Ethical Issues in Communication Professions

New Agendas in Communication

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NEW YORK AND LONDON

Chapter 1

Freedom of the Press and Journalism Ethics in the Internet Age

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After the website WikiLeaks disclosed thousands of classified United States military documents leaked by a soldier, Republican Vice Presidential candidate Sarah Palin called the site a terrorist organization, while a member of the Norwegian Parliament nominated it for a Nobel Peace Prize. In illuminating the threat of the Internet to the social-responsibility principles of journalism ethics in the U.S., the document disclosure torpedoed a bill pending in the U.S. Senate giving journalists a long-sought statutory journalist's privilege to protect confidential sources. But wasn't the website providing citizens with truthful information about public affairs and serving as a watchdog of government—precisely what we want from journalistic organizations? The dissemination of truth is a core value in American free-press theory and journalism ethics theory, but WikiLeaks and other recent examples underscore how the Internet age requires rethinking of traditional theories of freedom of the press and journalism ethics.

The Internet has revolutionized traditional media ecology, diminishing the news media's gatekeeping role and the role of journalists in mediating news. This technological shift has also reduced institutional barriers for individuals who want to disseminate information to the public. Matt Drudge's online scoop of President Bill Clinton's sexual dalliance with a White House intern in 1998 catapulted bloggers to the journalistic fore, and some bloggers quickly established their journalistic bona fides to openly compete with large, commercial media companies. Today, there is no longer the question of whether bloggers are journalists, but rather a question of what makes a blogger a journalist. Indeed, one wonders whether journalism itself is a profession and discipline that can sustain itself in the new media landscape. Professor Paul Starr in *The Creation of the Media* (2004) and Professor Elliot King in *Free for All: The Internet's Transformation of Journalism* (2010) demonstrate that the Internet is not the first technology to revolutionize the journalism profession. However, in *We're All Journalists Now* (2007), attorney Scott Gant argues that the Internet does indeed present a paradigm shift for the concept of journal-

ism as a profession, arguing that journalism is better viewed as a process and product that can be done by anyone with a computer and modem.

This chapter explores the impact of the Internet age on the legal and ethical frameworks of traditional journalism. Can journalism, defined by ethical and legal frameworks, continue to be a distinct discourse in the Internet age? To what degree does adherence to traditional journalism ethical practices afford online communicators with legal protections as journalists? How should the law define who is a journalist in today's changing media landscape? Given the technological revolution, does it even make any sense to use ethical concepts to provide legal distinctions for journalism, and if so, how should traditional journalism's ethical principles evolve in light of new practices and legal problems raised by new technologies? After exploring these questions and concluding that journalism should remain a central component of normative free-press theory, I offer several suggestions on how future research can expand and apply free-press theory and journalism ethics to journalistic practices in the Internet age.

Journalism as a Preferred Press Freedom

As Supreme Court Justice Potter Stewart viewed it in 1974, the press clause of the First Amendment in the U.S. Constitution is a uniquely American structural provision that provides journalistic institutions—"the daily newspapers and other established news media"—with explicit constitutional rights in order to guarantee an independent "fourth estate" of government to provide "organized, expert scrutiny of government" (Stewart, 1975). In a seminal scholarly work, Professor Vince Blasi articulated a "checking value" theory of the First Amendment that positioned journalists as an archetype of First Amendment freedom fighters, professional experts whose ethical purpose was to advance democracy and improve government by serving as truth seekers acting in the public interest (Blasi, 1977). Professor David A. Anderson, in his treatise on the original intent of the press clause, concluded that this fourth estate model "seems so thoroughly supported by the legislative history that one may wonder why it has not been universally accepted" (Anderson, 1983). More recently, C. Edwin Baker has argued that the Supreme Court's free-press doctrine embraces this institutional, instrumental approach (Baker, 2007).

The idealistic, utilitarian vision of journalism as a constitutionally protected and imperative institution that Justice Stewart presented in 1974 is one normative model of modern free-press theory. But the theory is outdated when one considers the transformative effects of the Internet on journalism. The status and role of journalism has changed dramatically in recent years, with potentially transformative effects on free-press theory. For free-press and journalism-ethics scholars, a profound question

is whether the Stewart–Blasi–Anderson view of journalism as a special discourse—constitutionally protected and democratically important—is even worth rescuing in the Internet age. As Professor Randall D. Eliason has argued, laws specifically protecting journalism "may soon be considered a relic of a simpler era—a relic that now is neither workable or necessary" given the "rapid technological changes in both the nature and quantity of information regularly made available to the public" (Eliason, 2006).

