure "would constitute a clearly unwarranted invasion of personal privacy."¹⁰⁷ The Court said it was addressing a personal privacy issue pursuant to the statute, but it appeared to be addressing a physical security and safety issue. The case reached the Court after federal district and appeals courts ruled in favor of *The Washington Post's* efforts to use the FOIA to gather federal records to determine whether some Iranian nationals holding positions in the Iranian government were citizens of the United States or had been issued United States passports. State Department officials had argued unsuccessfully in the two lower courts that they were not required to produce this information because it was the type of privacy-sensitive material that Exemption 6 was formulated to protect from disclosure.

¹⁰⁶ 456 U.S. 595 (1982).

¹⁰⁷ 5 U.S.C. §552(b)(6) (2004). The pertinent sections of the statute say: "§552 Public information; agency rules, opinions, orders, records and proceedings ... (a) Each agency shall make available to the public information as follows: ... (b) This section does not apply to matters that are ... (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Six professional associations of journalists, nominally led by the American Newspaper Publishers Association, filed an *amicus* brief supporting *The Washington Post* and arguing that a person’s status as a citizen is clearly public information available in federal courthouses all over the country and should be released.¹⁰⁸ “[N]o legitimate expectation of privacy can attach to the fact of citizenship,” the ANPA brief argued.¹⁰⁹ It called a person’s citizenship status “uniquely public information” that “can never be withheld from the public in the name of ‘privacy.’”¹¹⁰

The State Department disagreed and relied on the wording of Exemption 6 to justify withholding the records.¹¹¹ The appeals court found it unnecessary to deal with the question of whether releasing the passport and citizenship information constituted an unwarranted invasion of personal privacy. It ruled that the first element of Exemption 6 – that the information be in personnel, medical, or similar files – had not been satisfied. When the State Department appealed, the Supreme Court reversed and in so doing addressed privacy issues. It found that the “similar files” referred to by the FOIA did apply to passport and citizenship information. It said the legislative intent of Exemption 6 was to “protect individuals from the *injury and embarrassment* that can result from the unnecessary disclosure of personal information.”¹¹² While privacy issues usually revolve around the potential for embarrassment with the release of intimate information, here the Court also emphasized protection against

¹⁰⁸ Brief *Amici Curiae* of the American Newspaper Publishers Association in Support of Respondent, *Department of State* (No. 81-535).

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.* at 3.

¹¹¹ 456 U.S. at 596.

¹¹² *Id.* at 599 (emphasis added.)

physical, non-psychoic injuries. The Iranian nationals faced physical injury if the requested information was publicized, according to a sworn statement submitted by a State Department official and cited by the Court:

Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with distrust. An official of the government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence. It is the position of the Department of State that any statement at this time by the United States Government which could be construed or misconstrued to indicate that any Iranian public official is currently a United States citizen is likely to cause a real threat of physical harm to that person.¹¹³

Although the Court found it unnecessary to reach the privacy issue once it dispensed with the appeals court's interpretation of the reference to "similar files" in the FOIA, dictum in the opinion indicated the Court had addressed a privacy concern, which under its interpretation of Exemption 6 included a concern for a person's physical safety. Under this construction, the privacy value embodied in the FOIA statute outweighed the competing free press values.

When the Court was petitioned in 1989 to again construe a privacy-protecting provision of the Freedom of Information Act in *U. S. Department of Justice v. Reporters Committee for Freedom of the Press*,¹¹⁴ the privacy interests again prevailed even though physical safety was not an issue as in *State Department v. Washington Post*. The case began its trek toward the Court when a television journalist was rebuffed when he invoked the FOIA in an effort to compel the Federal Bureau of Investigation, an arm of the Department of Justice, to provide copies of the "rap sheet" records it had compiled from other law enforcement agencies on reputed organized crime figure Charles Medico. FBI officials

¹¹³ *Id.* at 597 n. 2.

¹¹⁴ 489 U.S. 749 (1989).

refused to provide the records and cited FOIA's Exemption 7(C),¹¹⁵ which allowed the agency to withhold records compiled for law enforcement purposes if the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹¹⁶ Ultimately, the journalist requested only Medico's crime history that did not involve his ostensibly private finances and was a matter of public record. Nonetheless, the district court found releasing the rap sheets would be an unwarranted invasion of privacy that Exemption 7(C) allowed the FBI to prevent. The court of appeals reversed that ruling, finding the privacy interest in rap sheets to be minimal because the information was already in public records. The Supreme Court disagreed, saying, "The privacy interest in a rap sheet is substantial."¹¹⁷ The ruling was careful to distinguish between the privacy interests as defined and protected by the FOIA and those defined by common law privacy torts or the U.S. Constitution because the Court had found minimal privacy interests in matters contained in public records and newsworthy matters of public concern.¹¹⁸

The American Civil Liberties Union sided with the Justice Department in an *amicus* brief filed with the Court and argued that "a variety of harms to individual privacy may result from disclosure of criminal history record[s]."¹¹⁹ These harms included reputational damage, negating the presumption of innocence, and "the stigmatizing effect of a criminal history

¹¹⁵ 5 U.S.C. §552(b)(7)(C). After establishing that agency records should be made available to the public, the pertinent provisions of §552 say: "(b) This section does not apply to matters that are ... (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy."

¹¹⁶ *Id.*

¹¹⁷ 489 U.S. at 771.

¹¹⁸ *See id.* at 762 n. 13.

¹¹⁹ Brief Amicus Curiae of the American Civil Liberties Union at 16, *Reporters Committee* (No. 87-1379).

record, and the lack of probative value or relevance of an arrest record.¹²⁰ This was essentially the same position taken by the Justice Department. An *amici curiae* brief filed by the American Newspaper Publishers Association and other news media groups¹²¹ said the Justice Department's own argument showed that privacy was not actually at issue in this case, but the government was trying to claim that its compilation of information from public records had somehow made that information private:

The gravamen of a privacy claim is the wrongful public disclosure of private facts, but the government's objections to access to the information at issue actually relate to inaccurate collection and possible subsequent misuse. . . . The potential for misuse of collected public record information by a powerful public agency like the FBI does not create a privacy interest; it suggests the need for proper user safeguards, and public access to "watchdog" the implementation of those measures.¹²²

Ultimately, the Court determined that its understanding of Congress' legislative intent for the FOIA would control. Seven years later a Senate report repudiated that assessment of congressional intent.¹²³ Nonetheless, the Court in *Reporters Committee* said lawmakers did not intend to have federal agencies serve as clearing houses to help disseminate personal information about private people but to provide access to records that would show how these agencies were doing their jobs. The fact that this information was already in the public arena was not dispositive because it was arduous to obtain and not otherwise readily available, the Court said. Its disposition of the privacy issue was clear:

¹²⁰ *Id.*

¹²¹ Brief of *Amici Curiae* The American Newspaper Publishers Association et al., *Reporters Committee* (No. 87-1379).

¹²² *Id.* at 5.

¹²³ See KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 501 (2003) citing Sen. Rep. No. 104-272, 104th Cong., 2d Sess. 26-27 (1996).

[W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."¹²⁴

Fifteen years later, the Court revisited the FOIA's Exemption 7(C) in *National Archives v. Favish*.¹²⁵ Its conception of privacy expanded dramatically beyond the parameters set in *Reporters Committee* and the asserted privacy interests again proved to be superior to the other competing interests in the case. As before, the ruling was unanimous, and the concept of privacy differed in significant ways from the principles embodied in the privacy torts. Foremost among these differences was the Court's explicit determination that under this provision of the FOIA, privacy rights extended beyond the death of a person identified in a requested government record and were vested in that person's family. Nonetheless, there was one striking similarity in the Court's ruling and the concerns that prompted the creation of journalism ethics codes and inspired the seminal law review article that gave rise to the torts. All expressed concern about the irresponsible and sensationalist media.

The ruling in *National Archives v. Favish* was the culmination of an attempt to secure death-scene photographs of Vincent W. Foster Jr., the former deputy White House counsel to President Bill Clinton, who was found fatally shot in a national park in Virginia in 1993. Allan J. Favish, the respondent in the case, sought the photographs because he wanted to further pursue his suspicion that there was a government cover-up in the death and

¹²⁴ 489 U.S. at 780.

¹²⁵ 541 U.S. 157 (2004).

subsequent investigations that concluded Foster had committed suicide.¹²⁶ Favish, an attorney acting on his own behalf, filed a FOIA request and was turned down by the Office of Independent Counsel, which did so in reliance on its interpretation of Exemption 7(C). A series of appeals landed the case before the U.S. Supreme Court, which determined that Congress, in enacting the FOIA and exemption 7(C), created separate and distinct personal privacy rights for the surviving relatives of a person identified in government records compiled for law enforcement purposes. Exemption 7(C) then required the Court to determine if the invasion of those rights was warranted. The Court found the Foster family's privacy interests outweighed the public interest in disclosure of the death scene photographs and the images would not have to be disclosed.¹²⁷

Justice Anthony Kennedy wrote the decision and clearly distinguished these survivor privacy rights from the privacy rights at issue in the *Reporters Committee* case. The personal privacy rights referred to by Exemption 7(C) are not limited to empowering living people to control public dissemination of information about themselves, Kennedy explained. Foster's relatives "seek to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased," he wrote in reference to

¹²⁶ Favish initially became involved in the effort to acquire the Foster photographs as an attorney representing Accuracy In Media, a media watchdog group that filed a FOIA request with the National Park Service. The park service, which investigated Foster's death, withheld the photos by claiming they were exempt from disclosure because they violated privacy rights. The Court of Appeals for the District of Columbia agreed. *See Accuracy in Media Inc. v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied* 529 U.S. 111 (2000). Favish subsequently filed a FOIA request for himself and eventually received a favorable decision from the Ninth Circuit Court of Appeals in California. The FOIA request and subsequent lawsuit were filed against the Office of Independent Counsel, which was then conducting its own investigation of the Foster death and had legal possession of the photographs. When OIC completed its work, the photographs and related files were turned over to the National Archives and Records Administration, which became the petitioner in the appeal of the Ninth Circuit Court's decision to the U.S. Supreme Court. *See Favish v. Office of Independent Counsel*, 217 F.3d 1168 (9th Cir. 2000).

¹²⁷ 451 U.S. at 170.

affidavits family members submitted to the trial court.¹²⁸ Sheila Foster Anthony, the decedent's sister, told the lower court that she had been beset by people who wanted to exploit her brother's death for political or commercial advantage and that she had suffered nightmares and insomnia after seeing a death-scene photograph of her brother that had been leaked to the press. Kennedy's decision included a highly emotive segment of Anthony's statement that was particularly critical of the mass media: "I fear that the release of [additional] photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage."¹²⁹ Anthony's attorney, James Hamilton, elaborated on these points in oral argument before the Court saying the family should be freed "from seeing these photographs on television and in grocery store tabloids . . . [and] from the knowledge that these photographs are displayed in virtual perpetuity on ghoulish Web sites that show death and carnage."¹³⁰

Kennedy invoked ancient images of Antigone, the heroine of the classic Greek drama who sacrificed to ensure respect for her brother's corpse, and the modern electronic images of mutilated dead American soldiers being dragged through the streets of Somalia or the Middle East to drive home his assertion that common law and universal, long-standing cultural traditions recognized privacy rights vested in relatives when a loved one's corpse

¹²⁸ 541 U.S. at 166.

¹²⁹ *Id.*

¹³⁰ Oral Argument In The Supreme Court of the United States (Dec. 3, 2003) at 17, Office of Independent Counsel v. Allan J. Favish, 541 U.S. 157 (2004) (No. 02-954).

was subject to desecration or exploitation.¹³¹ Kennedy’s references seem to validate Schauer’s claim, which was introduced early in this chapter, that privacy is a variable social construct,¹³² and Halstuk’s assertion that privacy is a fundamental and immutable human value.¹³³

Jane Kirtley, a media law scholar who submitted an *amicus curiae* brief in support of Favish, provided an explanation for the emotional tone of the Kennedy opinion and its grasp on a moral or ethical justification: “Cases where ‘survivor privacy’ arises often are freighted with emotion, and it is difficult to fault the judicial instinct to shield innocents from emotional distress.”¹³⁴ Kirtley’s fundamental argument, however, was that the survivor privacy concept was at odds with the FOIA’s statutory language and legislative intent and should not be grafted onto Exemption 7(C) by judicial fiat.

Justice Scalia also seemed to dispute and struggle with the survivor privacy concept. During oral argument he said, “It doesn’t seem to me that it’s . . . their privacy that’s being invaded. It’s their sensitivity. . . . Surely they have an interest in not having their . . . relative displayed this way, but I wouldn’t normally call that a privacy interest.”¹³⁵ Notwithstanding those early doubts and his effort to reconcile his understanding with the evolving definition of privacy, Scalia was part of the unanimous ruling that validated the inclusion of survivor privacy in considerations of Exemption 7(C). Years before Scalia accepted the concept,

¹³¹ See *Favish*, 541 U.S. at 168-74.

¹³² See Schauer, *supra* note 16.

¹³³ See Halstuk, *supra* note 17.

¹³⁴ Brief of Amicus Curiae Silha Center for the Study of Media Ethics and Law at 25, *Office of Independent Counsel v. Favish*, 541 U.S. 156 (2004) (No. 02-954).

¹³⁵ See Oral Argument, *supra* note 125, at 7.

journalism ethics codes recognized it and advised reporters and photographers to respect it. As early as 1993, the Society of Professional Journalist's code and the collection of case studies it published to foster ethical journalism practices addressed the publication of graphic death-scene photographs and the effects on surviving family members.¹³⁶ The SPJ ethics code expressed even more pointed cautions in the revised version that was in effect in 2004. It urged journalists to “[s]how compassion for those who may be adversely affected by news coverage” and to show sensitivity toward those “affected by tragedy or grief.”¹³⁷

Embedded in Kennedy's explanatory dictum was an implication that the Court's configuration of privacy rights would help curb media access to and subsequent dissemination of disturbing images of death. Although Kennedy made no direct reference to the professional ethics of publishing such images, he framed the matter in such a way that the practice was presented as wrong and in need of the corrective measures the Court prescribed. First Amendment scholar and commentator Ken Paulson also noticed the Court's slap at the media and, in an observation consistent with the Hutchins Report's warning, wrote, “This is a reminder that as [the] public, press and media push the envelope with increasingly sensational content, courts are going to be inclined to push back.”¹³⁸ Paulson indicated that the Court was really directing its venom at the Internet and not the mainstream news media. Nonetheless, in the immediate aftermath of the decision two mainstream newspapers apparently saw some writing on the wall and acted accordingly. Two weeks after the *Favish*

¹³⁶ See JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES* 5-6, 172-74 (1993). The case study addressed *The Louisville Courier-Journal's* decision to publish photographs of the corpse of a pressman who was gunned down on the job.

¹³⁷ See Society of Professional Journalists Code of Ethics, *supra* note 25. The code advised sensitivity in seeking interviews and photographs of those affected by tragedy and grief.

¹³⁸ Ken Paulson, *Supreme Court Places a Premium on Privacy* (Apr. 1, 2004), at <http://www.firstamendmentcenter.org/commentary.aspx?id=13104>.

decision was announced, two Florida newspapers abruptly ended their lawsuit challenging the constitutionality of a state law that denied them access to the autopsy photographs of famed race car driver Dale Earnhardt.¹³⁹ The editor of one of the papers, the *Orlando Sentinel*, reportedly said “it would be difficult to prevail” in the aftermath of the *Favish* ruling.¹⁴⁰ Even though the Florida cases and *Favish* raised different legal issues, both sought photographs of a dead person and that similarity apparently was enough to chill the Florida newspapers.

After identifying the privacy interest that would invoke Exemption 7(C), the Court then had to decide if releasing the requested photographs “could reasonably be expected to constitute an unwarranted invasion” of that privacy.¹⁴¹ That meant balancing these privacy rights against the competing public interest in disclosure of the photographs. In this balancing, the Court gave privacy an especially high valuation.

We hold that, where a privacy interest is protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.¹⁴²

¹³⁹ Doug Peters, *Supreme Court’s Ruling in Favish Prompts Florida Newspapers to Drop Suit Challenging Law Sealing Autopsy Photos*, SILHA BULLETIN (Spring 2004) at <http://www.Silha.umn.edu/Spring%2004/FloridaSuitDropped.pdf> (last visited Aug. 23, 2004).

¹⁴⁰ *Id.*

¹⁴¹ 541 U.S. at 171.

¹⁴² *Id.* at 174.

By requiring users of FOIA to do a better job of proving how the requested government records will reveal a government malfunction before they can see the records, the Court has erected a formidable, if not impenetrable, protective barrier around privacy interests.

In 1984 the Court gave precedence to the privacy values embodied in a statutory rule of civil procedure when it decided a case pitting privacy interests against free press rights in *Seattle Times Co. v. Rhinehart*.¹⁴³ Just as FOIA compels the disclosure of records, Rule 37, a Washington pretrial discovery measure¹⁴⁴ that was at issue in *Rhinehart*, compels parties to litigation to disclose some records to their adversaries. Both measures allow privacy exemptions. In this 1984 case, Keith Milton Rhinehart, the spiritual leader of a religious foundation in Washington, had sued *The Seattle Times* newspaper for libel and privacy invasion as a result of a series of articles it published. As the lawsuit proceeded toward trial, the newspaper availed itself of Rule 37 to acquire membership lists, donor lists, and related information about Rhinehart's foundation. The newspaper openly revealed its intention to use that information in news stories that would be published before the trial ended. Rhinehart claimed publication of the information posed risks to himself and the foundation supporters' privacy interests, physical security, and fundraising ability. Accordingly, he sought a court order to stop the publication pursuant to Rule 26(c), a state court rule that allowed sealing records uncovered pursuant to civil trials.¹⁴⁵ The trial court granted the order despite the newspaper's contention that its free press rights were thereby violated. The Washington

¹⁴³ 467 U.S. 20 (1984).

¹⁴⁴ Wash. Super. Ct. Civ. Rules 37.

¹⁴⁵ Wash. Super. Ct. Civ. Rules 26(c).

Supreme Court and a unanimous U.S. Supreme Court upheld the protective order and cited privacy interests as justification.

An *amici curiae* brief filed with the Court by the American Civil Liberties Union and others said none of the lower courts had made a factual determination that Rhinehart or his foundation “would suffer actual harm to any privacy interest by public disclosure of the requested information. Moreover, there has been no attempt to relate the requested documents to a specific privacy interest of the plaintiffs.”¹⁴⁶ The Court opinion cited the portion of Rule 26(c) that said protective orders could be issued “to protect a party or person from *annoyance, embarrassment, oppression* or undue burden.”¹⁴⁷ Each of these refers to the type of psychic injury associated with invasions of privacy. The Court also observed, “Although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.”¹⁴⁸ Even Justices Brennan and Thurgood Marshall, consistently staunch defenders of free press rights, joined in the ruling, agreeing “that the respondents’ interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment.”¹⁴⁹ Here the privacy interests prevailed when they were embodied in court rules and related to religious freedom and to a lesser degree, a physical safety issue.¹⁵⁰

¹⁴⁶ Brief of the American Civil Liberties Union in Support of Petitioners at 19, *Rhinehart* (No. 82-1721).

¹⁴⁷ 467 U.S. 20 at 26 (emphasis added).

¹⁴⁸ *Id.* at 35 n. 21.

¹⁴⁹ *Id.* at 38 (Brennan, J., concurring).

¹⁵⁰ Rhinehart and church members reported assaults followed when they were publicly identified as members of the religious group and these increased risks of harm impaired their religious freedom. *See id.* at 24 n.4, 25, 26.

