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STUMBLING DOWN TOBACCO ROAD: MEDIA SELF-CENSORSHIP AND CORPORATE CAPITULATION IN THE WAR ON THE CIGARETTE INDUSTRY

Clay Calvert*

I. INTRODUCTION

Walt Disney Co. (Disney) announced its $19 billion takeover of Capital Cities/ABC Inc. on July 31, 1995.1 Three weeks later, ABC threw in the towel in the defamation action2 filed against it by tobacco industry giant Philip Morris Co., Inc.3

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After the deal, Walt Disney Co., which generated $16.5 billion in revenue in 1994, now owns or controls interests in the following properties: (1) ABC television network; (2) Walt Disney Pictures; (3) Touchstone Pictures; (4) Hollywood Pictures; (5) Miramax; (6) the Disney Channel; (7) ESPN2; (8) Disneyland; (9) Walt Disney World; (10) Fairchild Publications; and (11) newspapers and magazines across the country. How the Entertainment Giants Measure Up, WALL ST. J., Aug. 1, 1995, at B1. It also is part owner of the Arts & Entertainment and Lifetime cable channels, and it has a partnership with three of the so-called Baby Bell phone companies to provide video programming and interactive services. Id.

2. Defamation generally encompasses the libel and slander torts. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). See, e.g., CAL. CIV. CODE § 44 (West 1982) (providing that defamation is effected by either libel or slander). The basic elements of a defamation cause of action are: (1) a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

Westinghouse Electric Corp. (Westinghouse) announced its plan to take over CBS on August 1, 1995. Three months later, CBS pulled a sizzling 60 Minutes exposé criticizing the tobacco industry. The network eventually ran a very similar story more than three months later on 60 Minutes and during its CBS Evening News program, but only after The Wall Street Journal had published nearly identical information several days before.


The specter that ABC, in light of the settlement, may no longer vigorously pursue the tobacco industry in its investigative reporting raises the question of whether the initials "ABC" may more accurately stand for "All But Cigarettes." According to Frank Rich, media critic for The New York Times, "the time network evening-news shows devoted to the tobacco industry fell by more than 75 percent during the second half of 1994—after Philip Morris filed its suit against ABC." Frank Rich, Bennett's Moral Filter, N.Y. TIMES, Dec. 9, 1995, at 23.

While the corporate owners of ABC decided to settle the case on behalf of the network, it should be emphasized that the two journalists involved with the Day One reports at issue—producer Walt Bogdanich and correspondent John Martin—refused to sign ABC's letter of apology to Philip Morris. Alicia C. Shepard, Up In Smoke, AM. JOURNALISM REV., Nov. 1995, at 28, 30.

Some mocked CBS's decision to run the story only after publication of similar information in The Wall Street Journal.

For instance, media critic Frank Rich of The New York Times poked fun at CBS and broadcast journalism:

"This change of heart is only half-heroic. It was precipitated not by newfound courage from CBS's lawyers but by The Wall Street Journal, which a week ago obtained and published its own account of Mr. Wigand's allegations, thereby reducing CBS's risk of a lawsuit from Brown & Williamson, Mr. Wigand's former employer. But once liberated by their print col-

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5. Bill Carter, '60 Minutes' Ordered to Pull Interview in Tobacco Report, N.Y. TIMES, Nov. 9, 1995, at A1; see also Lawrence K. Grossman, CBS, 60 Minutes, and the Unseen Interview, COLUM. JOURNALISM REV., Jan.-Feb. 1996, at 39 (providing an in-depth review by the former president of NBC News of the events and circumstances surrounding the decision by CBS officials to pull from its 60 Minutes schedule a Mike Wallace interview with Jeffrey S. Wigand, a former research executive for the Brown & Williamson Tobacco Corp.).


The recipe sounds simple. Take two television network news divisions, add two major corporate takeovers, and toss in two powerful and angry tobacco companies. The result is two unsavory journalistic defeats.

The information in both stories was of paramount public importance. ABC’s two-part Day One story\(^9\) exposed the tobacco industry practice of nicotine reconstitution/manipulation\(^10\) and the ability of cigarette manufacturers to produce nicotine-free cigarettes.\(^11\) The CBS 60 Minutes episode was to feature an interview with former tobacco-industry research executive, Jeffrey S. Wigand.\(^12\) Wigand reportedly told 60 Minutes correspondent Mike Wallace that the Brown & Williamson Tobacco Corp. had abandoned plans to create a safer cigarette, altered evidence and documents showing that it had plans for such a cigarette, and knowingly used a pipe-tobacco additive known to cause cancer in laboratory animals.\(^13\) Wigand also alleged that Thomas Sandefur, former chief executive of Brown & Williamson, lied to Congress

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\(^10\) The commissioner of the Food and Drug Administration provides an excellent description of cigarette companies’ efforts to manipulate the nicotine content in cigarettes, including the genetic manipulation of nicotine content in tobacco plants. *See Regulation of Tobacco Products: Hearings Before the Subcommittee on Health and the Env’t of the Comm. on Energy and Commerce House of Representatives, 103d Cong., 2d Sess. 4-31* (1995) (testimony and statement of David A. Kessler, M.D., Commissioner of Food and Drugs, Food and Drug Admin.).


\(^12\) Wigand was a $300,000-per-year research director—vice president of research and development—for the Brown & Williamson Tobacco Corp. Suein L. Hwang & Milo Geyelin, *Getting Personal: Brown & Williamson Has 500-Page Dossier Attacking Chief Critic*, WALL ST. J., Feb. 1, 1996, at A1. The holder of a doctorate in biochemistry, he was fired under disputed circumstances in 1993. *Id.* Today, Wigand is a $30,000-per-year high school teacher in Louisville, Kentucky. Grossman, *supra* note 5, at 40. He claims to have received death threats, as well as threats of harm to his children, as a result of his statements against his former employer. Elizabeth Jensen, ‘60 Minutes’ Source Offered Aid by CBS, WALL ST. J., Nov. 20, 1995, at A3, A6.

about nicotine addictiveness.\footnote{Bill Carter, Dispute Erupts at '60 Minutes' Over Canceling of Interview, N.Y. TIMES, Nov. 18, 1995, at A10.}

Fear of monetary liability played a major role in both cases. ABC dreaded protracted litigation as a libel defendant in a case that plaintiff Philip Morris pursued with virtually unparalleled vigor and tactics.\footnote{Philip Morris' discovery tactics included the use of disinterested third-party subpoenas in an attempt to obtain, \textit{indirectly}, the identity of ABC's confidential sources used in compiling the \textit{Day One} segments. When ABC refused to directly reveal the identity of its sources, invoking the so-called reporter's privilege, Philip Morris hit back by subpoenaing the records of airline, telephone, hotel, and rental car companies to trace the movements of the ABC journalists in the course of their investigation. Through such records, Philip Morris hoped to obtain the identity of ABC's sources. \textit{Philip Morris Co.}, 23 Media L. Rep. (BNA) at 1434-35 (Philip Morris Co. I). For a review of the discovery tactics employed by Philip Morris, see Steve Weinberg, Hardball Discovery, A.B.A. J., Nov. 1995, at 66, 66.} Officials at CBS feared exposure under a rather novel theory of liability against a media defendant—tortious interference with contractual relations\footnote{See RESTATEMENT (SECOND) OF TORTS § 766 (1979) (providing the criteria for a cause of action for intentional interference with the performance of a contract by a third party). The basic elements for a cause of action for intentional interference with contractual relations are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." Savage v. Pacific Gas & Elec. Co., 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305, 314 (1993) (quoting Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 791 P.2d 587, 589-90, 270 Cal. Rptr. 1, 3-4 (1990). Defendants may raise the affirmative defense of justification—that the interference was made "either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification." Herron v. State Farm Mutual Ins. Co., 56 Cal. 2d 202, 205, 363 P.2d 310, 315 (1961)).} for allegedly inducing the
breach of a confidentiality agreement between a tobacco company and a whistle-blowing former employee. While several defense attorneys suggest such a theory may have proved successful against CBS, others argue that "it is unlikely the media can be successfully sued for inducing breach of a confidentiality agreement." Regardless of whether ABC and CBS ultimately would have prevailed, one thing is clear—when giant tobacco corporations play, or merely threaten to play, litigation hardball to squelch criticism of their often-attacked industry, their tactics prove largely successful against some major media players. Where news divisions and old-school journalists might have once fought such cases to the finish in the name of First Amendment principles of free speech and press, today corporate officers in charge of the financial purse strings appear more likely to take the advice of their attorneys, ante up cash settlements, publish apologies, and pull stories with an eye toward their corporate-conglomerate's bottom line. As The New York Times lamentingly opined about the 60

Minutes incident: “CBS and its general counsel insist no one acted out of personal monetary interest, but the network’s action shows that media companies in play lose their journalistic aggressiveness when they let lawyers and corporate executives make decisions that ought to be the province of news executives.”