This argument can be troubling to free-press and journalism-ethics scholars because it challenges theoretical frameworks and modern legal and ethical doctrines. Free-press theory as it has developed in American legal jurisprudence has emphasized normative claims about the role of journalism in a democratic society to justify special rights and responsibilities. Broadly speaking, the principle of freedom of the press forbids the government from censoring, punishing, or licensing the press except in extraordinary circumstances and under strict scrutiny of the judiciary, based on the justification that a free press is necessary for citizens to exercise their sovereignty over government. Indeed, one cannot read the U.S. Supreme Court's major press cases of the twentieth century without appreciating the Court's full embrace of the essential tenets of the free-press principle. This began in 1931 when, in *Near v. Minnesota*, the Court struck down a Minnesota law that allowed newspapers to be banned as a public nuisance. Five years later, in striking down a Louisiana law requiring the nine largest newspapers in the state to pay a 2% licensing tax, the Supreme Court wrote in *Grosjean v. American Press Co.* (1936), "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves" (p. 250). The Supreme Court expanded its commitment to the free-press principle in ensuing decades. In the landmark 1964 decision *New York Times v. Sullivan*, in which the Court overturned a $500,000 libel judgment against the *New York Times*, the Court wrote that "debate on public issues should be uninhibited, robust and wide open" (p. 270). Professor Lee Bollinger described the decision as the "fullest, richest articulation of the central image of freedom of the press" (Bollinger, 1991, p. 2), which he characterized as having a distrust of government, treating the citizen as sovereign, emphasizing the importance of public debate, and viewing the press as the public's representative.

The special role of journalists in the free-press principle was the centerpiece of the Court's ruling in *New York Times v. U.S* (1971). On a vote of 6–3, the Court rejected President Richard Nixon's attempt to halt publication of the so-called Pentagon Papers—leaked, classified documents about the government's involvement in the Vietnam War. In separate opinions, several justices articulated visions of the institutional press and the journalism profession as noble crusaders of truth on behalf of the public. In an almost poetic opinion, Justice Hugo Black wrote

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. ... In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.
>
> (p. 717)

Justice Black referred to the press as singular, referring clearly to the institution the public came to know as journalistic news organizations. Other justices in the case did the same. Justice Douglas cited *Near* in arguing that a "vigilant and courageous press" is needed to confront the "malfeasance and corruption of government officials in a vast bureaucracy" (p. 723). And Justice Stewart wrote that especially in regard to national defense and international affairs, "it is perhaps here that a press that is alert, aware and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people" (p. 728).

Despite this strong rhetoric of journalism as a special discourse that serves as the basis for free-press theory, a paradox exists in First Amendment jurisprudence. As Professor Anderson argued in the *Texas Law Review*, "as a matter of positive law, the Press Clause actually plays a minor role in protecting the freedom of the press. Most of the freedoms of the press the press receives from the First Amendment are no different from the freedom everyone enjoys under the Speech Clause" (Anderson, 2002, p. 429). As early as 1938, in *Lovell v. City of Griffin*, the Court emphasized an individual rather than institutional view of press freedom. "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets ... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion" (p. 453). Indeed, while the Court has embraced the rhetoric of press freedom protecting journalistic institutions most fully, "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others," Justice Burger wrote in *First National Bank v. Bellotti* in 1978 (p. 798). Burger made his view clear:

> The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.
>
> (p. 801)

This legal approach views the press clause as generally impotent other than to emphasize an individual's right to disseminate information in print as well as verbally, analogous to legal protections under the speech clause of the First Amendment. On the other hand, Justice Stewart, in his 1974 speech "Or of the Press," said conclusively that the press clause "extends protection to an institution." He went on:

> It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They are guaranteed that freedom to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy ... By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.
>
> (Stewart, 1975, p. 633)

Despite the seeming embrace of the individual rights model over the institutional model, the articulation of the free-press principle in the Supreme Court's jurisprudence often emphasizes the special role of journalism in a democratic system of government, and it has arisen in various contexts in which the press has sought to use the free-press principle both as a shield and as a sword. A free press serves two primary purposes, both of which can be viewed as utilitarian or instrumental: to inform citizens about public affairs to advance democracy and to check for abuses among those in power. The public-information theory of the First Amendment articulated by Alexander Meiklejohn (1948) and the checking-value theory of the First Amendment articulated by Vince Blasi (1977) both support the institutional view of journalism that has developed in modern Supreme Court jurisprudence. Journalists have been far more successful at using the First Amendment as a shield from government censorship and civil liability. The major foundations of press law doctrine establish judicial hostility toward prior restraints and higher burdens of liability based on First Amendment concerns. Thus far, the press has been less successful at convincing the Supreme Court that the free-press principle grants journalists broad special rights, such as an evidentiary privilege or access rights to jails and records. The press has had greater success in the lower courts and in state legislatures in securing special legal protections.

To be sure, the free-press principle is ripe for criticism in several respects. First, the principle generally prioritizes press freedom over other social

interests, such as individuals' reputations and privacy, except in egregious cases. The press generally cannot be compelled to present multiple viewpoints, it can use sensationalism to distort, it can emphasize entertainment over public affairs, it can play to personal biases and prejudices, and it can fuel ignorance and pettiness. In addition to the market-based failings of journalism to live up to its ideals and the tensions between the institutional versus individual approach to the press clause, the Internet has raised profound questions about the premises and implications of the traditional free-press principle.

The Internet Revolution's Effects on Journalism

The development of the free-press principle into Supreme Court jurisprudence began in the 1930s and peaked in the 1970s. The legal doctrines are the creation of a media environment dominated by print journalism. However, this journalism-centric model of the free-press principle is ripe for alteration and rethinking because of the Internet revolution's effects on traditional journalism.

