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DO WE WANT A RESPONSIBLE PRESS?: A CALL FOR THE CREATION OF SELF-REGULATORY MECHANISMS

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&

BARBARA S. ISAACMAN‡

The first amendment guarantee of a free press has never been more important to American society. The guarantee of freedom of expression now extends beyond the printed page to the airwaves of radio and television broadcasting. The media in this electronic age wield unprecedented power to influence public opinion. For the most part the media have admirably fulfilled their role as society's eyes and ears, acting as watchdog over governmental deeds and misdeeds. In recent years, however, abuses of this first amendment privilege have caused many to view the media as an arrogant, self-righteous institution, insensitive to the rights and interests of others. In this Article Mr. Sheran and Ms. Isaacman examine the growth of media power in modern society and the increasing criticism of irresponsible media practices. After reviewing the limited success of judicial, legislative, and executive efforts to instill a sense of responsibility in the media, the authors conclude that media self-regulation in the form of rigorous self-discipline is the only practicable and constitutionally acceptable means of curbing media excesses. The authors call for a detailed code of media ethics and offer guidance for its formulation by raising specific pertinent questions that such a code must resolve if the media are to regain credibility and respect.

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I. INTRODUCTION

Early in 1980 the press orchestrated a symbolic media event by convening what it entitled a “First Amendment Congress.” The Congress was organized by Sigma Delta Chi, the Society of Professional Journalists, and sponsored by twelve news organizations representing the bulk of the nation’s major press groups. Its stated goal was to enhance public awareness of the importance of a

1. For a general description of the Congress and excerpts from the major speakers, see McCoy, First Amendment Congress, QUILL, Mar. 1980, at 23. This article deals only with the first meeting held in Philadelphia in January 1980. A second three-day follow-up conference was held in Williamsburg, Virginia, in March 1980.
free press in a free society.\textsuperscript{2} Thus, it is not surprising that the cities chosen for this Congress, which was attended by close to three hundred people, were Philadelphia and Williamsburg—sites of great significance in the history of the United States and of the Bill of Rights.

The First Amendment Congress was merely one of a number of conferences held during the last several years\textsuperscript{3} which have attempted to improve the media's relationship not only with the public but also with the judiciary, an institution charged with the task of ensuring that the public interest is being properly served. For a number of reasons\textsuperscript{4} not understood by the media, which are still congratulating themselves for their significant role in exposing the Watergate scandal,\textsuperscript{5} their image has suffered dramatically in the eyes of the public and the courts in recent years.\textsuperscript{6}

What are the causes of the media's loss of popularity and what concrete steps can be taken to reverse this trend, consistent with the first amendment's protection of freedom of speech and press?\textsuperscript{7} We argue in this Article that freedom of the press—\textsuperscript{8} in the sense of the media's right to publish or broadcast—is presently secure and

\textsuperscript{2} Id.

\textsuperscript{3} Other recent conferences include the First Amendment Survival Seminar held in March 1979, the March 1975 Conference sponsored by the Washington Post and the Ford Foundation, see Simons & Califano, Preface to THE MEDIA AND THE LAW, infra, note 99 at vii, and a 1980 California Bar Association Conference held at UCLA, see 55 CAL. ST. B.J. 1 (1980).

The goals of all these meetings are to start dialogues between media and legal professionals so that each may begin to understand the problems faced by the other.

\textsuperscript{4} See infra notes 78-101 and accompanying text.

\textsuperscript{5} Typical is the following statement:

[H]ad the full panoply of the Burger Court's press decisions been in play, it is quite possible that the Watergate scandal might not have been uncovered. For example, the whole thing might have been cut off at the pass by closing the original bail hearing to the press. That way, reporters Bob Woodward and Carl Bernstein could hardly have noticed that high-priced lawyers were representing "third-rate burglars."

Zion, High Court vs. the Press, N.Y. Times, Nov. 18, 1979, § 6 (Magazine), at 76, 145, col. 1.

\textsuperscript{6} Some commentators believe that these are related. Because they now have low prestige in the eyes of the people, they can be mistreated by the courts. McCoy, supra note 1, at 26; Oakes, Dwindling Faith in the Press, N.Y. Times, May 24, 1978, at AL3, col. 2, reprinted in PRACTICING LAW INSTITUTE, COMMUNICATIONS LAW 1978, at 169-70.

\textsuperscript{7} The relevant portion of the first amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Minnesota Constitution is even more explicit. "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. CONST. art. I, § 3.

\textsuperscript{8} For a discussion of exactly what comprises the "press" or the "media" as used in this article, see infra notes 140-43 and accompanying text.
has always been recognized and protected by the Supreme Court. In order for the media to perform their historically recognized and constitutionally required function, however, they must be not only free but responsible in wielding the considerable power that they presently have over public opinion and the lives of all citizens.

Economic and social changes since the drafting of the first amendment have greatly increased the power and complexity of both the government and the press, have given these institutions the ability to pry deeply into the private lives of the American people and have made Americans feel alienated from their government and their media. The media have an important function to play both in informing the people about their government and in ensuring that government does not use its


10. See infra notes 103-34 and accompanying text.
11. See infra notes 58-77 and accompanying text.
12. See infra notes 90-93 and accompanying text.
14. As Professor Blasi has noted,

The inevitable size and complexity of modern government is related to another premise that underlies my understanding of the contemporary significance of the checking value. This is the need for well-organized, well-financed, professional critics to serve as a counterforce to government—critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public. It may have been possible in the eighteenth century to arouse the populace against a particular official or policy by amateur, makeshift protect methods. Today, however, it is virtually impossible to do so, at least beyond the local level.
greatly expanded power against the interests of its citizenry. By doing this, the media serve not only as the eyes and ears of the people but also as the "fourth estate." There are, however, no checks against the media's own misuse of power—either in terms of shaping public opinion or in invading the private lives of members of "the public"—and this, we argue, is what is responsible for the public's present discontent.

To recapture public confidence, more is needed than mere public relations. Some way must be found to guard against possible media abuses of their power and to restore a sense of shared community purpose between the press and the public. One possible solution is the adoption of a policy of media self-regulation to

15. This is one of the major functions of investigative reporting. See D. Anderson & P. Benjaminson, Investigative Reporting 17-22 (1976).


17. We do not mean to imply that the press is more powerful than the government, and we recognize that much of governmental cooperation with the press occurs because government officials believe that they can use the media for their own purposes. See, e.g., L. Sigal, Reporters and Officials 131-48 (1973).

18. See infra notes 78-101 and accompanying text.

19. Others include specific codes of ethics, media ombudsmen, press councils, and rights of access. See infra notes 363-478 and accompanying text.
grapple with the extremely difficult and complex ethical problems inherent in the news-gathering and disseminating processes.\textsuperscript{20} If the media do not show themselves willing to the task,\textsuperscript{21} we fear that the public will condone and encourage incursions into press freedoms\textsuperscript{22} by their executives,\textsuperscript{23} by their legislatures,\textsuperscript{24} or by the courts.\textsuperscript{25} If these institutions act to curb press overreaching, how-

\begin{itemize}
\item[20.] As Fred Friendly, former president of CBS News, noted, journalists who resist self-regulation are behaving just like businessmen did before passage of the Sherman Antitrust Act—thereby risking government intervention.
\item I care a lot about the First Amendment, but . . . because they (journalists) are not constitutionally Accountable, with a big 'A', to government doesn't mean that they are not accountable, with a small 'a', to . . . their readers . . . There's a difference between being legally accountable and being morally accountable.
\item When newspapers get on their high horse and say, 'We're different from everybody else; we are accountable only to ourselves,' and that's somehow what the Constitution of the United States says, that's almost a blasphemy. F. Friendly, quoted in Shaw, Public distrust is bad news for media, St. Paul Sunday Pioneer Press, Oct. 4, 1981, at 6 (Focus), col. 6.
\item Much of media refuses to see the need for any regulations. They think of freedom of the press as absolute. \textit{See infra} note 103. \textit{But see infra} note 351.
\item The results of the Gallup Poll conducted for the First Amendment Congress showed that the public thought more controls were necessary. Gallup, \textit{Public Opinion and Freedom of the Press} 3 (paper presented to First Amendment Congress, Jan. 1980). For a breakdown of these results, see \textit{infra} note 87.
\item There is evidence that the executive branch has tried to do this in devious ways. Thus, the Nixon administration attempted to punish the \textit{Washington Post} for its role in Watergate, and it greatly increased the use of subpoenas against journalists. \textit{See infra} notes 267-68 and accompanying text. President Carter attempted to keep his officials from leaking information to the press. \textit{See infra} notes 287-90 and accompanying text.
\item The statement made by the Mayor of New Orleans at the First Amendment Congress is typical of this position. \textit{See infra} note 94; \textit{see also infra} note 242. Recently, however, legislatures have been protecting the press more than have the courts. Witness, for example, the spate of shield laws that have passed sympathetic legislatures, only to be narrowly construed by the courts. \textit{See, e.g., In re Farber, 78 N.J. 259, 394 A.2d 330 (1978), cert. denied, 439 U.S. 997 (1978).} For a discussion of these laws, see \textit{infra} notes 269-77 and accompanying text.
\end{itemize}

\textsuperscript{25} Many courts are willing to do so, especially in criminal cases. For a justification of such practices, see Apfel, \textit{Gag Orders, Exclusionary Orders, and Protective Orders: Expanding the Use of Preventive Remedies to Safeguard a Criminal Defendant's Right to a Fair Trial}, 29 AM. U.L. REV. 439 (1980). In the past, courts have been closed to shield rape victims from public embarrassment, Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966), \textit{cert. denied}, 386 U.S. 964 (1967), to protect the identities of undercover police agents, Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), \textit{cert. denied}, 423 U.S. 937 (1975), and to prevent the disclosure of confidential investigatory techniques, United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973). There were, however, an unprecedented number of closures in the months between the Supreme Court's approval of this practice in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), and its disapproval in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). \textit{See 5 MEDIA L. REP. (BNA) 1865 (Nov. 20, 1979).} Similarly, gag orders, although imposed often by the trial court, have not been favored by the Supreme Court. \textit{See, e.g., Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).} For a discussion of gag orders, see Garry & Riordan, \textit{Gag}
ever, the results may be not only of dubious constitutionality but certainly harsher than the steps the media themselves would take. We urge the media to face the ethical problems head-on, through the establishment of a code of ethics for their members, so that they will remain sufficiently unfettered to carry out their crucial constitutional function of ensuring an informed citizenry.

It is our basic, underlying assumption that it is in the media’s self-interest to regulate themselves. Unrestrained power generates abuses which, in extreme situations, cause people to revolt against the source of that power and to unreasonably curtail such excesses. To keep legislatures from passing unconstitutional laws and to keep courts from limiting the legitimate exercise of press freedom, it is necessary to have public opinion on one’s side. In the


26. Although the commerce clause permits the federal government to apply antitrust and labor relations laws to the media and to regulate heavily the electronic media, at some point the commerce clause will come into contact with the first amendment’s guarantee of freedom of the press. Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) with CBS v. Democratic Nat’l Comm., 412 U.S. 94 (1973).

27. In general, professions decide to regulate themselves to avoid government regulation. R. Blair & S. Rubin, Regulating the Professions (1979).

28. See infra notes 529-77 and accompanying text. Blasi argues:

If the professional press is to serve as an effective counterforce to the tendency of officials to abuse their power, it is important that the journalism profession develop an internal ethos that emphasizes such qualities as independence, vigor, innovativeness, and public responsibility—qualities typically associated with the status of autonomy and not with the status of dependency.

Blasi, supra note 14, at 587.

29. As Justice Frankfurter noted in his concurring opinion in Pennekamp v. Florida, 328 U.S. 331, 354-55 (1946) (footnote omitted), “Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society.” Alexander Meiklejohn contends that the function of the first amendment is to protect citizens’ rights to obtain and discuss information relating to self-government, A. Meiklejohn, Political Freedom (1960), but the “right to know” has never been accepted by a majority of the Supreme Court. See O’Brien, The First Amendment and the Public’s Right to Know, 7 Hastings Const. L.Q. 579 (1980).

30. Recent Supreme Court decisions affecting the media have been heralded by them in just these terms. Thus, for example, the Los Angeles Times called Zurcher v. Stanford Daily, 436 U.S. 547 (1978), “a major setback for news organizations,” L.A. Times, June 1, 1978, § 1, at 1, col. 3, and the Columbia Journalism Review suggested that the decision would have permitted the government to hold back the publication of the Pentagon Papers. Comment, Colum. Journalism Rev., July-Aug. 1978, at 22 (noting comment of Benjamin C. Bradlee); see also Czerniejewski, Your Newsroom May Be Searched, Quill, July-Aug. 1978, at 24. Gannett Co. v. DePasquale, 443 U.S. 368 (1979), was similarly received. See Time, Sept. 17, 1979, at 82 (emphasizing disparity of lower court interpretations and in-
long run no constitutional rights can remain protected without such support. Thus, unless something is done to stem the erosion of public support for a free press, the next few years will witness significant inroads into press freedoms and the likelihood of massive regulation either by the government or in the name of the Bill of Rights.

II. THE ROLE OF THE MEDIA IN MODERN AMERICAN SOCIETY

There is no question that the mass media—in particular the newspaper and the broadcasting industries—wield a great deal of power in the United States today. They are the major, if not the only, source of the public's news about its government, its neighbors, and the world.

Journalism and those media of mass communication that interpretations of Justices themselves). See generally Goodwin, Press-Court Relations: Can They Be Improved?, 7 HASTINGS CONST. L.Q. 633, 634-35 (1980); O'Brien, supra note 29, at 580 & n.6. According to the retired editor of the Virginia-Pilot (Norfolk, Va.), Zurker and Herbert represent the "steady crimping of traditional press prerogatives . . . against which publishers, editors, and columnists have thundered in concert as an infringement on the public's 'right to know' and a blight on societal enlightenment." Mason, The Supreme Court and Press Fashions, 22 WM. & MARY L. REV. 259, 271 (1980).

31. A Wall Street Journal columnist recently observed:

That First Amendment we cherish is not some immutable right handed down to Moses on Mt. Sinai. It's a political right granted by the people in a political document, and what the people grant they can, if they choose, take away. There is no liberty that cannot be abused and none that cannot be lost.

Royster, Reflections on the Fourth Estate, Washington Post, Dec. 25, 1978, at A19, col. 1. Anthony Lewis has struck a similar theme on the need for public confidence in media:

Powerful newspapers and networks are not universally beloved as it is; there is talk about the arrogance of the media. Ordinary citizens may find it hard to understand why the press should have rights denied to them. And in the long run, rights depend on public understanding and support. Professor Bork has put it succinctly: "To the degree that the press is alone in the enjoyment of freedom, to that degree is its freedom imperilled."

Lewis, supra note 16, at 609 (quoting Bork's address to William O. Douglas Inquiry into the State of Individual Freedom delivered on Dec. 8, 1978, reprinted in CENTER MAGAZINE, Mar.-Apr. 1979, at 28, 34). According to John Oakes, formerly Senior Editor of the New York Times, "Once the American public loses faith in the press as an institution of prime importance to the democratic process, the most fundamental protection of the press—far greater than that embodied in the First Amendment—will have been lost." Oakes, supra note 6.

This position was, in fact, one of the underlying reasons for the decision by the Twentieth Century Fund to create a national news council. As its task force recognized, "A free society cannot endure without a free press, and the freedom of the press ultimately rests on public understanding of, and trust in its work." TWENTIETH CENTURY FUND TASK FORCE, A FREE AND RESPONSIVE PRESS 3 (1973) [hereinafter cited as A FREE AND RESPONSIVE PRESS].
are vehicles for it are social institutions of immense importance to society. They gather, process, and distribute news of the week, day, hour, and even of the minute. As social institutions, the media provide most of the information we receive. Socially pervasive and physically ubiquitous, the media also constitute a major American industry. Individual units of the media are usually significant economic forces in the communities in which they are located, and the larger units contribute to and are intricately involved in both regional and national commerce. In the political sphere, the media appropriately have been termed the "fourth branch of government," an apppellative describing journalism's function as watchdog over and influencer of the three other branches. The media have power and influence in the social, political, and economic spheres of society. Because they supply us with so much crucial information, they are largely responsible for each person's perceived reality and his funded information.32

Prior to the 1960's the public received its news primarily from the daily press. Although television news existed from the medium's beginning, producers believed that it was a bothersome, if necessary, interruption of their lucrative entertainment programming. Accordingly, the news was kept short, and news commentators merely read wire service reports over the air.33 When, during the 1960's, television discovered that news broadcasting could also attract audiences, and, therefore, advertisers, news reporters were hired, and the magazine format introduced. By the end of the decade television had become the primary source of news for the majority of Americans.34 Although today's public perceives television news as more accurate than newspaper reporting,35 most Americans still read their local newspapers and consider them important news sources.36

34. A Roper survey conducted at the end of the decade reported that 60% of American adults relied on television as their primary source of news. TELEVISION 3 (B. Cole ed. 1970). See generally F. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL . . . (1967); W. WOOD, ELECTRONIC JOURNALISM 1-20 (1967). A 1971 Harris poll found that 82% thought television network news was either "excellent" or "pretty good." LIFE, Sept. 10, 1971, at 42. Nevertheless, Americans continue to read newspapers. See M. DEFLEUR & S. BALL-ROKEACH, THEORIES OF MASS COMMUNICATION 29-33 (3d ed. 1975); W. SCHRAMM, MEN, MESSAGES, AND MEDIA 252 (1973).
35. The Roper survey also found that more Americans consider television the most believable news medium. While 44% said they would be most likely to believe TV in cases of conflicting stories, only 21% thought newspapers were their most believable source.
36. In a report given to the First Amendment Congress in Philadelphia on Jan. 17,
The last twenty years has also seen other changes in the mass media which have direct bearing on how and what the media report. Of particular significance for the “marketplace of ideas” is the growing concentration of ownership in the print and electronic media with its consequent decrease in the diversity of ideas in circulation.37 Related to this phenomenon, to a certain extent, is the rise in investigative reporting and the reassertion by the media of its role as government critic.

Media concentration, which existed from the beginning in the electronic media,38 is a relatively recent phenomenon in the print media. Although the openness of media entry during the colonial period, when anyone with enough money to buy a printing press
could become a publisher, largely disappeared during the late nineteenth century,\textsuperscript{39} major technological changes and increasing costs in recent years have resulted in fewer and fewer newspapers and in expanding control by newspaper chains.\textsuperscript{40} According to a study by the Twentieth Century Fund Task Force, by the early 1970's almost one-half of the daily newspapers, which represent approximately three-fifths of the daily and Sunday circulation, were owned by newspaper groups and chains, some of which were diversified business conglomerates.\textsuperscript{41} Effective newspaper competition was present in only four percent of the larger cities and 2.5\% of all American cities—making one-newspaper towns the rule.\textsuperscript{42}

\textsuperscript{39} The era of mass circulation and the alliance of the press with business interests began in 1833 with the establishment of the \textit{New York Sun}, the first of the penny papers. This was the beginning of sensational journalism which was to dominate the metropolitan press well into the twentieth century. The industrial revolution, particularly the development during the 1850's of the high-speed rotary press and the stereotyping process, transformed the press from a handcraft of printers to a mass medium with much greater power. \textit{See} L. Brown, \textit{supra} note 32, at 3-4; \textit{see also} M. Defleur & S. Ball-Rokeach, \textit{supra} note 34, at 15-33.


\textsuperscript{40} Schramm estimated in the 1950's that to compete with an established daily newspaper, one needed at least five million dollars of risk capital. W. Schramm, \textit{Responsibility in Mass Communication} 29 (1957). Printing equipment, although quite expensive, remains idle most of the time. Barber, \textit{Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy}, 2 La. L. Rev. 503, 511-12 (1964). According to the student authors of a symposium on the mass media, while a small independent newspaper could survive in a free market, entry into the present monopolistic market is impossible for such a newspaper. Special Project, \textit{supra} note 37, at 895-96.

Various artificial barriers have been erected to hinder the successful publication of a small daily. The use of exclusive distribution contracts restricts entry into the market by requiring the new entrant to develop his own distribution system. Obtaining wire service from either the AP or UPI is a difficult proposition for new publications; good syndicated features may be unavailable in a market area where a larger competitor has been granted exclusive territorial rights. \textit{Id.} at 896 (footnotes omitted).


\textsuperscript{42} In 1910, 2,442 newspapers were published in the United States and 689 cities had competing dailies. By 1970 there were 1,748 daily papers but only 42 cities had competing newspapers under separate ownership. Special Project, \textit{supra} note 37, at 892; \textit{see also} N.Y. Times, Mar. 26, 1975, at 20, col. 1. The number of daily newspapers in the United States dropped from 1,942 in 1930 to 1,774 in 1973. In 1930, 228 cities had competing newspapers. By 1960 the number had dropped to 61. \textit{Id.} By 1978 this figure had dropped to 35. Shenefield, \textit{Ownership Concentration in Newspapers}, 65 A.B.A. J. 1332, 1332 (1979). As of the spring of 1978, the 167 firms owning two or more daily newspapers own a total of 1,082 dailies, or 61.4\% of the 1,759 dailies being published. These 167 firms accounted for 75\% of the daily circulation and 80\% of the Sunday circulation. In 1978, 53 newspapers changed hands, and 47 of these were purchased by newspaper groups. By the end of 1978
Added to this is the control by the three television networks over almost all television broadcasting seen throughout the country, and cross-ownership of print media, radio, and television. As a result, there has been a serious diminution in the number and types of ideas that are in circulation, although the circulation process is more complete and the ideas reach more people than


Thus, in 1978, each of the three major networks owned five of the most profitable of the nation's television stations which, although they represented only 2% of the commercial stations, yielded 20% of TV's total earnings. The networks also provided more than 80% of each day's total programming on 585 other commercial outlets, and 75% of all television stations were either licensed to or affiliated with them. Van Deerlin, Broadcasting Needs a New Act to Follow, N.Y. Times, Feb. 5, 1978, at D29, col. 1, reprinted in Practicing Law Institute, Communications Law 1978, at 221-23. In 1980, ABC-TV had 206 primary and 33 secondary affiliates, CBS-TV had 198 affiliates, and NBC-TV had 213. Broadcasting/Cable Y.B. 1981, at D-24 to -25, D-34 to -35, D-39 to -41. This does not take into account the significant number of AM and FM radio stations also affiliated with the three major networks. Id. at D-25 to -31, D-34 to -35, D-40 to -41.


The FCC is beginning to try to curtail this cross-ownership, although it is moving rather slowly. In FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978), the Supreme Court upheld this slowness. For a discussion of this case and its significance, see Lee, Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media, 32 Vand. L. Rev. 1249, 1328-35 (1979); Yasser, supra note 37.

Although at least one commentator argues that diversification of ownership will not lead to diversity of ideas, see J. Barron, Freedom of the Press for Whom? (1973); Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967), the potential for heterogeneous content is greatly increased when there are a large number of competitors. This conclusion is borne out by a study of 214 newspapers and television stations in 77 cities which found that cross-ownership contributes to news homogeneity. Gormley, supra note 37. Some of the less innocuous effects of cross-ownership are described in Yasser, supra note 37, at 108-10. See also Johnson & Hoak, supra note 37, at 278-79 (multiple and conglomerate ownership can lead to deliberate distortions of content to further economic interests of owners); Blasi, supra note 14, at 549, 645. The effect of advertiser control of speech—a serious problem under all circumstances—is more ominous.
ever before. The process and effects of media concentration are cogently described by Chief Justice Burger in his opinion in *Miami Herald Publishing Co. v. Tornillo*:

[Although] though newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same inter-

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46. It was estimated that as of January 1, 1980, 78.6 million homes in the United States (or 99%) were radio equipped with 456 million radio sets. As of January 1, 1981, there were television sets in 77.8 million American homes (98%). *Broadcasting/ Cable Y.B. 1981*, at D-112. This is up from 42.1 million and 5.9 million homes equipped with radios and televisions respectively in 1950. *Id.* Total daily circulation of newspapers is also high. In 1971 it was over 62 million copies per day. *1971 Editor & Publisher Int'l Y.B.* 13.

ests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible.48

The other important recent development in media journalism to which the Chief Justice alluded in his description of the changing media scene is the rise of investigative reporting.49 Although news-

48. Id. at 248-50 (footnotes omitted).

There are many who take the position, however, that the media do not really provide a marketplace for ideas because they are in the hands of conservatives and simply reproduce conservative ideas and ideology. Ever since the 1930's there have been charges, for example, that because most American daily newspapers are owned by conservatives, their readers see only conservative editorials. Minority groups have long complained that their members are underrepresented on the staffs and their viewpoints are underrepresented in the products distributed by the various media. While "underground" and special interest papers have emerged to fill these voids, they cannot compete with the big media in influencing what Americans think. W. Schramm, supra note 34, at 288-89.

49. For an in-depth discussion of the mechanics of investigative reporting, see D. Andersen & P. Benjaminson, supra note 15. They are more enamored with this journalistic tool than many members of the public.

There is no institution of any standing, anywhere, that wouldn't be improved by a bit of investigation. After all, in 1974 Boy Scouts of America, Inc. was found to be lying about its membership figures in order to qualify for federal aid. Other malfeasances have been unearthed at Boys Town in Nebraska, a health charity, and in the fund-raising techniques of an organization set up to aid widows of policemen. Presidents, senators, congressmen, governors, federal judges, cops,
papers were, during the colonial period and early days of the Republic, exceedingly political in their coverage. In the nineteenth century this political preoccupation gave way to sensationalism in the reporting of local events—primarily murders, trials, suicides, accidents—which continued well into the twentieth century. Because of the lack of interest in political news, the media simply accepted as true the press releases of the government and passed them on as news to their readers and listeners. Then, partly in response to the tensions created by the civil rights movement and the Vietnam War, several of the large, well-established news organizations began attacking governmental and social orthodoxy. The uncovering of the Watergate scandal is only the most spectacular even investigative reporters have all been caught violating their public trusts.

Id. at 17.

50. See L. BROWN, supra note 32, at 3-4. This was, in fact, the model of the press included by the Founding Fathers in the first amendment. See infra note 108.

51. L. BROWN, supra note 32, at 4.

52. This, by and large, continues. See infra note 286; see also note 79 infra.

53. The Pentagon Papers Case, New York Times Co. v. United States, 403 U.S. 713 (1971), is the most well-known court case to involve investigative political reporting. In Branzburg v. Hayes, 408 U.S. 665 (1972), news reporters challenged government attempts to gain access to their sources regarding political discontent, drug sub-cultures and the Black Panthers. The newsroom search that was upheld in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), was conducted to discover photographs of a student demonstration.

Blasi, who conducted a national survey on the newperson’s privilege, described the rise of investigative reporting in the following terms:

Perhaps the most significant recent development in American journalism, however, is the pronounced disillusionment that many reporters have come to experience with regard to the nation’s political leadership. This feeling is not traceable solely to President Nixon’s treatment of the press. Indeed, the disillusionment traces back to the Kennedy Administration’s more subtle manipulation of the media and to the credibility gap of the Johnson years. Nor is the attitude limited to the young reporters whose naive idealism has been punctured.

Blasi, The Newsmen’s Privilege: An Empirical Study, 70 MICH. L. REV. 229, 234 (1971) (footnote omitted). Anthony Lewis agrees. In his speech at the First Amendment Congress he stated: “The press is changing, becoming more aggressive. . . . We learned from Watergate and, especially I think, from Vietnam. I think the press today is more valuable to the country than it used to be. . . . At the same time there are dangers in the wolfhound school of journalism.” McCoy, supra note 1, at 26.

According to Tom Wicker, this is fundamental to the function of the “adversary” press:

I assert the necessity to encourage the developing tendency of the press to shake off the encumbrance of a falsely objective journalism and to take an adversary position toward the most powerful institutions of American life.

By “adversary,” I don’t mean a necessary hostile position; I use the word in the lawyer’s sense of cross-examining, testing, challenging, in course of a trial on the merits of a case. Such an adversary is “opposed” only in the sense that he or she demands that a case be made—the law stated, the facts proven, the assumptions and conclusions justified, the procedure squared with common sense and good practice. An adversary press would hold truth—unattainable and fre-
ular form that investigative reporting has taken. 54

Public reaction to the daily reports of the details and progress of the war in Vietnam shaped the conduct and the eventual abandonment of that engagement. 55 Similarly, the Nixon administration fell because of aroused public opinion which responded to and was shaped by media reports on the Watergate affair. 56 The outcome of the Iranian incident also was shaped more by public reaction to the detention of the hostages than by considerations of international law which, ideally, would have governed the situation. 57 Although these are dramatic and far-reaching illustrations of the point, the media influence the more mundane aspects of our lives in a similar manner. In this country public attitudes and collective actions are determined by what we read in the newspapers,

T. WICKER, ON PRESS 259-60 (1978) (emphasis in original).

54. The Watergate investigation is described in T. CROUSE, THE BOYS ON THE BUS 289-300 (1974). See generally C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974). Neil Skene, the Assistant City Editor of the St. Petersburg Times, describes a similar exposé of the activities of Bert Lance, President Carter's first cabinet nominee. Skene, supra note 16, at 615-17. He discusses what investigative reporting can do, and has done, as follows:

"The work that the community should prize most" is the work that average folk cannot do for themselves: keeping watch on the government and the social system. Few of us can obtain—much less have time to read—the Comptroller's full report on the banking practices of Bert Lance, but reporters in Washington can; and they can tell us that the President's famous exculpation, "Bert, I'm proud of you," supported a fellow who used his control over banks to obtain special benefits for himself and his family to the detriment of the institution he managed. Few of us can keep handy files on the personal and financial interests of our lawmakers; but reporters at city hall and in state and national capitals can, and they can tell us when someone like Robert Sikes uses his positions on important congressional committees to enhance the value of his own land and his own stock. Few of us can knock on the doors of powerful men to ask about slush funds, but reporters for The Washington Post can; so they can tell the nation that the burglary at the Democratic national headquarters was part of a "massive campaign of political spying and sabotage on behalf of President Nixon's re-election." Reporters tell us when the city council wants to raise our taxes or reduce our services; they tell us when a part of our community is unhappy; they tell us when power is being abused. They tell us what is going on in our world.

Id. at 616-17 (footnote omitted).

55. See W. SCHRAMM, supra note 34, at 286-87; Blasi, supra note 14, at 527 & n.21. The role of the press has not always been so admirable. It probably fooled the American public in its early reporting on the Vietnam War—especially by feeding the public the information that formed the basis of the Tonkin Gulf Resolution which was later exposed as incorrect.

56. Blasi, supra note 14, at 527 (citing T. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 224, 227 (1975)).

57. The lives of the hostages' families were also affected by the media coverage. The varying kinds of experiences are discussed in Carmody, Hostages' Families Discuss News Media, N.Y. Times, Nov. 9, 1980, at A25, col. 1.
DO WE WANT A RESPONSIBLE PRESS?
see on the television and hear on the radio. In matters as diverse as cigarette smoking, one's reaction to the ERA, and choice of political candidates the media exert profound influence.

58. As Blasi observes,
Consider the most important ways in which the First Amendment has made a difference in recent years. But for the peace marches and other protests, the Johnson administration might very well have escalated the war in Vietnam after the Tet offensive and the Nixon administration might have attempted to sustain a wider war after the Cambodian "incursion." But for the tradition of a free press, the crimes and abuses of Watergate might never have been uncovered. These incidents in our recent political experience are so familiar that it is easy to underestimate their importance. In the last decade, the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power as by protecting the dignity of the individual, maintaining a diverse society in the face of conformist pressures, promoting the quest for scientific and philosophic truth, or fostering a regime of "self-government" in which large numbers of ordinary citizens take an active part in political affairs.

Blasi, supra note 14, at 527 (footnotes omitted); see also Beytagh, supra note 13, at 510. Two mass communication theorists detect a high level of dependence by audiences on mass media information dissemination in urban-industrial societies.

Dependency on media information is an ubiquitous condition in modern society. One finds it in settings ranging from the need to find the best buys at the supermarket to more general or pervasive needs such as obtaining information that will help maintain a sense of connectedness and familiarity with the social world outside one's neighborhood. . . . For example, one form of dependency is based on the need to understand one's social world; another type of dependency arises from the need to act meaningfully and effectively in that world; still a third type of dependency is based on the need for fantasy-escape from daily problems and tensions. . . .

As societies grow more complex, and as the quality of media technology improves, the media take on more and more unique information-delivery functions. In the American society, for example, the media are presumed to have several unique functions. They operate as a Fourth Estate delivering information about the actions of government; they serve as the primary signaling system in case of emergencies; they constitute the principal source of the ordinary citizen's conceptions of national and world events; they provide enormous amounts of entertainment information for fantasy-escape.

M. DEFEUR & S. BALL-ROKEACH, supra note 34, at 261-62; see also W. SCHRAMM, supra note 34, at 254-62.


60. The FCC policy is to use the fairness doctrine to achieve a discussion of diverse viewpoints. 47 U.S.C. § 315(a) (1976) (broadcasters must provide equal opportunity to legally qualified candidates). The media first built up and then destroyed Edward Kennedy during the 1980 presidential primaries. Tom Shales of the Washington Post berated the television networks for their biased reporting:

For the past three months, the network news departments have had a field day playing Get Teddy. They have turned the election process into The Wide World of Politics and they supply the viewer electorate with a daily fix on winners and losers. Kennedy, it seems, has been declared the loser. We might as well cancel the primaries, the conventions and maybe the November elections.

Even some network newsmen acknowledge that TV reports have been consistently negative about Kennedy. We turn on the nightly newscasts to find out how badly he is doing today.

"It's the new sociology of news," says one of the most respected TV news-
The creation of public opinion through investigative reporting is, at least to some commentators, the essence of the proper function of the press clause of the first amendment.

In principle, both freedom of speech and freedom of the press are concerned with the political freedom which consists of self-government. But the press does what merely spoken discussion cannot do...: it makes genuinely and durably public what is otherwise limited and transitory. The press puts into the public record the facts and the reflections of the persons committed to informing the public. The press is indispensable, indeed, not just to enlightening an already existing public but to bringing a public into being and maintaining it. The press, taken in the broadest sense as newspapers, pamphlets, radio, television, the arts, and the scholarly activities of research, is the principal instrument of opinion-making in our self-governing society.