During the same year that it decided *Rhinehart*, the Court decided *Press-Enterprise Co. v. Superior Court*,¹⁵¹ which required it to weigh the privacy interests of potential jurors against the constitutional interests in assuring fair and open trials and a free press. Here, potential jurors summoned to a California court for a rape-murder trial were questioned during *voir dire* about personal experiences and opinions that might affect their ability to fairly and impartially render a verdict in the case. Journalists and the public were barred from this process by the trial judge and denied access to a transcript of the *voir dire* afterward. The Press-Enterprise newspaper company filed suit challenging the restrictions as violations of the First and Fourteenth Amendments.

The prospective jurors were questioned about several highly charged issues imbedded in the trial. Among them was the fact that the defendant was a black man with a prior conviction for raping a white girl; he was here accused of raping and killing another white girl, and execution was a potential sentence and a matter of public controversy. More than one juror revealed they had been sexually abused at some point in their lives.¹⁵² Revelations about these issues were matters that should be kept private, according to defense attorney Joseph Peter Meyers. He argued in an *amicus curiae* brief on behalf of prospective jurors that a juror “should not have to be deprived of all privacy rights, or risk exposure of his or her most intimate feelings and experiences to broad segments of the public who have no need for such information.”¹⁵³

¹⁵¹ 464 U.S. 501 (1984).

¹⁵² Brief Amicus Curiae in Support of Respondent at 6, *Press-Enterprise* (No. 82-556).

¹⁵³ *Id.* at 3.

Attorneys for the *USA Today* newspaper and other news organizations argued conversely in their *amicus* brief that until this case, “no state or federal court has found a right of privacy protecting the disclosure of facts relevant to one’s qualification to serve as a juror.”¹⁵⁴ The brief went on to claim that “a juror cannot avoid disclosure of personal information when the information is necessary to determine the juror’s fitness to decide those issues. Public scrutiny is equally important in each instance.”¹⁵⁵

By the time the newspaper’s complaint about being denied access to the questioning of jurors reached the Supreme Court, resolution of the case depended on an answer to a single question: Does the constitutional guarantee of public criminal trials include the *voir dire* of potential jurors? The Court ruled that it does. Nonetheless, in extraordinary circumstances, narrowly defined portions of the *voir dire* could be closed if the trial judge could articulate the specific overriding privacy interests that required closure and demonstrate that there was no other way to protect those interests. The ruling placed a higher value on the free press, fair trial, and open trial interests by establishing a presumption that *voir dire* must be open to the press and the public. The ruling also clearly indicated that at times the privacy interests would be superior. “[A] valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.”¹⁵⁶

Although the Court’s judgment was unanimous, three Justices wrote separate concurrences to explain what the ruling did not do. Justice John Paul Stevens emphasized

¹⁵⁴ Brief *Amici Curiae* in Support of Petitioner at 18, *Press-Enterprise* (No. 82-556).

¹⁵⁵ *Id.* at 20-21.

¹⁵⁶ 464 U.S. at 512.

that the right of access to *voir dire* proceedings comes from the First Amendment and not the Sixth.¹⁵⁷ Justice Marshall's concurrence addressed two issues, but he dealt first with the ambiguity that might have been engendered by the Court's main opinion:

I agree with the result reached by the Court but write separately to stress that the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which "deeply personal matters" are likely to be elicited in *voir dire* proceedings.¹⁵⁸

Justice William Blackmun addressed the Court's handling of the privacy issue saying, "I write separately to emphasize my understanding that the Court does not decide, nor does this case require it to address, the asserted 'right to privacy of the prospective jurors.'"¹⁵⁹ He indicated that while privacy interests were important, this ruling did not elevate them to the level of a constitutional right.

The majority holding can be viewed as a victory of First Amendment interests over privacy interests because the Court ruled that the *voir dire* proceedings are presumptively open. But the holding also allows the jurors' privacy interest to prevail in some narrowly defined circumstances.

Summary and Conclusions

Law scholars, jurists, legislators, and many of the American public have long expressed belief in the sanctity of privacy and the need for law to protect it. Some have found

¹⁵⁷ *Id.* at 516 (Stevens, J., concurring).

¹⁵⁸ *Id.* at 520 (Marshall, J., concurring).

¹⁵⁹ *Id.* at 513. (Blackmun, J., concurring).

justification in the penumbra of the Constitution and basic notions of human dignity for placing such a high value on privacy. Privacy became a social issue and invasions of it became a social problem at the twilight of the 19th century as the country became more industrialized and urban. City newspapers began widely publicizing information that previously circulated, if at all, among smaller social groupings in rural communities by discreet word-of-mouth communication. When newspapers began boldly discussing matters that previously would have been talked about in hushed tones or only among a select few, public sensibilities were enflamed in some quarters. Legal scholars sought and found rationales for the right to be let alone; popular outcries arose against yellow journalism; and eventually journalists themselves rebuked members of their profession for depredations against privacy. As a result, this social problem was attacked with moral, ethical, and legal strictures. Journalists tried to restrain but not fully eliminate press intrusions by making privacy concerns a prominent and common feature of their codes of ethics. Statutes and the common law also were applied to solve the problem and recorded some initial successes on the state level. However, when privacy cases were appealed to the U.S. Supreme Court, particularly invasion of privacy tort cases, the privacy interest was pitted against free press interests and generally lost. Once the Court determined that an otherwise private matter had become a matter of public concern or newsworthy, the basic privacy tort – public disclosure of private information – became an ineffective remedy. When the Court revealed a reluctance to allow civil or criminal penalties against the press for disseminating private information that was true or had been made public by deliberate or inadvertent government action, the tort and related legal actions also were severely undermined. Privacy became a nearly inconsequential issue when the Court reviewed false light tort cases because the focus shifted

to the level of fault that caused the false assertion at issue. In order for a false light plaintiff to prevail, the Court said, not only must the harmful assertion be false, it must be the result of actual malice, that is, the assertion must be deliberately or recklessly false.

All four privacy torts – false light, appropriation, intrusion and public disclosure of private information – or the privacy interests related to them were addressed by Court rulings between 1947 and 2005 and were construed by the Court to protect the same privacy interests that journalism codes of ethics sought to protect. Accordingly, when the Court’s edicts valued privacy interests less than other competing interests, the efforts of the journalism codes were unsupported or undermined. But the codes and the Court were in agreement when the privacy interests at the heart of a case were those of a public official or public figure and the otherwise private or sensitive information was newsworthy or a matter of public concern. Both made provision for invasions of privacy under these conditions.

The justices’ words indicated that they value the principles of privacy at least as highly as the journalism ethics codes do, but their rulings have not borne out those valuations. In tort cases, free press interests generally have prevailed against privacy interests. As Justice Fortas observed in his *Time v. Hill* dissent, the Court’s written opinions are filled with “the ringing words of so many members on so many occasions in exaltation of the right of privacy,” but the controlling opinion “discloses hesitancy to go beyond the verbal acknowledgment.”¹⁶⁰

The Court’s valuation of privacy interests increased significantly when they arose in cases that did not involve any of the privacy torts. In the two Freedom of Information Act cases examined in this chapter, for example, the privacy interests asserted under the privacy

¹⁶⁰ 385 U.S. at 416 (Fortas, J., dissenting).

exemptions to the law prevailed in contests with the news media's access claims. This can be traced largely to the Court's interpretation of the legislative intent that produced the law and the justices' grouping other interests, such as physical safety, religious freedom, and sensitivity to survivors, within the rubric of privacy. The Court decisions construed as private much information that is publicly available or in government records. Information such as records of citizenship and criminal activity was deemed to have become private once the federal government had compiled those records and an outside party tried to gain access to them. The cases in this section indicate the often inconsistent and illogical distinctions made about the nature of privacy as defined by statute, the Constitution, and common law. It was the application of these varying definitions that usually determined whether privacy interests would be valued above or below free press interests.

A broader analysis of the Court's treatment of privacy concerns indicates that the role the government was asked to play in these cases was dispositive of the outcome. When the government was asked to approve or impose civil or criminal liability on a media defendant for publishing information it had already obtained, as in *Cox Broadcasting Co. v. Cohn*, *Florida Star v. B.J.F.*, *Oklahoma Publishing. Co. v. District Court* and *Smith v. Daily Mail*, the free press interest clearly prevailed over the privacy interest and the punishments were not allowed. The free press interest prevailed in *Time v. Hill*, even though the published information was not true. When the government was asked to provide information or facilitate a media request for information that arguably invaded someone's privacy, as in *U.S. Department of State v. Washington Post Co.*, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* and *Seattle Times Co. v. Rhinehart*, the privacy interest prevailed over the free press interest. In these cases the Court was adhering to its established

edict that the First Amendment generally does not create a right to gather news or, more precisely, a right of access to information. As a result, the privacy interest as defined and supported by federal law and state court rule prevailed. Although the Court has determined that there is no general First Amendment right of access to information, it has found a First Amendment right of access to court proceedings. That exception makes this analysis applicable to the rulings in *Press Enterprise v. Superior Court* and *Globe Newspaper Co. v. Superior Court*, where the privacy interests did not prevail. In effect, this exception creates one area in which the First Amendment operates as a Freedom of Information Act. The Court has not said that all court proceedings must be open, but only a compelling interest would be sufficient to close them, and such determinations would be made on a case-by-case basis. No such interest was found in *Press Enterprise* or *Globe Newspaper*. A more basic analysis of the cases indicates that the Court has been unwilling to facilitate the public dissemination of information deemed private, but once such information has been publicized, the Court has been unwilling to allow the media to be punished for having made the exposures.

CHAPTER FIVE

Civic Responsibility: A Casualty of Ethical Principle

As the tally of American troops killed in Iraq spiked upward in the spring of 2004, *The Seattle Times* openly defied a federal ban on photographing soldiers' coffins enroute to grieving families for burial. The front page of the newspaper's April 18 edition showed a procession of flag-draped coffins aboard a transport plane in Kuwait.¹ The newspaper's editors knew the Pentagon had forbidden taking such pictures since 1991 and that federal officials "had issued a stern reminder of that policy in March 2003."² They also knew the policy had been challenged in court soon after it was announced and that a federal appeals court ruling in 1996 allowed the ban to remain.³ Nonetheless, *The Seattle Times* made an ethics-based decision to publish the photograph of coffins. It was open defiance of the law and a refusal to comply with a duly promulgated and judicially tested government policy. For those reasons, some of the newspaper's readers condemned the publication of the photo as an immoral, illegal, and unethical act.⁴ Such condemnation is a common and perhaps inevitable

¹ See Hal Bernton, *The Somber Task of Honoring the Fallen*, THE SEATTLE TIMES, Apr. 18, 2004, at A1. The photograph of the coffins accompanied this news article. The photograph was not taken by a newspaper employee, but was supplied by a Seattle-area resident who was employed by a private military contractor in Kuwait.

² See Ray Rivera, *Images of War dead a Sensitive Subject*, THE SEATTLE TIMES, Apr. 22, 2004, at A22.

³ *JB Pictures, Inc. v. Department of Defense*, 86 F. 3d. 236 (D.C. Cir.) (1996). The ruling focused specifically on press access to coffins at the U.S. Air Force base in Dover, Delaware, but the Defense Department policy at issue applied in both instances.

⁴ A majority of the written reader responses to the issue that were published in the newspaper or its online edition praised the editors for publishing the photos. See *What Readers are Saying*, THE SEATTLE TIMES (Apr.

consequence when morality, law, and journalism ethics collide. This chapter examines the collisions that ensue when ethical principles and directives encourage journalists to violate the letter of the law or the public policy it embodies.

Four Ethical Directives to Break the Law

For the limited purposes of this examination, morality, law, and ethics can be defined as guides to proper behavior. Because they often agree on what is proper, morality and ethics are sometimes codified in law. But the three also can make opposing determinations of propriety because they address separate responsibilities and duties. Law establishes the civic responsibilities and duties people owe to their governments and civic community. Morality establishes the major responsibilities and duties people owe to society and the human race. Ethics define the responsibilities and duties a person owes to society based on his or her specifically defined role in that society or civic community.⁵ Morality, law, and ethics serve overlapping constituencies and often operate in tandem, but the nature of that service sometimes causes conflict. Those conflicts are defined here as ethical and moral dilemmas that have to be resolved through a painstaking, reasoned, and value-laden process.

Readers of *The Seattle Times* had witnessed the resolution of one such dilemma and criticized the outcome. Their criticism of the “illegal” publication of the photo is grounded in

22, 2004) available at http://seattletimes.nwsourc.com/html/localnews/20019099336_webreaders22.html (last visited July 27, 2005).

⁵ To illustrate these definitions consider the fact that morality condemns murder and guides people to take action to punish murderers. Law codifies this moral rule by making murder a crime and by prescribing the most severe punishments. But the ethics codes created for those in the specifically defined role of criminal defense attorney require them to zealously protect murderers from punishment. Ironically, the law also prescribes punishment for attorneys who do not fulfill these ethical duties. See American Bar Association Model Rules of Professional Conduct (2004), available at http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM (last visited March 15, 2006).

the assumption that every citizen has a fundamental moral duty to obey the law in accord with the primordial social contract that lifts humans out of anarchy and the barbaric state of nature.⁶ And despite some claims that equating law breaking with moral transgression is indicative of immature moral development,⁷ the type of moral condemnation made by *The Seattle Times* readers is historically quite common in a variety of contexts and arises among people who are arguably mature and morally astute.

In response to reader criticism, the newspaper publicly and painstakingly addressed the ethics of taking and publishing the photograph. It described the photograph as “undeniably news worthy”⁸ and justified journalists’ use of even graphic war photographs “because it is their job to convey what is happening.”⁹ But its explanation focused almost exclusively on privacy issues. The editors did not address or seem to struggle at all with the moral propriety of breaking the law or flouting a government directive that a federal appeals court had found valid.¹⁰ Nor did the fundamental concepts of civic responsibility or the intrinsic civic duty to comply with the law arise in the newspaper’s explanation for its actions. It was as if this violation of the spirit or the letter of the law was an automatic, pre-ordained reaction and not the culmination of the careful consideration required when the law, morality, and ethical principles collide headlong.

⁶ Obeying the law is widely identified as a civic duty and civic responsibility. *See, e.g.* Daniel Warner, *Citizenship, in*, ENCYCLOPEDIA OF APPLIED ETHICS VOL. 1, 493 (Ruth Chadwick ed., 1998) “[T]o be a good citizen requires following the laws.”

⁷ *See generally*, LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT : MORAL STAGES AND THE IDEA OF JUSTICE* (1981).

⁸ *See* Michael R. Fancher, *Powerful Photograph Offered Chance to Tell an Important Story*, *THE SEATTLE TIMES*, Apr. 18, 2004, at A2.

⁹ Editorial, *The Photo That Stirred a Nation*, *THE SEATTLE TIMES*, Apr. 25, 2004, at D2.

¹⁰ Fancher, *supra* note 8.

Some of the newspaper's readers found the contravention of law unacceptable. "*The Seattle Times* is guilty of trafficking [in] stolen merchandise," one reader complained in the newspaper's online edition.¹¹ Another arrived at the civic and ethical crux of the matter by writing: "[T]aking the photograph was against the law. Obviously, you think that people should break the law if they don't agree with it."¹² Moral philosophers as venerable and diverse as Plato, Socrates, Thomas Hobbes, John Locke, and Jean Jacques Rousseau have insisted that citizens, as part of the basic social contract, have a moral obligation to obey the law.¹³ More recently, Boston University law professor Randy E. Barnett asserted "most citizens think that when a command is called a 'law,' it carries with it a moral duty of obedience. . . ." ¹⁴ Duke University law professor George C. Christie also has argued in support of this duty and concluded, as if validating *The Seattle Times* readers' complaints, "[I]f ordinary people believe that there is a moral obligation to obey the law, who is to say that they are wrong. Nor am I persuaded that we should want to say that they are wrong."¹⁵

The Seattle Times' willful decision to violate the law and government policy was not an aberration. Indeed, American journalists have a long history of flouting the widely touted

¹¹ *What Readers are Saying*, *supra* note 4.

¹² *Id.*

¹³ *See generally* SAMUEL ENOCH STUMPF, *MORALITY AND THE LAW* 181-242 (1966); JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES*, (G. D. H. Cole, trans. Dutton, 1959) (1762); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., 1980) (1690); THOMAS HOBBS, *LEVIATHAN* (Oakeshott ed. 1960) (1651).

¹⁴ Randy E. Barnett, *Constitutional Legitimacy*, 103 *COLUM. L. REV.* 111, 116 (2003).

¹⁵ George C. Christie, *On the Moral Obligation to Obey the Law*, 1990 *DUKE L. J.* 1311, 1336 (1990). *See also* W. Bradley Wendel, *Civil Obedience*, 104 *COLUM. L. REV.* 363, 65 (2004), "A person who sincerely believes that a law is morally wrong nevertheless has an obligation to obey it, because the law represents a social decision about what ought to be done, collectively speaking, in the circumstances of persistent disagreement." *But see* J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?* 82 *YALE L. J.* 950 (1973).

civic responsibility and moral duty to obey the law. It is a journalistic practice that predates the First Amendment, which is the commonly cited defense and justification for these acts of apparent civic irresponsibility. Colonial American newspaperman John Peter Zenger achieved legendary status by defying well-established law. He published libels against the governor of New York, refused to identify the source of those libels, and asserted the then-unlawful truth defense at his trial in 1735.¹⁶ For these arguably unethical acts of civic irresponsibility, Zenger is widely regarded as perhaps the first hero of American journalism.

The roster of law-breaking and authority-flouting journalists has grown long during the ensuing centuries. Within their profession they often are considered heroes or even martyrs. Gossip columnist Marie Torre of the *New York Herald Tribune* defied a federal court order in the 1950s to become the first journalist to claim a First Amendment privilege to conceal the identity of a news source. The court said there was no such privilege.¹⁷ *New York Times* reporters Earl Caldwell and Myron Farber earned laurels in the 1970s by refusing in separate episodes to obey court orders to reveal their sources or testify about them.¹⁸ The U.S. Supreme Court declined to hear Farber's case but accepted the cases of Caldwell and two similarly situated journalists. It did not find the journalists' refusal fully justifiable but about three decades later, putative journalist Vanessa Leggett used the same arguments in an effort to justify her refusal to comply with a similar court order. Leggett was jailed for 168 days after refusing to surrender materials law enforcement officials said they needed to pursue a murder investigation. Her travails were recounted by the news media in a largely

¹⁶ See A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley Nider Katz ed., 1972).

¹⁷ See *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

¹⁸ See *In re Farber*, 78 N.J. 259, *cert. denied*, 439 U.S. 997 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

sympathetic and supportive manner. One such account of her fight with the law bore the headline: “The Making of a First Amendment Martyr.”¹⁹ Among her accolades was the \$25,000 PEN/Newman’s Own First Amendment Award, which was bestowed upon her in 2002 for being “a hero in the effort to preserve investigative freedom for writers and journalists.”²⁰

These were but a few of the many journalists who rejected the civic responsibility to obey the law and whose actions were in accord with ethical principles. This chapter examines how these principles have been addressed by U.S. Supreme Court rulings from 1947 through 2005. These rulings focus on ethics-based journalism practices that run afoul of civic responsibility and that journalists claim are required and protected by the First Amendment. This examination continues this dissertation’s analysis of how the Court has addressed fundamental principles of journalism ethics. Each Court ruling examined here was prompted by the actions of people who did or could claim to be upholding at least one of the following principles or directives of ethical journalism: the duty to gather and report news, maintain independence, protect the First Amendment, and protect confidential sources. Each of these principles is presented by the codes in such a manner that compliance with each is being faithful to and protecting the role the First Amendment establishes for journalists. The Amendment is interpreted in such a manner that it protects and justifies some civic irresponsibility. These principles and directives have promoted practices that conflict at times with civic responsibilities. In the two prior chapters, which analyzed Court rulings that

¹⁹ Paul McMasters, *The Making of a First Amendment Martyr*, (Aug. 22, 2001), available at <http://www.freedomforum.org/templates/document.asp?documentID=14670>.

