ISSA Proceedings 1998 – Truth And Justice In Mass Media Reporting And Commentary: Serving More Than One Master In American Adversarial Contexts

1. Background

When writing for the mass media, reporters must usually explain complex matters in simple terms (Fiordo, 1997). Were media reporters to explain complex matters in complex terms, they would employ a style generally unsuited to their audiences. Writing for the mass media requires a style that is plain and direct (Roth, 1997; Harrigan, 1993). Although the principle of clarity is frequently violated for commercial and thematic media purposes, plainness remains a primary criterion of style (Kennedy, Moen & Ranly, 1993; Knight & McLean, 1996). Mass media writing should also have substance and be ethical (Zelezny, 1996).

A problem existing in American mass media reporting and commentary is analyzed in this paper. Two cases are used to illustrate a difficulty that surfaces frequently in American journalism. While this same troublesome condition may occur in the journalism of other countries, its manifestation in US journalism alone is examined here. For this study, 127 American television news broadcasts were viewed and 132 American newspaper and magazine articles read. All had content pertaining to the problem addressed. Because of its straightforward use in journalism (Kennedy, Moen & Randy, 1993), general semantics has been selected for this analysis. General semantics separates reports from inferences and judgments.While reporters utilize all three, the most heavily weighted should ideally be the report. The report is a statement verifiable through our senses (or the scientific extensions of our senses). An inference is a statement about the unknown made on the basis of what is known. And, a judgment is an evaluative or emotive statement highly autobiographical in its function. Reporters will be understood in this paper to be writers or speakers who ideally communicate to us

through reports primarily and inferences and judgments secondarily (Hayakawa & Hayakawa, 1990). Reporting and commentary are thus distinguished through higher frequency of inferences and judgments in commentary.
Subsequently, the reporter might construct an accurate and just account of the facts related to a topic or issue. The account should take the context of the facts into account (whether the context is the field of medicine, law, education, or whatever). Without reference to a context, we lack appropriate standards. What a statement means in relation to one set of criteria depends in part on what it means in relation to some context (Morris, 1964; Albrecht & Bach, 1997, 153). For example, a woman speed skater in the Nagano Olympics had to cover 500 meters in 39 seconds or less to win an Olympic medal; however, a woman speed skater in a regional 500 meter race may win a medal with a time of 47 seconds or less. Apart from the context of Olympic versus regional competition, the time would have a limited meaning since the context would be undefined. We would merely know the time it takes a particular female skater to cover 500 meters. In a medical report about reducing sodium in our diets, a "lite" soy sauce with 540 milligrams per tablespoon would be endorsed over one with 1130 milligrams per tablespoon. However, the diet of people with hypertension might require that soy sauce be avoided entirely. So, a 65 year old woman with a threatening case of hypertension may have to minimize sodium from all sources while a 20 year old female with no health problems may be able to consume an all-you-can-eat salty supper with minimal risk.

Truth is a term frequently used in the rhetoric of reporting. While reporters can address what has been verified (or what is verifiable) without violating journalistic ethics (Geib & Fitzpatrick, 1997), they might best construct the information available to them in a valid, fair, and accurate context. Much professional reporting is reasonable: for example, the reporting of Bill Moyer, Catherine Crier, or Bill Gaines. I target here, however, reporting that does not:
1. acknowledge neutrally and uncritically (yet realistically) that some information is classified and unavailable to the public at the time of reporting,
2. let the public know that some information is confidential and justly so,
3. explain to the public that some confidential information cannot be shared without sacrificing justice,
4. note the information being reported is speculative or premature, and
5. emphasize that professionals in law and media serve competing goals-that is, more than one master.

Acknowledging in an American context the tensions between the disclosure of truth and the implementation of justice constitutes a major theme of this paper. Proceeding with a respect for media reports, I urge here that in the US, reporting that deals heavily with legal matters should enlighten the public to the complexities of the US judicial system and legal principles with respect to the shared guidelines of truth and justice. Facts and constitutional protection must both be weighed. Rather than placing truth at the top, media reporters might more accurately place truth counterbalanced by justice at the top. Claims of reporters should display the data, warrants, and backing (Toulmin, 1958; Toulmin, Rieke and Janik, 1984; Eemeren, Grootendorst & Henkemans, 1996) for statements pertaining to law and fact.

