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WHERE ARE OUR MINDS AND WHAT ARE WE THINKING? VIRTUE ETHICS FOR A “PERFIDIOUS” MEDIA

MARIANNE M. JENNINGS*

“This story is true. The questions we raised about then-Lieutenant Bush’s National Guard service are serious and legitimate.”
—Dan Rather, CBS News and 60 Minutes anchor after being told that the 1973 memo by Colonel Jerry Killian was forged

“Memos on Bush Are Fake But Accurate”
—New York Times headline on Rather story

“I regret the mistake I made during the course of this investigation, which was not conducted in good faith.”
—Jack Kelley, Former USA Today reporter in his resignation letter following revelations of falsehoods in his stories for which he could not produce sources

“If they’re all so brilliant and I’m such an affirmative-action hire, how come they didn’t catch me?”
—Jayson Blair, Former New York Times reporter reflecting on his resignation following revelations regarding his falsifying and plagiarizing stories

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1. With gratitude to H.L. Mencken who described the average American newspaper as “ignorant, unfair, hypocritical, perfidious, lewd and dishonest.” JOHN C. MERRILL, LEGACY OF WISDOM 169 (1994). Mencken was actually generous with those comments. He reserved his most harsh comments for schools of journalism: “Probably half of them, indeed, are simply refuges for students too stupid to tackle the other professions.” Id.


"Scoops are what it's all about. It's what we strive for every week. It's what you pay me for."

—Michael Isikoff, Newsweek and Washington Post reporter upon reflecting on the Monica Lewinsky story

"Fox News, a blatantly biased, conservative news service that is challenging the longtime supremacy of the more balanced networks . . ."

—Professor Joan Konner, Dean Emerita, Columbia University Graduate School of Journalism

“What elephant?”

—Jimmy Durante

INTRODUCTION

The opening quotes reflect a cross-section of ethical issues in the media, from the Machiavellian attitude of the story at any cost to the falsification of sources and stories, to the issue of bias. The quotes were chosen for their stinging effect. No one can read the first four quotes or recall their underlying stories without wincing. The conduct of Dan Rather, Jack Kelley, and Jayson Blair is not at a level where we fret to ourselves, “They were involved in such nuanced ethical issues. I never would have seen that coming.” Instead, as it were, we look at their conduct and conclude, “Where were their minds and what were they thinking when they decided to behave as they did?” Perhaps even more relevantly, we might ask, “Where were the minds of their editors and producers to allow such monumental mistakes and oversights to occur?”

The last two quotes may offer some insight into the questions: Where were their minds? What were they thinking? The desire to break a story and an inability to determine when bias has clouded judgment may be the factors that fueled the obviously wrong conduct and the lax supervision that permitted it to go on for so long without question.

The last five years in journalism have not been a pretty sight. Indeed, the last two years that netted us the Blair, Kelley, and Rather scandals indicate that reform and improvement are not on the horizon and that we may, in fact, be traveling in the

7. See infra note 142 for source and explanation.
wrong direction. To err is human, but the course of the road is a choice, and the journey ahead does not appear to hold much promise. As a business school professor with one foot in the door of the Fourth Estate’s castle because of my some-time columnist activities, I have watched with bemusement the media indictment of business for its hubris, greed, and utter ethical collapse, which have permitted the financially devastating scandals at Enron, WorldCom, Adelphia, Tyco, and Marsh McLennan. Somehow the ironic parallels have escaped my brethren and sisters in the media. They mocked Ken Lay and Bernie Ebbers who, as CEOs, allowed—indeed maybe joined in—fraud going on under their noses. When Mr. Lay and Mr. Ebbers protested, “But we didn’t know,” there was a nationwide guffaw from newsrooms around the country. The parallels between the business


10. For example, a New York Times reporter phrased the conduct of these CEOs as follows: “With his investment blunders, Mr. Lay joined a group of chief executives—including Bernard J. Ebbers of WorldCom and John J. Rigas of Adelphia Communications—who structured their finances with an apparent view that their companies would never stumble. Each borrowed heavily on his stock, each left his job amidst the scandal, and now—after years of cultivating images as a brilliant corporate strategist—each must rely on admissions of his own shortcomings to defend decisions that now seems incomprehensible.” Kurt Eichenwald, Company Man to the End, After All, N.Y. TIMES, Feb. 9, 2003, § 3, at 1.

11. USA Today called Ken Lay’s news conference “extraordinary” and quoted Mr. Lay as saying, “As CEO of the company, I accept responsibility for Enron’s collapse . . . However, that does not mean I knew everything that happened at Enron, and I firmly reject the notion that I engaged in any wrongful or criminal activity.” Greg Farrell, Lay Sets Robust Defense in Motion, USA TODAY, July 9–11, 2004, at 1A. Even the Wall Street Journal’s editorial writer, Holman W. Jenkins, Jr., phrased his reaction this way, “Did a bacillus descend from space and make Enron senior employees in equal parts evil and stupid?” How Could They Have Done It?, WALL ST. J., Aug. 28, 2002, at A15.
ness culture that allowed the excesses and fraud and the media culture that spawned Blair, Kelley, Rather, and a host of other stories of journalistic hijinx are uncanny but largely overlooked. For example, one investment banker whose firm was involved with Enron described the culture of his firm and others at the time of Enron's and WorldCom's growth: "In investment banking the ethic is, ‘Can this deal get done?’ If it can, and you're not likely to be sued, it's a good deal."12 The mentality is akin to the Isikoff scoop view applied to investment banking.

Ethics in business are no different from ethics in the media. Yet somehow, those in the Fourth Estate have fancied themselves different—above the fray, and certainly above the obvious missteps of the corporate scoundrels.13 No one is above the very basic ethical standards that should have applied in those business settings. Indeed, those same standards should apply to those in the media, and perhaps more so, because of public trust and the critical role of information in a free society. However, the areas of gray have grown to encompass the ethical standards in the media, creating a state of confused and misguided moral relativism that finds the media victims of their own doings. Virtue ethics have all but disappeared as the standard for journalistic choices and dilemmas, and their absence explains where journalists' minds were and what they were thinking as they participated in or allowed the breaches to occur. As in business, the goals of philanthropy, environmentalism, diversity, and other noble social causes were the measure of ethics—not honesty in financial reports or fair dealing with shareholders.14

The purpose of this Article is to encourage the reinstatement of virtue ethics as a means of restoring the role and trust of the media in advancing democracy and eliminating its perfidious

13. The term "Fourth Estate" is often attributed to Edmund Burke, who said that the press in the gallery at Parliament constituted the Fourth Estate, which had far more power than any of the other components of that government body. See Carlyle, supra note 8. However, it has been used by others to signify the proletariat, as opposed to the other three classes of individuals in France. There are uses that precede Burke's, referring to Kings, Lords, Commons, and the Fourth Estate—The Mob—a group that all the other three must pass by. See Fourth Estate, in WIKIPEDIA: THE FREE ENCYCLOPEDIA, at http://en.wikipedia.org/wiki/Fourth_estate (last modified Mar. 6, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Given the events in the media during the 2004 presidential election, the mob interpretation may be the preferable root of the term.
14. See Jennings, Restoring Ethical Gumption, supra note 9, at 501, for more background on the social responsibility trend as penance for misdeeds in financial reporting.
reputation. The first portion will offer a brief inventory of the most notorious journalism scandals that have engulfed the profession. The second portion will explore the backdrop of organizational and professional cultures that afforded a ripe environment for those scandals—an environment similar to the scandals in business. The final portion will offer solutions for preventing the scandals through a mending of the ethical cultural fabric of the media as well as the training of future journalists in true virtue ethics.

I. THE SCANDALS THAT HAVE ENGULFED THE MEDIA

A. The Early History: Beginnings of the Fake Story—Masson and Malcolm

While the year 1998 was a turning point for media ethics, there was certainly an abundance of similar mishaps during the entire final decade of the century. There were percolating signs of compromised ethics and eerily similar ethical mishaps prior to this watershed year. Journalists edged a bit into the area of fakery in 1989 when Jeffrey Masson brought suit against the New Yorker and Janet Malcolm for about twelve quotes she had attributed to him in one of her articles.\footnote{William S. Henry III, The Right to Fake Quotes, TIME, Aug. 21, 1989, at 49.} The quote that most irritated Mr. Masson was one in which Ms. Malcolm wrote that he had referred to himself as an “intellectual gigolo.”\footnote{Masson v. New Yorker Mag., 501 U.S. 496, 502 (1990). A side-by-side examination of the tapes and the quotes, as the following excerpt from the U.S. Supreme Court’s opinion shows, demonstrate that Ms. Malcolm did take license with the thoughts of the plaintiff, Mr. Masson:
Malcolm quoted a description by petitioner of his relationship with Eissler and Anna Freud as follows:

“Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, “Well, it is very nice sleeping with you in your room, but you’re the kind of person who should never leave the room—you’re just a social embarrassment anywhere else, though you do fine in your own room.” And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough “in my own room.” They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don’t take him out in public. . . .” In the Freud Archives 38.

The tape recordings contain the substance of petitioner’s reference to his graduate student friend, App. 95, but no suggestion that Eissler or Anna Freud considered him, or that he considered himself, an “intellectual gigolo.” Instead, petitioner said:}

In a 2-1
“They felt, in a sense, I was a private asset but a public liability... They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.” *Id.*, at 104.

(b) “Sex, Women, Fun.” Malcolm quoted petitioner as describing his plans for Maresfield Gardens, which he had hoped to occupy after Anna Freud’s death:

“...It was a beautiful house, but it was dark and somber and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.” In the Freud Archives 33.

The tape recordings contain a similar statement, but in place of the references to "sex, women, fun" and *The Wizard of Oz*, petitioner commented:

“[It is an incredible storehouse. I mean, the library, Freud’s library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It’s fascinating.” *App.* 127.

Petitioner did talk, earlier in the interview, of his meeting with a London analyst:

“I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We’d have great parties there and we were [laughs]... going to really, we were going to live it up.” *Id.*, at 129.

(c) “It Sounded Better.” Petitioner spoke with Malcolm about the history of his family, including the reasons his grandfather changed the family name from Moussaieff to Masson, and why petitioner adopted the abandoned family name as his middle name. The article contains the passage:

“...My father is a gem merchant who doesn’t like to stay in any one place too long. His father was a gem merchant, too—a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff—it sounded better.” In the Freud Archives 36.

In the most similar tape-recorded statement, Masson explained at considerable length that his grandfather had changed the family name from Moussaieff to Masson when living in France, “[j]ust to hide his Jewishness.” Petitioner had changed his last name back to Moussaieff, but his then-wife Terry objected that “nobody could pronounce it and nobody knew how to spell it, and it wasn’t the name that she knew me by.” Petitioner had changed his name to Moussaieff because he “just liked it.” “[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on.” In the end, he had agreed with Terry...
Ninth Circuit decision, with a strong dissent from Judge Alex

that "it wasn’t her name after all," and used Moussaieff as a middle instead of a last name. App. 87–89.

(d) "I Don’t Know Why I Put It In." The article recounts part of a conversation between Malcolm and petitioner about the paper petitioner presented at his 1981 New Haven lecture:

"[I] asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outre views into the bitter and belligerent anti-Freudian he had become.

"Masson sidestepped my question. You’re right, there was nothing disrespectful of analysis in that paper," he said. ‘That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don’t know why I put it in.’” In the Freud Archives 53.

The tape recordings instead contain the following discussion of the New Haven lecture:

Masson: "So they really couldn’t judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh,—"

Malcolm: "What were the circumstances under which you put it [in]? . . ."

Masson: "That it was, was true.

". . . . I really believe it. I didn’t believe anybody would agree with me.

". . . . But I felt I should say something because the paper’s still well within the analytic tradition in a sense. . . .

". . . . It’s really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn’t really do it. And then I thought, I really must say one thing that I really believe, that’s not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . ." App. 176.

(e) "Greatest Analyst Who Ever Lived." The article contains the following self-explanatory passage:

"A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux has taken The Assault on Truth [Masson’s book]. ‘Wait till it reaches the best-seller list, and watch how the analysts will crawl,’ he crowed. ‘They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he’s the greatest analyst who ever lived. Suddenly they’ll be calling, begging, cajoling: “Please take back what you’ve said about our profession; our patients are quitting.” They’ll try a short smear campaign, then they’ll try to buy me, and ultimately they’ll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It’s going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.”” In the Freud Archives 162.
This material does not appear in the tape recordings. Petitioner did make the following statements on related topics in one of the taped interviews with Malcolm:

"... I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it." App. 136.

"Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[1] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. it's me alone." Id., at 139.

The tape of this interview also contains the following exchange between petitioner and Malcolm:

Masson: "... analysis stands or falls with me now."
Malcolm: "Well that's a very grandiose thing to say."
Masson: "Yeah, but it's got nothing to do with me. It's got to do with the things I discovered." Id., at 137.

(f) "He Had The Wrong Man." In discussing the archives' board meeting at which petitioner's employment was terminated, Malcolm quotes petitioner as giving the following explanation of Eissler's attempt to extract a promise of confidentiality:

"'[Eissler] was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? You're doing it. What am I supposed to do—be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.'" In the Freud Archives 67.

From the tape recordings, on the other hand, it appears that Malcolm deleted part of petitioner's explanation (italicized below), and petitioner argues that the "wrong man" sentence relates to something quite different from Eissler's entreaty that silence was "the honorable thing." In the tape recording, petitioner states:

"But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, 'Do you want to poison Anna Freud's last days? Have you no heart?' He called me: 'Have you no heart? You're going to kill the poor old woman. Have you no heart? Think of what she's done for you and you are now willing to do this to her.' I said, 'What have I, what have I done? You did it. You fired me. What am I supposed to do: thank you? be grateful to you?' He said, 'Well you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence.' 'Fuck you,' I said, 'Why should I do that? Why? You know, why should one do that?' 'Because it's the honorable thing to do and you will save face. And who knows? If you never speak
Kozinski, the court ruled that the quotes did not alter the substance of Mr. Masson's thoughts and were protected under the First Amendment. But the U.S. Supreme Court reversed the decision and remanded it for trial, because the case had only been heard on summary judgment at the federal district court level.\textsuperscript{17} Ms. Malcom has maintained that there were unrecorded conversations and notes, but Mr. Masson denied that in the trial. The court ruled that it could not get into the business of judging more than a technical correction such as syntax or punctuation:

Even if a journalist has tape-recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word.

In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century.\textsuperscript{18}

\textsuperscript{17} Masson v. New Yorker Mag., Inc., 895 F.2d 1535 (9th Cir. 1989), rev'd, 501 U.S. 496 (1991).
\textsuperscript{18} Masson, 501 U.S. at 515.
The reaction to this new reporting habit and the court decision varied. Some editors felt that "everyone does it—just look at press conferences"—and all was well so long as the intent was preserved. But others could not understand how journalists could be happy with such a finding for their field. The muddled reaction was perhaps a license or a foreshadowing of the additional lines that would be crossed in the name of not altering the substance. Justice Byron White, in a rare situation, concurred with the Court's decision to remand but dissented on the strength of its renunciation of what the reporter had done:

My principal disagreement is with the holding . . . that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."