²⁰ Free Expression Network, *Vanessa Leggett to Receive 2002 PEN/Newman’s Own First Amendment Award* (Apr. 11, 2002), available at http://www.freeexpression.org/newswire/0411_2002.htm.

addressed the principles of truth telling and respect for privacy, adherence to those principles usually was consistent with the law. But in the cases examined for this chapter, the journalists' allegiance to ethical principles has led them to break the law, defy court orders, or flout their government's policy.

The first section of this chapter is an examination of the longstanding notion that citizens have a moral duty to obey the law. This section includes an assessment of some moral and civic justifications for abandoning that duty.²¹ The second section of the chapter examines how the ethical principles and directives this study links to civic irresponsibility have been promoted by journalism ethics codes as well as the landmark Hutchins Commission Report, which is perhaps the best known written advocacy of ethical, socially responsible journalism.²² The third section of this chapter is an analysis of Supreme Court rulings in cases involving lawbreaking traceable to those ethical principles and directives. It also includes an examination of the general conflict between law and journalism ethics. The fourth and final section identifies a nascent movement by journalists to reconcile their ethical duties with their civic responsibilities.

The Moral Duty to Obey the Law

It may be impossible to determine precisely when the duty to obey the law became widely accepted as a basic civic and moral responsibility, but the concept was already in play in the 5th century B.C. as indicated by the iconic Greek philosopher Plato's use of Socrates as

²¹ This section of the discussion relies on many of the icons of moral philosophy and civil disobedience used in a more general analysis of legal and moral imperatives by Professor Robert P. Lawry. See Robert P. Lawry, *Ethics in the Shadow of Law: The Political Obligation of a Citizen*, 52 CASE W. RES. L. REV. 655 (2002).

²² COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (Robert D. Leigh ed., 1947).

a rhetorical device to explore the intersection of civic and moral duties. Through much of the 20th century and into 21st century A.D., Western philosophers such as John Rawls affirmed the duty to obey the law.²³ Others have questioned when or whether such a duty exists.²⁴ Socrates may have performed the ultimate act of civic responsibility when he killed himself in accord with a court order even though he found that order patently unjust. Socrates, as depicted by Plato in *Crito* and *The Apology*, examined the moral basis of the citizens' duty to their government and its laws.²⁵ Socrates is a fitting vehicle for this dissertation's discussion of journalists caught between legal duty and ethical imperatives because he was enmeshed in a similar dilemma. He too ran afoul of the law by following his ethical principles. He was convicted of corrupting the youth of Athens and other acts of impiety that he considered necessary pursuant to his duties as a philosopher and teacher. When an Athenian court convicted him, he condemned its judgment as unjust, but willingly complied with the government order to kill himself by drinking poisonous hemlock. He reasoned that it was his moral duty to obey the law or legal judgments of his government even when he believed them wrong. Socrates argued that he owed obedience to his government because to disobey the will of the duly constituted civic authority was to attack and damage it. The society made possible by government would die if citizens could flout the law that bound it together. He also said he owed the government obedience because as a citizen he had been cared for by the government and because he had agreed to obey its laws.

²³ See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Christie, *supra* note 15; Raz, *supra* note 15; Lawry, *supra* note 21.

²⁴ See Raz, *supra* note 15; Smith, *supra* note 15.

²⁵ See *THE COLLECTED DIALOGUES OF PLATO* (Edith Hamilton & Huntington Cairns eds., 1989).

These notions of civic damage and civic agreement were intrinsic to the social contract theory that was formally introduced to Europe in the 17th century by Thomas Hobbes as elaborations on the citizen's duty to obey the law.²⁶ *Leviathan*, Hobbes' best-known work, postulated that humans escaped the back-biting, life-threatening, anarchistic condition he referred to as the state of nature by creating governments to establish and maintain order. Government is the product of a social contract through which people willingly surrender some measure of the freedom they had in the state of nature and agree to follow their government's laws in return for security and stability, according to Hobbes. Each breach of the promise of obedience to the government damages the government and threatens to return the citizen to the dreaded state of nature. Late 17th century philosopher John Locke affirmed the civic duty to obey the law in his classic *Two Treatises on Government*, but he cast that duty as revocable.²⁷ He constructed a less hostile version of Hobbes' state of nature concept as he expanded the social contract theory to include situations in which a person is relieved of the civic duty to obey the law when the government does not live up to its responsibilities. He even encouraged the eradication of irresponsible governments, but called for the formulation of a new government by agreement. Jean-Jacques Rousseau's 18th century writings also reaffirmed the citizen's duty to obey the law in accord with the social contract, but he emphasized the reciprocal duty of the government to uphold its agreements with the citizen.²⁸

²⁶ Hobbes, *supra* note 13.

²⁷ Locke, *supra* note 13.

²⁸ Rousseau, *supra* note 13.

These seminal philosophical discourses on the moral duty to obey the law have remained vibrant and in play for centuries. Their themes are apparent in the wording of a 1994 ruling made by U.S. District Judge William M. Hoeveler as he proceeded with criminal contempt charges against journalists of the Cable News Network who openly defied his order against televising the confidential conversations that Panamanian drug trafficker and political strongman Manuel Noriega had with his legal counsel.

The thin but bright *line between anarchy and order* – the delicate balance which ultimately is the vital protection of the individual and the public generally – is the *respect which litigants and the public have for the law* and the orders issued by the courts. Defiance of court orders and, even more so, public display of *such defiance cannot be justified or permitted*.²⁹

Although the duty to obey the law is widely regarded as a fundamental and moral obligation of citizenship, no major philosopher has said it is absolute. As with other moral obligations, obedience to law must yield when there is sufficient justification. Professor John Rawls declared in 1964, “I shall assume . . . that there is, at least in a society such as ours, a moral obligation to obey the law, although it may, of course be overridden in certain cases by other more stringent obligations.”³⁰ Even Socrates in his address to the Athenian jurors said he would reject a court order that prohibited him from philosophizing because he believed he was morally obligated to be a philosopher and that obligation outweighed his civic duty. “Gentlemen, I am your grateful and devoted servant,” he said. “[B]ut I owe a greater obedience to God than to you and so long as I draw breath and have my faculties, I shall

²⁹ United States v. Cable News Network, Inc., 865 F. Supp. 1549, 1564 (S. D. Fla. 1994) (emphasis added).

³⁰ John Rawls, *Legal Obligation and the Duty of Fair Play*, LAW AND PHILOSOPHY: A SYMPOSIUM 3 (Sidney Hook ed., 1964).

never stop practicing philosophy and exhorting you and elucidating the truth for everyone that I meet.”³¹

Journalists who defy the law on ethical principle match the Socratic model in some respects. They too often claim a professional calling to elucidate the truth that morally overrides their civic obligation to accept or comply with the government’s interpretation of the First Amendment. Their codes of ethics provide the justification and motivation to openly defy the law. These deliberate violations of law, while encouraged by ethics codes are also apparently intended to effect change in the law or public policy. By the middle of the 20th century this type of activity widely came to be called civil disobedience. Its practitioners claimed justification for their lawlessness because the laws at issue conflicted with a higher moral principle and were therefore trumped. They were, in effect, following a moral directive that placed their actions beyond the reach of law. Indeed, under such circumstances many prominent moral philosophers have found it morally responsible to disobey some laws. Henry David Thoreau, the 19th-century Massachusetts philosopher and author of the influential essay titled “Civil Disobedience,” insisted that matters of conscience should trump civic responsibility.³² His conscience compelled him not to pay a state poll tax though he did not dispute poll taxes in general. His complaint was against the United States’ war with Mexico and the federal laws protecting slavery.³³ Civil disobedience has been defined in

³¹ THE COLLECTED DIALOGUES OF PLATO, *supra* note 25, at 15 (*Apology*). Socrates referred to his moral obligation to philosophize or teach as a duty imposed upon him by his god, but modern philosophers have interpreted that sense of religious piety as matters of conscience or moral duty. *See, e.g.*, T. A. SINCLAIR, A HISTORY OF GREEK POLITICAL THOUGHT (1967); N. GULLEY, THE PHILOSOPHY OF SOCRATES (1968).

³² *See*, HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (David R. Godine ed., 1969) (1849). The essay was originally titled “Resistance to Civil Government,” but was renamed “Civil Disobedience” when published after Thoreau’s death.

³³ *Id.*

many ways. Some scholars have said that Thoreau, although often cited as the originator of the term, did not actually engage in civil disobedience because his resistance was not public enough and the law he broke had little or nothing to do with the law and public policy he opposed.³⁴ For the purposes of this discussion, much of the journalists' behavior cited here bears many of the characteristics of civil disobedience because it consists of intentional public lawbreaking in pursuit of a moral principle by a person who does not flee legal punishment, or seek anarchy or complete dissolution of the government.³⁵ Its major failing as civil disobedience exists in the fact that journalists generally do not mount campaigns to break any laws to challenge their moral validity; the lawbreaking occurs as a matter of course in the process of practicing journalism. Archetypal American civil disobedients, however, do not engage in illegal behaviors in the course of doing something else. American civil rights activists of the 1960s, for example, did not illegally sit at segregated lunch counters or drink from whites-only water fountains because they became hungry or thirsty.³⁶ They clearly wanted the law to prosecute them, but it may be safe to assume that journalists would prefer not to rouse enforcement of the laws they break. They clearly would prefer to get back to the work of gathering and reporting news without any legal entanglements.

In the 20th century, civil rights leader Martin Luther King Jr. became the most visible American proponent of civil disobedience based on moral principle. The Civil Rights Movement of the 1960s relied heavily on deliberate law breaking to end racial discrimination

³⁴ See e.g., Lawry, *supra* note 21; David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, PHIL. & PUB. AFF. , Winter 1998, 31-49; William A. Herr, *Thoreau: A Civil Disobedient?* 85 ETHICS 87 (1974).

³⁵ See ELLIOT M. ZASHIN, *CIVIL DISOBEDIENCE AND DEMOCRACY* (1972) for a similar definition of civil disobedience.

³⁶ See generally DAVID GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986).

and segregation in the Southern states. Opponents criticized King and his followers as law breakers who had abandoned their civic responsibility. Historian James A. Colaiaco framed the opposition's position in nearly Socratic terms. "In effect, the racists said to the blacks: 'For the sake of law and order, you must submit to a social system, even though you believe it to be unjust.'"³⁷ Others said King's actions threatened to unleash anarchy and were creating "a legacy of lawlessness."³⁸ These also were the underlying themes of "An Appeal for Law and Order and Common Sense," a statement published by eight Alabama clergymen in the *Birmingham News* on April 12, 1963, to criticize King's non-violent, but disruptive flouting of the law.³⁹

King's public response, the historic *Letter from a Birmingham Jail*, eloquently laid out the moral basis of his action and reaffirmed his basic civic allegiance.⁴⁰ His rationale is applicable in many respects to journalists who break the law pursuant to ethical principle. The letter addresses the clergymen who signed the appeal.

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. . . . I agree with St. Augustine that "an unjust law is no law at all." . . . Sometimes a law is just on its face and unjust in its application. . . . In no sense do I advocate evading the law. . . . That would lead to anarchy. One who breaks an unjust law must do so openly. . . . I submit that an individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice is in reality expressing the highest respect for the law.⁴¹

³⁷ James A. Colaiaco, *Martin Luther King Jr. and the Paradox of Nonviolent Direct Action*, 47 *PHYLON* 16, 18 (1986).

³⁸ Frank Meyer, *Showdown with Insurrection*, *NAT. REV.*, Jan 16, 1968, at 36; *See also* LIONEL LOKOS, *THE LIFE AND LEGACY OF MARTIN LUTHER KING* 460 (1968).

³⁹ The text of the "Appeal for law and order and common sense" is available online at the Birmingham Public Library; <http://www.bplonline.org/Archives/faqs/letterrespondedtobymartinlutherking.asp>.

⁴⁰ The text of the letter is reprinted in Alton Hornsby, Jr., *Martin Luther King, Jr., Letter From a Birmingham Jail*, *J. NEGRO HIST.*, Winter-Autumn 1986, at 38-44.

⁴¹ *Id.* at 40-41.

In a manner that roughly parallels King’s reasoning, journalists who violate the law pursuant to ethical principle generally claim in defense that the First Amendment is a just law that is being applied unjustly when the government and its judges interpret it in a manner that would thwart journalism’s ethical directives by not providing them a full measure of protection against other laws and court orders they consider unjust when applied to themselves. They routinely accept the government’s punishment after exhausting their legal challenges of the law and profess no disrespect for the United States or the Constitution. They do not attempt anarchy, but their conscience – as guided by journalism ethics codes – tells them that some applications and interpretations of First Amendment law are unjust and must be resisted.

Ethical Justification for Lawless Conduct

Journalists who engage in these types of civic irresponsibility or civil disobedience can find encouragement and justification in four fundamental ethical principles and directives: report the news,⁴² remain independent, protect the First Amendment and protect confidential sources. These principles can provide the justification for what may be described in King’s parlance as “acts of civil disobedience that have roused the conscience of the community.”⁴³ American lawmakers, apparently roused by the highly publicized struggles of journalists against some arguably unjust interpretations of the law, had enacted press shield laws in 31 states and the District of Columbia by 2005 and introduced legislation to create a

⁴² The definitions of “news” and “newsworthy” are varied and necessarily elastic. For the purposes of this examination, news and newsworthy refer to those issues and occurrences that are matters of public concern.

⁴³ Hornsby, *supra* note 40 at 41.

federal press shield law.⁴⁴ The widespread adoption of state shield laws followed repeated instances during the 1970s of journalists refusing court orders to identify their confidential sources and claiming an ethical obligation and a First Amendment right to do so. A 2005 proposal to create a federal press shield law to provide journalists some measure of protection against government subpoenas and forced disclosure of sources directly flowed from the highly publicized federal action begun in 2003 against journalists targeted in an investigation of the public disclosure of Valerie Plame's status as an undercover operative for the Central Intelligence Agency.⁴⁵ Journalists in each of the instances referred to above defied legal edicts that would have them violate basic ethical principles or shirk their duties.

These principles establish an affirmative duty to gather and report the news. This duty is necessarily as compelling as the journalist's obligation to tell the truth, the most heralded principle of ethical journalism. Ideally, the two duties are inseparable. Perhaps because the duty to report is so basic, it is not always expressed explicitly in journalism ethics codes but it is affirmed in every one examined for this study. It is such an overarching imperative that other ethical principles were created to restrain or guide it. These other principles, for example, indicate how this fundamental duty to report matters of public concern is to be executed – truthfully, independently, with a respect for privacy, and in a manner that minimizes harm.⁴⁶ Most of the written codes examined in this study apparently assumed

⁴⁴ See KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 508 (6th ed. 2005); David B. Smallman, *Federal Shield Law Introduced in House*, *THE IRE J.*, March/April 2005, at 2; CONG. REC. S 9423 (daily ed. July 29, 2005) (statement of Sen. Dodd).

⁴⁵ See Jim Abrams, *House Lawmakers Introduce Bill to Protect Reporters from Subpoenas*, Associated Press (Feb. 2, 2005) http://web.lexis-nexis.com/universe/document?_m=db4531d5d029e851600da8f2b6945d4d.

⁴⁶ See, e.g., Society of Professional Journalists Code of Ethics, *available at* http://www.spj.org/ethics_code.asp (last visited Feb. 27, 2006) [hereinafter SPJ Code]; RTNDA Code of Ethics and Professional Conduct, *available at* <http://www.rtna.org/ethics/coe.html> (last visited April 8, 2004) [hereinafter RTNDA Code]; Gannett

journalists needed no encouragement to gather and report news. Accordingly, the codes focused most of their directives on how this affirmative duty was to be performed. The power of this fundamental ethical directive is so great that it apparently has the ability to induce journalists to set aside the moral duty to obey the law. Legal prohibitions are not necessarily seen as waivers of the duty to gather and report news.

The first sentence of the Canons of Journalism — one of the earliest and most influential statements of journalism ethics — provided journalism’s fundamental ethical impetus in 1923 as it declared: “The primary function of newspapers is to communicate to the human race what its members do, feel, and think.”⁴⁷ The codes created in the ensuing decades have affirmed that seminal directive implicitly, explicitly, and consistently. The 1987 incarnation of the code developed by the Society of Professional Journalists, for example, informed its members that “[t]he public’s right to know events of public importance and interest is the overriding mission of the mass media.”⁴⁸ This imperative to report remained compelling at the start of the 21st century as indicated by journalism ethics professor Christopher Hansen’s declaration in the *Columbia Journalism Review* in 2003 that “[i]nforming the public is a key principle of journalism.”⁴⁹ The Associated Press Managing Editors’ ethics code agreed and stated, “The public’s right to know about matters of

Newspaper Division, Principles of Ethical Conduct for Newsrooms, *available at* <http://www.gannett.com/go/press/pr061499.htm> (last visited April 6, 2005) [hereinafter Gannett Principles].

⁴⁷ Canons of Journalism, *reprinted in* NELSON ANTRIM CRAWFORD, THE ETHICS OF JOURNALISM 183 (1924).

⁴⁸ The Society of Professional Journalists, Sigma Delta Chi, Code of Ethics, *reprinted in* JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 4 (1993).

⁴⁹ Christopher Hansen, *Weighing the Costs of a Scoop*, COLUM. JOURNALISM REV., Jan. / Feb. 2003, at 35.

importance is paramount.”⁵⁰ Ben Bradlee, the legendary editor of *The Washington Post*, was quoted in a journalism trade magazine referring to “our God-given duty to report the news.”⁵¹ In 2005, the Society of Professional Journalists continued to extol the duty to report. “The duty of the journalist is . . . seeking truth and providing a fair and comprehensive account of events and issues.”⁵² This wording resembles the statement made more than a half century earlier by the Hutchins Commission Report as it reiterated and reaffirmed the overarching duty to gather and report the news by listing it first among the five things the American polity required of its press: “Today our society needs, first, a truthful, comprehensive account of the day’s events.”⁵³

As the codes and the Hutchins Commission Report were goading journalists to gather and report the news, they also ascribed a duty to maintain journalistic independence and protect the First Amendment’s guarantee of free speech and the free press. “Freedom of the press is to be guarded as a vital right of mankind,” declared the second of the enumerated Canons of Journalism.⁵⁴ Three decades later, the Hutchins Commission Report indicated that its own work was motivated by a desire to preserve press freedom. The Commission’s pronouncements affirmed the primacy of those freedoms.⁵⁵ “Freedom of speech and the press is close to the central meaning of all liberty. Where men cannot freely convey their thoughts

⁵⁰ Associated Press Managing Editors, Ethics Code, available at <http://www.asne.org/index.cfm?ID=388> (last updated May 4, 2004).

⁵¹ Florence George Graves, *Protecting the Privilege*, AM. JOURNALISM REV., April 1998, at 22.

⁵² SPJ Code, *supra* note 46.

⁵³ COMMISSION ON FREEDOM OF THE PRESS, *supra* note 22, at 20.

⁵⁴ Canons of Journalism, *supra* note 47, at 183.

⁵⁵ Robert M. Hutchins, *Foreword* to COMMISSION ON FREEDOM OF THE PRESS, *supra* note 22, at vii.

to one another, no other liberty is secure,” the report said.⁵⁶ Here was an indication of the commission’s frequently expressed conviction that press freedom was a necessary and indispensable component of democracy. Journalism ethics codes also have reflected and consistently reinforced this assumed duty to protect press freedom. “Freedom of the press is to be guarded as an inalienable right of people in a free society,” announced SPJ’s 1987 code.⁵⁷ When the Associated Press Managing Editors released its revised ethics code in 1995, prominently listed among newspapers’ responsibilities was the following clause: “The newspaper should uphold the right of free speech and freedom of the press.”⁵⁸ The Principles of Ethical Conduct unveiled by the Gannett news corporation in 1999 similarly identified protecting press freedom as a journalistic duty geared to maintain democracy. Under the general heading of “Serving the public interest,” Gannett said, “We will uphold First Amendment Principles to serve the democratic process.”⁵⁹ The Hutchins Commission ascribed more than political value to press freedom; it was deemed a moral right as well. “It is a moral right because it has an aspect of duty about it,” the report said.⁶⁰ It asserted that this moral right was expressed as a legal right in the First Amendment, but the moral right had precedence.