2. Communication and Law

Although the field of communication and media law has developed worthy texts (Overbeck, 1998; Matlon, 1988; Zelezny, 1997), the pursuit of a concern with truth and justice must extend itself beyond these useful texts to texts from the field of law per se. While legal education in liberal arts curriculum has precedents in American higher education, such courses are not generally available. As regards journalists, legal communication eductors (Gillmor, Barron & Simon, 1998) hold that while a "basic understanding of the law governing the press is essential," no journalist should be (or is) "expected to play the role of lawyer in deciding whether or not to publish."

Journalists who understand the law and legal system may foresee potential problems. Once a journalist identifies a potential legal problem, such as libel, a lawyer can be consulted to determine the litigation risk (xxi). Since journalists often report on legal matters, knowing legal materials and research becomes crucial. Like lawyers, journalists can find the "cases, statutes, treaties, and other sources of law" that will prove useful (xxii) in reporting. Pember (1998) asserts that no nation may be "more closely tied to the law than the American Republic." In the US, "law is a basic part of existence" (2). While technically it is incorrect to discuss the US judicial system (since there are 52 different judicial systems – one for the federal government, one for the District of Columbia, and one for each of the 50 states), due to their similarity and for convenience, the US judical system will be addressed (15).

Since reporting truth with justice depends on a free press, a brief review of freedom of expression is in order. Courts have ruled that free speech presupposes civility and good behavior; it may not serve as an instrument for abuse or inciting

violence. Also, courts have ruled that if a decision is made in terms reasonably carrying more than a primary meaning, a court will assign the meaning that least interferes with the rights and liberties of individuals (Butcher, 1992, 308). The freedom of expression allowed in the US and a few dozen other democracies is unique in world history (Lijphart, 1984). Leaders of many countries place national or personal security above the freedom of their citizens. Mass media reporting is but a tool for propaganda or national development a weapon against rivals. Some leaders still censor the mass media directly as well as arrest, torture, and murder mass media reporters. Governments may also control the media through subsidies the media need to survive, thereby weakening or destroying editorial independence (Overbeck, 1998, 32). Free expression for the public media have been earned through tragic efforts; this legacy is respectable. However, with free expression comes media reporting that expresses complex matters in ways which obscure truth and justice as well as in simplistic ways which distort or falsify truth and justice. Justice in the present context means US justice.

3. Legal Ethics and Professional Responsibility in the US Adversarial System

Truth with the restriction and discipline of justice may best guide reporters. Neither truth nor justice alone, but truth tempered by justice or facts bridled by law, might best serve as the ground for reporting. To hold truth up without its counterbalancing from US law, especially constitutional law and the American Bar Association's Principles of Professional Responsibilities (1987), may work against accurate and lucid reporting .

Legal godterms can be clarified and confusion reduced. The practice of the US adversarial system offers hope for clarifying theoretical confusion. Whether lawyers or judges comment on the godterms in the practice of law, the practice of law has to integrate the competing values of truth and justice. In asserting that "our adversary system rates truth too low among the values that institutions of justice are meant to serve," Judge Frankel (1980, 100) reminds us that truth is but one value. In fact, he adds that many of the rules and devices of adversary litigation are suited to "defeat the development of the truth" (102). Since interested parties employ lawyers, the adversarial process "achieves truth only as a convenience, a by-product, or an accidental approximation." Furthermore, Frankel holds the business of a lawyer is to "win if possible without violating the law." The goal of lawyers is "not the search for truth as such" because "truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time" (103). In short, the metaphor of the

“hired gun” embodies the “substance of the litigating lawyer’s role.” So, although the “discovery of the truth,” according to Frankel, might best serve as a lawyer’s paramount commitment in principle, the “advancement of the client’s interests” reigns in practice (115).

Contrary to Judge Frankel’s view is Professor Freedman’s stand on truth and justice (Freedman, 1975). Referred to by Judge Frankel (1980, 113) as the “earnest and idealistic scholar who brought the fury of the (not necessarily consistent) establishment upon himself when he argued in our adversarial system for values that compete with truth over truth as a singular value.” Freedman argued on theoretical as well as practical grounds for truth and its tempering values of justice, defense, liberty, and winning.

In the US adversarial system, a trial is in part a search for truth. However, the individual has several fundamental rights: a counsel, a trial by jury, due process, and the privilege against self-incrimination. These basic rights serve as “procedural safeguards against error in the search for truth.” A trial thus is “far more than a search for truth” since our constitutional rights “may well outweigh the truth-seeking value”: in fact, these rights and others “may well impede the search for truth rather than further it” (2). Our system requires that certain processes be followed which ensure the dignity of the individual, irrespective of their impact on the determination of truth (3). Freedman sees truth as a basic value in the adversarial system. While he maintains that truth-seeking techniques include “investigation, pretrial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence in summation,” he emphasizes that since our society honors an individual’s human dignity, truth-seeking is not an absolute. On occasion, truth may be subordinated to values that are situationally important: for example, the Fifth Amendment’s privilege against self-incrimination or the attorney-client privilege of confidentiality (4-5).