The journalism profession is in trouble. Between 2001 and 2010, American newspapers shed 25% of their newsroom employees. The title of Robert McChesney and Victor Pickard's 2011 book, *Will the Last Reporter Please Turn Out the Lights*, reflects the existential crisis for journalism. Due to changes in the production, dissemination, and consumption of news, traditional journalists no longer serve as citizens' primary gatekeepers and mediators of news. The business model for newspapers, the traditional core of the journalism profession, is being gutted by the irreversible loss of advertisers and declining circulation. Filling the void of traditional journalism is a cacophony of information disseminators and services. The Internet has created new models of information production, dissemination, and consumption that eliminate the monopoly newspapers had in gathering, sifting, and packaging news. The technologies associated with the new media—aggregation, search, hyperlinks, digital video and audio, smart phones, live blogs, forums and commenting, social media—mean that news dissemination occurs increasingly in an open information network. The Internet has also allowed for instant access to information, greater personalization, increased globalization, and low costs of entry to publishing. The technological changes have also erased the economic barriers for new journalism entities, and both organizations and individuals have used the new technologies to launch journalistic endeavors wholly on the web.

The flip side of the "journalism is dead" coin is that the Internet allows anyone with access to a computer and modem to publish information to a potentially worldwide audience. Histories of the blogosphere often point to Matt Drudge's exposé of the Clinton–Lewinsky affair as the birth of

the blogger-as-journalist. Drudge was working as a gift-shop employee living in a $600-a-month basement apartment in Santa Monica, California, when he received a tip on January 17, 1998, that *Newsweek* magazine held a story alleging Clinton had an affair with a White House intern. The conventional wisdom suggested Drudge did little more than splash the tip onto his website, www.drudgereport.com, and sit back to watch American politics become embroiled in the most salacious political scandal of a generation, resulting in the impeachment of Bill Clinton. But Drudge was much more than simply a conduit of unconfirmed gossip. He worked the phones, tracked down multiple sources, and received subsequent tips based on his original reporting that furthered the story's developments. He wrote about the tips with background context and provided primary documentary material. Indeed, by reading post-scandal analyses, Drudge's own accounts and the original web postings, a clear picture emerges of Drudge as an aggressive reporter pushing the boundaries of a massive scandal. While one can lament the salaciousness of the content, Drudge unquestionably used many traditional investigative-reporting techniques to land him in the front of the line of those who broke news about a U.S. President's conduct in the White House (Drudge, 2000). In the debate over whether the work product of a blogger is similar to that of a traditional journalist, Matt Drudge became an important case study. Not only is Drudge's website one of the most well-read today because of his record to be right and first just often enough to establish a baseline of credibility, but his infamous rise to fame set the stage for today's political bloggers.

Drudge's performance in covering the Lewinsky story earned him scorn but also accolades. Andrew Sullivan, the former editor of the *New Republic* turned full-time blogger-journalist, said Drudge was a key player by "making history from his basement apartment with a Radio Shack computer and no journalistic training or institutional support against a White House almost as ruthless as Nixon's" (Sullivan, 2000). Today, the Drudge Report is one of the most visited news websites in the world. As newspaper readership continues to see record declines, Drudge continues to see record-high readership. On a random day in spring 2012, his website boasted of more than 29 million hits in the previous 24 hours. While Drudge operates in a new medium with somewhat different rules, he represents a possible new model of journalism, one in which anyone with motivation and a website can become a disseminator of news.

The emergence of blogs as an alternative to the mainstream press has been lauded as one of those transformative moments in American media history, as significant as the postal network or the telegraph. The early history of the blogosphere has revealed a complex relationship between bloggers and traditional journalists. Many journalists scoff at the suggestion that bloggers are one of them. Bloggers can be vapid, opinionated,

self-absorbed, and deal in a currency that has nothing to do with facts, objectivity, and balance. But there is a segment of bloggers who write about current events and politics whose work habits, performance, and work product confound those who say what they do is not journalism. Many of these bloggers search for facts, dig through documents, and disseminate their findings for the world to read. Even some traditional journalists have left their stodgy confines in the mainstream media to create blogs of their own, bringing with them credentials and reputation. And perhaps most importantly, blogs have changed the mainstream media by serving as fact checkers, by providing a wealth of sources and background information for traditional reporters, and by pushing news organizations to cover stories they may not otherwise have covered. Bloggers may be ushering in a new marketplace for public debate while at the same time challenging the old one, and at least some of them are practicing journalism some of the time. Meanwhile, entire news organizations have developed successful business models online, including *Politico* and the *Huffington Post*. They are all part of this new, open, networked journalism.

Traditional Journalism: Legal and Ethical Frameworks

Two separate regulatory models of journalism have emerged in the legal and professional fields. The legal model emphasizes journalistic autonomy and embraces libertarian press theory that emphasizes negative liberty, or the absence of regulation. The ethics model embraces social responsibility theory and articulates frameworks and principles of responsible conduct, emphasizing the normative role the press plays in society and the utilitarian purposes of journalism. While law and ethics are often viewed as separate fields, they intersect in many important ways when it comes to the discussion of who and what is journalism. Because traditional free-press theory posits that journalism is a public good essential to democracy, using concepts and principles of journalistic ethics, a normative inquiry into the future of freedom of the press in the Internet age must consider the separate but related domains of legal doctrine and professional ethics.