Because of this duty to what is *beyond the state*, freedom of speech and freedom of the press are *moral rights* which the state must not infringe. The

⁵⁶ COMMISSION ON FREEDOM OF THE PRESS, *supra* note 22, at 107.

⁵⁷ The Society of Professional Journalists, Sigma Delta Chi, Code of Ethics, *supra* note 48.

⁵⁸ Associated Press Managing Editors, *supra* note 47.

⁵⁹ Gannett Principles, *supra* note 46.

⁶⁰ COMMISSION ON FREEDOM OF THE PRESS, *supra* note 50, at 8.

moral right of free expression achieves a legal status because the conscience of the citizen is the source of the continued vitality of the state.⁶¹

When *The New York Times* published a newly revised ethics code in 2003, it too made a nearly reverent reference to journalism's democratic purpose and "its solemn responsibilities under the First Amendment" and also appeared to assume a duty to maintain press freedom.⁶²

None of the aforementioned statements of journalists' ethical duty and responsibility explained or suggested moral or legal limitations on this obligation to protect and support press freedom and the First Amendment. There are, however, recurrent indications that an expansively interpreted First Amendment is an indispensable means of maintaining independence,⁶³ a principle of ethical journalism that was venerated in the earliest codes and remains enshrined in the latest. Indeed, independence was the third of the Canons of Journalism enumerated in 1923. This early ethical pronouncement informed journalists that "[f]reedom from all obligations except that of fidelity to the public interest is vital."⁶⁴ Similarly, in 2005 the Society of Professional Journalists' code was urging its members to "[a]ct Independently — Journalists should be free of obligation to any interest other than the public's right to know."⁶⁵ Broadcast journalists of the Radio-Television News Directors Association made the most explicit connection between independence and press freedom in the ethics code its members approved in 2000 and which remained in effect in 2005. It listed

⁶¹ *Id.* at 9 (emphasis added).

⁶² The New York Times, *Ethical Journalism Guidebook*, at 3 (Jan. 2003), available at <http://www.nytc.com/company-properties-times-coe.html>.

⁶³ The assumed interdependence of independence and the First Amendment is common among journalists and scholars. See, e.g. Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L. J. 895, 917 (1998). "The press's freedom under the First Amendment is a guarantee of independence."

⁶⁴ Canons of Journalism, *supra* note 47, at 184.

⁶⁵ SPJ Code, *supra* note 46.

independence as a major heading in its written code and included within it the responsibility to protect press freedom. “Professional electronic journalists should defend the independence of all journalists from those seeking influence or control over news content,” the broadcasters wrote.⁶⁶ RTNDA’s final directive under the “independence” rubric was, “Defend the rights of the free press for all journalists.”⁶⁷

Ethical directives that addressed independence generally sought to insulate news coverage from the influence of advertisers, media owners, special interest groups, and even journalists’ own personal interests. Directives supportive of press freedom and the First Amendment were apparently designed to forestall government influence on the news. In short, independence is presented in the codes as an ethical principle to be protected against private and government encroachment alike. Independence was to be maintained in fact as well as appearance.⁶⁸ Journalists who had apparent conflicts of interest were instructed to withdraw from the conflicting activity, fully disclose it, or withdraw from reporting on matters upon which their independence could be questioned or appeared to be compromised.⁶⁹ Partnerships with government were particularly odious to the independence principle, and journalists went to great lengths to avoid even the appearance of collaboration, particularly when the government’s judiciary or law enforcement agencies sought information acquired by journalists. This latter aspect of the independence principle

⁶⁶ RTNDA Code, *supra* note 46.

⁶⁷ *Id.*

⁶⁸ *See, e.g.*, SPJ Code, *supra* note 46. (directing journalists to “[a]void conflicts of interest, real or perceived.”).

⁶⁹ *Id.* (directing journalists to: “Remain free of associations and activities that may compromise integrity or damage credibility. . . . Disclose unavoidable conflicts.”)

encourages and justifies journalists' refusal to disclose even non-confidential sources and information when sought by the government.

While journalism ethics codes generally have been unequivocal in urging journalists to zealously protect the freedom and independence granted by the First Amendment, they do not explicitly acknowledge that neither the First Amendment nor any other federal law necessarily means precisely what it says. It has long been established in American jurisprudence that these laws ultimately mean only what the Supreme Court says they mean.⁷⁰ The first Chief Justice of the United States, John Marshall, essentially settled that matter more than 200 years ago when he wrote the decision in *Marbury v. Madison* and concluded, “[I]t is emphatically the province and duty of the judicial department to say what the law is.”⁷¹ The First Amendment’s statement that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁷² has never meant Congress shall make no such laws, according to the Supreme Court. It has never been interpreted by the Court in such absolutist terms. At best it has meant Congress should have a compelling reason when making such laws. Neither Congress nor the President — the first and second estates of government — is allowed to insist on its interpretation of the First Amendment or any other federal law. The First Amendment and the rest of the Constitution these elected government officials swear to uphold is the one created by Supreme Court interpretation. But the Fourth Estate has insisted at times on its own absolutist or fundamentalist interpretation of the Amendment’s text that no Supreme Court justice, with the possible exceptions of William O. Douglas and Hugo

⁷⁰ See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

⁷¹ 5 U.S. 137, 177 (1803). See also, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 77 - 85 (1993); DAVID P. CURRIE, THE CONSTITUTION OF THE UNITED STATES: A PRIMER FOR THE PEOPLE 14-24 (1989).

⁷² U.S. Const. amend. I.

Black, has ever sanctioned.⁷³ Ben Bradlee, for example, insisted on his interpretation as he condemned the Court's 1972 ruling in *Branzburg v. Hayes*,⁷⁴ which found journalists had no First Amendment privilege to conceal confidential sources when subpoenaed by a grand jury. "There is a privilege whether the Supreme Court says so or not," Bradlee declared.⁷⁵

Similarly defiant interpretations of the Amendment have been embedded in journalists' codes of ethics for nearly a century. The codes consider the First Amendment to be more than a legal document. They have treated it as holy text that creates a moral imperative, an entitlement, and, at times, a justification for law breaking. Since 1937 the Court has sought to disabuse journalists of this notion.⁷⁶ As the Court decisions examined in the next section will illustrate, its success has been limited. Some of the most notable failures have occurred when trying to compel journalists to identify their confidential sources. Journalists have been particularly adamant in following the ethical directive to protect these sources. To do otherwise would compromise independence. Compliance with subpoenas for confidential and non-confidential materials risks the appearance of collaboration with the government. Some ethics codes have openly directed journalists to defy subpoenas and other court orders in this cause. The code developed by the American Newspaper Guild, for

⁷³ See *Bridges v. California*, 314 U.S. 252 (1941); *New York Times v. United States*, 403 U.S. 713 (1971); Mary E. Fairhurst & Andrew T. Braff, *William O. Douglas Lecture: William O. Douglas: The Gadfly of Washington*, 40 GONZ. L. REV. 259 (2004-2005); Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221 (2002); HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 3-11 (1992).

⁷⁴ 408 U.S. 665 (1972).

⁷⁵ Graves, *supra* note 51.

⁷⁶ See *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Associated Press v. United States*, 326 U.S. 1 (1945); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946). In these cases the Supreme Court found the First Amendment did not immunize the press against laws of general application such as labor laws and anti-trust legislation.

example, told its members: “Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies.”⁷⁷

Beyond the Reach of Law

Journalists have defied the law and engaged in civic irresponsibility in two basic frameworks. They have flouted court orders instructing them to reveal news sources and have broken the law in pursuit of news. In both frameworks, journalists have relied on ethical principles to justify their actions and fundamentalist interpretations of the First Amendment to defend themselves against legal sanctions. This examination of Supreme Court decisions addressing these two frameworks will proceed thematically instead of chronologically.

Branzburg fits squarely within the first framework of civic irresponsibility. Journalists in that case gathered or published newsworthy information and then refused to comply with government orders to reveal their sources or provide other information that would facilitate government investigations of potential criminal behavior such as drug dealing and gun trafficking.⁷⁸

The Vanessa Leggett case similarly developed from a government demand for information from her to pursue a murder investigation,⁷⁹ and the Valerie Plame case involved journalists defying court orders issued in an investigation of a potentially life-threatening breach of national security law.⁸⁰ Each of these cases occurred long after the U.S. Supreme

⁷⁷ Newsman’s Code of Ethics *reprinted in* GEORGE L. BIRD & FREDERIC E. MERWIN, *THE PRESS AND SOCIETY* 592 (1971).

⁷⁸ 408 U.S. at 667-78.

⁷⁹ See Dan Eggen & Paul Duggan, *Jailing of Writer Sparks 1st Amendment Debate; Prosecutor Seeks Notes In Texas Murder Case*, WASH. POST, Aug. 1, 1001 at A3

⁸⁰ Howard Kurtz, *A Case Most Clearly Defined By Its Shadows*, WASH. POST, July 7, 2005 at A12.

Court had established that the First Amendment did not immunize journalists against laws of general application that applied to all citizens. In *Branzburg*, the Supreme Court specifically addressed subpoenas issued to journalists and ruled in accord with its precedents that the First Amendment did not place journalists beyond the reach of grand jury subpoenas that would be applicable to all citizens. Yet the same basic issue was presented in the Leggett and Plame cases decades later, and journalists raised the same ethical justifications and First Amendment defenses the Supreme Court had rejected in *Branzburg*.⁸¹ But the Court's 5-4 disposition of *Branzburg* was widely seen as an equivocal statement about journalists' ability to resist subpoenas and protect their sources from government inquiries. That ruling will be analyzed in greater depth later in this chapter.

The second framework of journalistic civic irresponsibility – breaking the law in pursuit of news – is illustrated by the Lawrence Matthews case. Matthews, a veteran journalist, was charged with violating a federal child pornography law. He defended himself by asserting that he was sending and retrieving the pornography via the Internet in order to make contacts with pedophiles and write news stories about this matter of public concern.⁸² He failed to convince the trial court judge and an appeals court that the First Amendment protected his activity. In fact, they would not even allow him to make that argument to a jury. His basic claim was that although he was in technical violation of the law, he did not have the same intent as a typical criminal. He broke the law to report on a matter of public concern the law was designed to solve. Journalists sometimes violate laws for the sole purpose of

⁸¹ See Douglas McCollam, *Attack at the Source, Why the Plame Case is So Scary*, COLUM. JOURNALISM REV., March 2005 at 29.

⁸² See *U.S. v. Matthews*, 209 F. 3d 338 (4th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000).

reporting on newsworthy issues.⁸³ An *amici curiae* brief filed with the U.S. Supreme Court by several journalism associations in support of Matthews argued:

When an individual engaged in a constitutionally protected activity, such as news gathering, violates an otherwise valid law that affects that activity, but does not cause the harm meant to be proscribed by the statute, he should be able to argue at trial that his actions were protected by the First Amendment.⁸⁴

The U.S. Supreme Court declined to hear Matthews' appeal and let stand a lower court's finding that consistent with the holding in *Branzburg*, journalists did not have a broad First Amendment exemption from legal responsibilities that bound other citizens.

Branzburg, notwithstanding its alleged ambiguity, has emerged as the Court's keystone iteration of its longstanding pronouncement that the First Amendment does not place journalists beyond the reach of laws that apply to everyone. It is the basic precedent relied on in court rulings involving journalists who assert a First Amendment right to resist subpoenas or break the law pursuant to news gathering. *Branzburg's* majority opinion undercuts the ethical principles and directives that goad journalists toward civic irresponsibility and law breaking. *Branzburg* has been interpreted in some lower federal courts as recognizing some limited First Amendment protection or privilege for journalists when gathering news,⁸⁵ but the majority decision written by Justice Byron White denied the broad protection journalists had sought. The first two sentences of the opinion appeared to be

⁸³ See, e.g., Alice Kaderlan, *Reporter Accused of Staging a Dogfight*, WASH. JOURNALISM REV., November 1990, at 19 (explaining how journalists set up an illegal dog fight to capture video images for news report on dog fighting); Alix M. Freedman & Rekha Balu, *How Cincinnati Paper Ended Up Backing Off From Chiquita Series*, WALL STREET J., July 17, 1998 at A16 (recounting the travails of a newspaper reporter who illegally obtained corporate e-mails during investigation of questionable business practices); Alan Wolper, *Undercover Angel Grounded in Texas*, EDITOR & PUBLISHER, February 2005, at 19 (examining actions of a reporter who posed as prostitute and illegally solicited customers).

⁸⁴ Brief of *Amici Curiae* The Reporters Committee for Freedom of the Press et al. at 3, *Matthews v. U.S.*, 531 U.S. 910 (2000) (No. 00-5605).

⁸⁵ See *infra* p. 255 and note 93.

clear: “The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.”⁸⁶ Less clear was the concurring opinion of Justice Lewis F. Powell, whose vote created the bare majority that ruled against the journalists’ claims.

The first sentence in Powell’s opinion said the majority holding was limited. The second sentence sought to mark those limits by pointing out what the majority did not say: “The Court does not hold that newsmen, subpoenaed to testify before a grand jury are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”⁸⁷ Indeed, White’s majority opinion did say “news gathering is not without its First Amendment protections,” and “grand juries must operate within the limits of the First Amendment.”⁸⁸ But White’s ultimate conclusion was that in the case before the Court these particular journalists had no First Amendment right to refuse to identify their sources before grand juries, or ignore subpoenas, or break the law to gather news.⁸⁹ The four dissenting justices, as well as Powell and the rest of the majority, agreed that there were some First Amendment protections for newsgathering and confidential sources, but only the dissenters concluded that these protections applied in the instant case.⁹⁰ The various *Branzburg* opinions were unanimously supportive of some First Amendment protection for news gathering processes. On the specifics of that protection, however, the opinions were fragmented and

⁸⁶ *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

⁸⁷ *Id.* at 709 (1972) (Powell, J., concurring).

⁸⁸ *Id.* at 707, 708.

⁸⁹ *Id.* at 682, 690, 691.

⁹⁰ *Id.* at 711-25 (Douglas, J., dissenting); *Id.* at 725-52 (Stewart, J., dissenting).

ranged from the vague generalities of White’s opinion to the virtually absolute First Amendment protection advanced by Justice William O. Douglas’s dissent. Powell’s concurring opinion was so much in accord with the Court’s dissenting minority bloc on the parameters of this protection that his opinion might well be described as a dissenting concurrence. Justice Potter Stewart described the *Branzburg* 5-4 ruling on reporter’s privilege as perhaps “a vote of four and a half to four and a half.”⁹¹

It is therefore understandable that during the ensuing three decades some lower federal courts cited *Branzburg* as a precedent for protecting sources or newsgathering processes in some instances.⁹² It is equally understandable that other federal courts relied on *Branzburg* to subject journalists to the strictures of law.⁹³ One scholar has concluded that the greater number of those courts had been deciding in favor of some type of reporter’s privilege or other protection until the closing years of the 20th century when the tide began to shift.⁹⁴ An opinion handed down in 2003 by the highly influential federal circuit judge Richard A. Posner in *McKevitt v. Pallasch* was particularly indicative of the shift.⁹⁵ Posner’s opinion expressed surprise that some fellow jurists had thought *Branzburg* affirmed the existence of a reporter’s privilege. Posner also indicated that some of these jurists’ rulings

⁹¹ Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 635 (1974-1975).

⁹² See, e.g., *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993) (recognizing reporter’s privilege in civil and criminal cases); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *Gilbert v. Allied Chem Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *United States v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972); *Baker v. F&F Investment*, 470 F.2d. 778 (2d Cir. 1972).

⁹³ See, e.g., *Lee v. United States DOJ*, 287 F. Supp. 2d 15, 17 (D.D.C. 2003) (observing that the Supreme Court had “expressly and resoundingly declined to recognize” a reporter’s privilege); *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998) (denying existence of privilege in criminal trial context); *In re Shain*, 978 F.2d 850 (4th Cir. 1992) (denying reporter’s privilege in case where confidentiality had not been promised to source).

⁹⁴ See Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL’Y 35, 40-46 (2006).

⁹⁵ *McKevitt v. Pallasch*, 339 F. 3d 530 (7th Cir. 2003).

“essentially ignore *Branzburg*.”⁹⁶ Posner’s ruling rejected the claim of reporter’s privilege raised by journalists seeking to quash a court order directing them to surrender audiotapes to a criminal trial court.

Notwithstanding the apparent shift in the interpretations and effects of *Branzburg*, the case has provided journalists with a legal justification for some ethics-based acts of civic irresponsibility in subsequent cases. In that respect, those cases appear to be theoretical framework descendants, though not direct legal progeny, of *New York Times v. United States*, the Pentagon Papers case.⁹⁷ This case was decided in 1971, a year and a day before *Branzburg* and yielded a *per curiam* opinion with nine separate opinions – six concurring and three dissenting. At that time, no other Supreme Court case had more pointedly showcased the civic responsibility of American journalists in conflict with ethical principles.⁹⁸ Journalists adhering to their duty to independently gather and publish news ostensibly broke the law, flouted government policy, and risked national security.

The federal government sought injunctions to stop *The New York Times* and *The Washington Post* from publishing news articles revealing the contents of a top secret federal report commonly referred to as the Pentagon Papers but formally titled “History of U.S. Decision-Making Process on Viet Nam Policy.” Daniel Ellsberg and Anthony Russo were suspected of stealing the report and copying it.⁹⁹ Copies of the report eventually wound up in

⁹⁶ *Id.* at 532.

⁹⁷ 403 U.S. 713 (1971).

⁹⁸ Many of the same issues were raised in a lower federal court a few years later in the “atomic bomb” case, *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

⁹⁹ See *United States v. Russo*, No. 9373 – (WMB) – CD (filed Dec. 29, 1971), *dismissed* (C.D. Cal. May 11, 1973). Ellsberg and Russo were indicted, but the charges were later dismissed. See also Melville B. Nimmer, *National Security Secrets v. Free Speech*, 26 STAN. L. REV. 311 (1974) (arguing that the conduct of Ellsberg and Russo was not illegal and that the federal law purporting to criminalize their actions was unconstitutional);

the possession of the newspapers and was the basis of news articles that detailed the history of the United States' political and military involvement in the ongoing Vietnam conflict. The Supreme Court was called on solely to determine whether the injunctions would violate the First Amendment, but the individual opinions went further afield into theoretical frameworks that implicated issues of civic responsibility and journalists' professional responsibilities.

Justices Black, Douglas, William Brennan, Stewart, Byron White, and Thurgood Marshall wrote separate concurrences to the short *per curiam* denial of the injunction. They concluded that the government had failed to overcome the high burden of justification created by the First Amendment. Black's opinion, which was joined by Douglas, used language that was amenable to an interpretation that would absolve journalists who published newsworthy information about a matter of public concern even if that information had been stolen or publication was otherwise precluded by any law subordinate to the First Amendment. "Both the history and language of the First Amendment support the view that the press must be left free to publish news, *whatever the source*, without censorship, injunctions or prior restraints," Black wrote.¹⁰⁰ This opinion displayed the absolutist or fundamentalist interpretation of the First Amendment sometimes promoted by Black and Douglas and provided legal support for the ethical directives under discussion here.

[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from receiving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be

William S. Robby, *Receipt of Public Documents Taken by Another Without Authorization as Receipt of Stolen Property*, 57 A.L.R. 3d 1211 (1974).

¹⁰⁰ 403 U.S. 713, 717 (1971) (Black, J. concurring) (emphasis added).

commended for serving the purpose that the Founding Fathers saw so clearly.¹⁰¹

In Black's view, the government was asking his Court "to hold that the First Amendment does not mean what it says."¹⁰² Indeed, Black's opinion cited Solicitor General's Erwin N. Griswold's remarks making that point on behalf of the government during oral argument: "You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law.'"¹⁰³

Douglas's opinion was largely in accord with Black's but took pains to point out that no federal law would be broken by the newspapers' publication of the contested information and that the government's request for the injunctions was not premised on criminal activity by the newspapers.¹⁰⁴ Brennan's opinion echoed Black's fundamentalist interpretation of the First Amendment and even condemned the delay in publication occasioned by the proceedings through the federal courts. "The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise," he complained.¹⁰⁵ This was an argument supporting press independence.