The actions of ABC and CBS raise important questions that affect journalistic independence, investigative reporting, and First Amendment freedoms in an age of ownership concentration, deregulation, and mega-media conglomerates. It is an age when Disney purchases ABC, Westinghouse takes over CBS, and General Electric owns NBC. It is an age when bigger is seen as bet-


25. The Telecommunications Act of 1996, signed into law by President Bill Clinton in February 1996, continues the 1980’s trend of deregulation in the broadcast industry. For instance, the Act: (1) eliminates the cap on the number of AM and FM broadcast stations that one entity may own or control nationally and relaxes local ownership caps; The Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a)-(b), 1996 U.S.C.C.A.N. (110 Stat.) 110 (directing the Commission to modify 47 C.F.R. 73 3555); (2) eliminates the cap on the number of television stations that a person or entity may own, operate, or control nationally, while increasing the national audience reach limitation for television stations to 35 percent from 25 percent, id. § 202(c), 1996 U.S.C.C.A.N. (110 Stat.) 111 (directing the Commission to modify 47 C.F.R. 73 3555); (3) permits a person or entity to own or control a network of broadcast stations and a cable system, id. § 202(f), 1996 U.S.C.C.A.N. (110 Stat.) 111 (directing the Commission to modify 47 C.F.R. 76,501); and (4) extends the term of licenses for broadcast stations to eight years, id. § 203, 1996 U.S.C.C.A.N. (110 Stat.) 112 (to be codified at 47 U.S.C. 307(c)). See generally Christopher Stern, New law of the land, BROADCASTING & CABLE, Feb. 5, 1996, at 8 (providing a summary of the changes brought by The Telecommunications Act of 1996).

26. An example of a mega-media conglomerate with cross-ownership media holdings is Viacom, chaired by Sumner Redstone. Viacom properties in 1995 included: (1) Paramount Motion Picture Group; (2) the new United Paramount Network (UPN); (3) MTV network; (4) the Showtime pay-TV channel; (5) Simon & Schuster publishing; (6) Blockbuster Video stores; and (7) North American Paramount theme parks. How the Entertainment Giants Measure Up, WALL ST. J., Aug. 1, 1995, at B1. In 1994, Viacom had revenues of $10.12 billion. Id.
ter—when the Federal Communications Commission no longer places a cap on the number of television stations nationally that a single corporation or entity may own. The questions are simple; the answers are not. The questions are:

(1) Why did ABC and CBS surrender to the tobacco companies?

(2) What changes must take place to protect investigative reporting so that the ABC and CBS cases represent an aberration—rather than a growing trend—in journalism?

In Part II, this Article argues that the simple answer to the first query—ABC and CBS surrendered because of pressure from Disney and Westinghouse, respectively—is reductionist, superficial, and incorrect. Corporate pressure—real or imagined, covert or overt—may have played a role in the decision to settle at ABC or to pull the 60 Minutes story at CBS. However, corporate pressure represents only one source of influence, not the sole cause. The pressure was most likely indirect and ingrained in the nature of these capitalist enterprises rather than the product of direct edicts from Disney or Westinghouse.

The answer to why ABC and CBS surrendered lies at the confluence of four factors. These factors coalesced to varying degrees in both cases, dealing a serious, but not irreparable, blow to investigative journalism. The four contributing factors are:

(1) corporate-media ownership whose interests conflict with those of aggressive and independent journalism;

(2) weaknesses in the bulwark of First Amendment protection that guards the press;

(3) questionable newsgathering and investigative practices; and

(4) aggressive tactics by a threatened and powerful tobacco industry.

The answer to the second question, examined in Part III of


28. See infra Part II.

29. See infra Part II.A.

30. See infra Part II.B.

31. See infra Part II.C.

32. See infra Part II.D.
this Article, is threefold. To prevent incidents like those involving ABC and CBS from occurring on a regular basis, changes must occur in three areas: (1) the law; and (2) the practice of journalism; and (3) the decision-making processes at media corporations. A holistic approach to the problem works better than isolating one area for cure while allowing the others to fester and plague investigative journalism again in the future.

This Article concludes that while the lessons learned from the Day One and 60 Minutes incidents are painful for the press, media owners, and their attorneys, the damage done is reparable. Exposed now are the flaws and weaknesses in journalistic practices, corporate ownership, and the law. The process of solving those problems must begin.

II. WHY DID ABC AND CBS SURRENDER?

Why did ABC and CBS back down in their battles with the tobacco industry? The answer to this question is more complex than it initially seems and more complicated than some commentators would like. The answer lies in a potent combination of four factors described below.

A. Corporate-Media Ownership Whose Interests Conflict With Those of Aggressive and Independent Journalism

The popular press and journalism circles lambasted ABC when it announced it would settle the Philip Morris defamation action by publicly apologizing to the tobacco-industry giant and paying its attorneys' fees. Many viewed the decision as nothing more than a corporate sell-out of hard-hitting journalism.

For instance, Reese Cleghorn, president of the American Journalism Review and dean of the College of Journalism at the University of Maryland, quipped that the ABC settlement "shows us how ominous the corporatization of the news has become." Calling the settlement decision "devastating to ABC's credibility," Cleghorn mused that it was based on little more than dollars

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33. See infra Part III.
34. See infra Part III.A.
35. See infra Part III.B.
36. See infra Part III.C.
38. Id.
and cents. "For multibillion-dollar companies' lawyers and top executives, this kind of settlement may simply seem to be practical: avoidance of further costs in legal expenses."39

Newsweek's Jonathan Alter, commenting on ABC's settlement, lamented that "[d]eep pockets once meant that news outlets had the resources to back up investigative reporting, which often risks lawsuits. Today, deep pockets often mean a higher duty to shareholders and potential buyers than to journalists ferreting out the truth."40

Laurence Tribe, constitutional scholar and Harvard law professor, called ABC's move "a disgraceful settlement," adding that "[a]nybody with half a brain would advise [ABC] that at the end of the road they will prevail."41 However, Tribe observed that the settlement made economic sense if ABC was concerned "purely with the corporate bottom line."42

Richard A. Daynard, professor at Northeastern University School of Law and chairman of the Tobacco Products Liability Project, put it more bluntly: "This is a triumph of bottom-line thinking over news judgment. . . . Philip Morris has bullied a major television network into apologizing for what was essentially a true story."43

A similar reaction greeted CBS when news broke that it had pulled its interview with whistleblower Jeffrey S. Wigand from its 60 Minutes line-up in November 1995. The New York Times declared in an editorial:

[The most troubling part of CBS's decision is that it was made not by news executives but by corporate officers who may have their minds on money rather than public service these days. With a $5.4 billion merger deal with the Westinghouse Electric Corporation about to be approved, a multi-billion-dollar lawsuit would hardly have been a welcome development.44

Jane E. Kirtley, executive director of the Reporters Committee for Freedom of the Press, observed in the wake of the CBS

39. Id.
40. Alter, supra note 22, at 29.
42. Id.
43. Landler, supra note 3, at D6.
44. Self-Censorship at CBS, supra note 23, at E14.
decision to pull its interview with Wigand that "it is a sad day for the First Amendment when journalists back off from a truthful story that the public needs to be told because of fears that they might be sued over the way they got the information."  

Writing in The New Yorker shortly after Disney's takeover of ABC, Ken Auletta explicated the tension and potential friction between the desires of Disney's top executive, Michael Eisner, and the news department at ABC:

Eisner has no natural predilection for journalism. He tends to take a dim view of reporters; last week, he thanked several journalists for generally favorable pieces, as if they were choosing his side rather than just reporting his coup [the Capital Cities/ABC takeover], and he tends to freeze out those whom he views as critics. Now that Eisner will have responsibility for the most successful broadcast-news division as well as Cap Cities/ABC's newspapers and magazines—more than a hundred publications—the questions that are already being asked about him are these: Does he care about the news product, or only about profit margins? Does he feel some public-trust obligation—as ABC obviously did earlier this year [1995] when it broadcast a low-rated prime-time hour on the war in Bosnia because the story was important—or does he only track ratings? Will he find that news, with its attendant controversy and sometimes uncomfortable questions, detracts from the friendly Disney image?

For his part, Eisner professes not to become involved with news issues at ABC. He told Auletta that "ABC News is the best news organization in the world.... I know it well. Roone Arledge has brought to ABC News the same kind of invention that he brought to ABC Sports. They will be left alone to operate autonomously."