One of the key features of the Internet era is the loss of journalistic identity through a diminution of journalistic institutions. For press law, the blurring of journalistic identity requires us to revisit the purposes of the First Amendment in thinking about how traditional legal doctrines might need to change based on the new problems presented by new technologies. For example, the law recognizes journalists as a special class of individuals in many contexts, including protection of confidential sources, exemptions from campaign finance laws, limited liability from libel suits through retraction statutes, and special access to government

institutions such as press boxes in legislative chambers and courtrooms, to name a few.

For journalism ethics, the economic and technological changes require evaluation of the purposes and processes of journalism that are necessary and important for democratic self-government. Journalism ethics discourse needs to address the long-term sustainability of ethical journalism as well as whether different ethical doctrines describe and should guide the increasingly different domains of news production, dissemination, and consumption.

As Professor Hazel Dicken-Garcia has traced, journalism standards and principles developed with the rise of the occupation of a reporter in the late nineteenth century and were solidified by the development of journalism schools, professional organizations, and written codes of ethics in the early twentieth century (Dicken-Garcia, 1989). Modern free-press doctrine developed somewhat later, perhaps explaining why so much *dicta* in Supreme Court decisions embraces an understanding of the free-press clause that is based on the normative theory of journalism. As a result, journalism ethics helped create protective law. For example, journalists used ethical concepts of confidential-source protection to advocate for legal protections in legislatures and the courts, successfully turning an ethical principle into a legal principle (Shepard, 2011a).

One scholarly approach is to treat the law and ethics domains separately, recognizing that the general approach in law is egalitarian, where distinctions between journalist and non-journalist speakers are usually, but not always, problematic, while ethical discourse has emphasized an expert model that makes clear distinctions between journalists and non-journalists based on their adherence to ethical principles. Professors Erik Ugland and Jennifer Henderson (2007) used this dichotomy to create three categories of speakers based on adherence to ethical practices. "Top-level journalists" are those "who are not merely concerned with telling the truth but also with honoring the ethical canons of traditional American journalism, such as independence, proportionality, comprehensiveness, and accountability." Credentials such as training, education, and affiliation may help identify individuals as "top-tier" journalists, but their actions are ultimately what define them. Next, "second-tier" journalists are those who regularly engage in disseminating information to the public but do not adhere to professional standards and core values of ethics codes. Ugland and Henderson identify Arianna Huffington of the *Huffington Post*, Markos Moulitis of the *DailyKos*, the *Newsmax* website, magazines such as *The Progressive* and *The American Prospect*, and television programs such as *Countdown with Keith Olbermann* and *The Daily Show with Jon Stewart* as examples. Finally, they define "public communicators" as individuals who disseminate ideas or information occasionally and without a permanent media presence that enhances accountability.

> A college professor giving a public address, a witness to a terrorist attack who posts a video on YouTube, or an aspiring film critic who sends reviews to others through a listserv would all fall into this category, as would professionals in advertising, public relations, or other fields whose communications are not designed to report on important events occurring in society.
>
> (Ugland & Henderson, 2007, p. 13)

In other words, Ugland and Henderson suggest that adherence to ethical standards is a decisive factor in determining who is a journalist and what is journalism.

Traditional ethical codes of conduct and practice, along with an institutional and organizational framework that encourages and enforces responsibility, have helped identify journalism as a special discourse that deserves special legal protection. The basis for these special laws is under threat as lawmakers and judges increasingly worry about the lack of gatekeepers and the corresponding potential for abuse. The First Circuit Court of Appeals in 2011 seemed to agree, stating, "changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw ... Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status" (*Glik v. Cunniffe*, 1st Cir. 2011). Given these new realities, can journalism, defined by ethical frameworks, continue to be a preferred press freedom in the Internet age?

One of the foundations of traditional free-press theory is that journalists, in part because of their ethical frameworks, were able to fulfill their fourth estate role. But it is worth asking whether we can continue to expect traditional journalism to be able to serve its checking-value function. Additionally, new technologies have raised new problems for professionals, as well as old problems for new practitioners. What follows is a discussion of a disparate set of new legal problems for both traditional journalism and new media practitioners that highlight the complex relationship between law and ethics. All raise unresolved and difficult questions about the appropriate lines of rights and responsibilities for the traditional press and their new media peers. Afterward, I offer a synthesis of these problems in a discussion of where future scholarship could help make sense of these legal and ethical issues.

New Legal and Ethical Problems in the Internet Age

Just as traditional print journalists have needed to learn new professional skills as a result of the Internet revolution—shooting and editing audio and video, search engine optimization, basic web editing, to name

a few—traditional journalists have also had to think about new ways in which their new digital practices might get them into legal trouble in ways that did not happen before the Internet. Prior to the Internet, most publishing situations with legal risks had been satisfactorily resolved in traditional newsroom ethical decisionmaking. None is more obvious than in the realm of privacy law, where amorphous concepts of "public concern" and "newsworthiness" have made the law very deferential to journalists, in part because news organizations' ethics codes often instilled a responsibility in journalists to balance the public interests of their reporting with the harm it may cause, including the harm to persons' privacy. But traditional journalism has many new legal worries that carry related ethical dilemmas. Consider three examples.