Stewart and White indicated that the newspapers may have broken the law, that their actions were contrary to government policy and would do "substantial damage to public interests."¹⁰⁶ White also indicated that the government had made a mistake in seeking an

¹⁰¹ *Id.*

¹⁰² *Id.* at 715.

¹⁰³ *Id.* at 717-18 (footnotes omitted).

¹⁰⁴ *Id.* at 721 (Douglas, J. concurring).

¹⁰⁵ *Id.* at 713, 725 (Brennan, J. concurring).

¹⁰⁶ *Id.* at 727- 40 (Stewart & White, JJ., concurring).

injunction but might well prevail in a criminal prosecution of the newspapers. “I would have no difficulty sustaining convictions under these sections on facts that would not justify [an injunction],” he wrote.¹⁰⁷ Here was a clear warning that the First Amendment would not place journalists beyond the reach of criminal law even when performing the essential job of informing the people about government deception or other matters of public concern.

The dissenters, Chief Justice Warren E. Burger and Associate Justices John M. Harlan and Harry A. Blackmun, wanted to permit the injunction but settled for chastising the two newspapers for receiving stolen documents and forsaking their civic duty to return them and preserve their secrets. “To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought – perhaps naively – was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices and the New York Times,” Burger wrote.¹⁰⁸ Blackmun also pointedly remarked on what he perceived as an unseemly lack of civic responsibility displayed by the press in light of the potential harm that publication of the Pentagon Papers might inflict on their nation’s international relations and the American troops still on the battlefields of Vietnam. “I strongly urge, and sincerely hope that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. . . . [T]he Nation’s people will know where the responsibility for these sad consequences rests.”¹⁰⁹

¹⁰⁷ *Id.* at 737.

¹⁰⁸ *Id.* at 751 (Burger, C.J., dissenting).

¹⁰⁹ *Id.* at 762-63 (Blackmun, J., dissenting).

Blackmun's comments were reminiscent of Socrates' arguments about the moral duties every citizen owed to the state and evoked the Hutchins Commission Report's warning to journalists that their fellow citizens might rewrite the First Amendment to limit its protection if the press did not live up to its responsibilities.¹¹⁰ Subsequent studies have indicated the commission's warning accurately gauged the mindset of the American public in some such circumstances, but not all. Writing in 1970 about opinion surveys on this topic dating back to 1936, social researcher Hazel Gaudet Erskine concluded: "Americans believe in free speech in theory, but not always in practice. Many would like to see . . . the Bill of Rights tailored to the times and the occasion."¹¹¹ A year later she similarly concluded that "the public has never exhibited overweening concern for freedom of the press," but polls conducted to gauge public opinion on the Pentagon Papers controversy indicated "[m]ost Americans sided with the newspapers in the contest."¹¹² On the basic question of whether the newspapers were right to publish the information despite the government's opposition, the Gallup Poll found 58 percent favored the newspapers and 30 percent opposed them; the Harris Poll found 51 percent backed the papers and 35 opposed them.¹¹³ Notwithstanding these findings, another Harris Poll conducted on August 12, 1971, posed the following question: "If there is any doubt about violating the national security in publishing documents

¹¹⁰ See THE COLLECTED DIALOGUES OF PLATO, *supra* note 25; COMMISSION ON FREEDOM OF THE PRESS, *supra* note 22, at 80 (warning that if the media "are irresponsible, not even the First Amendment will protect their freedom from governmental control. The amendment will be amended.").

¹¹¹ Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OPINION Q. 483 (1970).

¹¹² Hazel Erskine, *The Polls: Government Information Policy*, 35 PUB. OPINION Q. 483 (1971-1972).

¹¹³ *Id.* at 638.

such as the Pentagon papers on Vietnam, then the documents should not be published.” An overwhelming 70 percent agreed and only 14 percent disagreed.¹¹⁴

Although the Court’s disposition of the Pentagon Papers case was ostensibly determined by the First Amendment’s abhorrence of prior restraints on publication and an affirmation of the precedents on that point, it is susceptible to interpretation as affirming some basis for First-Amendment immunity for journalists’ unlawful practices. Chief Justice William Rehnquist made precisely this claim 30 years later when he dissented from the Court’s ruling in *Bartnicki v. Vopper*,¹¹⁵ a case devoid of prior restraint as a legal issue but rife with allegations that journalists had broken the law or otherwise shirked their civic responsibility.¹¹⁶ The Court majority in *Bartnicki* relied on the Pentagon Papers case and others as it determined that the First Amendment would shield journalists from civil liability for publishing stolen information. The information was true and newsworthy, and journalists therefore had an ethical duty to report it.

As in the Pentagon Papers case, journalists in *Bartnicki*, came into possession of “stolen” newsworthy information and published it. The information was a cell phone conversation between the president of a Pennsylvania high school teachers union and the union’s primary negotiator about matters that would ultimately affect how taxpayer money would be spent on education. The conversation had been illegally intercepted – stolen – by an unknown person and shared with journalists and others. Because the information dealt with a matter of public concern, it was newsworthy and the journalists had an ethical duty to report

¹¹⁴ *Id.* at 639.

¹¹⁵ 532 U.S. 514, 555 (2001) (Rehnquist, C. J., dissenting).

¹¹⁶ Radio talk show host and respondent Frederick Vopper is being referred to here as a journalist because his radio program, “The Fred Williams Show,” is described in court papers as a news and public affairs program.

it. The union president and negotiator, as permitted by federal law, sued the journalists for publishing the conversation. The case made its way to the Supreme Court as the journalists claimed the protection of the First Amendment.

The Court said the narrow issue to be decided was whether the First Amendment protects the disclosure of an illegally intercepted communication under these specific circumstances. By a 6-3 vote the Court decided in favor of the journalists saying, “[W]e are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.”¹¹⁷ The *Bartnicki* findings most germane to this study were that the journalists played no role in the interception, the journalists knew or should have known the conversation had been illegally intercepted, the conversation was about a matter of public concern, and the law forbidding the dissemination of the conversation was a law of general application.

Writing for the majority, Justice John Paul Stevens cited a series of precedents dating from the Pentagon Papers case through the 1970s that generally provided First Amendment protection for journalists who disseminated truthful, newsworthy information that wound up in their hands through no legal fault or improper action of their own.¹¹⁸ In these cases the Court did not allow the illegal acquisition of information by a third party or the mistaken release of information to justify sanctions against the journalists who thereafter published it. Some of these cases specifically noted that the journalists had not broken the law or caused it to be broken to acquire news and that the First Amendment would not immunize journalists’

¹¹⁷ 532 U.S. 514 at 518.

¹¹⁸ Stevens cited *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *New York Times v. United States*, 403 U.S. 713 (1971).

illegal acts.¹¹⁹ But in *Bartnicki*, legal sanctions were not limited to the acquisition of the information but extended to the subsequent publication as well.¹²⁰

This was also true in the cases Stevens relied on: *Florida Star v. B.J.F.*, *Smith v. Daily Mail*, and *Landmark Communications v. Virginia*. Statutes in these cases made publication illegal or allowed civil liability for publication. In *Bartnicki*, as in the cases Stevens relied on, the penalty provisions of the statutes could not be enforced in these circumstances without violating the First Amendment. Although the Court did not say journalists were beyond the reach of law, it did say these laws were reaching into areas protected by the First Amendment and were therefore unconstitutional as applied.¹²¹ It is a fine distinction in terms of consequences for journalists, but the effect can be seen as case-by-case grants of immunity – the journalists were not punished or held liable. It should be noted that the Court has emphatically denied that this is what has been occurring. White’s majority opinion in *Branzburg*, for example, stated, “It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.”¹²² Surely, the Court has issued no licenses but has issued a number of decisions with the individual effects of licensing that support some of journalism’s ethical directives.

¹¹⁹ *But see* Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000) (indicating that journalists participating in or encouraging the illegal interception of cell phone conversations would not be protected by the First Amendment).

¹²⁰ Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511(1)(c) (1968) (providing that any person who “intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished.”).

¹²¹ *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

¹²² *Branzburg*, 408 U.S. at 691.

These case-by-case grants of immunity in effect will be referred to here as the Pentagon Papers line of cases because each case revolved around journalists who willfully or negligently engaged in civic irresponsibility by breaking the law or contravening their government's policy. The journalists in *Daily Mail*, for example, knowingly and willfully violated the law that forbade them to identify a juvenile crime suspect. Although they initially followed the law, they later made a conscious decision to break it. This decision was made after the juvenile's identity was disclosed in another medium, but the law did not recognize such an escape clause.¹²³ Equally willful were the actions of the journalists in *Landmark*, who flouted the law's ban on publicizing internal investigations of the judiciary.¹²⁴ The journalists in *Florida Star* who violated the law against identifying sexual assault victims were merely negligent.¹²⁵ The Court's ruling in *Cox Broadcasting Corp. v. Cohn* has to be included in this line even though Stevens did not cite it in *Bartnicki*.¹²⁶ The journalists in *Cox Broadcasting* violated a Georgia law that forbade the publication of the name of a rape victim and allowed lawsuits against those who violated that law. In an 8-1 ruling the Court protected the journalists by not allowing the challenged provisions of Georgia that would have permitted a civil suit against the journalists under the specific facts of the case. The majority opinion written by Stevens noted that the embattled journalists had discovered the victim's name by examining a public government record. Stevens also highlighted the fact that the proceedings in the rape case "are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to

¹²³ 443 U.S. at 99-100.

¹²⁴ 435 U.S. at 832.

¹²⁵ 491 U.S. at 528.

¹²⁶ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

report the operations of government.”¹²⁷ Here was, perhaps, an apparent affirmation of the duty to report notwithstanding the law.

The Court opinions in the Pentagon Papers line of cases frequently and favorably cited the fact that journalists were pursuing matters of public concern, matters of public significance, public questions, or public issues when they ran afoul of the law.¹²⁸ These were among the rationales for protecting the journalism practices at issue in these cases and the rulings supported if not encouraged the affirmative duty to report the news about these public matters. Notwithstanding some adverse rulings, the Supreme Court has been generally supportive of those ethical directives and principles of journalism that are often linked to practices that are illegal or otherwise contrary to government policy and civic responsibility. Despite a multitude of Court statements insisting that journalists are no more beyond the reach of the law than any other citizen is, a case-by-case tally indicates that more often than not, the Court has placed them outside of harm’s way without affirming the fundamentalist reading of the First Amendment that journalists promoted.

Notwithstanding the assertion above that the Court tolerated or to some degree excused journalists’ civic misbehavior when public issues were involved, the next section of this examination focuses on a landmark case in which the most important public issue – electing government officials – was integral to the journalists’ actions, yet the Court provided virtually no protection or tolerance.

¹²⁷ *Id.* at 492.

¹²⁸ *See, e.g., Florida Star*, 491 U.S. at 536-37; *Daily Mail*, 443 U.S. at 103; *Cox Broadcasting*, 420 U.S. at 491-95.

Within the Grasp of Equity

This chapter's examination of U.S. Supreme Court cases in which journalists complying with ethical principles have collided with the law and broken it, now turns to *Cohen v. Cowles*,¹²⁹ a case in which journalists complying with two ethical principles collided with a third and broke a rule of equity, but technically did not violate the law.¹³⁰

Journalists employed by the Cowles Media Company in Minnesota intentionally broke their promise to conceal the identity of a confidential source who, while working for a state political candidate, provided the journalists with potentially damaging information about an opposition candidate.¹³¹ The journalists subsequently decided that the political operative's use of a smear campaign tactic – anonymously circulating negative information about the opposition – was newsworthy, and they revealed his name and tactics in their newspapers. This disclosure was clearly a violation of the ethical directive to protect confidential sources. In breaking the promise, however, the journalists were complying with the two ethical principles that impelled them to report the newsworthy truth. The information was about prior criminal acts by a candidate and was newsworthy because voters arguably needed it to make an informed democratic choice. The source, Dan Cohen, once publicly identified and linked to negative campaigning, was fired immediately; he sued the journalists

¹²⁹ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

¹³⁰ Law and equity are separate forms of jurisprudence, according to legal scholar Peter Charles Hoffer, but the distinction is rarely made since the merger of law and equity in American federal and state courts empowered judges of law to act simultaneously as chancellors in equity. See PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 85-106 (1990).

¹³¹ 501 U.S. at 666.

claiming they had breached their contract with him by breaking their promise of confidentiality.¹³²

Minnesota's Supreme Court determined that the journalists' promise was not a legal contract and Cohen, therefore, could not prevail in a lawsuit for a contract law violation. Minnesota's highest court nonetheless found Cohen might have a remedy in equity under the promissory estoppel doctrine, but ruled that resorting to equity under these circumstances would violate the First Amendment.¹³³ On appeal and in a 5-4 ruling, the U.S. Supreme Court overturned this portion of the Minnesota ruling and said deciding the case under this equity doctrine would not necessarily violate the First Amendment.¹³⁴ The Court found the equitable doctrine of promissory estoppel to be a state law of general application; and just as it had in *Branzburg*, the Court ruled that journalists were not immunized by the First Amendment against laws of general application that applied to every other citizen.¹³⁵ The Court accordingly remanded the case to the state court where Cohen eventually prevailed.¹³⁶

With this ruling the Court seemed to begin fulfilling the Hutchins Commission's dire prediction and warning about the consequences of irresponsible journalism. The warning said the government would make the press responsible if it did not become so on its own and the

¹³² *Id.*

¹³³ *Cohen v. Cowles Media Co.*, 457 N.W. 2d 199, 205 (Minn. 1990) (concluding "that in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights. ... There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case. Plaintiff's claim cannot be maintained on a contract theory. Neither is it sustainable under promissory estoppel.).

¹³⁴ 501 U.S. at 665.

¹³⁵ 501 U.S. at 670 (holding that [t]here can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability).

¹³⁶ *Cohen v. Cowles Media Co.*, 479 N.W. 2d 387 (Minn. 1992) (reinstating a \$200,000 damages award).

First Amendment would not protect them.¹³⁷ The Court had cleared the way for a case involving an ethics-based journalism practice to be decided in a court of equity – a court that scholars say makes judgments based on morality and decides cases based on its conception of social responsibility.¹³⁸ Scholars have described equity’s morality-based jurisprudence in a variety of ways. Legal historian Peter Charles Hoffer called it “the law’s conscience.”¹³⁹ Two other scholars, Judge Roger Young and law professor Stephen Spitz, devised the following maxim in a light-hearted, but not inaccurate encapsulation of the basic normative premise upon which equity cases are decided: “[I]n equity, good guys should win and bad guys should lose.”¹⁴⁰

Although this study has found other Court rulings that enforced or undermined press responsibility as defined by journalism ethics codes, *Cohen v. Cowles* may have the greatest potential to allow, in effect, the creation of a governmental code of journalism ethics because it opened the door to equity jurisprudence in this context. Equity is the branch of jurisprudence that is designed to provide justice when the technical requirements of law cannot.¹⁴¹ Law, for example, enforces a promise only when the promise meets the technical

¹³⁷ See COMMISSION ON FREEDOM OF THE PRESS, *supra* note 22, at 80 (warning that if the media “are irresponsible, not even the First Amendment will protect their freedom from governmental control. The amendment will be amended.”).

¹³⁸ See generally, HOFFER, *supra* note 130, at 7-21 (defining equity and explaining why courts of equity came to be widely known as courts of conscience); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 300-18 (2002) (presenting a history of the evolution of equity); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 918-40 (1987) (explaining that chancellors in equity historically have considered the larger moral issues).

¹³⁹ HOFFER, *supra* note 138 at *xii*.

¹⁴⁰ Roger Young & Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S. C. L. REV. 175, 175 (2003-2004).

¹⁴¹ See Marcia S. Krieger, *The Bankruptcy Court is a Court of Equity: What Does That Mean?* 50 S.C. L. REV. 275, 279 (1999) (observing, “[E]quity was available only when no adequate remedy at law existed. Thus it grew interstitially to fill the gaps in the common law.”).

requirements of contract law. Equity, through promissory estoppel, enforces a promise when the failure to do so would deny justice to the person who relied on the promise.¹⁴² In short, equity focuses on producing the right or just result when the technicalities of law would prevent it; equity makes sure the good guy wins. Equity is morally based and enforces society's demand for responsibility from its members. Virtually every society considers promise keeping to be a moral responsibility of its members and condemns those who break promises.¹⁴³ The journalists in *Cohen v. Cowles* broke their promise to Cohen and were therefore the bad guys when their transgressions were judged under equity.

Equity originated during the Middle Ages in the English Court of Chancery, which was distinct from courts of law, and was brought to America by English colonists who replicated the dual systems of jurisprudence in the United States.¹⁴⁴ It has been condemned often for allowing judges or chancellors too much discretion and being subject to their prejudices and notions of right and wrong as well as their potentially arbitrary identifications of those parties Young and Spitz would refer to as “good guys and bad guys.” One of the most famous critical commentaries on this point was written by 17th century English jurist John Seldon.

Equity is a roguish thing. For law we have a measure, know what to trust to: equity is according to the conscience of him that is Chancellor, and as that is

¹⁴² BLACK'S LAW DICTIONARY (8th ed. 2004) defines promissory estoppel as: The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.

¹⁴³ See, e.g., Rachel Cohon, *Hume on Promises and the Peculiar Act of the Mind*, 44 J. HIST. PHIL. 1 (2006) (observing that “[p]romising—with its more formal manifestation, contract—is a vital part of social life. Most forms of long-term cooperation, including commerce, depend in some way on the fact that people can bind themselves to others now to perform actions later.”).

¹⁴⁴ See Subrin, *supra* note 138. The U.S. Supreme Court was given jurisdiction over law and equity from inception, U.S. CONST. art. III, §2.

larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure this would be! One Chancellor has a long foot, another a short foot, a third and indifferent foot; 'tis the same thing in the Chancellor's conscience.¹⁴⁵

Seldon's critique was based on the fact that early English equity was not bound by the rule of precedent that made common law stable and relatively predictable. The American brand of equity follows precedent much more faithfully than its English predecessor, but nonetheless functions with a significant degree of discretion.¹⁴⁶ Hoffer, an ardent supporter of 20th-century American equity jurisprudence, has praised it for producing the Supreme Court's landmark 1954 ruling in *Brown v. Board of Education* ordering the desegregation of public schools in the South.¹⁴⁷ "[T]he justices were acting as chancellors. *Brown* was and remains the greatest 'equity' suit in our country's history, perhaps in the history of equity," he wrote.¹⁴⁸

Fans and opponents of that ruling have praised or criticized it as social engineering by Chief Justice Earl Warren, who led the Court at that time. Viewed through the lens of pragmatic instrumentalism, which is the theoretical framework of this dissertation, Warren and his brethren on the Court had used the law to achieve a social goal. When considered in terms of an equitable proceeding, the *Brown* decision could be readily perceived as a judgment of conscience and a ruling based in morality. Indeed, law scholar Karl Llewellyn, who was identified in the first chapter of this dissertation as a pragmatic instrumentalist,¹⁴⁹

¹⁴⁵ JOHN SELDEN, THE TABLE TALK OF JOHN SELDEN 148-49 (3d. ed 1860) cited in John Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1436 (1998).

¹⁴⁶ See Subrin, *supra* note 138, HOFFER, *supra* note 138, at 147-78.

¹⁴⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁴⁸ HOFFER, *supra* note 138, at 4.

¹⁴⁹ See *infra* Chapter One p. 10.

referred to the social activism of the Warren Court as pragmatic and instrumentalist.¹⁵⁰ The Court's decision in *Cohen v. Cowles* may well have positioned journalism's ethical practices for this type of engineering, not only by the High Court, but by 21st century chancellors sitting in each of the state courts as well.