While investigative reporting plays an extremely important role in uncovering government's mistakes, exposing governmental mismanagement, and barring unnecessary governmental secrecy, the...
tools of the investigative reporter can also have a damaging effect on innocent persons.65 A leading proponent of the right to privacy66 bemoans the threat posed by the exploitation of private

sary secrecy underlay the Pentagon Papers Case, and according to Blasi, it is the most serious threat to the entire system. Blasi, supra note 14, at 538-44. To protect the executive function President Carter made all his top advisors promise in writing that they would not leak information to the press. See J. CALIFANO, GOVERNING AMERICA: AN INSIDER’S REPORT FROM THE WHITE HOUSE AND THE CABINET (1981); Minneapolis Tribune, May 3, 1981, at 14, cols. 2-4. Similarly, judges are accused by the media of being overly secretive when they close their courtrooms to press coverage. According to Alexander Bickel, however,

government may guard mightily against serious but ordinary leaks, and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and Congress.


Some, like Franklin, supra, at 138-48, and Prosser, supra, at 423, fear judicial censorship of the press. Others, like Hill, supra, at 1268-69, are worried about jury censorship of unpopular ideas or defendants. And Bloustein, supra, at 52-54, is concerned with the abuse of helpless victims by overly zealous reporters.


The privacy right entails primarily the right to control the flow of information about oneself to the wider public. See, e.g., A. Miller, Assault on Privacy 25 (1971) ("pri-
lives by the mass media.

Just as the intimacy and inner space necessary to individuality and human dignity may be impaired by a peeping Tom, a wiretapper, or an eavesdropper, so too may it be impaired by the sensational exposure of the intimate details of a private life in the mass media.

. . . [A newspaper takes such an action and] the individual has been profaned by laying a private life open to public view. The intimacy and private space necessary to sustain individuality and human dignity has been impaired by turning a private life into a public spectacle. The innermost region of being—the soul, if you will—has been bruised by exposure to the world.67

A prime example of the journalistic lack of empathy68 for the

privacy is the individual's ability to control the circulation of information relating to him"); Fried, Privacy, 77 YALE L.J. 475, 483 (1968) [privacy as "control over knowledge about oneself"]; Comment, Accommodation of Privacy Interests, supra note 65, at 1394 ("three specific privacy interests . . . can be identified: (1) an interest in retaining actual control over the release about oneself, for the sake of one's dignity and individuality; (2) an interest in preserving intact . . . one's relationship with others; and (3) an interest in how the public perceives one, or reputation"); Comment, Maintenance and Dissemination of Criminal Records: A Legislative Proposal, 19 U.C.L.A. L. REV. 654, 654 n.2 (1972) [privacy as "right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the fact of his personal life"].

Justice Douglas believed that privacy had two aspects:

[Every individual needs both to communicate with others and to keep his thoughts and beliefs from others. This means that a person should have the freedom to select for himself the time and circumstances when he will share his thoughts and attitudes with others and to determine the extent to which that sharing will go.


One commentator argues that individuals have a property interest in themselves.

[There is a deep-seated feeling that some facts about individuals, certainly not limited to shameful facts, are not appropriate for public scrutiny and should, in that sense, be private. . . . [This], in part explains the related feeling that the individual ought to have control over the use of private facts. For this reason, it is useful to think of an individual as having a property interest in certain information about oneself. That such property is incorporeal is no objection; like tangible property, it has value to the possessor, there is a market for it, and it depreciates with use. Also like tangible property, its use by others without permission may create feelings of resentment, event outrage, although if sought, permission to use such information might freely be given.

Ellis, Damages and the Privacy Tort: Sketching a 'Legal Profile', 64 IOWA L. REV. 1111, 1135 (1979); accord Bloustein, supra. But see Posner, The Right to Privacy, 12 GA. L. REV. 393 (1978) [property interest in privacy is meaningless].

67. Bloustein, supra note 65, at 53-54 (footnotes omitted).

68. Giglio, Unwanted Publicity, the News Media, and the Constitution: Where Privacy Rights Compete with the First Amendment, 12 AKRON L. REV. 229, 229-30 (1978). As Daniel Schorr, the noted television news reporter, has come to realize:
private lives of ordinary citizens is demonstrated by the media handling of facts about the private life of Oliver Sipple, the ex-marine who deflected the arm of a woman attempting to shoot President Ford while he was visiting San Francisco.69 As part of their reports on the event, a number of media included the fact that Sipple was a homosexual, a disclosure that had no direct relevance either to his conduct during the incident nor to the motives

"It's all well and good to cite the First Amendment when you're reporting important news about how our government conducts its business. But too many of us also hide behind the First Amendment when we barge into the private lives of helpless human beings.

"There's an enormous difference between storming the barriers of a powerful government and invading the privacy of the weak." 69 . . . "In all the years I worked at CBS, it never really occurred to me that perhaps it isn't right to invade a hospital with cameras, or to hover around an accident scene and film interviews with reluctant witnesses or bereaved relatives. These aren't powerful politicians or public officials I'm talking about. These are everyday people who are being abused by television. Don't they have the right to keep their picture from being taken? Television is so big that it just tramples on people. It almost never shows any sensitivity.

"Local stations are the biggest offenders, . . . The cheapest way to get your money's worth from a local camera crew is to follow the police around. . . .

"And so we get pictures of dead bodies and bad accidents and the cameras poke around in the faces of witnesses and next of kin. They prey on these people's emotions. Or we get cameras barging into homes on the heels of police who are carrying out a drug raid."


To a great extent, the courts have upheld the legality of such intrusions. Thus, public figures like Jacqueline Onassis and Ralph Nader have no real privacy and no protection from media intrusions into all aspects of their lives, as long as there is no physical intrusion or unreasonable media conduct. See Galella v. Onassis, 353 F. Supp. 196, 223 (S.D.N.Y. 1972), modified, 487 F.2d 986, 995-96 (2d Cir. 1973); Nader v. General Motors Corp., 25 N.Y.2d 560, 564, 255 N.E.2d 765, 769, 307 N.Y.S.2d 647, 652-53 (1970). Private persons who become newsworthy lose all right to privacy unless the media get the facts wrong and print or broadcast those facts with actual malice. See Cantrell v. Forest City Publishing Co., 419 U.S. 245, 249 (1974); Time, Inc. v. Hill, 385 U.S. 374, 390 (1967). Once a private individual becomes part of an official court record he or she automatically becomes newsworthy and loses the right to privacy from media attention. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975).

or attitudes of any of the participants. In his invasion of privacy suit filed against the Des Moines Register, Sipple contended that the disclosure had ruined his relationship with his family, from whom he had kept his sexual preference. Although this press disclosure may have played an important role in maintaining public interest in a story that had nothing new to report, it was clearly insensitive and violated the feeling held by many citizens and commentators that individuals should be able to control to a certain extent the information that is both collected about them and publicly placed in circulation.

The press displayed similar callousness when the American hostages held in Iran were being released. Radio and television re-

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70. According to Bezanson, the only reason for including the fact of Sipple's homosexuality was to generate continued readership for an event that was no longer really newsworthy. Bezanson, Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Acts Involving the Press, 64 IOWA L. REV. 1061, 1100 (1979). It was not until two days after the assassination attempt that the issue of his homosexuality was first implied; the next day it was explicitly stated in a number of news articles. Id. citing Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 146-47, 147 Cal. Rptr. 59, 61 (1978).

71. Sipple v. Des Moines Register was a $15 million invasion of privacy suit. N.Y. Times, Oct. 1, 1975, at 20, col. 1. The reported opinion deals only with the question of whether the California courts have jurisdiction over the Des Moines Register. Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978).

72. N.Y. Times, Oct. 1, 1975, at 20, col. 1. The most damaging disclosures generally are those relating to sex, health, and events that have occurred in the distant past. Comment, Accommodation of Privacy Interests, supra note 65, at 1411.

73. Bezanson provides an extremely illuminating analysis of the newsmaking role of tortious public disclosures in news reporting. Bezanson, supra note 70, at 1066-71.

74. It is because of such attitudes that laws aimed at protecting individuals' privacy have been enacted at both the federal and state levels. See generally Project, Government Information and the Rights of Citizens, 73 MICH. L. REV. 971, 1221-340 (1975). By 1978 all states, with the exception of Nebraska, Rhode Island, and Wisconsin, recognized the right of privacy either by statute or case law. Giglio, supra note 68, at 231-32. These recent developments, as Bezanson notes, reflect the recognition that "the narrow and severable event of publication is not the sole component of the privacy tort; rather, privacy interests also relate closely to the maintenance of and access to private facts whose disclosure might be tortious." Bezanson, supra note 70, at 1108.

75. The government is the major villain here. See Project, supra note 74, at 1222-24; see also Bezanson, supra note 70, at 1108.

76. Bloustein, supra note 65, at 51-69; Giglio, supra note 68, at 259 ("The first amendment, however, does not require that the public has an absolute right to know everything."); Comment, Accommodation of Privacy Interests, supra note 65, at 1396. But courts have refused to treat public disclosure suits as actions to vindicate the federal constitutional right to privacy. See, e.g., Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), aff'd per curiam, 547 F.2d 436 (8th Cir. 1977).

It is generally recognized that the right to know and the right to privacy must be reconciled. Beytagh, supra note 13, at 510-11; Emerson, Legal Foundations of the Right to Know, 1976 WASH. U.L.Q. 1, 20-23; Giglio, supra note 68, at 254. This issue received a good deal of discussion at the First Amendment Congress.
ports besieged the families of the hostages for news. In several cases when the newly released hostages telephoned their families from Germany, they were met on the telephone not by their relatives but by the local reporter who had been staking out their home in search of "human interest" news. Rather than letting the hostage speak with his family, the reporter barraged him with questions. Not satisfied with hounding the families of the hostages, the media began creating stories on the effects of their intrusions on the lives of these families. All Americans essentially became intruders into the private lives of individuals who had become public personae merely because they had the misfortune of having a relative who had been held hostage thousands of miles away.\textsuperscript{77}

This overzealousness in reporting together with the obvious power in the hands of the mass media have generated a great deal of public hostility toward them and their perceived privileges.\textsuperscript{78} As one commentator describes it,

\begin{quote}
In our society it is the press that performs much of this task of scrutinizing the government. Paradoxically, this is part of the problem in the dispute between advocates of access and privacy. Deep suspicion of the press exists among many persons today, including aggres-
\end{quote}

\begin{footnotes}
\textsuperscript{77} See Carmody, supra note 57.
\textsuperscript{78} This problem has been around for the entire century. See W. Lippmann, supra note 61; Commission on Freedom of the Press, A Free and Responsible Press (1947) [hereinafter cited as Hutchins Commission Report].
\end{footnotes}
sive civil libertarians. Much of the press today has taken on the configuration of modern American business, ruled by corporate interests concerned more with profit than the contents of the editorial page. This is distressing to those who see such corporate ownership as threatening to society and American values. Others find the actions of individual journalists reprehensible and view the press as sensation-seeking with little regard for human dignity, human privacy, or the value of what it published.79

79. Pember, The Burgeoning Scope of “Access Privacy” and the Portent for a Free Press, 64 IOWA L. REV. 1155, 1204 (1979). Pember notes, however, that while

[t]hese perceptions of the press are not totally inaccurate, . . . neither do they reflect the entire story. Regardless of how one views the press in our society, until another agency or institution emerges to accept the responsibility, the press will be relied on as the primary watchdog of government. As such, it must be given the fullest opportunity to fulfill this function. To limit the actions of the press because we find some of its behavior distasteful or because we distrust its corporate ownership is surely to cut off our nose to spite our face. For better or worse, if society desires a group to monitor the government and carry out the functions outlined above, the American press, at least at present, is the only institution capable of carrying out that task.

Id. at 1204-05.

The 1960’s are seen as a watershed for criticism.

Most commentators agree that there was a greater amount of press criticism in America by the mid-1970s than there had ever been before. But no one was quite sure why this was so. Some suggested that it was part of the increasingly combative posture of the American press since the Johnson administration. The 1970s seem to have been a formative time when the press was less and less concerned about playing a consensus function in society. If the press had been a lackey of the State Department in propagandizing for foreign policy during much of American history, this was not to be in the 1960s when the political consensus burst apart at the seams. By no means was the press universally antigovernment, but many major press institutions were bluntly critical.

The growing gulf between the Presidency and the press that began in the Johnson administration and widened during the Nixon administration was also a factor. With the attacks of Spiro Agnew on the press in 1969 and the continued call of the Nixon administration to a ‘silent majority,’ there was strong evidence that the press was not widely trusted or respected by the general public. Like other American institutions, the press faced a crisis of confidence.

E. DENNIS, THE MEDIA SOCIETY: EVIDENCE ABOUT MASS COMMUNICATION IN AMERICA 135 (1978). This has continued to the present, according to television reporter Daniel Schorr:

“Today [the issue of government secrecy vs. public disclosure through the press] is being overshadowed by the question of privacy vs. disclosure. In other words, it’s no longer the government against the media, but rather the individual against the media.

“The media have got to make sure that they use their First Amendment Freedom to support the liberties of Americans, not to invade those liberties.”

D. Schorr quoted in Deeb, supra note 68, col. 2. Another series of articles in the St. Paul Pioneer Press demonstrates this conduct in action. The Green Bay (Wis.) Press Gazette printed one hundred articles over a six-month period attacking the character and conduct of County Judge James W. Byers which caused his wife to leave him and might have been responsible for his heart attack and death at the age of 53. Barbash, Death of judge in Green Bay stirs bitterness toward paper, St. Paul Pioneer Press, Mar. 23, 1980, at 10M, col. 1.
For years the polls have been reporting a deep resentment toward the media, despite the public's ever increasing reliance on them for its news. Generally, people do not quarrel with the basic news judgments journalists make, but they are critical of media inaccuracies, stories that are perceived as biased, and the defensive and arrogant behavior of media journalists. Although public opinion polls showed that numerous Americans believed that Nixon and Agnew were hounded out of office by an arrogant and irresponsible press, the press, according to Justice Stewart, was merely playing the role that the Constitution intended for it.

This public hostility toward the media and toward the first amendment also appeared in a Gallup Poll conducted especially

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80. Isaacs, Values, QUILL, Sept. 1978, at 13. Brown gives the following explanation:

In an era in which society has shown itself particularly suspicious of the power enjoyed by its several major institutions of government, it follows that the press, remote from direct societal control, should receive its share of disaffection. The maintenance of a free press has proved a preoccupation with its member persons and institutions, and often a chore for the judicial establishment. Rarely has press freedom been a popular issue because the social contract between the press and society is only an implied one, and its provisions accordingly are vague.

L. Brown, supra note 32, at 6.

81. HUTCHINS COMMISSION REPORT, supra note 78; Giglio, supra note 68, at 254. For a description of this type of activity, see Carmody, supra note 57.

The image of the press that emerged from the First Amendment Congress was of a closed and insular institution, reluctant to admit its failings, even less willing to concede that it makes errors. McCoy, supra note 1, at 23.

82. Sack argues eloquently that, despite the media's arrogance, it still requires special constitutional protection:

We are told that the press is perceived as arrogant; some suggest that it is impolitic, unwise, and often plain wrong to claim a privileged position in its behalf. There is justification for these remarks. Too many members of the "institutional press" doubtless convey an overblown sense of privilege, asserted with an air of infallibility and condescension that is widely resented. And the press' advocates commonly fail to distinguish between what is helpful or desirable—anything, in the name of the first amendment, that would aid in obtaining or disseminating news or in any other respect protect the business or operations of the press—and what is essential for proper exercise of the press function. Little wonder, then, that those outside the press find it difficult to distinguish between issues, the resolution of which will seriously affect the operation of the media, and those which will not.

But it cannot follow from press arrogance, real or perceived, that special protection for the press function is therefore not required. And it cannot follow from press unpopularity or overreaching that the role of the press has somehow lost its historic and particular necessity in the constitutional scheme. And there cannot be a wrong or impolitic time to argue that the press function must have the privileges necessary to enable the press properly to perform its constitutionally ordained role for the ultimate benefit of all.


83. Stewart, supra note 16, at 631.
for the First Amendment Congress that convened in Philadelphia in January, 1980. Based on the results of this poll, George Gallup reported to the delegates that the American press is "operating in an indifferent and, to some extent, hostile environment." Three-fourths of the 1,523 adults polled did not know what the first amendment was or what rights it protected, by a two-to-one margin they felt that curbs on the news media were not strict

84. See *supra* notes 1 & 2 and accompanying text (discussion of First Amendment Congress).

85. *News Notes*, 5 Media L. Rep. (BNA), Jan. 29, 1980. There are, however, certain positive trends. Gallup reported that good will toward the press exists. Thus, local newspapers ranked third out of 24 organizations rated in terms of efforts to improve city life; journalists ranked high among 20 selected occupations rated on "honesty and ethical standards," a career in journalism—either print or electronic—was considered one of the top career choices of college students; the public's confidence in newspapers had increased during the 1970's (in 1973 39% had a "great deal" or "quite a lot" of confidence in newspapers, but in the latest survey the figure was 51%); and 69% of the surveyed population believed that reporters should not be required to reveal information sources used in gathering material for news reports, up from 57% in 1972. Gallup, *supra* note 22, at 4-5.

86. Only 24% got the correct answer. The remaining 76% either did not know or answered incorrectly. The following chart was prepared by Gallup for the First Amendment Congress on this question:

**KNOWLEDGE OF FIRST AMENDMENT TO U.S. CONSTITUTION**

<table>
<thead>
<tr>
<th>Q: Do you happen to know what the First Amendment to the U.S. Constitution is, or what it deals with?</th>
<th>Correct</th>
<th>Don't know, Incorrect</th>
</tr>
</thead>
<tbody>
<tr>
<td>NATIONAL</td>
<td>24%</td>
<td>76%</td>
</tr>
<tr>
<td>Curbs too strict</td>
<td>34</td>
<td>66</td>
</tr>
<tr>
<td>Not strict enough</td>
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<td>18-29 years</td>
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<tr>
<td>50 and over</td>
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<td>80</td>
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enough, and thirty-four percent (up from twenty-four percent in 1958) did not think the media got their facts straight in stories

<table>
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<th>Not Enough</th>
<th>About Right</th>
<th>No Opinion</th>
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<tr>
<td>Independents</td>
<td>31</td>
<td>69</td>
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Gallup, supra note 22.

In fact, today's public would not adopt the first amendment at all. Skene, supra note 16, at 630 & n.62.

87. CURBS ON PRESS—TOO STRICT OR NOT STRICT ENOUGH?

Q. Do you think the present curbs placed on the press are too strict or not strict enough?

1958 question and findings:

Would you approve or disapprove of placing greater curbs on what newspapers print?

<table>
<thead>
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<th>Approval</th>
<th>Disapprove</th>
<th>No Opinion</th>
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<tr>
<td></td>
<td>21%</td>
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100%
about which the reader had firsthand knowledge. Those who wanted stricter curbs did so because they felt that the press distorted or exaggerated the news to increase headline value, that they rushed to print without verifying the facts, and that they published information that was not in the national interest.

What exactly are the public's complaints? First, there is a feeling of powerlessness before the media. The media industry in the

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<th>Facts Straight</th>
<th>Inaccurate</th>
<th>Can't Say</th>
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<td>12%</td>
</tr>
<tr>
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<td>46%</td>
<td>33%</td>
<td>21%</td>
</tr>
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<td>37%</td>
<td>13%</td>
</tr>
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<td>41%</td>
<td>44%</td>
<td>15%</td>
</tr>
<tr>
<td>About right</td>
<td>55%</td>
<td>26%</td>
<td>19%</td>
</tr>
<tr>
<td>Should be required to reveal name</td>
<td>40%</td>
<td>41%</td>
<td>19%</td>
</tr>
<tr>
<td>Should not</td>
<td>50%</td>
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<td>44%</td>
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<td>Republicans</td>
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<td>46%</td>
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<td>47%</td>
<td>35%</td>
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</tr>
<tr>
<td>Trend</td>
<td>70%</td>
<td>24%</td>
<td>6%</td>
</tr>
</tbody>
</table>

Gallup, supra note 22.

89. Id.

90. Barron explains this feeling of powerlessness as follows: The individual finds himself placed between the two behemoths of contemporary life—giant government and giant media. It has been the genius of the American experiment that we have managed in our pragmatic way to allow, insofar as our polity has deemed just, a free scope to business and at the same time to be ever mindful of the rights and claims of individuals to privacy, reputation, and expression. I believe that these latter values—privacy, reputation, and
United States is large and concentrated and, like all other forms of big business, is seen as primarily interested in making profits. The public perceives itself as caught between big government and big media, neither of which is particularly interested in it and its problems and both of which are insulated from the public they supposedly serve. Part of this feeling of powerlessness relates to the belief that people cannot influence the media and that the media are not interested in matters of concern to the local community within which they operated; people see no effective way of influencing what the media report and how they go about reporting it. Second, Americans are concerned about the uncontrolled power that the media seem to wield over the lives of both ordinary citizens and public officials. The media are seen as being capable of ruining people’s lives at will and there is widespread belief that the news is distorted. Third, the media are seen as arro-
gant\textsuperscript{97} and interested in expanding their already privileged position\textsuperscript{98} without regard to competing claims of others.\textsuperscript{99} When the media rail at alleged infringements of their purported absolute rights protected by the first amendment,\textsuperscript{100} they lose many potential supporters who find their complaints self-serving.\textsuperscript{101}

While not all criticisms leveled at the media are justified, the thought the press reported accurately. \textit{See supra} note 88. It should be noted, however, that whatever distortions may occur are often more related to the time pressures under which the media operate and the time constraints imposed on television journalism by the medium itself. Nevertheless, the recent scandal surrounding the Pulitzer Prize-winning story by a \textit{Washington Post} reporter which was entirely fabricated demonstrates the ease with which such hoaxes can be perpetrated on the public. \textit{See} \textit{N.Y. Times}, Apr. 16, 1981, at 1, col. 4; Shaw, \textit{supra} note 20.

\textsuperscript{97} Part of this arrogance relates to the media's inability to admit that they make mistakes. \textit{See} McCoy, \textit{supra} note 1; \textit{infra} notes 381-90 and accompanying text.

\textsuperscript{98} McCoy, \textit{supra} note 1, at 23; Sack, \textit{supra} note 82, at 654; Lewis, \textit{supra} note 16; \textit{see infra} note 101.

\textsuperscript{99} Barron, Lewis, and Kessler took this position in their speeches to the First Amendment Congress. Dean Barron noted, for example, that while "the press has been valiant and eloquent in defense of its own rights to liberty and expression[, i]t has been somewhat less eloquent and somewhat less valiant in its valuation of the rights to expression, privacy, and reputation of those whom it serves." Barron, \textit{supra} note 90, at 8; Lewis, \textit{supra} note 16.

One commentator complains that the press does not accord sufficient value to individual's privacy interest.

\textit{Journalists}, like other professionals, compose an interest group anxious to retain as many special privileges as possible. The slightest restriction placed upon their freedom is viewed as a threat; the growing concern over privacy in general and public disclosure in particular, is perceived as an infringement. Moreover, the news media tends to view the privacy/public disclosure issue in terms of either/or, as if the values involved were diametrically in opposition to each other. The question is framed in such a way as to polarize the issue, placing the value to society of a vigorous and free press to expose the Watergates . . . in opposition to a vaguely defined interest of the [individual] to retain sole control of private facts because the disclosure of this knowledge, which may be true, might prove embarrassing.

Giglio, \textit{supra} note 68, at 254.


\textsuperscript{100} An example of this was the opening address of Dan Rather to the First Amendment Congress bemoaning recent Supreme Court decisions that have diminished the ability of the press to act as a watchdog. \textit{News Notes}, \textit{5 MEDIA L. REP.} (BNA), Jan. 29, 1980.

Others, however, find the media's complaints self-serving. As Dean Barron reminded the First Amendment Congress, "In my view, it would be the greatest caricature of the First Amendment to say that at the end of the Twentieth Century it is meant only to protect the freedom of those who have an ownership interest in the great corporations that control our print and broadcast media." Barron, \textit{supra} note 90, at 6-7.

\textsuperscript{101} Justice Joseph R. Weisberger, a member of the Rhode Island Supreme Court, rejects the media's complaints against recent Supreme Court decisions and maintains that the press' position is much more privileged than the Founding Fathers intended. The following are among the additional press protections that Judge Weisberger thinks the Supreme Court has afforded the media over the years:
mure fact that a significant segment of the American public believes such criticism is valid should be, and is coming to be, seen by the media as a serious problem. The remainder of this Article examines the various mechanisms that exist not only to convince the media to become more responsive to the desires and needs of the public they serve and in whose name they claim their privileged position, but to resolve some of the conflicts that presently characterize the media’s relations with individual citizens and to improve the media’s prestige in the eyes of the public.

III. THE LEGAL FRAMEWORK OF A “FREE PRESS”

A. Freedom of the Press

Any examination of the role played by the media in contemporary American life must necessarily begin with a discussion of the first amendment’s protection of freedom of speech and of the press. Commentators, no matter what their position regarding the Constitution’s purported grant of special privileges for the press, all

(1) the dilution of the press’ responsibility for libel with respect to public figures;
(2) the expansion of the prohibition against prior restraint of publication of the matters affecting national security or judicial proceedings;
(3) the disappearance of the criminal libel laws as a mechanism to curb media irresponsibility;
(4) the inability of the courts to use their contempt power to punish interference with the judicial process by publication because the Supreme Court has found it constitutionally impermissible.


Even if the media deserve special protection under the first amendment, it is “not for the benefit of the press so much as for the benefit of all of us.” Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).
agree that the statement of the first amendment that "Congress shall make no law . . . abridging the freedom . . . of the press" is meant to ensure the protection of a free and robust press. Justice Black's concurrence in New York Times Co. v. United States provides a particularly eloquent statement of this principle:

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. Only a free and unrestrained press can effectively expose deception in government. . . . 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.

104. U.S. CONST. amend. I. As originally introduced by Madison what became the press clause read as follows: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 4 ANNALS OF CONG. 434 (1794) (emphasis added).

105. For a discussion of the genesis of this statement, see infra note 158.

106. 403 U.S. 713 (1971). New York Times was Justice Black's last opinion as a member of the Supreme Court.

107. Id. at 717 (Black, J., concurring). Justice Black struck a similar note in Mills v. Alabama, 384 U.S. 214 (1966), writing for the majority in an opinion that overturned a statute forbidding newspapers from publishing political editorials on election day.

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Id. at 219 (citations omitted).

Justice Douglas took a similar position in his concurrence in the Pentagon Papers Case:

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.


http://open.mitchellhamline.edu/wmlr/vol8/iss1/1
Commentators also generally agree that the Founding Fathers intended the press to serve essentially a political function. 108

Leaving aside for the moment the question of who and what "the media" 109 comprise, in order for them to do their job prop-
erly, all media must be able to carry out three distinct functions.\footnote{110}

First, they must have the ability to collect information. This requires access to written documents and to people, both public officials and private citizens.\footnote{111} But it also requires access to places where the documents are stored and where the people can be found.\footnote{112} Sometimes people are unwilling to talk openly to the media, either because they fear reprisals from their superiors, their families, or their friends and neighbors or because imparting the information sought may expose them to civil or criminal liability. To assure access to such persons, it is often necessary to promise them anonymity or that their names will not be linked with the information they are providing.\footnote{113} Thus, the first function of the media, which will be referred to as "the newsgathering function," requires access to people, places and information as well as the ability to promise anonymity to information sources and to insure that the information collected will remain confidential.\footnote{114}

The second major function performed by the media can be called "the editorial function." This involves analysis of the information collected and decisions by both the information gatherer

\footnote{110. Viewed from the perspective of output rather than processes, Brown isolates four functions of the press:  
(1) surveillance of the environment (the "watchdog" function);  
(2) correlation of society's parts (the analysis, interpretation, evaluation processes);  
(3) transmission of society's heritage, especially social norms, values and beliefs (the educational function);  
(4) entertainment.  
L. Brown, supra note 32, at 7.}

\footnote{111. Thus, the media need access to government officials and to other newsworthy personalities, as well as access to court and government documents. Some of this access is statutorily protected, but some is dependent on the common law. See infra notes 247-57 and accompanying text.}

\footnote{112. Open meeting laws, access to courts and to witnesses, access to jails, access to foreign countries all are necessary if the media are to do their job properly. See infra notes 258-61 and accompanying text.}

\footnote{113. This is the basis for media objections to answering subpoenas. See infra notes 263-77 and accompanying text.}

\footnote{114. Justice Stewart's dissent in \textit{Branzburg} recognized this:  
Such an interest must surely be the First Amendment protection of a confidential relationship . . . . [T]his protection does not exist for the purely private interests of the newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship. Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. at 270.  
\textit{Branzburg} v. Hayes, 408 U.S. 665, 737-38 (Stewart, J., dissenting).}
and his or her editor as to the content and form in which the news will appear. The obvious importance of governmental noninterference with this vital media function often requires that media files and workplaces be inaccessible to government employees.115

The third function—the act of publication—is dissemination itself,116 the specific form and breadth of which depend on the medium involved.117 Despite a natural tendency to equate freedom of the press with this last step of publication, it is clear that publication becomes an effective right only if the publisher also has the freedom to gather information and the freedom to analyze and package it.118

115. This accounts for the media's outrage at the Zurcher decision. See supra note 30. Performance of this function also requires protection of independent editorial judgment. The Supreme Court has been more solicitous of this aspect, which it recognized in CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). See also Herbert v. Lando, 441 U.S. 153 (1979).


117. Thus, the lonely pamphleteer reaches very few; newspapers reach more; TV has the widest audience, although syndicated columns and the wire services have the greatest impact on opinion formation.

118. Thus, Meiklejohn, supra note 62, at 814, defines the press as "the process in which facts and opinions are put into view."

Justice Brennan recognizes this necessity in his concurrence in Richmond Newspapers:

While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed, the First Amendment has not been viewed by the Court in all settings as providing an equally categorial assurance of the correlative freedom of access to information. Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. . . .

The Court's approach in right of access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. When so employed against prior restraints, free speech protections are almost insurmountable. But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sake; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.


On numerous occasions Justice Brennan has taken the position that it is possible to
The Supreme Court, however, has never explicitly recognized the interrelationship of these three functions nor has it developed a consistent theory to guide its decisions regarding freedom of the press. Of those justices who believed that freedom of the press carried an absolute proscription against government interference in the press function most are no longer on the Court.119 Several current members find no substantive difference between the speech and press clauses of the first amendment.120 Chief Justice Burger's opinion in *Nebraska Press Association v. Stuart*,121 in which he characterized the case as "a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged,"122 is typical of this position.123 The remaining Justices believe that the press is entitled to broad constitutional protection either because the press clause protects the press as an institution124 or because it was designed to preserve the societal function of the press: the collection, analysis, and dissemination of information.125

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120. Chief Justice Burger seems to take this position, and he is supported by Justices White, Blackmun, and Rehnquist.


122. *Id.* at 570 (emphasis added).

123. Another example of this position is found in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), in which the issue is presented purely in terms of freedom of speech. This opinion was also written by Chief Justice Burger.


>The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.

438 U.S. at 17.

125. This appears to be the position of Justices Powell, Stevens, Marshall, and Brennan. *See, e.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also* Richmond Newspa-
The major proponent of what has come to be called the "structural" interpretation of the press clause is Justice Stewart. In an address delivered at Yale Law School on November 2, 1974, he argued that the free press guarantee was "a structural provision of the Constitution" which explicitly protected the publishing business. This interpretation supports the press only in its editorial and publishing functions.

So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

This autonomy, however, cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

While freedom of the press makes prior restraints on publication unlawful and protects the press against discriminatory governmental regulations, policies that prohibit both the press and the public access to government information and public institutions are unsailable under Justice Stewart's formulation. Thus, the struc-

126. This address is excerpted in Stewart, supra note 16.

127. [T]he Free Press guarantee is, in essence, a structural provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

128. Id. at 636.

129. In fact, Justice Stewart wrote the majority opinions in both Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), which upheld state and federal government regulations denying professional journalists access to particular inmates. The Court's holding in each case was based on dictum in Branzburg v. Hayes, 408 U.S. 665, 684 (1972), that "the First Amendment does not guarantee the press a Constitutional right of special access not available to the public generally."

He explained the Court's position in Pell v. Procunier as follows:

The First and Fourteenth Amendment bar government from interfering in any way with a free press. The Constitution does not, however, require the government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources,
tural interpretation gives the newsgathering function no constitutional protection.

In contrast to the "structural" approach to the press clause, the "functional" perspective protects all three media functions—newsgathering, news analysis, and news dissemination. According to this theory, the freedom of the press to disseminate information is worthless without access to information the press can gather, analyze, and then disseminate. Justice Powell articulated this position in his dissent in *Saxbe v. Washington Post Co.*

What is at stake here is the societal function of the First Amendment in preserving free public discussion of government affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . "[T]he First Amendment is one of the vital bulwarks of a national commitment to intelligent self-government." It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.

A similar theme was struck by Justice Stevens in his dissenting opinion in *Houchins v. KQED, Inc.*, the most recent Supreme Court case dealing with access to public institutions.

In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential social function. Our system of self-gov-

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and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.

417 U.S. at 834 (footnote, citations omitted).


131. *Id.* at 862-63 (Powell, J., dissenting) (footnote, citations omitted).


133. The last couple of cases to raise issues of freedom of the press involved access to criminal trials and both revolved around the issue of whether the public had a constitutional right to attend criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The other press freedom case decided since *Houchins* challenged the constitutionality of judicial orders that information within the possession of the media could not be published. Smith v. Daily Mail Publishing Co., 411 U.S. 97 (1979).
government assumes the existence of an informed citizenry. . . . It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-government contemplated by the Framers would be stripped of its substance.

For that reason information-gathering is entitled to some measure of constitutional protection. As this Court's decisions clearly indicate, however, this protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.134

Since the media can adequately perform their task of informing the public about its government only if there is non-interference with the newsgathering, the editorial, and the publishing functions, the "functional" interpretation of the press clause articulated by Justices Powell and Stevens is more consonant with the realities of modern American society than the approach taken by Justice Stewart or by Chief Justice Burger. Insofar as the constraints placed on media freedom by these latter two interpreta-

134. 438 U.S. at 31-32 (1978) (Stevens, J., dissenting) (footnotes, citations omitted).

Justice Stevens highlights the same theme in his ebullient concurrence in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980):

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. An additional word of emphasis is therefore appropriate.

Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by Mr. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in Saxbe v. Washington Post Co., 417 U.S. 843, 850, MR. JUSTICE POWELL unequivocally rejected the conclusion that "any governmental restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern." Id. at 857 (emphasis in original). And in Houchins v. KQED, Inc., 438 U.S. 1, 19-40, I explained at length why MR. JUSTICE BRENNAN, MR. JUSTICE POWELL, and I were convinced that "[a]n official prison policy of concealing . . . knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." Id., at 38. Since MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN were unable to participate in that case, a majority of the Court neither accepted nor rejected that conclusion or the contrary conclusion expressed in the prevailing opinions. Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

Id. at 582-83.
tions of the press clause reflect a belief that the media are not adequately considering other constitutionally protected rights and duties of citizens, some media demonstration of self-regulation may obviate the need for even the minimal government regulation upheld in recent Supreme Court decisions.