These reactions suggest two related reasons for the ABC settlement and the CBS cancelation:

(1) Takeovers of the networks by Disney and Westing-

47. Id. at 32.
house created pressure on the news divisions, causing them to fold.

(2) Demands for corporate profits, not the public interest, dictate journalism decisions at large conglomerates.

Are these arguments grounded in truth? The first hypothesis—that the Disney and Westinghouse takeovers caused the networks to retreat—is a vast oversimplification of the issue and is probably wrong. First, ABC and Philip Morris started settlement negotiations long before the Disney takeover. Settlement talks began in the summer of 1994, a year before ABC became part of Disney's Magic Kingdom. Although those talks broke off, it is clear that issues of legal liability had as much a role to play in the decision to settle as did any direct pressure from the higher-ups at Disney. There is no evidence of any direct order or threat by either Disney or executives at ABC to settle because of the impending Disney deal.

At CBS, Peter Lund, president of CBS's Broadcast Group, acknowledged that CBS decided to pull its scheduled 60 Minutes report in November 1995 to avoid lawsuits. However, he em-

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49. Alix Freedman et al., Why ABC Settled with the Tobacco Industry, WALL ST. J., Aug. 24, 1995, at B1, B10. While the talks began more than a year before the Disney takeover of Capital Cities/ABC, reporter Steve Weinberg suggests that this was "just as rumors began that Disney might make ABC part of its entertainment empire." Weinberg, supra note 11, at 36.

50. According to The Wall Street Journal, the impetus for the settlement came in Spring 1995, when attorneys at ABC "reached an unsettling conclusion, say two people close to the network: The documents [ABC had] didn't sufficiently support the broadcast's most contested assertion about nicotine 'spiking.'" Freedman et al., supra note 49, at B1. Furthermore, the case was to be tried in the heart of tobacco country in Virginia before a potentially hostile jury. Alter, supra note 22, at 29. In addition, the judge in the case, Theodore J. Markow, "has relatives on the Philip Morris payroll." Id.

The New York Times, however, reported "the network's own lawyers felt they had a 65 percent chance of winning the case." Mark Landler, Philip Morris Revels in Rare ABC News Apology for Report on Nicotine, N.Y. TIMES, Aug. 28, 1995, at D5.

phasized that the network made the decision without regard to its pending $5.4 billion sale to Westinghouse.  

Indeed, it is very unlikely that any edict was ever handed down ordering a settlement because of the Westinghouse takeover. A direct order was unnecessary.

While the Disney and Westinghouse takeovers did not directly cause the actions of the two networks, that does not refute the second hypothesis: Demands for corporate profits now dictate journalism decisions at large conglomerates. This argument, unlike the first, is sound and requires little elaboration—profits count. Shareholders buy stock to reap profits. It is the nature of business.

As Lawrence K. Grossman, former president of NBC News and PBS, states about the 60 Minutes case, “Corporate executives have a duty to protect the company’s stockholders from undue risk.” Concomitantly, this duty to shareholder profits gives priority to advice from corporate counsel about litigation risks, not to the news judgment of veteran journalists and editors.

A major problem with mega-media conglomerates is that corporate attorneys, rather than practicing journalists, come to dictate journalism decisions, as they largely did in the ABC and CBS incidents. According to Theodore L. Glasser, faculty member and former director of the graduate program in journalism at Stanford University, journalistic independence requires that journalists, not attorneys, dictate editorial decisions. Glasser argues that while attorneys should not play the role of news gatekeeper, they do have a limited place in the newsroom. “Journalists should not be oblivious to the law. Rather, they should make their own principled decisions and then call in the attorneys to creatively defend their positions. The attorneys should not be called in first to make

52. Id. Lund told The Wall Street Journal:

[W]e had a potential liability of billions of dollars and no reasonable assurance of a reliable defense . . . . When the law department says that, you do start to feel a responsibility for all the people who work at the organization as a whole, against the responsibility you feel for journalism and the First Amendment. I wish it could be otherwise.

Id. Eric Ober, president of CBS News, stated in a Nov. 19, 1995 memorandum, “The decision [to kill the 60 Minutes story] was made by CBS NEWS management in consultation with CBS attorneys.” Grossman, supra note 5, at 44.


54. The Washington Post quoted Mike Wallace as saying, “We argued with the attorneys and we lost.” Grossman, supra note 5, at 45.

the journalism decisions.\textsuperscript{55}

When a news division or journalism operation becomes part of a large conglomerate with multiple holdings—some media related, others not—producing the best journalistic product becomes clouded by other concerns. As Ben H. Bagdikian, media critic and former dean of journalism at the University of California, Berkeley, puts it, "When a corporation buys a local monopoly or market domination, few can resist the spectacular profits that can be made by cutting quality and raising prices."\textsuperscript{57} It is a world in which public information becomes little more than an industrial byproduct.\textsuperscript{58}

Desire for profits influences which stories are covered and how they are presented. Business interests affect news selection. As Bagdikian states about the newspaper industry:

[T]he wall of separation between American news and the business interests of the companies who control the news is being systematically dismantled at institutional levels of journalism. The problem is no longer the reporter or editor who accepts money or favors to insert or delete a piece of news. It is more widespread and insidious. Executive editors throughout the country are being trained not to select news of interest to their community as a whole, but only for those people who live in selected neighborhoods that have certain characteristics wanted by major advertisers. The news thus becomes profoundly altered for financial reasons unconnected to the principle of never permitting business advantage to influence the news.\textsuperscript{59}

In the ABC and CBS cases, business advantage clearly influenced the news. It made financial sense for ABC to settle. It was a sound business decision for CBS to pull its 60 Minutes segment. Litigation costs—win or lose—were averted. CBS's Peter Lund admitted to weighing the risk of litigation costs from airing the

\textsuperscript{55} Id.
\textsuperscript{57} Bagdikian, supra note 24, at 7.
\textsuperscript{58} See generally id. at 27-45.
\textsuperscript{59} Id. at 232. Doug Underwood of the University of Washington expresses a similar sentiment. Underwood states that the job of the editor at a modern daily newspaper has "the new trappings of a business where marketing the newspaper has become the top goal of newspaper managers and where attention to the bottom line has replaced many of the tasks that once occupied editors' time." Doug Underwood, When MBAs Rule the Newsroom xii (1993).
story: "In the end . . . we said that this is not an acceptable risk."  

The influence of giant corporate ownership need not be overt to change the news. It often takes the form of subtle, unspoken self-censorship. It may consist of "silent bargains" and "silent routines that serve[] to keep the subject of self-coverage generally quiescent among writers and reporters without direct managerial involvement."  

Interests that impinge on editorial judgment and newsroom discretion produce what communication scholar Margaret Gallagher describes as "the politics of accommodation." In brief, editors in charge of news decisions take account of—and accommodate—interests and influences other than the public good. Bagdikian nicely summarizes the problem:  

The deeper social loss of giantism in the media is not in its unfair advantage in profits and power; this is real and it is serious. But the gravest loss is in the self-serving censorship of political and social ideas, in news, magazine arti-

60. Jensen, supra note 51, at B16.  

61. The takeovers at ABC and CBS also raise important questions about self-censorship related to the two networks' coverage of news about their own parent companies and companies controlled by their parent companies. There is a danger that the networks may not cover negative stories about their parent companies and that they may water down any potentially hard-hitting stories about their owners. See Joseph Turow, Hidden Conflicts and Journalistic Norms: The Case of Self-Coverage, 44 J. COMM. 29, 43 (1994) (suggesting "there exist particular types of circumstances where journalists' fears for their jobs combine with their superiors' fear of extreme organizational instability to lead both parties to avoid, suppress, and otherwise manage conflict in complex ways").  

For a nonacademic article summarizing the dangers of self-censorship that stem from cross-ownership, see Marc Gunther, All in the Family, AM. JOURNALISM REV., Oct. 1995, at 36.  

Observing that Westinghouse businesses include electric power generating equipment used in nuclear power plants, Gunther openly questions whether CBS's 60 Minutes will ever investigate nuclear safety. Id. at 41. Sarah McClendon, a White House correspondent, opined, "If they get to buy CBS, you are going to hear news according to Westinghouse. . . . We are going to have to take their word on radiation, and on the management of nuclear fuel." Allan Wolper, Veteran Journalist Takes on Westinghouse, EDITOR & PUBLISHER, Sept. 16, 1995, at 17, 17. Gil Schwartz, the vice president of communications for Westinghouse Broadcasting, refuted McClendon's charge stating, "At no time has the Westinghouse Electric Corporation tried to influence the news operations of its broadcasting subsidiaries." Id.  