Managing an Anonymous Public Forum

The Internet provides potential for deliberative discourse by removing barriers for public discussion that exist in other forms of mass communication. Online bulletin boards, forums, and commenting systems could embody the "marketplace of ideas" metaphor of the First Amendment unlike any other form of communication. However, in practice, news organizations have struggled with regulating their marketplaces of ideas, including, for example, commenting systems on their websites. Many newspaper websites want to draw as many "hits" as possible, and a "wild west" treatment of their comments pages can often draw hundreds of readers who regularly revisit pages and engage with others about news stories. On the one hand, this is a healthy new function for news organizations to provide an open forum for citizens to discuss the news of the day. The reality, of course, is that commenters can be obnoxious, racist, threatening, liars, or marketers and product promoters. News organizations have struggled with various systems to moderate, systems that have legal and ethical implications. If an individual posts something criminal or tortuous, under what circumstances is the newspaper required to provide the writer's identity to police or lawyers? Should the newspaper ever try to protect the identities of pseudo anonymous commenters as if they were confidential sources? What should a newspaper do when they themselves want to "out" a commenter because of the public interest in his or her identity and behavior?

The courts have developed varying tests to determine when an anonymous Internet writer must be identified, often through a subpoena to the web hosting service that tracks an individual's IP address, which usually then provides identifying information, such as a person's name, address, and telephone number. Generally, under section 230 of the federal Communications Decency Act, Internet websites are not legally liable for defamatory content posted by others, but the websites can be

compelled through a subpoena to produce records identifying the posters. In an emerging judicial doctrine, lower courts have generally required the web service to notify the anonymous poster and give them an opportunity to intervene. Then, the plaintiff must make some level of a *prime facie* showing that the writer's actions were likely actionable (i.e., libelous or an invasion of privacy) before the court would unmask the writer's identity.

In some cases, newspapers have gone even further, entangling themselves in fighting for legal anonymity of people who posted on their websites by arguing that state shield laws protect commenters as if they were confidential sources. In a few cases, newspapers were allowed to argue in court on behalf of individuals who posted anonymous comments. This is a troubling development, as anonymous commenters do not often invoke the same characteristics as journalists who are protecting confidential sources. But perhaps sometimes the interests of protecting "whistleblower-like" commenters invokes the same interests as protecting traditional confidential sources, an area of underdeveloped judicial and scholarly articulation.

Alternatively, there have been cases in which newspapers have voluntarily unmasked commenters. In Wausau, Wis., after one commenter posted negative remarks about the *Daily Herald*'s selection of the local village administrator as person of the year in 2008, the mayor demanded to know the name of the disgruntled citizen. The newspaper's publisher gave the mayor the man's e-mail address, who then received a personal letter from the mayor. One high-profile and fascinating example occurred in 2010 when the *Cleveland Plain Dealer* "outed" one of its commenters as being that of a local judge—who was reportedly commenting on stories about cases appearing in her courtroom. The judge, Shirley Strickland Safford, sued the newspaper and its web host for breach of contract, fraud, invasion of privacy, and defamation, while denying she was the writer of the comments. The lawsuit was settled and its terms are not known, but the case reveals several ethical and legal dilemmas. Should a journalist expose a public official who is abusing her power by posting anonymously on a newspaper's website? Are newspapers legally vulnerable if they voluntarily unmask the anonymity of a poster?

These examples suggest that news organizations need to discuss and develop appropriate policies for policing the public forums on their websites in ways that encourage openness and also reasonableness, in ways that take into account both the ethical and the legal implications of this new technology. News organizations want to build stronger relationships with readers, and comment sections can sometimes be the most interesting corners of a website. Comment sections also further a news organization's function in providing citizens with new tools to scrutinize government and encourage the expression of unpopular ideas, which is

facilitated by anonymity. The costs and benefits of anonymity should continue to be the source of dialogue for practitioners and scholars. Some newspapers have moved away from a completely open forum by requiring posters to register, and sometimes use their real names publicly, in an effort to increase responsibility. Others heavily moderate the forums, which requires resources and potentially increases liability. The risk is that registration will significantly restrict the quantity of posts and might inhibit people from speaking their minds. Newspaper policies need to be debated for the right calibration of openness and responsibility. They also need to be transparent in what protections are afforded to users.

Erasing the Past

Given the permanence and wide access of the Internet, do journalists have new ethical obligations to make corrections, follow-ups, and deletions because of the effects of their stories? In a pre-Internet era, an individual was far less likely to be haunted by old news stories that existed only in hard copy in newsroom morgues and microfilm. Today, a Google search can quickly lead to old, incomplete, and sometimes erroneous stories about a person's criminal record, making statutory expungement laws powerless in aiding individuals from escaping a criminal paper trail. Journalists are supposed to seek and report truth while mitigating harm. The permanence of the Internet makes this task more complicated when every possible old story might have multiple or new truths that individuals want told in order to the minimize the harms they have suffered as a result of that publication. Others want news stories on the Internet to disappear altogether, including those whose criminal records have been expunged in the courts but remain available for all to see on the Internet.