The other troublesome aspect of freedom of the press that has not been adequately resolved by the Supreme Court is who or what actually constitute “the press.” Thus, in Lovell v. City of Griffin, 303 U.S. 444, 452 (1938), the Court stated that “[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” Accord Mills v. Alabama, 384 U.S. 214, 219 (1966) (press includes “not only newspapers, books, and magazines, but also humble leaflets and circulars”). Justice Stewart, however, would include only the institutional press. Stewart, supra note 16, at 633 (“The publishing business is, in short, the only organized private business that is given explicit constitutional protection”). As he stated in his dissenting opinion in Zurcher:

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our constitution does not explicitly protect the practice of medicine or the business of banking from all abridgement by government. It does explicitly protect the freedom of the press.

436 U.S. 547, 576 (1978) (Stewart, J., dissenting). The Chief Justice disagrees completely with this position. Although the majority opinion in First Nat’l Bank v. Bellotti, 435 U.S. 765, 781 (1978), stated that “[t]he press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate,” the Chief Justice’s concurring opinion argued that it would be unwise to confer “special and extraordinary privileges or status on the ‘institutional press.’ ” 435 U.S. at 796-97 (Burger, C.J., concurring). The Chief Justice’s interpretation has been criticized by Meiklejohn. See Meiklejohn, supra note 62, at 814-15.

The exact definition of “the press” for constitutional purposes has generated much discussion by commentators. Meiklejohn, for example, defines “the press” as “the process in which facts and opinions are put into public view” and would extend constitutional protection to “[a]ny participant in public discussion—pamphleteer, scholar, and preacher, as well as reporter, editor, columnist, and commentator—. . . . with respect to gathering, assimilating, and disseminating data of public significance from which effective public opinion is made.” Meiklejohn, supra note 62, at 814; see also Lewis, supra note 16, at 626-27. Others distinguish between oral and written dissemination. See, e.g., Bezanson, supra note 108, at 782-83; Nimmer, Freedom of the Press, supra note 103, at 650-52. Some commentators take the position that it is impossible or unnecessary to make any distinction at all. See, e.g., Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505, 1508-10 (1974) [hereinafter cited as Note, Right to Gather Information]. Still others define the press more narrowly to include only professional journalists, including those employed by the broadcast media engaged in journalism. See, e.g., Note, Examining the Institutional Interpretation of the Press Clause, 58 Tex. L. Rev. 171, 171 n.1 (1979) [hereinafter cited as Note, Institutional Interpretation of the Press]; Blasi, supra note 14, at 587; see also Abrams, supra note 103, at 582-83 (journalists plus freelance writers). One appeal of the institutional interpretation is that

[j]it promises the establishment of the press as an ombudsman to safeguard the public by documenting official abuse. . . . Assigning this responsibility to the
the first amendment. The Supreme Court has never squarely faced this question, although opinions abound with dicta on the subject. It is clear from numerous decisions by the Court that "the institutional press"—the daily and weekly commercial newspapers and magazines plus commercial radio and television—is covered by the press clause, but beyond that the line-drawing becomes more difficult. Thus, it has long been recognized that "[t]he 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 . . . ." The press clause also protects "the right of the lonely pamphleteer who uses carbon paper or a mimeograph as much as . . . the large metropolitan publisher who utilizes the latest photocomposition methods." While definitions may vary depending on the circumstances of the person and the function seeking protection of the press clause, for our purposes it is sufficient to limit "media" to the institutional press. Because we are concerned with the media's power over the formulation of public opinion and over the reputations of ordinary citizens, this definition is well-suited to our ar-
The pamphleteer may well be a member of the "media" for some or all constitutional purposes, but he has little power in today's complex, impersonal, geographically expansive society. He is also likely to be unresponsive to efforts to educate him on his responsibility to society or to conform to certain norms of behavior, through peer pressure or otherwise. In fact, the "lonely pamphleteer" historically is the non-conformist who advocates an idea that is so novel or unpopular that it is unlikely to be aired in any other way. While the pamphleteer adds to the "marketplace of ideas," he has little impact. Therefore, he is less likely to have power to abuse. For these reasons it matters little that he is not behaving "responsibly."

B. The Limits of Institutional Regulation of the Media

Despite the existence of the first amendment ever since the beginning of the Republic, the different branches of government have attempted at times to regulate the press. Press freedom has rarely been popular, partly because its importance to the continuation of democratic institutions is not obvious and partly because the press is often a nuisance to government officials. In this section we will discuss the various mechanisms, both legitimate and illegitimate, that exist for regulating the media as we enter the 1980's, their constitutionality under present Supreme Court inter-

142. Not all commentators would use the press clause to provide constitutional protection to the lonely pamphleteer. Instead, he would be covered by the speech clause. See, e.g., Abrams, supra note 103, at 567; see also Blasi, supra note 14, at 587, 631-32.

143. In fact, his existence is often used by opponents of a system of media self-regulation. Because he is unreachable and because anyone like him can be a journalist, it is argued that self-regulation will not work. See, e.g., Wehrwein, supra note 39.

144. The Alien and Sedition Acts, passed in 1798, 1 Stat. 570 (1798); 1 Stat. 596 (1798), were the first of these. For a brief discussion of their genesis and impact, see 1 T. Emerson, D. Haber & N. Dorsen, Political and Civil Rights in the United States 20-23 (1976); L. Tribe, American Constitutional Law § 12-12, at 632-34 (1978).


146. Legitimate mechanisms include civil suits for defamation or invasion of privacy, see notes infra 148-78 and accompanying text, the fairness doctrine as applied to the electronic media, see infra notes 215-21 and accompanying text, and the antitrust laws, see infra notes 197-208 and accompanying text. Illegitimate mechanisms include the use of subpoenas as a form of harassment and administrative harassment through the FCC of media critics of the government. See infra notes 287-89 and accompanying text.
pretations of the first amendment, and their efficacy in guarding against the media excesses described above.

I. Direct Judicial Regulation

One way to ensure circumspect and responsible media behavior is through direct judicial regulation of media behavior. A number of common-law doctrines as well as the judiciary’s supervisory control over the nation’s courtrooms could be used to encourage accuracy and media appreciation of individual privacy rights.

The related common-law doctrines of defamation and invasion of privacy provide the major judicial mechanisms for ensuring media responsibility, at least with regard to what they print about public and private individuals, and media respect for individuals’ privacy not only in what they decide to publicize but also in what they choose not to publish. The judicial doctrines of defamation and invasion of privacy are enunciated in the Restatements of Torts, and they are enforced by the common law. These doctrines allow individuals to sue for false statements that are harmful to their reputation. They also allow individuals to sue for unauthorized publication of private facts that are actionable because of being highly embarrassing or intruding into the individual’s personal life.

Comment, supra note 103, at 283–84 (footnotes omitted). Abrams suggests that, although the media in recent cases asked the courts merely to balance their interests against other constitutionally protected rights—and did not demand absolute protection—their restrained and balanced positions were rejected by the courts “in rather absolutist legal terms.” Abrams, supra note 108, at 12.

According to Giglio, unless the media establish some form of internal mechanism to protect the public from media excesses, the Supreme Court may well impose censorship by approaching some degree of prior restraint.

Unless the media exercise greater restraint on public disclosure of private facts, and unless the media come to accept the fact that privacy is also an important value in a free society, the recourse may eventually be some form of censorship. A future court may decide that privacy is more important than certain kinds of public disclosures currently protected by the first amendment privilege and impose a narrowly defined form of prior restraint.

Giglio, supra note 68, at 259.


149. See W. PROSSER, supra note 148, § 120; see also RESTATEMENT (SECOND) OF TORTS § 632D (1977).
in how they go about gathering their information. Most commentators agree, however, that these torts do little to remedy the plight of the person who finds his private life either spread out on the pages of the daily newspaper or the subject of a story on the evening news.\textsuperscript{150} Nor do they effectively deter the media from committing such excesses in the future.\textsuperscript{151} Lawsuits based on these torts merely pad the salaries of the lawyers who represent either the maligned individual or the misbehaving media corporation.

Until the Supreme Court’s decision in \textit{New York Times Co. v. Sullivan},\textsuperscript{152} libel lawsuits against media defendants were governed by the common law of defamation, an extremely archaic, complicated, and not altogether logical branch of tort law.\textsuperscript{153} In \textit{New York Times} and its progeny,\textsuperscript{154} the Supreme Court responded to the me-

\textsuperscript{150} As Bloustein states, intrusion of an individual’s privacy by the mass media “threatens our liberty as individuals” in a way that might be irreversible. Bloustein, \textit{Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional As Well?}, 46 TEX. L. REV. 610, 620 (1968).

\textsuperscript{151} What is really at issue when, for instance, a magazine gives an account of the emotional crisis that a man faced in leaving his wife and children, is not merely the distress the individual suffers as a result of the reawakening of his agony, but the debasement of his sense of himself as a person that results because his life has become a public spectacle against his will. There is anguish and mortification, a blow to human dignity, in having the world intrude as an unwanted witness to private tragedy. The wrong is to be found in the fact that a private life has been transformed into a public spectacle. \textit{Id.} at 619; \textit{accord} Time, Inc. v. Hill, 385 U.S. 374, 412-15 (1967) (Fortas, J., dissenting).

\textsuperscript{152} Some commentators argue that only the use of an injunctive remedy can resolve this problem. \textit{See}, e.g., Symposium, \textit{Toward a Resolution of the Expanding Conflict Between the Press and Privacy Interests}, 64 IOWA L. REV. 1061 (1979). There are, however, serious constitutional problems with prior restraint of speech. \textit{See} Near v. Minnesota, 283 U.S. 697, 706-23 (1931); T. EMERSON, \textit{supra} note 108, at 503-07; L. TRIBE, \textit{supra} note 144, \S 12.31.

\textsuperscript{153} Lawsuits based on defamation or invasion of privacy are very difficult to win against media defendants. In defamation actions plaintiffs have to demonstrate that the statements made were false. In invasion of privacy lawsuits, where publication of truthful but private information is actionable, plaintiffs are stymied by the rule that any information in public records is publishable and by the media’s newsworthy defense which permits publication of all information that is of interest to the community. \textit{See infra} note 174 and accompanying text.


\textsuperscript{155} Under the common-law tort a publisher, broadcaster, or speaker could be held strictly liable for the publication or utterance of a defamatory falsehood, unless he could show that the statement was privileged. \textit{Id.} \S\S 113, 114, at 772-74, 776-77, 784-85; 1 F. HARPER & F. JAMES, \textit{The Law of Torts} \S 5.5, at 364 (1956).

\textsuperscript{156} The companion cases of \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130 (1967), and
do's argument that large damage awards to plaintiffs were interfering with their ability to report the news. In an attempt to protect the media who were diligently doing their job, while at the same time punishing those who purposely set out to defame others, the Court constitutionalized the libel tort, at least as regards public officials, and required plaintiffs to prove that the allegedly libelous statement had been made with malice or with reckless disregard for its truth or falsity. Later cases extended what came to be called the *New York Times* standard to public figures on the same theory that such protection for the media was necessary to ensure an "uninhibited, robust, and wide-open" press. More


155. As the Court stated in New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964), "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." For this reason the freedom of speech and freedom of the press "require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. This is because "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing spaces' that they 'need . . . to survive.'" *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). As interpreted in a later Supreme Court decision, "The *New York Times* standard was applied to libel of a public official or figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971) (plurality opinion).


157. For the exact quotation of what came to be called the *New York Times* actual malice standard, see *supra* note 155.

158. Justice Brennan wrote this phrase in the majority opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), when he pointed to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

The same theme was expressed in the later cases relying on and expanding the *New Times* standard.
recently, the Court has drawn back from this position by widening the category of private plaintiffs who can recover merely upon a showing of negligence, if that is the standard used in the state where the libel occurred. Moreover, the recent case of *Herbert v. Lando*, in which the Court permitted a plaintiff to inquire into the defendant's state of mind at the time the allegedly defamatory article was written, a clear infringement of the heretofore inviolable editorial function, suggests that the balance is being struck

_York Times_ holding. For example, in _St. Amant v. Thompson_, 390 U.S. 727, 731-32 (1968), the Court stated:

> But _New York Times_ and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

According to the plurality opinion in _Rosenbloom v. Metromedia_, Inc., 403 U.S. 29, 52-53 (1971), "It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation . . . is threat enough . . . ."


161. As the same Supreme Court had noted in _Miami Herald Publishing Co. v. Tornillo_, 418 U.S. 241 (1974),

> A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size, and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control.

_Id. at 258 (footnote omitted). Similarly, in _CBS v. Democratic Nat’l Comm._, 412 U.S. 94,
more and more in favor of the plaintiff.162

What effect does all this have on media behavior? How does the law of libel create greater media responsibility and inculcate respect for the private lives of members of the community? Unfortunately, the new libel standard has had little affect on media responsibility. Winning a libel suit does not really compensate the plaintiff for the embarrassment of having lies about him or her broadcast from coast to coast.163 The media complain that these most recent Supreme Court rulings have had the unanticipated effect of encouraging frivolous libel suits and lengthening the time period of the litigation.164 Whereas many libel suits formerly were dismissed on the defendant’s motion for summary judgment,165 Herbert v. Lando extends the litigatory process, resulting in far

124 (1973), the Court stated that “[f]or better or worse, editing is what editors are for; and editing is selection and choice of material.”

162. According to one commentator, had the Court really wanted to protect the first amendment interests at stake, it could have recognized a reporter’s work product as constitutionally protected. See Comment, Constitutional Protection for the Newsmen’s Work Product, 6 Harv. C.R.-C.L. L. Rev. 119, 120 n.10 (1970). Alternatively, if it made little sense to draw the line there, the Court could have extended protection to a journalist’s work product plus oral and written communications with his or her editor. The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 155 (1979). See generally Emerson, The Right of Privacy and Freedom of the Press, 14 Harv. C.R.-C.L. L. Rev. 329, 335-37 (1979).

163. See supra note 150.

164. According to one commentator, the three most recent Supreme Court decisions will encourage both public and private figures to bring more defamation suits because their odds of winning now seem greater, will deter courts from granting summary judgment to media defendants before the elongated discovery approved by Herbert v. Lando is completed, and will discourage grants of summary judgment even after discovery because of a suggestion in Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). The Supreme Court, 1978 Term, supra note 162, at 156-57; see Colum. Journalism Rev., July-Aug. 1980, at 17; see also Note, supra note 159.


Because the New York Times rule did not operate until trial, and thus only partially mitigated against self-censorship, many of the lower courts granted media defendants summary judgment on the issue of actual malice to discourage press self-censorship more
greater attorney's fees for the hapless and innocent defendant. The effect of all this on the media is that, due to extremely high legal costs incurred in the defense of frivolous lawsuits and the large damage awards given by juries with little sympathy for the media corporations, they have fewer resources to devote to their primary functions of gathering, editing, and disseminating the news. Moreover, the fear of large jury awards inevitably makes the media more cautious in their statements. To the extent that this greater cautiousness causes the media not to investigate or publish certain things for fear of a libel lawsuit, it decreases the information that is put into circulation about public officials. This, of course, makes the media less effective in their job of keep-


166. In fact, one court interpreting Herbert has held that to defeat a media defendant’s summary judgment motion a public figure plaintiff “need only present evidence which shows a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.” Nader v. De Toledano, 48 U.S.L.W. 2146 (D.C. July 31, 1979). Thus, even perfectly law-abiding media defendants will have to incur the expenses of going to trial with the possibility that an unpredictable jury will return an enormous adverse verdict.

With attorneys’ fees reaching an average of $1,000 per day, the media are now spending millions of dollars defending lawsuits that previously would have been dismissed before trial. See COLUM. JOURNALISM REV., July-Aug. 1980, at 17-18. Again, the burden falls more heavily on the smaller media outlets. Thus, the New Jersey Monthly is presently spending 10% of its budget on legal fees because of its involvement in a long, drawn-out libel suit. Id. at 18; see also The Supreme Court, 1978 Term, supra note 162, at 157.

167. According to one editor, the costs of defending libel suits make his magazine “think twice” about tough, investigative assignments, and “[i]f these suits keep up, advocacy journalism of any kind will be dead.” COLUM. JOURNALISM REV., July-Aug. 1980, at 18. A media attorney noted that already “[s]tories aren’t being written because of these rulings. Someone will say, ‘let’s not explore that hornet’s nest.’ Another will claim, ‘We don’t have the resources to go after that one.’ You’ll still get some ‘damn-the-torpedoes’ publishers, but others, when faced with [choosing between] either a tough investigative piece that could be libelous, or a softer feature story, will grab for the feature.” Id.; see also, Skene, supra note 16, at 622 (fuzzy definitions of “public” are also involved in creating this new cautious mood); The Supreme Court, 1978 Term, supra note 162, at 157.

For a discussion of the effects of these latest Supreme Court decisions on libel litigation, see Rosen, Media Lament—The Rise and Fall of Involuntary Public Figures, 54 ST. JOHN’S L. REV. 487 (1980); Note, supra note 159; Comment, Wolston and Hutchinson, Changing Contours of the Public Figure Test, 13 LOY. L.A.L. REV. 179 (1979); Note, Libel Becomes Viable: The Narrow Application of Limited Public Figure Status in Current Defamation Law, 7 OHIO N.U.L. REV. 125 (1980); Note, Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Reproduction, 58 TEX. L. REV. 623 (1980).

ing the public informed. Thus, the slight impact libel lawsuits may have on media responsibility and accuracy, is probably heavily outweighed by the negative effects of constraining the amount of information imparted to the audience. And whatever greater protection is afforded libel plaintiffs by the Supreme Court's most recent rulings comes at the expense of the media's ability to perform their reporting function.

Similar conclusions must be reached with regard to the tort of invasion of privacy. A tort of recent origin, it overlaps to a certain extent with defamation and suffers many of the same disabilities. The Supreme Court has had only one opportunity to rule directly on the conflicting claims of journalists and private persons whose privacy had allegedly been invaded, and it struck the balance in favor of the media. Furthermore, the recognized defense of newsworthiness is sufficient to shield most media defend-

168. The reason for this is that libel suits operate only indirectly on media behavior. Thus, it is harder for the media effectively to modify their behavior toward all individuals because the spectre of large jury awards and the cost of lengthy legal defenses force the media to question who is a public figure and whether some unknown jury will consider their behavior sufficiently diligent in checking the accuracy of their reporting to rule in their favor. The media are not asking themselves how they can generally ensure greater accuracy of reporting, what their policies ought to be regarding particular types of individuals, or what relatives of public figures should also be considered part of the public domain. This second set of questions, however, is much more germane, if the media are to act responsibly toward the public. See supra notes 556-58, 566-67 and accompanying text.

169. Critics argue that the Justices were unmindful of the first amendment values at stake and that they underestimated the chilling effect of their rulings in these recent cases. The Supreme Court, 1978 Term, supra note 162, at 156-60; Hunter, supra note 165, at 815-21.

170. Invasion of privacy really involves four torts, only one of which—the public disclosure of private facts—is significant as a possible deterrent of media excesses in their dealings with individual citizens who are the subject of their reporting. See W. PROSSER, supra note 148, § 117, at 804-15; Prosser, supra note 65, at 389; RESTATEMENT (SECOND) OF TORTS § 652D (1977).

171. It was first proposed by Warren and Brandeis in 1890. Warren & Brandeis, The Right to Privacy, 4 HARV. L. Rev. 193, 195-97 (1890). Since then the tort has found much more favor with commentators than it has with the courts. See supra note 65.


In Hill the Court imposed the actual malice test of New York Times Co. v. Sullivan in a false light cause of action and reversed the judgment for plaintiff on this ground. 385 U.S. at 387-91. Whether this requirement is still good law after the most recent defamation cases remains to be seen. See supra notes 159-69 and accompanying text. Some think that it is not. See, e.g., Ashdown, supra note 151, at 663, n.89; Pember & Teeter, Privacy and the Press Since Time, Inc. v. Hill, 50 WASH. L. Rev. 57 (1974).

The other serious problem facing a plaintiff alleging invasion of privacy is that the disclosure at issue often involves facts that were public at some time in the past but which, for various reasons, the plaintiff does not presently want publicized. The past public nature of such facts has always been a complete defense in this type of lawsuit. Dictum in Wolston v. Reader's Digest Association, however, may prove beneficial to plaintiffs in the future because the opinion suggests that persons, although once public, may become private after the passage of some years.

The other area in which the Supreme Court has established

174. The newsworthiness defense has been the focus of most of the commentaries and case law in this area. See, e.g., Beytagh, supra note 13; Bloustein, supra note 65; Bloustein, supra note 150; Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267; Kalven, supra note 65; Nimmer, supra note 65; Phillips, Defamation, Invasion of Privacy, and the Constitutional Standard of Care, 16 SANTA CLARA L. REV. 77 (1975); Woito & McNulty, supra note 65; Comment, Public Disclosures of Private Facts, supra note 65; Comment, Accommodation of Privacy Interests, supra note 65.

Several commentators argue, however, that this emphasis is incorrect. See, e.g., Karafoil, The Right to Privacy and the Sidis Case, 12 GA. L. REV. 513 (1978); Lee, Privacy Intrusions While Gathering News: An Accommodation of Competing Interests, 64 IOWA L. REV. 1243 (1979); Comment, Public Disclosure Actions, supra note 65.

175. Thus, for example, activities relating to past criminal or sexual behavior, if true, can be published. See, e.g., Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (disclosure of long-past crime). Justice Rehnquist's opinion for the court in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), might prove helpful here, although it involved a libelous statement. In dictum he noted that a person's involvement in criminal conduct does not automatically make him a public figure for purposes of comment on issues relating to his conviction. Id. at 168.

176. Nevertheless, the Supreme Court specifically reserved the question in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975):

Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, . . . it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records . . . .


178. Justice Blackmun argued that the passage of time between the controversial event and the libelous statement could often be relevant in deciding whether a person possesses the public figure characteristics.

This analysis implies, of course, that one may be a public figure for purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence . . . . I conclude that the lapse of 16 years between petitioner's participation in the espionage controversy and respondents' defamatory reference to it was sufficient to erase whatever public-figure attributes petitioner once may have possessed.

Id. at 171 (Blackmun, J., concurring). For this reason he only concurred in the results.
rules for media conduct is where the first and sixth amendments clash. This conflict, commonly labelled “free press/fair trial,” results from the media’s interest in reporting about impending or on-going criminal trials and the right of a criminal defendant to be tried by an unbiased jury. Two easily effected procedures exist for protecting this right—closing the trial to the press and ordering all participants in the trial not to discuss anything about it with


180. According to some, this labeling is incorrect. The second session of the First Amendment Congress, meeting in Williamsburg, Va., took the position that the two rights involved were not really in conflict:

> We need not, and should not, choose between the First and Sixth Amendment rights of the public. We believe that at root they are in concert, not in conflict: Each is designed to protect the public against the power of government. In protecting rights of one segment of society the courts need not, and should not, infringe on the rights of another segment of society.

Values in Concert: First, Fourth and Sixth Amendments (First Amendment Congress, Mar. 1980).

181. According to an article in the New York Times, in the nine months after the Gannett decision, which was handed down on July 2, 1979, there were 239 motions to bar the public and the press from various aspects of criminal proceedings, at least 37 of which were attempts to close trials or sentencing proceedings. N.Y. Times, Apr. 7, 1980, at D10, col. 4. Of the 185 attempts to close courtrooms between July 2, 1979, and February 15, 1980, 121 involved pretrial proceedings, 37 involved trials or convictions, 19 involved pre-indictment hearings, and eight involved sentencing. About 100 of the 185 requests were granted. Id.

According to one student commentator, exclusionary orders prejudice defendants:

> The execution of an exclusionary order appears overly drastic—unlike gag orders, all, not merely prejudicial, comment is restricted from publication. The press is deprived of public information which it requires to sustain itself. In addition, the press may be deterred from future investigations. The public lacks even a general knowledge of what transpires in the proceedings; the main antagonist to the right to a fair trial, unconstitutional police and judicial conduct, goes observed. Thus, the most deleterious effects produced by the exclusionary order may be to the defendant himself. A more sensitive trial court, employing techniques calculated to assure an impartial jury, is most important. The sensational trial merely illustrates the need for their more general implementation.


The retired editor of the Virginia-Pilot believes that the media have so changed since their period of sensational trial reporting that the present court closures are unwarranted:

> The Supreme Court majority in Gannett failed to recognize that court coverage by newspapers has foregone most of its recklessness and much of its volume in the last twenty-five years . . . . Press attention to courts and their administration today is hardly sufficient to satisfy either the public’s interest in justice or the need for an informed citizenry.

Mason, supra note 30, at 260-61. The source for this statement is a study conducted by the National Center for State Courts which demonstrated that 54% of those queried did not
The Supreme Court, on occasion, has approved

feel that media coverage was adequate to show how the court system really worked. National Center for State Courts, The Public Image of the Courts 16 (1978).

The two most recent cases in which the Supreme Court grappled with the problems posed by court closings were Gannett Co. v. DePasquale, 443 U.S. 368 (1979), and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). After the Gannett decision was announced, which found closure of pretrial proceedings constitutional, a number of the Justices explained the extent of the holding in non-judicial fora—an extremely unusual move. The Chief Justice discussed it in an August 1979 interview with the Gannett News Service, Goodwin, supra note 30, at 635 n.12, and Justice Stevens explained the decision in an address he gave at the Dedication Ceremony of the University of Arizona College of Law on September 8, 1979, Stevens, Some Thoughts About a General Rule, 21 Ariz. L. Rev. 599 (1979).

182. According to a study by the Reporter's Committee for the Freedom of the Press, 80 of the 94 federal district courts have standing orders about what can be published during the pendency of a trial. Landau, Fair Trial and Free Press: A Due Process Proposal, 62 A.B.A.J. 55, 56 (1976). While such forced silence of participants in a criminal trial may prevent the publication of certain information, thereby stifling the news, the Supreme Court has not applied the same presumption against the validity of such standing orders as it does to direct restraints of the press. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 358-63 (1966).

In the wake of Sheppard, the American Bar Association (ABA) established a committee to develop guidelines to resolve the fair trial/free speech controversy. The culmination of this study was the Reardon Report and the ABA Standards on Fair Trial and Free Press (1968). After the Nebraska Press Ass'n case, the ABA revised its standards. ABA, Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press (2d ed. Tent. Draft, 1978); see Skene, supra note 16, at 626-30.

In some areas of the country there also exist committees which deal informally with conflicts that develop between the media and the courts. See Rights in Conflict, supra note 108, at 18-19; ABA Legal Advisory Committee on Fair Trial and Free Press, Fair Trial/Free Press Voluntary Agreements (1974) [hereinafter cited as ABA, Fair Trial/Free Press Voluntary Agreements]. The earliest voluntary agreements—Oregon (1962); Massachusetts (1963); Washington (1966)—antedated the adoption of the ABA Standards.

One student commentator studied the 26 reported cases in which gag orders were imposed by the trial court prior to 1977. Of these, 20 involved prior restraint to stop publication of news threatening to the criminal defendant. The press obeyed 11 of the gag orders, and in six of them obedience caused irrecoverable loss of the news item. The press violated 15 gag orders, and contempt citations were issued in 10. United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973), was the only case in which the gag order was sustained on appeal. Note, Gag Orders on the Press, supra note 25, at 192-96. The author concludes that despite the fact that the media ultimately prevail, the uncertainty has a chilling effect on the decision to publish. See id. at 216-18. "When a lone judge, acting without review, can irrecoverably deny the right of the press to print the news and the right of the public to know the workings of government, 'the civilizing hand of the law' has been replaced by the despot's iron fist." Id. at 218; see also Goodale, supra note 25, at 505-12. As to whether a reporter has to obey an invalid order prohibiting publication, compare Walker v. Birmingham, 388 U.S. 307, 317 (1967) (proper method for making constitutional challenge is to apply to state courts to have injunction modified or dissolved) and United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) (injunction duly issued must be obeyed irrespective of ultimate validity), cert. denied, 414 U.S. 979 (1973) with State v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (violation of order patently in excess of jurisdiction cannot produce valid judgment of contempt), cert. denied, 404 U.S. 939 (1971)
both of these methods, although other, more costly and cumbersome ways of protecting a jury exist without burdening the media's first amendment rights. Although premised on the theory that the courts are acting to protect the right of the defendant,


Prettyman argues that the Supreme Court would not countenance a restraint on publication unless the alternatives had been tried without success. See Prettyman, Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?, 20 ST. LOUIS U.L.J. 654, 657-58 (1976). Moreover, according to Justice White, "Regardless of how beneficient-sounding the purposes of controlling the press might be, we... remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

184. The possibilities are described by Justice Clark in his majority opinion in Sheppard v. Maxwell, 384 U.S. 333 (1966). These include the proscription of extrajudicial statements on prejudicial matters, continuance of the case or a change of venue, more effective use of voir dire, the use of precautionary instructions, or the sequestration of the jury. Id. at 361-63. For a discussion of the problems with the alternatives to closure, see Isaacson, Fair Trial and Free Press: An Opportunity for Coexistence, 29 STAN. L. REV. 561, 561-67 (1977); Note, Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After Gannett v. DePasquale, 44 ALB. L. REV. 455, 463-64 nn.39-43 (1980).

185. Whether all these procedures actually protect the defendant's right to a fair trial has never been conclusively determined. According to one federal judge, newspapers have no significant impact on jurors:

Of the things you [newspapers] have fostered... is to think that you really influence people and that four days after they read a story, they will remember the first damn thing about it. The fact is, I discovered in trying highly publicized cases, where the issues were brought out for months and weeks beforehand in daily headlines—Chicago police scandal cases involving 24 defendants in a single case, things of this nature—that when we interrogated prospective jurors and asked them, "Do you remember reading anything about this case?" by actual count, 94 percent never remembered the story. The other 6 percent remembered vaguely that they had read something about it. But only one half of 1 percent remembered what it was they read, and less than half of those had made up their minds as a result of what they had read.

So pretrial publicity doesn't concern me at all. I don't think, really, it is a matter that should concern either the media or the courts.

many such rulings are sought not by the defendant,\textsuperscript{186} but by the prosecution.\textsuperscript{187} Closing the court or issuing gag orders may be important to judges interested in orderly trials and courtrooms, but only in truly egregious circumstances\textsuperscript{188} are they even tangentially related to press responsibility.\textsuperscript{189}

\textsuperscript{n.47.} Moreover, since most criminal cases do not reach the jury, and those slated for trial are commonly disposed of by guilty pleas, the commotion seems a bit out of place. Barth, \textit{supra} note 108, at 64-65; Stephenson, \textit{Fair Trial-Free Press: Rights in Continuing Conflict}, 46 \textbf{Brooklyn L. Rev.} 39, 39-40 & n.5 (1979).


\textsuperscript{186.} Some attorneys believe that the defendant needs to have access to the media. \textit{See}, e.g., Freedman & Starwood, \textit{Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum}, 29 \textbf{Stan. L. Rev.} 607 (1977); Garry & Rior-dan, \textit{supra} note 25. According to a municipal court judge from Los Angeles, however, the press is no longer beneficial to the criminal defendant. Younger, \textit{supra} note 185, at 593.

\textsuperscript{187.} Not all of the post-\textit{Gannett} closings were sought by the defense. Thus, for example, in United States \textit{v}. Stipe, No. 79-123 (D. Okla. July 18, 1979), the U.S. attorney moved to seal all pretrial proceedings and documents, the defense opposed the motion, and the judge denied it on the ground that \textit{Gannett} could only be invoked by the defense. In State \textit{v}. Lynch, No. 79 CPS 7594 (N.C. Super. Ct., Mecklenburg County, July 12, 1979), the prosecutor moved to close the trial during the testimony of the alleged rape victim on the ground that it would be embarrassing to her. The defense did not oppose, and the judge closed the trial during her testimony. In United States \textit{v}. \textit{The Progressive}, 467 F. Supp. 990 (W.D. Wis.), \textit{appeal dismissed}, 610 F.2d 819 (7th Cir. 1979), the government, rather than \textit{The Progressive}, unsuccessfully sought closure. In one case a witness’ attorney unsuccessfully sought closure on the ground that news accounts of the testimony would prejudice his right to an impartial jury in a later trial. People \textit{v}. Angus, No. 104-69-78 (N.Y., Albany County, July 25, 1979). These cases, along with the larger number of post-\textit{Gannett} cases in which closure was sought by the defense, are summarized in Paul, \textit{Gannett v. DePasquale—What to Do About It?}, in \textbf{Practicing Law Institute, Communications Law} 1979, at 48-70.

\textsuperscript{188.} A more efficacious way of dealing with this problem may be through joint contacts between judges, lawyers, and the media and the creation of local rules of access and committees to serve as a liaison between judges and journalists. The American Bar Association has devoted some time and energy to such endeavors. \textit{See} ABA \textbf{LEGAL ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS} (1976). \textit{See generally ABA, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS, \textit{supra} note 182; ABA PROJECT ON MINIMUM STANDARD FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS} (1968); note 182 supra.

\textsuperscript{189.} Sheppard \textit{v}. Maxwell, 384 U.S. 333 (1966), was such a case. For a description of the sensational nature of press coverage of the murder trial of Dr. Sam Sheppard, see Portman, \textit{The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond}, 29 \textbf{Stan. L. Rev.} 393, 403-05, 404 n.51 (1977).
2. Legislative Regulation

The media are composed of individuals and businesses. As such, they are not beyond the reach of civil and criminal statutes. The Supreme Court has held that, despite the existence of the First Amendment, the media are not exempt from the provisions of the Sherman Act,\(^{190}\) the National Labor Relations Act,\(^{191}\) and the Fair Labor Standards Act.\(^{192}\) And although the Supreme Court in *Grosjean v. American Press Co.*\(^{193}\) struck down a Louisiana statute that imposed a special tax on newspapers with a circulation of more than 20,000 a week,\(^{194}\) it noted that nondiscriminatory taxation of newspapers would not violate the free press clause of the first amendment.\(^{195}\)

Because the media are a type of big business, the major form of governmental regulation of the print media\(^{196}\) has been through the antitrust laws.\(^{197}\) The Supreme Court has taken the position

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190. *See Associated Press v. United States*, 326 U.S. 1, 19-20 (1945). The Court noted that its decision did “not compel AP or its members to permit publication of anything their ‘reason’ [told] them should not be published.” *Id.* at 20 n.18. That the government is prohibited from interfering with the marketplace of ideas but must remove unreasonable restraints on access to the marketplace was reaffirmed in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 135-36 (1969).


194. The Court characterized the challenged statute as “a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees.” *Id.* at 250.