Under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), "malice" means deliberate falsehood or reckless disregard for whether the fact asserted is true or false. Id., at 279–280. As the Court recognizes, the use of quotation marks in reporting what a person said asserts that the person spoke the words as quoted. As this case comes to us, it is to be judged on the basis that in the instances identified by the Court, the reporter, Malcolm, wrote that Masson said certain things that she knew Masson did not say. By any definition of the term, this was "knowing falsehood": Malcolm asserts that Masson said these very words, knowing that he did not. The issue, as the Court recognizes, is whether Masson spoke the words attributed to him, not whether the fact, if any, asserted by the attributed words is true or false. In my view, we need to go no further to conclude that the defendants in this case were not entitled to

20. Indeed, what is fascinating is a web search of Ms. Malcolm that reveals undying respect for her attention to details and accuracy, to wit, "Janet Malcolm handles the medium [collage] with the same attention to nuance, the same passion for exactitude that informs her writing." Maureen Mullarkey, Janet Malcolm, ARTCRITICAL.COM (Nov. 2003) at http://www.artcritical.com/mullarkey/MMMalcolm.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy). What is more fascinating is a quote from Ms. Malcolm on the role of the journalist: "Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse." JANET MALCOLM, THE JOURNALIST AND THE MURDERER 3 (1990).
summary judgment on the issue of malice with respect to any of the six erroneous quotations.\textsuperscript{21}

The case had an equally muddled history. In 1993, a jury found for Masson but became deadlocked on what the damages should be. The judge dismissed the jury and ordered a retrial, which was held in 1994. That jury found that Ms. Malcolm had acted without malice and found against Mr. Masson.\textsuperscript{22}


NBC \textit{Dateline}'s November 1992 report on General Motors trucks proved to be another step in the direction of “well, it's true even if not entirely accurate.” The \textit{Dateline} segment focused on the side-saddle gas tanks on GM trucks exploding upon impact. The tests conducted by NBC news as part of its segment found GM engineers watching the footage of the gas tanks exploding and insisting that the degree of explosion could not be so. GM hired private investigators and discovered that the gas tanks had been rigged with extra kick ("... gunpowder. Good old saltpeter, charcoal and sulphur") to make the impact on the gas tanks more dramatic.\textsuperscript{23}

NBC News, the division responsible for production of the report, admitted that it had attached incendiary devices to the gas tanks so that the explosion of the tanks was more dramatic for the purpose of giving viewers a visualization of the problem. Michael Gartner, then the chief of NBC News, initially defended the use of the devices for the story because while the devices were fake, the story was true. He said that “sparking devices” were


used, but that the story is “fair and accurate.” Mr. Rather was not the first to rely on what has become a steady pillar of journalism: the information is fake, but the story is true. In another indication of the Rather trait, Mr. Gartner “accused GM of using the lawsuit ‘to divert attention from the central issue’ of whether its 1973–87 pickups are safe.” When GM filed suit, Stone Phillips and Jane Pauley read an extraordinary on-air apology and Mr. Gartner resigned.

C. The Early History: The Isolated Crooked Columnists—Cooke and Winans

Ironically, it was Janet Cooke, once a reporter with the Washington Post, who broke the story about the GM suit against NBC for the Dateline report. Ms. Cooke won a Pulitzer in 1981 for her story about an eight-year-old drug addict that was a hoax.

There were other forms of discovery about the habits of columnists and reporters. R. Foster Winans, a columnist with the Wall Street Journal, was indicted in 1985 and convicted of insider trading and served seven months at a federal prison, with his term ending in 1988. He was able to play the market well because he used the information he had gathered for his “Heard

24. Maynard, supra note 23, at 1A.
25. Id.
26. Mr. Gartner then served as co-owner and editor of the Tribune in Ames, Iowa. He also served as a weekly op-ed contributor to USA Today. Mr. Gartner won the Pulitzer Prize in 1997 for editorial writing. Iver Peterson, 20 Pulitzer Prizes Are Announced With a Theme of Personal Impact on Lives, N.Y. Times, Apr. 8, 1997, at B8. He served as ombudsman for Brill’s Content, now defunct, and he now owns a Triple-A baseball team in Iowa, the Iowa Cubs. Peter Johnson, Jason Blair Uproar Has Yet to Quiet Down, USA Today, May 29, 2003, at 3D; Felicity Barringer, News Executive Leaving It Behind for a Baseball Life, N.Y. Times, Sept. 6, 1999, at C6.
27. Brian Donlon & Peter Johnson, Lawsuit Sparks Debate Over News Show’s Tactics, USA Today, Feb. 9, 1993, at 2A.
28. Id.
29. See R. Foster Winans, Trading Secrets: Seduction and Scandal at the Wall Street Journal (1986). On his website, http://www.fosterwinans.com, Mr. Winans links to an article in which he claims that since the Jayson Blair case, he has been in the middle of all the inquiries about journalism and ethics. Joann Loviglio, Disgraced Writer Finds Redemption, Editor & Publisher, June 26, 2003, available at http://www.fosterwinans.com/FW-AponE&P062603.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Mr. Winans has founded a nonprofit writer’s room, of which some have said Michigan would be proud. Mr. Winans also has a classic quote, “The only reason to invest in the market is because you think you know something others don’t.” Eric Gelman et al., The Secret World of Ivan Boesky, Newsweek, Dec. 1, 1986, at 50. Interestingly, Mr. Winans offered Martha Stewart advice on how to handle prison. Daniel McGinn, Advice for Martha, Newsweek, June 30, 2003, at 13.
on the Street" column to position himself and others, through tips to them about forthcoming column items, to profit in the market prior to publication of the information. The U.S. Supreme Court described a strict Wall Street Journal policy prohibiting the disclosure of Heard on the Street information in advance of publication because of the column’s proven ability to move markets.

D. The 1998 Scandals: The Story Line Repeats

But it was the year 1998 that was a media ethics turning point. This was the year that saw institutions such as the New Republic and the Boston Globe become victims of the simplest types of scandals. From that point forward, the scandals erupted in a fairly steady stream, the most surprising aspect of which is that the scandals were so repetitious: different names and media outlets, same story.

1. Stephen Glass and the New Republic

New Republic columnist Stephen Glass may have provided the 1998 wake-up call that started the series of discoveries. Pricked consciences of writers and editors in all forms of media seemed to create this watershed year of revelations about journalism's ethics. In June 1998, Stephen Glass was a twenty-five-year-old associate editor at New Republic, a publication with an eighty-four-year history of charting new territory, provoking thought, and pursuing the topics of our times. The editors perhaps did not realize exactly how new the territory was that Mr. Glass was chart-
Between December 1995 and May 1998, the New Republic had published forty-one articles by Mr. Glass, but it was the piece Hack Heaven that tipped Mr. Glass's hand. Fortunately, or unfortunately, depending upon whose ethical corner one resides in and whether one is Mr. Glass or an outsider, the topic of the story, a young lad who was able to hack into a corporate website and then publish proprietary information on the Web, caught the eye of those who cover the field of the web and web journalism. Some perfunctory checks by publications such as Forbes found, for example, that there was no company by the name of Jukt Micronics, the alleged company, and that there was no Uniform Computer Security Act. Based on the inquiry from Forbes, some fact-checking began on that story as well as others. The editors who had served during the Glass era, Andrew Sullivan, Michael Kelly, and Charles Lane (the editor in 1998), determined that many of Mr. Glass's stories were fabricated and others contained information that could not be verified. Hack Heaven, they wrote in an apology to readers, "was made up out of whole cloth." They explained that they had made assumptions about Mr. Glass that were not justified:

We assumed that no person who calls himself a journalist, least of all a member of our own tnr family, would attempt to work with us on any other basis. In Stephen Glass's case, this assumption was not warranted. For reasons known only to him, Glass mounted what appears to have been quite an elaborate effort, including the falsification of documents and reporter's notes, to trick our editors and elude our fact-checkers.

Based on those inquiries, we now believe that two other articles that have appeared recently in our pages cannot be substantiated. They are: "Monica Sells," Glass's account of a purported convention of political novelty vendors in Rockville, Maryland (April 13, 1998), and "Plotters," Glass's account of a purported meeting of anti-Clinton activists in Virginia (February 23, 1998). Additionally, we believe that Glass manufactured the opening anecdotes of the article "Praised Be Greenspan" (March 30, 1998), concerning activities at purported investment houses in New York.

Ultimately, twenty-seven of the forty-one articles could not be verified.
Interestingly, the New Republic editors raised a defense not unlike those of accounting firms found holding the bag when it turned out that the financial statements they had certified for companies were also spun out of whole cloth:

[O]ur editing and fact-checking systems are designed to defend against the errors and mistakes even good professionals sometimes make—not against the systematic and intentional deceptions of someone who actually has no business practicing journalism.\(^36\)

The auditor defense is that we can detect mistakes, but we do not have the systems in place to detect fraud. “No major aspect of the independent auditor’s role has caused more difficulty for the auditor than questions about his responsibility for the detection of fraud.”\(^37\) The late A.A. Sommer, Jr., former SEC Commissioner, said, “Fraud is impossible to eliminate—it is a part of human nature.”\(^38\)

Former Securities Exchange Commission Chairman Harvey Pitt’s discussion echoes that of the New Republic editors:

The issues are different for accountants. We start from the proposition that accountants engaged in auditing, unlike lawyers, are not, and may not act as, advocates for their clients; they are professionals whose function is to give the investing public greater confidence that a company’s financial reports are reliable, and truthfully prepared. Like lawyers, auditors have professional responsibilities. Some would try to make accountants guarantors of the accuracy of corporate reports. But, even the most dutiful accountant could not assume that level of obligation. Years of experience teach that it is difficult, and often impossible, to discover frauds perpetrated with management collusion. The fact that no one can guarantee that fraud has not been perpetrated does not mean, however, that we cannot, or should not, improve the level and quality of audits. The Auditing Standards Board recently approved an exposure draft on revised standards for fraud detection. This is a timely and a positive development; one that needs to be finalized promptly. Auditing firms also should put their collective heads together to figure out better ways to struc-

36. Id.
ture audits so that their personnel can better detect fraud. At present, the firms largely act unilaterally; acting in concert would ensure that greater resources could be applied to the problem more effectively, and would have the not insignificant side benefit of demonstrating accounting firms really do care about improving the safeguards our system offers investors.\(^9\)

The parallels between business and media ethics continue as a theme.

Another theme that continues in the 1998 unraveling, and, indeed, in the earlier situations, is that of the life of the uncovered reporter after the termination. Stephen Glass lives on, and does well, despite the *New Republic* experience. He completed law school at Georgetown and served as a judicial clerk for a D.C. federal district judge, although he lives under the name of Thomas Pynchon. Mr. Glass published a novel in 2003, *The Fabulist*, a book that appears to be semi-autobiographical.\(^4\) The 2003 film, *Shattered Glass*, enjoyed critical acclaim. Interestingly, director Billy Ray said that because of the nature of the subject matter, he created each scene with a goal of absolute truth.\(^4\)

The critic's description of the factors that led to Glass's behavior carry an eerie portending of what would befall young business executives in the years following Glass's demise:

Ray set up "Shattered Glass" so that every scene, he says, would tell the truth. The film shows he stuck to his word. "Shattered Glass" is a compelling movie that at times feels almost like a thriller, as Glass tries desperately to cover his tracks and compounds his lies with more and more lies. Finally, he comes crashing down, caught in his own net of deceptions. The film emerges as a cautionary tale about the perils of succeeding no matter the cost, and the frailties of a profession that is supposed to protect our freedoms by always revealing the truth—no matter the cost.\(^4\)

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42. *Id.*
Mr. Glass appeared on an ethics in journalism panel at George Washington University in 2003 and admitted that he had "led a pretty unethical life." Andrew Sullivan also appeared on the panel and suggested, "If you had any integrity, you would go away." Mr. Glass confessed, "I don't know how I can demonstrate my remorse." Mr. Glass refused to answer questions about the truthfulness and authenticity of the remaining articles of the forty-one he wrote for the New Republic but indicated in a piece for Rolling Stone that he would like to return to journalism.

2. Patricia Smith and the Boston Globe

June was not a good month in 1998. Perhaps a newfound paranoia set in, because there were disclosures nationally and locally about Glass-like reporters. Following the New Republic disclosures, the Boston Globe, part of the New York Times family of newspapers, dismissed one of its columnists, Patricia Smith, after it was discovered that she had fabricated quotes on four columns with one of the columns being almost an entirely fabricated story about a woman who was dying of cancer. For Ms. Smith, a Pulitzer Prize finalist, it was her second mistake. She had worked at the Chicago Sun-Times and had written a review of a concert she had not attended. While the newspaper ran an apology and correction, she was able to retain her job. Indeed, she was able to be hired by the Boston Globe despite the Globe being unable to determine whether editors were aware of that previous issue at the time she was hired. For the Globe, the decision to end its relationship with Ms. Smith was "self-evident." Then-editor Matthew V. Storin noted, "There is no middle ground on something like this." Like all those who emerge in the pattern of similar stories, Ms. Smith is doing well today. She has contin-

43. Shafer, supra note 40.
44. Id.
45. Id.
46. For an example of a less-publicized local reporter scandal involving fabricated stories, see Richard de Uriarte, Writers' Lies Sully Media, ARIZ. REPUBLIC, June 28, 1998, at E1. Julie Amparano, a local reporter, was dismissed when stories (of the Cooke highly emotionally-charged sort) could not be verified. David Parrish et. al, Columnist's Dismissal a Story of Untraceable Sources, ARIZ. REPUBLIC, Aug. 24, 1999, at A1, A4.
47. Robin Pogrebin, Boston Columnist Is Ousted for Fabricated Articles, N.Y. TIMES, June 19, 1998, at A18. Actually, the editorial board asked for her resignation. Id.
48. Id.
49. Id.
uced with her already established work as a poet and continues to appear at events of the Academy of American Poets.  

3. Mike Barnicle and the Boston Globe

The Boston Globe's 1998 was hard-hitting because, in August, another columnist, one of twenty-five years, Mike Barnicle, ran into some difficulties when a reader noticed that Barnicle's August 2, 1998, column, I Was Just Thinking seemed to be "thinly disguised" versions of lines from George Carlin's 1997 book, Brain Droppings. An example:

Barnicle: Someday I'd love to see the Pope appear on his balcony and give the baseball scores.
Carlin: Someday I wanna see the Pope come out on that balcony and give the football scores.

Mr. Barnicle's initial explanation was that the jokes had been given to him by friends, and the result was that he was suspended for two months with an agreement to return under more stringent controls. However, when longsuffering editor of the Globe, Matt Storin, learned that Mr. Barnicle had recommended Mr. Carlin's book on a television appearance almost a year earlier (during the book's initial promotion), Mr. Storin demanded Mr. Barnicle's resignation. Mr. Barnicle refused to resign but did eventually tender his resignation when questions about a 1995 column about two children suffering from cancer emerged.

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53. Felicity Barringer, Furor Over Globe Columnist Exposes Fault Lines in Boston, N.Y. TIMES, Aug. 17, 1998, at D1, D7. Mr. Barnicle's attitude was not one of remorse. "These things happen," he told reporters. "This is a stupid mistake. But you know, when you look in the rear view mirror, there's no lives lost. There's no...reputation ruined in the background, other than perhaps mine being smirched a little. I mean this is, you know, a series of supposedly funny one-liners. I mean we have to maintain some perspective here. This was not about the news. This was not a contrivance." Boston Globe Seeks Resignation from Columnist Mike Barnicle, CNN, Aug. 6, 1998, at http://www.cnn.com/US/9808/06/bosglobe.barnicle.01/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter Barnicle Resignation].