It seems apparent that disputes submitted for equitable resolution are geared to favor the party who has seized the moral high ground or who most effectively frames the dispute in terms of morally proper versus improper behavior. Briefs submitted to the Supreme Court in *Cohen v. Cowles* contain arguments calculated to do both. One obvious frame presented the dispute as a battle between one now-jobless guy, Cohen, against a multi-million dollar media corporation that owned the two newspapers that cost him his job. Another focused on the fact that at least one of the reporters who personally made the promise of confidentiality to Cohen recognized that breaking it was wrong and was forced to do so by her deceptive corporate bosses. A portion of a brief submitted by Cohen's attorneys indicates framing in this direction.

Respondent Cowles Media claimed that its journalists did not regard the promise of confidentiality as creating an obligation to Mr. Cohen. On the contrary, its reporter, Lori Sturdevant believed that identifying Mr. Cohen violated the promise she had made to him. She objected so strongly to [her editors'] decision to dishonor her promise that she refused to allow her name to be used on the Star Tribune article identifying Mr. Cohen.¹⁵¹

Similar morality-based framing is evident in the briefs submitted by the Cowles Media Co. attorneys. They depicted Cohen as a deceptive and dishonorable political operative who tried

¹⁵⁰ KARL LLEWELLYN, *THE COMMON LAW TRADITION* 3-4 (1960) cited in Kroger, *supra* note 145, at 1478.

¹⁵¹ Reply Brief of Petitioner Dan Cohen at 12-13, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634) (citations omitted).

to use the newspapers to boost the campaign of his boss, Whitney, by anonymously smearing his opponent Johnson.

Cohen's strategy failed, however, in its further objective to manipulate the thrust of the news coverage. Cohen wanted to keep his role in releasing the information confidential so that the focus of the story would be on Johnson's court record, and to avoid public backlash against the Whitney campaign. The editors decided that the public was entitled to both parts of the story, and identified Cohen as the source. Cohen's lawsuit amounts to a complaint that he was unable to attack Johnson while shielded by anonymity.¹⁵²

An *amici curiae* brief submitted by nine news media companies also sought to present Cohen as the bad guy by arguing that “[p]etitioner was attempting to use the media to disseminate misleading information . . . and sought to prevent the dissemination of the truth.”¹⁵³

This brief also recognized that this case posed the risk of inducing judicially mandated journalism ethics and tried to steer the Court away from that course. “Judicial enforcement of an ethical obligation not to publish truthful information about political campaigns violates the First Amendment,” the media attorneys argued.¹⁵⁴ They further argued that journalists themselves disagreed over the proper ethical resolution of this case and the Court should not impose its own resolution.¹⁵⁵ The enforcement of ethical obligations, according to the brief, would be provided by peer criticism and a loss of peer respect. “[A]s is true of most ethical obligations, ‘enforcement’ must come from self-policing, rather than a

¹⁵² Brief of Respondent Cowles Media Company at 28-29, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634) (citations omitted).

¹⁵³ Brief of *Amici Curiae* Advance Publications, Inc. et al., at 31, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634) (citations omitted).

¹⁵⁴ *Id.* at 13.

¹⁵⁵ *Id.* at 40.

government command.”¹⁵⁶ Cohen’s attorneys disagreed, arguing that this type of enforcement had proved ineffective against media companies in the instant case.

The specter of a large damage award is a much more effective incentive for a publisher to honor a promise of confidentiality than the fear of criticism from other members of the press. Indeed, any such fear of professional criticism was apparently insufficient to convince appellants to abide by their promises.¹⁵⁷

These arguments, despite their various intents, served to reinforce the moral and ethical implications of the case. Other arguments presented in conjunction with guiding journalists toward proper practices also raised the troubling notion that an ethical judgment should or could be weighed as a financial consideration. Cohen’s brief reminded the Court that the Minnesota trial court found that the relationship between journalists and their sources of information “is a commercial one.”¹⁵⁸ Chief Justice William Rehnquist highlighted the commercial side of the dispute during oral argument by asking the Cowles Media Co. attorney John D. French whether the cost of tort damages should “weigh in the balance when they decide whether or not to breach their agreement [with a confidential source]. . . . [A]ny number of large concerns which have the potential for doing damage to people, whether they’re trucking companies or . . . making asbestos . . . have to live with the threat of litigation. That’s part of doing business in our economy, isn’t it?”¹⁵⁹

¹⁵⁶ *Id.* at 30.

¹⁵⁷ Reply Brief of Petitioner Dan Cohen, *supra* note 151, at 23.

¹⁵⁸ *Id.* at 17.

¹⁵⁹ Oral Argument of John D. French on Behalf of the Respondents, at 26 *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634).

Justice Byron White, in the majority opinion that Rehnquist joined, returned to the commercial, cost-of-doing business concept that would be resolved in a state court of equity.

[C]ompensatory damages are not a form of punishment. . . . If the contract between the parties in this case had contained a liquidated damages provisions, it would be perfectly clear that the payment to [Cohen] would represent a cost of acquiring newsworthy information to be published at a profit. . . . The payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source.¹⁶⁰

Justice Harry A. Blackmun disagreed insisting that “the sanctions we review in this case are no more justifiable as ‘a cost of acquiring newsworthy material,’ than were the libel damages at issue in *New York Times Co. [v. Sullivan]*, a permissible cost of disseminating newsworthy material.”¹⁶¹ Nonetheless, the debate over making journalism more ethical gained another impetus or rationale for putting the onus on the owners of the media by making ethical transgressions a matter of finance and perhaps more likely to be self-imposed by the managers of the practice of journalism.

Obeying the Law: An Emerging Ethical Principle

Several prominent news media companies recently have become increasingly uncomfortable with American journalists’ longstanding professional acquaintance with ethically motivated law breaking and have sought to restrain these practices. Whether it is fueled by fear of financial liability or professional ethics remains to be seen. Some individual journalists also have been embracing greater civic responsibility despite the traditional ethical teachings.

¹⁶⁰ 501 U.S. at 670.

¹⁶¹ *Id.* at 676 (Blackmun, J. dissenting) (citations omitted).

Several of the most recent iterations of these media companies' journalism ethics codes have reasserted the civic responsibility to obey the law. The Gannett newspaper division, for example, stated unequivocally in its 1999 newsroom guidelines, "We will obey the law."¹⁶² This directive was listed under the heading "Integrity." Similarly, when *The New York Times* revised its code in 2003 it stated forthrightly: "Staff members must obey the law in pursuit of news. . . . In short, they may not commit illegal acts of any sort."¹⁶³

These pronouncements are consistent with the ethical guidelines of major professional associations such as the American Medical Association and the American Bar Association. The AMA declares, "A physician shall respect the law."¹⁶⁴ Similarly, the American Bar Association ethics rules state, "A lawyer's conduct should conform to the requirements of the law."¹⁶⁵

The latest pronouncement of *The New York Times* code of ethics went on to explain that even when the law did not impose sufficiently stringent standards of behavior, the *Times* would hold its journalists to a higher code of conduct.¹⁶⁶ In the matter of protecting confidential new sources, a practice that frequently has led journalists to defy the law, the code adopted by the Associated Press Managing Editors in 1994 seemed cautious as it advised: "News sources should be disclosed unless there is a clear reason not to do so. When

¹⁶² Gannett Principles, *supra* note 46.

¹⁶³ The New York Times, Ethical Journalism, *supra* note 62, at 9.

¹⁶⁴ American Medical Association E-Principles, available at <http://www.ama-assn.org/ama/pub/category/8292.html> (last updated Jan. 4, 2005). The remainder of the quoted sentence indicates a duty of legal activism on a patient's behalf. "A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient."

¹⁶⁵ American Bar Association Model Rules of Professional Conduct (2004), *supra* note 5.

¹⁶⁶ *Id.* at 10. "Staff members may not record conversations without the prior consent of all parties to the conversation. Even where the law allows recording with only one party aware of it, the practice is a deception."

it is necessary to protect the confidentiality of a source, the reason should be explained.”¹⁶⁷

The Gannet Corporation’s ethics directive for its newspapers advised caution in granting source confidentiality, but indicated that in clearly defined instances “[t]he newspaper will not name [confidential sources] under any circumstances.”¹⁶⁸

Douglas McCollam, writing in the *Columbia Journalism Review*, identified himself as one of a growing number of journalists who do not agree with their colleagues’ time-worn insistence on a fundamentalist interpretation of the First Amendment that flies in the face of repeated judicial pronouncements. “[A]s *Branzburg* made clear, those First Amendment protections may guard the final [news] product but don’t necessarily extend to news gathering,” he observed.¹⁶⁹ Similarly, Mark Bowden, a journalist who was held in contempt for refusing a Pennsylvania court order to turn over his notes in 2000, wrote, “The First Amendment protects freedom of the press, but it doesn’t absolve it from all civic responsibility.”¹⁷⁰ He expressed second thoughts about his refusal and doing what journalism ethics and his colleagues had goaded him to do. He considered what would have happened if he had turned over his notes. “I would have lost my chance to play hero for a day,” he wrote, “but I would have done my duty as a citizen, and that would have been that.”¹⁷¹

¹⁶⁷ APME Statement of Ethical Principles, at <http://apme.com/ethics/> (last visited Aug. 22, 2005).

¹⁶⁸ Gannett Principles, *supra* note 46.

¹⁶⁹ McCollam, *supra* note 78, at 31.

¹⁷⁰ Mark Bowden, *Lowering My Shield*, COLUM. JOURNALISM REV., July 2004, at 24. *See also* Robert W. Greene, *Newsday Reporters Have a Duty to Testify*, NEWSDAY, Feb. 10, 2000, at A37 (condemning newspaper’s refusal to allow reporters to fulfill their civic duty to testify before a grand jury).

¹⁷¹ *Id.*

In this context consider the case of *Charlotte-Herald News* reporter Michael Smith.¹⁷² He had done extensive reporting on corruption among public officials in Florida, and a state grand jury subpoenaed him to testify about what he knew. He quietly complied. Afterward, he decided he wanted to write news articles and a book about his experience in the grand jury room but was told such publications would violate the law. He did not rush into publication but filed a lawsuit asking the courts to determine if his First Amendment rights were violated by this prior restraint. A unanimous U.S. Supreme Court, relying on its holdings in *Landmark Communications*, ruled in Smith's favor.¹⁷³

Perhaps the most significant defection from traditional journalism ethics, particularly for the purposes of this dissertation, was the decision by *Time* magazine's editor-in-chief Norman Pearlstine to comply with a subpoena in connection with the government's search for confidential sources in the Valerie Plame case.¹⁷⁴ One report in *The New York Times* indicated the corporate decision was unprecedented in the history of modern journalism.¹⁷⁵ *Time* magazine is often referred to as "the house that Luce built" because it rose to journalistic prominence under the guidance of Henry Luce – the man who created the Hutchins Commission and inspired its push for journalism ethics. Pearlstine's decision to comply was widely, but not universally, condemned by journalists and First Amendment advocates. The publisher of *The New York Times*, which vigorously supported its reporter Judith Miller's longstanding refusal to obey a subpoena issued in the Valerie Plame case,

¹⁷² See *Reporter Can't Write About His Testimony Before a Grand Jury*, EDITOR & PUBLISHER, March 19, 1988, at 28; Ruth Marcus, *Court Voids Restraint in Testimony Given to Grand Jury*, WASH. POST, March 22, 1990, at A5.

¹⁷³ *Butterworth v. Smith*, 494 U.S. 624 (1990).

¹⁷⁴ Adam Liptak, *Time Inc. to Yield Files on Sources, Relenting to U.S.*, N.Y. TIMES, July 1, 2005, at A1.

¹⁷⁵ *Id.*

said, “We are deeply disappointed by Time Inc.’s decision to deliver the subpoenaed records.”¹⁷⁶ Matthew Cooper, the subpoenaed *Time* reporter who had been resisting subpoenas beside Miller, objected to his employer’s decision and said he was “obviously disappointed.”¹⁷⁷

Pearlstine, who has a law degree, explained his decision as a citizen’s duty to comply with the law because the magazine’s legal challenge of the subpoena was defeated in court and the U.S. Supreme Court declined to hear an appeal. “Once a federal grand jury and the Supreme Court have weighed in, we had little option,” Pearlstine said as he questioned whether a corporation has a right to engage in civil disobedience.¹⁷⁸

Reaction from *Time* readers was mixed and reflected several concepts addressed in this study such as civil disobedience and the social contract. “Pearlstine said the company had an obligation to follow the law. But throughout our country’s history, it has been those who have stood up to the misuse of law who have brought about the social changes needed to protect our constitutional rights,” wrote one reader.¹⁷⁹ Another reader said: “*Time* did the right thing. . . . We don’t have to like laws, orders or rulings. But unless we are anarchists, we should follow the law.”¹⁸⁰

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ David Carr, *A Tough Call, and then Consequences*, N.Y. TIMES, July 11, 2005, at C1.

¹⁷⁹ Patricia Lake, *Sharing Journalists’ Notes*, TIME, Aug. 1, 2005, at 8 (published in Letters section).

¹⁸⁰ Rich McLeod, *Sharing Journalists’ Notes*, TIME, Aug. 1, 2005, at 8 (published in Letters section).

Summary and Conclusion

This final chapter traced the citizen's dilemma from ancient Greek civilization into the 21st century and found scholars and lay people alike insisting that citizens do or do not have a moral duty to obey the law. It remains a great divide. The basic framework of the ongoing conflict between civic responsibilities and a citizen's moral and ethical duties has not changed over the centuries. Ethics codes historically have told citizen journalists to answer to an ethical authority that is superior to mere statutes or court orders. The codes draw on the First Amendment to define journalists' duties in their civic communities and to protect them when lesser laws or transient government policies seek to keep them from performing their duties. From time to time a tiny minority of the Supreme Court has agreed with this fundamentalist view of the First Amendment's protection of journalists, but in all of the cases reviewed here the great bulk of the Court's members have rejected that premise. Nonetheless, when the Supreme Court has decided cases in which journalists have broken the law or acted contrary to public policy pursuant to an ethical directive, the outcomes generally have favored the journalists.

There have been indications in Court rulings since the late 1990s, however, that such outcomes may not be so common in the future. There is also mounting evidence that journalists and their institutional employers may be in the process of reassessing their civic and professional responsibilities and may perhaps decide that ethics may not always trump some civic responsibilities. This shift may be consistent with the Hutchins Commission Report's recommendations for the ethical practice of journalism. That report urged journalists to act with greater social responsibility – a framework that arguably includes civic responsibility. Although the commission expressed a hope that the reforms would be self-

generated instead of government compelled, it is not altogether clear if corporate news media's in-house reforms are fulfilling this hope if they are motivated by fears of government directed or permitted sanctions that threaten their profits.

CHAPTER SIX

Summary, Conclusions, and Recommendations

As this dissertation has indicated, criticisms of American journalists and efforts to make them perform more ethically predate the First Amendment and have continued unabated into the 21st century. The Hutchins Commission's call for ethical and socially responsible journalism in 1947 is the starting point of this study because it has proved to be the most influential of these efforts and because the commission considered inviting government intervention to achieve these ends. This study looked at government intervention in the form of U.S. Supreme Court rulings that addressed matters that implicated journalism ethics. This study's conclusions will be presented here in two formats. The first is a theory and philosophy-based overview of government- or Court-created journalism ethics. The second is a summary of the study's findings with respect to the specific ethical principles addressed by Court rulings and answers to the individual research questions posed by the study.

Theoretical and Philosophical Overview

Although the Hutchins Commission ultimately rejected of the idea of recommending government intervention to improve journalism, it feared the intrusion might occur of its own accord if journalists did not reform themselves sufficiently. During the phase of American history in which the commission operated – a period that included the Great Depression and World War II – the federal government had been called on to solve a variety of social and economic problems and had achieved some commendable successes. It was therefore

understandable that a governmental resolution was considered. Even during this troubled phase, however, it was fairly well established that the First Amendment would prohibit government imposition of rules of behavior for the press even when the goal was to make members of the profession perform more ethically and serve society better.

Nonetheless, the commission warned that if the American public became sufficiently roused by journalists' misbehavior, not even the First Amendment would be enough to protect the press. This too, was an understandable warning given the period in which it was issued. This was the heyday of pragmatic instrumentalism – a descriptive legal theory that claims the law, particularly judge-made law, is a coercive tool for justifying and implementing social policy directly or indirectly. The contours of First Amendment protection, according to an instrumentalist view of the problem, might well be altered by interpretation and redefined by Supreme Court edict if the Court found sufficient cause.

This dissertation proceeded from a pragmatic instrumentalist perspective and examined United States Supreme Court rulings from the year of the Hutchins Report through 2005 to determine whether or to what extent the commission's warning and concerns had been validated. This study was limited to Supreme Court rulings because the Court determines whether and to what extent particular press behaviors are protected by the First Amendment. Rulings were studied in cases that addressed the five major principles that journalists identified in their ethics codes and in other pronouncements as most vital to the ethical practice of their profession. One of the major goals of this study was to determine if the Court, in its efforts to achieve a variety of social and political goals for nearly seven decades, has issued rulings in First Amendment cases that have goaded the press to be more ethical. Proceeding from a pragmatic instrumentalism perspective, this study found that in

some instances the Supreme Court has intruded into the ethical practice of journalism. At times this was done in pursuit of better journalism and sometimes at the expense of better journalism while in pursuit of other social objectives. This study also has concluded that the courts now seem poised to intervene in the creation of ethical journalism to an even greater extent. There is no indication that the Supreme Court has systematically sought to create ethical rules of behavior for the press, but this study's results-based observations – grounded in pragmatic instrumentalism – indicate that in deciding cases that involve principles of journalism ethics, the Court protected or encouraged some journalism practices while others were undermined or punished by being left vulnerable to legal sanctions.

Pragmatic instrumentalism is a results-based theory that focuses on what the law or a court has done as opposed to dwelling on the rationales or processes used to produce any particular legal result. For this reason, the aftermath of President Franklin D. Roosevelt's so-called "Court packing plan" of 1937 is cited as a validating example of the Supreme Court using the law as a tool to solve a social problem or attain a social goal.¹ The law at issue in this example was the Constitution, and, for a portion of the 1930s, the Court was interpreting the Constitution in a manner that invalidated some of the most important New Deal legislation the Roosevelt administration had created to deal with catastrophic unemployment and provide a financial safety net for retired workers. Not long after he proposed increasing the number of justices to create a new majority that would find his social-remedy legislation constitutional, the Court actually began finding this type of legislation constitutional.

Pragmatic instrumentalism is not concerned with the fact that the Court-packing legislation

¹ See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094 (2005).

failed to become law, or that there were personnel changes at the Court, or that the four justices who most consistently found New Deal legislation unconstitutional did not waver from those legal principles and precedents.² It focuses on the result – the New Deal legislation abruptly was being found constitutional even though the Constitution itself had not changed. The Constitution had been crafted into an instrumentalist tool to solve the pressing social problems of the time.

In a similar manner, according to the findings of this dissertation, the Court's interpretation of the law – primarily the First Amendment – has been tailored to achieve just results in cases that involved pressing social issues. These pressing issues were not always issues of journalism ethics. Sometimes, as in the landmark *New York Times v. Sullivan* case,³ the social issue that controlled the First Amendment and the ethical issues raised by the case was racial inequality. Here, as in other social issues cases, the Court can be seen reaching a morally just decision and an equitable decision grounded in notions of basic fairness and morality. The litigants in *Sullivan* were on opposite sides of a moral divide – the Civil Rights Movement of the 1960s – even though the case was ostensibly about whether a newspaper should be held legally accountable for publishing false and libelous statements about a government official in Alabama. Truth, or the failure to tell the truth, was the journalism ethics issue addressed by the case. To resolve the dispute, the Court interpreted the First Amendment in a manner that undermined the ethical value of truth telling by providing legal protection for the failure to tell the truth in some circumstances. In so doing, the newspaper's failure to tell the truth was protected because it was so important to the progress of the Civil

² See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

³ 376 U.S. 254 (1964).