195. *Id.*

196. The electronic media are heavily regulated by the FCC. The rationale for this different treatment of print and electronic media is that there is a scarcity of airbands which must be regulated in the public interest. *See CBS v. Democratic Nat'l Comm.* 412 U.S. 94, 104 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); *NBC v. United States*, 319 U.S. 190, 210-17 (1943). *But see 49 U.S.L.W. 2588* (relaxation of FCC guidelines on radio nonentertainment programming).

This rationale, however, has been severely attacked by critics who demonstrate that there are fewer newspapers than radio and television stations and that technological breakthroughs in the electronic media make scarcity a meaningless concept. *See, e.g.*, Bazelon, *The First Amendment and the “New Media”—New Directions in Regulating Telecommunications*, 31 FED. COM. L.J. 201 (1979) [hereinafter cited as Bazelon, *The First Amendment*]; Bazelon, *infra* note 38.

The Supreme Court in *Pacifica Foundation* has come up with another rationale to support FCC regulation of content—the captive audience theory. *See infra* note 212.

that antitrust regulation is in the public interest because it ensures that there will be more opinions added to the marketplace of ideas. Although first amendment considerations may and should influence the development of media antitrust policy, they do not prevent the enforcement of antitrust statutes. Thus, antitrust regulation of the press is permissible, but governmental inquiry into editorial content is not.

The media, however, are not like any other big business because of their connection with the first amendment. For example, the Newspaper Preservation Act of 1970 acknowledges that economic competition is unrealistic in many situations and attempts to prevent the further disappearance of independently owned daily newspapers. Subject to the written consent of the Attorney General, the Act permits competing newspapers in the same city to merge their production, circulation, and advertising operations if one of them is in danger of financial failure, and the

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198. According to one commentator the Supreme Court’s seeming unconcern with the first amendment in newspaper antitrust settings rests on the belief that the business conduct of the press is beyond the protection of the first amendment. Lee, supra note 44, at 1276 n.153. However, in Opinion of the Justices, 392 N.E.2d 849 (Mass. 1980), the Massachusetts Supreme Court stated that, in its opinion, a proposed law which compelled disclosure of the financial interests of reporters violated the first amendment.


201. The Supreme Court in FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978), upheld FCC rules requiring divestiture of newspaper-broadcasting combinations in communities with only one daily newspaper and one broadcasting station and barred the formation of such combinations in the future. These rules were found to be consistent with the first amendment. This decision is criticized in Lee, supra note 44, at 1328-35. For an extensive bibliography of commentaries on the FCC rules involved, see id. at 1328 n.483.

202. See supra note 190. This position is consistent with the Supreme Court’s insistence in other contexts that the first amendment protects the media from governmental intrusion on the editorial process. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); CBS v. Democratic Nat’l Comm., 412 U.S. 946 (1973); see supra note 115 and accompanying text.

203. See generally Lee, supra note 44. The 14 antitrust actions brought by the Department of Justice against newspapers are summarized by Connell, supra note 197, at 705-11 app.


205. For a critique of the Act, see Special Project, supra note 37, at 899-902 (Act treats only the outward signs, not illness).


207. See id.
merger does not affect their editorial and reportorial policies. \(^{208}\)

While the print media have received only limited regulation, \(^{209}\) the electronic media have always been heavily controlled. \(^{210}\) Despite the existence of the first amendment, other considerations have consistently been found to justify far-reaching, in-depth interference by the Federal Communications Commission (FCC) \(^{211}\) in the electronic media’s internal decisionmaking. \(^{212}\)

\(^{208}\) Id. § 1802(2). One commentator argues that it is impossible to satisfy the requirement because the owner’s influence on the content of his newspaper is inherent in the job. Special Project, supra note 37, at 902; see supra notes 45 & 48.

\(^{209}\) In a speech at Fairleigh Dickenson University on November 6, 1974, Justice Douglas lauded the continued independence of the media.

Prior restraint and the rule of air comment are only forerunners of censorship. The private owners of the various parts of our mass media may be conservative, reactionary, or ignorant. But their right to be independent promises independence for any opposed school of thought. So over the years we can expect a wide spectrum of ideas exploited by our mass media which would not happen if Big Brother in Washington, D.C., got his hands on the controls. Remarks of William O. Douglas, 26 HASTINGS L.J. 819, 821 (1975).

\(^{210}\) According to Bazelon, a member of the Court of Appeals for the District of Columbia,

"When it comes to the written word, the basic rule has been ‘hands off.’ . . . [T]he editorial process has been almost inviolable. In contrast, the broadcast media is extensively regulated. Every three years the FCC scrutinizes the broadcaster’s performance to determine whether the broadcaster has fulfilled its obligation to serve the public interest. The FCC has imposed a myriad of specific requirements to flesh out the public interest obligation . . . . While the print editor’s discretion is bounded only by the laws of libel and slander, the TV editor’s judgment is significantly constrained by the law, the FCC’s rules, and the need for periodic license renewal."

Bazelon, The First Amendment, supra note 196, at 202-03. In another setting Bazelon argues that the roots of broadcasting regulation lie in the early perception of broadcasts as mere entertainment and, thus, unworthy of first amendment protection. Bazelon, supra note 38, at 219-20.


\(^{211}\) Although its members are appointed by the executive branch, the FCC performs legislative and judicial functions as well. See K. DAVIS, ADMINISTRATIVE LAW TEXT § 13.01 (1972). Its governing statute, 47 U.S.C. §§ 151-609 (1976 & Supp. IV 1980), gives it power to regulate both technical and substantive aspects of radio and television broadcasting.

\(^{212}\) Traditionally, a number of rationales existed for treating broadcasting differently from the print media. First, because the airways belonged to the public, stations could be required to serve the “public interest, convenience, and necessity.” Such language, which
Supreme Court explained this different treatment in *CBS v. Demo-
cratic National Committee213 as follows:

[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in Red Lion, we said “it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.214

The fairness doctrine,215 which legitimizes the FCC’s regulation


On March 24, 1981, the Supreme Court upheld the FCC’s program of deregulation begun during the Carter administration, as it affected types of entertainment. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). Justice White’s majority opinion stated that the Court was deferring to the Commission’s decision since it “has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats,” id. at 595, and that the first amendment did not give “individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs.” Id. at 604; see N.Y. Times, Mar. 25, 1981, at A16, col. 3.


214. Id. at 101 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)). The groundwork for this attitude toward FCC regulation was laid in NBC v. United States, 319 U.S. 190 (1943), when the Supreme Court refused or failed to see any first amendment limitations on the FCC’s regulation of business practices. This permitted the FCC to regulate well beyond antitrust violations as long as it based its determinations of unreasonable behavior on the public interest standard. See Lee, supra note 44, at 1320-22.

215. The fairness doctrine assures opposing ideas access to the electronic media so as to assure diversity of content. See generally Special Project, supra note 37, at 1031-45. The
of the electronic media,\textsuperscript{216} provides a promising rationale for government regulation of all media. Both the fairness doctrine and the Newspaper Preservation Act are premised on the government's perceived need to ensure diversity in the marketplace of ideas.\textsuperscript{217} Access statutes, like the one struck down by the Supreme Court in the

FCC has 14 standards for protecting the public interest, only one of which is the fairness doctrine. 44 F.C.C. 2303, 2314 (1960).

The fairness doctrine has also been judicially extended to commercial advertisements. See Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971) (fairness doctrine extended to standard product commercials); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) (cigarette commercials raised fairness doctrine), cert. denied, 396 U.S. 842 (1969). But see Public Interest Research Group v. FCC, 522 F.2d 1060, 1065 (1st Cir. 1975) (FCC approach upheld, fairness doctrine not extended to snowmobile advertising), cert. denied, 424 U.S. 965 (1976).

The underpinning of the fairness doctrine is the right of the audience to receive diversified content. As the Supreme Court stated in Red Lion Broadcasting Co. v. FCC, 395 U.S. 377, 390 (1969), "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here."

Judge Bazelon, of the District of Columbia Circuit Court of Appeals, criticized the operation of the fairness doctrine as follows:

By forcing the press to share its space, its medium, with persons of the government's choosing, we are restricting the journalistic discretion which is the purpose of the First Amendment to protect. If one group has a right of access or a right to have the licensee present that group's point of view, there is no independent press; there is only a multitude of speakers. . . . To require that a licensee be "fair" in presenting opinionated programming, or present a reasonable "balance" of programming as defined by a government agency, or not offer programming which a majority of listeners do not want to hear nullifies that journalistic discretion which the Framers thought indispensable to our constitutional order.

Bazelon, supra note 38, at 235-36.

Although the fairness doctrine was designed to enhance the discussion of controversial issues, it has done just the opposite, and it has been singled out by many commentators as one of the major causes of bland, rather than controversial, programming. See, e.g., Green & Lewis, A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access, 39 GEO. WASH. L. REV. 532, 560 (1971); Price, Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation, 31 FED. COM. L. J. 215, 217-19 (1978); Simmons, Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective, 75 COLUM. L. REV. 1083, 1111 (1975); Comment, Evaluation of the Basis for and Effect of Broadcasting's Fairness Doctrine, 5 RUT.-CAM. L. REV. 167, 179-80 (1973); Comment, Power in the Marketplace of Ideas, supra note 212, at 764. In his dissent in CBS v. Democratic Nat'l Comm., 412 U.S. 94, 187-89 (1973), Justice Brennan noted that because broadcasters are in business to make a profit, they may not raise controversial issues for fear of alienating their advertisers.

Another way to ensure diversity is through competition from public broadcasting. See Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 CALIF. L. REV. 1104, 1130-31 (1979).

\textsuperscript{216} See supra note 212 and accompanying text.

\textsuperscript{217} See supra note 196 and accompanying text.
DO WE WANT A RESPONSIBLE PRESS?

Miami Herald Publishing Co. v. Tornillo,\textsuperscript{218} are based on this theory that the government has to intervene to ensure the airing of different viewpoints because it is no longer possible for any interested person to go out and open a newspaper.\textsuperscript{219} Thus, whatever government regulation exists is always said to be in the public interest because it ensures diversity within the marketplace of ideas.

Despite the Supreme Court's decision that such access statutes are unconstitutional when applied to the printed media,\textsuperscript{220} a number of commentators argue forcefully for the need to ensure citizens and unpopular political ideas access to the columns of airspace controlled by the various media.\textsuperscript{221} It may very well be that if the media do not do something to improve their image in the eyes of the public and the judiciary, forced access will be upheld as constitutional,\textsuperscript{222} despite the obvious dangers associated with governmental control over what is disseminated.\textsuperscript{223} Nevertheless, for the present, direct government regulation of what ideas can appear on the pages of the national newspapers and magazines does not appear likely.

\textsuperscript{218} 418 U.S. 241 (1974). The statute at issue required newspapers to publish replies by political candidates to editorials critical of them.

\textsuperscript{219} This is the position taken by those commentators who believe that citizens should have a right of access to the media. See, e.g., J. Barron, supra note 45, at 319-43; Bollinger, supra note 212.

It should be noted, however, that shortwave and citizens band radio operators have unrestricted access to the airwaves. Cable television is also promising in this respect. For a discussion of these newer broadcasting forms, see W. Baer, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING 40-65 (1973); Barrow, supra note 212, at 692-96; Bollinger, supra note 212, at 37-42; Botein, Access to Cable Television, 57 CORNELL L. REV. 419 (1972); Gerlach, Toward the Wired Society: Prospects, Problems, and Proposals for a National Policy on Cable Technology, 25 ME. L. REV. 193 (1973); Price, supra note 215, at 221-22; Price, Requiem for the Wired Nation: Cable Rulemaking at the FCC, 61 VA. L. REV. 541 (1975); Rappaport, The Emergence of Subscription Cable Television and Its Role in Communications, 29 FED. COM. L. J. 301 (1976); Simmons, The Fairness Doctrine and Cable TV, 11 HARV. J. ON LEGIS. 629 (1974); Special Project, supra note 37, at 970-83; Report of the Committee on the Future of Broadcasting, 40 MOD. L. REV. 469 (1977). Some commentators believe that cable will negate the traditional scarce resource rationale for FCC regulation and make the fairness doctrine obsolete. See, e.g., Simmons, supra; Special Project, supra note 37, at 983. Barrow, supra note 212, at 697-98, and Botein, supra, believe, however, that the fairness doctrine should apply to cable television because of the monopoly position of the cable operator.


\textsuperscript{221} See Barron, supra note 45; Barrow, supra note 212, at 689-91; Blasi, supra note 14, at 625-29; Bollinger, supra note 212; Lange, supra note 212, at 8-34; Note, Keeping Third Parties Minor: Political Party Access to Broadcasting, 12 IND. L. REV. 713 (1979).

\textsuperscript{222} Justice Stewart holds out the possibility of a controlled press. Stewart, supra note 16, at 636; see also Special Project, supra note 37, at 994-1000; Bugas, supra note 78 (if profession does not establish standards legislature will).

\textsuperscript{223} See Bazelon, supra note 38, at 234-37.
Not only media corporations but also individual journalists are subject to statutory and common-law controls on their behavior. The Supreme Court has stated on numerous occasions that one’s status as a journalist does not give one greater rights than other American citizens. In *Branzburg v. Hayes*, for example, the Court held that all citizens, including journalists, had a duty to appear and testify before a grand jury investigating possible criminal activity. It is also generally accepted that journalists, in their pursuit of the news, are expected to behave legally and comply with the lawful requests of law enforcement officials. Thus, journalists can be prosecuted for trespass and other violations.

224. Although these are judicial and not legislative, they operate similarly. Thus, they will be discussed together.

225. Thus, courts have been closed to journalists on the ground that they have no greater right of access than the public at large, Gannett Co. v. DePasquale, 443 U.S. 368 (1979), and they have been prohibited access to jails on the same theory. Houchins v. KQED, Inc. 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974). See also Note, *Sunlight in the County Jail: Houchins v. KQED, Inc. and Constitutional Protection for Newsgathering*, 6 HASTINGS CONST. L.Q. 933 (1979).


227. *Id* at 682, 708.

228. As the court noted in Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971), “The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office.”

229. In *State v. Lashinsky*, 81 N.J. 1, 404 A.2d 1121 (1979), for example, the New Jersey Supreme Court held that a cameraperson’s refusal to leave the scene of an accident when ordered to do so by the police was unreasonable interference with police activities and thus his arrest was justified. The court rejected the defendant’s claimed first amendment right to photograph news events and his argument that his press card gave him access to the area.

tions of the criminal law.231

The most extreme form of legislative regulation of the media would be some type of licensing system, either of media corporations or of journalists themselves.232 Such licensing, of course, is already pervasive in the electronic media industry.233 It would not be difficult for Congress to expand the regulatory functions of the FCC to include newspapers and news magazines, especially given the interlocking relationship that presently exists between the print and electronic media.234 The commerce clause235 certainly provides Congress the power to take this step, and the economic concentration of the print media is analogous to that in the electronic media which justified congressional intervention there.236


231. See, e.g., Oklahoma v. Bernstein, 5 MEDIA L. REP. (BNA) 2313 (Okla. Dist. Ct. 1980) (reporters who entered nuclear power plant site with protesters found guilty of criminal trespass because first amendment right of access to newsworthy events was outweighed by legitimate state interests in protecting property rights and maintaining law and order).


233. See supra notes 210-16 and accompanying text.

234. For a discussion of the interlocking relationship, see supra note 45.

235. The commerce clause gives Congress the power "To regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. This clause has been given extremely broad application by the Supreme Court, and even purely intrastate activities may be regulated if they, when combined with other similar activities, affect interstate commerce. See, e.g., Fry v. United States, 421 U.S. 542 (1975); Daniel v. Paul, 395 U.S. 298 (1969); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). There should be no problem connecting the media to interstate commerce. For example, a newspaper that bought its paper, ink or components for its presses from various states, a news agency that sent its reporters to cover stories in other states, a television or radio network whose signals reached more than one state would all be covered by federal regulations grounded in the commerce clause.

236. Although Chief Justice Burger's opinion in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 (1974) (quoted supra at text accompanying note 48), outlined the changes that were responsible for concentration in the print media, there was no attempt to make analogies between the two types of media. In fact, there was no mention at all of the other form of medium in either Miami Herald or Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), despite the fact that both dealt with first amendment challenges to the principle of forced access. According to one constitutional scholar, the clearly analogous positions of the print and electronic media should prompt the Supreme Court to develop a coherent approach to their treatment by the courts: Columbia Broadcasting System took a step away from Red Lion by its treatment of broadcasters as part of the "press" with an important editorial function to perform rather than as analogous to the postal or telephone systems, but CBS was firmly in the Red Lion tradition when it refused to consider the possibility that either the technologically scarce radio and television channels, or the finite time available on such channels, might be allocated much as economically scarce newspaper opportunities are allocated: by a combination of market mechanisms.
All of the Supreme Court cases to date, however, suggest that such congressional action would be found to be unconstitutional as violative of the first amendment.\textsuperscript{237}

The other form of direct legislative control of the media would be the licensing of journalists themselves. At the present time, journalism is probably the only major profession\textsuperscript{238} that is not licensed in some way\textsuperscript{239} either directly by the state\textsuperscript{240} or by some quasi-public body.\textsuperscript{241} Journalism has been able to avoid such regulation because of its close association with the first amendment. A number of legislators, however, have begun to call for regulation as a way to ensure media responsibility,\textsuperscript{242} although the source of

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\textsuperscript{238} On the question of whether journalism is even a profession, see infra notes 510-16 and accompanying text.

\textsuperscript{239} According to a 1975 survey by the National Association of Attorneys General, over 100 separate professions and occupations were licensed by various states. R. BLAIR & S. RUBIN, supra note 27, at vii. The number of people actually controlled by these regulatory boards is enormous. In New York State, for example, about 450,000 people are licensed in 30 occupations ranging from doctors, dentists, pharmacists and nurses to engineers, accountants and masseurs. N.Y. Times, May 30, 1980, at B1, cols. 5-6. State agencies receive about 15,000 complaints a year, about 3,000 of which are actually investigated, but it can take as long as five years to process the charges of misconduct or incompetence made by members of the public. Id.

\textsuperscript{240} In Minnesota, for example, some 60 “professions” are licensed.

\textsuperscript{241} The more prestigious, like lawyers and doctors, are licensed by their professional organizations rather than by the state. This gives them control over the type of licensing requirements and the extent of discipline imposed.

\textsuperscript{242} As Ted Bugas, an Oregon State Representative, warned the First Amendment Congress,

Don’t forget, the most fearsome thing about politicians is, they crave to legislate. In Oregon the form such legislative action might take could be a Board of Media Standards and Regulations or a Media Standards and Licensing Commission. Membership would be appointed by the Governor from the media mainly, with some public members.

I can’t buy the growing idea that media reporters should somehow be licensed by the state, but the very suggestion ought to tell you how far the American public has gone down the road to modifying its thoughts about the sanctity of a free press.

Bugas, supra note 78, at 4.

Balk, in his background paper on the need for a national press council, warned of the
such regulatory power as well as the rationale for its imposition are not apparent.

Despite the serious constitutional problems with direct state regulation of the journalism profession, some states are already suggesting it be tried. Although it would almost certainly be declared unconstitutional by the Supreme Court, states could pass legislation and then wait for the inevitable court challenge in the hopes of getting some form of regulation approved. Such strategy would be damaging for the first amendment as well as for the journalism profession and should be fought at all costs.

Aside from the direct regulation of journalists through the imposition of a licensing system, there is much leeway for indirect legislative regulation. In fact, a great deal of indirect regulation presently exists in the form of governmental control over access to documents and to people.

Access to documents is usually controlled through a Freedom of Information Act. What began as a limited common-law right of access to information held by state agencies has been broadened in the vast majority of states in their open-records laws. Gener-

serious consequences for the media and the public if the media did not begin to act responsibly and attempt to respond to the needs of the public:

The social upheavals which shook the sixties are far from over. Rapid change, with its disorienting and sometimes violent manifestations, will persist. The news media, as portayers of that change and interpreters of its consequences, cannot escape the storm. If they do not recognize the forces at work to humanize institutions, expand consumer participation in the marketplace, and allow individuals in our mass society to preserve a personal franchise, then the consequences may be serious indeed.

Balk, supra note 41, at 62. Although these remarks were made in 1973, they remain just as true nine years later.

243. See infra note 518 and accompanying text.
244. See infra notes 509-17 and accompanying text.
245. See, e.g., supra note 24.
246. For an excellent and exhaustive study of existing state laws, see Project, supra note 74.
ally speaking, all government records are open for inspection unless the open-records or some other statute labels them private, confidential or privileged. These exceptions reflect each state’s balance of access to information against its citizens’ right to privacy. Thus, although all states classify adoption records as confidential, arrest and criminal identification records are


confidential in only ten states, parole records in only eleven, and motor vehicle records in only two. And while all welfare records are confidential in twenty states, in twenty-one the names of recipients or other directory information can be disclosed. Since, at a minimum, the media have the same rights as


254. CAL. VEHICLE CODE § 1808.5 (West 1971) (medical information); CONN. GEN. STAT. ANN. § 14-10 (West 1958).

255. ALASKA STAT. §§ 47.05.030 (Supp. 1974); ARK. STAT. ANN. § 83-138 (1960); CAL. WELF. & INST. CODE § 10850 (West 1972) & Supp. 1975); COLO. REV. STAT. §§ 26-1-114 (1973); CONN. GEN. STAT. ANN. §§ 17-83 (West 1958); DEL. CODE ANN. tit. 31 § 1101 (1974); HAWAII REV. STAT. §§ 346-10 (1968); IDAHO CODE §§ 56-221 (1948); IOWA CODE ANN. §§ 217.30 (West Supp. 1974); KY. REV. STAT. ANN. §§ 205.175 (Bobbs-Merrill 1972); ME. REV. STAT. ANN. tit. 22, § 4496 (Supp. 1974); MICH. COMP. LAWS ANN. §§ 400.35 (West 1970); N.Y. SOC. SERV. LAW §§ 136, 136a (McKinney 1976) (media can inspect disbursement records if recipient’s name not disclosed; can be used by tax department in fraud investigations); N.D. CENT. CODE §§ 50-09-13, 50-24-31 (1974); R.I. GEN. LAWS §§ 40-6-12 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 695c, § 33 (Vernon 1964); VT. STAT. ANN. tit. 33, § 2511 (Supp. 1974); VA. CODE §§ 63.1-53 (Supp. 1974).

any other member of the public, these laws controlling what is public and nonpublic governmental information directly affect the media’s ability to carry out their newsgathering function.

Similarly, the state controls, to a certain extent, the places to which the public, and by extension the media, has access. Although the common law recognized no public right to attend meetings of government agencies, and courts have found none stemming from the first amendment, almost all states presently provide such right by statute. This right extends to legislative


257. The Supreme Court has rejected the proposition that the press has a greater right of access than the public. Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978). Nevertheless, some states do give the press greater access to documents. See, e.g., N.Y. Soc. Serv. Law §§ 136, 136a (McKinney 1976) (media can inspect welfare disbursement records if recipient’s name not disclosed).

258. See City of Miami Beach v. Berns, 245 So. 2d 38, 40 (Fla. 1971); Reeves v. Orleans Parish School Bd., 281 So. 2d 719, 723 (La. 1973) (Summers, J., concurring); Beacon Journal Publishing Co. v. City of Akron, 3 Ohio St. 2d 191, 198, 209 N.E.2d 399, 404 (1965) (per curiam); H. Cross, supra note 248, at 180-82.


Some states have recently adopted constitutional provisions that guarantee such public access. See, e.g., LA. CONST. art. XII, § 3 (“No person shall be denied the right to observe the deliberations of public bodies . . . except in cases established by law.”); MONT. CONST. art. II, § 9 (“No person shall be deprived of the right . . . to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

sessions themselves—party caucuses, legislative committees, and legislative chambers—although the extent of the access varies greatly from state to state.\textsuperscript{261}

In enacting both open-records and open-meetings laws, state legislatures have had to deal with many of the same issues that have confronted the courts in their attempts to balance the public's right to know, the public's right to privacy, and governmental accountability.\textsuperscript{262} Although the trend has certainly been to permit widespread access to government records and deliberations, certain categories of records have been exempted from public scrutiny because their disclosure would constitute an invasion of privacy, and certain topics are reserved for discussion in closed meetings of governmental agencies. It is too early to tell, however, whether these statutes strike the proper balance.

In addition to this form of legislative assistance for the media's newsgathering function, the media have sought other forms of legislative protection. Specifically, the media have lobbied for

\begin{footnotesize}
\begin{enumerate}
\item Only Mississippi, New York, Rhode Island, and West Virginia do not have open meeting laws.
\item See supra notes 152-78 and accompanying text. The authors of a student project on government information and the rights of citizens describe the arguments against open meetings.
\end{enumerate}
\end{footnotesize}
“shield laws” to protect reporters from governmental probes of their confidential sources of information and, more recently, for insulation of the editorial process against searches by law enforcement officials.

It has long been assumed by the media that it is necessary to cultivate confidential sources of information in order to properly carry out their newsgathering function. To keep these channels of information open, journalists must protect their sources’ ano-

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263. There has been a tremendous amount written about the importance of a journalist’s access to confidential sources of information. Empirical studies, however, are rare, although a few attempts have been made to actually test how often and in what context confidential sources are tapped. The best study was done by Vincent Blasi in 1971. Blasi, supra note 53; see also Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 NW. U.L. REV. 18 (1969) (more-or-less haphazard survey of 37 editors of various daily papers to find out how much press relied on confidential sources). Blasi conducted 47 in-depth interviews with reporters and editors in seven of the major cities, mailed questionnaires to 67 reporters especially familiar with the problem, and carried out a quantitative survey of 975 journalists working for the 208 daily newspapers with circulations of 50,000 or greater and for the three major news weeklies (Newsweek, Time, U.S. News & World Report), of the editors of 95 underground newspapers, of a random selection of reporters at NBC and ABC and of all local TV news directors in the 21 leading market areas. Blasi, supra note 53, at 236-39. His most important findings can be summarized as follows: (1) good reporters use confidential sources more to assess and verify than to gain access to sensitive newsworthy information; (2) the subpoena threat has the adverse effect of “poisoning the atmosphere” rather than making sources “dry up” which makes investigative reporting more difficult but not impossible; (3) the reporter and his source often have only an imprecise or unstated understanding of confidentiality; (4) rather than forcing journalists not to receive sensitive information, subpoenas compromise their status in the eyes of sources; (5) journalists who do interpretative journalism are the only ones adversely affected; (6) reporters feel that they, rather than the judiciary, should decide whether to cooperate; and (7) it is more important to protect the identity of sources than the contents of the confidential information given by them. Id. at 284.

nymity by refusing to divulge their names under all circumstances. 264 Journalists take this responsibility toward their sources


Some courts also take this position. As the Third Circuit explained in United States v. Criden, 633 F. 2d 346 (3d Cir. 1980),

This court has held flatly that journalists have a federal common law privilege, albeit qualified, to refuse to disclose their confidential sources. . . .

. . . The courts have made a value judgment that it is far better for there to be immediate, unshackled distribution of news, at the risk of some factual error, . . . than a restraint on the flow of public information that would result if confidential news sources had to be identified. . . .

. . .

Our national commitment to the free exchange of information also embodies a recognition that the major sources of news are public figures . . . . The brute fact of human experience is that public officials are far more willing to test new ideas under the public microscope through anonymous disclosure than when they are required to be identified as sources.

Id. at 355-56. Justice Douglas took the same position in his dissent in Branzburg:

The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though they live in the city where the forces that would undermine society operate. The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. Its performance means that the press is often engaged in projects that bring anxiety or even fear to the bureaucracies, departments, or officials of government. The whole weight of government is therefore often brought to bear against a paper or a reporter.

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter’s main function in American society will be to pass on to the public the press releases which the various departments of government issue.


264. Examples abound of journalists who, in recent years, chose jail rather than divulgence of their sources’ names or confidential information. Aside from the three reporters involved in Branzburg v. Hayes, 408 U.S. 665 (1972), John Lawrence, the Washington Bureau Chief of the Los Angeles Times, was jailed for a time for refusing to release recordings of interviews with a major Watergate figure, NEWSWEEK, Jan. 1, 1973, at 58; N.Y. Times, Dec. 22, 1973, at 1, cols. 1-3, William Farr was jailed for refusing to disclose his source of information regarding a 1970 murder trial, see Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Cal. Dist. Ct. App. 1971), cert. denied, 409 U.S. 1011 (1972); Farr v. Pitchess, 522 F. 2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976), reporters and their editors were held in contempt over 20 times for refusing to divulge the source of their story on grand jury proceedings in Fresno, California, see Rosata v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (Cal. Dist. Ct. App. 1975), cert. denied, 427 U.S. 912 (1976), and Myron Farber went to jail for 40 days for refusing to divulge his confidential information in the murder trial of a New Jersey doctor. See In re Farber, 78 N.J. 259, 394 A. 2d 330, cert. denied, 441 U.S. 153 (1978). For the factual situations of some of the more famous journalist resisters, see Friendly, supra note 181; Lewis, The Farber Case, N.Y.
seriously. The Code of Ethics of the Society of Professional Journalists provides that "[j]ournalists acknowledge the newsman's ethic of protecting confidential sources of information,"[265] and the equivalent document of the American Society of Newspaper Editors states that "[p]ledges of confidentiality to news sources must be honored at all costs."[266]

While members of the press have been subpoenaed to appear before grand juries ever since colonial times, the issuance of such subpoenas became a serious problem for journalists in the late 1960's when governmental agencies began to use the press subpoena as a way to get information about dissidents.[267] In response to the rising number of press subpoenas, the media turned to Times, Aug. 7, 1978, at A17, col. 1, reprintedin PRACTICING LAW INSTITUTE, COMMUNICATIONS LAW 1978, at 163; RIGHTS IN CONFLICT, supra note 108, at 93-101; Comment, The Fallacy of Farber, supra note 263, at 323-27. When reporters decide they will not divulge confidential information, nothing that the state can do to them has any significant effect. A study of over 100 reported and unreported cases in which journalists have claimed the privilege to refuse to disclose their confidences found that only four eventually disclosed the information in response to court orders. Unpublished dissertation of A. Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege (1970) (U. of Wis. Library). Between 1972 and 1978 at least 40 contempt judgments were issued against reporters, which resulted in a minimum of 12 jailings lasting from a few hours to several weeks. Saxon, Cases Against Reporters Increase, N.Y. Times, July 25, 1978, at B7, col. 1.

266. Art. VI, A STATEMENT OF PRINCIPLES, infra note 370.
267. Blasi, supra note 53, at 229-30, 262. In response to the public outcry of journalists claiming governmental harassment, then-Attorney General Mitchell issued Justice Department Guidelines for subpoenaing reporters. In revised form they are codified at 28 C.F.R. § 50.10. Although these guidelines were cited with approval in Branzburg, 408 U.S. 655, 707 n.41, the protection they afford is minimal because they only require negotiations with the media prior to seeking the subpoena, they govern only Justice Department personnel, and they are frequently ignored. The Media and the Law, supra note 99, at 14-18; Hearings on H.R. 215 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 94th Cong., 1st Sess. 130 (1975) (statement of Richard Wald, President of NBC News) [hereinafter cited as Hearings on H.R. 215]; Walters, Sharing the News with Justice, COLUM. JOURNALISM REV., Sept.-Oct. 1975, at 18-21; Comment, A Federal Shield Law, supra note 263, at 184-87. Thus, of all subpoenas requested between August 1970 and October 1972, five were never approved by the Attorney General, Newspaper's Privilege: Hearings on H.R. 717 Before Subcomm. No. 3 of the Comm. on the Judiciary, 93d Cong., 1st Sess. 578-82 (1973) (Justice Department Memorandum) [hereinafter cited as Hearings on H.R. 717], and of 79 subpoenas issued between March, 1973 and May, 1975, 22 were never approved. Hearings on H.R. 215, supra, at 33-34 & 37-93 (letter and documents submitted by Antonin Scali, Asst Attorney General).

In 1980 the Justice Department made its policy on the issuance of subpoenas to members of the media applicable to subpoenas in civil proceedings and to subpoenas for telephone toll records of media members. See Federal Agency Rulings, 49 U.S.L.W. 2332 (Nov. 18, 1980).

268. According to statistics compiled by the Reporters' Committee for the Freedom of
their legislatures for protection. Between 1964 and 1977, thirteen so-called “shield laws” were passed, and eleven were strengthened. Presently twenty-six of the fifty states have such laws. At least eight of these were enacted in response to Justice White’s invitation to the states to do so in his majority opinion in the Press, for example, only about a dozen subpoenas were sought between 1960 and 1968, 150 between 1968 and 1970, 500 between 1970 and 1976, after which it stopped counting because the number was so high. Carmody, Subpoenas of Notes of Reporters Grow, N.Y. Times, Nov. 19, 1978, at 38 col. 1, reprinted in Practicing Law Institute, Communications Law 1979, at 521-22.


The scope and coverage of these laws vary greatly from state to state. For a comprehensive analysis of these 26 statutes, see Comment, The Fallacy of Farber, supra note 263, at 303-08. For a comparison of the post-Branzburg and pre-Branzburg shield law coverage, compare Comment, The Fallacy of Farber, supra note 263, Table I, with a similar chart in D’Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information, 6 Harv. J. on Legis. 307, 327-30 (1969).

Since the heyday of the McCarthy era, journalists have been treated much more gingerly by the legislative branch of government than by the courts. See, e.g., Comment, A Federal Shield Law, supra note 263, at 181-82. Although reporters have been subpoenaed, Congress has been wary of causing a clash with first amendment values. Thus, when the president of CBS refused to turn over to the House of Representatives the out-takes from a television documentary, The Selling of the Pentagon, he was not cited for contempt. N.Y. Times, July 14, 1971, at 1, col. 8. Neither did the Senate press the issue when columnist Jack Anderson’s assistant, Brit Hume, refused on first amendment grounds a senator’s demand for his notes on the ITT scandal. N.Y. Times, Mar. 11, 1972, at 13, col. 1.