54. Fred Bayles, Columnist Gets 2-Month Suspension Without Pay, USA TODAY, Aug. 12, 1998, at 5A. Editor Storin said, "[I]t is clear that he misrepresented himself either to his television audience or his editors...This contradiction is unacceptable." Barnicle Resignation, supra note 53.
The sources for the column could not be found, and Mr. Barnicle agreed to resign within two weeks of the questions about that column emerging. Questions from the past about Mr. Barnicle's work also re-emerged during this time, such as from Chicago columnist Mike Royko who had accused Mr. Barnicle of lifting ideas from his work and from Professor Alan Dershowitz who complained that Mr. Barnicle had attributed a racist quote about Asian women to him.

Despite the questions and the conduct, the ongoing theme of success following scandal continues. Mr. Barnicle has re-emerged as a columnist for the New York Daily News. He also appears as a commentator on MSNBC and hosts a daily talk show on Boston radio. His regular TV contributions, on which he first touted the Carlin book, continue as well. In March 2004, the Boston Herald hired him as a columnist.

55. Although he had quoted people in the article, he could not give names of the persons involved and admitted that he had only heard of the story second-hand from a nurse. The touching column had been solicited for reprint in the Reader's Digest, but that publication's fact checkers were unable to confirm the story and had concluded it was a fabrication. The editor of the Reader's Digest wrote of this situation to the Boston Globe when the August 1998 events unfolded. Sinéad O'Brien, For Barnicle, One Controversy Too Many, AM. JOURNALISM REV., Sept. 1998, at http://www.ajr.org/Article.asp?id=192 (on file with the Notre Dame Journal of Law, Ethics & Public Policy).


57. The quote was "I love Asian women, don't you? . . . They're so . . . they're so submissive." Mr. Barnicle defended his quote, but the Boston Globe settled the suit for $75,000. Gordon McKibben, A Blow to Credibility, BOSTON GLOBE, Mar. 11, 1991, at http://nl.newsbank.com/nl-search/we/Archives?p_action=list&p_topdoc=81.

58. For more thoughts on this notion of fame following a fall, see Samuel G. Freedman, Caught Concocting Facts? No Problem—Fame Will Ensue, USA TODAY, July 6, 1998, at 13A.


62. Jurkowitz & Slack, supra note 56.
4. CNN and Peter Arnett

Print journalism was not the only arm of the media to suffer setbacks in 1998. CNN suffered a humiliation through the work of Pulitzer Prize-winning journalist, Peter Arnett. CNN ran, as part of its "NewsStand" series, a joint effort with Time magazine, a segment that alleged that U.S. military commandos used nerve gas on American defectors during the Vietnam War. The story, called The Tailwind Report, was also featured in Time and was retracted following protests from the Pentagon and veterans. The retraction also followed a report by CNN outside counsel Floyd Abrams who concluded that the story was false. As part of the retraction, CNN dismissed two of the producers for the segment that had taken eight months to complete, April Oliver and Jack Smith. The retraction also included the New Republic type of response of "we're not really sure how it happened, but checks and balances will be put into place." Again, the parallels to business and accounting issues are remarkable.

Ironically, both Ms. Oliver and Mr. Smith still believe their story as it ran was true. When Arnett was brought to CNN

66. Peter Johnson, CNN Takes Second Look at Role Played by Arnett, USA TODAY, July 8, 1998, at 3D. Tom Johnson, then the CNN News Group Chairman and its President and CEO wrote, "There is insufficient evidence that sarin or any other deadly gas was used. Furthermore, CNN cannot confirm that American defectors were targeted or at the camp, as NewsStand reported." Rabinowitz, supra note 64, at A16.
67. Johnson, supra note 66, at 3D. As if to excuse the behavior that Mr. Abrams attacked in his analysis of a culture that allowed a false report to go forward, Mr. Abrams noted, "[T]he CNN journalists involved in this project believed in every word they wrote." Rabinowitz, supra note 64, at A16. They still do and felt their termination was an injustice and that CNN caved. Ms. Oliver filed suit against CNN for wrongful termination. Ex-CNN Producer Sues Network Over Dismissal, ARIZ. REPUBLIC, May 8, 1999, at A13. See Barry Grey, April Oliver Speaks—Fired CNN Journalist on Dismissal of Arnett: "They will do anything to stem the flow of information", WORLD SOCIALIST WEB SITE, Apr. 22, 1999, at http://www.wsws.org/articles/1999/apr1999/oliv-a22.shtml (on file with the Notre Dame Journal of Law, Ethics & Public Policy) for an interview with Ms. Oliver nearly a year after her termination. Indeed, she was a contributor to a book on challenging powerful interests through journalism and offered these ten tips:

1. If you have a controversial story, prior to broadcast or publication, make sure your management up to the top knows all your concerns in
WHERE ARE OUR MINDS AND WHAT ARE WE THINKING?  

writing. Fortunately, we do have a fat wad of such memos and even a briefing book—so that CNN management cannot hide behind the fiction that they didn’t know it was so controversial, or who and what our sourcing was.

2. If you ever hear the word “investigation” in the air about your work—hire a lawyer fast. I say that with sincere regret because I don’t like the thought of anyone spending piles of money on lawyers. We should have never met with Kohler and Abrams without a lawyer present to protect our interests. [CNN Vice President Pam Hill ordered April Oliver and Jack Smith to meet with Floyd Abrams and David Kohler. Oliver was told that Abrams was going to give Smith and her advice about First Amendment and confidential source issues. Later in the week, Oliver was told that Floyd was no longer advising her, but investigating her as CNN’s legal counsel.]  

3. Never, ever, ever accept a gag rule. During the course of the investigation, we were bound and gagged, and told not to comment on the story. [CNN wanted to control the story’s spin. While CNN’s management publicly questioned Oliver’s competence as a journalist, she was ordered to remain silent.] During this period of time, many untruths—such as the fiction of repressed memory—circulated in the press [Newsweek’s Evan Thomas was the principal writer on What’s the Truth about Tailwind? a June 22, 1998, article that questioned the veracity of Oliver’s CNN report. In a skeptical tone, Thomas wrote that an important source of the CNN story, Lt. Robert Van Buskirk, had “told Newsweek that he had repressed the memory” of killing a Caucasian soldier at a North Vietnamese base until twenty-four years later when he suddenly remembered it during his interview with Oliver. Almost a year later, on June 27, 1999, the Charlotte Observer reported Van Buskirk saying that the “repressed memory” part of the Newsweek article was “the biggest hogwash I ever heard of.” Thomas’s response: “Thomas says he didn’t misquote Van Buskirk, although he added that Van Buskirk could have misunderstood the question when asked if he had repressed the memory of the incident.”]. We had to respond to those with silence. The problem with such reporting is that with today’s twenty-four-hour news cycle, you have to respond instantly, otherwise the mistruths are accepted as fact. I should have been leaking all over town and handing out transcripts—playing the Washington game.

4. If your boss requests that you assist the subject of your reporting with its internal investigation, don’t. Tom Johnson [now retired from CNN, Johnson was at the time, chairman and chief executive officer of CNN News Group] marched me and my coproducers over to the Pentagon to assist the Pentagon with its investigation of Tailwind. This unprecedented cooperation with the military foreshadowed CNN’s subsequent capitulation. We should never have abided by this incredible request.

5. When controversy over a story develops, demand to be notified immediately if you and your story are under investigation.

6. Insist that any investigation be carried out by people from the world of journalism. This is not work for lawyers in the pay of corporate managers.

7. Don’t resign, no matter what the pressures. I was told by Tom Johnson I could resign with dignity and admit a terrible mistake or be
headquarters for questioning, his defense was that he had been covering the war in Iraq and that when he returned, he was on the speaking circuit. Thus, "I contributed not one comma to the story." The defense left Mr. Arnett in a bit of a Barnicle position. If he did not contribute to the writing of the segment or the *Time* magazine piece, both of which carried his name, then he was guilty of misrepresentation or claiming credit for work not done. If he did contribute to the writing, then he needed to be dismissed along with the producers who were held accountable for the report's content. Mr. Arnett was spared temporarily, but Pentagon officials refused to work with CNN; and, in the nine months following the controversy, Mr. Arnett appeared on

terminated. I demanded to be fired. I remain proud of this story and consider it my best work to date. Over time, I do believe we will be vindicated, and CNN will be proven to have caved to pressure.

8. The word "lawsuit" isn't necessarily a dirty word. When I first received a notice that I was being sued by retired General John Sngaeb, I was a little panicked. Over time, and considering my options, I came to welcome the process, realizing that maybe now I had a forum. After being written off by most of the media, maybe now I had a vehicle for proving the truth. Let's subpoena Henry Kissinger and Richard Helms and find out what they have to say under oath, instead of in the back channels of CNN's executive suite.

9. If lawsuits develop, make sure that your journalism company pays your legal bills. Don't let them pick your lawyer. Demand to see their libel insurance policy. You are entitled to legal representation, and it should not be dictated by an employer who fired you.

10. Lastly, but most importantly, get a life—sooner as opposed to later. Amidst the maelstrom and the headlines, my nine-pound, three-ounce son was born. He's got all his fingers and toes, to the profound relief of CNN's legal team. His daily smiles are a constant reminder of what is meaningful in life. Family and friends have far more shelf life than any piece of tape. They will still be there to support you in the long run and are far more rewarding than any journalism prize.


68. Johnson, supra note 66, at 3D.

69. The Arnett firing fueled a sub-debate about the ethics of simply bringing in a "voice," or a correspondent to handle the reporting video on a segment once the work is done. And that sub-debate produced a sub-sub-debate, which was whether those who are brought in simply for "voice" have the right to claim authorship credit. The sub-debates and sub-sub-debates seemed to detract from the fundamental issue that the story was false, and claiming credit or not claiming credit for a false story one reported carries at least a taint of disingenuousness.
the air only once.\textsuperscript{70} He was ultimately terminated by CNN two and one-half years before his contract was set to expire as part of a contract settlement reached with CNN.\textsuperscript{71} He was hired in 2003 by \textit{National Geographic Explorer}, a program aired on MSNBC. However, during the course of the Iraqi war, he gave an interview on Iraqi television and said the following as reported by Fox News:

He said the United States is reappraising the battlefield and delaying the war, maybe for a week, "and rewriting the war plan. The first war plan has failed because of Iraqi resistance. Now they are trying to write another war plan."

"Clearly, the American war plans misjudged the determination of the Iraqi forces," Arnett said.

Arnett said it is clear that within the United States there is growing opposition to the war and a growing challenge to President Bush about the war's conduct.

"Our reports about civilian casualties here, about the resistance of the Iraqi forces, are going back to the United States," he said. "It helps those who oppose the war when you challenge the policy to develop their arguments."\textsuperscript{72}

Mr. Arnett did apologize for the remarks but was fired by National Geographic, MSNBC, and NBC almost immediately.\textsuperscript{73}


\textsuperscript{71} \textit{Id.}


\textsuperscript{73} \textit{Id.}; \textit{National Geographic Fires Peter Arnett}, \textit{NAT'L GEOGRAPHIC NEWS}, Mar. 31, 2003, \textit{at} http://news.nationalgeographic.com/news/2003/03/0331_030831_arnettfired.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The National Geographic Society released the following statement: "National Geographic has terminated the service of Peter Arnett. The Society did not authorize or have any prior knowledge of Arnett's television interview with Iraqi Television, and had we been consulted, would not have allowed it. His decision to grant an interview and express his personal views on state-controlled Iraqi Television, especially during a time of war, was a serious error in judgment and wrong." \textit{Id.} Mr. Arnett apologized on NBC's \textit{Today}. "I want to apologize to NBC, MSNBC, National Geographic EXPLORER and the American people for clearly making a misjudgment by giving the interview to Iraqi Television," Arnett said. "Clearly by giving that interview I created a firestorm in the United States, and for that I'm truly sorry." \textit{Id.}
Keeping with the theme of the nine lives of journalists, he was hired within twenty-four hours by the *Daily Mirror* of London.74

E. The 2003 Scandals and History Repeats Itself

Whether through fear, adequate checks and balances, or simply the life cycle of fraud, the revelations slowed a bit following 1999. However, 2003–2004 saw a repeat of the 1998 scandals, with additional twists that made those of this earlier era seem comparatively mild. In 2003, the *New York Times* faced two scandals in the month of May. The first, the Jayson Blair scandal, would change the management of the newspaper, as well as practices in the news industry.

1. Jayson Blair and the *New York Times*

On Sunday, May 11, 2003, readers of the *New York Times* awoke to find 7,000 plus words of explanation and remorse about the reporting habits of a twenty-seven-year-old rising star, Jayson Blair.75 What the exposé revealed, in addition to an apology to readers, was that Mr. Blair "fabricated comments," "concocted scenes," and "lifted material from other newspapers and wire services."76 By the time of the Sunday publication, the *New York Times* determined that thirty-six of Mr. Blair’s seventy-three stories that were filed since he became a national correspondent were riddled with problems. Simple checks, such as tracing Mr. Blair’s cell phone calls, showed that while he may have filed stories from places, he had not been there, and in some cases, he had submitted expense reports receipts from New York restaurants. The checks on his six hundred other stories were not yet complete, but the *Times* created a special e-mail address for readers and others to send in any concerns about Blair stories.77

What distinguishes the Blair case from the others presented here is that there were warning signals about Mr. Blair’s work.

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76. *Id.* at A1. One scene he concocted was the father of Jessica Lynch standing on the porch of their West Virginia home and looking out over the tobacco fields. *Id.* at A25. West Virginia is known for many things, but growing tobacco is not one of them. Fact-checkers were apparently not familiar with climate, geography, or state economies.

Mr. Blair did not have a college degree, and he was taken from the position of intern to national desk reporter over a short five-year period. He first worked for the Times in 1998 as an intern brought in as part of a diversity program the Times was required to have pursuant to the settlement of a discrimination case. And during that time, there were editors who saw that he lacked reporting skills and that his submissions were fraught with errors. In October 2002, Jonathan Ladman, the editor for the Times Metropolitan Desk, was so concerned that he sent an e-mail to all administrators that read simply, "We have to stop Jayson from writing for the Times. Right now." At that point, Mr. Blair indicated he had personal problems but was told that his job was on the line. He took some leave and improved his work substantially so that within just a few months the editors, including executive editor Howell Raines and managing editor Gerald Boyd, felt he was ready for a national desk assignment. Neither Mr. Raines nor Mr. Boyd disclosed to their national desk editor that Mr. Blair had previous problems with his performance. His assignment was the sniper case that was unfolding in the Maryland, Virginia, and Pennsylvania area, an assignment they felt he could handle because he was from the area and had gone to school there. However, there were accusations of plagiarism coming in from newspapers around the country who were victims of Blair’s theft. By the end of April 2003, the documentation was irrefutable, and Mr. Blair resigned effective May 1, 2003.