62. Turow, supra note 61, at 43.  

cles, books, broadcasting, and movies. Some intervention by owners is direct and blunt. But most of the screening is subtle, some not even occurring at a conscious level, as when subordinates learn by habit to conform to owners' ideas. But subtle or not, the ultimate result is distorted reality and impoverished ideas.\textsuperscript{64}

In summary, it is highly unlikely Disney or Westinghouse directly influenced the news divisions at ABC and CBS, respectively. Direct influence was not needed. Self-censorship habits develop when news operations become parts of large conglomerates with interests at odds with investigative journalism.\textsuperscript{65}

While the business interests of media owners played a role in the decisions at ABC and CBS, they were not the only contributing factor. Section B suggests that gaps in the wall of First Amendment protection for the press also contributed to the retreat, particularly for CBS.

\textbf{B. Weaknesses in the Bulwark of First Amendment Protection that Guards the Press and Investigative Journalism}

Bottom-line pressures on conglomerates whose primary interest is private profit, not public good, contributed to the decisions at ABC and CBS. In turn, potential legal liability and the costs of protracted litigation were the bases for worries about financial losses in both cases. The incidents—in particular, the \textit{60 Minutes} fiasco—illustrate weaknesses in First Amendment defenses and privileges that protect the press and investigative journalism.

This Section briefly describes the development of those defenses and privileges. It then analyzes a growing trend of plaintiffs' efforts to take end-run approaches around those defenses. In particular, plaintiffs are attacking the processes of newsgathering and pleading alternative theories of relief designed to avoid First Amendment limitations on state defamation laws. This Section then briefly describes the theory of liability about which attorneys

\begin{itemize}
\item 64. \textit{Bagdikian, supra} note 24, at 45.
\item 65. That the interests of journalism and big business are at odds is not a new revelation. As \textit{Newsweek} writer Jonathan Alter pithily notes: "Remember that book 'Men Are From Mars, Women Are From Venus'? Well, business is from Saturn, journalism is from Jupiter. As the media monopoly grows, the culture clash between the two is becoming a source of major discomfort." Jonathan Alter, \textit{A Call for Chinese Walls: Why We Should Keep Journalists Out of the Magic Kingdom}, \textit{Newsweek}, Aug. 14, 1995, at 31, 31.
\end{itemize}
at CBS worried most. Finally, this Section discusses the attack by Philip Morris on ABC's newsgathering practices.

1. The principle of uninhibited, robust, and wide-open debate, and the actual malice standard

Prior to 1964, the First Amendment did not limit or restrict the reach of state libel laws designed to compensate citizens for reputational harm.\(^6\) Defamatory speech received no constitutional protection. As First Amendment commentator and journalist Anthony Lewis states, "Libelous utterances had always been regarded as outside the First Amendment, an exception to 'the freedom of speech' it guarantees."\(^67\) Under the common law in many states, a defendant could be held strictly liable for any falsity, even if it was published accidentally or unintentionally.\(^68\) State of mind about falsity made no difference; the principle of liability without fault was the rule.

This strict liability standard changed with the United States Supreme Court's decision in New York Times Co. v. Sullivan.\(^69\) The Court held in Sullivan, "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.\(^70\)

The Sullivan Court articulated a federal rule—the actual malice standard—to give the press the breathing room it needs to play a central role in facilitating and making public debate about government officials and political issues. The Court stated:

The constitutional guarantees require, we think, 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 "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.\(^71\)

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\(^66\) KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 272 (2d ed. 1996).


\(^69\) 376 U.S. 254 (1964).

\(^70\) Id. at 269.

\(^71\) Id. at 279-80.
With the adoption of the actual malice standard, the Court introduced a constitutional layer of analysis to common law libel actions. Gone was the rule of strict liability—at least when the plaintiff is a public official and the speech concerns his or her official conduct. The Court introduced a constitutionally mandated fault element requiring analysis of a defendant’s state of mind about the veracity of his or her message.

In addition, the Court held public official plaintiffs must prove actual malice with “convincing clarity.” This standard of proof is greater than the normal “preponderance of the evidence” standard that applies in civil trials “but less than [the] ‘beyond a reasonable doubt’” criminal standard. A definition of the convincing clarity standard is: evidence that is “‘clear, explicit, and unequivocal,’ ‘so clear as to leave no substantial doubt,’ and ‘sufficiently strong to demand the unhesitating assent of every reasonable mind.’”

The Sullivan Court adopted the actual malice standard to give the so-called “citizen-critic of government” the breathing space necessary to engage in “uninhibited, robust, and wide-open” debate on public issues required in a self-governing democracy. The common law policy of strict liability chilled speech causing citizens to engage in self-censorship out of fear they could be held liable for any factual inaccuracy. The Sullivan Court, recognizing that “erroneous statement[s] [are] inevitable in free debate,” adopted the actual malice standard to protect speakers from liability for accidental errors when writing about the official conduct of public officials.

Three years after Sullivan, the Court extended the actual malice standard to protect defendants in defamation actions.
brought by public figures in *Curtis Publishing Co. v. Butts*. In his crucial concurring opinion, Chief Justice Earl Warren reasoned that public figures, like public officials, often are influential in society and are more likely than the average citizen to have access to media channels to voice their own criticisms and to respond to character attacks. In *Gertz v. Robert Welch, Inc.* the Supreme Court emphasized that both “public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”

The Supreme Court has adopted other constitutional safeguards for the press in defamation actions. In *Bose Corp. v. Consumers Union of United States, Inc.* the Court bolstered the determination in *Sullivan* that appellate courts must conduct an

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80. Drawing the line between so-called public figure plaintiffs and private persons is often difficult. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the United States Supreme Court identified different circumstances in which an individual might achieve public figure status:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

*Id.* at 345.

81. Not all government or state employees count as public officials for purposes of defamation law. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the United States Supreme Court stated that the public figure classification “applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.* at 85. See *James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 10, 20 Cal. Rptr. 2d 890, 895 (1993) (providing a list of four factors that courts in California apply to determine public official status).

84. *Id.* at 345. In contrast, private persons, the Court observed in *Gertz*, have not assumed the risk of harm. *Id.* In addition, private persons are more vulnerable to injury because they have less access “to the channels of effective communication” to contradict a lie or correct an error. *Id.* at 344. The *Gertz* Court thus held that private figure plaintiffs are not required under the First Amendment to prove actual malice to recover damages for actual injury in a defamation action. Instead, the Court concluded, “[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Id.* at 347.
independent examination of the trial court record in libel actions. In *Bose* the Court stated:

The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." According to First Amendment scholar Lucas A. Powe, Jr., the decision in *Bose* "reaffirmed the duty of appellate courts to scrutinize carefully all jury determinations, even in a case wholly divorced from the world of robust political exchange that is at the heart of the Kalven-Meiklejohn tradition." In *Harte-Hanks Communications, Inc. v. Connaughton* the Court revisited the issue of independent review, citing with approval to its language in *Bose*. This standard contrasts with the general rule that appellate courts "are permitted only to review findings of fact under the 'clearly erroneous' standard." In *Anderson v. Liberty Lobby, Inc.* the Court held the convincing clarity standard of proof for actual malice that applies at trial also applies when a defendant makes a motion for summary judgment. *Anderson* was a crucial victory for the press. As defense attorneys C. Thomas Dienes and Lee Levine state, "[t]he obstacle it erects for the public figure plaintiff seeking to avoid dismissal is largely responsible for the extraordinary media success in avoiding the costs of trial and its potential for adverse jury verdicts."

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86. *Id.* at 510-11.
87. *Id.* at 511.
90. *Id.* at 659.
93. *Id.* at 257.
In addition to bolstering review standards and evidentiary requirements, the Supreme Court has switched the traditional burden of proof on the issue of falsity, at least when the speech is a matter of public concern and a media defendant is involved. At common law a defamatory statement was presumed false and the burden was on the defendant to establish its truth as a defense. In Philadelphia Newspapers, Inc. v. Hepps the Court expressed concern that defendants may have difficulty in proving truth. It noted the danger that speakers may be punished for uttering truthful statements simply because they are unable to prove truth. The Court concluded that "[t]o ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." "

In summary, the Supreme Court, acting in the name of First Amendment concerns for free speech and press, has created substantial protection for media defendants in defamation actions.

96. Id. at 776.
98. Id. at 776.
99. Id.
100. Id. at 776-77.
101. The Supreme Court has also held that the actual malice standard applies in torts other than defamation, including the invasion of privacy tort of false light—a close cousin of libel, Time, Inc. v. Hill, 385 U.S. 374, 390 (1967)—and the tort of intentional infliction of emotional distress when the mental distress is allegedly caused by message, picture or drawing, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

According to the Restatement (Second) of Torts, false light exists when:
One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.