Courts have just begun to wade into this problem of privacy and permanence, including a Pennsylvania judge who ordered two newspapers to delete stories about individuals who sought to get their criminal records expunged. The judge reversed himself after the newspapers objected. It would take a dramatic and dangerous shift in First Amendment doctrine for the courts to mandate that news websites remove truthful stories about past crimes. Rather, Professor Clay Calvert argues that journalists have an ethical duty to follow up on stories involving crimes, to report not just an arrest but the ultimate adjudication. This would place new responsibilities on journalists to focus on the follow-up, when journalists are more likely to conduct reporting on crime at the beginning—the crime, the arrest, and the charging stage (Calvert & Bruno, 2010).

The data trail of an arrest is but one of many examples in which the content of websites can haunt individuals. For example, the website Best Gore, among others, published the gruesome crime scene photos of the traffic death of 18-year-old Nikki Catsouras, whose decapitated body

was so disfigured that the coroner refused to allow the parents to identify their daughter's body. The family identified the leak of the photos as two California Highway Patrol officers, who lost a privacy lawsuit brought by the family. It is not far-fetched to envision the website coming under legal threat. Could the judge, after a legal finding of invasion of privacy, provide as a remedy a permanent injunction prohibiting the publication of the photograph? In the pre-Internet days, it would be hard to imagine a news organization publishing a photo of a decapitated teenage girl who died in a car accident. It is less inconceivable to think that websites of all sorts might post, or link to, similar photos under some circumstances. Professor Calvert notes:

> It thus may be here where the judicial or legislative intervention is needed the most—targeting non-journalism organizations and, in the case of Catsouras, the downstream distributors of her images after they left the hands of the members of the California Highway Patrol.
>
> Calvert suggests that broadening the ability of individuals to recover damages through tort law is a "legal nudge to an ethical result" (Calvert, 2010).

As Professor Calvert suggests, some argue that the law should treat "non-journalism" organizations differently in some contexts. Where ethics constrains traditional journalists from publishing the gruesome crime scene photographs of a teenage girl, the law likely does not. A website dedicated to gory crime scene photos is but one of the new publications on the web that suggest traditional journalism ethics are not able to enforce responsibility through informal regulatory schemes.

There are troubling aspects to the proposition that the law should treat journalistic and non-journalistic entities differently, but the law already does so in a number of contexts. In campaign finance law, for example, individuals are limited in using money to speak about political preferences in particular contexts, but these laws specifically exempt media organizations.

Protecting Confidential Sources

The questions of who is a journalist and what is journalism have been most explored in the legal scholarship in the context of a journalist's right to protect confidential sources. Bloggers have increasingly sought protection as journalists for purposes of privilege protection, and judicial interpretations of state and federal laws have provided a framework for developing models of when individuals are and are not sufficiently similar to traditional journalists to warrant privilege protection.

Notably, case law provides a number of useful analogies in the pre-Internet era. Journalists have argued for a legal right to protect confidential sources dating back to the mid-1800s, and by the early 1900s, states began passing statutory protections for journalists. Today, all but one state provide some legal rights for journalists to protect confidential sources and other newsgathering information. A more ambiguous right exists under federal law, based on a mix of constitutional law, common law, and administrative rules. As a result of this long history, precedents existed before bloggers were created to test the boundaries of who and what is journalism. Generally, courts have extended privilege protection to individuals whose work purposes, processes, and products were sufficiently similar to those of traditional journalists (Shepard, 2011a). So, a documentary film maker and investigative book author were found by federal appellate courts to be deserving of journalistic privilege protection even if they were not working for traditional news organizations. However, federal appellate courts rejected privilege claims by an aggrieved mistress and a professional wrestling commentator, ruling that their purposes, processes, and product were not journalistic in nature and thus were not deserving of protection. The general rule to emerge from these cases is whether a person has an intent at the beginning of a newsgathering process to disseminate information to the public. In 2006, bloggers who regularly covered Apple Computer products were sued by Apple, which wanted the names of individuals who leaked information about yet-to-be-released Apple products. A California appeals court found no distinctions in the purpose, process, or product between the bloggers and traditional journalists. The court noted:

> [W]e can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contradiction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience ... If their activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.
>
> While the court did not expressly define its analysis in journalism ethics discourse, among the criteria used were a commitment to accuracy, editorial oversight, transparency, authority, readership, intent, and past publication record (*O'Grady v. Superior Court*, 2006).