Given the level of knowledge around the paper’s offices about Mr. Blair’s shortcomings, many employees created a palpable sense of disgruntlement as they grappled with the fallout and

78. Mr. Blair had studied at the University of Maryland. Nancy Gibbs, Reading Between the Lies, Time, May 19, 2003, at 56.
79. One example of the types of errors Blair made was that in reporting on a murder case, he gave the cause of death as a shooting when in fact it was a stabbing. Id.
80. Barry et al., supra note 75, at A20.
82. Rose, supra note 77, at B1.
83. His editors were not, at this time, aware that he had not graduated from the University of Maryland. Christopher Caldwell, The New York Times’s Meltdown, Weekly Standard, May 26, 2003, at 19.
84. For example, Macarena Hernandez, a reporter with the San Antonio Express-News who, ironically, had interned with Blair and was aware of his propensity for mistakes, complained to her editor that Mr. Blair’s story about a missing person was lifted from her story that had appeared earlier. Editor Robert Rivard wrote to Howell Raines to complain. Gibbs, supra note 78, at 56.
the damage to the paper's reputation as well as to their own. On May 14, 2003, six hundred employees gathered at Loew's Theater in Times Square to attend a meeting with publisher Arthur Sulzberger, Jr., executive editor Howell Raines, and managing editor Gerald Boyd. At the insiders-only meeting, Mr. Raines indicated he was not planning to resign and that the Blair scandal was a "huge black eye" and a "low point" in the paper's 152-year history. However, the clear focus of the meeting, as detailed, ironically, from unnamed sources present, was that mistakes that should have been grounds for Mr. Blair's termination were overlooked and that signals were ignored. In a widely acknowledged remark, Mr. Raines indicated that his roots in segregated Alabama may have caused him to overlook some issues with Mr. Blair to "right past wrongs against blacks." The clear theme of the meeting was one in which employees questioned the management of the paper, a management that carried a certain infallibility because of the number of Pulitzer prizes the paper had earned covering the September 11th attacks alone. That theme continued upon return to their offices with many employees contacting Mr. Sulzberger directly to protest the remaining presence of the two editors whom they felt had autocratic styles and systems of favoritism. The Times hired a "public editor," Daniel Okrent, a man who would serve as a watchdog for reporters' work and also as a contact person for the public in the event there were concerns or issues arising from reporting or content.

On June 5, 2003, both Mr. Raines and Mr. Boyd resigned. Mr. Sulzberger indicated it had been their decision to do so but added, "The morale of the newsroom is critical."

86. Id.
87. Id.
88. Johnson, supra note 85, at D4.
89. Id. What perhaps sent some staffers reeling were the following remarks from Mr. Raines at the meeting: "You view me as inaccessible and arrogant. You believe the newsroom is too hierarchical, that my ideas get acted on and others get ignored. I heard that you were convinced there's a star system that singles out my favorites for elevation." Peter Johnson, At "Times": "This is a day that breaks my heart", USA TODAY, June 6, 2003, at 4A. Because Raines did not say "I am inaccessible and arrogant," and because Raines failed to promise change, staffers returned wholly unsatisfied that matters would change and took their concerns to the publisher. Id.
But Mr. Blair landed on his feet. He penned a book *Burning Down My Masters' House*, founded a company, Azure Entertainment, is being treated for manic depression, lectures journalism students on being ethical, is working on the paperback version of his book with updates and clarifications, and updated his website, www.jayson-blair.com. His business, Azure, offers copywriting, ghostwriting, website designs, and editing. In addition, Mr. Blair has created the Azure Mental Health Foundation, a 501(c)(3) organization that contributes to substance abuse programs in Virginia, North Carolina, and New York City.

2. Rick Bragg and the *New York Times*

The second *New York Times* scandal over reporter Rick Bragg, another Pulitzer Prize-winning journalist, initially seemed to pale in comparison to the Blair saga as a tempest in a teapot. But, as the story unfolded, editors and reporters realized that there were incremental steps to the Blair, Cooke, and Smith problems. The problem with Rick Bragg also demonstrated that the *Times* was invoking a no-prisoners approach to discipline over questions about reporter's work. Apparently, Mr. Bragg had used the work of an unpaid intern in the *Times* Miami bureau, but did not give the intern a byline or credit in the stories he was doing on the tobacco industry litigation. An investigation determined that Mr. Bragg was not just having the intern fill in a detail here or there. The intern, Maribel Morey, who was eighteen at that time in 2000, said, "There were articles at the tobacco trial that are all of my quotes." Mr. Bragg was relying on the intern for substantial portions of the research done for the article. In addition, Mr. Bragg relied on a freelancer for substantial portions of a story that appeared under only his byline and left the impression that he had done the reporting on

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95. *Id.*

96. Apparently it escaped the *Times*’ note, as well as those of the experts culled and interviewed for thoughts on the byline issue, that a Pulitzer Prize-winning reporter was relying on an eighteen-year-old to gather critical quotes on one of the critical trials of the century. The lessons of 1998 and quotes did not seem to have been internalized or the sting had been quickly forgotten.
location when he had actually been there only briefly; whereas, the freelancer resided there, and Mr. Bragg paid apartment rent for the freelancer as he researched the story.\textsuperscript{97} He was suspended for two weeks and was not happy: "Apparently, we are in an atmosphere where even the most routine reporting practices are being questioned, and I despise that. I hate that. But there is nothing I can do about it."\textsuperscript{98} Ms. Morey was troubled by the use of her quotes because Mr. Bragg spent so little time at the trial, and she was not certain he could write about it, having not experienced even a day in the proceedings.\textsuperscript{99} Mr. Bragg employed the standard ethics rationalizations of "everybody does it"\textsuperscript{100} and "that's the way it has always been done." Following his resignation from the \textit{Times}, Mr. Bragg wrote Private Jessica Lynch's autobiographical book, \textit{I Am a Soldier Too}.

3. Jack Kelley and \textit{USA Today}

A Pulitzer Prize nominee, Jack Kelley was an icon of war reporting. He had covered ethnic cleansing in a Kosovo village in 1999 for \textit{USA Today} and had written a story that was gripping in its detail and emotionally wrenching with its quotes.\textsuperscript{102} He wrote of an Army notebook with the order "Cleanse" in it. However, questions arose in 2003 because publisher Craig Moon

\begin{itemize}
  \item 97. The \textit{Times} ran the following explanation:
  An article last June 15 described the lives and attitudes of oystermen on the Florida Gulf Coast who faced threats to their livelihood from overuse of water farther north. It carried the byline of Rick Bragg, and the dateline indicated that the reporting was done in Apalachicola.
  In response to a reader's recent letter questioning where the reporting took place, The Times has reviewed the article. It found that while Mr. Bragg indeed visited Apalachicola briefly and wrote the article, the interviewing and reporting on the scene were done by a freelance journalist, J. Wes Yoder.
  The article should have carried Mr. Yoder's byline with Mr. Bragg's.
  \item 98. \textit{Id.} The quote is revealing in that the lack of credit for work done is "routine practice." Others at the paper agreed that using material from "stringers and assistants" without giving credit is "common practice." \textit{Id.} By May 29, 2003, Mr. Bragg had resigned. Jacques Steinberg, \textit{Times Reporter Steps Down Amid Criticism}, N.Y. \textit{Times}, May 29, 2003, at A20.
  \item 99. Mr. Bragg would ultimately write four pieces on the trial with limited exposure to the courtroom proceedings by relying on Ms. Morey. \textit{Id.}
  \item 101. The book was published in November 2003 by Alfred Knopf Publishing.
\end{itemize}
received an anonymous letter, and editors at the paper began a seven-month investigation. After interviewing a human rights advocate quoted in the article and to whom Mr. Kelley allegedly showed the notebook, his editors confronted Mr. Kelley because Natasa Kandic indicated some dispute with Mr. Kelley’s description of the size and color of the notebook and the fact that there was such an order present in it. Further, she could not recall being interviewed by Mr. Kelley. Mr. Kelley offered another source, but the source had served only as a translator for Mr. Kelley and could not offer information about the story or the alleged interview. Following the confrontation on this story, Mr. Kelley resigned. However, Mr. Kelley indicated that he “panicked” when asked questions and that, “In my 21-year career, I have never fabricated or plagiarized a story.”

A follow-up investigation revealed that the more than 1,400 stories Mr. Kelley had written during twenty-one years of reporting for USA Today had a pattern of lies, deception, and plagiarism. Most of the stories found to be fabricated seemed to follow advice Mr. Kelley had given in speeches, to “make it gripping.” Indeed, in at least thirteen stories, Mr. Kelley watched

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103. Craig Moon, Publisher Outlines Policy on Inquiries, USA TODAY, Apr. 22, 2004, at 10A.
104. USA Today did not publish a correction. Steinberg, supra note 102, at CI (“Because of differing recollections, we still can’t be certain what occurred.”).
105. Id. In a statement, Mr. Kelley also said:
I walk away from USA TODAY knowing that in 21 years I have never had a correction or retraction printed. Every story published under my byline was accurate based on what I saw, the interviews conducted and the details available at the time. Any discrepancies that may have been found during the inquiry of the Yugoslav story are not material as the facts of that story have been confirmed.
I regret the mistake I made during the course of this investigation which was not conducted in good faith.
People who truly know me realize that this mistake is inconsistent with my history as a journalist and my ethics as an individual. I trust over time they will balance my lapse in judgment against the way in which USA TODAY has handled this matter

106. Blake Morrison et. al, Kelley Issues Apology: More Fabricated Stories Discovered, USA TODAY, Apr. 22, 2004, at 10A. Among the stories that were found to be “simply untrue”: Kelley’s reports of finding diaries of Iraqi soldiers by corpses along the roadways, a trip to Somalia, Kelley’s alleged listening to a tape of the downing of an airplane carrying missionaries in Peru, a visit with Elian Gonzalez’s father inside the father’s Cuban house, a visit to bin Laden’s terrorist training camps, and time spent near the cave complexes at Tora Bora. Id.
107. Id.
someone died,\textsuperscript{108} situations that could not later be verified. One story featured a photo of Mr. Kelley with a Cuban refugee who Mr. Kelley would later say died in her quest for freedom. The investigation showed that the woman is alive, well, married, pregnant, and living in the Southeast.\textsuperscript{109} Even the expenses for trips were falsified. One submission was for $1,800 for an interpreter who, when contacted, indicated she was never paid. Expense reports for the same day had Mr. Kelley in Moscow for $1,200 and also 1,200 miles away in Grozny, Chechnya for $2,000.\textsuperscript{110}

Karen Jurgensen, the editor of \textit{USA Today}, resigned just days before the findings of the investigation of Mr. Kelley’s work were published and soon after receiving a report from a panel of three experts on what allowed the years of falsified reporting to occur.\textsuperscript{111} Mr. Moon apologized. “As an institution, we failed our readers by not recognizing Jack Kelley’s problems. For that I apologize.”\textsuperscript{112} Hal Ritter, the managing editor, would step down just two days after Ms. Jurgensen’s departure.\textsuperscript{113}

The timeline for the Kelley story is difficult to reconstruct because there are inconsistencies in the reported date for the initial anonymous tip, the first investigation, the follow-up investigations, and the three-person panel of experts.\textsuperscript{114} There may have been overlapping investigations with the result being this confusion, but, what is clear is that there was nearly a year’s worth of checking and wondering prior to public disclosure of the extent of the problem.\textsuperscript{115} Interestingly, the most details

\begin{thebibliography}{115}
\bibitem{108} Id.
\bibitem{110} Id.
\bibitem{111} Jacques Steinberg, \textit{Editor of USA Today Resigns, Citing Failure Over Fabrications}, N.Y. TIMES, Apr. 21, 2004, at A1. Ms. Jurgensen’s departure was called a “retirement” by Mr. Moon, but her statement included the following: “Like all of us who worked with Jack Kelley, I wish we had caught him far sooner than we did.” Peter Johnson, \textit{USA Today Editor Resigns after Reporter’s Misdeeds}, USA TODAY, Apr. 21, 2004, at B1.
\bibitem{112} Steinberg, \textit{supra} note 109, at A1.
\bibitem{113} Peter Johnson, \textit{Another USA Today Editor Steps Down}, USA TODAY, Apr. 23, 2004, at B1. Mr. Ritter said, “I don’t think anyone could possibly be more upset about the Kelley mess than I am. I love our newspaper dearly. My departure will make it easier for my colleagues in News to continue the job of making the newspaper even greater.” Id. Mr. Kelley’s wife, Jacki, is an executive vice president at \textit{USA Today} and did not resign.
\bibitem{114} The experts used were John Seigenthaler, former op-ed editor at \textit{USA Today}, William Hilliard, former editor of the \textit{Oregonian}, and Bill Kovach, former Washington bureau chief of the \textit{New York Times} and editor of the \textit{Atlanta Journal-Constitution}. Steinberg, \textit{supra} note 109, at A1.
\end{thebibliography}
about the work surrounding the investigation can be found in a Christian Evangelical website through which Kelley had friends and contacts because he had been a speaker at the 2000 annual meeting of the Evangelical Press Association. In addition, the evolution of Mr. Kelley's reactions and eventual resignation are presented quite vividly there through the work of a reporter with access to friends and pastors of both Kelleys.

4. CBS and Dan Rather

While many of the stories about Dan Rather, 60 Minutes, and the story of President George W. Bush's National Guard service refer to the tarnishing of the Tiffany network, the Rather misstep is actually the third major journalistic ethics dust-up for the network. Its documentary, The Selling of the Pentagon, while still shown and touted in journalism schools, contains editing that reflected so poorly on the Pentagon officials involved that the two officials sued the network. In 1982, CBS had another dust-up with General William Westmoreland over a similar type of deceptive depiction of his conduct during the Vietnam War. A suit by the General was settled by CBS without payment, but with

116. The website provides the most background detail of any print newspaper on what actually happened and who was investigating what:
A team of five reporters, an editor, and a prestigious panel of veteran journalists reviewed about 720 stories written by Kelley from 1993 through 2003. They re-interviewed sources, compared travel vouchers with Kelley's claims of the location of his stories, and searched his computer. The editors spent more than 20 hours with Kelley.
Kelley told friends up to the moment of the paper's announcement that he thought he was convincing the editors of his innocence. Wesley Pippert, head of the prestigious University of Missouri journalism program in Washington, says, "Jack was still holding out hope that he would be vindicated."


the result that the position of vice president for news practices
was created at CBS News.119

The 2004 scandal that found Dan Rather apologizing on
air—as NBC had done with the side-saddle gas tanks—involves a
60 Minutes120 investigation into President George W. Bush's
National Guard Service, a story that had emerged during the
2000 presidential election and then re-emerged several times in
the 2004 election.121 Oddly, Mr. Bush had signed a release for
all of his military records, and the story of his service, which
appeared to wane near the end of his five years, was public
record. However, Dan Rather and his producer for the segment,
Mary Mapes, pursued the National Guard Bush Service story yet
again for the 2004 election.122

Ms. Mapes had pursued the story over a five-year period, and
she concluded that there were documents out there that dealt
with Mr. Bush's service. Eventually, about eighteen months prior
to the time that the story would run on 60 Minutes, Ms. Mapes
ran across Bill Burkett, a man known as a political operative with

119. Howard Kurtz, CBS, Sitting Between Fiasco and Fallout, WASH. POST,
Sept. 22, 2004, at Cl.

120. Technically, as Morley Safer and others indicated, the story ran on
60 Minutes II, but the network had changed the name of the program to just 60
Minutes even though there were different staff personnel for the two shows. Bill
Carter & Jacques Steinberg, CBS Quiet About Fallout, But Precedent Is Ominous,

121. For perhaps the best summary of the guard service issues, allega-
tions, and various stories, see Byron York, What the Bush Guard Papers Really Say,
york200409100809.asp (on file with the Notre Dame Journal of Law, Ethics &
Public Policy). Mary Mapes has never given up investigating the National
Guard Service issue, having been at it for five years.