Rights Movement that the movement's opponents sought to punish the newspaper by suing it out of existence. *Amici curiae* briefs filed in the case made precisely this argument. This dissertation concluded that in crafting a moral, equitable and just solution to a social problem – racial inequality – the Court weakened the support that the law of libel had provided for the ethical value of truth.

When viewed as a case that hinged on moral choice and moral justice, *Sullivan* has the earmarks of a case in equity. Jurisprudence in the United States is administered primarily in courts of law and courts of equity, but the distinction between the two is rarely made because they have been merged. The U.S. Constitution gave the Supreme Court jurisdiction in law and equity and later legislation achieved full merger. Historically, judges have used their equity powers when there is no adequate remedy at law or when strict adherence to law would produce a morally wrong or unjust result. In this sense, the letter of libel law, as interpreted by the Alabama Supreme Court provided a victory for L.B. Sullivan. The U.S. Supreme Court, however, apparently considered that to be an unjust result and found or crafted a rationale in the First Amendment for a judgment for the newspaper. Equity seeks justice notwithstanding the letter of the law; it is known as the court of conscience. This dissertation found equity to be a nearly perfect tool of pragmatic instrumentalism because the resolution of social issues in a court room arena is virtually always a matter of justice and morality. Not every case examined in this study can be identified as a case in equity, but some clearly are susceptible to such an interpretation. *Cohen v. Cowles Media Co.*,⁴ the last major case examined in this study, plainly opens the door to equitable resolutions in cases involving journalism ethics.

⁴ 501 U.S. 663 (1991).

Cowles Media Co. involved the journalists' ethical obligation to protect confidential sources from exposure. It also involved the moral obligation to honor a promise and the legal obligation to comply with contracts. In this case, the journalists broke the ethical rule, shirked moral obligation, but did not violate the contract because under the law, there was no contract. Here was a perfect scenario for invoking equity jurisdiction because there was no adequate remedy available at law. Morally and ethically, the journalists appeared to be on the wrong side of the divide. The Supreme Court ruled that the First Amendment did not prevent the resolution of the case in a state court using promissory estoppel, a doctrine created and administered in courts of equity. The door to equitable and moral resolutions of legal conflicts involving journalism ethics had been thrown open. Further study is needed to determine whether or to what extent state courts have begun applying this or other equitable doctrines to cases involving ethical principles of journalism.

Has the Court Imposed Ethical Standards?

When the United States Supreme Court had occasion to address the five fundamental ethical principles and directives of journalism in cases it decided from 1947 through 2005, its rulings were generally supportive of them, but not universally so. This study has found no wholesale conversion of ethical standards into legal imperatives. This study has found, however, that in deciding cases that implicated these principles, the Court created a legal basis for rendering some of these principles practical nullities and undermined others so significantly that in some areas judicial edicts are at odds with journalists' own ethical prescriptions. In some instances, the Court denigrated some of journalism's most cherished principles in deference to other ideals it deemed more important. These Court rulings raise concerns that professional practices of journalists in the 21st century and beyond may be

guided by legal edicts to a greater extent than ethical principles and, in some respects, the judicial standard strays from the standard journalists had set for themselves.

Once a Court ruling backs an ethical principle, or penalizes, or allows penalties for compliance with others, this judicial standard is logically likely to become the standard that is most often followed. Compliance with the judicial standard seems particularly likely when the ethical decision making and professional policy making are done in corporate news media offices where compliance with the law is a matter of company policy that may override ethical considerations. Court rulings that addressed the ethical standards of journalism sometimes imposed penalties or provided no protection for compliance with standards journalists had set for themselves. Standards of professionalism set by journalists themselves are almost exclusively hortatory and not mandatory. There are no significant penalties for deviance or rewards for compliance.

Journalists historically have rejected compulsory ethics as contrary to their First Amendment interests even when the compulsion was self-administered through voluntary press associations. But when the compulsion is self-administered by the news media corporations, their individual journalist employees may have scant ability to resist or reject those ethical standards. From the inception of ethics codes in the United States, the only codes that issued orders instead of mere suggestions were those developed for individual newsrooms as conditions of employment. When the National News Council was formed in 1971 in the hope of using public disclosure of ethical wrongdoing and peer pressure to establish ethical parameters for journalism, major news organizations resisted even this level of coercion and the council eventually failed. As a result, there was reason to fear legal

intervention might well occur by default because criticism of journalists' professional practices remained fairly constant.

Have Court Rulings Affirmed or Undermined Ethics?

This study identified five ethical principles and directives that journalists themselves established as fundamental to journalism: tell the truth, respect privacy, report the news, protect sources, and maintain independence. The study then sought to identify cases in which the Court addressed these principles pursuant to resolving related legal issues. One of the goals of the study was to determine the Court supported or undermined these principles.

When the Court addressed the truth principle during the time frame of this study, its rulings broadly affirmed and supported the value of truth and truth telling by usually forbidding or sharply limiting the imposition of criminal or civil penalties against journalists for the dissemination of truthful information. Truth came before the Court most prominently in libel cases, and it was in these that the Court came closest in matching the value journalism ethics codes ascribed to truth telling. The Court valued truth so highly it remained an absolute defense to libel.

In the codes, truth telling is the prime directive and arguably the highest value. But this value was deflated and undermined to a significant degree by the Court's creation, application, and extension of the actual malice rule in libel cases. This rule, if explained simply, says if a journalist does not intentionally misstate the truth or is not wholly reckless in seeking the truth, the law will provide some significant measure of protection against some libel claims. The Court seemed to be saying truth is valuable, but if journalists do not intentionally lie or recklessly misstate the truth, the law will protect the published results of

that effort as if they actually were true even if they are wholly false. Protecting falsity based on such a basis actually undervalues and undermines truth telling as heralded in the codes.

In formulations compatible with the Court's, the codes also indicated that journalists should not lie, which is the act of intentionally misstating the truth. But the codes drew a harder line early on and insisted there was no excuse for falsity, even by mistake. The Canons of Journalism, for example, stated, "By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control or failure to obtain command of these essential qualities."⁵

While the Court provided the greatest protection for libelous falsity published about the powerful and famous – public officials and public figures, the codes made no such distinctions. Nonetheless, the Court's actual malice rule affirms the value of truth by providing no protection to intentional and reckless falsehoods and even allowing extra penalties in the form of punitive damages.

The Court's two major libel rulings that devalued truth telling were *New York Times v. Sullivan*⁶ and *Gertz v. Welch*.⁷ Both cases were entangled in crucial social issues such as racial inequality and civil rights which implicated other important values. These values led to rulings in which the news media defendant prevailed in *Sullivan*, but lost in *Gertz*, the Court apparently preferring these other social values over pure truth. Some of the *amici curiae* briefs submitted in these cases capitalized on these social issues and used them as well as their legal arguments to press for favorable rulings.

⁵ Canons of Journalism, reprinted in NELSON ANTRIM CRAWFORD, THE ETHICS OF JOURNALISM, 184 (1924).

⁶ 376 U.S. 254 (1964).

⁷ 418 U.S. 323 (1974).

In crafting the actual malice rule and extending legal protection to journalists who published news and other information about matters of legitimate public concern, the Court has supported the ethical values and directives that compel journalists to report the news independently despite restraints posed by law or public policy. “Matters of legitimate public concern” has been employed in Court opinions with nearly talismanic effect to exonerate or protect journalists acting in contravention of law or public policy. This is particularly evident in matters of privacy, where the Court has found newsworthiness and truth to be broadly protective of journalist defendants in civil cases. In these, the Court’s valuation of privacy interests has been lower than the value ascribed to it in journalism ethics codes. For example, the Court has protected journalists who publicly identify sexual assault victims while journalism codes generally say such exposure is unethical. In other areas, particularly outside the invasion of privacy torts, the Court has valued privacy higher than the codes have and has defined it much more broadly, as well.

Has the Court Eroded the Distinction Between Law and Ethics?

Perhaps the most disturbing finding of this study is that judge-made law may be affecting the practice of journalism practices by setting benchmarks indicating where First Amendment protection of ethics-directed practices begins and ends. Judicial determinations function indirectly as a carrot and a stick by nourishing and protecting or by inflicting or allowing punishment for value-based journalism practices. Ethics codes guide journalists using a carrot of peer approval and stick no thicker than a finger wagged in disapproval. Absent countervailing influences such as individual idealism and personal integrity, judicial determinations may well have the greatest influence on the efficacy of the principles that

mainstream journalists will actually follow. It appears that the ethical practices that have the greatest legal protection or affirmation are the most influential. Those lacking such protection or that invoke legal penalties appear less likely to guide behavior. As such, the distinction between what is ethical and what is legal becomes almost moot when they coincide; or the ethics nearly become moot when they don't coincide with the law.

It seems apparent that this is becoming the case in some corporate journalism firms where the largest carrot is profit and the thickest stick is the threat of legal penalties that would diminish profits. Legal considerations are being included in revised and updated ethical guidelines and rules of professional practice for the major journalism companies. Supreme Court precedents on First Amendment issues are virtually certain to be among the considerations. Efforts are therefore necessary to guide the law into line with the ethics as determined by journalists or the perimeter of ethical practice will be established by the cumulative effects of judicial fiats. A federal press shield law is one such guide because journalists can have input legislatively that would be denied to them in judicial decision making.

What are the Ramifications of Court-Created Ethics?

When journalists create ethical guidelines for themselves, they are focused virtually exclusively on the specific role they have to play to make their proper contribution to society. When the Supreme Court or any other agency creates an ethics codes for any other entity, particularly the press, it lacks that narrow specialized focus because it has its own broader set of values and directives that may render it incapable of defining the ethical role of others. Although the Court has proved to be highly respectful of the First Amendment, it has to be respectful of every other provision of the Constitution as well. Journalists derive much of

their mandate from the First Amendment's scheme for maintaining a properly functioning democracy. As a result, it is not likely that the other provisions of the Constitution are given as much weight when journalists decide what is ethical. A Court-created ethics code for journalists would almost necessarily be something other than what journalists would create for themselves. It would destroy the check and balance the Fourth Estate provides for the other three.

Since the Supreme Court opened the door in *Cohen v. Cowles Media Co.* for equity adjudication of conflicts related to journalism practices, value-driven court judgments may speed up the process of government-imposed social responsibility. But that is not necessarily the case. Journalists must enter the battle for the hearts and minds of the American public and the courts. They need to explain the important values they uphold in their professional practices so the people, in whose interest journalists ultimately serve, will understand. They have to make it clear that when they stand in the court of conscience, they are the good guys.

Further study is essential to monitor the state courts when they apply equitable principles in First Amendment cases. More research also needs to be done to determine if corporations can or do function as journalists driven by professional ethics or whether they are guided more by fear of legal retribution in the form of damages that threaten profits.

Perhaps the most important contribution this dissertation can make is to help foster a better understanding of the distinctions among morality, ethics, and law. Such an understanding is essential to maintaining those distinctions and allowing journalists to create the ethical principles that will guide their practice and allow them to fulfill their constitutionally mandated responsibilities to American democracy.

BIBLIOGRAPHY

Primary Sources

American Bar Association. *Model Rules of Professional Conduct (2004)*
<http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM> (5 April 2006).

“American Society of Newspaper Editors Statement of Principles, Adopted by ASNE Board of Directors Oct. 23, 1975.” In Meyer, Philip. *Ethical Journalism: A Guide for Students, Practitioners, and Consumers*. New York: Longman, 1987, 249.

American Medical Association. *E-Principles*. <<http://www.ama-assn.org/ama/pub/category/8292.html>> (4 April 2006).

American Society of Newspaper Editors. *ASNE Statement of Principles*.
<<http://asne.org/kiosk/archive/principl.htm>> (5 April 2006).

Answer to Amicus Curiae Brief of The Tribune Company, Associated Press v. Walker, 388 U.S. 130 (1967) (No.150).

Associated Press Managing Editors. *APME Statement of Ethical Principles*.
<<http://apme.com/ethics/>> (5 April 2006).

Associated Press v. NLRB, 301 U.S. 103 (1937).

Associated Press v. Walker, 388 U.S. 130 (1967).

Associated Press v. United States, 326 U.S. 1 (1945).

Attorney General v. John Peter Zenger, 17 Howell’s State Trials 675 (1735)

Baker v. F&F Investment, 470 F.2d. 778 (2d Cir. 1972).

Bartnicki v. Vopper, 532 U.S. 514 (2001).

Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

Berger v. Cable News Network, Inc., 129 F. 3d 505 (1997), cert denied 525 U.S. 961 (1998).

Berger v. Cable News Network, Inc., No. CV 94-46-BLG-JDS (D. Mont Jan 26, 2001).

Branzburg v. Hayes, 408 U.S. 665 (1972).

Branzburg v. Hayes, 408 U.S. 665 (1972).

Bridges v. California, 314 U.S. 252, (1941).

Brief for Chicago Tribune Company as Amicus Curiae, Smith v. Daily Mail, 443 U.S. 97 (1979) (No. 78-482).

Brief for Respondent, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

Brief for The Tribune Company as Amicus Curiae, Associated Press v. Walker, 388 U.S. 130 (1967) (No. 150).

Brief of Amici Curiae ABC, Inc. et al. in Support of Petitioners in No. 97-1927 and Respondents in No. 98-83, Hanlon v. Berger, 526 U.S. 808 (1999), Wilson v. Layne, 526 U.S. 603 (1999) (Nos. 97-1927, 98-83).

Brief of Amici Curiae The Reporters Committee for Freedom of the Press, Matthews v. U.S., 531 U.S. 910 (2000) (No. 00-5605).

Brief of Respondent, Firestone, Time Inc. v. Firestone, 442 U.S. 448 (1976) (No. 74-944).

Brief of Amicus Curiae Silha Center for the Study of Media Ethics and Law , Office of Independent Counsel v. Favish, 541 U.S. 156 (2004) (No. 02-954).

Brief of the American Civil Liberties Union in Support of Petitioners, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (No. 82-1721).

Brief of the Tribune Company as Amicus Curiae in Support of Petitioner, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

Brief of the Washington Post Company as Amicus Curiae in Support of Petitioner, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

Burstyn v. Wilson, 343 U.S.495 (1952).

Butterworth v. Smith, 494 U.S. 624 (1990).

Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974).

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

Cong. Rec. S 9423 (daily ed. July 29, 2005) (statement of Sen. Dodd).

Cooley, Thomas M. *A Treatise on the Law of Torts: Wrongs Which Arise Independent of Contract*. Chicago: Callaghan, (2nd ed. 1888).

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Federated Publications, Inc. v. Swedburg, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982).

Florida Star v. B.J.F., 491 U.S. 524 (1989).

Gannett Newspaper Division. *Principles of Ethical Conduct for Newsrooms*.
<<http://www.gannett.com/go/press/pr061499.htm>> (5 April 2006).

Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied 358 U.S. 910 (1958).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 399 (1974).

Gilbert v. Allied Chem Corp., 411 F. Supp. 505 (E.D. Va. 1976).

Godkin, E.L. "Rights of the Citizen." *Scribner's Magazine*, July 1890, 67.

Hanlon v. Berger, 526 U.S. 809 (1999).

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

In re Farber, 78 N.J. 259, cert. denied, 439 U.S. 997 (1978).

In re Shain, 978 F.2d 850 (4th Cir. 1992).

JB Pictures, Inc. v. Department of Defense, 86 F. 3d. 236 (D.C. Cir.) (1996).

"Kansas Code of Ethics." In Nelson Antrim Crawford, *The Ethics of Journalism*, 202-210. New York: A.A. Knopf, 1924.

Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

Lee v. United States DOJ, 287 F. Supp. 2d 15, 17 (D.D.C. 2003).

Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).

McKevitt v. Pallasch, 339 F. 3d 530 (7th Cir. 2003).

Masson v. New Yorker Magazine, 501 U.S. 496 (1991).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1979).

Near v. Minnesota, 283 U.S. 697 (1931).

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Nelson v. McClatchy, 131 Wash. 2d. 523 (1997), cert. denied, 522 U.S. 866 (1997).

New York Times v. Jasclevich, 439 U.S. 1331 (1978) (Marshall, J., in chambers).

New York Times v. United States, 403 U.S. 713 (1971).

New York Times v. United States, 403 U.S. 713 (1971).

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

Olmstead v. United States, 277 U.S. 438 (1928).

Oral Argument In The Supreme Court of the United States (Dec. 3, 2003), Office of Independent Counsel v. Allan J. Favish, 541 U.S. 157 (2004) (No. 02-954).

Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).

Petition for Certiorari, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

Radio Television News Directors Association. *RTNDA Code of Ethics and Professional Conduct*. <<http://www.rtna.org/ethics/coe.html>> (5 April 2006).

Restatement (Second) of Torts §652B (1972).

Restatement (Second) of Torts §652C (1972).

Restatement (Second) of Torts §652D (1972).

Restatement (Second) of Torts §652E (1972).

Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

Roth v. United States, 354 U.S. 476, 486-87 (1957).

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

Sheppard v. Maxwell 384 U.S. 333 (1966).

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).

Smith v. Daily Mail, 443 U.S. 97 (1979).

Society of Professional Journalists. *Code of Ethics*. <http://www.spj.org/ethics_code.asp> (5 April 2006).

The New York Times, *Ethical Journalism Guidebook*. <<http://www.nytc.com/company-properties-times-coe.html>.> (5 April 2006).

Time, Inc. v. Firestone, 442 U.S. 448 (1976).

Time, Inc. v. Hill, 385 U.S. 374 (1967).

Time, Inc. v. Pape, 401 U.S. 279 (1971).

Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

United States v. Matthews, 209 F. 3d 338 (4th Cir. 2000), cert. denied 531 U.S. 910 (2000).

United States v. Cable News Network, Inc., 865 F. Supp. 1549, 1564 (S. D. Fla. 1994).

United States v. Cable News Network, Inc., 865 F. Supp. 1549, 1564 (S. D. Fla. 1994).

United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986).

United States v. Liddy, 478 F.2d 586 (D.C. Cir. 1972).

United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

United States v. Russo, No. 9373 – (WMB) – CD (filed Dec. 29, 1971), dismissed (C.D. - Cal. May 11, 1973).

United States v. Smith, 135 F.3d 963 (5th Cir. 1998).

1947 NARND Code of Standards. In Shelley, Jack “Somehow It Works!” *RTNDA Communicator*, Oct. 1990, 86.

Warren, Samuel and Louis Brandeis. “The Right to Privacy.” *Harvard Law Review* 4 (1890): 193.

Wilson v. Layne, 526 U.S. 603 (1999).

Secondary Sources

- Abraham, Henry J. and Barbara A. Perry. *Freedom and the Court Civil Rights and Liberties in The United States*. New York: Oxford University Press, (7th ed. 1998).
- Akhil, Reed Amar. "Hugo Black and the Hall of Fame." *Alabama Law Review* 53 (2002):1221.
- Alexander, Laurence B. "Ethical Choices that Become Legal Problems for Media." *Newspaper Research Journal*. Winter/Spring 1996, 49.
- Allen, Anita. *Uneasy Access: Privacy for Women in a Free Society*. Totowa, N.J. : Rowman & Littlefield, 1988.
- Allen, David S. "Merging Law and Ethics: Discourse Legal Theory and Freedom of Expression in Hurley." *Communication Law & Policy* 4 (1999): 403.
- Baker, C. Edwin. "Media Concentration: Giving Up on Democracy." *Florida Law Review* 54 (2002): 839.
- Baldasty, Gerald. *The Commercialization of News in the Nineteenth Century*. Madison, Wis.: University of Wisconsin Press, 1992.
- Ball, Howard & Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution*. New York: Oxford University Press, 1992.
- Banning, Stephen A. "The Professionalism of Journalism: A Nineteenth-Century Beginning." *Journalism History* 24 (Winter 1998-1999): 157.
- Barnett, Randy E. "Constitutional Legitimacy" *Columbia Law Review* 103 (2003): 111.
- Bates, Stephen. *Realigning Journalism with Democracy: The Hutchins Commission, Its Times and Ours*. Washington, D.C.: Annenberg Washington Program, 1995.
- Bezanson, Randall P. "Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press." *Emory Law Journal* 47 (1998): 895.
- Bird, George L. & Frederic E. Merwin. *The Press and Society*. New York: Prentice-Hall, 1971.
- Black, Jay. "Rethinking the Naming of Sex Crime Victims." *Newspaper Research Journal* 16 (1995): 96.
- Black, Jay, Bob Steele and Ralph Barney. *Doing Ethics in Journalism*. Greencastle, Ind.: The Sigma Delta Chi Foundation and The Society of Professional Journalists, 1993.