Ethical principles will likely continue to emerge in judicial doctrines as more and more Internet writers make claims to be journalists. The

functional analysis to emerge from the federal case law, which I have expanded as a "comprehensive functional analysis" in *Privileging the Press: Confidential Sources, Journalism Ethics and the First Amendment* (2011a), requires a case-by-case assessment of the individual's journalistic characteristics. For example, this comprehensive functional analysis supports the conclusion that blogger Crystal Cox was not a journalist for legal purposes in a 2011 defamation lawsuit filed by a bankruptcy trustee who became the target of a number of websites created by Cox. A federal judge refused to define Cox as a journalist or media defendant based on her failure to demonstrate adherence to basic journalism ethical standards. In rejecting Cox's claim as being a "media" defendant or a "journalist," the judge used seven relevant criteria:

> Defendant fails to bring forth any evidence suggestive of her status as a journalist. For example, there is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting "the other side" to get both sides of a story. Without evidence of this nature, defendant is not "media."
>
> (*Obsidian Finance Group v. Crystal Cox*, 2011)

Using these standards to legally define a journalist may be problematic, but some standards are necessary if we are to determine that who is a journalist is important in journalist's privilege law. Making a distinction between journalist and non-journalist speakers is also important in the context of campaign finance laws. Federal laws limiting electioneering speech, as well as their state counterparts, generally exempt press entities from regulation, so as not to chill journalists from covering politics and elections. Under the two-part analytical framework developed by the Federal Elections Commission (FEC) and the federal courts over the interpretation of the "press exemption," an individual or organization must first be a "qualifying press entity," defined as a broadcast or cable television, newspaper, magazine, or other periodical publication that must ordinarily derive revenue from advertisements or subscriptions, and appears at regular intervals. Second, the entity must be engaged in a "proper press function," and it must not be controlled by a political party, committee, or candidate. The two-prong model has been used by the FEC and the courts to rule that some press entities that engage in activities outside of their proper functions have run afoul of the FEC, including one political advocacy group that created a special publication, beyond its regular newsletter, to expressly advocate for and against candidates. However, the FEC has ruled that regularly updated Internet websites with political commentary were legitimate press entities serving legitimate press functions. The diminution of media institutions, the new uses of the Internet, and the variety of political communications make the FEC framework of continuing importance for evaluating claims by web writers and websites that they fall under the press exemption (Shepard, 2011b).

WikiLeaks: A New Paradigm?

The website WikiLeaks presents perhaps the most fascinating and challenging case study for the future of journalism law and ethics. Depending on who is asked, WikiLeaks is a stateless terrorist organization (Sarah Palin and Joe Biden) or an important new form of networked journalism that will advance self-government and democracy by exposing government and corporate secrets outside the legal jurisdiction of any state and deserving of a Nobel Peace Prize (founder Julian Assange and a Norwegian MP). To a large degree, the WikiLeaks phenomenon is the result of a single document leak from a U.S. soldier. It is, however, apparently the largest leak of classified information in world history. That a start-up website run outside the jurisdiction of any country and by a larger-than-life eccentric could come into possession of this material is perhaps a historical anomaly. But the case points to the promises and perils of rogue, stateless websites apparently unconstrained by traditional law or ethics.

On the one hand, as Charlie Beckett points out in *WikiLeaks: News in the Networked Era* (2012), WikiLeaks demonstrates how new forms of investigative journalism and political communication can be unleashed by new technologies, challenging the paradigm of corporate media accountable to government. WikiLeaks founder Julian Assange used the language of free-press theory and journalism ethics to argue for journalistic credibility and autonomy. In holding governments accountable by disclosing their secrets, the website was simply a new model of journalism. Its features were different. It was independent of a state or corporation. Its mission was to publish everything and protect its sources. Raw data was its central content.

On the other hand, WikiLeaks challenges some fundamental legal and ethical principles. By wholesale disclosure of thousands of classified documents, the website may have violated the Espionage Act, and a federal grand jury was empanelled to pursue possible criminal charges. Several U.S. corporations shut down modes of access to the website in an unprecedented display of private–public censorship. Journalism ethicists criticized the website for failing to articulate what ethical standards it was using to reduce the potential harm from disclosure. That one man could

unilaterally publish thousands of government secrets without accountability in law or ethical frameworks is indeed a troubling and fascinating development for free-press and journalism ethics scholars.

Implications for Future Research

In many ways, the Internet's transformative nature raises profound questions about the appropriate role of ethics and law in moderating and regulating mass communication. For scholars interested in the future of journalism, studying the ways in which the Internet is changing the domains of journalistic production, dissemination, and consumption may lead to new models for practitioners that will help economically sustain the kinds of journalism that scholars believe are necessary components of democratic self-governance. For media law and ethics scholars, these domains are particularly relevant in determining whether, or under what circumstances, journalism as a special discourse should be treated differently than other forms of communication. A fundamental concern for scholars should be whether law or ethics should dictate the norms and boundaries of journalism. If, as I believe, journalism should remain a distinct and special discourse in the Internet era, scholars should situate research agendas that help explain why.

First, scholars should focus on developing standards and models of journalism that can inform practitioners, lawmakers, and the courts. If we cannot adequately explain what journalism is and what it is not, we cannot expect the law to provide special status to journalism. Ugland and Henderson's (2007) three tiers of communicators framework uses ethical standards to discriminate among speakers, but it does not easily translate into legal rules, which are arguably more important as a practical matter in several areas of communication law. One approach I have examined elsewhere (Shepard, 2011a), and that has broad support in case precedents, is a comprehensive functional analysis that examines whether a person's purposes, process, and products are like that of a traditional journalist. Further refinement of these standards, drawing from ethical frameworks and professional practices, may be useful. Historical research examining different types of journalism in a historical context may help support normative frameworks to apply to online communicators.