122. The story had re-emerged in the 2004 election cycle in Salon. See
James C. Moore, The Case of the Missing Bush Documents, SALON, July 15, 2004,
index_np.html (on file with the Notre Dame Journal of Law, Ethics & Public
Policy). By July 20, 2004, DNC chairman Terry McAuliffe was holding a news
conference via telephone for reporters raising the issue and creating a website
that promised to keep the issue alive. The website was www.dnc.org/wherewas-
bush. It is no longer active. Mr. Rather has a sordid history with the Bush
family because of his 1988 shouting match with George H.W. Bush during an
interview that focused on Mr. Bush's involvement in and knowledge about the
Iran Contra weapons-for-hostages scandal. Alessandra Stanley, Even Humbled,
Dan Rather Has His Thorns, N.Y. TIMES, Sept. 21, 2004, at A24. Mr. Rather and
Ms. Mapes had worked together on major stories, such as breaking the story
about the abuse of prisoners in the Abu Ghraib prison in Iraq. CBS was first
with the photographs as a result of their work together. Jim Rutenberg & Kate
Zernike, CBS Apologizes for Report on Bush Guard Service, N.Y. TIMES, Sept. 21,
an ax to grind against the Bush family. Indeed, in connection to furnishing the memos to CBS, Mr. Burkett also arranged to talk with the DNC.

Ms. Mapes met with Mr. Burkett, who gave her memos allegedly penned by the now deceased Lieutenant Colonel Jerry B. Killian, Mr. Bush's squadron commander in Texas. Mr. Burkett would not disclose his source but indicated that they had come from someone who had been an aide to the colonel and would have had access to the files. But that person was overseas and unable to be interviewed. Ms. Mapes had Mr. Rather interview Mr. Burkett for the segment. The story was aired on 60 Minutes, and the conclusion of the piece was that Mr. Bush had not served honorably.

Within hours of the segment's airing on September 8, 2004, several problems emerged. First, Colonel Killian's widow and his son, Gary Killian, told the national media that they had told Ms. Mapes that neither of them believed that the documents were authentic. They did not know the Colonel kept those types of records. Then came the web bloggers who began checking the font of the type on the memos and concluded that the documents had been created using Microsoft Word, clearly a process that was unavailable during 1973 when the memos were said to have been produced. Further, there were other content-type errors found by bloggers and noted by Mr. Killian. One such error was how the Colonel was identified on the memos and the type of language used. When the questions about the memos

123. The work of Michael Hedges at the Houston Chronicle paints a portrait of Burkett that was very different from what was reported in the national media and what was eventually disclosed by CBS. Michael Hedges, Texan Has A History of Attacks on Bush: Possible CBS Source Has Had His Credibility Questioned Before, Hous. Chron., Sept. 17, 2004, at A1.

124. Mr. Burkett had contact with Max Cleland as well as Joe Lockhart, the latter contact was one that was facilitated by Mary Mapes. Kevin Johnson et. al, CBS Had Source Talk to Kerry Aide, USA Today, Sept. 21, 2004, at 1A.


126. Id.

127. Byron York developed the problems at length, but the following represents an excerpt:

For example, none of the documents released by the White House bears the letterhead "111th Fighter Interceptor Squadron/P.O. Box 34567/Houston, Texas 77034," and yet that is at the head of two of the CBS documents. Perhaps more importantly, on every document released by the White House last February, Killian's name is written, "JERRY B. KILLIAN, Lt. Colonel, TexANG," the last letters referring to the Texas Air National Guard. But on the two CBS documents with Killian's name on them, he is simply called "Lt. Colonel" or "Lt. Colonel/Commander." Judging by the earlier documents, it would have
emerged, Mr. Rather stood firm, as did the network, citing the fact that the White House was remaining silent on the story. Questions swirled through the weekend following the broadcast of the report, as Mr. Rather flew to Texas to once again interview Mr. Burkett. Even Colonel Killian's former secretary said the documents were fake but suggested that perhaps the Colonel did have negative feelings about Mr. Bush, as the fake documents reflected. Mr. Burkett eventually confessed that he had lied about the source of the documents. Mr. Rather issued an on-air apology on September 20, 2004, saying he was "personally and directly" sorry. CBS President Andrew Heyward called the report a "mistake, which we deeply regret."

The commentary on "memo gate" was blistering. Some indicated CBS was "sucker-punched," while others said, "CBS is wounded and there is blood in the water." One scholar referred to the lapses by the network as "beyond imagination." To investigate what happened with the story, CBS appointed a special panel, including Louis D. Boccardi, the former chief executive of Associated Press, and Dick Thornburgh, former governor of Pennsylvania and former U.S. Attorney General. Within two months of the acknowledged flaws in the Bush National Guard story, Mr. Rather announced his resignation as anchor for the network, with his last broadcast to be in March 2005, which would take him to this twenty-fourth anniversary as an anchor.

been somewhat out of character for Killian to refer to his rank without mentioning the Texas Air National Guard. Yet that is what he is purported to have done in the CBS documents.

York, supra note 121.


129. Dave Moniz et. al, CBS Backs Off Guard Story, USA TODAY, Sept. 21, 2004, at 1A.

130. Id.


132. Moniz et. al, supra note 129, at 1A.

133. Carter & Steinberg, supra note 120, at A22.


136. Jacques Steinberg & Bill Carter, Rather Quitting as CBS Anchor in Abrupt Move, N.Y. TIMES, Nov. 24, 2004, at A1. Mr. Rather is not, however, leaving 60 Minutes. Id.

137. Id. Mr. Rather took over for Walter Cronkite. The discussions for Mr. Rather's departure had begun in the summer of 2004, but no date had been set. Many conclude that "memo gate" expedited Mr. Rather's exit because of a decline in ratings. Bill Carter, Courage, CBS News, With Departure of Dan Rather, Some See a Fresh Start for the Network, N.Y. TIMES, Nov. 24, 2004, at C1.
When the panel issued its 221-page report in January 2005, it concluded that CBS has suffered a breakdown in judgment in its rush to get the story to air and that failed to carry out “basic journalistic steps” in investigating and airing the story. Among the findings of the panel: (1) management failed to scrutinize the background of the source of the documents; (2) management failed to find a second source for the story; (3) the producer of the story, Mary Mapes, was given too much autonomy in the production of the story and spent too much time looking for sources to validate the story instead of looking for sources on the story, regardless of views; (4) when challenged on the story, CBS issued a statement indicating that experts had vouched for the documents when the experts had indicated just the opposite and that the statement issued by the network was false; and (5) neither management nor anchor Dan Rather reviewed the segment before it was run, abdicating their duties and again allowing too much control in Ms. Mapes. The fallout was that CBS fired four employees: Mary Mapes, the segment’s producer, senior vice president Betsy West, 60 Minutes Wednesday producer, John Howard, and senior broadcast producer, Mary Murphy. To the incredulity of many, the panel concluded that it could find no evidence of bias in the production and airing of the story.
II. How Could This Have Happened?

This review of journalism’s follies during the past fifteen years leaves one with the heavy feelings of a Shakespearean tragedy. Indeed, the lines of Romeo & Juliet’s prince as he realizes the death and destruction that have befallen all in their foolish feuds seem relevant:

See what a scourge is laid upon your hate
That Heaven finds means to kill your joys with love!
And I, for winking at your discords too,
Have lost a brace of kinsmen. All are punished.143

Lives have been affected, some destroyed. Institutions have been irreparably damaged. We have lost kinsmen in this constant duel for the stories, the scoops, and the ratings. And many of us who have stood by and done or said nothing as the casualties have arisen have only seen greater harm come with each misstep and debacle. The media’s critical role in the preservation of democracy is at risk because these stories of downfalls undermine our trust in those upon whom we rely for full and complete information. With each footnote citation, I found myself wondering, “I wonder if this really is a true statement,” or “I wonder if this quote is accurate,” or “I wonder if this interview really occurred.” That the quote appears in multiple sources is no longer an assurance of its accuracy because the Blair case taught us that quotes can come from copying, not from an actual recording at an interview or press conference. I feel as I felt when I labeled WorldCom the second largest bankruptcy in the history of the United States. It made me nervous because we were forced to rely on WorldCom’s numbers to make such a claim, and considering its executives had wrongly capitalized $9 billion in ordinary expenses in defiance of all accounting conventions, it was risky to place such reliance there.144

Looking at anything from the Smith to the Barnicle to the Bragg to the Rather case does not leave us with a troubled feeling of, “Wow! That was really a nuanced ethical situation. I never would have seen that coming.” We look at their conduct and wonder aloud, “Where were their minds, and what were they thinking when they decided to engage in such behavior?” Those are the same questions we in business asked when we realized that WorldCom had capitalized $9 billion in ordinary expenses; that Enron had created over 3,000 off-the-book entities into

143. WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, act 5, sc. 3.

144. Seth Schiesel, WorldCom Sees More Revisions of Its Figures, N.Y. TIMES, Nov. 11, 2002, at C1.
which it could deceptively spin the company debt to make the balance sheet look better and keep the stock price high; and that Dennis Kozlowski had spent $6,000 of Tyco’s funds for a shower curtain for his apartment and hundreds of thousands more of Tyco’s funds for a Sardinia birthday party for his wife.\textsuperscript{145} These are not even close ethical calls.

In determining how such obvious wrongs could occur, and, in many cases, under so many noses and over such a long period of time, cultural characteristics become key factors. In examining ethically-collapsed businesses, we find common factors such as the presence of an iconic figure, the relative youth of those involved in the indiscretions, a board and management not particularly hands-on or inquisitive, and an inability to look at numbers and conclude, “If it sounds too good to be true, it is too good to be true.” Labeled “The Yeehaw Culture” in the literature, a confluence of factors exists in the culture of an organization that allows blatantly illegal or unethical activity to occur.\textsuperscript{146} The seven factors are:

- Pressure to Maintain Those Numbers and That Performance
- Fear and Silence
- The Young ‘Uns and Bigger-Than-Life CEO
- Weak Board
- Culture of Conflicts
- Culture of Innovation Like No Other
- Culture of Social Responsibility.\textsuperscript{147}

While the factors require slight rephrasing for purposes of adapting to a media organization, the basic psychological, physical, and cultural presences that contribute to ethical collapse are the same. In this section, these factors are adapted and applied to explain what happened in the organizations that were home to reporters and reports of deception. An understanding of these factors provides the backdrop for the final section’s discussion of developing an ethical media culture of virtue.


\textsuperscript{146} Jennings, \textit{Federalist Paper on Corporate Governance}, supra note 9, 392-93; see also Jennings, \textit{Primer on Enron}, supra note 9 (providing greater detail on Enron’s culture).

\textsuperscript{147} Jennings, \textit{Federalist Paper on Corporate Governance}, supra note 9, at 393.
A. Pressure To Maintain Those Numbers and That Performance

In all of the business ethical collapses, there was an atmosphere of intense pressure to meet quarterly, annual, and even daily numbers. As Professor Barbara Lougee has noted, "The complexity of accounting strategies often masks a simple goal, to do whatever it takes to meet Wall Street's expectations." For example, at WorldCom, Bernie Ebbers, its founding CEO, even reduced numbers growth to a per employee basis. The following is an excerpt from the 1997 Ebbers letter to shareholders:

On a pro forma basis, total revenues increased over 30 percent on volume gains of 35 percent. WorldCom's efficiency in SG&A per revenue dollar is not at the expense of effectiveness, as the Company once again outstripped its major competitors with its ability to add incremental year-over-year internal revenue growth of $1.7 billion for the year. WorldCom continues to lead with the productivity of its employees. On average, each employee generates over $500,000 of revenue per year, based on 1997 results.

There is much more to the pressure in these media ethical collapses than just the usual deadline pressure that precluded meticulous verification. It seems media organizations are not immune from standard business numbers pressure. The numbers pressure in the media is so real that there has been a business crossover; even newspapers are under SEC investigation for possible falsification of circulation numbers. Newsday, Hoy, the Dallas Morning News, and the Chicago Sun-Times have all disclosed that they overstated their circulation numbers. The circulation numbers were falsified in order to increase advertising revenues, and the estimate is that these newspapers, or their parent companies, will be forced to refund approximately $130 million in overcharges to the advertisers who had relied on the falsified circulation numbers.

149. Id.
150. The SEC has sought documents from Dow Jones, Gannett, Knight Ridder, McClatchy, the New York Times, and the Washington Post. There are no allegations against the companies. However, the SEC is said to be investigating the issue of circulation numbers and how those numbers are disclosed to investors. Jacques Steinberg, S.E.C. Is Said To Seek Data On Circulation of Newspapers, N.Y. Times, Oct. 13, 2004, at C1.
151. Id.
152. Id. In some cases, the circulation numbers were falsified with elaborate schemes involving distributors who were offered gifts and other incentives.
The report by outsiders on what happened in the case of Mr. Kelley indicates that the pressure for USA Today to scoop papers such as the New York Times created an atmosphere of pressure: "Among the forces driving such behavior [referring to Mr. Kelley's fabrications]. . . . was 'the great joy when you can produce a story that makes it look like you have outdone the big guys, the papers with a huge foreign staff—The Times, The Post, The L.A. Times."

Debbie Howlett, USA Today's Midwest correspondent, expressed anger at editors who did not see the holes in Mr. Kelley's work, saying, "He was aided and abetted by editors who were hungry for prizes and weren't nearly skeptical enough of these fantastical tales." In addition to organizational pressure, there was individual pressure in each of the reporters involved. While that pressure had different origins, all reporters experienced a relentless drive, a sense of hubris, a fear of being found out, or of losing superstardom, that fueled their deceptions. In each of the stories of ethical collapse noted in Section I, the reporters were carefully identified as either being young and having some success and recognition under their belts, or, in the cases of Glass and Blair, young with great expectations heaped upon them because of their hiring or achievement. In Mr. Rather's case, it was the pressure of the continual decline of CBS as the nation's news organization during his tenure as anchor of the evening news. According to journalism professor Phillip Meyer, "Dan Rather was not out to get George W. Bush. He was out to get a good story. And the desire for a good story, in the face of competition from all of the varieties of new and old media, is a powerful—and sometimes blinding—incentive."

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155. Bill Carter, supra note 187, at C4 (charting the steady decline of "The CBS Evening News" with Mr. Rather as anchor). Mr. Rather and Ms. Mapes may have felt other pressures along ideological grounds, but discussion of that issue follows infra at notes 199–201 and accompanying text. CBS executives said that the journalistic lapse was the result of "a perfect storm" of intense competition, faith in the producer and her reputation, and reliance on a poor source. Rutenberg & Zernike, supra note 122, at A1.
All of these reporters, and even their news organizations, felt a certain degree of pressure to "get there" or to keep the trend going. Kelley and his near Pulitzer Prize, Bragg and his Barnicle and his longstanding success in the tough Boston market, Smith and her prize—they are specific examples of the causes of the enormous pressure these reporters felt to achieve at any price. The sense that "the scoop is everything," and the compelling, albeit, fabricated stories, the deadlines, the awards, and the need to maintain status at the top are all factors which contributed to the clouded judgment of individuals, newsrooms, editors, and their newspapers. This clouded judgment inevitably accompanies pressure for achievement of materialistic measures of contribution.

B. Fear and Silence

In business, this factor translates into employees being afraid to raise issues, or, if they do muster up the courage to raise issues, these employees are terminated, or otherwise punished, for noticing. When Sherron Watkins, a high-ranking Enron executive was asked why she did not raise her concerns about Enron's accounting processes sooner, she responded, "It would have been a job-terminating move." Employee Clayton Vernon was fired after he posted a question on an internal company online discussion about whether Enron's accounting was too aggressive and overstated its profits. Another employee was fired for commenting on the $55 million paid to officers as retention bonuses in December 2001. Even outsiders who raised questions were taken to task and punished. John Olson, a Houston-based analyst, asked questions about Enron's accounting, and Ken Lay protested to Mr. Olson's boss, saying, "John Olson has been wrong about Enron for over 10 years and is still wrong. But he is consistent (sic)." Mr. Olson was terminated by Merrill Lynch for raising the issues.