The basic elements of a cause of action for intentional infliction of emotional distress include: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 1487, 232 Cal. Rptr. 668, 681 (1986).
Unfortunately for reporters engaged in enterprise reporting and investigative journalism, plaintiffs are now turning to causes of action other than defamation to circumvent the constitutional strictures of libel law.102

David Kohler, deputy general counsel of Turner Broadcasting System, Inc., observes that this trend began in the 1980s and is growing today:103

[I]nnovative lawyers began looking for creative ways around some of the more insurmountable First Amendment barriers. Thus today, in addition to the more common claims of defamation and invasion of privacy that have relatively well-developed First Amendment limitations, we increasingly see suits alleging trespass, breach of contract, infliction of emotional distress, unfair trade practices and even racketeering.104

As the 60 Minutes incident illustrates, alternative theories of liability that focus on newsgathering—as opposed to news dissemination—may be the press’s Achilles heel. These theories may stifle the “uninhibited, robust, and wide-open”05 debate treasured by the Supreme Court just over thirty years ago in New York Times Co. v. Sullivan.

102. As attorney Timothy B. Dyk observed, the United States Supreme Court “has not been as generous [in extending protection] in the areas of newsgathering.” Timothy B. Dyk, Newsgathering, Press Access and the First Amendment, COMM. LAW., Summer 1992, at 1, 1. In a 1995 article, Steven A. Bookshester and Toni N. Gilbert note, “In recent months, electronic newsgathering has become a legal minefield, with plaintiffs bringing high-visibility bid ticket cases involving both common law and statutory claims.” Steven A. Bookshester & Toni N. Gilbert, Legal Minefield of Electronic Newsgathering, COMM. LAW., Spring 1995, at 11, 11. See generally, Douglas P. Jacobs et al., Expanding Theories of Press Liability: Anatomy of a Case, COMM. LAW., Winter 1995, at 1, 22-25 (providing examples of recent cases that illustrate alternative theories of liability against the press).


104. Id. See Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993) for an example of another case against CBS involving allegedly intrusive newsgathering practices and featuring a panoply of causes of action other than libel. In Baugh, the plaintiff pleaded causes of action for appropriation of likeness, trespass, intrusion on seclusion, fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress, among others. Id. at 749-50.

105. Sullivan, 376 U.S. at 270.
2. Pleading around defamation: the new focus on newsgathering practices and alternatives to libel law

In terms of legal liability, how news is gathered is becoming as important as what the news says. Recent United States Supreme Court decisions involving newsgathering practices have not favored the press. For instance, in *Cohen v. Cowles Media Co.* the Court refused to extend First Amendment protection to media defendants who breached promises of confidentiality to their sources. In that case, plaintiff Dan Cohen sued two newspapers after they revealed his identity, breaching reporters' promises of confidentiality. The United States Supreme Court held, in a narrow 5-4 decision, that the plaintiff's state-law promissory estoppel theory of relief was not subject to heightened First Amendment scrutiny. Justice Byron White wrote for the majority, "[T]he well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news" controlled the case. Quoting from a prior Supreme Court decision, he emphasized that it is "beyond dispute that 'the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'"

In its fractured *Branzburg v. Hayes* decision, the Court refused to create a constitutional reporter's testimonial privilege to protect journalists who refuse to reveal the identity of their sources and instead laid down a general principle. While "news

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107. *Id.* at 665.
108. *Id.* at 666.
109. *Id.* at 670.
110. *Id.* at 669.
111. *Id.* at 670 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).
113. *Id.* at 702. It should be emphasized that many lower courts have interpreted the various opinions in *Branzburg* as creating a qualified reporter's privilege. As media defense attorney James C. Goodale states, lower courts have "generally concluded that Justice Powell's concurring opinion plus Justice Stewart's and Justice Douglas' dissenting opinions provide the basis for a qualified privilege." James C. Goodale et al., *Reporter's Privilege Cases, in COMM. LAW 1993*, at 389, 397 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-372, 1993). Robert D. Sack and Sandra S. Baron emphasize the importance of Justice Powell's concurrence stating, "Because Justice White's plurality opinion was rather enigmatic and Justice Powell's was the pivotal fifth vote, his concurring opinion has been treated as authoritative."
gathering is not without its First Amendment protections,"\(^{114}\) the press generally has no greater rights under the First Amendment than other citizens.\(^{115}\) As the \textit{Branzburg} Court stated in addressing whether a grand jury can compel journalists to testify, "We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations."\(^{116}\)

In brief, decisions in areas outside of defamation law have not been favorable to the press. As media defense attorney P. Cameron DeVore informed \textit{The New York Times} in response to its editorial criticizing CBS's \textit{60 Minutes} decision, "while the Supreme Court has continued its strong First Amendment protection for reputational torts, it has not recently provided any First Amendment protection for news gathering."\(^{117}\)

3. CBS and interference with contractual relations: attacking newsgathering practices at the "Tiffany network"

In the CBS incident, network executives feared the theory of relief of interference with contractual relations.\(^{118}\) This cause of action is premised on "the common law tort principle that one who intentionally induces another to break a valid contract is, unless such conduct is privileged, liable for damages legally caused thereby."\(^{119}\) The \textit{Restatement (Second) of Torts} provides at section 766 that:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary

\(^{114}\) \textit{Branzburg}, 408 U.S. at 707.
\(^{115}\) \textit{Id.} at 683. This principle may not be true under state laws, however. For instance, the California Penal Code gives greater protection to journalists than other citizens to view disasters "including a flood, storm, fire, earthquake, explosion, accident or other disaster." \textit{CAL. PENAL CODE} § 409.5 (West Supp. 1996).
\(^{116}\) \textit{Branzburg}, 408 U.S. at 702.
\(^{117}\) DeVore, \textit{supra} note 18, at A30.
\(^{118}\) \textit{See generally} \textit{FOWLER V. HARPER ET AL., THE LAW OF TORTS} §§ 6.5-6.10 (2d ed. 1986) (providing an overview of the law of interference with contractual relations).
\(^{119}\) \textit{Id.} § 6.5.
loss resulting to the other from the failure of the third person to perform the contract.\textsuperscript{120}

The argument against CBS under this theory of relief is that its journalists interfered with Brown & Williamson's confidentiality agreement with Jeffrey S. Wigand. In short, CBS's newsgathering methods allegedly induced Wigand to breach his contract with the cigarette manufacturer. Wigand had agreed to keep secret certain matters relating to his past employment at Brown & Williamson. When he spoke with CBS's Mike Wallace, Wigand allegedly revealed certain information that, under his contract with Brown & Williamson, was to remain confidential.\textsuperscript{121}

David Kohler observes that "absent a clear defense under the First Amendment, the success of such a claim would likely turn on the degree to which the journalist encouraged or induced the source to disregard his agreement."\textsuperscript{122} Media attorneys Rex S. Heinke and Lincoln D. Bandlow emphasize that it is not enough merely to interfere with the performance of a contract; the interference must, under the \textit{Restatement} definition, be "improper."\textsuperscript{123} The key issue, therefore, may have turned on whether the behavior of the CBS journalists was legally improper. Kohler points out, however, that in light of the United States Supreme Court's decision in \textit{Cohen v. Cowles Media Co.},\textsuperscript{124} the First Amendment de-

\begin{itemize}
\item \textsuperscript{120} \textit{Restatement (Second) of Torts} § 766 (1979).
\item \textsuperscript{121} Brown & Williamson, in fact, filed a lawsuit against Wigand alleging breach of the confidentiality agreement. Hwang, supra note 13, at A3.
\item \textsuperscript{122} Kohler, supra note 103, at A16.
\item \textsuperscript{123} Heinke & Bandlow, supra note 19, at 4. In describing what constitutes improper interference, the \textit{Restatement (Second) of Torts} provides:
\begin{quote}
The plaintiff's interest in his contractual rights and expectancies must be weighed, however, against the defendant's interest in freedom of action. If the defendant's conduct is predatory the scale on his side may weigh very lightly, but if his conduct is not predatory it may weigh heavily. The issue is whether in the given circumstances his interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In determining this issue, the nature of his conduct is an important factor.
\end{quote}
\textit{Restatement (Second) of Torts} § 766 cmt. c (1979).
\item \textsuperscript{124} Several states have adopted variations of the \textit{Restatement} position. For instance, to decide whether the defendant's conduct is improper, California courts must engage in a "balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties." Herron v. State Farm Mutual Ins. Co., 56 Cal. 2d 202, 206, 363 P.2d 310, 312, 15 Cal. Rptr. 294, 296 (1961).
\end{itemize}
fenses in defamation and similar cases may not be available.”

Without enhanced protection in the name of free speech and press, the press is treated like any other defendant subject to generally applicable state laws.