Second, scholars should focus on legislative efforts that expand freedom of information laws, protect the journalist's privilege, and approve policies that support journalistic institutions. While most scholarship focuses on constitutional theory and judicial doctrines, legislative efforts can have as much, if not more, impact on press freedom. State legislatures often tinker with public records and public meeting laws, and openness advocacy can help legislative lobbying. At the federal level, legislative advocacy is necessary for access to government information, as well as

continued efforts in passing a federal shield law giving journalists a legislative right to protect confidential sources. Finally, legislation that supports journalism institutions is not often examined, but some legislation significantly influences journalism organizations. For example, many states require notices of government actions to be published in advertisements in newspapers, which until recently were a stable and sizeable slice of revenue for news organizations.

Third, scholars need to explain why the Internet's easy and permanent access to data should not justify new limits on government information and public records. In this area, scholars should pay particular attention to the text and interpretations of public records laws, which are under threat in some jurisdictions as lawmakers and judges worry about the consequences of the Internet on disclosure. The physical limitations of records access that existed before the development of the Internet helped reduce abuse of information while providing journalists in particular with necessary information. But paradoxically, the low access costs of the Internet are causing some to recalibrate the harms of some public records. The examples of the criminal records and crime scene photos discussed earlier in this chapter are but a few examples that may lead to increasing limits on public records.

Fourth, scholars need to better articulate the constitutional standards of "public interest" and "public concern" that courts use in many First Amendment cases. Whether speech is about matters of "public concern" or in the "public interest" is central to many media law doctrines. For example, in libel law, whether the allegedly defamatory statement is about a matter of public concern significantly restricts plaintiffs in recovering damages in the absence of a showing of actual malice, and assertions must be proven false in order to recover any damages if the statement was about a matter of public concern. Additionally, in order to win an invasion of privacy public disclosure of private facts suit, a plaintiff must establish that the disclosed information was not of public concern or newsworthy. States with anti-SLAPP (strategic lawsuit against public participation) statutes often allow frivolous lawsuits to be dismissed when individuals are legitimately exercising their speech rights on matters of public concern. And in assessing whether public employees can be disciplined for pure speech acts, courts assess whether the statements are about matters of public concern. In journalist's privilege law, many courts have also evaluated the public interest in assessing whether the privilege should give way to other interests. Most courts apply a case-by-case balancing of interests, assessing whether the public has a "legitimate" interest in the information and whether the information is "newsworthy." While courts have traditionally deferred to news organizations for these definitions, the Internet era makes this deference increasingly unlikely and irrelevant. Stronger scholarly articulations of the purpose of the public concern and

public interest doctrines, drawn from a wider range of theory than the legal case law provides, can help advocates better defend their positions. What is a legitimate vs. non legitimate public concern? Can newsworthiness be defined any better than simply being whatever deliberative news organizations decide to publish? This normative approach should also draw on the foundations of journalism ethical standards and practices, as journalists have long discussed the difficulties in assessing what and when to publish as a matter of ethical duty.

And fifth, scholars need to ask how, or maybe whether, journalism can continue to carry out its responsibility to hold power to account. This is clearly a big endeavor, but journalism as a distinct discourse risks being crowded out in the Internet marketplace of ideas. It is necessary to develop ways in which the law and ethics can help sustain the types of journalism important to democratic self-government. John Nichols and Robert McChesney's proposals for taxes on broadcast spectrum and Internet service providers are a starting point for direct intervention by the government to support journalism organizations (McChesney & Nichols, 2010, p. 209–211). The decline in news organizations has broader implications than content. For example, Professor RonNell Andersen Jones has recently drawn attention to what she calls the impending "critical lapse in legal efforts to demand accountability and accessibility to government" with the diminution of access lawsuits filed by news organizations (Jones, 2011, p. 561). In the last century, newspaper plaintiffs established some of the most important constitutional precedents that exist in the Supreme Court's free-press doctrine, not to mention access issues at the state level. But in 2011, nearly 80% of media lawyers said access to information litigation has declined, while 60% said litigation had "fallen dramatically" (Jones, 2011, p. 595). Because litigation is required for the courts to weigh on constitutional and policy questions, two sobering questions present themselves: Who will take the place of news media litigators in the twenty-first century, and what are the consequences to the public's right to know if nobody does? Professor Jones suggests that universities, non-profit foundations and advocacy organizations, and publicly funded solutions help fill the void. All are ripe for further exploration by scholars interested in the causes and effects of access litigation and accountability journalism.

Conclusion

In the midst of a technological and economic revolution sparked by the Internet, journalism is undergoing a legal and ethical revolution as well. Ethics scholars need to examine how journalism's core principles and ideals can remain relevant and viable on the Internet even as its gatekeeping and agenda-setting roles increasingly diminish in a crowded Internet

marketplace. By extension, ethical principles and practices for online journalism may help preserve and possibly extend legal protections for journalism that embody the public-information and checking-value theories of the First Amendment's press clause.

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