159. John Schwartz, Man Who Doubted Enron Enjoys New Recognition, N.Y. TIMES, Jan. 21, 2002, at C8. Mr. Olson said that when his boss showed him the note from Mr. Lay, he responded, "You know that I'm old and I'm worthless, but at least I can spell 'consistent.'
160. With the conviction of five Merrill executives, we now understand that Merrill was heavily invested in Enron and could not afford a negative
Fear existed in the organizations that fell victim to the likes of Blair, Glass, and Kelley. For example, the USA Today panel of experts concluded the following about the culture of Kelley's paper:

A "virus of 'fear'" infected some USA Today staffers who had suspicions about Kelley's work. That fear, born in part of the perception that Kelley "was seen as untouchable" and the "Golden Boy" for the newspaper's top management, deterred them from forcefully raising concerns with editors and made the newspapers' staff "enablers for the fraud Jack Kelley produced."161

At the New York Times, staffers complained to reporters of other organizations about the nature of the Times' culture that facilitated Mr. Blair's deceptions. Several management experts referred to the Times' culture as one with autocratic leadership. Autocratic leadership, such as that of Mr. Raines, is efficient, but "people learn to wait for direction from the boss, or worse, they become terrified of making the wrong decision. In any case, creativity is discouraged, and the most talented people eventually leave."162 The Times art director said, "I hope things settle down and we get a decent executive editor who's reasonable. Howell Raines is someone who is feared."163 Mr. Raines's management style was referred to as the first strike against him,164 and fear may be part of what that means. Media critic Ken Auletta of the New York Post called the atmosphere at the New York Times, a "culture of fear."165

Joe Sexton, deputy metropolitan editor at the

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162. Del Jones, Autocratic Leadership Works—Until It Fails, USA TODAY, June 6, 2003, at 4A.
163. Johnson, supra note 89, at 4A.
164. Id.
165. In an interview with Forbes, Auletta offered the following on his take on Howell Raines:

He fails to adequately acknowledge his own flaws as a newsroom manager. He is gratuitously cruel to his predecessor, Joe Lelyveld. He overstates the culture of complacency at the Times. If he was so right about this culture, then why did he apologize to his staff and vow to stop berating them to raise their metabolic level? For a man who professes to respect publisher Sulzberger, he treats him with condescension.

Times said, “People feel less led than bullied.”

The means by which the Rather story came unhinged and Mr. Rather’s amazing resistance to retracting it speak to the culture of fear. The story would have gone along to Kelley iconic standards had it not been for the Internet bloggers. Indeed, there was such disdain for their questions about the truthfulness of the story and authenticity of the documents that CBS executives bristled at the thought that “geeks in their pajamas” could somehow uncover something that its extensive news staff did not.

And it was not until a forbes.com reporter raised questions about a Glass story that the New Republic editors pursued an investigation. An outsider’s voice had to infiltrate a culture that afforded a young star great latitude and an associate editor position by the age of twenty-five. Insiders could not curb an atmosphere that discouraged those around him from raising issues. In an ethics panel in 2003, Glass’s former editor Andrew Sullivan indicated that Glass benefited from adoration during his time at the New Republic: “You were loved [at the magazine]. I didn’t know anybody at the New Republic who was as loved as you.”

In an atmosphere of fear, even those who see the issue of malfeasance and its consequences will say nothing. The presence of fear and silence is what enables the creation of what will

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166. Caldwell, supra note 83, at 19, 21. An example that emerges is the extensive Times coverage of the Augusta National Golf Club policy on not admitting women as members and its relentless drive to change that policy, even if, as occurred, it meant prohibiting sports columnists from writing about the U.S. Open being played there.


168. William Bennett is allegedly the originator of the “geeks in their pajamas” phrase. Mr. Bennett used this phrase on Hannity & Colmes in describing the CBS Memogate problem and the initial reactions of Rather and CBS executives to the challenge to the Bush National Guard memos and story. Hannity & Colmes (Fox News Network television broadcast, Sept. 16, 2004) (transcript on file with the Notre Dame Journal of Law, Ethics & Public Policy) (“It was broken by a bunch of geeks in their pajamas at 4:00 in the morning. You know? Wake up.”).

become a "huge black eye" for a company or a newspaper. In the investigations that followed these collapses, there is yet another common thread—the investigations began with anonymous or other types of tips from outside or inside the organization.

C. The Young 'Uns and Bigger-than-Life CEO

In companies that collapse ethically, with an iconic CEO surrounded by direct reporters who are a generation younger and enjoying the too-soon fruits of too-often ill-gotten gain, there exists an atmosphere in which no questions are asked because there is a presumption of whiz kid talent as assessed by an accomplished figure who has risen to the top of his game. Ken Lay of Enron, Bernie Ebbers of WorldCom, and Dennis Kozlowski of Tyco were examples of CEOs who had attained such remarkable status that even when there were skeptics who questioned their achievements and whether it was possible to maintain the type of stock price growth and returns they were delivering, those skeptics were readily dismissed. In short, because they were who they were, how could there be any questions about their reports, their efforts, and their forthrightness?

This superstar mentality overtook the organizations that fell victim to their own reporters and correspondents. The list of those involved in the fifteen years of scandals discussed in Section I and the status of those involved indicate that any questions raised about these reporters meant that the questioner was taking a trot across thin ice. In Mr. Blair's case, there was the status of being a member of a protected class, as well as a personal favorite with Mr. Raines. Further, the complaints about Mr. Blair referred to the Blair scandal as a huge black eye for the paper. See William Safire, A Huge Black Eye, N.Y. Times, May 12, 2003, at A25.


For information regarding the development of the details of this business factor, see supra note 10 and accompanying text.

While more on the role of diversity and affirmative action follows in a later factor's discussion, there were many who raised the issue of protectionism for Mr. Blair, indeed, advancement beyond qualifications. Some have noted that while the scandal has certain roots "born of ambition," it is clear that it also involves race. "Publications like the Times work hard to find and keep the best black reporters. That sometimes involves hiring minority reporters whose experience 'was significantly below what [we would] normally require because we wanted a lot of minority reporters."

Nancy Gibbs, Reading Between the Lies: A Young Reporter Who Stole and Made Up Stories Faces the New York Times to Take
Blair were either not investigated or not communicated down the chain for discipline or correction. As early as November 2002, people Mr. Blair cited as being interviewed by him were calling the Times to complain, but even reprimands did not hinder his assignments or preclude him from continuing to file stories.\textsuperscript{174} Mr. Bragg was a Pulitzer Prize winner who enjoyed the protection of Mr. Raines until other staff members objected to Mr. Bragg's public characterization of indirect reporting being so commonplace.\textsuperscript{175} There are references to Mr. Bragg's close relationship with Mr. Raines.\textsuperscript{176}

Jack Kelley was also a reporter with superstar immunity. He was given access to the corporate jet for his travels and a pass on scrutiny even when confronted by other reporters on the lack of logic in what Mr. Kelley was including in his articles.\textsuperscript{177} The outside experts who investigated the matter concluded: "More than a few reporters told us they thought the image of Kelley as a reporter with close friends in high places made editors uncomfortable when they heard criticism of Kelley."\textsuperscript{178}

In the case of Mr. Rather and the memos, at least two document experts and two relatives concluded that the memos were not authentic, but somehow, the story proceeded despite these misgivings.\textsuperscript{179} Somehow, no one was willing to challenge Mr. Rather or veteran producer Mary Mapes who were enjoying the glow of the story break on the misconduct of United States military personnel toward Iraqi prisoners. Veteran reporter Morley Safer, of the original 60 Minutes program, attributed the failure to respond to concerns raised as a function of the culture of this "other 60 Minutes" as follows: "These are not standards that


\textsuperscript{175} Jacques Steinberg, Times's Top 2 Editors Resign After Furore on Writer's Fraud, N.Y. Times, June 6, 2003, at B8.

\textsuperscript{176} Indeed, Mr. Bragg made certain that those who interviewed him were aware of his dinner relationship with Mr. Raines. Matthew Rose et al., New York Times Suspension Exposes Issue Over Bylines, N.Y. Times, May 27, 2003, at B6.

\textsuperscript{177} Debbie Howlett, a correspondent, raised issues in 1999 about an article Mr. Kelley had written on Kosovo. She indicated that "given Jack's reputation," there was little the editors were interested in doing to follow up on the questions. See Jacques Steinberg, Journalists Say Paper Failed To Stop Deceit of a Reporter, N.Y. Times, Mar. 29, 2004, at C9.

\textsuperscript{178} Kevin McCoy, Report: Newsroom Culture Enabled Kelley, USA Today, Apr. 22, 2004, at 10A.

would have ever been tolerated, and it's inconceivable this would have made it on the air on the Sunday show.\textsuperscript{180}

Mr. Glass had reached an estimable status at a very young age. In addition to his work at the New Republic, his work was appearing in the pop culture Rolling Stone and George.\textsuperscript{181} His high profile made him invincible to questions from editors.\textsuperscript{182} As noted in the previous section, he was twenty-five years old and an associate editor.

Mike Barnicle's misstep with Mr. Carlin's Brain Droppings was the end of a line of questioning that had been directed at him—some resolved and some unresolved. His status as a longstanding columnist afforded him an immunity that was not justified, but existed and permitted the lack of management oversight.\textsuperscript{183} The ease with which other complaints were dismissed and the unquestioning manner in which Mr. Barnacle's initial explanation was accepted indicated a certain deference, and again, it was not until a complaint came from the outside that any exploration of Mr. Barnicle's material was a possibility.

In the case of Mr. Arnett, CNN, and the nerve gas story, the Wall Street Journal noted: "The outcome also demonstrates the peril of consorting with a celebrity news correspondent who isn't easily controlled."\textsuperscript{184} Larry Grossman, a former president of NBC News noted: "When people become stars it sometimes has an effect of frazzling their brains."\textsuperscript{185}

\section*{D. Weak Board}

This factor is the management reaction to the status problem discussed in Subsection C. For a superstar to avoid detection and questioning, there must be a weak and deferential management in place. In business, Enron's board ignored warning signals about accounting practices,\textsuperscript{186} WorldCom's board was

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\begin{itemize}
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Richard Lacayo, Heart of Glass, Time, May 19, 2003, at 57.
\item \textsuperscript{182} See supra notes 32–44 and accompanying text (relating former editor Andrew Sullivan's experiences with Mr. Glass).
\item \textsuperscript{185} Id. For a good example, consider Mr. Arnett's eventual misstep during his interview which included statements about the United States as well as Geraldo Rivera's lack of judgment in disclosing troop locations. \textit{Id}.
\item \textsuperscript{186} See S. REP. No. 107-70, at 94 (2002); see also Bill Saparito, Speak No Evil, Time, Feb. 18, 2002, at 34.
\end{itemize}
known to be comprised of Mr. Ebbers's friends, and Tyco's board was largely comprised of insiders incapable of raising confrontational questions and issues. Superstars cannot evade effective managers, and one of the weaknesses that emerged in the independent reports on the debacles was that there was, indeed, weak management. For example, the USA Today's Kelley report found the following management weaknesses: (1) editors did not follow up on either complaints or anonymous tips; (2) policies on routine editing were ignored; (3) editors failed to be vigilant and diligent with Kelley's work; (4) lines of communication among editors and news divisions were very poor; (5) top-down rules made it nearly impossible for staff concerns to reach management; (6) editors permitted extensive use of anonymous sources in violation of strong policies against such use; and (7) relationships between Kelley and his editors that were too close created a chilling effect on the editing process.

The atmosphere at the New York Times appears to have paralleled that found at USA Today, and even CBS employees have scratched their heads over how such a story was able to creep through with such little vetting of the source and the documents. The atmosphere at the New Republic was similar in that the three editors under whom Stephen Glass had worked all acknowledged their shortcomings in their failures to detect the fraud. But, their mea culpa was really one that failed to acknowledge their weaknesses as managers:

How could this happen? It is a perfectly fair question. We have been asked it repeatedly since we informed the press of Glass's firing, and we expect to be confronted with it again and again. We are asking it of ourselves. The editors of The New Republic, like those of other magazines, have devised fact-checking procedures to insure the accuracy of our copy. Generally, however, the precautions we took were not adequate to prevent Glass's

189. McCoy, supra note 178, at 10A.
190. Terry Eastland, Confidentiality Men: CBS and Its Anonymous Source, WEEKLY STANDARD, Oct. 4, 2004, at 12. Amazingly, even weeks after the Bush National Guard story had been retracted, there were those who knew the story was ongoing for CBS and could not say with definitiveness that Mapes and Rather were no longer on the story. Id.
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fabrrications from making it into print. We intend to find out why and to take corrective action where necessary.

We editors take responsibility for the failures of discernment that permitted this false material to be published. But it is important to understand that our editing and fact-checking systems are designed to defend against the errors and mistakes even good professionals sometimes make—not against the systematic and intentional deceptions of someone who actually has no business practicing journalism.

We assumed that no person who calls himself a journalist, least of all a member of our own trn family, would attempt to work with us on any other basis. In Stephen Glass's case, this assumption was not warranted. For reasons known only to him, Glass mounted what appears to have been quite an elaborate effort, including the falsification of documents and reporter's notes, to trick our editors and elude our fact-checkers.

Looking to the future, our commitment to you, our readers, is to do whatever is necessary to restore any of your trust in us that may have been lost as a result of this extraordinary situation. We are not proud of the fact that Glass's falsehoods ever made it into our pages in the first place. But, once we had a reasonable basis to suspect that such falsehoods might have been published, we immediately investigated. Once we established the facts, we promptly removed the culprit, and we publicly acknowledged the problem. The New Republic's stringent tradition demanded nothing less. 191

Indeed, the uniform weakness of managers in these news organizations appears to be that so long as reporters are selling papers or reporting the types of stories editors find ideologically pleasing, no questions are asked. That management approach is fundamentally flawed when it comes to cheats, and fatal when it comes to superstar cheats.

E. Culture of Conflicts

While there are problems with conflicts of interest in the media, those conflicts issues were not critical in the cases discussed in Section I, except as they related to the overly close relationships between the editors and the star reporters and

columnists. But the management of conflicts of interest is a problem. Further, management, either by disclosure or elimination, is necessary in order to ensure safe, efficient operations in business, or any other type of organization. Operations in an atmosphere where business conflicts reside include: producing loans to corporate officers, ensuring contracts between the company and officers' relatives, and an interconnectedness between personal lives and corporations that make it impossible to differentiate between embezzlement and the utilization of funds under full authorization. The same is true in journalism. Conflicts are disclosed so that we may differentiate between those who benefit from the facts presented in the report from those who are being paid simply to report the facts.