That this theory was available to Brown & Williamson did not guarantee success or that CBS automatically would have terminated its story. However, CBS’s newsgathering practices increased the cigarette manufacturer’s chances of success under this theory. Questionable and unconventional journalism practices, in addition to the interests of corporate ownership and gaps in the wall of First Amendment protection, played a pivotal role in the 60 Minutes debacle. Section C describes those practices.

4. ABC and confidential sources: attacking source confidentiality in newsgathering

Philip Morris Co., Inc. v. ABC, Inc. also exposed a potential weakness in First Amendment protection for newsgathering—the ability to maintain the confidentiality of sources. Philip Morris was not a defamation case involving a theory of relief based on intrusive or improper newsgathering methods; however, much of the legal wrangling focused on how the news was gathered.

Philip Morris was upset with what it believed was the dissemination of false information about itself. It alleged that ABC falsely charged it with “spiking,” or “fortifying,” its cigarettes with

125. Kohler, supra note 103, at A16.

126. Indeed, there is a split of opinion among media defense attorneys about the chances of a successful CBS defense against a cause of action for interference with contractual relations. For instance, First Amendment attorney James C. Goodale wrote in response to the CBS decision:

As far as I know, no news organization has ever been sued for what it published solely on a claim of inducing breach of contract. It is true in recent years that lawyers, frustrated by the hurdles placed in their way by the Supreme Court, have been adding the claim to libel suits. But uniformly this claim has been tossed out as “an end run” around the Court’s rules.

I suspect that the reason no suit has been brought against the press claiming that something has been published as a result of inducing someone to break a contact is that the First Amendment prevents it.


Likewise, attorneys Rex S. Heinke and Lincoln D. Bandlow argue, “[C]onfidentiality agreements, which seek to stop ex-employees from exposing alleged wrongdoing, are unlikely to be enforced against the media.” Heinke & Bandlow, supra note 19, at 4.

In contrast, attorneys at CBS must have felt the risk was serious enough to cause corporate executives to pull the Wigand interview.

nicotine from sources other than tobacco. As a corporate public figure defamation plaintiff, Philip Morris had to prove that ABC aired its *Day One* broadcasts with actual malice.

To satisfy the actual malice requirement, Philip Morris sought to attack the credibility of ABC's sources. Showing that ABC knew its sources were not credible would help Philip Morris establish actual malice against the network. To attack the credibility of ABC's sources, of course, Philip Morris needed to know their identities. ABC refused to reveal their identities, citing promises of confidentiality and invoking the qualified reporter's privilege created by lower court interpretation of the concurring and dissenting opinions in *Branzburg v. Hayes*. The Virginia Supreme Court had previously recognized, albeit in a factually distinct context, a reporter's privilege based on *Branzburg* and its progeny.

Philip Morris, undaunted by ABC's refusal to directly reveal

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129. See generally Matthew D. Bunker, *The Corporate Plaintiff as Public Figure*, 72 JOURNALISM & MASS COMM. Q. 597 (1995) (describing the problem of determining when a corporation is classified as a public figure plaintiff for purposes of libel law).

130. *Philip Morris Co.*, 23 Media L. Rep. (BNA) at 2440 (providing that actual malice “is an element of Philip Morris' prima facie case”) (*Philip Morris Co. II*).


132. See supra note 113 and accompanying text. Robert D. Sack and Sandra S. Baron state that in light of *Branzburg*, “most courts that have faced the question have concluded that there is a qualified privilege for a journalist to protect the identity of a confidential source, at least during the course of libel litigation.” SACK & BARON, supra note 113, at 707.

133. 408 U.S. 665 (1972).

134. *Brown v. Commonwealth*, 204 S.E.2d 429, 430 (Va. 1974). *Brown* dealt with the reporter's privilege in a context distinct from *Philip Morris* both in terms of facts and issues. *Brown* involved a criminal defendant's efforts to seek the identity of a reporter's confidential source. *Id.* Without the identity of the source, Brown contended that his constitutional rights to a fair trial and due process were violated. *Id.* at 431. The reporter was not a party to the criminal action. In contrast, *Philip Morris* involved a civil libel action by plaintiffs who named journalists invoking the privilege as parties to the suit. *Philip Morris Co.*, 23 Media L. Rep. (BNA) at 1434 (*Philip Morris I*). In addition, the constitutional right of a criminal defendant to a fair trial was not at stake.

The judicially created privilege in *Brown* is concomitant with the scope of protection for reporters under the First Amendment. As Judge Markow stated in *Philip Morris*, “the Virginia Supreme Court has tailored the privilege to the limits protected by the First Amendment.” *Id.* at 1436.

135. Virginia does not have a codified state shield law to protect reporters from revealing their sources. *Philip Morris Co.*, 23 Media L. Rep. (BNA) at 1436 (*Philip Morris Co. I*).
the identities of its sources, tried to obtain their identities indirectly. The tobacco company subpoenaed telephone, credit card, and hotel records of the ABC journalists involved in the *Day One* reports to trace their footsteps in hopes of finding the sources. Judge Theodore J. Markow faced an issue of first impression that directly affected newsgathering: whether the qualified reporter's privilege included protection against the use of disinterested third-party subpoenas to discover, indirectly, the identities of confidential sources. Furthermore, even if he adopted a qualified reporter's privilege, Judge Markow could still find that Philip Morris had overcome it.

ABC escaped with a narrow victory on these twin issues. Judge Markow ruled initially that the qualified reporter's privilege includes protection against the use of third-party subpoenas, but determined that Philip Morris had shown sufficient cause to overcome that privilege. Upon motion for reconsideration and reargument, however, Judge Markow vacated the order compelling disclosure of ABC's confidential sources. He ruled that Philip Morris had not scaled a three-part test used for determining when the need for the identity of a confidential source overcomes a qualified privilege. Judge Markow stated, "Prudence suggests that Philip Morris go further to establish a record that further convinces the court that its need for discovering the confidential sources, tried to obtain their identities indirectly. The tobacco company subpoenaed telephone, credit card, and hotel records of the ABC journalists involved in the *Day One* reports to trace their footsteps in hopes of finding the sources. Judge Theodore J. Markow faced an issue of first impression that directly affected newsgathering: whether the qualified reporter's privilege included protection against the use of disinterested third-party subpoenas to discover, indirectly, the identities of confidential sources. Furthermore, even if he adopted a qualified reporter's privilege, Judge Markow could still find that Philip Morris had overcome it.

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136. As the Court stated in *Philip Morris*:

Philip Morris had also caused Letters Rogatory to be issued in various jurisdictions resulting in subpoenas duces tecum served on several non-parties. The challenged subpoenas duces tecum are those served on American Express, Citibank, USAir, United Airlines, Continental Airlines, Hertz Corporation, Adam's Mark Hotel, AT&T, Cellular One, Bell Atlantic, MCI, Sprint, and NYNEX. Philip Morris' purpose in seeking discovery from these non-parties, to which ABC objects, is to trace the movements of the defendants in the course of their investigation in the hope of identifying their confidential sources. *Id.* at 1435.

137. *Id.* at 1441.

138. *Philip Morris Co.*, 23 Media L. Rep. (BNA) at 2440 (*Philip Morris Co. II*). Between the time that Judge Markow made his initial order allowing discovery via the third-party subpoenas and the time he imposed a stay pending reconsideration of the issue, American Express turned over the requested documents to Philip Morris. *Weinberg*, supra note 11, at 36.

139. *Philip Morris Co.*, 23 Media L. Rep. (BNA) at 2440 (*Philip Morris Co. II*). The three-part test, drawn by Judge Markow from *Branzburg*, includes consideration of: (1) the relevance of the information in question; (2) the availability of that information from alternative sources; and (3) whether there is a compelling interest in obtaining that information. *Id.*
sources is, indeed, compelling.\textsuperscript{140}

ABC was fortunate—and fortunate only upon a motion for reconsideration—to maintain the confidentiality of its sources. A different ruling would have dealt a serious blow to newsgathering processes necessary for investigative journalism. Often, sources—particularly sources like the whistleblowers involved in both the ABC and CBS incidents—will not release or discuss information vital to the public interest unless promised confidentiality. They may fear loss of a job or even bodily injury.\textsuperscript{141} Indeed, Brown & Williamson whistleblower Jeffrey Wigand reported receiving death threats after his interview with Mike Wallace.\textsuperscript{142} Protection is necessary for such sources if journalists are to play an active, investigatory role in a self-governing democracy.

In summary, both the CBS and ABC incidents reveal weaknesses in First Amendment jurisprudence that protects newsgathering processes. While the line of defenses in libel law may sufficiently protect the media, other areas need added safeguards. Without such protection, settlements and decisions like those involving ABC and CBS may become more common.