For a discussion of the issue from the perspective of the source, see Note, The Right of Sources—The Critical Element in the Clash over Reporters’ Privilege, 88 Yale L.J. 1202 (1979).
Branzburg v. Hayes, 408 U.S. 665, 706 (1972). In response to this invitation, approximately 55 bills were introduced in the 93rd Congress which would have given the press either an absolute or qualified privilege. See Murasky, supra note 263, at 842, n.46; Comment, Search Warrants and Journalists' Confidential Information, 25 Am. U.L. Rev. 938, 938 n.5 (1976) [hereinafter cited as Comment, Search Warrants]; Note, Shield Laws, supra note 263, at 472 n.114. None has as yet been enacted into law. Although some commentators feel that a federal shield law is necessary, see, e.g., Graham & Landau, The federal shield law we need, 11 Colum. Journalism Rev., Mar.-Apr. 1973, at 26; Comment, A Federal Shield Law, supra note 263; others argue against them, see, e.g., Lewis, supra note 16; O'Neil, supra note 263. O'Neil takes the position that it is hazardous to seek special protection via federal regulations applying to the media, it is inappropriate to protect freedom of expression through the commerce clause, the problem of defining when and with regard to whom such a privilege would apply is too complex, and a shield law gives a false sense of security when one realizes that the greatest first amendment threats have occurred in shield law states. O'Neil, supra note 263, at 518-31. He urges instead that the media press for use of a constitutional standard. Id. at 531-55. See generally, Van Alstyne, supra note 16, at 769. Despite the continuation of media challenges to incursions on their confidential relationships with sources, the Supreme Court has refused to reevaluate its position and has denied certiorari in recent cases raising this issue. See, e.g., Reporters Comm. for Freedom of the Press v. A.T. & T., 440 U.S. 949 (1979); Pennington v. Kansas, 440 U.S. 929 (1979); New York Times Co. v. New Jersey, 441 U.S. 153 (1979).


274. New Jersey, whose state supreme court decided In re Farber, 78 N.J. 259, 394 A.2d 333, cert. denied, 439 U.S. 997 (1978), was one of those states.

275. See supra note 267.
media's ability to carry out their newsgathering function.277

The other major form of assistance the media have sought from both states' legislatures and the Congress is protection of their offices from searches by law enforcement personnel.278 These requests were in response to the recent case of Zurcher v. Stanford Daily,279 in which the Supreme Court upheld the use of search warrants to obtain information on third parties from the offices of a media organization.280 This opinion led to a flurry of activity in

276. There have been many attempts, beginning in 1929, to get a federal shield law through Congress, all of them unsuccessful. From the 71st Congress to the 88th, 23 bills creating a newperson privilege were introduced in one or the other of the houses. SUB-Comm. on ADMINISTRATIVE PRACTICE AND PROCEDURE, 89th CONG. 2d Sess., THE NEWSMAN'S PRIVILEGE 62 (Comm. Print 1966). Over 60 bills were introduced in response to the Branzburg opinion. Murasky, supra note 263, at 842 n.46; see also Note, Shield Laws, supra note 263, at 472 n.114.

277. Most commentators believe that the Supreme Court in Branzburg underestimated the cost to the media of disclosure of confidential sources. See, e.g., Blasi, supra note 14, at 603-11; Murasky, supra note 263, at 842-66; Comment, A Federal Shield Law, supra note 263, at 169-76. For a discussion of the costs to the media, see infra notes 292-93.

278. The number and exact effect of the use of search warrants against newsroom sources is unclear. According to the Reporters' Committee for Freedom of the Press, there have been from 10 to 15 such searches between 1971 and 1978. REPORTERS' COMM. FOR FREEDOM OF THE PRESS, PRESS CENSORSHIP NEWSLETTER 12 (1978). The federal government admits that at least 12 searches have been ordered, mostly in California. House Comm. on Gov't Operations, Search Warrants and the Effects of the Stanford Daily Decision, H.R. Rep. No. 1521, 95th Cong., 2d Sess. 4 (1978) [hereinafter cited as H.R. Rep. No. 1521]. Generally speaking, search warrants are issued on demand. Between 1969 and 1976, for example, the police sought 5,563 applications for search warrants under the 1968 Omnibus Crime Control Act, only 15 of which were denied, and in 1977 all of the 626 applications were granted. Id.


As one commentator succinctly put it, "Society loses when its watchdogs are forced to become stoolpigeons." Skene, supra note 16, at 626. Another observer notes the negative effects that flow from newsroom searches:

The journalist is an innocent third party. Because the press covers all events of public interest, including criminal activity, a reporter becomes a victim of a search merely by performing his job. Once his files have been searched the damage is done. The police have gained access to all of the reporter's confidential information. They have been able to seize any other evidence of criminal activity which is found during the execution of the warrant and they have had the opportunity to use the seized evidence against another person charged with criminal activity. The use of a search warrant will also erode the press' fourth
Congress which culminated in federal legislation protecting the work product of authors and the media from search warrants.281 At least eight states have similar statutes to protect the press, and sometimes individuals, from police searches.282

Despite attempts by the media to use the legislative process to assist them in their newsgathering efforts, legislative regulation presents certain problems. Direct legislative licensing would probably be unconstitutional,283 but even the indirect legislation controlling what information is public, what persons must deliberate in public, when the media may be questioned about their sources of information, and when they must open their offices to the police, is problematic. Some commentators caution the media against giving up their argument that their behavior is constitutionally protected, since statutes passed today can be repealed tomorrow.284 Others fear that a state that gives out favors to the

amendment protection . . . because a reporter will be unable to prevent the search and seizure before its occurrence. Furthermore, the journalist who is not a defendant in a criminal proceeding cannot rely on the exclusion of evidence to deter illegal searches and seizures.

Comment, Search Warrants, supra note 271, at 969.

According to the editor of The Washington Post, had newsroom searches previously been considered legitimate, the practice would have been prevented, or at least hindered, both the Pentagon Papers reports and the Watergate investigation. Comment, supra note 103, at 262-63 nn.8 & 12.

281. In response to the Zurcher opinion, 18 bills were introduced in Congress. For a list of those directed at third-party searches in general or newsroom searches in particular, see Note, Communications Law: The Decline of Press Privilege, 19 WASHBURN L.J. 54, 68 n.122 (1979). See also Citizens Privacy Protection Act: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 95th Cong., 2d Sess. (1978).

On September 22, 1980, the House approved a bill that would prohibit surprise searches of newsrooms by law enforcement officials. H.R. 3486. The Senate version that was passed August 4, 1980, protected only the news media, S. 1790, while the House version protected those engaged in newsgathering and public information activities and directed the Justice Department to propose guidelines for searches of other third parties, such as lawyers and doctors. 49 U.S.L.W. 2223 (Sept. 30, 1980). The Privacy Protection Act of 1980, as put together by the House Senate conference committee requires federal, state, and local law enforcement officials to get subpoenas when seeking evidence from writers, editors, scholars, and others involved in newsgathering activities. 49 U.S.L.W. 2239 (Oct. 7, 1980). It was signed into law by President Carter in late 1980.

282. These states are California, Connecticut, Illinois, Nebraska, New Jersey; Oregon, Texas, and Wisconsin. Bailey, Surprise Police Searches Curbed, STATE GOV'T NEWS, Apr., 1980, at 8; see also Memorandum from Jacquelyn L. Jackson to the ANPA Gov't Affairs Comm. (Oct. 16, 1979), reprinted in PRACTISING LAW INSTITUTE, COMMUNICATIONS LAW 1979, at 761-65 (analysis of state efforts compiled by ANPA Gov't Affairs Comm.). For a discussion of California’s 1979 Amendment of the Penal Code to prohibit warrants for newsroom searches, see Comment, Media Searches, supra note 280, at 501.

283. See supra text accompanying note 237.

284. See O’Neil, supra note 263.
media will begin to expect certain behavior in return which becomes subject to state regulation.\textsuperscript{285} Moreover, these types of indirect effects on the media’s ability to properly do their jobs relate only tangentially to the issues of major concern to our argument. Aside from direct licensing, the legislative branch of government cannot really control the media excesses that worry us.

3. Executive Regulation

Executive regulation of the media is even more indirect than that of the legislative branch. Nevertheless, the executive, especially the President, can profoundly affect the media’s ability to inform the public about its government.\textsuperscript{286}

One way this can be done is through the executive’s control over its subordinates. The President can use his right to appoint mem-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{285} See Lewis, \textit{supra} note 16, at 606-07; Van Alystne, \textit{supra} note 16, at 768-69; \textit{supra} note 16.
\item \textsuperscript{286} The executive can control the information flow through the use of the press release, the press conference, and the background briefing. L. Sigal, \textit{supra} note 17, at 143-44. Other mechanisms of control include the withholding of information, the removal of reporters, pressures for self-censorship or direct interference. See Special Project, \textit{supra} note 37, at 909-17.
\end{itemize}
\end{footnotesize}

A study of channels of information for news at the \textit{New York Times} and the \textit{Washington Post} demonstrates the importance of access to the creation of news. The author analyzed 2,850 stories that appeared on the first page of these two newspapers on each of two randomly selected weeks in 1949, 1954, 1959, 1964, and 1969. L. Sigal, \textit{supra} note 17, at 119-30.

The results appear below:

\begin{center}
\begin{tabular}{llr}
\hline
 & Official Proceedings & 12.6\
Routine & Press releases & 17.5 \\
 & Press conferences & 24.2 \\
 & Nonsynspontaneous events & 4.5 \\
 & Background briefings & 7.9 \\
 & Leaks & 2.3 \\
Informal & Nongovernmental proceedings & 1.5 \\
 & News reports, editorials, etc. & 4.0 \\
 & Interviews & 23.7 \\
 & Spontaneous events & 1.2 \\
Enterprise & Books, research, etc. & --- \\
 & Reporter’s own analysis & 0.9 \\
Not ascertainable & 0.3 \\
\hline
\end{tabular}
\end{center}

\textit{Id.} at 121.

Numerically the most important sources of information are U.S. government officials. Executive officials predominate, providing 92\% of all the sources, as compared to 6\% from Congress and 2\% from the federal judiciary. \textit{Id.} at 124. The breakdown by source is as follows:
bers of the FCC\textsuperscript{287} to control certain aspects of the electronic media's behavior.\textsuperscript{288} Although we will not dwell on this point, there have been allegations that the Nixon Administration harassed the

<table>
<thead>
<tr>
<th>U.S. officials, agencies</th>
<th>46.5%</th>
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</thead>
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<tr>
<td>Foreign, international officials, agencies</td>
<td>27.5</td>
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<tr>
<td>American state, local government officials</td>
<td>4.1</td>
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<tr>
<td>Other news organizations</td>
<td>3.2</td>
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<tr>
<td>Nongovernmental foreigners</td>
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<tr>
<td>Nongovernmental Americans</td>
<td>14.4</td>
</tr>
<tr>
<td>Nonascertainable (including stories in which channel was spontaneous event or the reporter's own analysis)</td>
<td>2.4</td>
</tr>
</tbody>
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\textit{Id.} In single source stories the role of federal officials was even more pronounced—they were the sole source in 56.3\% of the 405 single-source stories and were 53.8\% of all primary sources. \textit{Id.} at 124-25.

287. According to at least one commentator, the FCC, because it can regulate the content of speech in the public interest, has the greatest potential for intimidating broadcasters through the regulation of business practices that could not be touched in other first amendment businesses, such as the movie industry which can only be regulated under the antitrust laws. Lee, supra note 44, at 1320-21.

288. There are other things that can be done as well to harass the media. In the Nixon Administration these took several forms. Vice President Spiro Agnew and other administration spokespersons attacked the media for bias. \textit{NEWSWEEK}, Nov. 24, 1969, at 88-90, 92. In the course of the Watergate investigation it was uncovered that the executive branch, upset by its unflattering treatment at the hands of the media and by disclosures of government secrets, developed an extensive campaign to harass the press, much of it by using administrative machinery to pressure journalists. Newspersons were subjected to selective investigation by federal agencies, and one of the House Judiciary Committee's impeachment charges was that the Administration had induced tax audits of troublesome members of the media. \textit{See Statement of Information: Hearings on H. 521-34 Before the Comm. on the Judiciary, 93d Cong., 2d Sess.} 16-17, 21 (1974). Journalists' telephones were tapped, \textit{NEWSWEEK}, June 24, 1974, at 26, and numerous federal lawsuits were brought to force them to reveal their confidential sources. \textit{Freedom of the Press: Hearings Before the Subcomm. on the Constitutional Rights of the Comm. on the Judiciary, 92d Cong., 1st & 2d Sess.} 416-38, 669-780, 988-97 (1971-1972). President Nixon also attempted to punish the \textit{Washington Post} for its role in the Watergate scandal by manipulating his appointees to the FCC. \textit{See infra} note 289. For a discussion of the concerns aroused by these types of activities, see H. \textit{ASHMORE, FEAR IN THE AIR—BROADCASTING AND THE FIRST AMENDMENT} (1973).

The administration's willingness to employ federal machinery to silence the press is apparent from the events surrounding the creation of the "enemy list." John Dean, then the President's legal counsel, stated in a memorandum: "This memorandum addresses the matter of how we can maximize the fact of our incumbency in dealing with persons known to be active in their opposition to our administration. Stated a bit more bluntly—how can we use the available federal machinery to screw our political enemies." \textit{Presidential Campaign Activities of 1972: Hearings on S. 961-4 Before the Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess.} 1689 (1973). He also suggested that "grant availability, federal contracts, litigation, prosecution, etc." should all be considered in determining how most effectively to "screw" opponents. \textit{Id.} The enemy list as compiled contained a total of 57 reporters, editors, columnists, and television commentators. \textit{Id.} at 1716-28. The \textit{Washington Post}, the \textit{New York Times} and the \textit{St. Louis Post Dispatch} were among the institutions included. \textit{Id.} at 171; see also \textit{THE WHITE HOUSE TRANSCRIPTS} 57-58, 63, 404, 782-84 (Bantam Books, Inc. 1974).
Washington Post in this way.\textsuperscript{289} The executive can also attempt in various ways to cut off press access to its personnel. For example, President Carter told all his department heads not to leak information to the press.\textsuperscript{290} President Reagan’s attempt to control who gets to ask what at his news conferences is another way in which the executive can affect the flow of information from the government to the media.

The executive branch at all levels can also influence the extent to which the media use the tools of investigative reporting. It is the executive, after all, who decides whether to subpoena reporters to appear before grand juries\textsuperscript{291} and who chooses whether to get a

\textsuperscript{289} A taped conversation between President Nixon and his staff disclosed the existence of a strategy to challenge the \textit{Washington Post}’s application for renewal of the licenses of its affiliated radio and television stations because of its leading role in reporting the Watergate events. Washington Post, May 9, 1974, at C6, col. 1. In January 1973, the Associated Press and United Press International reported that the licenses of two Florida television stations owned by the \textit{Washington Post} were being challenged before the FCC by a group of long-time friends and political associates of President Nixon. N.Y. Times, Jan. 4, 1973, at 21, col. 1; Washington Post, Jan. 3, 1973, \$ A, at 6, col. 1. Of the 36 stations in the state, only these two were being challenged. It later came out that the general counsel of the Committee for the Re-election of the President was associated with this group and had advised some of the principals, although they all denied any political motivation for the challenges. Washington Post, Jan. 9, 1973, \$ A, at 6, col. 1; see Bazelon, supra note 38, at 244-52; see also J. Lukas, \textit{Night-mare: The Underside of the Nixon Years} 273-74 (1976).

\textsuperscript{290} See J. Califano, supra note 64; Minneapolis Tribune, May 3, 1981, at 1A, cols. 2-4, at 9A, cols. 3-4. Blasi maintains that any rule requiring a government employee to obtain departmental approval before talking to the press is antithetical to first amendment values. Blasi, supra note 14, at 608. According to one commentator, all presidents try through various means, the most effective of which is exclusion from the “inner councils,” to control leaks by lower level officials for whom these provide the only access to the press. L. Sigal, supra note 17, at 144-48.

\textsuperscript{291} The government’s use of press subpoenas rose sharply in the late 1960s as part of the Nixon Administration’s campaign against left-wing political groups. In 1969 the trial of the “Chicago Seven,” United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), in which the defendants were charged with inciting a riot at the 1968 Democratic National Convention in Chicago, subpoenas were served on all four major Chicago daily newspapers, the three major television networks, and \textit{Newsweek}, \textit{Time}, and \textit{Life} magazines. Subpoenas were also issued in the trials of the members of SDS alleged to have participated in the “Days of Rage” demonstration in Chicago, \textit{Newsweek}, Feb. 17, 1970, at 56 (\textit{Time}, \textit{Life}, \textit{Newsweek}, NBC, all four Chicago newspapers), and that of black militant Angela Davis. N.Y. Times, Apr. 3, 1971, at 9, col. 1 (7 newspapers, 2 magazines, 9 TV stations in New York, Chicago, and Detroit); see Comment, \textit{A Federal Shield Law}, supra note 263, at 162-63.

During the first two and one-half years of the Nixon administration the number of newshapers subpoenaed rose dramatically. At least 124 subpoenas were served on CBS or NBC. N.Y. Times, Sept. 21, 1971, at 18, col. 4. The \textit{Chicago Sun-Times} and the \textit{Chicago Daily News} received 30, two-thirds of which were from government officials, while Duane
search warrant to go through their offices in search of the same kind of information. This effect on media behavior is indirect because it is the cost to the media in challenging these practices in the courts that determines how and for what purposes the tools

Hall, one of the Sun-Times reporters, was served in 11 separate lawsuits within an 18-month period. *Newsmen’s Privilege: Hearings on S. 36 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 93d Cong., 1st Sess. 542 (1973)* [hereinafter cited as *Hearings on S. 36*].

The Los Angeles Times editor William F. Thomas testified that his paper received more than 30 subpoenas and had been threatened with more than 50 others. *Id. at 282*. The Chicago Tribune estimated that from 1967 through 1972, approximately 75 to 100 “dragnet subpoenas” were served on the newspaper or its employees. *Hearings on H.R. 717*, supra note 267, at 301. The Justice Department Guidelines for subpoenaing reporters, which were issued in response to media cries of governmental harassment, appear at 28 C.F.R. § 50.10 (1980). They provide little real protection, however, and are not always followed. *See supra note 267*.

292. According to the New York Times, the media’s legal costs have soared during the last few years. Whereas several years ago only the largest papers had in-house counsel, now all major newspapers have them, and even smaller papers are in daily consultation with attorneys. N.Y. Times, Apr. 7, 1980, at D10, cols. 4-7. The Los Angeles Times reportedly spent over $200,000 to fight subpoenas over a several year period. During this time over 30 subpoenas were served and 50 more threatened. *Hearings on S. 36*, supra note 291, at 282 (testimony of William F. Thomas ed. *L.A. Times*). As a result of its defense of its reporter Myron Farber who refused to surrender his confidential files to a murder defendant, the New York Times paid $285,000 in fines alone. *Comment, The Fallacy of Farber*, supra note 263, at 327. This, of course, does not include their costs in asserting the journalistic privilege in the courts of New Jersey and in the Supreme Court. Similarly, the Chicago Tribune received 300 grand jury summons because they were being unkind to the mayor, which cost them several hundred thousand dollars in legal fees just for preparing the papers and going into court to have them quashed. *Hearings on H.R. 215*, supra note 267, at 112-14 (testimony of Len H. Small, treasurer of ANPA); *see id. at 95* (9ther expensive subpoena lawsuits).

Small media outlets are unable to cope with the legal fees or compliance costs, *Newsmen’s Privilege: Hearings on H.R. 837 Before Subcomm. No. 3 of the Comm. on the Judiciary, 92d Cong., 2d Sess. (1972)* [hereinafter cited as *Hearings on H.R. 837*], and even medium-sized newspapers are cutting back their news-gathering facilities because of the increased use of subpoenas. *Hearings on H.R. 717*, supra note 267, at 309 (letters to the ANPA). The Sacramento Bee, for example, announced in 1978 that it was no longer going to print information from confidential sources because it feared the possibility of its reporters being jailed. Sacramento Bee, Sept. 29, 1978, § B, at 4, col. 5.

This, of course, does not include the human costs. Blasi argues that the recent subpoena spate has interfered with reporting because it not only takes up a great deal of time during the litigation period, but it is emotionally costly for the reporter who decides to challenge the subpoena, and if he chooses to go to jail he is out of commission for a period of time. Blasi, *supra* note 53, at 265-66.

While the media contends that the use of subpoenas in the late 1960’s and early 1970’s was a form of political harassment by the government, *see supra* note 267; *infra* note 310, more recent subpoenas seem to have other purposes. Subpoenaing reporters has become a common tactic in criminal trials, either to delay them or to lay the ground for an appeal by the defendant when the reporter refuses to testify. Carmody, *supra* note 268. Both sides call journalists to testify because it is less expensive to get information from them than to locate the source independently. *Id.*
of investigative reporting will be used. The more these techniques are used by the executive, the more the media will think before they collect confidential information, the less information will flow in their direction from those who fear reprisals if it is discovered that they are the source of the information, and the

293. Although large wealthy media outlets may be able to absorb the costs, the expense might still deter them from publishing certain information; these costs, or their risk, will probably have a greater self-censorship effect on smaller, less prosperous media. Murasky, supra note 263, at 864. The effects were explained by various witnesses testifying before Congress on the need for a journalist's privilege.

So what happens as a result of the possibility of being subpoenaed? Newspapers stop printing stories that could cause them legal problems, and sources—clearly perceiving that all this means their confidentiality rests upon an increasingly frail reed—stop giving information to all of us . . . .

Another thing is happening. Stories are not being told because the media itself is becoming gun shy . . . . It would be asking too much of human nature not to expect some to take the easy way out when the alternative could be jail or crushing expense, or both.

Hearings on S. 36, supra note 291, at 282-84 (testimony of William F. Thomas, ed. L.A. Times). Another witness described what happened when CBS tried to interview a "cheating" welfare recipient for a documentary on public assistance. When the network decided it could not guarantee protecting her identity if subpoenaed, the interview was cancelled and the story never done. Id. at 269. Since stories like these will never reach the public because they do not appear sufficiently significant for the journalists to risk jail or the other costs with publishing them, grand jury power to compel the press to reveal its sources acts against the public interest in a robust press.

294. One commentator argues persuasively that Branzburg will have serious repercussions on the newsgathering function because the Supreme Court failed to consider the significant role of confidential sources in investigative reporting.

The Court ignored the argument that the most important types of stories—not the most common types—depend upon the protection of a confidential relationship. Despite the Court's emphasis on the importance of the grand jury in apprehending criminals, it was the Washington Post's confidential source, "Deep Throat," which led to the indictment of the Watergate conspirators and the resignation of President Nixon. Other recent reporting achievements, such as Jack Anderson's exposure of the ITT scandal and the New York Times' discovery of illegal domestic activities by the Central Intelligence Agency also depended upon confidential sources. It is imperative that courts address the qualitative importance of the newsmen's shield in order to balance properly the conflicting public interests.

Comment, A Federal Shield Law, supra note 263, at 174 (emphasis in original). As columnist Jack Anderson noted recently,

Solid sources who know we will go to jail before identifying them are still coming to us. I don't know of any way of measuring the effect on the new sources we are trying to develop. But we're seeing an uneasiness. They are asking us what the court decisions mean, which they never asked before. They joke about it but the jokes are nervous jokes.


295. Blasi argues that because public employees play a central role in keeping the government honest, media communication with them should receive the highest protection.

A reporter's privilege stronger than that governing other press-subpoena disputes seems appropriate when the source whose confidentiality the reporter seeks to protect is a public employee. These news sources play a unique role in the
worse off the public will be because it will know less about how its government operates.\textsuperscript{296}

It should be noted that it is the executive branch which tends to be responsible for the cut-off of information about the operation of the judicial system and about criminal defendants. Although, in its classic form, the free speech/fair trial debate pits the right of the public to know against the right of a defendant to a fair trial,\textsuperscript{297} not all kinds of gag orders protect defendants,\textsuperscript{298} and some
members of the criminal defense bar actually feel that defendants will benefit from increased press coverage of their trials.²⁹⁹

All these executive attempts to control the media's access to information, like the indirect legislative effect on the newsgathering function, can profoundly affect the media's effectiveness in reporting to the public. The Supreme Court has been careful to ensure that, at least with regard to newspapers, legislative regulation of the media is not a masked attempt to control the content of speech.³⁰⁰ However, the Court has not displayed similar solicitude when dealing with the individual rights of journalists. Notwith-

²⁹⁹ See supra note 185.

³⁰⁰ Content regulation of the electronic media is common, and the fairness doctrine itself creates unavoidable content regulation. Such regulation was expressly approved in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969), where the Court found no fundamental first amendment right to broadcast that was comparable to the right to speak, write, or publish. At least one lower court has refused to apply the fairness doctrine to daily news broadcasting because of the editorial skill involved. American Sec. Council Educ. Found. v. FCC, 607 F.2d 438 (D.C. Cir. 1979), cert. denied, 444 U.S. 1013 (1980).

In FCC v. Pacifica Found., 438 U.S. 726 (1978), the Supreme Court upheld a particular kind of content regulation. Some commentators suggest that the best way to avoid such illegal investigation of what should be independent editorial judgment is to regulate the context, rather than the content, of speech by placing time, place, and manner limitations on programming. See, e.g., Comment, "Filthy Words," supra note 212, at 176-83; Note, Morality and Broadcast Media, supra note 212, at 684; Note, The Limits of Broadcast Self-Regulation, supra note 212, at 1546-48; see also Bazelon, The First Amendment, supra note 196, at 237-44 (broadcast media should be regulated structurally rather than behaviorally). The family viewing hour policy, which is an attempt to do just this, however, has been the subject of a great deal of controversy. See Note, The Family Viewing Hour, supra note 212; see also Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), vacated, 609 F.2d 355 (9th Cir. 1979) (FCC pressure on networks to accept "family hour" programming policy violated first amendment), cert. denied, 449 U.S. 824 (1980).
standing the forceful arguments of journalists and their media employers that compelled testimony before grand juries investigating criminal activities would have a highly detrimental effect on their confidential sources and thereby on their ability to report the news, the majority in *Branzburg v. Hayes* paid little attention to these fears. The Court showed no greater sympathy for the media’s argument that newsroom searches as opposed to subpoenas would have an extremely detrimental effect on their ability to carry out their function of informing the public.

Even if the interest in ensuring the proper functioning of the criminal justice system could be found to override the direct interest of reporters in their notes and confidential sources, the effects of these rulings have been extremely costly for the media and have forced them to devote more of their time and resources to defending themselves against incursions on their knowledge and their documents. Thus, indirectly at least, these Supreme Court decisions have increased the cost of investigative reporting, making the media less inclined to devote as much of their limited economic and human resources to this type of journalism. Yet, investigative reporting is critical if the media are to perform their function as the eyes and ears of the public. The Supreme Court recognized long ago in *Grosjian v. American Press Co.* that if the government were permitted to fetter the press, all citizens would be the losers. The Supreme Court should therefore delve more deeply below the surface when confidential information or documenta-

301. 408 U.S. 665 (1972).
302. See *supra* notes 267-68 and accompanying text.
303. See *supra* notes 278-82 and accompanying text.
304. See *supra* note 292.
305. See *supra* note 264.
306. See *supra* note 296.
307. See *supra* notes 293-94.
308. 297 U.S. 233 (1936).
309. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees, [but] because, in the light of its history, and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. 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.

*Id.* at 250.
tion is sought by law enforcement officials or grand juries to ensure that this is not a form of harassment aimed at muzzling the media.\textsuperscript{310}

In any event, whether such incursions into what the media consider to be areas protected by the first amendment are a form of government harassment\textsuperscript{311} or merely the proper resolution of a conflict between the private needs of journalists and the public need for law and order,\textsuperscript{312} they neither ensure that the media report the news completely and accurately nor force them to respect the privacy of the ordinary citizen. Thus, this form of control of media behavior is of little use for our purposes.

\textbf{C. Conclusion}

As the above discussion makes clear, direct legislative and executive regulation of the media through some form of licensing system is the only form of legislative and executive control that could check the media's misuse of power. Thus, media that "misbehaved" could lose their print or broadcast licenses that would be handed out by the FCC or some other federal regulatory agency, and individuals who "misbehaved" could be stripped by their state's regulatory board of their licenses to work as journalists. While such a system could certainly be made to work administratively, we believe that, even were the establishment of such regulatory boards and agencies to withstand a constitutional challenge, the costs associated with the regulation of the media by the state would be too high.

Despite such legislation's lofty goals, government censorship of the content of the news through the manipulation of licenses

\begin{itemize}
\item \textsuperscript{310} Some media spokespersons believe that the jailing of journalists who refused to provide information to grand juries was a form of intimidation and harassment by a government whose goal was to create a hostile public attitude toward the press. It was seen as part of a campaign to create a monolithic media under the control of the national administration. \textit{Hearings on H.R. 837, supra note 292, at 369.}
\item \textsuperscript{311} See Bazelon, \textit{supra} note 38, at 244-51 (appendices on Nixon strategy to intimidate media); \textit{supra} notes 267 & 310.
\item \textsuperscript{312} This is, in fact, the rationale of the Supreme Court cases. Discussing \textit{Branzburg, Zurcher} and other recent cases in this area, Meiklejohn notes, While lip service has been given to the importance of a free press and, in particular, to the significance of public criticism of the judicial process, those values have been subordinated to the apparently more peremptory demands for the orderly administration of justice. Public enlightenment has been conceived as indefinite and long-run, justice as immediate and urgent. But such unequal treatment of the press and fair trial clauses is unfaithful to their copresence in the Bill of Rights. Meiklejohn, \textit{supra} note 62, at 811-12.
\end{itemize}
would be inevitable. Even if the regulatory agency did not by its licensing provisions directly affect the content of what was reported, media organizations, fearing the loss of their license, would themselves censor their product. This self-censorship of content is well documented by the electronic media which have lived under the control of the FCC almost since their inception. 313

Experience with the regulation of the electronic media also shows how difficult it is for the regulator to devise rules that will only regulate what is intended. Thus, although the FCC has extremely complex regulations to ensure that there is a diversity of messages on the airwaves, the regulations do not work as they are intended. 314 Instead, the FCC often advances the interests of media executives at the expense of the public interest. 315 Furthermore, if a regulatory agency is given the mandate to ensure media accuracy and respect for individual privacy, it will have to probe deeply into the internal affairs of the media as well as the editorial process in order to do so.

A state regulatory body charged with licensing individual journalists would have similar problems. Only journalists who "played it safe" by not alienating anyone and who simply passed on what they were told by government news sources could be assured of maintaining their licenses.

The end result, of course, would be the complete emasculation of the press clause of the first amendment. 316 One of the major functions of the first amendment would be entirely lost. If the media, either as organs of information or as journalists, were controlled by the government and had to justify their methods of gathering and packaging the news, it would be impossible for them to perform their central functions of reporting to the people about political events and exposing governmental misconduct.

313. Robinson discusses fully the use of the license renewal process for in terrorem control of broadcast operations. Robinson, The FCC and the First Amendment, supra note 38, at 118-27. In fact, the Nixon administration warned that stations which did not correct "network imbalance" might find themselves in trouble at renewal time. THE POLICIES OF BROADCASTING 228-34 (M. Barrett ed. 1975). For the background of program regulation of the broadcast media, see Goldberg & Couzens, supra note 212, at 3-11. For television the proscriptions in Chapter IV of the Television Code make bland offerings even blander. According to one student commentator, "the Code's contrariety with first amendment values applicable to television deprives proponents of proscribed ideas of access to the medium and denies the television audience the opportunity to receive access to creative expression." Note, The Limits of Broadcast Self-Regulation, supra note 212, 1549.

314. See supra note 215.

315. Bazelon, supra note 38.

316. See supra notes 104-08 and accompanying text.
In conclusion, an alternative method of controlling media excesses must be found or devised. That this other method might prove to be less effective would be more than outweighed by the fact that it would impinge less on the central role of the media in American life.

III. THE SELF-REGULATION OF THE MEDIA

A. The Constitution and a Responsible Press

So far in this Article we have assumed that media responsibility toward the public they serve is a positive goal toward which they should strive, and we have examined the various types of regulations that presently exist to determine how well, if at all, they serve the function of encouraging media responsibility. One might ask, however, whether such responsibility is constitutionally required as part of the media's duty to the public. In other words, does the press clause of the first amendment, by specifically protecting the press from government infringement, somehow create a fiduciary relationship between the media and the public it serves?

Archibald McLeish, the philosopher, believed that because newspapers were "surrogates for the public" they had a fiduciary obligation to account for that stewardship.

Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics.

As much as one might wish to find such an implied requirement of responsibility, the first amendment does not appear to be its source. Instead, it seems that the authors of the Constitution anticipated a cantankerous, irresponsible press that would have to be

317. See supra notes 10-31 and accompanying text.
318. See supra notes 148-312 and accompanying text.
319. W. Hocking, Freedom of the Press 99 n.4 (1947) (statement of A. MacLeish; italics omitted). Brown would also imply such a relationship:

The press represents both a paradox and a dilemma for contemporary society. The press serves best when it is free; but, free as it is, how can it be known that the press is serving? What assurance is there that the press (in its several forms, including broadcast) is responsible and that its performance justifies the guarantee of the First Amendment? The dilemma, simply, is one of devising a way to control without controlling.

L. Brown, supra note 32, at 6.
tolerated so as not to stymie its ability to carry out its constitutionally required functions. Judge Gurfein, in his decision in the Pentagon Papers case, captures the essence of this position:

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.

Although editors of the print and broadcast media sometimes abuse their power in selecting and editing news material, this lack of editorial discretion does not destroy the media's constitutional protection under the first amendment. As the Supreme Court noted in CBS v. Democratic National Committee, "Calculated risks of abuse are taken in order to preserve higher values. . . . [T]he authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—civility—on the part of those who exercise the guaranteed freedom of expression." Other Supreme Court decisions also emphasize that press responsibility, although desirable, is not required by the Constitution. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."

Nevertheless, there is another theory under which regulation would appear to be more of a necessity. The media are sometimes referred to as the fourth branch of government, and to a certain extent this description is apt. This branch, however, is the only one that is unaffected by the principle of checks and balances built into the Constitution. The executive department cannot function without appropriations made available by the legislature.

320. See 4 ANNALS OF CONG. 934 (1794) (remarks by James Madison).
322. Id. at 331.
324. Id. at 125.
327. See supra note 16 and accompanying text. Such reference, of course, is the basis of Blasi's article on the checking function of the media. Blasi, supra note 14.
legislature's laws are meaningless without enforcement by the executive branch. The judgments of the judiciary are in significant measure controlled by laws formulated by the legislature and enforced through the executive channels. There are no comparable constraints on this fourth branch of government. It does not, and should not, depend upon the legislature for its revenues; it does not, and should not, depend upon the executive branch to carry out its reporting functions; and constitutional limitations make it relatively free of supervision by the judiciary. Therefore, if there are to be checks and balances or some measure of restraint on the media's exercise of power, it must be a restraint generated from within, a discipline self-imposed.

The media themselves recognize the need for and do impose some form of self-regulation. We will now examine whether existing self-regulation can sufficiently control media excesses and abuses of their power.