Conflict issues continue to percolate throughout the industry amidst the same issues of arrogance that permeated the scandals discussed in Section I: a sense of immunity, a sense of infallibility, and an unwillingness to understand the importance of managing conflicts rather than asserting one's independence despite the conflicts. For example, Lou Dobbs of CNN—who was critical of the Justice Department's indictment of Arthur Andersen in 2001 for obstruction of justice based on the destruction of documents related to that firm's work on Enron—simply refused to yield to perception and disclosure issues related to his reporting and his relationship with those who were the subject of his reports. Mr. Dobbs failed to disclose that he had given speeches for Andersen, that Andersen sponsored a show he hosted on CNN, and that a company in which he owned an interest had Andersen as its auditor. Mr. Dobbs was outraged at the criticism directed at him, alleging his conflicts of interest and his failure to disclose them: "They criticize me for not disclosing my

192. Enron's major travel agency was co-owned by Mr. Lay's sister, Sharon Lay. Ms. Lay's Alliance Worldwide Travel booked more than $10 million in travel for Enron and its employees. Mr. Lay's son, Mark, did work for Enron for a time, but then created two privately held technology firms. See David Barboza & Kurt Eichenwald, Son and Sister of Enron Chief Secured Deals, N.Y. TIMES, Feb. 2, 2002, at A1. Enron signed contracts to do business with both companies and invested in one. The amount of loans Bernie Ebbers acquired from WorldCom with shares pledged as securities were so extensive that if he defaulted on any of the loans, the sale of shares to gain cash for repayment would have devalued the shares of WorldCom significantly. See Rebecca Blumenstein & Jared Sandberg, WorldCom CEO Quits Amid Probe of Firm's Finances, WALL ST. J., Apr. 30, 2002, at A1; see also Alex Berenson, Board Member of Tyco Unit Owed Millions to 2 Executives, N.Y. TIMES, Mar. 29, 2002, at C1 (noting that executive loans and interrelationships with directors were a tangled mess).

'ties' to Andersen, and they say those 'ties' mean I cannot be objective." Actually, despite the culture of the media that seems incapable of drawing definitive lines, Mr. Dobbs's financial ties are per se conflicts that deprive him of objectivity, no matter how virtuous he fancies himself to be. Mr. Dobbs is free to express his opinion, but he ought to at least disclose potential conflicts.

Other conflict issues that have arisen, although not necessarily in the context of the scandals presented in Section I but certainly as a part of the evolving media ethical culture, include those of business commentators who fail to disclose their interest in companies and stocks they are discussing, touting, or presenting as part of their news/analysis programs. CNBC had to develop a conflicts policy after disclosures that a reporter owned 1,000 shares of Citigroup but still went on air to interview its chairman, Sanford I. Weill. CNBC's policy became the most stringent in the industry with a prohibition on all managers and news staff, and their families, from owning individual stocks, except those of their employer companies. All other employees, including even those who apply make-up to the on-air talent, were permitted to keep the stocks they already owned but could no longer buy any more individual stocks. The Wall Street Journal and Business Week prohibit employees from writing about companies in which they own stock. However, their policies and those of other networks such as Fox News are not as stringent as the CNBC policy, one that has caused a stir based on the perception that it is tightly drawn.

F. Culture of Innovation Like No Other

In the businesses that have collapsed over the past three years, an interesting psychological phenomenon contributed to their collapses. The companies—and their executives—fancied themselves unique, innovative, and above the drudgery of the usual business battle of product, service, price, and strategy. Jeffrey Skilling, the CEO of Enron, had a favorite line that he repeated in interviews: "We are on the side of angels." A plaque in the lobby for Enron's Houston headquarters read:

194. Id.
196. See Kurt Eichenwald & Diana B. Henriques, Enron Buffed Image to a Shine Even as It Rotted from Within, N.Y. TIMES, Feb. 10, 2002, at A1. The full quote as it appeared in print, and later on television, was: "We are the good guys. We are on the side of angels." Id.; see also Frontline (PBS television broadcast, June 5, 2001), transcript available at http://www.pbs.org/wgbh/
“The World’s Leading Company.”197 *Business Week* referred to WorldCom as “the very model of a 21st century phone company . . . the deal [MCI] will offer businesses one-stop shopping for all their communications needs.”198

This type of superior attitude puts an organization at risk for ethical collapse. In the discussion in Section I, various examples of this were elucidated, including: (1) the Tiffany network, “all the news that’s fit to print”; (2) 152 years of reputation at the *New Republic*; (3) the *Boston Globe* and its long history; and (4) *USA Today* being the world’s largest newspaper. The organizations that fell victim to journalistic ethical lapses, and in some cases, fraud, had distinctive offerings and roles that gave them a sense of immunity. This ethical risk factor has been described as follows:

The psychology of “How Could They Have Done It?” is present in the culture of innovation because these executives have never failed, have been used to the accolades of accomplishing the impossible, and, to a large extent have been given an immunity from those around them charged with the responsibility of reining in those who exceed their authority, overstep legal and ethical boundaries, or compromise shareholder interests for self-interest.199

Their innovation status buys them a pass from scrutiny. They see themselves as being unlike anyone else in the industry or who has come before them. The absence of scrutiny only extends and expands the cover-up period during which innovation has vanished and the executive team is buried beneath the harsh reality of business and the unrelenting demands of operations, markets and customers. To breathe during this immersion in reality, the executive team props open windows and doors with toothpicks of flimsy accounting and temporary air vents that

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199. Seth Schiesel, *Trying to Catch WorldCom’s Earnings Mirage*, N.Y. TIMES, June 30, 2002, at BU14 (“Wall Street was more than captivated by these new guys; they were eating the lotus leaves and it made companies like AT&T and Sprint look stodgy in comparison.”).
they hope will last until they can undertake massive reconstruction.200

The arrogance came through as CBS, faced with incontrovertible evidence of forgery, waited a week before retracting the story. The arrogance was obvious—from the unwillingness to investigate complaints about a star journalist, or even why their journalist seemed to get the scoops no one else in the industry was able to come close to—in the cases of Cooke, Smith, Glass, and Kelley. This cultural factor was present in the news organizations to the same degree as it was found in the collapsed businesses, indicted by these same news organizations.

G. A Culture of Social Responsibility

This factor is a classic “ends justifies the means” philosophy applied to conduct as well as a type of equation balancing rationalization. Enron executives felt justified in spinning debt off the books and, in effect, presenting false financial statements because the company was a generous donor to various Houston charities, the executives themselves were also donors and fundraisers, and many of them offered their time to various organizations as a means of community involvement.201 Bernie Ebbers was a massive donor to communities and colleges in Mississippi.202 Dennis Kozlowski was generous with both his and Tyco’s monies as he gave buildings to schools and funds for everything from the arts to park maintenance.203 The philanthropy and volunteerism are not problematic except when used as a means of atonement for business malfeasance. It was almost as if

200. See Jennings, Restoring Ethical Gumption, supra note 9, at 450–51.
202. See Chris Woodyard, Pressure to Perform Felt as Problems Hit, USA TODAY, July 1, 2002, at 3A; see also Barnaby J. Feder & David Leonhardt, From Low Profile to No Profile: WorldCom’s Fired ‘Whiz Kid’ Leaves a Mystery and a Mess, N.Y. TIMES, June 27, 2002, at C6.
their self-perceived virtue, and the impression that it created on outsiders, made it impossible for them to internalize the wrongs being committed—from the accounting departments to the self-dealing. There was selective virtue—with goodness in some areas making up for sins in others.

The Blair scandal is perhaps the most obvious application of virtue in one area atoning for sins in another. Mr. Raines himself acknowledged that the continuing promotion of Mr. Blair—despite warnings—was a function of his desire to right racial injustices. The commentary on the case has pointed out that signals were ignored in the name of diversity. However, that commentary is not limited to the Blair case. In 1996, the New York Times had experienced yet another black eye in the name of racial diversity. The Times ran a scathing piece on discrimination at Texaco based on the content of tape-recorded conversations of company executives. The transcript, given to the paper by the class action plaintiffs' lawyer, was printed in the Times. The problem was that the tapes had been altered, the transcription was not correct, portions of the tape were inaudible and had still been transcribed, and there were backdrops and explanations, including the content of Texaco's diversity training that cleared the executives of any wrongdoing or racial slurs. Another scandal had snookered the Times because of its self-perceived righteousness in pursuit of racial diversity.

The "too quick to believe" pattern, based on desires or views, emerged as a theme in the scandals: the eight-year-old drug addict is an indictment of the Reagan administration by Ms. Cooke, the National Guard memos are damaging to George W. Bush, the gripping stories of Jack Kelley make it clear that war is hell, and Stephen Glass's stories always took on angles the New Republic had an aversion to—such as Nancy Reagan's DARE program. In December 2004, the New York Times ran a front-page, top-of-the-fold story titled, Troops Queries Leave Rumsfeld on the

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204. See supra note 173 and accompanying text.
Defensive. The theme of the story was that the troops, during a visit to Iraq by Secretary of Defense Donald Rumsfeld, were confrontational, unhappy, and displeased with their equipment. One particular question by a National Guardsman about the program for creating armored vehicles seemed to ignite glee in the article's author. The National Guardsman, Specialist Thomas Wilson, with the Tennessee National Guard, had been asked by a reporter to ask the question upon which the stories of discontent were then based. The news was made via the reporter and his role was not disclosed. These incidents reveal a blindness to truth that springs from dedication to causes. The merit of those causes is not the issue, much like the fact that all the charity performed by the businesses and their executives was irrelevant to their continued commissions of fraud. The fact that there is goodness in some sense does not atone for missteps in the presentation of the truth, whether it regards the financial status of a company or the lack of pursuit of truth by a news organization. The goal may be noble, but the means to its achievement still matter.

To call the problems here “bias” incorrectly states the problem. This is more than a bias problem. Bias is human nature emerging in the course of descriptions. The financial reports of the companies that were engaged in much good were not biased; they were just simply wrong. The Rather report on the Bush National Guard Service was not just biased; it was simply wrong. The relentless pursuit of a story Mr. Rather and Ms. Mapes believed to be true resulted in sloppiness with sources, arrogance in resisting vetting, and embarrassment for an entire network. This aspect of the culture of these organizations was perhaps the most serious because it was often the reason for turning a blind eye, for the lack of questioning, for the failure to adequately source, and the inaction related to complaints. This factor in a culture of ethical collapse is one in which the ends, the self-perceived good, justify any means for arriving there.

209. Other newspapers followed the same theme. Dave Montz, Troops Fire Tough Queries at Rumsfeld, USA TODAY, Dec. 9, 2004, at 1A.
210. Edward Lee Pitts of the Chattanooga Times Free Press was the embedded reporter who fed the question and who did not disclose his role in the question in his report. His role emerged later when he sent an e-mail to his colleagues at the Tennessee paper describing how his story was picked up internationally and that the result was "one of my best days as a journalist." Mark Memmott, Soldier, Reporter Teamed Up for Question Asked Rumsfeld, USA TODAY, Dec. 10, 2004, at 9A.
III. RESTORING VIRTUE ETHICS IN THE MEDIA

A. What Values? Whose Values?

In 1999, when called upon to give a speech on journalism and ethics at Hillsdale College, I suggested five values that should guide all decisions in the media on everything from coverage to content to conflicts: honesty, independence, fairness, productiveness, and pride.\footnote{See Marianne M. Jennings, The Evolution—and Devolution—of Journalistic Ethics, \textit{Imprimis}, July 1999, at 1.} If I were giving that same speech today, I would dismiss independence, fairness, and pride as impossible values for those in the media today to achieve. I would ask only that the two values of honesty and productiveness be the focus of all ethics in the media.

My reason for dismissing independence, fairness, and pride because of their impossibility, is a form of surrender, but also recognition of the reality of human nature percolating through the humans who carry out the tasks of covering the news. In short, I have come to recognize that it is impossible to ask or achieve independence. But, that admission is not pessimism on my part, an indictment of others, nor an omen of horrific media ethics. This notion of independence has been touted, but as of yet, not followed. It is feared, but not acknowledged. It has been labeled a requirement without an understanding of history. The piety of today is but lip service to the underlying realities of news coverage and a defiance of its history. It is an impossible task to ask us to dismiss our experiences, our views, our ideology, and our employers when we cover the news. The notions of balance, fairness, and independence are simply the rantings of idealists, much as CEOs tout their high ethical codes and standards only to stuff the channels with inventory to ensure the achievement of their numbers for the quarter. I am reminded of the infamous quote of former \textit{New Yorker} movie critic, Pauline Kael, who, when stunned by the results of the 1972 presidential election that returned Nixon to the White House, said: “I don’t know how Richard Nixon could have won. I don’t know a single person who voted for him.”\footnote{La \textit{Trahison des Jerks}, \textit{Weekly Standard}, Oct. 25, 2004, at 2.} With that personal backdrop, how can one expect detached, fair, and balanced reporting?

History has taught us that those who own the papers drive the direction of the coverage. This is something we have acknowledged and lived with in previous eras, but suddenly seem incapable of grappling with these days. For example, Alexander...
Hamilton owned the *New York Post*.\(^{213}\) I dare say the coverage of Jefferson during that era may have been less than favorable and that the discussions of Jeffersonian democracy may have carried a more negative twist than the discussion of *The Federalist Papers*. Horace Greeley owned the *New York Tribune*, but he was also a Whig Congressman and used his newspaper to expose corruption in Congress.\(^{214}\) Today, Mr. Greeley would be called onto the carpet for a conflict, and the *Tribune*’s stories would be dismissed as the rantings of someone “with an agenda.”

Ownership, ideology, experience, circles of friends, and other human factors drive our perceptions and analyses. Howard Kurtz offers a more modern-day example of the contrast in coverage of an issue, based on the ideology of newspaper ownership. Barney Frank, a Democratic representative from Massachusetts, was the center of a great deal of media attention following the revelation that he had a young live-in male companion who was running a homosexual escort service from Frank’s apartment. The *Washington Times* is a newspaper founded in 1982 and owned by the Reverend Sun Myung Moon, the leader of the Unification Church. Reverend Moon unabashedly stated when he began the newspaper that his goal was to save America from “the collapse of traditional values.”\(^{215}\)

Reverend Moon was also a vocal opponent of homosexuality. When the Frank story broke, the *Washington Times* ran with it, accumulating forty-five stories between August 25, 1989, and September 22, 1989. The headlines for some of the stories were as follows: *Frank Losing Ground as Hill Recess Ends*, *GOP’s Strategy in Frank Case: Sit Back, Enjoy; Embarrassed Leaders Want Frank to Go*, and *Outrage Grows in Massachusetts.*\(^{216}\)

However, the *Boston Globe*, a paper that had on its staff many friends of Representative Frank, ran the following types of headlines: *Little Long-Term Damage to Career Seen, and Frank Has a History of Overcoming Obstacles.*\(^{217}\) Those at the *Globe* spoke of palpable hesitancy to cover the Frank story.\(^{218}\) That there are differences in coverage does not mandate indictment of either the *Washington Times* or the *Globe*. Their ownership, their loyalties, their ideology, and their views influence not just what stories

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\(^{214}\) *Id.*

\(^{215}\) *Id.* supra note 213, at 185–86.

\(^{216}\) *Id.* at 187.

\(^{217}\) *Id.*

\(^{218}\) *Id.*
are covered, but how much coverage, how the headlines will read, and what content will be included within those stories.

Similar ideology can be seen as recently as the 2004 presidential election. On Monday October 25, 2004, the *New York Times* ran an account of the disappearance of a host of weapons from Iraq, a story then used by the Kerry campaign to allege incompetence on the part of Mr. Bush.219 The *New York Times* characterized the story as a failure on the part of the Bush administration.