C. Questionable Newsgathering and Investigative Practices: "Lame Journalism Makes Bad Law"\textsuperscript{143}

Section A argued that corporate financial needs and pressures played a role in the decisions at ABC and CBS. Section B, in turn, stressed that weaknesses in First Amendment jurisprudence related to newsgathering increased the pressure for a journalistic retreat. This section describes the questionable journalistic practices in the CBS incident that further enhanced the odds of Brown & Williamson's success against the network under a theory of interference with contractual relations. Blame cannot be placed solely

\begin{footnotesize}
\begin{enumerate}
\item[140.] \textit{Id.}
\item[141.] According to the authors of a recent textbook on journalism ethics, situations of threatened harm or loss to a source who possesses vital information are the most appropriate times for granting promises of confidentiality. \textsc{Jay Black et al., Doing Ethics in Journalism: A Handbook with Case Studies} 199 (2d ed. 1995). They state that "confidentiality should only be granted to protect someone who is relatively powerless, or who is in a position to lose the capacity to continue as a solid source of information. In addition, the story would be of overriding public importance." \textit{Id.}
\item[142.] Jensen, \textit{supra} note 12, at A6.
\item[143.] Stuart Taylor Jr., \textit{Closing Argument: Lame Journalism Makes Bad Law, Tex. Law.}, Nov. 27, 1995, at 25, 25.
\end{enumerate}
\end{footnotesize}
on the greed of corporate owners, the advice of their attorneys, or the current state of the law. Journalists, too, share the blame.

Writing about the *60 Minutes* debacle, Stuart Taylor Jr. observed "[i]f the First Amendment is losing some of its potency as a shield for journalists, these news organizations share some of the blame: Lame journalism makes bad law." Taylor's remarks came in reference to *The Wall Street Journal*'s breaking of the story that CBS journalists engaged in a number of dubious activities to get Jeffrey S. Wigand's damning statements against Brown & Williamson. In particular, CBS: (1) gave Wigand veto power over its interview with him, promising that it would not run the interview without his approval, which he never gave; (2) previously paid Wigand $12,000 as a consultant for an earlier *60 Minutes* exposé; and (3) agreed to indemnify Wigand against any libel action resulting from the *60 Minutes* interview. Perhaps most disturbing was that CBS chose to keep all of this information secret, hiding it away from viewers and depriving them of the chance to make informed judgments about the trustworthiness of a confidential source. Without source identification a reader cannot make a judgment about the veracity of the information. Readers may speculate that the source's identity is being kept secret for fear of injury, loss of job, or because the source is simply a bitter person with something to hide, and thus, chooses to remain anonymous. The so-called "lame journalism" exhibited by CBS has three effects.

1. It undermines journalistic independence

Giving a source—not an editor or reporter—ultimate editorial power erodes journalistic independence. The source, by way of veto power, gets the final word. Just as attorneys should not make

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144. *Id.*


146. *Id.* Somewhat ironically, CBS correspondent Mike Wallace, who was directly involved with the Jeffrey Wigand interview, wrote an article for *Quill* magazine suggesting remedies to counteract growing public distrust of the media. Mike Wallace, *The Press Under Fire*, *Quill*, Nov.-Dec. 1995, at 21. In particular, Wallace lamented over "time-honored complaints about . . . checkbook journalism." *Id.* at 22. Wallace, perhaps too conveniently, forgot to mention his employer's secret payments and indemnification promised to Wigand. Agreeing to pay a source's potential legal fees in exchange for an interview is the type of quid pro quo conduct that is tantamount to checkbook journalism.
editorial decisions, sources should not be allowed to dictate editorial judgment.

2. It increases the chances of legal liability under the theory of interference with contractual relations

Payments create the impression of improper interference with the contractual relationship between a source and his or her former employer. Offering an indemnification agreement to a source previously paid for help is also a giant step towards improper interference. William Bennett Turner, a San Francisco media attorney, states that an indemnification agreement is "strong evidence of interference with the contract between the source and the source's employer." Steve Thel, law professor at Fordham University, cautions against the use of consulting fees like those paid to Wigand: "I would be fearful that a judge or jury might second-guess whether $12,000 was too much to pay for what he did a year ago and was thus a payment for breach of contract, even if it wasn't."

3. It increases public distrust of the news media

The public has a right to know up front whether a source is being paid for his or her interview. This information is vital for making an informed judgment about the source's credibility and the veracity of his or her information. CBS's covert conduct is a tiny step removed from the so-called checkbook journalism tabloid television magazines engage in by paying sources in advance for telling their stories on camera. 60 Minutes, "that den of journalistic testosterone," edges closer to A Current Affair and Hard Copy by adopting such practices. In turn, the already sinking reputation of journalism and journalists slips lower.

147. Indemnification agreements with sources in the broadcast industry are "extremely rare but not unheard-of." Freedman et al., supra note 145, at A1.
148. Id.
149. Id. at A5.
150. See generally Lou Prato, Tabloids Force All to Pay for News, AM. JOURNALISM REV., Sept. 1994, at 56 (defining checkbook journalism as "the practice of paying sources"). Prato observes, "Network news divisions and local stations, despite their loud denials, also pay in one form or another. Although they may not openly pay in cash, many use consulting fees, travel and entertainment expenses and other such covert arrangements." Id.
151. Rich, supra note 6, at 23.
152. See generally Wallace, supra note 146 (lamenting the sagging reputation of journalism and journalists in the United States).
This trio of effects involves issues of legal liability and journalistic ethics. While the law and journalistic ethics are separate affairs, following ethical procedures and guidelines that call for journalistic independence may have mitigated CBS's potential legal liability.

D. Aggressive Tactics by a Threatened and Powerful Tobacco Industry

The final factor that one must take into account when analyzing the ABC and CBS incidents is the nature of the opponent. In both cases news operations squared off against tobacco companies. These are not ordinary opponents.

As part of an industry under severe governmental attack, the tobacco companies have plenty of reason to fight any challenge to their interests, particularly ones that may spark governmental investigation and congressional hearings. The companies can also tap vast financial reserves to litigate aggressively, or threaten to litigate, cases against the media. Most potential plaintiffs lack such resources to back up their cries of media foul play.

Philip Morris litigated against ABC as if fighting for its life. In addition to subpoenaing documents from disinterested third-parties to avoid the qualified reporter's privilege, the company engaged in other aggressive discovery tactics. For instance, despite the existence of a court protective order limiting the scope of dissemination, Philip Morris produced documents to ABC on dark-red paper to prevent photocopying. There is no reason to sus-

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154. The Wall Street Journal observes: [T]he Food and Drug Administration is waging a fierce battle with the industry in an effort to regulate cigarettes as drugs—and place new limits on advertising and marketing aimed at minors. Mr. Wigand's testimony in Mississippi—and similar statements he has already made to FDA Commissioner David A. Kessler—could provide powerful ammunition for the regulators.
Freedman, supra note 8, at A1, A12.
156. Steve Weinberg, Hardball Discovery, A.B.A. J., Nov. 1995, at 66, 103; Benjamin Wittes, Philip Morris' Files Leave Foes Fuming in ABC Libel Case, The Recorder, May 5, 1995, at 1, 10. In addition to the red color, ABC alleged that the paper was chemically treated to produce a rancid odor. Weinberg, supra, at 103. The paper, manufactured by the linguistically correct company, Nocopi Technolo-
pect that the company would have given up had ABC prevailed at trial. Much more was at stake than the reputation of one tobacco company. The reputation of the entire tobacco industry hung in the balance.

Brown & Williamson flexed its muscles by suing Wigand for breach of his confidentiality agreement and publicly accused CBS of interfering with the tobacco company's nondisclosure agreement with Wigand. There is little doubt Brown & Williamson would have sued CBS had it run its originally scheduled 60 Minutes interview with Wigand in November 1995. Brown & Williamson has shown in prior cases that it is willing to litigate against the media.

E. Synopsis: Why Did ABC and CBS Give Up? There Is No Simple Answer

The solution to the question that guides this part of the Article cannot be reduced to a simple cause-and-effect relationship. Rather, a number of variables or factors must be considered. These variables, described above, touch on problems with corporate ownership, the legal system, and journalism practices. In addition, the peculiar status of the tobacco companies, as industry-under-fire plaintiffs, completes the picture. Given the multiple problems that contributed to the journalistic backpedaling at ABC and CBS, attention must now focus on how to resolve these issues to better promote and foster aggressive investigative journalism.

III. SOLVING THE PROBLEMS

Dissecting the problems that plagued ABC and CBS is a relatively easy chore compared to the task of proposing solutions to those problems. This Part addresses the question: What changes must occur to protect investigative reporting so that the ABC and CBS cases represent an aberration—rather than a growing trend—in journalism?