Black, Jay, Bob Steele and Ralph Barney. *Doing Ethics in Journalism*. 3rd ed. Boston: Allyn and Bacon, 1999.

Black, Jay and Ralph D. Barney. "The Case Against Mass Media Codes of Ethics." *Journal of Mass Media Ethics* 1 (Fall-Winter 1985-86): 27.

Blair, Jayson. *Burning Down My Master's House: My Life at the New York Times*. Beverly Hills, Calif.: New Millennium Press, 2004.

Blanchard, Margaret A. "Press Criticism and National Reform Movements: The Progressive Era and the New Deal." *Journalism History* 5 (1978): 33.

_____. "Reclaiming Freedom of the Press: A Hutchins Commission Dream or Nightmare?" *Communication Law & Policy* 3 (1998): 371.

_____. "The Hutchins Commission, The Press and the Responsibility Concept." *Journalism Monographs*, May 1977.

Bloustein, Edward J. "The First Amendment and Privacy." *Rutgers Law Review* 28 (1974): 41.

Cohon, Rachel. "Hume on Promises and the Peculiar Act of the Mind." *Journal of the History of Philosophy* 44 (2006): 1.

Dennis, Everette E. and John Merrill. *Media Debates: Issues in Mass Communication*. New York: Longman, 1991.

Braman, Sandra. "Public Expectations of Media Versus Standards in Codes of Ethics." *Journalism Quarterly* 65 (1984): 71.

Brogan, Patrick. *Spiked: The Short Life and Death of the National News Council*. New York: Priority Press, 1985.

Bunker, Matthew D. *Critiquing Free Speech*. Mahwah, N.J.: Lawrence Earlbaum Associates, 2001.

Calvert, Clay. *Voyeur Nation: Media, Privacy and Peering in Modern Culture*. Boulder, Colo.: Westview Press, (2000).

Chafee, Zechariah Jr. *Government and Mass Communications*. Chicago: University of Chicago Press, 1947.

Christians, Clifford G. *Good News :Social Ethics and the Press*. New York: Oxford University Press, 1993.

_____. "Fifty Years of Scholarship in Media Ethics." *Journal of Communication* 27 (1977): 19.

Christie, George C. "On the Moral Obligation to Obey the Law." *Duke Law Journal* 1990 (1990): 1311.

Cohen, Elliot D. and Deni Elliot, eds. *Journalism Ethics: A Reference Handbook*. Santa Barbara, Calif: ABC-CLIO, 1998.

Colaico, James A. "Martin Luther King Jr. and the Paradox of Nonviolent Direct Action." *Phylon* 47 (1986): 16.

Commission on Freedom of the Press, *A Free and Responsible Press*. Edited by Robert D. Leigh. Chicago: University of Chicago Press, 1947.

Copeland, David A. *Colonial American Newspapers: Character and Content*. Newark : University of Delaware Press, 1997.

Crawford, Nelson Antrim. *The Ethics of Journalism*. New York: A.A. Knopf, 1924.

Cronin, Mary M. and James B. McPherson. "Pronouncements and Denunciations: An Analysis of State Press Association Ethics Codes from the 1920s." *Journalism & Mass Communication Quarterly* 72 (1995): 890.

Currie, David P. *The Constitution of the United States: A Primer for the People*. Chicago: University of Chicago Press, 1988.

Dennis, Everette E. and John Merrill. *Media Debates, Issues in Mass Communication*. New York: Longman, 1991.

Denno, Deborah W. "The Privacy Rights of Rape Victims in the Media and the Law." *Fordham Law Review* 61 (1993): 1113.

Detmold, M. J. *The Unity of Law and Morality: A Refutation of Legal Positivism*. Boston: Routledge & Kegan Paul, 1984.

Dreschel, Robert E. "Media Malpractice: The Legal Risks of Voluntary Social Responsibility in Mass Communication." *Duquesne Law Review* 27 (1989): 237.

Edelman, Peter B. "Free Press v. Privacy: Haunted by the Ghost of Justice Black." *Texas Law Review* 68 (1990): 1195.

Erskine, Hazel. "The Polls: Freedom of Speech." *Public Opinion Quarterly* 34 (Autumn 1970): 483.

_____. "The Polls: Government Information Policy." *Public Opinion Quarterly* 35 (Winter 1971-1972): 483.

Evensen, Bruce. "Journalism's Struggle over Ethics and Professionalism During America's Jazz Age." *Journalism History* 16: (1989) 54.

Fairhurst, Mary E. & Andrew T. Braff. "William O. Douglas Lecture: William O. Douglas: The Gadfly of Washington." *Gonzaga Law Review* 40 (2004-2005): 259.

Farber, Daniel A. & William N. Eskridge Jr. *Cases and Materials on Constitutional Law*. St. Paul: West, 1993.

Fargo, Anthony L. "Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States" *Communication Law & Policy* 11 (2006): 35.

Fedler, Fred. *Media Hoaxes*. Ames: Iowa State University Press, 1989.

Flint, Leon Nelson. *The Conscience of the Newspaper*. New York: D. Appleton and Company (1925).

Fortner, Robert S. "The Self-Conscious Image and the Image of an Ethical Press," *Journalism History*. 5 (Summer 1978): 46.

Franklin, Marc A. "The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law." *Stanford Law Review* 16 (1964): 789.

Freedman, Alix M. & Rekha Balu. "How Cincinnati Paper Ended Up Backing Off From Chiquita Series." *Wall Street Journal*, July 17, 1998, A16.

Gannett Newspaper Division. "Principles of Ethical Conduct for Newsrooms." <<http://www.gannett.com/go/press/pr061499.htm>> (5 April 2006).

Garcia, Hazel-Dicken. *Journalistic Standards in 19th Century America*. Madison, Wis.: University of Wisconsin Press, 1989.

Garrow, David. *Bearing the Cross: Martin Luther King Jr., and the Southern Christian leadership Conference*. New York: William Morrow, 1986.

Gersh, Debra. "Resurrect the National News Council?" *Editor & Publisher*, May 8, 1993, 12.

Glass, Stephen. *The Fabulist: A Novel*. New York: Simon & Schuster, 1993.

Goldstein, Tom. "Wanted: More Outspoken Views; Coverage of Press is Up, But Criticism is Down." *Columbia Journalism Review*. November-December, 2001, 144.

- Goodale, James C. "The Press Ungagged: The Practical Effect on Gag Order Litigation of *Nebraska Press Association v. Stuart*." *Stanford Law Review* 29 (1977): 497.
- Goodwin, H. Eugene and Ron F. Smith. *Groping for Ethics in Journalism*. Ames: Iowa State University Press, 1999.
- Graves, Florence George. "Protecting the Privilege." *American Journalism Review*, April 1998, 22.
- Guest, Stephen, ed. *Positivism Today*. Brookfield, Vt.: Dartmouth. 1996.
- Gulley, Norman. *The Philosophy of Socrates*. New York: St. Martin's Press, 1968.
- Habermas, Jurgen. *The Theory of Communicative Action*. Translated by Thomas McCarthy. Boston: Beacon Press, 1981.
- Halstuk, Martin E. "Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and Accountability." *Communications Law Conspectus* 1 (2003): 71.
- Harrigan, Jane T. and Karen Brown Dunlap. *The Editorial Eye*. Boston: Bedford/St. Martin's, 2004.
- Henning, Albert. *Ethics and Practices in Journalism*. New York: Long and Smith, 1932.
- Herr, William A. "Thoreau: A Civil Disobedient?" *Ethics* 85 (1974): 87.
- Hindman, Elizabeth Blanks. *Rights vs. Responsibilities: The Supreme Court and the Media*. Westport, Conn.: Greenwood Press, 1996.
- Hobbes, Thomas. *Leviathan*. Michael Joseph Oakeshott, ed. New York: Simon & Schuster, 1960.
- Hoffer, Peter Charles. *The Law's Conscience: Equitable Constitutionalism in America*. Chapel Hill: The University of North Carolina Press, 1990.
- Hook, Sidney, ed. "John Rawls, Legal Obligation and the Duty of Fair Play." In *Law and Philosophy: A Symposium*. New York: New York University Press, 1964.
- Hopkins, W. Wat. "Negligence 10 Years After *Gertz v. Welch*." *Journalism Monographs*, August, 1985.
- _____. "The Involuntary Public Figure: Not So Dead After All." *Cardozo Arts & Entertainment Law Journal* 21 (2003): 9.

Hornsby, Alton Jr. "Martin Luther King, Jr., Letter From a Birmingham Jail." *Journal of Negro History*, Winter-Autumn 1986, 38.

Isaacs, Norman E. *Untended Gates: The Mismanaged Press*. New York: Columbia University Press, 1986.

Johnson, Michelle. "Of Public Interest: How Courts Handle Rape Victims' Privacy." *Communication Law & Policy* 4 (1999): 201.

Jenkins, Evan. "News Councils: The Case for and Against." *Columbia Journalism Review*, March/April 1997, 39.

Kaderlan, Alice. "Reporter Accused of Staging a Dogfight." *Washington Journalism Review*, November 1990, 19.

Katz, Stanley Nider, ed., *A Brief Narrative of the Case and Trial of John Peter Zenger*. Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 1972.

Kohlberg, Lawrence. *The Philosophy of Moral Development : Moral Stages and the Idea of Justice*. San Francisco: Harper & Row, 1981.

Kovach, Bill and Tom Rosenstiel, *The Elements of Journalism*. New York: Three Rivers Press, 2001.

Krieger, Marcia S. "The Bankruptcy Court is a Court of Equity: What Does That Mean?" *Supreme Court Law Review* 50 (1999): 275.

Kriss, Ronald P. "The National News Council at Age One." *Columbia Journalism Review*, Nov./Dec. 1974, 33.

Lambeth, Edmund B. *Committed Journalism: An Ethic for the Profession*. Bloomington: Indiana University Press, 1992.

Lancaster, Paul. *Gentleman of the Press: The Life and Times of an Early Reporter, Julian Ralph, of the Sun*. Syracuse, N.Y.: Syracuse University Press, 1992.

Lawhorne, Clifton O. *Defamation and Public Officials*. Carbondale: Southern Illinois University Press, 1971.

Lawry, Robert P. "Ethics in the Shadow of Law: The Political Obligation of a Citizen." *Case Western Reserve Law Review* 52 (2002):655.

Levin, Daniel A. and Ellen Blumberg Rubert. "Promises of Confidentiality to News Sources After Cohen v. Cowles Media Company: A survey of Newspaper Editors." *Golden Gate University Law Review* 24 (1994): 423.

Lloyd, Scott. "A Criticism of Social Responsibility Theory: An Ethical Perspective." *Journal of Mass Media Ethics* 6 (1991): 99.

Locke, John. *Second Treatise of Government*. C.B. MacPherson, ed. Indianapolis: Hackett Publishing Co., 1980.

Lokos, Lionel. *The Life and Legacy of Martin Luther King* (1968).

Lyons, David. "Moral Judgment, Historical Reality, and Civil Disobedience." *Philosophy & Public Affairs*, Winter 1998, 31.

Marcus, Paul and Tara L. McMahon. "Limiting Disclosure of Rape Victims' Identities." *Southern California Law Review* 64 (1991): 1020.

Marzolf, Marion T. *Civilizing Voices: American Press Criticism 1880-1950*. New York : Longman, (1991).

McCollam, Douglas. "Attack at the Source, Why the Plame Case is so Scary." *Columbia Journalism Review*, March 2005, 29.

McConnell, Jane S. "Choosing a Team for Democracy: Henry R. Luce and the Commission on Freedom of the Press." *American Journalism* 14 (Spring 1997): 148.

McIntyre, Jerilyn S. "The Hutchins Commission's Search for a Moral Framework." *Journalism History* 6 (Summer 1979): 54.

_____. "Repositioning a Landmark: The Hutchins Commission and Freedom of the Press." *Critical Studies in Mass Communication* 4 (1987): 136.

Merrill, John C. *Journalism Ethics: Philosophical Foundations for News Media*. New York: St. Martin's Press, 1997.

Merritt, Davis. *Public Journalism and Public Life: Why Telling The News is not Enough*. Hillsdale, N.J.: Erlbaum, 1995.

Meyer, Frank. "Showdown with Insurrection." *National Review*, Jan. 16, 1968, 36.

Meyer, Philip. *Ethical Journalism : A Guide for Students, Practitioners, and Consumers*. New York: Longman, 1987.

Moore, Michael S. "The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism." *Cornell Law Review* 69 (1984): 988.

Murchison, Brian C. et al., "Sullivan's Paradox: The Emergence of Judicial Standards of Journalism." *North Carolina Law Review* 73 (1994): 7.

Nimmer, Melville B. "National Security Secrets v. Free Speech." *Stanford Law Review* 26 (1974): 311.

Nizer, Louis. "The Right of Privacy." *Michigan Law Review* 39 (1941): 526.

Overholser, Geneva. "Name the Accuser and the Accused." *Poynteronline*, July 23, 2003 <http://www.poynter.org/content/content_view.asp?id=42260>.

Pember, Don R. *Privacy and the Press: The Law, the Mass Media, and the First Amendment*. Seattle: University of Washington Press, 1972.

Poser, Susan. "Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status." *Nebraska Law Review* 81(2002): 283.

Posner, Richard A. "Against Constitutional Theory." *New York University Law Review* 73 (1998): 1.

_____ "Pragmatic Adjudication." *Cardozo Law Review* 18 (1996): 1.

_____ "Pragmatism Versus Purposivism in First Amendment Analysis." *Stanford Law Review* 54 (2002): 737.

_____ *The Problematics of Moral and Legal Theory*. Cambridge, Mass.: Belknap Press of Harvard University Press, 1999.

Powe, Lucas A. Jr. *American Broadcasting and the First Amendment*. Berkeley: University of California Press, 1987.

Prakash, Saikrishna B. & John C. Yoo. "The Origins of Judicial Review." *University of Chicago Law Review* 70 (2003): 887.

Pritchard, David and Madelyn Peroni Morgan, "Impact of Ethics Codes on Judgments by Journalists: A Natural Experiment." *Journalism Quarterly* 66 (1984): 934.

Prosser, William L. "Privacy." *California Law Review* 48 (1960): 383.

Raz, J. *The Authority of Law: Essays on Law and Morality*. New York: Oxford University Press, 1979.

Rosenberg, Norman L. *Protecting the Best Men: An Interpretive History of the Law of Libel*. Chapel Hill: University of North Carolina Press, 1986.

Rosen, Jay. *Getting the Connections Right: Public Journalism and the Troubles in the Press*. New York: Twentieth Century Fund, 1996.

- Rousseau, Jean Jacques. *The Social Contract and Discourses*. G. D. H. Cole, trans. New York: E. P. Dutton, 1959.
- Saalberg, Harvey. "The Canons of Journalism: A 50-Year Perspective." *Journalism Quarterly* 50: 1973) 731.
- Sack, Robert D. *Sack on Defamation*. New York: Practising Law Institute (3rd ed. 1999).
- Sanford, Bruce W. *Don't Shoot the Messenger*. New York: The Free Press, 1999.
- Schauer, Frederick. "The Social Construction of Privacy." In *Journalism and the Debate Over Privacy*, edited by Craig L. LaMay 3-16, 2003). Mahwah, N.J.: Erlbaum, 2003).
- Schiller, Dan. *Objectivity and the News: The Public and the Rise of Commercial Journalism*. Philadelphia: University of Pennsylvania Press, 1981.
- Schmuhl, Robert, ed. *The Responsibilities of Journalism*. Notre Dame, Ind.: University of Notre Dame Press (1984).
- Shepard, Alicia C. "Going Public." *American Journalism Review*, April 1997, 29.
- Siebert, Fred S., Theodore Peterson and Wilbur Schramm. *Four Theories of the Press*. Urbana, Ill.: University of Illinois Press, 1956.
- Sinclair, T. A. *A History of Greek Political Thought*. Cleveland: World Pub. Co., 1967.
- Smallman, David B. "Federal Shield Law Introduced in House," *The IRE Journal*, March/April 2005, 2.
- Smith, M.B.E. "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82 (1973): 950.
- Smolla, Rodney A. "Accounting for the Slow Growth of American Privacy Law." *Nova Law Review* 27 (2002): 289.
- Stavitsky, Alan G. *Independence and Integrity: A Guidebook for Public Radio Journalism*. Washington, D.C.: National Public Radio (1995).
- Stein, M.L. "News Councils, Threat or Salve." *Editor & Publisher*, Oct. 19, 1997, 15.
- _____ "Revive the News Council?" *Editor & Publisher*, Mar. 29, 1997, 8.
- Stephen, James Fitzjames. "The Doctrine of Liberty in Its Application to Morals." In Gerald Dworkin ed. *Morality, Harm, and the Law*. Boulder, CO: Westview Press, 1994.
- Stewart, Potter. "Or of the Press." *Hastings Law Journal* 26 (1974-1975): 631.

Storey, Jeff. "Does Ethics Make Good Law? A Case Study," *Cardozo Arts and Entertainment Law Journal* 19 (2001): 467.

Stumpf, Samuel Enoch. *Morality and the Law*. Nashville: Vanderbilt University Press, 1966.

Subrin, Stephen N. "How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective." *University of Pennsylvania Law Review* 135 (1987): 909.

Summers, Robert Samuel and Arthur L. Goodhart, eds. *American Legal Theory*. New York: New York University Press, 1992.

Summers, Robert Samuel. *Instrumentalism and American Legal Theory*. Ithaca, N.Y.: Cornell University Press, 1982.

The Twentieth Century Fund. *A Free and Responsive Press*. New York: The Twentieth Century Fund, 1973.

Thoreau, Henry David. *Civil Disobedience*. Boston: David R. Godine, 1969.

Tomlinson, Don E. "Where Morality and Law Diverge: Ethical Alternatives in the Soldier of Fortune Cases." *Journal of Mass Media Ethics* 6 (1991): 69.

United States. *Report of the National Advisory Commission on Civil Disorders*, Washington, D.C.: U.S. Govt. Printing Office 1968.

United States. *Report of the Warren Commission on the Assassination of President Kennedy*, New York: McGraw-Hill, 1964.

Stone, Vernon. "Evolution of the RTNDA Codes of Ethics." <<http://web.missouri.edu/~jourvs/rpcodes.html>> (5 April 2006).

Wallace, Mike. "The Press Under Fire." *Quill*, Nov./Dec. 1995, 20.

Wendel, W. Bradley. "Civil Obedience." *Columbia Law Review* 104 (2004): 363.

Whitman, James Q. "The Two Western Cultures of Privacy: Dignity Versus Liberty." *Yale Law Journal* 113 (2004): 1151.

Wiegand, Shirley A. "Sports Heroes, Sexual Assault and the Unnamed Victim." *Marquette Sports Law Review* 12 (2001): 501.

Young, Roger and Stephen Spitz, "SUEM – Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose." *South Carolina Law Review* 50 (2003-2004): 175.

Zashin, Elliot M. *Civil Disobedience and Democracy*. New York: Free Press, 1972.

Zimmerman, Dianne B. "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort." *Cornell Law Review* 68 (1983): 291.