B. Existing Forms of Media Self-Regulation

To many members of the media, regulation by market forces is the only legitimate regulatory form. If the public does not like what the media print or broadcast, proponents of this position argue, its members will let the media know through their pocketbooks. People dissatisfied with outrageous behavior of newspaper reporters will simply stop buying that newspaper, and

329. Id. art. II, § 3.
330. Id. art. III.
331. Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit recently took the position that there should be constraints. In a speech delivered to the Associated Press Managing Editors Association, Judge Leventhal stated:

There are some in the press who seem to think that because they are rightly given enormous freedom, they must be given absolute freedom. . . . If the press has a status equivalent to a branch of government, it must realize that with power comes responsibility, and in our society that means legal as well as public accountability.

News Notes, 5 Media L. Rep. (BNA) (Nov. 6, 1979); see also supra note 16.
333. The executive branch, however, does to a great extent control the information from which news is made. See supra note 286.
334. See supra notes 147-89 and accompanying text.
those who disapprove of the intrusiveness of certain television reporters will turn to another channel for their news.

While the market approach to media regulation might theoretically make some sense in a capitalistic society, the free market does not operate in the media business. Market forces are clearly irrelevant in one-newspaper towns, even if one takes into consideration the theoretical competition between print and electronic media. Moreover, both the electronic and the print media are highly concentrated industries, in which large conglomerates control the production of news and its distribution across the country, and even the less-than-daily newspapers are not really local but rather receive their news from centralized sources and tend to be part of large newspaper chains.

Another problem with the free market philosophy is that the public's choice of media may be motivated by neither their news coverage nor their attitude toward the local citizenry. Because people often read newspapers for supermarket and department store advertisements rather than for news coverage, even if they want to protest some terrible invasion of their privacy by the news department, they are unlikely to cancel their subscription if the paper continues to meet these other needs. The media are therefore unlikely ever to learn of the public's dissatisfaction with their reporting methods or with their lack of appreciation for local community affairs.

The media also take the position that the public cannot expect them to be perfect and that the already existing methods of apologizing for mistakes sufficiently satisfy their responsibility to the public. The time constraints imposed on news reporting make a certain amount of inaccuracy inevitable. Nor can overzealous

336. Note, however, FCC v. WNCN Listeners Guild, 101 S. Ct. 1266 (1981), in which the Supreme Court upheld the FCC's abandonment of the "format doctrine" on the ground that the market, rather than regulation, is the best way to promote diversity in entertainment formats.

337. See supra note 42. It must also be recognized that the two forms—electronic and print—complement each other and are not really in competition. See, e.g., W. Schramm, supra note 34, at 250-54.

338. See supra notes 40-46 and accompanying text.

339. See M. Defleur & S. Ball-Rokeach, supra note 34.

340. The Supreme Court accepted this characterization when it constitutionalized libel actions in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Quoting from NAACP v. Button, 371 U.S. 415, 433 (1963), the Court noted that "erroneous 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." 376 U.S. at 271-72. The Court articulated a similar theme in Near v. Minnesota, 283 U.S. 697, 720 (1931), when it
reporting methods be helped at times. According to NBC Executive Producer Reuven Frank,

Lawyers do not understand what we do, because they do not think as we do. Their thinking is organized, ritualized and bipolar. Ours is disorganized, individual and multipolar. When a reporter goes forth on a story, he has no idea of what he will find, and only a general idea of what he is looking for. He does not—or at least he should not—be seeking only such information as buttresses a conclusion he has already reached.

Reporters are not saints, or heroes, or as a group, selfless, charitable, or modest. Professionally, they and lawyers use different methods of thinking and have diametrically different habits of thought. That is why they cannot understand each other.341

As the Founding Fathers recognized, the public simply has to put up with these small inconveniences.342

To a certain extent this is certainly the case. Journalists operate under extremely tight time constraints. This places a premium on rapid decisions rather than on extended deliberation, on responding to crises rather than reflecting over the implications or long-range effects of what is reported. Deadline pressures have always been enormous, but recent increases in the rapidity of information transmission have increased the time demands placed on journalists. This problem is somewhat less serious in the electronic media,
but deadlines continue to be a vital consideration.\textsuperscript{343}

Pressured to speed of action by fear of competition and by highly accelerated technology, journalists live in an atmosphere of urgency. They must make important decisions against impending deadlines. Action is important, not refusal to act for whatever consideration of consequence . . . . There is the rule of thumb, "refusal to publish cannot be justified on the basis of foreseeable harm." . . .

The temporal dimension also affects the journalist's treatment of the reality to be reported. There is little time for contemplation or interpretation in the usual news day . . . .

. . . In case of conflict between speed of report and accuracy or completeness of report, there is an ethical tension. But the deadline looms; the decision must be made . . . . "Go with what you've got" has been the traditional imperative.

The peculiar episodic conception of the undertaking colors the professional mind-set and reward system. Deadlines are harsh but rewards are immediate—a broadcast completed, a story published, the by-line in type or on the air. The day is over, the news put out, psychic reward realized. Problems are resolved with each deadline or implicitly put off until the next chunk of day to be covered . . . . It is difficult to feel morally obligated for the complex after-effects which may result from the news account. Of necessity, present action is more important than preparation of consequence.\textsuperscript{344}

These time constraints, to a certain measure, contribute to the problems of media inaccuracy. Journalism has been defined as history in a hurry, which makes accurate reporting more difficult. Getting the story first is rewarded more than getting it right.\textsuperscript{345} In addition, the lack of formal mechanisms for having others check the accuracy of a story before it is distributed increases the chance

\begin{itemize}
  \item \textsuperscript{343} See, e.g., T. CROUSE, \textit{supra} note 54, at 5.
  \item \textsuperscript{344} C. CHRISTIANS \& C. COVERT, \textit{TEACHING ETHICS IN JOURNALISM} 45-46 (1980). Unfortunately audiences often suffer from similar temporal problems. According to Jerome D. Frank, a psychiatrist at Johns Hopkins University:
    \begin{quote}
      The mass media bombard us with news of transient events, all presented with the same air of importance regardless of long term significance. . . .
    \end{quote}
    . . . [L]oss of temporal continuity undermines features of character that provide the basis for personal meaning and significance. I keep thinking of the Doonesbury cartoon in which the television news commentator Roland Burton Hedley says, 'We'll give this issue in-depth coverage—45 seconds."
    Frank, \textit{Mental Health in a Fragmented Society: The Shattered Crystal Ball}, 49 \textit{Am. J. Orthopsychiatry} 397, 399-400 (July 1979).
  \item \textsuperscript{345} THE \textit{MEDIA AND THE LAW, supra} note 99, at 6.
\end{itemize}
DO WE WANT A RESPONSIBLE PRESS?

Inaccuracy is partially the result of the incompleteness of the information from which the media fashion their news. Simons and Califano explain some of the causes:

Reporters and editors can be captives of pseudo-events staged for their benefit. Too frequently daily journalism is practiced the way the State Department conducts too many diplomatic relations, with a crisis mentality and a crisis response. Some of these problems attend the human condition: People who know do not speak, at least not soon enough; people who think they know tell only part of the story; some lie, others obfuscate, all try to protect their own interest. Other problems stem from institutional limitations of newspapering: the daily component of daily journalism; the pressure of space limitations in increasingly expensive newsprint; the different metabolisms, skills, sources, and perceptions of individual editors and reporters.

The likelihood of inaccuracy is also increased by the media’s effort to lure the audience to their wares. This, in turn, leads them to focus on the sensational and the exceptional rather than the significant and representative. As Walter Lippmann long ago noted, “news and truth are not the same thing, and must be clearly distinguished. The function of news is to signalize an event, the function of truth is to bring to light the hidden facts, to set them in relation with each other, and make a picture of reality on which men can act.”

What makes this so galling to the public is the arrogance with which the media proclaim their right to be free from all restraints. The media claim their greater privilege from the fact

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346. The fact that such mechanisms do not exist or are rarely used also suggests that the end result—accuracy in reporting—is not perceived by the media to be essential. The recent scandal over the fabrication of a Pulitzer Prize-winning story in the Washington Post demonstrates the seriousness of the problem. See supra note 96 and accompanying text.


348. Capturing the attention of the audience is very important. See, e.g., W. Schramm, supra note 34, at 200-01; Hutchins Commission Report, supra note 78, at 54-55.

349. W. Lippmann, supra note 61, at 226. Epstein agrees that the search for truth and the enterprise of journalism are not necessarily the same. Epstein, Journalism and Truth, Commentary, Apr. 1974, at 36-40.

that they act and stand for society at large, but they never recognize the responsibility that they have to the public as a result of their special position.

The media also claim that they already have internal mechanisms that adequately deal with public complaints. When a newspaper makes a mistake and unduly maligns a citizen or prints an inaccurate story, this will be corrected in a subsequent edition in the “corrections” section. Similarly, citizens who are dissatisfied with media coverage are encouraged to express their concerns in letters that presumably will appear in the “Letters to the Editor” section.

“Correction” sections are a particularly inadequate method for resolving problems associated with media abuses toward members of the public. These sections, which do not appear in all newspapers and magazines, are not prominently placed, are probably ignored by the vast majority of newspaper readers, and completely ignore gross misinterpretations. Instead, they tend to be limited to corrections of details such as age, title, or income, which are not generally the kind of misstatements or inaccuracies that actually harm members of the public. Moreover, a later, inconspicuous correction that appears buried inside a newspaper cannot adequately redress the suffering caused by a misleading headline in a story on page one, and “corrections” provide no solace to the electronically maligned because the broadcast media have no institutional mechanism for apologizing.

351. See Symposium on the Press Clause, 7 Hofstra L. Rev. 559 (1979). A legislator who participated in the First Amendment Congress challenged the media’s self-perception as the guardian of the first amendment:

We have seen a concept evolve of the reporter as the representative of the public, as the guardian, the spokesman of the people. There are those who believe that reporters are the eyes and the ears and even the voice of the public. . . . [But who is to define public issues? Is it the public official who was elected by the people and who must answer to the people? Or is it the reporter who is hired by and answers to a profit-making corporation? Is it pretentious of the press to view itself as the sole, legitimate arbiter of the public interest?

Morial, supra note 94, at 2-3.


353. The “Corrections” section in the Minneapolis Star & Tribune, for example, is located at the lower left-hand corner of page three.

354. See On corrections and letters, supra note 352.

355. A correction is no better than winning a libel award, see supra text accompanying note 150, since those who heard the original insult often ignore the later vindication.

356. The editors of the Columbia Journalism Review suggest that the reason why apologies are not part of television news programs is because the television journalists have not discovered an inconspicuous way to make them. On corrections and letters, supra note 352.
Letters to the editor, touted by the media as the place where the public can question a story's import or attack its alleged gross misinterpretation, are also an ineffective way of dealing with media abuses. An informal survey of letters to the editor and corrections printed by the New York Times, the Washington Post, and the Los Angeles Times, during a two-week period demonstrates that neither of these methods works. Of the three papers the Washington Post devotes more of its “Letters to the Editor” section to letters critical of its stories—twenty-eight percent as compared to twelve percent for the New York Times and sixteen percent for the Los Angeles Times—but this is still only an indirect way of admitting errors. Moreover, letters to the editor have been found not to reflect the opinions of the reading public and many working class people are too intimidated to write because of their poor writing skills at which the newspaper would scoff.

At least some journalists are beginning to realize that the media have no mechanisms for correcting the fact that their product each day is “a partial, hasty, incomplete, invariably somewhat flawed

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The two-week period covered was April 15-28 for the New York Times, April 11-25 for the Washington Post, and April 1-14 for the Los Angeles Times. On corrections and letters, supra note 352.

357. See Weiner, Have you heard the one about the traveling salesman?, Colum. Journalism Rev., July-Aug. 1980, at 14. Weiner discusses an episode in which the New York Times printed a story that was entirely incorrect, ignored criticism from the academic community, failed to print angry letters of protest, and printed no retraction. Four months later when a retraction was finally printed, the article suggested that the academic community and not the paper had been at fault.


and inaccurate rendering\textsuperscript{361} of that day's events or for dealing with the significant distortions and omissions that inevitably occur in a profession which must choose to present only a small amount of what passes for news. One journalist explains the problem as follows:

We don't come back today with a corrected and updated version of what we told you yesterday. We treat each day as a snapshot, an isolated 24-hour chunk of history, with little relationship to the past or future. We not only fail to correct and update yesterday's version, but we often seem to unconsciously avoid doing that.

How do you correct a story that is factually accurate but is, because of the pressures under which it was produced, totally wrong in its implications? We haven't found a way—perhaps because we haven't looked hard enough.

And have you ever tried to get a newspaper to give space a day or two later to an event it missed or couldn't find room for? It is almost impossible, because we are committed to a silly and outdated tradition that puts a premium on immediacy: The value of a piece of news diminishes with each passing minute.

If public acknowledgement that today's product is less than perfect prods us into doing something about it tomorrow, we will have made a major advance.\textsuperscript{362}

Given the inability of the free market forces or of existing corrective mechanisms to resolve the problems of incomplete and inaccurate news reporting, we must look to other forms of self-regulation that have been tried or proposed.

C. Self-Regulatory Mechanisms for Ensuring Media Responsibility

1. Media Canons of Ethics

The need for media responsibility, although perhaps heightened by the technological and economic changes of the last decades,\textsuperscript{363} is not a new theme in the history of journalism. The journalism educators who established schools of journalism in the early decades of the twentieth century sought to turn journalism into an honorable and legitimate profession by emulating the professions of medicine and law. According to one early educator, "Establish-

\textsuperscript{361} Seib, \textit{The limitations of the press}, Minneapolis Tribune, June 16, 1979, at 6A, col. 4 (quoting David S. Broder).

\textsuperscript{362} \textit{Id.}

\textsuperscript{363} See supra notes 32-63 and accompanying text.
ing a firm professional standing requires the creation of an ethical code so generally accepted [that] the charlatan in journalism will take his place with the shyster [in law] and the quack [in medicine]."

The earliest code of journalism ethics was the Kansas Code adopted by the Kansas Editorial Association in 1910. It had separate sections governing the behavior of the publisher—in advertising, in circulation, in costs and in news—and of the editor. It condemned the publication of fake illustrations of persons and events, the practice of investigating the guilt or innocence of those under suspicion of committing crimes, and the front-page publication of public officials' offenses against private morality. It also railed against attempts by outsiders to warp the presentation of the news through gifts of money and called for the firing of reporters who accepted gifts or favors "from any factors whose interests would be affected by the manner in which his reports are made."

The American Society of Newspaper Editors adopted its Canons of Journalism in 1923. Of its seven canons, two relate directly to

365. L. Brown, supra note 32, at 107-14 app.
366. Id. at 110-11 app.
367. Id. at 111-12 app.
368. Id. at 113 app.
369. Id. at 114 app.
370. The Canons of Journalism (American Society of Newspaper Editors 1923), reprinted in L. Brown, supra note 32, at 102-04 app. This Code was supplanted in 1975 by "A Statement of Principles" containing six articles. It is just as general and idealized as its predecessor:

A STATEMENT OF PRINCIPLES PREAMBLE

The First Amendment, protecting freedom of expression from abridgment by any law, guarantees to the people through their press a constitutional right, and thereby places on newspaper people a particular responsibility.

Thus journalism demands of its practitioners not only industry and knowledge but also the pursuit of a standard of integrity proportionate to the journalist's singular obligation.

To this end the American Society of Newspaper Editors sets forth this Statement of Principles as a standard encouraging the highest ethical and professional performance.

ARTICLE I—Responsibility

The primary purpose of gathering and disseminating news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. Newspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust.

The American press was made free not just to inform or just to serve as a forum for debate but also to bring an independent scrutiny to bear on the forces
the issues of concern to us. Canon IV stated in part that "a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control."371 Canon VI provided that "[a] newspaper should not publish official charges affecting reputation or moral character without opportunity given to the accused to be heard."372 More specifically Canon VI stated that "[a] newspaper should not invade private rights or feelings without a sure warrant of public right as distinguished from public

ARTICLE II—Freedom of the Press
Freedom of the press belongs to the people. It must be defended against encroachment or assault from any quarter, public or private.
Journalists must be constantly alert to see that the public's business is conducted in public. They must be vigilant against all who would exploit the press for selfish purposes.

ARTICLE III—Independence
Journalists must avoid impropriety and the appearance of impropriety as well as any conflict of interest or the appearance of conflict. They should neither accept anything nor pursue any activity that might compromise or seem to compromise their integrity.

ARTICLE IV—Truth and Accuracy
Good faith with the reader is the foundation of good journalism. Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly. Editorials, analytical articles and commentary should be held to the same standards of accuracy with respect to facts as news reports.
Significant errors of fact, as well as errors of omission, should be corrected promptly and prominently.

ARTICLE V—Impartiality
To be impartial does not require the press to be unquestioning or to refrain from editorial expression. Sound practice, however, demands a clear distinction for the reader between news reports and opinions. Articles that contain opinion or personal interpretation should be clearly identified.

ARTICLE VI—Fair Play
Journalists should respect the rights of people involved in the news, observe the common standards of decency, and stand accountable to the public for the fairness and accuracy of their news reports.
Persons publicly accused should be given the earliest opportunity to respond.
Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified.
These principles are intended to preserve, protect and strengthen the bond of trust and respect between American journalists and the American people, a bond that is essential to sustain the grant of freedom entrusted to both by the nation's founders.

This Statement of Principles was adopted by the ASNE board of directors, Oct. 23, 1975; it supplants the 1922 Code of Ethics ("Canons of Journalism").

371. L. BROWN, supra note 32, at 103 app.; see also A STATEMENT OF PRINCIPLES, supra note 370, at art. IV.
372. L. BROWN, supra note 32, at 103 app.; see also A STATEMENT OF PRINCIPLES, supra note 370, at art. VI.
curiosity,” and that a newspaper must “make prompt and complete correction of its own serious mistakes of fact or opinion.” As the above quotes demonstrate, the Canons are rather general statements of principle without moorings to the common, everyday problems and conflicts faced by journalists.

As groups of professional societies emerged around various aspects of journalistic practice—editing, publishing, broadcasting, reporting—they tended to promulgate extremely general codes of idealized behavior similar to those described above. Thus, for example, the Radio Television News Directors Association adopted a Code of Broadcast News Ethics in 1966 and the Society of Professional Journalists (Sigma Delta Chi) adopted its code in 1973.

373. L. Brown, supra note 32, at 104 app.
374. Id.
375. As such, they were quite like the Canons of Professional Ethics enacted by the American Bar Association in 1908. See A. Kaufman, Problems in Professional Responsibility 29 (1976). The Statement of Principles is no improvement in this regard.
377. This Code of Ethics, as it is entitled, reads in its entirety as follows:

The Society of Professional Journalists, Sigma Delta Chi, believes the duty of journalists is to serve the truth.

We believe the agencies of mass communication are carriers of public discussion and information, acting on their Constitutional mandate and freedom to learn and report the facts.

We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public’s right to know the truth.

We believe those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy, and fairness.

To these ends, we declare acceptance of the standards of practice here set forth.

Responsibility
The public’s right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

Freedom of the Press
Freedom of the press is to be guarded as an inalienable right of people in a free society. It carries with it the freedom and the responsibility to discuss, question, and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

Ethics
Journalists must be free of obligation to any interest other than the public’s right to know the truth.
1. Gifts, favors, free travel, special treatment, or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.
2. Secondary employment, political involvement, holding public office, and service in community organizations should be avoided if it compromises the
There is also a Radio Code and a Television Code of the National Association of Broadcasters, although only small segments of these codes have anything to do with news coverage, and individual integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner which protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount. That is the nature of their profession.

3. So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

5. Journalists acknowledge the newsman's ethic of protecting confidential sources of information.

Accuracy and Objectivity

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal, which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience, and judgment qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

Fair Play

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.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of news media to make prompt and complete correction of their errors.

5. Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers, and listeners should be fostered.

Pledge

Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people.


378. See NATIONAL ASSOCIATION OF BROADCASTERS RADIO CODE, reprinted in
newspapers or chains have their own standards of behavior that they expect their employees to respect.\textsuperscript{379} Only the code of Sigma Delta Chi speaks of enforcement. It ends with the following pledge: "Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people."\textsuperscript{380}

These codes have a number of serious shortcomings. As statements of principle they are fine, but they fail to assist the journalist in resolving the moral dilemmas that are daily faced in the pursuit of the news. The Statement of Principles of the American Society of Newspaper Editors, for example, is hardly a complete code of conduct, since it does little more than state its commitment to freedom of the press\textsuperscript{381} and acknowledge the importance of truthfulness and accuracy.\textsuperscript{382} The Code of Ethics of the Society of Professional Journalists is also limited, both in terms of its scope and commitment. Neither these, nor the codes of conduct adopted by specific newspapers or chains, have dealt in a comprehensive, sustained, or systematic way with the controversial problems with which the profession is daily involved. None really forces the individual journalist to ponder ahead of time how he or she is going to resolve the many conflicts that are bound to arise on a day-to-day basis. Nor do they adequately protect the public from overzealous pursuit of the news or unnecessary invasions of privacy.

\textsuperscript{379} Thus, for example, Brown reprints the standards of behavior governing the Hearst newspapers, L. Brown, \textit{supra} note 32, at 115-17 app., the \textit{Sacramento Bee}, \textit{id.} at 117-18 app., and the \textit{Seattle Times}, \textit{id.} at 118-19 app. Recently the editor of the \textit{Minneapolis Star} promulgated a code to guard against reporters' conflicts of interest. See Schmitz, \textit{Minneapolis's new (double) standard}, COLUM. JOURNALISM REV., July-Aug. 1980, at 18.

In a recent NLRB challenge by the Newspaper Guild to the unilateral imposition of a code of ethics modeled on that of Sigma Delta Chi, a federal appeals court held that the National Labor Relations Act § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d) (1976), as amended by Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395, 395-96, does not prevent a publisher from adopting reasonable rules designed to prevent employees from compromising their standing as journalists and to shield editorial control from outside influence. Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB, 636 F.2d 550, 560-61 (D.C. Cir. 1980).

\textsuperscript{380} \textit{Code of Ethics}, \textit{supra} note 377.

\textsuperscript{381} \textit{A Statement of Principles}, \textit{supra} note 370, art. II.

\textsuperscript{382} \textit{id.} art. IV.
2. Joint Media-Legal Committees to Establish Guidelines

Another traditional mechanism for dealing with media responsibility has been the creation of joint committees made up of media and legal professionals to establish guidelines for resolving areas of conflict. This technique has been used most effectively in the conflict over media coverage of the judicial process.

Although the Canons of Journalism recognized a vague duty of fair play when in the coverage of criminal trials, the media seemed to forget their responsibility when reporting on a lurid crime. The prejudicial publicity caused by the outrageous media abuses in the coverage of the Sam Sheppard murder trial in Ohio in 1954 and the televised fraud trial of Billie Sol Estes in Texas in 1962 resulted in Supreme Court reversals of convictions in both those cases. In 1964 the Warren Commission, investigating the assassination of President Kennedy, urged the press, the bar, and law-enforcement officials to develop standards for protecting the integrity of trial machinery, and in 1968 the American Bar Association approved the Reardon Report, based on a three-year study by a commission of prominent lawyers and judges, which established specific standards for determining what types of information should and should not be released during the pendency of a criminal trial.

As a result of these activities, in a number of states representatives of the media and the bar began meeting to develop guidelines that would make the judicial process as fair as possible without sacrificing freedom of the press. This movement began in Oregon, Massachusetts, Kentucky and Washington, and by 1974 almost one-half of the states had adopted voluntary fair trial-free press

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383. Canon VI states only that "[a] newspaper should not publish official charges affecting reputation or moral character without opportunity given to the accused to be heard; right practice demands the giving of such opportunity in all cases of seniors accused in outside judicial proceedings." The Canons of Journalism, supra note 370, Canon VI.


386. ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press (P. Reardon chairman 1968); see also supra notes 182-88. A revised version of the ABA Standards was adopted by the ABA House of Delegates in 1978. See supra note 182.
Most of the guidelines, based on the Reardon Report, dealt with what information should be released at the time of arrest, at other points prior to trial, and during the course of the trial. These voluntary guidelines work only as long as both the media and the judiciary are willing to follow them. In states like Washington, whose guidelines began evolving in 1963, the key to success has been the existence of a joint administrative committee, chaired by the Chief Justice of the Washington Supreme Court, and a liaison committee of seven: two trial judges, a prosecutor, a practicing attorney and three representatives of the media. The committee receives advance notice of a possible collision and works out accommodations so that the courtroom will not need to be closed and restrictive judicial orders will not have to issue.

Although there has been a tendency to limit this kind of cooperation to issues surrounding the media's coverage of criminal trials, there is a certain potential for expansion to other areas. In California, the adoption in 1970 of a joint statement of principles by the state's bar, bench, and media was followed by the establishment of local press-bar groups in many counties to implement the joint declaration. In San Mateo County, which has one of the most effective local groups, the committee holds monthly dinner meetings attended by representatives of the law enforcement community and the media at which issues of mutual concern are discussed. These have ranged from gag orders and cameras in the courtroom to interpretations of libel law, the disclosure of secret grand jury testimony, and access to information on juvenile offenders.

Such cooperation also led to the creation in 1977 of a joint American Bar Association-American Newspaper Publishers Association Task Force to serve as a forum through which both associations could discuss issues of mutual concern. Presently, this task force is preparing instructional material for use in schools and at professional meetings. The media, however, are opposed to fair

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387. National News Council Report, supra note 385, at 76; see also supra note 182.
388. National News Council Report, supra note 385, at 76. These are discussed in ABA FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS, supra note 182.
390. Id. at 80.
391. Id.
392. Id. at 82.
393. Id.
trial-free speech guidelines on a national level, believing that each problem must be addressed in its local context. 394

The development of media-bar-bench contacts 395 and task forces is certainly a welcome phenomenon and the extension of discussion from fair trial-free press issues to such subjects as libel can be nothing but beneficial. Nevertheless, this mechanism for creating dialogue between legal and media professionals can only partially address the issues that concern us. Since existing legal mechanisms for controlling media abuses of their power only tangentially encourage media responsibility toward the public, 396 the improvement of relations between these professions, while laudable, will not resolve the problems we have identified as central to the crisis of deteriorating public confidence in the media. 397 Lawyers and judges come in contact with individual members of the public and their grievances against the media only when there are lawsuits involved. For this reason they are as poorly prepared to represent the "public interest" in this dialogue as the media who profess to embody it.

3. Media Ombudsmen

A number of newspapers have created either part-time or full-time positions to deal with press accountability. 398 These are

394. Id. (statement of Terry Maguire, associate general counsel of ANPA and its staff representative on joint task force).

395. Such contact was the reason for the Washington Conference on the Media and the Law sponsored by the Ford Foundation and the Washington Post on March 7-9, 1975. Simons & Califano, Preface to The Media and the Law, supra note 99, at vii-viii. After the conference Simons and Califano observed that

the journalists were essentially insensitive to rights of privacy, the rights of the accused in criminal cases, and the right of the government to preserve national security secrets. The jurists invoked their responsibility to sit in judgment on individual rights as a source of omniscient power that entitled their activities in courtrooms to immunity from public scrutiny not available to any other segments of American society, and vested their orders with an absolutism they denied journalists under the First Amendment.

Id. at viii.

The First Amendment Congress also called for regular meetings of the bench, the bar, and the media in each state and larger locality to deal with issues of mutual concern, and an increase of informal media/bar contacts to ensure that the media met frequently with prosecutors, judges, lawyers, legislators, and media counsel. First Amendment Congress, First Amendment and the Legal profession (Williamsburg, Va., Mar. 1980); see also supra notes 1-3 and accompanying text.

396. See supra notes 148-312 and accompanying text.

397. See supra notes 13-18 and accompanying text.

398. Some newspapers have more than one internal system of accountability. In a 1973 study for the American Newspaper Publishers' Association Research Center 135
sometimes called ombudsmen, after the institution in Sweden that is widely used to resolve problems between citizens and government agencies. 399

The first newspaper to employ this kind of procedure was the Louisville Courier-Journal which appointed an ombudsman in 1967 to handle reader complaints. 400 The Washington Post established one shortly thereafter. Other newspapers created Bureaus of Accuracy and Fair Play with similar functions. 401 By 1973 twelve newspapers had ombudsmen; 402 and there were fifteen reported ombudsmen in 1976, 403 and over thirty newspapers used regular

newspapers of various sizes located in nine geographic regions were polled about their forms of accountability to the public. The results appear below:

**ACCOUNTABILITY SYSTEMS CATEGORIZED BY NEWSPAPER CIRCULATION**

<table>
<thead>
<tr>
<th>Circulation:</th>
<th>100,000+</th>
<th>99,999</th>
<th>49,999</th>
<th>20,000</th>
<th>Up to 20,000</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>System:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ombudsman</td>
<td>8(21%)</td>
<td>2(7%)</td>
<td>1(3%)</td>
<td>1(4%)</td>
<td>12(9%)</td>
<td></td>
</tr>
<tr>
<td>Press Council</td>
<td>0</td>
<td>0</td>
<td>1(3%)</td>
<td>3(11%)</td>
<td>4(3%)</td>
<td></td>
</tr>
<tr>
<td>Advisory Board</td>
<td>3(8%)</td>
<td>1(3%)</td>
<td>4(10%)</td>
<td>4(14%)</td>
<td>12(9%)</td>
<td></td>
</tr>
<tr>
<td>Accuracy Forms Sent to Sources</td>
<td>7(18%)</td>
<td>5(17%)</td>
<td>3(8%)</td>
<td>3(11%)</td>
<td>18(13%)</td>
<td></td>
</tr>
<tr>
<td>Accuracy Forms Published in Paper</td>
<td>3(8%)</td>
<td>1(3%)</td>
<td>0</td>
<td>1(4%)</td>
<td>5(4%)</td>
<td></td>
</tr>
<tr>
<td>Standing Head for Corrections</td>
<td>9(24%)</td>
<td>3(10%)</td>
<td>2(5%)</td>
<td>3(11%)</td>
<td>17(13%)</td>
<td></td>
</tr>
<tr>
<td>&quot;Other&quot; System</td>
<td>1(29%)</td>
<td>13(40%)</td>
<td>25(64%)</td>
<td>16(56%)</td>
<td>65(48%)</td>
<td></td>
</tr>
<tr>
<td>No Formal System</td>
<td>7(18%)</td>
<td>6(20%)</td>
<td>15(38%)</td>
<td>3(11%)</td>
<td>31(23%)</td>
<td></td>
</tr>
</tbody>
</table>

Several newspapers have more than one system of accountability. Percentages are based on the number of newspapers responding within the circulation category. For example, eight newspapers of the 38, or 21 per cent, responding in the largest circulation category indicate the use of an ombudsman program.


399. As part of its reorganization of the press council in 1969, the Swedes established a General Public's Press Ombudsman to collect grievances and prosecute violations of press ethics. L. Brown, supra note 32, at 87; E. Dennis, supra note 79, at 121.

400. L. Brown, supra note 32, at 66; E. Dennis, supra note 80, at 122.

401. L. Brown, supra note 32, at 66; E. Dennis, supra note 79, at 122. This idea came from the New York World which had established such a Bureau in 1913. Among the newspapers with such offices are the Minneapolis Star & Tribune and the St. Petersburg Times. L. Brown, supra note 32, at 66; E. Dennis, supra note 79, at 122.

402. Sanders, supra note 398.

403. E. Dennis, supra note 79, at 123. These data came from a 1976 study by the Associated Press Managing Editors' Reader Relations Committee which surveyed 105 newspapers.
staff to carry out the ombudsman function on a part-time basis.\textsuperscript{404}

One of the conceptual problems with the ombudsman is that he is expected to deal with both external and internal problems. The ombudsman must serve as the bridge between members of the public and the newspaper’s staff. When a complaint is made, the ombudsman must deal with the person who lodges it to ensure that the problem is resolved to his satisfaction and must also work with staff on improving the product. A 1976 survey found that while generally the public’s reaction to the ombudsman concept has been good, “[s]taff reaction is another thing . . . . This bears out what many in the profession know about reporters and editors involved in production—some of them are sensitive souls, adverse to criticism, all too often reluctant to admit mistakes.”\textsuperscript{405} The ombudsman at the \textit{Washington Post} found this to be too difficult and charged that handling reader complaints interfered with his ability to carry out the function of general critic.\textsuperscript{406}

While the ombudsman concept may offer the public some relief and may force journalists to think about their relations with members of the public, the ombudsman is still a new and experimental concept that affects only a very small part of the American press. It is limited to the print media and does not yet exist in radio or television newsrooms. Moreover, it does not appear that management provides enough space for an ombudsman to operate effectively, since policing media-public relations is certainly more than a part-time job. Without cooperation from the journalists and editors, an ombudsman cannot expect to succeed, since much of his task involves teaching the staff to appreciate the public’s complaints. Finally, because the ombudsman is established on a paper-by-paper basis, uniformity of response is difficult to achieve. While we certainly applaud the concept of the ombudsman and would press for more widespread usage by both print and electronic media, the solutions to the problem need to be national in scope because of the nationwide influence of the media.

\textsuperscript{404} \textit{Id.}

\textsuperscript{405} \textit{Id.} (quoting unpublished notes of Thomas W. Jobson of \textit{Asbury Park (N.J.) Press} from his summary of Associated Press Managing Editors’ report presented at Washington Journalism Center program on media criticism, 1976).

\textsuperscript{406} \textit{L. Brown,} supra note 32, at 52; \textit{see E. Dennis,} supra note 79, at 123.
4. **Press Councils**

The concept of a press council\(^\text{407}\) dates back to 1916 when the Swedish government set up a Press Fair Practices Commission to mediate between the press and the public.\(^\text{408}\) Since then fifteen other European countries have established press councils,\(^\text{409}\) the most successful of which has been the British Press Council.\(^\text{410}\)

In the United States, however, press councils have had a much more checkered history.\(^\text{411}\) The first national press council was established by the federal government as part of the short-lived National Industrial Recovery Act\(^\text{412}\) passed by Congress in 1933 and declared unconstitutional in 1935.\(^\text{413}\) Walter Lippmann, in his seminal work *Public Opinion* published in 1922, had called on the press to behave responsibly and suggested the need for some external body.\(^\text{414}\) In 1947 the Commission on a Free and Responsible Press,\(^\text{415}\) chaired by Robert Hutchins, called for "the establishment of a new and independent agency to appraise and report annually upon the performance of the press."\(^\text{416}\) It was not until 1973 that a national press council was established, and a private foundation—the Twentieth Century Fund—rather than the media themselves, was the motivating force.\(^\text{417}\) Generally speaking, the media have

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\(^{407}\) For a highly informative discussion of press councils in the United States, see Ritter & Leibowitz, *supra* note 335.