Freedman extends his case to support: (l) the zealous advocate who will let justice prevail for a client though the heavens fall if justice requires they do (9-11), (2) the keeping of secrets between lawyer and client even to the point of supporting a client on a testimony the lawyer knows will constitute perjury (28-31), and (3) making the truthful witness through cross-examination appear to be mistaken or lying (43-45). To prevent the lawyer-client relationship from being destroyed, these constitutional rights must be preserved: counsel, trial by jury, due process, and the privilege against self-incrimination (5-6). In the corroborative words of Norton, lawyers serve “more than one master” and have a primary duty to pursue

truth and justice (Norton, 1980, 261).

The American Bar Association Model Rules of Professional Conduct, adopted by the ABA House of Delegates on 2 August 1983 and amended repeatedly (ABA, 1995), supports the complex view that lawyers serve more than one master or that adversarial law has godterms, such as justice, that compete with truth. Rule 1.6 deals with the confidentiality of information. While a lawyer may reveal information to the extent the lawyer believes is necessary to prevent the client from committing a criminal act, a lawyer should not reveal information about a client unless the client consents with the exception of specified disclosures (20). Confidentiality applies not only to matters the client communicates in confidence but also to the information tied to the representation regardless of its source (21). In Rule 3.3 on candor toward a tribunal, a lawyer should not take a false statement or offer false evidence. However, in some jurisdictions a lawyer may have a client testify even if the lawyer knows the testimony will be false. The disclosure of perjury is subordinate to constitutional rights to counsel and due process (62-65).

4. Public Communication and Mass Media

Unlike fiction, the law usually lacks an omniscient author of wrongs and remedies. In stories acted out by stars like Clint Eastwood and Chuck Norris, we witness the wrong and then see the heroes remedy it. When wrongs come before lawyers, judges, and juries (none of whom are witnesses), no omniscient author is available to resolve the dramatic conflict in the style of a 30 to 90 minute program or movie. The facts have to be constructed and the law observed. Truth and justice, balanced against one another, may be pursued to untangle the confusion and complication of media accounts. The significant difference between facts and law needs clarification. The facts are “what happened,” and the law is “what should be done because of the facts” (Pember, 1998, 15).

In this final section, the notion that lawyers must bow to several godterms in their professional practice of law is applied. Media reporters might best acknowledge these complications to advance the validity of their accounts. Two cases from legal reporting will help demonstrate the perspective presented in this paper. Because media writers have such high profiles in the reporting of legal events, they receive my attention here. Media writers, however, may communicate legal information generally better than most lay professionals interested in disseminating such information. The journalist as an ethical professional is respected.

In reporting the fatal shooting on 31 December 1989 of Kevin Weekley in rural East Grand Forks (Black, 1998, 1C), the reporter tells us who were charged in this murder investigation, the charges that each faced, and the remaining charges of first and second degree murder. The reporter asserts that on 15 July 1997 half the charges faced by the four defendants were dropped because the statute of limitations had expired. While the law allows for the defendants to have rights and privileges, the knowledge of these rights and privileges are assumed by the writer rather than explained. The reader untrained in the law might know something about statutes of limitations but might also benefit from a line or two putting their legality in context. A sequel to this murder case (Black & Copeland, 1998, 1C) continued to cover the dramatic elements more instructively than the legal aspects. A female witness in the Weekley murder trial told police in Mandan, North Dakota that a white male grabbed her as he entered the back door of her apartment, threw her to her knees, and delivered this harsh message: "If you testify, you die." A real life drama with greater power than a fictional drama falls short of an adequate legal explanation with backing. While the story was reasonably well written, I believe it would have been stronger had the legal rules favoring any defendant been mentioned. Instead, an attorney for one of those charged with Weekley's murder is quoted as admonishing: "You have to remember that almost all of the witnesses are part of the underworld." The truth and the law need further attention here, and this story has, I believe, been reported better than most.