The solution is three-tiered. At the first level, changes must be made in the law. Legal changes, however, are not sufficient to

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gies, Inc., is typically sold to computer companies to make their manuals impossible to duplicate. Wittes, supra, at 10.


158. See generally Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) (holding the First Amendment does not protect false statements with actual malice).
remedy the problems—problems both legal and ethical in nature—that plague news divisions like ABC's and CBS's. Changes must also occur at the level of journalism practices and routines. Journalists cannot foist the blame for their travails solely upon the shoulders of corporate executives and attorneys. Reporters and editors too shoulder the burden. Change must also occur at a third level: There must be a stricter separation of church—editorial side—and state—business/advertising side—in media operations. Editorial decisions must be further insulated from corporate bottom line pressures.

This Part briefly describes these three areas ripe for change. The solutions are tentative and necessarily incomplete, lacking the benefit of the informed discourse and debate that must occur among all affected by the changes. This discourse, ideally, should include input from journalists, shareholders, media executives, media attorneys, and most importantly, members of the general public. The public, after all, is the entity that ultimately pays the price—a price paid in ignorance—for the practice of journalistic self-censorship.

A. Changes in the Law

In New York Times Co. v. Sullivan\textsuperscript{159} the United States Supreme Court created a constitutional layer of protection to guard defendants who disseminate false information. Similar constitutional protection must be created to protect the media in the newsgathering process, especially if that information is true and of public importance. Without newsgathering there can be no news dissemination. Without newsgathering information dissemination that promotes democratic self-governance and the kind of robust debate envisioned in Sullivan is thwarted.

The Cohen v. Cowles Media Co.\textsuperscript{160} principle that generally applicable laws are not subject to First Amendment scrutiny hinders newsgathering. First Amendment guarantees of free speech and press are given no consideration, much less a preferred position in a hierarchy of constitutional values.\textsuperscript{161} Without First

\textsuperscript{159} 376 U.S. 254 (1964).
\textsuperscript{161} The concept of preferred position balancing is often linked to Justice Stone's footnote in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). First Amendment scholars Marc A. Franklin and David A. Anderson observe, "[T]he phrase has largely fallen into disuse, but the idea of special consideration for
Amendment protection plaintiffs will continue to take end-run approaches around libel law and focus instead on newsgathering practices. Heightened scrutiny, therefore, must occur when a plaintiff alleges injury based on newsgathering practices.

To gain judicial sympathy for such changes, however, journalists must make the case that their newsgathering practices merit First Amendment protection. The more offensive or repugnant those practices appear, the less likely they are to garner judicial support. As described below, changes in journalism practices must occur to avoid a spate of cases like those involving ABC and CBS.

B. Changes in the Practice of Journalism

As discussed in Part II, CBS engaged in source indemnification and payment of consulting fees. These practices erode journalistic independence. Ethically, they are dubious at best. They reduce established, mainstream news organizations to the level of television trash-talk tabloids.

It is a cheap shot to discuss a growing public perception of the oxymoronical nature of “journalistic ethics.” However, even if ethics do not count for much these days at the major networks, legal liability certainly attracts their attention. The dubious practices engaged in at CBS exposed the network to potential legal liability. Journalists must clean up their practices, not only to regain public trust and confidence, but also to avoid legal liability.

As new technologies enhance newsgathering processes, many journalists will be tempted to abuse those technologies in ways that offend community norms of civility that undergird much of privacy law. Such abuses will continue to erode public confidence in journalists and will deter judges from expanding the scope of newsgathering protection for journalists.

Because the press is generally not accorded any greater First Amendment protection than other citizens, it must comply with freedom of communication still carries weight in the balancing process.” MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 47 (5th ed. 1995).


163. FRANKLIN & ANDERSON, supra note 161, at 57 (providing that the United nations and other international bodies have recognized privacy as a fundamental human right).
both the ethics and laws that govern society. Journalism practices that reduce journalistic independence, erode public confidence in the profession, and create legal liability ultimately harm all citizens. Journalists must take a long look in the mirror before placing all the blame on media attorneys and before making a legitimate—in the eyes of the public—claim for greater legal protection in the realm of newsgathering.

C. Changes in the Relationship Between Editorial and Business Operations

In the aftermath of the Disney takeover of ABC, Newsweek writer Jonathan Alter observed the danger of self-censorship that arises from the subtle, often unspoken pressures of business interests on journalism content.64 "In a tight job market, the tendency is to avoid getting yourself or your boss in trouble. So an adjective gets dropped, a story skipped, a punch pulled."65

To protect independent journalism, tighter enforcement of the boundaries between business and editorial interests must occur. As Theodore L. Glasser, former director of the graduate program in journalism at Stanford University, states, journalism needs to be as insulated from marketplace forces as much as it is from government intrusion.66

Part of the solution to resurrecting or fortifying the barrier between editorial and business operations lies in communication and openness. Currently there are many so-called "silent bargains" and "silent routines" in which self-censorship breeds and festers.67 Journalists assume that certain stories are off limits, and thus, they will never pitch some story ideas to editors. In a sense, what exists is a silent form of the speech codes that proliferated in the late 1980s and early 1990s at universities across the country.68 These codes prohibited the use of certain words and ideas. Similarly, at many news organizations, there are silent codes that prohibit, in de facto fashion, the writing of certain stories and in-depth coverage.

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64. Alter, supra note 65, at 31.
65. Id.
66. Glasser, supra note 55.
67. Turow, supra note 61, at 43.
68. See generally Arati R. Korwar, War of Words: Speech Codes at Public Colleges and Universities (1994) (providing a comprehensive survey of university speech codes).
of issues.

A recent example is the major networks' coverage of the debate and issues behind the recently passed Telecommunications Act of 1996. Newsweek writer Jonathan Alter observes, "[A]most none of the news organizations covering the communications bill in Congress acknowledge in their stories that their owners are busy lobbying in favor of the bill." The silent policy at these organizations was one of nondisclosure.

Organizations should make explicit rules and guidelines that define the boundaries between editorial and business operations. Those boundaries must be clear and the wall separating the two operations must be high. Each side should know what is expected.

Most importantly, the public should know the ground rules and what to expect from news operations. Conflicts of interest that may lead to self-censorship must be given publicity and exposed to public scrutiny. Media should not keep the public in the dark about the internal battles that ultimately reduce the principle of "uninhibited, robust, and wide-open" debate that lies at the heart of the Supreme Court's pro-press decision in Sullivan.

Media organizations often use the phrase "the public's right to know." In this case the public has a right to know about the media. Specifically, it has the right to know about conflicts of interest within media conglomerates that may stifle information of public concern. News organizations, of all entities, should not keep secrets that influence the public.

In addition to establishing an explicit line between editorial and business operations, rules must be created that define the relationship between journalists and attorneys. Ultimately, journal-

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170. Alter, supra note 65, at 31.
171. The benefits of giving publicity to practices that may be deceptive are many. For example, philosopher and ethicist Sissela Bok observes:
To deliberate, to reason, to seek to justify in public: these are all ways of stating and of testing views, of talking them over, of making them explicit and thus open to inspection and to criticism. Such openness challenges private biases, errors, and ignorance, and allows the shifting of perspectives crucial to moral choice.
173. Id.
174. See generally POWE, supra note 68, at 233-59 (describing the right-to-know model of press freedom).
ists—not the attorneys—must have the final say if journalistic independence means anything. In articulating the proper relationship between journalists and attorneys, Jon Shure observes:

[T]he lawyers’ job is to lay out the possibilities. A television network interested in practicing the highest order of journalism will take legal advice into account and then balance it against the obligation to go after the truth and broadcast the results. In journalism, if you think you’re right, you are supposed to go ahead and then be prepared to defend your actions.\(^\text{175}\)

Two lines or barriers must be drawn: one between journalistic and editorial operations, and one between journalistic decisions and legal decisions. In each case, the line should be drawn to afford maximum independence to investigative journalism.

**IV. CONCLUSION**

The battle between news divisions at major television networks and the tobacco industry highlights severe problems that plague investigative journalism in an age of ownership concentration and mega-media conglomerates. As this Article illustrates, the problems touch on legal issues, investigative journalism processes, and corporate ownership. Reductionist views and simple solutions will not resolve these knotty problems.

Stepping back from the specific incidents involving *Day One* and *60 Minutes*, larger issues arise. In particular, the role of journalism as a watchdog institution that ferrets out the truth, uncovers abuses and corruption, and informs public debate lies in the balance. Unless a concerted discourse begins involving journalists, corporate executives, media attorneys, and members of the general public, the problems will grow. When the profit function of corporate journalism replaces the watchdog function of investigative journalism, it will be a sad day for journalism and the American public. The ABC and CBS incidents are warning shots that signal a call to arms to prevent that day.

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\(^{175}\) Shure, *supra* note 46, at 3.