\(^{408}\) L. BROWN, *supra* note 32, at 87. In 1969 it was reorganized to include members of the general public. At the same time an ombudsman was established to prosecute violations of press ethics.


\(^{410}\) For an in-depth analysis of the functioning of the British Press Council, see H. LEVY, *THE PRESS COUNCIL* (1967); see also Balk, *supra* note 41, at 23-30, 80-85.


\(^{412}\) National Industrial Recovery Act of 1933, Pub. L. No. 67, 48 Stat. 195 (declared unconstitutional in 1935). The Act established a Newspaper Industrial Board to investigate complaints of violations of the Act. A committee of publishers was to prepare the Daily Newspaper Code which dealt with such matters as prohibition, child labor, ensuring good working conditions, and ensuring that journalists respected obscenity and libel laws. The Code was signed into law in 1934, but it ceased to operate when the Supreme Court declared the entire Act unconstitutional in 1935. See L. BROWN, *supra* note 32, at 74-75.


\(^{414}\) W. LIPPMANN, *supra* note 61.

\(^{415}\) HUTCHINS COMMISSION REPORT, *supra* note 78.

\(^{416}\) Id. at 100.

\(^{417}\) In 1972 the Ethics Committee of the American Society of Newspaper Editors (ASNE) sought the opinions of its members regarding a grievance committee to resolve complaints alleging unethical newspaper practices. Of the 405 editors responding to the
opposed all these developments.\textsuperscript{418}

The early press councils established in the United States were local or regional bodies whose goal was to put a newspaper or broadcasting station in direct touch with its immediate public.\textsuperscript{419} The first local press council was founded by the publisher of the 

\textit{Litton (Colorado) Independent} in 1946. For six years eight editors met regularly with eight critics, each from a different segment of the community.\textsuperscript{420} In 1950 the publisher of the Santa Rosa \textit{Press Democrat} set up a Citizens' Advisory Council to offer suggestions and criticisms about what the paper should do for the community.\textsuperscript{421} After 1967 the Mellett Fund for a Free and Responsible Press helped to establish six press councils, two of which included broadcasters as well as newspapers.\textsuperscript{422} Although these tended to be extremely short-lived, they helped citizens to learn about the needs of their local communities.\textsuperscript{423} These councils, while useful in bridging the communication gap between the media and the community, were not designed to ensure press fairness or curb media excesses.\textsuperscript{424}

Minnesota is the only state with a news council.\textsuperscript{425} Formed in

questionnaire, 306 opposed the establishment of such a committee by ASNE, 257 opposed supporting grievance machinery established by another organization, and 234 editors stated that they would not support a press council in their areas. Thus, it is clear that the vast majority of newspaper editors did not want a press council and did not wish to cooperate with one, were it established. \textit{See} L. Brown, \textit{supra} note 32, at 78-80.

\textsuperscript{418} During the Roosevelt era the media had been divided about whether to cooperate with the establishment of an external regulatory body. Some participated in the drafting of the newspaper code, and, in so doing, won certain concessions that did not appear in the codes written for other industries. There was almost universal opposition from the media toward the \textit{Hutchins Commission Report}—it was either ignored or attacked vociferously. In 1973 when the Twentieth Century Fund announced that it was planning to establish an independent national press council, a minority of newspapers gave it cautious support. The \textit{New York Times}, however, refused to cooperate because it felt that such a council could become a vehicle for special interest groups skilled at political propaganda. \textit{Id.} at 74-78. Brown implies that such antipathy was partly due to media reactions to the hostility of the Nixon administration and to judicial infringement on their traditional prerogative to protect confidential sources.

\textsuperscript{419} \textit{Id.} at 62; \textit{see also} Balk, \textit{supra} note 41, at 31-36 (discussion of press councils in America).

\textsuperscript{420} Balk, \textit{supra} note 41, at 31-36.

\textsuperscript{421} B. Blankenburg & W. Rivers, \textit{Backtalk: Press Councils in America} 13 (1972); L. Brown, \textit{supra} note 32, at 62-63; Balk, \textit{supra} note 41, at 32; Ritter & Leibowitz, \textit{supra} note 335, at 853.

\textsuperscript{422} B. Blankenburg & W. Rivers, \textit{supra} note 421, at 13; L. Brown, \textit{supra} note 32, at 64-65.

\textsuperscript{423} L. Brown, \textit{supra} note 32, at 64.

\textsuperscript{424} Ritter & Leibowitz, \textit{supra} note 335, at 853.

\textsuperscript{425} The Honolulu Press Council was established in 1969. While it was only a local
1971 by the Minnesota Newspaper Association, it is composed of twelve laypersons and twelve representatives of the news media, and is chaired by John E. Simonett, a Minnesota Supreme Court Justice. According to its previous Chairperson, the Minnesota News Council has been very successful at developing a common law of journalism ethics that represents a body of standards for responsible press performance in such areas as libel, access to the press, the newperson's privilege against forced disclosure of council, its effect was statewide because all the statewide media were located in Honolulu.

L. Brown, supra note 32, at 65; see also Balk, supra note 41, at 46-55.

426. Lay members are selected so as to include representatives of influential subgroups, such as women, educators, government leaders, and minority persons. Ritter & Leibowitz, supra note 335, at 854.


428. This selection seems to have been influenced by the British practice of selecting the chair for the Press Council from among the judiciary. See H. Levy, supra note 410.

429. Kennedy, supra note 427, at 27. Schafer thinks otherwise because there have been only 38 rulings from 1971 to 1979. R. Schafer, supra note 427, at 34-35.


431. In its decisions on letters to the editor the Minnesota Press Council follows the fairness-doctrine model outlined in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), rather than the Tornillo doctrine that newspapers cannot be compelled to grant a right of reply to a person who has been attacked in the newspaper. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). As the Council stated in McKee v. St. Paul Pioneer Press, Minn. Press Council Dec. No. 20 (1976), "[A]ny good newspaper should accept a reasonable volume of letters from readers consistent with its space and economics, and should impose upon itself a requirement of journalistic fairness so that many viewpoints may have a reasonable opportunity for expression, and especially those which differ from the newspaper's own editorial viewpoints or those of its opinion writers." In the three cases involving advertising, the Council has criticized newspapers that have denied advertising access, thereby running counter to court decisions which have refused to establish a right of advertising access. See, e.g., Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); Opinion of the Justices, 363 Mass. 909, 915, 298 N.E.2d 829, 833 (1973) ("We are aware of no circumstances in which it has been held that the First Amendment right of free speech gives a private individual the right to require publication of editorial advertising."); see also CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Nevertheless, the Council in Rachner v. Union Advocate,
The Council was established with the following goals:

- To preserve the freedom of the press;
- To maintain an independent press consistent with the highest professional standards;
- To deal in a practical and appropriate manner with complaints about the conduct of the press;
- To review how the press performs in matters of general public interest;
- To assist the press to fulfill its unique responsibility to perform in the public interest.

The Council hears complaints concerning fairness, accuracy, access, and professional ethics of any of Minnesota's media. Complaints concerning editorial opinion are considered only if they involve questions of accuracy or misrepresentation. The only prerequisites to filing a complaint are that the complainant have attempted unsuccessfully to resolve the grievance with the management of the media outlet involved and that he have waived any possible future civil lawsuit or action before a regulatory body.

Minn. Press Council Dec. No. 3 (1973), stated that advertising "like news columns, is a source of important public information. . . . [T]he very values which the First Amendment is designed to foster and protect impose moral obligations for newspapers devoted to the fair presentation of information for the general public.

432. In Lindstrom v. Union Advocate, Minn. Press Council Dec. No. 1 (1972), the Council stated that the newspaper could protect its confidential source, but unless it had some other evidence to support its story, it would be reprimanded by the Council.


435. See R. Schafer, supra note 427, at 23.


438. The following discussion of the operation of the Minnesota Press Council is taken from Minnesota Press Council, supra note 427, at 6-7, and Peterson, MPC, supra note 427.


440. The reason for this is that interference with the editorial process would violate the first amendment. Chief Justice Burger in his majority opinion in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), suggests that the editorial function cannot be harnessed. See supra notes 9 & 161 and accompanying text.

441. Minn. Press Council, Grievance Comm. Procedural Rule I. B.
agency. After both parties submit written explanations of their positions, one of the Council's two grievance committees investigates informally to verify the facts alleged in the complaint and the response and takes testimony from the parties. The Council then promptly issues a written determination outlining the issues and its reasoning in reaching the result. These determinations, which often include recommended guidelines for improving media performance, are released to the state's media for publication.

Publicity is the only sanction that the Press Council has at its disposal, but, according to Minnesota Supreme Court Justice Donald C. Peterson, the Council's previous chairperson, it is a powerful sanction. A Council publication explains that "in lieu of legal or governmental penalties or sanctions, the Council relies for its impact on the 'loud bark of publicity,' the reputations of its members, and a consensus among the media that a free press need not exist at the expense of a fair press." None of the media involved in a complaint has ever failed to publish the Council's decision; to ignore it would be unprofessional.

Although not all media thought the News Council was a good idea, it has had a discernible positive impact on media reporting. In a 1978 study of the news media in Minnesota, thirty

442. Id.
443. Minn. Press Council, Grievance Comm. Procedural Rule II. A.
444. Minn. Press Council, Grievance Comm. Procedural Rule II. D.
446. The usual time lapse between the filing of the complaint and its final determination is only a few weeks. Peterson, MPC, supra note 427, at 971.
447. For example, as part of its decision in Jacobson v. Minneapolis Tribune, Minn. Press Council Dec. No. 33 (1978), the Council endorsed social science polling techniques as a way for newspapers to explore complex social problems and issues. It then identified eight specific elements that should be included in all articles about polls—the identity of the poll's sponsor, the exact wording of the questions, the definition of the population sampled, the sample size and response rate, an indication of the sampling error, how interviews were conducted, when they were conducted, and which findings were based on responses from just one portion of the sample.
449. Peterson, MPC, supra note 427, at 970-71.
451. Peterson, MPC, supra note 427, at 971.
452. The St. Paul Pioneer Press was originally opposed, although by 1974 it recognized the significance of the Press Council and referred complaints to it. Ritter & Leibowitz, supra note 335, at 854. A recent poll also found television broadcasters less enthusiastic. Schafer, News Media and Complainant Attitudes Toward the Minneapolis Press Council, 56 Journalism Q. 744 (1979).
453. As Charles W. Bailey, the editor of the Minneapolis Tribune, recently noted,
percent of 337 media respondents stated that the existence of the News Council had a major effect on their news staffs, and they generally felt that Council criticism would improve their paper's long-term performance. Complainants also supported the Council, not so much because of the beneficial nature of criticism but because the existence of the Council provided them with a forum for their complaints. Ritter and Leibowitz argue that the Minnesota News Council has accomplished the four objectives for which press councils are created: (1) freeing the media from the self-imposed restraints due to the fear of criminal or economic sanctions; (2) providing community input in the determination of citizen-press disputes through the creation of an arbitration board composed of both laypersons and journalists; (3) correcting inaccurate or unfair reporting; and (4) developing a set of ethical standards of behavior for the news media.

The other major experiment with a press council in the United States is the National News Council which was established by the Twentieth Century Fund in 1973 to monitor press performance and to defend it against public and governmental attacks. According to the Twentieth Century Fund's report, the basic reason for a press council was to provide an independent forum unconnected to the government within which media responsibility and performance could be debated, so as to preclude the debate from taking place in legislative hearings, political campaigns or courtrooms.

The National News Council entertains any complaints concern-

"[A]round our state these days, editors and reporters may be a little more civil, more conscious of the need to be fair—and more careful to 'get it right'—because of the Minnesota Press Council.” Bailey, “The power of persuasion”, EDITOR & PUBLISHER, July 29, 1978, at 1.
ing inaccuracy or unfairness in a news report lodged against any of the principal national suppliers of news—nationwide wire services, supplemental wire services, national weekly news magazines, national newspaper syndicates, national daily newspapers, and nationwide commercial and noncommercial broadcast networks. It also takes complaints from news organizations alleging actions that restrict access to information of interest to the public, threaten freedom of communication, and impede the advancement of accurate and fair reporting.

Modeled after the British Press Council and the Minnesota News Council, the National News Council has proved much less successful. Primarily, this is because it was imposed on reluctant and hostile media. At the time of its establishment, the three major television networks and the New York Times stated that they would not cooperate and the Washington Post promised only limited cooperation. Despite this opposition, the Council received 160 complaints in its first nine months, and acted on a total of fifty-nine during its first two years of operation. Nevertheless, the Council did not get the kinds of complaints it was seeking, partly, perhaps, because unhappy consumers consider it remote from the people and unable to provide effective redress of wrongs.


461. Balk, supra note 41, at 3-4; Ritter & Liebowitz, supra note 335, at 862.


463. Ritter & Leibowitz, supra note 335, at 862.

464. Ritter and Liebowitz disagree with this conclusion, but their article was written only shortly after the National News Council’s formation. Ritter & Leibowitz, supra note 335, at 862-63.

465. Kennedy, supra note 427, at 27; see also E. DENNIS, supra note 79, at 117-18. In 1972 the Ethics Committee of the American Society of Newspaper Editors asked its 740 members by questionnaire whether they would support a press council in their own area. By a vote of 234 to 122 they said they would not, and by a vote of 296 to 92 they opposed official ASNE support for press councils. L. BROWN, supra note 32, at 79. See generally id., at 77-78.


committed by a television network or a national wire service. In this sense a local news council is likely to be more effective. Kennedy, supra note 427, at 27.

One critic complains that the National News Council has not gone out looking for complaints and that it has been too timid in its criticism of the media in those complaints it has handled. In addition, the sanction of publicity is limited because there are no media who have pledged to report Council decisions. Thus, it would appear that the National News Council has been neither widely accepted nor had a significant impact on the behavior of the nation's media.

Ritter and Leibowitz conclude their discussion of press councils by arguing that it is the proper mechanism for ensuring media responsibility:

The law can guarantee a free press, but it is incapable of guaranteeing a fair press. The journalism profession must recognize that while its enterprise is and should remain a private business, free from government regulation, its efforts to define and realize standards of performance are also a community concern. A mechanism is needed through which individuals who understand the complexities of modern journalism and members of the community can meet and discuss press performance and press responsibility. Their discussions should not be restrained by strict interpretations of the first amendment; elementary fairness and high journalistic standards should serve as their guides. A press council satisfies this need.

While we agree wholeheartedly with the goals outlined by these authors, we do not believe that press councils by themselves are the most efficacious way of achieving them.

First, because the problem of media irresponsibility is national in scope, so too must be the solution. An analysis of the different press councils, however, suggests that the Minnesota News Council has been more effective than the National News Council, its national counterpart. Partly this may be because it is easier to get the cooperation of a smaller number of media. It is also because there is not the same confidence by the public that the National News Council will be able to provide redress to citizens who have been unjustly treated in a nationwide television report or a na-

470. In this sense a local news council is likely to be more effective. Kennedy, supra note 427, at 27.
471. Id.
472. But see supra note 465. The decisions of the NNC are published in their entirety in the Columbia Journalism Review.
473. Ritter & Leibowitz, supra note 335, at 870.
474. See supra notes 452-57, 460-68 and accompanying text.
tional wire service article. Even if all states had press councils, there would be no forum for the resolution of abuses by national media because none would have jurisdiction over the perpetrator of the alleged abuse.

Second, unless all media outlets agree to abide by the decisions of a National News Council and promise to publicize them, the press council is bound to be ineffective. The experience of the National News Council clearly demonstrates that a mechanism that is imposed on the media by an outside group will be resisted. Unless it has the allegiance of the media themselves, the council's actions will be impeded or ignored.

The most fundamental problem with using a press council as the sole means of achieving media responsibility is the slow and lengthy nature of the process. A press council does, in fact, create a common law of media ethics, but this law evolves over a long period of time and is limited to the subjects about which the consuming public chooses to complain. The development of a code of ethics by the media themselves could be accomplished much more rapidly, and it would be much more complete.

D. Conclusion

As the above discussion suggests, each of the existing mechanisms that might help to assure media responsibility toward the public they serve has its limitations. The ethical principles that have been promulgated by the various organizations representing discrete portions of the publishing community are so general that they are incapable of molding behavior on a day-to-day basis. The expression of consumer disfavor through cancelled subscriptions or a drop in television ratings is an unlikely and ineffective means of forcing journalists to modify their behavior. Existing internal mechanisms, whether correction sanctions, letters to the editor, or an ombudsman to mediate between the media outlet and the public, do not require journalists to undergo the kind of soul searching we believe is necessary. Bar-bench-media contacts, though useful, include no representatives of the public and

475. See supra text accompanying note 470.
476. See supra notes 465-66 and accompanying text.
477. See supra text accompanying note 429.
478. See infra notes 529-37 and accompanying text.
479. See supra notes 381-82 and accompanying text.
480. See supra notes 335-38 and accompanying text.
481. See supra notes 352-60, 405-06 and accompanying text.
thus are limited to resolution of conflicts between the media and
the legal system.\textsuperscript{482} A press council is certainly an improvement
because it is the first mechanism that actually brings issues of irre-
 sponsibility into the open and attempts to wrestle with them. Nev-
evertheless, existing experiments have been only partly successful due
to limited jurisdiction or lack of cooperation from the media and
the public, and a common law of media ethics will take too long to
develop.\textsuperscript{483}

Through criticism of these mechanisms we do not mean to sug-
gest that they be scrapped. Instead, we think that another mecha-
nism—a code of ethics created by the media for the media—would
be a more effective way of ensuring media responsibility. Whether
a code of ethics by itself would be sufficient, we cannot say, but
without one we fear that outside intervention in the "press func-
tion" will be inevitable.\textsuperscript{484}

The development of a code of ethics to guide media behavior at
all stages of the "press function," from collection to dissemination
of information, would serve a number of functions beyond the ca-
pabilities of the existing mechanisms. The code of ethics would
be national in scope, an absolute necessity in light of today's media
networks. It would also force journalists to devote more of their
time to thinking about their ethical responsibilities to the public.
This would permit them to come up with the answers to ethical
problems posed by conflicting values before they arise so that they
will know how to act under the time pressures associated with their
jobs which do not permit contemplative, philosophical
ruminations.\textsuperscript{485}

\textsuperscript{482} See supra notes 395-97 and accompanying text.
\textsuperscript{483} See supra notes 464-78 and accompanying text.
\textsuperscript{484} In 1947 the Hutchins Commission called for the media's self-regulation to prevent
possible governmental regulation. It warned that "[n]o democracy, . . . certainly not the
American democracy, will indefinitely tolerate concentrations of private power irrespon-
sible and strong enough to thwart the aspirations of the people. Eventually governmental
power will be used to break up private power, or governmental power will be used to
regulate private power—if private power is at once great and irresponsible." Hutchins
Commission Report, supra note 78, at 80. This belief underscored the decision by the
Twentieth Century Fund to establish the National News Council. Balk, supra note 41, at
5; see also supra notes 20-27 and accompanying text.

According to one commentator, the Hutchins Commission Report was not accepted by
the media because of its warning of possible governmental regulation. W. Schramm,
supra note 40, at 90-91.
\textsuperscript{485} See supra notes 343-45 and accompanying text.
V. Media Self-Regulation Through a Detailed Ethical Code

A. Introduction: Professionals and Their Codes of Ethics

Since the late nineteenth century groups of professionals, and those aspiring to professional status, have sought to control access to their profession through either self-regulation or regulation by the state. The first two professions to utilize the power of the state in this way were medicine and law, which, during the late nineteenth century, received from state legislatures statutory power of self-regulation. The rationale for such a power was the need to protect the public from incompetent members of the profession. Because the profession had a monopoly on esoteric knowledge, neither the state nor the public would be able to decide who was really incompetent. It was therefore necessary to delegate the power to weed out incompetents to the profession itself. In return for this power, the profession promised to control the influx into the profession, oversee the type of preparation required, and discipline those who misused their power or misrepresented their knowledge. More recently aspiring professions have sought state licensing to protect their monopoly of knowledge and keep those who have not received the proper training from holding themselves out to the public as professionals. By 1975 it was estimated that over one hundred separate professions and occupations were licensed by one state or another.


487. Critics of the professions maintain that the real reason they seek control is economic—to increase the professions' income over the levels it would be if there were perfect competition. See, e.g., Horowitz, The Economic Foundations of Self-Regulation in the Professions, in Regulating the Professions (R. Blair & S. Rubin eds. 1979); see also R. Blair & S. Rubin, supra note 27, at vii.

488. The components of a profession, according to Haug, are monopolization of knowledge achieved through limitation of access to university training, and the mystification of the public about how esoteric that knowledge really is. Licensing procedures are mechanisms against alternative claims to knowledge by interlopers and help to guard the monopoly. Ethical codes justify trust, as they codify the service ideal and promise that the interests of the client will supersede the concerns of the practitioner. Indeed, one of the stated goals of the specialized training is to produce practitioners who have internalized the norm of trustworthy service as part of their achieving professionalism.


489. One of the most recent groups to be regulated is state employees. As reported in State Government News, Watergate . . . produced a flood of ethics legislation. By 1975, all states had some type of provision governing conflict of interest by public officials. By 1977, most states had strengthened or enacted laws requiring financial disclosure by pub-
Generally speaking, all professions, whether self- or state-regulated, share a number of basic characteristics. Each is governed by a board of experts appointed by the governor which is responsible for the overall regulation of the profession. These regulatory boards are composed primarily of members of the licensed group, and they are given sweeping powers to dictate educational and other entry requirements and to establish standards of conduct for the profession to follow. Entry standards are the second common characteristic of state-licensed professions. The state licensing act typically defines the minimum education, experience, and fitness requirements. The board must then determine the specific educational and training programs that will satisfy the statutory requirements and accredit educational institutions offering the professional curriculum. Finally the board must prepare and administer an examination aimed at measuring the competency of candidates for a license. Citizenship, resi-

lic officials." STATE GOV'T NEWS, Jan. 1980, at 6, 7. During the decade of the 1970's states have also enacted laws regulating lobbyists and created codes of conduct for public officials. Id.

The characteristics of state ethics boards, the coverage and scope of financial disclosure and conflict of interest provisions, and the registration provisions governing lobbyists, are found in BOOK OF THE STATES 30-31, 32, 140-42 (1980-1981).


491. The following discussion draws from Rubin, The Legal Web of Professional Regulation, in REGULATING THE PROFESSIONS 36-37 (R. Blair & S. Rubin eds. 1980).

492. The legal profession, because lawyers are officers of the court, cannot be regulated by a board appointed by the governor. See infra notes 520-28 and accompanying text. Instead, the state supreme court is responsible for regulating the practice of law. It usually delegates authority to the state bar association and an independent board of law examiners appointed by it to carry out routine regulatory functions. MINN. STAT. § 481.01 (1980).

493. See, e.g., MINN. STAT. § 147.01(1) (1980) (physicians and surgeons); id. § 148.03 (chiropractors); id. § 148.181(1) (registered nurses); id. § 154.22 (barbers); id. § 326.04 (architects, engineers, land surveyors, and landscape architects). Similar mechanisms govern the other forms of employment included in MINN. STAT. ch. 326—accountants, id. §§ 326.165-.231, electricians, id. §§ 326.241-.248, private detectives, investigators, and protective agents, id. §§ 326.31-.339, plumbers, id. §§ 326.37-.45, steamfitters, id. §§ 326.46-.52, motion picture film exhibitors, id. §§ 326.523-.53, watchmakers, id. §§ 326.54-.547, and water conditioning contractors and installers, id. §§ 326.57-.66.

494. See, e.g., id. § 147.02 (physicians and surgeons); id. § 148.06 (chiropractors); id. § 148.191(2) (registered nurses); id. § 154.24 (barbers); id. § 326.06 (architects, engineers, land surveyors, and landscape architects).

495. See, e.g., id. § 125.05,.09 (teachers and school supervisory and support personnel); id. §§ 147.02,.021 (physicians and surgeons); id. §§ 148.04,.10 (chiropractors); id. §§ 148.191(2),.211(1) (registered nurses); id. § 154.07,.16 (barbers); id. §§ 326.10,.11 (architects, engineers, land surveyors, and landscape architects).

496. There have been a number of lawsuits challenging the citizenship requirements.
dency, age, and good moral character are additional requirements that are either part of the licensing law or are established by the board. Licensing statutes also provide for "grandfathering" so that all those practicing at the time the licensing requirement is promulgated are automatically licensed without having to comply with the law's requirements. Related to this is the prohibition of unauthorized practice of the profession by unlicensed individuals.

Aside from controlling admission to the profession, licensing boards also control the behavior of those already admitted through a code of conduct and internal disciplinary procedures. The code of conduct exists to guarantee that licensees are professionally competent and fit. It proscribes unethical dealings with clients and also generally restrains competition between licensees of the same profession. To implement the code of conduct requires some sort of formal disciplinary mechanism, including powers of investigation, prosecution, adjudication, and punishment, which is usu-

See, e.g., In re Griffiths, 413 U.S. 717 (1973) (citizenship requirement struck down as violative of equal protection).

497. Residency requirements can be manipulated by a profession seeking to keep out those from other states so as to better protect its monopoly. Although the Supreme Court upheld New Mexico's six-month residency requirement for the practice of law as a reasonable period to allow the Board of Bar Examiners to investigate the character of those seeking admission, Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M.), aff'd, 409 U.S. 1020 (1972) (per curiam), several federal courts have held one-year residence requirements unconstitutional. See, e.g., Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

498. This requirement has been upheld for lawyers as long as it is rationally related to the applicant's fitness or capacity to practice his profession. See Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

499. See, e.g., MINN. STAT. § 147.02(1) (1980) (physicians and surgeons); id. § 148.06(1) (chiropractors); id. § 148.21(1) (registered nurses); id. § 154.05 (barbers); id. § 326.10(1) (architects, engineers, land surveyors, and landscape architects).

500. See, e.g., id. § 125.10 (teachers and school supervisory and support personnel); id. § 147.171 (physicians and surgeons); id. § 148.221 (registered nurses); id. § 154.13 (barbers).

501. See, e.g., id. § 147.10 (physicians and surgeons); id. § 148.101 (chiropractors); id. § 148.283 (registered nurses); id. §§ 154.01, 19 (barbers); id. § 326.02(1) (architects, engineers, land surveyors, and landscape architects); id. § 481.02 (attorneys).

502. As one critic explains, "The various professional ethics codes, which again are intended to reduce the client's uncertainty as to the quality of service received, while maintaining the clients' perhaps erroneous perception that the likelihood of receiving better quality service increases with its price, help to achieve a market solution which approaches that of superperfect price discrimination, implying in turn that the service might be provided to some persons who would otherwise not receive it." Horowitz, supra note 487, at 15.
ally delegated by the licensing act to the board. 503

During the early decades of the twentieth century, journalism educators sought to place journalism within this mold by comparing it to law and medicine as a public trust. 504 They promoted the idea of professionalism as a way to achieve acceptance and recognition for journalists, and they believed that formal education and codes would make journalism an honorable and legitimate profession. 505 Although journalism ultimately chose a different route, the rationale for regulation as well as the source of such regulatory power over journalists are not readily apparent. Moreover, there is some question as to whether journalism is even a profession.

As the above discussion demonstrates, professions are licensed by the state to protect the public in its direct dealings with the profession involved. 506 The theory is that licensing is necessary to ensure a high degree of professional competence and to provide high quality care to the public through control over training facilities. 507 Licensing is also considered necessary to ensure that professionals, who have a monopoly of esoteric knowledge not comprehended by the public they serve, do not take advantage of the trust that their individual clients place in them. 508

503. See, e.g., MINN. STAT. § 125.09 (1980) (teachers); id. § 147.021 (physicians and surgeons); id. § 148.10 (chiropractors); id. § 148.261 (registered nurses); id. § 154.16 (barbers); id. § 326.11 (architects, engineers, land surveyors, and landscape architects); id. § 481.15 (attorneys).

504. C. CHRISTIANS & C. COVERT, supra note 344, at 1-4; see supra text accompanying note 364.

505. See, e.g., Johnson, The Utilization of the Social Science, 4 JOURNALISM BULL. 30 (1927); Scott, supra note 364; see also Carey, A Plea for the University Tradition: AEJ Presidential Address, 55 JOURNALISM Q. 846 (1978).

506. Horowitz, supra note 487, at 8.

507. Haug, supra note 488, at 63. The client is not considered knowledgeable enough to criticize the professional's performance; only peers can adequately evaluate it. "Only fellow practitioners realize the shortcomings of knowledge and the uncertainty of outcomes, and can be trusted to make fair and informed judgments of their colleagues' job performance." Id. at 63-64.

508. See supra note 488. Weckstein provides the traditional rationale for the entire regulatory system:

The theory is that since the acquisition of professional skill requires a special aptitude and extensive period of study or training, laymen are incapable of adequately performing professional services for themselves and usually unable to determine whether or not a professional person has acted properly. Consequently, the uninitiated and uninformed must put a great deal of trust in the trained professional. . . . Where the services being performed involve the health, liberty, or property of the patient or client, it is of utmost importance that he be able to rely upon the competence and character of the professional. It is to this end that professional status is properly limited to those who successfully complete the requisite training and are willing to abide by appropriate standards of conduct. Thus, a layman, frequently unable to investigate or judge an indi-
DO WE WANT A RESPONSIBLE PRESS?

The licensing of journalists presents certain serious problems when one compares the reasons for its imposition—the need to guard against media abuse of power and the need to ensure press responsibility—\(^{509}\)—with those used to justify the regulation of other professions. Journalists do not have individual clients, they have no direct, personal relationship with "the public" at large, and they have no control over esoteric knowledge that they can manipulate to their own advantage at their clients' expense. Thus, the rationale for regulating is weak, as the following brief discussion exemplifies.

First, no special training is needed to become a journalist. While most graduate from college as journalism majors,\(^{510}\) this is not a necessary prerequisite, and one can enter the profession with a number of other academic backgrounds.\(^{511}\) Although presently unusual, a person with sufficient financing can still become a journalist simply by opening his own newspaper or buying out an existing one.\(^{512}\) Another problem is that the type of training needed is different for newspaper reporters, radio announcers, and television newscasters.

Second, there is no direct professional/client relationship in which the client must be protected. Often information is collected without the journalist having any direct dealings with the individual,\(^{513}\) and media responsibility to "the public" at large is a diffuse, theoretical concept that is difficult to define and to police.

This raises the question of whether journalism should even be labeled a profession. It is generally accepted that professions are

vidual professional's skill or loyalty, must put his faith in professional certification, codes of ethics, and professional disciplinary enforcement.


509. See supra notes 12-16 and accompanying text.

510. In 1977 there were 247 journalism and mass communications programs. JOURNALISM EDUCATOR, Jan. 1977.

511. Many, for example, receive training in the liberal arts. As Christians and Covert remark, "[A] literate art based on a talent rather than generally distributed throughout the population, journalism involves a basic skill with the language, a talent not restricted to graduates of approved schools of instruction." C. CHRISTIANS & C. COVERT, supra note 344, at 3.

512. While not anyone can be a doctor or attorney, anyone with the desire to write who has some money can be a publisher, editor, or reporter. Finnigan, The Editor's Notebook, St. Paul Pioneer Press, Mar. 2, 1980, at 3F, col. 4; see also, Minneapolis Star, Feb. 20, 1980, at 10A (story of small town newspaper run by man with no experience in journalism).

513. This is often considered incorrect. Should a person be given the chance to give his side of the story before the information is laid before the public?
marked by an emphasis upon learning and service to the public. Roscoe Pound defined “profession” as “a group of men pursuing a learned art . . . in the spirit of a public service.” It would appear that journalism satisfies the definition only in part. This was explicitly recognized in the Hutchins Commission Report which called for the professionalization of the journalistic trade:

A profession is a group organized to perform a public service. There is usually a confidential relation to the recipient of the service, one of advice, guidance, and expert assistance . . . . And there is an esprit de corps resting, among other things, on a common training and centering in the maintenance of standards . . . .

No public service is more important than the service of communications. But the element of personal responsibility, which is of the essence of such professions as law and medicine, is missing in communications. Here the writer works for an employer, and the employer, not the writer, takes the responsibility . . . .

But if professional organization is not to be looked for, professional ideas and attitudes may still be demanded. Profession or not, professionalization is what is required. This would support the establishment of rules the violation of which would result in suspension or loss of license, as long as the media corporations would be willing to comply with the decisions of a media regulatory board.

The most serious problem associated with media regulation, however, concerns the extent of the state's power to regulate. The first amendment clearly protects the freedom to publish, which makes the profession of journalism, to a certain extent, constitu-

514. Wade, Public Responsibilities of the Learned Professions, 21 LA. L. REV. 130 (1960); Weckstein, supra note 508; see also Haug, supra note 488. Tawney defined a profession as follows:

A trade which is organized . . . for the performance of a function . . . . It is a body of men who carry on their work in accordance with rules designed to enforce certain standards both for the better protection of its members and for the better service of the public . . . . Its essence is that it assumes certain responsibilities for the competence of its members or the quality of its wares, and that it deliberately prohibits certain kinds of conduct on the ground that, though they may be profitable to the individual, they are calculated to bring into disrepute the organization to which he belongs.


516. HUTCHINS COMMISSION REPORT, supra note 78, at 76-77.

517. Is this really possible? What if Walter Cronkite had been suspended? How would CBS News have survived?

518. For a discussion of the different formulations of the extent of the protection provided by the press clause, see supra notes 105-34 and accompanying text.
tionally protected in a way that other professions are not. Thus, the state could not be the source of the licensing, which would have to be self-imposed.

This constitutional problem, however, is not insurmountable, as can be demonstrated by the regulatory system that has developed to control the professional behavior of lawyers. Because they are considered to be officers of the court, and both the federal and state constitutions require the separation of power of the various branches of government, legislative licensing of the legal profession would also be unconstitutional. To ensure the profession’s accountability to the public it serves, state supreme courts have established systems of regulation that parallel those of the directly regulated professions. The only difference is that the regulatory board is established by the state supreme court rather than by the state legislature, the board is responsible and reports to the state supreme court which must approve the disciplinary

519. See, e.g., Model Code of Professional Responsibility. Judges too have their codes of conduct. The judges of the State of Minnesota, for example, are subject to a Code of Judicial Conduct which was adopted by the Supreme Court of the State of Minnesota on February 20, 1974. It details acceptable and unacceptable forms of judicial behavior in matters such as the judges’ responsibility to uphold the integrity and independence of the judiciary, to avoid impropriety or the appearance of impropriety, to perform his duties impartially and diligently, to endeavor to improve the law, the legal system and the administration of justice, to avoid extrajudicial activities likely to create a conflict of interest, and to refrain from political activity.