Turning from one of North America's favorite media themes to another, we move from violence to sex. As regretful as I am personally to give President Clinton's sex scandal any more coverage, the case with Monica Lewinsky will allow for a ready elucidation of truth and legal tensions in untangling media reports. If the public generally needs legal education from its media writers, in this case, the failure to provide the legal context of the journalistic coverage challenges journalistic and public relations ethics (Seib & Fitzpatrick, 1997; Seitel, 1995) with all respect due US federal freedom of information laws. As Overbeck (1998) reminds us, without freedom to gather news, freedom to publish amounts to little more than a "right to circulate undocumented opinions-a right to editorialize without any corresponding right to report the facts." For democracy to work, we must be knowledgeable of our government and have access to its open meetings and records (303).

Granting restrictions in the US Freedom of Information Act and loopholes in US Government in the Sunshine Act, millions of documents have become public and

some private meeting doors have opened (303-304). Putting aside for now issues connected with any president's personal sex life as being legally open or sheltered, we will look at the Lewinsky-Clinton sex scandal as portrayed in a nationally respected magazine with respect to untangling truth and justice.

One subtitle in a "special report on Clinton's crisis" reads: "A tangled web of politics, seduction and litigation." The article suggests a hopeful untangling it might accomplish (Gibbs, 1998, 21-33). Instead, the article, better written than most, presents the dramatic characters in several acts. The accounts of the events and facts derive largely from undocumented or partially documented opinions and many unsubtantialed claims. Readers are invited to share gossip on the alleged, sordid acts of President Clinton. We might, argumentatively speaking, appreciate the account more if it had factual over narrative value. The article shares a story with us: a story based on claims with sketchy or no evidence, a story that celebrates fiction for sales over evidence for justice. The opportunity to be a popular novelist shadows the opportunity to be a just reporter. Perhaps, the authors, being denied access to enough sources and facts, exercise their right to editorialize without exercising their responsibility to report facts. So, the authors choose to circulate views predominantly undocumented. The partisan accusations flourish while open inquiries wane. Rather than being enlightened with evidence, the readers receive a polemic on the evils of this Presidency. The quest for truth and justice has faded. The public is finessed into jumping on the oppositional bandwagon. Hearsay and speculation reign. As a commentator and citizen who appreciates facts over fiction and justice over bias, I would favor reporting that untangles false and irrelevant material from true and relevant material. This article weaves elements of fact with fiction so artistically that the effort has to be sifted through many filters to result in the actual sand of truth and justice desired. In one part of the coverage, the author reports: "Lewinsky is graphic in detailing, and at times denigrating, the President's sexual characteristics and performance." The author adds: "Lewinsky jokes that if she ever got to leave her job at the Pentagon and return to the White House, she would be made "Special Assistant to the President for b j " (22). In a related article describing these allegations, another author (Kirn, 1998, 30) affirms two passions of President Clinton: one "alleged passion is for fellatio" and the "second, proven, passion (warning: pun ahead) is for cunning linguistics." Both authors present numerous inferences and judgments as compared to reports. Facts not being convenient, the report turns to emoting over informing. At one point, one of the authors (Kirn, 31)

passes an opportunity to balance truth with justice. Referring to the possibility of Clinton facing impeachment proceedings, the author insults rather than instructs: “In an incredibly lucky constitutional break, the President’s judge and jury will be the Senate-recently home to Bob Packwood, still home to Chuck Robb and Ted Kennedy.” He then adds sarcastically: “Clinton just might find justice there. At least he’ll have a jury of his peers.” The author could have reported objectively what the President’s options are and who his judges will be. The role of justice in relation to truth would be one step closer to being extricated from obscurity and confusion instead of embroiled in it.

5. Conclusion

My concern in this paper has not been with media writers who are commentators aiming at influencing attitudes and changing behavior based on sound reporting. Rather my concern is to urge reporters to deliver fact over fiction and justice over insult. The media writers cited write, in my opinion, superbly for a market that requires a heavy blend of reports with inferences and judgments. Their style is highly polemical and proceeds, sometimes out of necessity, from undocumented opinions and unsubstantiated evidence with minimal allusion to the interplay of truth and justice. Perhaps, we need an alternative form of media reporting, a form that may appeal to readers and viewers who prefer to distinguish reporting clearly from commentary. Maybe we need an alternative form of journalism that labels reporting as discourse with a preponderance of reports over inferences and judgments and that labels commentary as discourse with a base in reports but a preponderance of inferences and judgments.

We might benefit from media reporting that:

1. explains in a concise and rigorous manner what is actually known at the time of writing instead of what is opined,
2. elucidates what an accused has a right to expect in the process of justice,
3. notes whether truth and fact play a major role at the time of writing, and
4. forecasts whether the adversarial process might (or definitely will) be a consequence of the allegations at the time of writing.

In conclusion, let us consider journalism in another key: one where truth and justice play a duet.

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