520. See, e.g., Maryland State Bar Ass’n v. Agnew, 271 Md. App. 543, 318 A.2d 811 (1974); Hoppe v. Kapperick, 224 Minn. 224, 28 N.W.2d 780 (1947); In re Wilson, 391 S.W.2d 914 (Mo. 1965).

521. U.S. CONST. arts. I-III. Minnesota’s constitutional provision reads as follows:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

MINN. CONST. art. III, § 1.

522. It would mean that legislators would be controlling the behavior of the judicial branch, which is not allowed by the constitution. See Lathrop v. Donohue, 367 U.S. 820 (1961) (rejecting challenge to constitutionality of integrated bar in Wisconsin); see also Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973) (legislation regarding use of attorneys’ dues was unconstitutional legislative usurpation of judicial function of regulating practice of law).


524. M. PIRSIG & K. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 19 (3d ed. 1976); Rubin, supra note 491, at 36.
actions against practicing members of the profession\textsuperscript{525} and the codes of behavior\textsuperscript{526} to which they must conform. Control over the quality of legal education is ensured through accreditation of law schools by the professional association of lawyers\textsuperscript{527} and through the state supreme court’s control over the standards and examinations used to admit new members to the profession.\textsuperscript{528}

\textbf{B. The Rationale for an Unenforceable Ethical Code}

While there is no media institution comparable to a state supreme court, the various organizations representing different aspects of the journalistic process and different types of media could certainly together create a Media Ethics Board. They could also agree that such a board, possibly with state affiliates, would have the same kind of power to oversee professional training as state supreme courts presently have over that of lawyers.

Because of the existence of the first amendment, however, the kind of disciplinary procedures used in other professions could not

\textsuperscript{525} As the Maryland Supreme Court stated in Maryland State Bar Ass’n v. Agnew, 271 Md. App. 543, 549, 318 A.2d 811, 814 (1974),

A court has the duty, since attorneys are its officers, to insist upon the maintenance of the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing its image into disrepute. Disciplinary procedures have been established for this purpose, not for punishment, but rather as catharsis for the profession and a prophylactic for the public.

\textsuperscript{526} Codes of behavior encompass not only one’s relationship with clients, but also the way one leads one’s private life. The court implied as much in \textit{In re} Wilson, 391 S.W.2d 914, 917-18 (Mo. 1965), when it stated:

The right and power to discipline an attorney, as one of its officers, is inherent in the court. . . . This power is not limited to those instances of misconduct wherein he has been employed, or has acted, in a professional capacity; but, on the contrary, this power may be exercised where his misconduct outside the scope of his professional relations shows him to be an unfit person to practice law.

But see \textit{In re} Peterson, 274 N.W.2d 922, 925 (Minn. 1979) (supreme court’s responsibility to formulate and enforce ethical principles and standards of professional conduct does not give it license to judge personal morality but only professional moral character of bar members).

The Code of Professional Responsibility was adopted by the American Bar Association on August 12, 1969. It was amended in 1970, 1974, 1975, and 1976. It contains some 30 printed pages of aspirational goals and minimal responsibilities of persons engaged in the practice of law. A new set of model rules has recently been approved by the ABA’s House of Delegates.


possibly be instituted to control the behavior of the media. A media code of ethics could serve as no more than a model of how a responsible journalist or a responsible media outlet should behave. The media board of ethics could interpret the code of ethics and could determine when certain behavior violates it, but it could take no disciplinary action because state power is proscribed and there is no inherent power to police the media profession that can be found to emanate from anywhere in the Constitution. Since a media board of ethics would have to be entirely controlled by the profession and be completely independent of any state organs, it would lack any form of coercive power other than the power of persuasion and of adverse publicity.

Given the lack of coercion in the hands of a media board of ethics and the consequent unenforceability of whatever media code of ethics is developed, why bother to write such a code of ethics at all? especially when ethical codes abound in the industry. As we previously demonstrated, the existing codes are far too general; they rely on platitudes and do not deal with the difficult day-to-day issues faced by practicing journalists, such as whether someone's name needs to be included in an article, to what extent illegal means can be used to collect necessary information, or what kinds of sources can safely be cultivated. The major reasons for developing a comprehensive media code of ethics dealing with the entire editorial process from collection to dissemination of information are to educate the media and to reassure the public.

The goal of a code of ethics for the media is to force the media to recognize that their first amendment rights do not exist in a vacuum but must interact with other constitutionally protected rights. At the present time journalists do no more than pay lip service to such rights as that of an individual to some privacy and that of a defendant to a fair trial. The media outcry at Supreme Court de-

529. Some members of the media believe that it is doubly ridiculous to have a media code of ethics when the legal profession's Code of Professional Responsibility is such a failure. See THE MEDIA AND THE LAW, supra note 99, at 158; Duluth News-Tribune, Feb. 20, 1980, at 8C, col. 1 ("Such guidelines, when used by other professions, are usually little more than cosmetic niceties. Lawyers and doctors have codes of ethics, but these codes are rarely referred to in making day-to-day decisions. Instead, such codes get a cursory reading in law or medical school, and then may be framed for hanging on the office wall.").

530. The Society of Professional Journalists, the American Society of Newspaper Editors, the National Association of Broadcasters, for example, all have codes, and so do many individual media outlets. See supra notes 370-82 and accompanying text.

531. See supra text accompanying notes 381-82.
cisions such as *Gannett Co. v. DePasquale*\(^{532}\) clearly demonstrates their myopic perspective.\(^{533}\) The process of drafting a code of ethics will force the media to recognize that there are rights besides their own which must be taken into consideration and that compromises are necessary.

The development of a code of ethics by the media for the media will allow them, rather than some other group, to determine how to strike the balance between rights in conflict. It will also permit them, rather than some other group, to draw the line between behavior that is proper and justifiable and that which is not. Although courts or legislatures might have struck the balance or drawn the lines somewhat differently, there will be a tendency on the part of governmental institutions to defer to the decisions of the media once they demonstrate that they are committed to behaving responsibly. In fact, it is likely that courts will look to the media's code of ethics for guidance when called upon to resolve conflicts between the media's and others' rights.\(^{534}\)

There is also a need to reassure the public that the media are not ignoring its interests. By drafting their own code of ethics, the media would publicly demonstrate that they are finally coming to recognize the abuses inherent in unchecked power and their commitment to check it themselves. This will do much to counteract the media's public image of an arrogant institution that uses the shield of absolute press freedom to protect itself from the imposition of checks on its irresponsible behavior.\(^{535}\) An improved image of the media\(^{536}\) will also strengthen public support for first amendment values.\(^{537}\)

\(^{532}\) 443 U.S. 368 (1979).

\(^{533}\) See Lewis, *supra* note 16; *supra* note 30; *infra* note 577.

\(^{534}\) In much the same way courts defer to the decisions of administrative agencies that involve the exercise of their unique expertise. See, *e.g.*, Board of Governors *v.* Agnew, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring); Skidmore *v.* Swift & Co., 323 U.S. 134, 140 (1944); Reserve Mining *v.* Herbst, 256 N.W.2d 808, 824-26 (Minn. 1977).

\(^{535}\) See *supra* note 31 and accompanying text.

\(^{536}\) The mere existence of a code of ethics, of course, does not automatically ensure the profession's high regard in the eyes of the public. The legal profession has such a code, but its status has declined. Partly this may be due to its image and the image of its code as being more concerned with preventing competition within the profession than protection of the public. It is hoped that the new code and more activist state boards of professional responsibility, which punish attorney overreaching rather than advertising, will improve the image of lawyers in the eyes of the public.

\(^{537}\) See *supra* note 31 and accompanying text.
C. The Substance of a Media Code of Ethics

The following discussion of the issues with which a media code of ethics would deal is in no way meant to be exhaustive. Instead, we merely hope to raise some of the critical questions that must be resolved in the process of drafting such a code.

In determining which areas of media behavior are to be regulated, one must begin by defining what is meant by media responsibility. The definition itself will then provide direction as to what kinds of activities should be encouraged or curtailed. The Hutchins Commission Report\(^\text{538}\) issued in 1947 defined the press' responsibility as follows:

- to provide a truthful, comprehensive and intelligent account of the day's events in a context that gives them meaning;
- to provide a forum for the exchange of comment and criticism;
- to project a representative picture of constituent groups in society;
- to present and clarify the goals and values of society;
- to provide full access to the day's intelligence.\(^\text{539}\)

The stated goals of the National News Council as delineated in the study prepared by the Twentieth Century Fund\(^\text{540}\) are also informative:

- to receive, to examine, and to report on complaints concerning the accuracy and fairness of news reporting;
- to initiate studies and report on issues involving freedom of the press.\(^\text{541}\)

Thus, media responsibility involves accuracy and fairness in coverage and access by the public to its pages or airwaves. What is missing from these definitions is the need to guard against the unnecessary infringement on individual rights by the media's overzealousness in collecting or presenting the news.

It is also necessary to decide which aspects of the editorial process, and consequently which groups of journalists, must be included in a code of ethics. It is our firm belief that in order for such a code to be effective, it must deal with all areas of news media activity—the collection, control, and dissemination of information—because they are all inextricably intertwined in the pro-

\(^{538}\) Hutchins Commission Report, supra note 78.
\(^{539}\) Id. at 20-29.
\(^{540}\) A Free and Responsive Press, supra note 31.
\(^{541}\) Id. at 3.
duction of the news and because each phase impinges on rights of privacy, involves moral issues associated with the legality of the methods, and is presently controlled to a greater or lesser extent by governmental actions.

1. Media Violations of the Law to Obtain News

When and under what circumstances is it ethically permissible for representatives of the news media to participate actively or passively in violations of the law in order to obtain the news? To clarify the issue, we agree that journalists, like other citizens, can choose to violate laws they in good faith believe to be unconstitutional when no attempt is made to conceal the violation and the purpose of the violation is to lay the basis for a constitutional challenge.542

Journalists take the position that violation of the law can be justified in the pursuit of news.543 As one reporter put it:

[A] lot of us on . . . the news media side of the table . . . are forgetting the essential anarchic tradition that underlies the First Amendment . . . . But there is a fundamental hostility between order and public information. And when our lawyer here raises the question about whether or not the press ought to be sensitive about when we disobey the law, I’m of course troubled by that as a citizen. But as a journalist there are times when my strongest sense is that the First Amendment is a mandate for an anarchic indifference to the felt needs of order, regularity, and continuity. In other words, we ought to kick over the bucket every now and then in our side of it . . . . Because (in the Pentagon Papers case we said that) if it gets to a crunch between our interest in publishing and a question of protection of the national security, let someone else worry about it. And when we get to one of these other cases later in our conference about breaching grand jury secrecy, you’re going to see this tension between anarchic traditions of an open press and the protective order even more vividly than you do here.544

What about violations associated with the deliberations of a grand jury? Under our legal system deliberations of a grand jury

542. Even here, some judges believe that this is not the proper way to challenge unconstitutional laws. Nevertheless, much of the Supreme Court’s caseload involving first amendment challenges is based on unlawful activities. See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965).

543. This is discussed in detail in The Media and the Law, supra note 99.

544. Id. at 73.
have always been conducted in secrecy. Disclosure of testimony presented to a grand jury before the return of an indictment is a violation of well-established law whose constitutionality cannot be seriously challenged.

Is it ethical for a representative of the news media to induce a member of the grand jury to divulge the proceedings and publish the information obtained? Would it make a difference if the representative of the news media passively received the information rather than inducing its disclosure? If so, would it be ethically permissible for the representative of the news media to create the situation in which such an illegal disclosure would be likely? Would it make a difference if the person responsible for the policies of the news media in the particular situation believed that the law which makes grand jury proceedings secret was an unwise one?

The answers to these questions, of course, depend to a large degree on one's attitude toward the role of the grand jury in modern American society. As two commentators note,

At one time, no editor in the nation would have seriously considered violating the sanctity of the grand jury. Each grand juror wore a journalistic chastity belt . . . . Even during Watergate, the Washington Post and other newspapers were edgily cautious about contacting grand jurors.

But like the times, the institution of the grand jury has changed. Watergate demonstrated that grand juries can be manipulated by participants and others. Some individuals did not have to appear before the grand jury; rather, they were accorded special treatment . . . .

. . . .

Too often the grand jury functions not as a judicious finder of facts, but as a prosecutorial tool in the preparation of a case, subjecting defendants to debilitating financial expenses, inducing plea bargaining by witnesses who will agree to testify against prosecutorial targets.

Something else has recently become commonplace at the grand jury stage of the criminal justice process. U.S. attorneys and defense lawyers have begun to leak material to reporters, where it serves their own or their client's purposes. They at-


546. See, e.g., MINN. STAT. § 613.68 (1980); MINN. R. CRIM. P. 18.08.
tempt to induce newspapers to write their stories at a time and in a manner they consider advantageous. U.S. attorneys have not hesitated to use the press by leaking certain elements of cases to reporters to increase the pressure on potential witnesses and target defendants. And the media readily and often knowingly lets itself be used, not out of recklessness or malice, but because the information they receive is so newsworthy. 547

Obviously, the way in which the media receive this kind of information will and must affect their decision to publish. Nevertheless, it is imperative that these questions be answered so that some lines can be drawn to distinguish printable from nonprintable information and legitimate from illegitimate media behavior in the process of amassing it.

Another problem of a similar nature involves the issue of whether the media should actively use illegal means to acquire information believed to be securely hidden from the public by its owner. Is it ethical for a media representative or an agent of the news media to break and enter a building in order to obtain information considered to be of vital public interest? If not, would it be acceptable for a news media representative to receive and print such information which he or she knows or reasonably should know to have been stolen by the person delivering it? If the information involves an issue of national security, should the rules against publication of illegally obtained information be relaxed or tightened?

What about lesser violations of the law? Would it be ethical for a representative of the news media to trespass on private property in search of newsworthy information or to enter a home or office without the owner’s permission? Would it be ethically permissible to “borrow” a document thought to have newsworthy information without the permission of the owner when a media representative is visiting another business? 548 Should the media encourage others to do so? What about wiring others with recording devices?

Should information gathered in this way ever be published? Would it be permissible to publish the information as long as it is not attributed to this source? This type of information is published


548. As Simons and Califano note, "If a group of reporters and editors in any room were asked whether they would physically steal a document in order to obtain a story, the answer would be a chorus of honorable 'No's!' All, however, could be charged with 'stealing' with their eyes (even upside down)." Id. at 35.
all the time. One reporter to whom this question was posed responded as follows:

You get a document and you know the document's stolen and you say, "We can't use a stolen document because we can't be in the position of using a stolen document . . . . Get it back there after we've made a copy." Now that we know it exists and someone has it, can we get another copy of it somewhere more legitimately? If not, can we develop a story knowing the contents of it by asking a lot of questions of the right people and develop an original story which we can say comes from other sources? The question of whether you use a document or don't use a document is in most cases too simple a question. You try to find a way in which you do and do not at the same time use a document. 549

In questions involving illegal acts by the media or their agents the conflict is between the duty of members of the media to respect society's decisions as to what behavior it will not tolerate from its members and their first amendment obligation to get and publish the news. Must media representatives, like all citizens, be subject to criminal penalties if they violate the law? Or are they held to a lower standard of behavior because of their responsibility to keep the public informed? A related question is whether the conspiracy laws should apply when media representatives induce others to violate the law so that their own hands will remain clean? There are no easy answers to these questions, but the media must begin to wrestle with them not only to protect their own members but to improve their status for honesty in the eyes of the public.

2. Coverage of Criminal Trials

The conflict that arises in this aspect of newsgathering is between the first amendment's guarantee of freedom of the press and the sixth amendment's guarantee to defendants of a fair trial. 550 Numerous guidelines exist here for the regulation of media behavior, but generally they have been imposed by the judiciary whose members do not tend to be sympathetic to media demands for access to information. 551 Experience demonstrates that the media receive more cooperation from the courts when they exercise a

549. Id. at 47.
550. The sixth amendment states in pertinent part that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.
551. See supra notes 178-89 and accompanying text.
certain degree of self-restraint.\textsuperscript{552} Thus, it would appear useful for the media to consider how to resolve the conflicts posed by the following examples.

Generally speaking, the prior criminal record of a defendant charged with a violation of the criminal law should not be offered in evidence to prove his guilt, although there are exceptions to this rule.\textsuperscript{553} In modern criminal procedure, the trial judge will frequently hold a pretrial hearing to determine whether, in a particular case, evidence of prior convictions should be received. If at a pretrial hearing a prior conviction is disclosed and the trial judge determines that reference to it at the time of trial will not be allowed, should the news media, while the case is still pending, report the prior conviction to the general public? If it does and if prospective jurors read and remember the account, the purpose of the law in rejecting prior convictions as proof of present guilt will have been undermined. Should it make a difference that the editor of the newspaper involved believed the judge to have been mistaken in his ruling? Should it make a difference that the journalist involved thinks the rule excluding evidence of prior convictions in criminal cases is an unwise one? Should it make a difference that the particular case is one representative of a type of crime endemic in the community with strong resultant public demand for a conviction?

It is another well-established legal principle that a person accused of a crime should not be compelled to testify against himself\textsuperscript{554} and that confessions of guilt should not be received in evidence unless freely and voluntarily given.\textsuperscript{555} Pretrial hearings are frequently held so that the judge can assess the voluntariness of a confession, and sometimes the judge will rule that a proffered confession was involuntary and therefore inadmissible. In such a situation, is it ethical for a news media representative to print the confession in whole or in part so that prospective jurors in the community know of its existence and will be consciously or uncon-

\textsuperscript{552} For a discussion of fruitful joint action, see supra notes 387-91 and accompanying text.

\textsuperscript{553} The general rule and its numerous exceptions are discussed in C. McCormick, McCormick's Handbook on the Law of Evidence § 190 (2d ed. E. Cleary 1972).

\textsuperscript{554} This right is protected by the fifth amendment which states in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

sciiously affected by this knowledge? Should it make a difference that the journalist making the decision to print believes in good conscience that the rule rejecting involuntary confessions is a bad one or that the trial judge who declared the confession to be involuntary made a mistake?

It is also a principle of criminal law that real evidence illegally obtained cannot be used to secure a conviction. Sometimes a trial judge will be called upon to examine the claims of the defense and of the state with respect to specific items of evidence and to rule whether it was or was not the product of an illegal search or an illegal seizure. If the trial judge rules the evidence inadmissible because of the method by which it was obtained, is it ethical for the journalist to report about the evidence while the case is still pending? Does it make a difference that he or she believes in good faith that the rule making this kind of evidence inadmissible in criminal trials is a bad one or that the judge in deciding that the evidence was obtained illegally made a serious mistake? The questions which arise in this field are even more difficult than those involving confessions because real evidence, even though illegally obtained, is not likely to be invented or contrived.

3. Publication of Private Facts

The conflict that arises here is between freedom of the press and the citizen’s right to protect his or her privacy. Although the United States Constitution nowhere states explicitly that such a right of privacy exists, it is well accepted by the Supreme Court that it either emanates from a number of different amendments or is part of a citizen’s first amendment protections. Linedrawing in this area is generally depicted as a clash between first amendment values.

It is often said that public officials give up much of their right to privacy by choosing to enter public life. This, of course, is why the Supreme Court has made it so much more difficult for public officials to prove that information published about them by the media

557. See Roe v. Wade, 410 U.S. 113 (1973) (source is fourteenth amendment’s concept of personal liberty and restriction on state action); Griswold v. Connecticut, 381 U.S. 479 (1965) (source is penumbra of Bill of Rights).
558. See supra note 65.
is libelous. Nevertheless, even public officials should be permitted some private life. Where the line between public and private should be drawn, however, is an extremely difficult question.

Do public officials have a right to privacy that must be respected by the media? Should all information about them be publishable or only that information which is reasonably related to their ability to carry out their public functions? How should the families of public officials be treated by the media? Which family members, spouses, children, parents, cousins, lose their right to privacy because of their relationship to a public official? What information about these people should be considered newsworthy? Should newsworthiness be related to the ability of the public officials to carry out their public function or to the public trust they have as a result of their positions as public officials?

Should the same policies apply to those who are not public officials but merely public figures? What makes a person a public figure? Should public figures who are associated with the government receive less protection than those whose public notoriety is unrelated to governmental activities? Which aspects of their lives are newsworthy as opposed to purely sensational?

What should be the policy toward reporting about ordinary citizens caught up in newsworthy events? Exactly what about them becomes public and what remains private? For how long do they remain public? Are there certain kinds of information that are more private and about which the media should be wary of discussing?

When should individual names be used in news stories? Should the answer to this question depend on whether the name belongs to a public official, a public figure, or a private citizen? Should the answer to this question depend on the person's relationship to the central point or points of the story?

Another important issue that must be faced by the media is what kinds of facts should be considered private. The conflict most often surfaces around the reporting of criminal activities, al-


560. When a young Kennedy or the son of a prominent judge is caught with pot, it is always printable, sometimes front-page news. In a sense, this is unfair to the children of public figures. Yet many politicians enthusiastically exploit their families for their own political purposes. If a politician uses his family to further his career and volunteers it to the public, is he not in effect putting his family into the public arena?

The Media and the Law, supra note 99, at 28.
though alcoholism and sexual behavior have also generated some controversy.561

Under what circumstances should information about past crimes be published? For how long a period of time are these past crimes relevant? Are certain crimes of inherently greater interest to the public than others? If there was an arrest but no conviction, should the information be published? What if the crime were committed when the individual was a juvenile?

Is alcoholism newsworthy? Under what circumstances does it become newsworthy and about whom? Should the alcoholism of public officials be more newsworthy than that of other persons? What should the policy be toward the disclosure of information about one’s sexual practices? Should this depend on whether one is a public official?562 Should these decisions be related to the effect of such behavior on the ability to carry out governmental functions? Should these decisions be related to the relationship of this fact to the central point or points of the news story? Are there any facts about other forms of private behavior that should always or never be reported?

4. Procedures to Govern Investigative Reporting

Investigative reporting has been identified in this article as one of the major forms of media overreaching.563 It is largely through investigative reporting that reporters are likely to disobey the law or to invade the privacy of individual citizens.564 It is also true that investigative reporting provides one of the most effective weapons against misbehaving public officials.565 Thus, it is partic-

561. For a discussion on the reporting of alcoholism, see id. at 141-43.
562. Jody Powell, White House press secretary under President Carter, maintains that the media should treat their own indiscretions the same way they treat those of public officials. “If it’s news that a Congressman is sleeping with a lobbyist of either sex or his secretary, shouldn’t it also be news if an important editor or columnist is doing the same thing?” Minneapolis Tribune, Apr. 11, 1981, at 3A, col. 1.
563. See supra notes 65-79 and accompanying text.
564. As two investigative reporters explain,
    Many fundamental techniques of investigative reporting involve actions some would label dishonest, fraudulent, immoral, and perhaps even illegal. Since investigative reporting aims at bringing corruption, hypocrisy, and law-breaking to public attention, it is reasonable to expect the newsgathering profession to act as ethically as possible. And if all the information a reporter ever needed for investigations was on file, in legally available public records, there would be no problem . . . . But the major fact of investigative reporting is that people frequently will go to great lengths to conceal damaging evidence.
565. See supra notes 53-64 and accompanying text. Although Watergate certainly was
ularly important that the media find some way of ensuring that investigative reporting continues to be used to uncover government misconduct while protecting the citizenry from overzealous newsgathering techniques. 566

Should the tactics of investigative reporting be used for only certain types of stories? Should this be influenced by the relationship of the story's subject to the governmental process? Who should make these decisions, the reporter, the editor, the publisher? What kinds of tactics should be permitted and what kinds proscribed? 567

Should there be some kind of internal policing mechanism to ensure that citizens are not harassed? Should citizens be able to complain to this person or persons secure in the knowledge that the complaint will be diligently investigated? What kinds of sanctions should be imposed on a journalist who is overly zealous in the investigative techniques used? Should a story in which such overly zealous techniques were used be published, even if the editor or publisher is aware of the indiscretions?

Related to these questions is the issue of whether sources should be paid for information and what effect such payment will tend to have on the veracity of the information received. 568 Although most newspapers will not buy information because it is too costly and would undermine their credibility with the public, television sta-

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566. Investigative reporters Anderson and Benjaminson suggest the following balance:

Most reporters use deceptive methods to gather information—on the theory that in a democracy the public’s right to information outweighs a public official's right to expect complete candor from journalists. Deceptive methods are justified, however, only when greater harm will be done the public if the information remains concealed than the harm done individuals by its publication. A reporter should never resort to questionable methods if the information can be obtained in any other way.

In those cases which are difficult to judge, most reporters tend to err on the side of dishonesty to obtain the information. The underlying assumption is that society has more to gain from an accurate, thorough reportage of events than it has to lose from the discomfort of the corrupt. Most professional journalists would prefer not to find themselves in a position of withholding important information from their readers simply to avoid worrying about their own personal ethics. Their overriding goal is to inform the public. Nevertheless, at some point, every investigative reporter who is in the least bit sensitive questions the ethics of the profession.

D. ANDERSON & P. BENJAMINSON, supra note 15, at 6-7.

567. This, of course, ties the dilemmas associated with investigative reporting to all the others that we discuss in this section.

tions frequently pay for information.\textsuperscript{569}

5. Procedures for Ensuring Accuracy

Conflicts that arise over this issue reflect the problems created by the time constraints under which the media operate and individual privacy rights. This is one of the major sources of individual irritation with the media\textsuperscript{570} which takes on added significance because of the lack of effectiveness of after-the-fact corrective measures. Too often journalists ignore the effects that their stories have on individual citizens,\textsuperscript{571} whether they be public officials or private persons. This is particularly problematic if the information reported is not accurate.

To what standard of accuracy can the media be held? What constraints imposed by the working conditions of print and electronic media make it necessary to allow for some degree of error in reporting and how much leeway will be permitted? Who within the organization will be given the responsibility to ensure that only accurate news reports are released, and what authority and methods of sanction will these persons have? Who within the organization will be charged with establishing the principles to follow in order to ensure accuracy, and who will be consulted? Should such issues be permissible subject matter for collective bargaining agreements?

How much verification is necessary before news is released to the public? Is greater verification necessary for damaging information? Should the person who is the subject of the story be given the opportunity to respond before publication? How should a refusal to respond be treated? Should there be different standards applied if the person is a private individual, a public figure, or a public official?

Should every media outlet have an institutionalized corrections mechanism? What prominence should it be given? Should corrections appear in a special section or should some be the subjects of news stories?

\textsuperscript{569} Id. at 35. These generally involve exclusive interviews with ex-public officials.
\textsuperscript{570} See supra note 88.
\textsuperscript{571} According to Anderson and Benjaminson the subjects of such investigations sometimes have nervous breakdowns, are jailed or hospitalized, or attempt to commit suicide. D. ANDERSON & P. BENJAMINSON, supra note 15, at 7.
6. Procedures for Ensuring Public Access to the Media

This is the other major area of citizen dissatisfaction with the media. People feel completely helpless in the face of media policies of which they disapprove and towards which they feel impotent.\textsuperscript{572} Citizens are also convinced that the media do not pay sufficient attention to matters of interest to the community they serve and that they do not report sympathetically about local events.\textsuperscript{573} Although there is a guaranteed right of access to the broadcast media,\textsuperscript{574} the right tends to be invoked only by politicians in election campaigns. Dissatisfied citizens generally have even fewer mechanisms through which to air their dissatisfaction with the broadcast than with the print media.

Should anyone who is mentioned by the media in a news story be given a right of reply or should such a right be limited to political figures? What threshold injury must be demonstrated by a citizen before a right of reply is granted? Should citizens with a different viewpoint be given a right to reply to the position taken by the media on a given issue? Should they be permitted to reply when the opposing viewpoint is implied in a news story or only if it receives editorial treatment? What form will the right of reply take? Who will decide whether the reply should be permitted? What kind of citizen input should be encouraged or required or precluded in these decisions?

How should the media ensure that community news and values are covered? Is national and international news more important than local news? What mix should be achieved? Who makes these decisions? Should community representatives have any input into the kind of news covered? Under what circumstances should citizen input be encouraged or discouraged?

7. Policies Governing Relationships with Confidential Sources

Almost no other aspect of the journalist’s profession has received as much public attention as the media’s relationship with confi-

\textsuperscript{572} See supra notes 90-93 and accompanying text.
\textsuperscript{573} According to Arnold Rosenfeld, editor of the \textit{Dayton (Ohio) News}, readers bemoan the newspaper staff’s lack of a “genuine sense of community.” \textsc{C. Christians & C. Covert, supra} note 344, at 29. Rosenfeld believes the reading public dislikes “the profession’s prized ability to transmit facts without bias or feeling” because reporters are not permitted to consider the consequences of publication or its impact on the reader. \textit{Id.}

In the face of increasing attempts by the government to utilize these relationships as an easy source of information, reporters and their employers have gone to great lengths to protect the relationships, even under threat of imprisonment of the reporter and the high costs of defending the principle of nondisclosure to the media employer. The response of the media to the government's attempts to undermine the confidential relationship between reporter and source has been largely responsible for the public's perception of media arrogance.

One way to avoid the conflict between the legal profession and the media over this issue would be for the media to develop guidelines to govern the use of confidential sources. This would reassure lawyers and judges that such sources are used only when necessary and would ensure that only truly confidential information is protected.

Who should establish a policy on the use of confidential sources? Should it be the media outlet, the editors, the individual reporter? Should the use of confidential sources be limited to certain kinds of stories? Should the decision to use a confidential source be affected by the likelihood that the source or his information will form the basis of a grand jury investigation or a criminal prosecution?

Should the media maintain records of information that might implicate a confidential source? Should the reporter share information about confidential sources with anyone else at his media outlet? Should a story ever be published if it is based solely on information from confidential sources?

When information from a confidential source is sought by a grand jury or one side to a criminal or civil lawsuit, who will decide what the journalist should do? Does a media outlet have the responsibility to support its journalist, whatever the decision?

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575. The other major areas of media outrage are newsroom searches, gag orders and libel actions. See supra notes 148-69, 179-89, 279-80 and accompanying text.

576. See supra notes 263-77.

577. This has been the greatest point of contention recently in the free press debate. During the pendency of the Farber case one Wall Street Journal reporter lamented that "[t]he judiciary—certainly not all of it, but enough of it to lay down the law—has for all practical purposes declared war against the press." Kwitny, A Judicial War on the Press?, Wall St. J., Aug. 23, 1978, at 12, col. 4. Anthony Lewis of the New York Times finds the media to be hysterical in their responses which does their image no good. See, e.g., Lewis, supra note 16, at 615-19; Lewis, Amending the Court, N.Y. Times, June 26, 1978, at A19, col. 5; Lewis, The Court and the Press, N.Y. Times, June 8, 1978, at A27, col. 1; Lewis, A Depressing Tale, N.Y. Times, Dec. 4, 1978, at A21, col. 2.
Does it matter whether a crime is involved? Does it matter who is seeking information—a grand jury, the prosecutor, the defendant in a criminal prosecution, a libel plaintiff?

VI. CONCLUSION

While a responsible press is not constitutionally mandated, the realities of a complex, highly industrialized society make media responsibility more necessary now than ever before. The media have the power to probe into the private lives of members of the public and to create news merely by their investigation of events that might prove harmful to the interests of these citizens. The media also have the power to probe into the activities of the various governmental branches. The information amassed through the techniques of investigative reporting can be used to unmask governmental management or corruption or to ruin the lives of both public officials and private citizens thrust momentarily into the public arena.

The individuals who establish policies for the news media generally act reasonably and with good judgment and exhibit as great a concern for the public welfare as we ourselves would aspire to achieve. The number of instances of media irresponsibility that could be cited are relatively few, considered in the context of the thousands upon thousands of reports made by the media in the general course of their business. Nevertheless, there is room for improvement.

Existing legal mechanisms cannot resolve these problems. Nor can they curb the media’s tendency to downplay the importance of constitutional protections that impinge on their absolute right to seek out and publish whatever information they believe is in the public interest. The judiciary is ill-equipped to foster media responsibility; access statutes, at least as they impinge on the editorial independence of the print media, are constitutionally defective; and attempts to control media behavior through the licensing of journalists are similarly defective. One result of the almost total lack of effective legal restraints on media behavior is widespread public dissatisfaction with media performance.

To overcome this lack of public confidence in the media and to ensure that the media are not unduly restrained and rendered incapable of performing their important function of keeping the government honest and the public informed, the media themselves must begin to act. Existing internal mechanisms, whether letters
to the editor or corrections sections, provide neither the necessary restraints nor the just redress owed those injured through inaccurate or irresponsible reporting. Therefore, the media need to look elsewhere.

Press councils are a good beginning, but they offer little concrete guidance to media representatives who must determine how to behave in concrete situations. Only if the press council has addressed a complaint on a particular public-media conflict are there principles enunciated which can provide this sort of guidance. It is for this reason that a code of ethics—to be taught in schools of journalism and discussed in newsrooms—is so necessary. It would certainly be preferable for the media to address themselves in a systematic and careful way to the kinds of questions raised in this article and to formulate standards and guidelines to be applied through self-regulation than to ignore the signs of public discontent until the day when regulation is imposed on them by government fiat. If the media promulgated their own code of ethics, the difficulties that members of the public experience with media behavior could be reduced through the formulation of controlling guidelines based on ethical considerations rather than having to rely on ad hoc decisions made in a vacuum while journalists are under the pressures of time and concerns for their relative competitive position vis-a-vis other journalists or media outlets.

Although unenforceable, a media code of ethics will benefit both the media and society. A media code is likely to provide the media more protection than they would receive were other entities commissioned to do the linedrawing between permissible and impermissible behavior. Courts will be more deferential to media decisions if they know that these decisions were well debated within the profession prior to their adoption and that they reflect the position of “responsible” journalism toward the reporting function. Society will also benefit from the media’s promulgation of a code of ethics. Greater media responsibility necessarily implies a greater recognition by the media of the conflicting rights of other segments of society—whether individual citizens or criminal defendants—and greater self-control over the use of the powerful investigative and reportorial weapons at their disposal.

We are not recommending the promulgation of a code of ethics as a panacea that will resolve all conflicts between the media and other societal institutions and restore the media to their rightful position of respect and privilege. Instead, we are suggesting this code as one small step to force the media to acknowledge and deal
with the moral dilemmas that confront them in their daily activities and to recognize the rights of others with which their activities may be in conflict. We also do not mean to suggest that all existing mechanisms for dealing with these problems should be discarded. What is probably needed is a combination of mechanisms—one internal to improve accuracy in reporting; one external, such as a press council, in which the public and the media both have input and in which both mold the decisions; plus a code of ethics created by the media to guide their members in the performance of their jobs at all stages of the "press function." Only with such a combination of efforts will all the competing interests of the parties to the conflicts be adequately protected.