The following day, the *Washington Times* ran a story featuring a response from the Pentagon—an aspect apparently missing from the *New York Times* report—and the headline read: *Pentagon responds to missing-explosives report.*220 The content of the *Washington Times* story and several others on the days following reflected a very different story than that of the original column:

The Pentagon said yesterday that 380 tons of missing explosives from an Iraqi munitions facility may have been moved before U.S. troops overran the area during the invasion to overthrow Saddam Hussein. The statement came after a joint project by CBS’ ‘60 Minutes’ and the *New York Times* reported that the Iraqi government has told the United Nations’ International Atomic Energy Agency (IAEA) that the stockpile of material for plastic explosives went missing during U.S. occupation.221

The Washington paper also reported: “U.S. intelligence agencies have obtained satellite photographs of truck convoys that were at several weapons sites in Iraq in the weeks before U.S. military operations were launched, defense officials said yesterday.”222 The *New York Times* has its views about the war in Iraq, and the *Washington Times* has its views. The story about the discovered explosives, or the missing explosives, in Iraq—a distinction that depends upon which newspaper was the source of the information—was presented in nearly diametrically opposed ways. Neither view is independent or fair. Yet, through the presentation of both views, we somehow came to the conclusion that the story was not a reflection of Bush incompetence. We may never be clear on what happened to the weapons or where they

221. Id.
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are now. These answers are perhaps of greatest concern for readers but, unfortunately, not a focus of either paper.

I am no longer concerned about fairness or independence. Newsweek would not break the Monica Lewinsky story initially, but the National Enquirer did. Newsweek did not want to report the DNA on Monica's blue dress story, but Matt Drudge would.\(^{223}\) Dan Rather's Memogate was a story based on forged documents that went forward, but "geeks in pajamas" made sure we knew about the forgery.\(^{224}\) I worry less about these virtues in 2004 than I did in 1999 because of the pervasiveness of the Internet and the persistence of bloggers. When Eason Jordan, a senior executive at CNN, appeared on a panel at the World Economic Forum in Davos, Switzerland in January 2005, he stated that the U.S. military was "targeting" journalists. No one present reported on the statement, although the majority of the audience consisted of journalists. However, again, the bloggers began posting a transcript of the remarks. While Mr. Jordan tried to deny the words, there was too much direct evidence and the result was significant public pressure that forced his resignation as CNN news director.\(^{225}\) The bloggers were relentless. The checks and balances that the media was incapable of providing for itself are now provided by the Internet—the town square of our time. Rather than wring our hands and cast aspersions, we can shrug our shoulders and seek alternative sources for journalistic bias and balance.

Because ideology is so pervasive in the press, it has become trite to tout pride as an ethic of journalism.\(^{226}\) Five years ago, I referred to pride in workmanship, the pride in having conquered a story and presented the facts accurately and fairly, as an

\(^{223}\) Michael Isikoff, Uncovering Clinton 333–35 (1999) (discussing the Monica Lewinsky story); id. at 146 (discussing Matt Drudge's coverage of the Lewinsky/Clinton affair).

\(^{224}\) See supra note 168 and accompanying text.

\(^{225}\) Jacques Steinberg & Katharine Q. Seelye, CNN Executive Resigns Post Over Remarks, N.Y. Times, Feb. 12, 2005, at B1, B4. Mr. Jordan was also at the center of controversy when the Iraq war first began when he disclosed that he had an agreement with the Iraqi government to not cover certain issues and stories in exchange for the government allowing CNN to maintain its exclusive presence in the country. Mr. Jordan disclosed the policy in an op-ed piece in the Times. Eason Jordan, The News We Kept to Ourselves, N.Y. Times, Apr. 11, 2003.

\(^{226}\) Indeed, a host of books speaks to the issue in depth, with much more detail, and the same fiat accompli. See, e.g., Ann Coulter, Slander (2002); Bernard Goldberg, Bias (2002); Howard Kurtz, Spin Cycle (1998); Eric Alterman, What Liberal Media? (2003). Mr. Alterman's book may be the best case made for establishing the existence of ideology on the part of the media. See also Marvin Kalb, One Scandalous Story (2001); Al Franken, Lies, and the Lying Liars Who Tell Them (2003).
important aspect of the journalistic endeavor. Pride today is tied to circulation numbers, awards won, and the advancement of ideology and candidates. The debacles discussed in Section I have caused me to lose hope. The cultures discussed in Section II that spawned those debacles have forced me to abandon pride as a value. Pride dwells in a different arena now; journalistic pride no longer resides in the arena of a job well-done, a story well-investigated, and change brought about by hard facts.

With independence not a possibility, fairness a pipe dream, and pride a non-issue, when it comes to unbiased and complete reporting, we are left with two values that should remain as the foundation for media ethics: honesty and productiveness. These two simple virtues could restore credibility—and advance discussions—in the public square. Those in the media, of course, must return to these simple guidelines and apply them as their tools for decision-making if this is to occur. Eliminating the relativism that has infiltrated the media is critical if survival is the goal. The existence of this relativism is obvious from the Rather debacle. The notion that "the story is true even if the facts are false" reflects an abandonment of values for the sake of proving a view and advancing an ideology.

B. What Is Honesty? Does Truth Exist?

The suggestion of the two aforementioned values as the basis for media ethics is a radical one. Skimming through the books used as texts for media and journalism ethics indicates philosophical foundations without conclusions, a look at possible theories for ethics without any moral absolutes.227 Wading through convoluted theory offers little insight into virtue application and only results in confusing signals about the role of the media. For example, one text, Ethical Issues in Journalism and the Media,228 offers the following topics for coverage: (1) ethics and politics of the media: the quest for quality; (2) journalism in the marketplace; (3) owners, editors, and journalists; (4) freedom of speech, the media, and the law; (5) codes of conduct for journalists; (6) privacy, publicity, and politics; (7) honesty in investigative journalism; (8) objectivity, bias and truth; (9) women and the press; (10) the oxygen of publicity: terrorism and reporting

227. See also Conrad C. Fink, Media Ethics (1988); John C. Merrill & Ralph D. Barney, Ethics and the Press (1975); Philip Patterson & Lee Wilkins, Media Ethics: Issues and Cases (1998). The topics covered include reporting on hantavirus, the Susan Smith case, advertising, the Exxon Valdez Oil Spill, and Joe Klein's penning of Primary Colors.

restrictions; and (11) something more important than truth: ethical issues in war reporting. A look at the list of essays in this book for students learning media and journalism ethics finds truth and honesty mentioned in only three of the eleven essays, two of which are qualified by circumstances and one that takes the position that ethical issues in war reporting are more important than truth. An excerpt from *Objectivity, Bias and Truth* proves this point:

A specific journalistic horizon may be identified, through which the journalist interprets reality. This horizon is constituted by the journalist's 'news values,' which is to say, by the stock of knowledge and competences, typically taken for granted by the journalist, by which any event may be assessed as being newsworthy. A given event occurs amid a plethora of other social events to which the journalist may or may not respond. The journalist's initial decision to attend to the event will rest upon the anticipation of the place of that event in a broader whole.

At the risk of sounding like a Dave Barry moment ("I am not making this up!") I could not begin to translate what this author is saying about the role of truth, objectivity, or bias in reporting. This massive overloading of simple concepts with dense philosophical grounding would be tolerable and touted if it were producing the types of journalists envisioned. However, the depth and extent of media misdeeds outlined in Section I provides all the proof we need that journalism programs have not instilled a strong sense of right and wrong in their charges. Journalists, and their managers and editors, have failed to detect the most basic of ethical questions.

There is also the possibility that we could rely on commissions, codes, and reports in order to reestablish the virtue of truth. However, as with most codes, there is the tendency to adopt the code as a minimum standard for behavior and seek loopholes. Indeed, with journalism codes, that danger is greater as the codes are established with loopholes in mind—such as when the breaking of the rules is considered to be in the public interest. The result is that we return to moral relativism and the journalist determining, according to circumstances, what

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229. *Id.* at v–vi.
230. See *id.* at 166. Indicating fairness and balance on my part in characterizing the essay on war, I have entitled the final section: "Whose truth?"
rules should and should not be followed, and what should or should not be reported.

When all else fails in terms of establishing a simple virtue such as truth, journalists, and business people alike, including auditors as with the Treadway Commission on fraud, turn to commissions to develop broad guidelines that professionals can use in exercising their responsibilities. For example, the Hutchins Commission\(^\text{233}\) recommends the following five values for the press: (1) the media should provide a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning; (2) the media should serve as a forum for the exchange of comment and criticism; (3) the media should project a representative picture of the constituent groups in the society; (4) the media should present and clarify the goals and values of the society; and (5) the media should provide full access to the day's intelligence.\(^\text{234}\)

After reading this list, my initial observation is that I have absolutely no idea of what constitutes a responsible media. My second observation is that what starts out as a laudable goal—to be truthful—is quickly consumed by a severe qualification—in a context which gives them meaning. The third observation is that this is emblematic of the very arrogance that Section II documented so well. Note that these requirements find the media presenting and clarifying the goals of society. As such, it appears that society is incapable of verbalizing these, or other, goals for itself.

The reasoning in this sample list of values is nearly maddening and can possibly explain many of the gross departures from virtue outlined in Section I. The truth does not need a context to give it meaning; the truth has meaning in and of itself. Who are the constituent groups? What is a representative picture? And what on earth do all of these standards have to do with ethics? In short, the texts, the codes, and the commissions have all made virtue in journalism and the media far too complex. As we revisit Section I and the misdeeds outlined therein, we are not faced with nuanced ethical issues. Once again, we look at the

\(^{233}\) The Hutchins Commission is often cited as the beginning of communitarian journalism. Robert M. Hutchins had been the chancellor at the University of Chicago before he became chair of the Commission of Freedom of the Press (in existence during the 1940s). At the behest of Henry Luce, the Commission studied the role of the press after World War II. His imprimatur on journalism was introducing journalists to the social conscience. See supra Section II and the discussion of cultural factor 7 on social responsibility and accompanying note.

\(^{234}\) John C. Merrill, Journalism Ethics 17 (1997).
conduct of these reporters and news organizations and shake our heads wondering: "Where were your minds? What were you thinking?" Any real thinking that may have taken place was buried beneath the complexities of what is taught in the name of media ethics. In the complexity of trying to develop its own set of ethics, the media has only confused its role and apparently, according to the sampling presented in Section I, abandoned all hope of a clear definition of truth.

Media ethics need not be this complex if we return to two straightforward standards of virtue ethics, the first of which is honesty. If reliance on honesty is to work as a standard for media ethics, two prerequisites are necessary: (1) we must agree that there is truth; and (2) we must begin training journalists to be virtuous, i.e., encourage them to develop morally as part of their training so that a moral compass guides them in their career.

1. Agreeing That Truth Exists

In too many of the texts on media ethics, as noted earlier, the standard for truth includes the caveat of "Whose truth?" Further, journalists are not unique in taking on the mantle of "But everyone's truth is different!" It occurs in the accounting arena as well. I can introduce one set of financial records to each of the four major accounting firms and receive in return four differing sets of financial statements. These distinct answers will include the representations by an auditor from each firm assuring me that her final product contains the truth about the financial condition of the company and its outlook for future performance. All professions and disciplines struggle with the accurate representation of facts. Nevertheless, we must remember that the truth does exist—it just may not always be discernible in time for our deadline. In order to make the case for insisting on these two standards of virtue ethics, I rely on a teaching exercise one of my colleagues demonstrated several years ago at the annual meeting of the Society for Business Ethics.235

My colleague tells his students that he knows he has dirty socks in his laundry basket at home, that he has clean socks in his dresser drawers, and that he may even have some socks here and there about his home, including possibly under the bed. He

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235. I would give attribution to my colleague, but it was a panel discussion, and, while he made an indelible impression with his pedagogy, his name did not. Nor did his name stick with any of my colleagues, some of whom could not even remember the anecdote, let alone who shared it. The critical issue, given all the events and conduct in Section I, is that you know this is not my original idea.
knows that the socks in sight would be countable were he there, but he cannot be and so his students are asked if there is an answer to the question, "How many socks do I have at home?" There is an answer to that question—a true answer—that is the absolute truth. However, we may not be able to determine it while sitting in the classroom discussing it. We could explore issues such as his recollection of how many socks he has, how many he saw in the laundry basket or put there this morning, and whether he had any receipts for sock purchases that we might examine. If we could go to his house, we could come closer to the truth because we could count what is in the drawer, and the laundry basket, and even conduct a search (with or without sock warrant, but certainly with permission) to find any of the errant socks. There is always the possibility of a sock left in the car, in a suitcase, or in a place we do not search, but we come closer and closer to the truth of the number of socks with each additional piece of information that we gather. Ultimately, we may only be satisfied with the conclusion that we are close to the truth, and we report it as such, with the caveats that may still hold following our search and investigation.

There is only one truth about the socks. To the extent that different reporters reach different numbers is not a matter of their takes on the socks. The differences could be a matter of productiveness (the extent and quality of the search), experience (where one looks for socks), and time (the deadline for reporting on the number of socks in a professor's home). We know that these explanations exist for differences in reports, but we cannot conclude that truth varies.

This simple example can be applied to the *New York Times* October 25, 2004, story about the missing weapons in Iraq, which was then used by presidential candidate John Kerry as a means of depicting Mr. Bush's competency in a bad light. There is indeed an absolute truth about several items in the story: (1) whether there was a "huge cache of explosives"; (2) when the explosives were housed at the Al Qaqaa site; (3) when and if the explosives were removed from the Al Qaqaa site; (4) who was in control when and if the explosives were removed from the Al Qaqaa site; and (5) if the explosives were removed, whether they still exist, where they are, and who has control. Counting explosives is, obviously, more difficult than counting socks. Determining the truth will require a good deal of time and effort. Uncovering the truth, however, is worth the effort. If one pro-

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236. See supra note 219 and accompanying text for a discussion of the article and its appearance.
ceeds with this story without that effort, she violates the first virtue of honesty and neglects the second value of productiveness. Regardless of how one feels ideologically about the war in Iraq, Mr. Bush, or the competency of the military, the truth deserves at least an earnest effort of counting and exploration—an effort that is akin to what can be done with the socks.

The New York Times front-page story was published without the effort required to report honestly. The story was based on a year-old memo from Dr. Mohammad Abbas—the head of the International Atomic Energy Agency and self-proclaimed opponent of Mr. Bush and the war effort. If ideology cannot be curbed, then the simple application of this standard for pursuit of truth is a simple resolution. When the story ran on October 25, 2004, none of the basic sock-inspired questions were answered. The story's sensationalism was clear—someone lost tons of explosives. In the absence of knowledge about the timing, though, the story was fundamentally misleading and did not approach absolute truth. Further, the story was premature because it did not allow for the productiveness of investigation. Indeed, running the story on a Monday meant that administration officials were not given the benefit of access to staff and records for purposes of investigating the issue themselves. Running the story without posing questions to military personnel who had been to the site disregarded the very preliminary process of determining truth. As other news outlets noted, this "big scoop" raised more questions than it answered. The Washington Post explored the issue a little more deeply—focusing on the basic question of finding out how many socks there were. The Post determined that the Times' take was tainted by its lack of understanding regarding the total number of explosives that would have been at the Al Qaqaa site. Its report differs markedly:

The 377 tons of Iraqi explosives whose reported disappearance has dominated the past few days of presidential campaigning represent only a tiny fraction of the vast
quantities of other munitions unaccounted for since the fall of Saddam Hussein's government 18 months ago.

U.S. military commanders estimated last fall that Iraqi military sites contained 650,000 to 1 million tons of explosives, artillery shells, aviation bombs and other ammunition.

The Bush administration cited official figures this week showing about 400,000 tons destroyed or in the process of being eliminated. That leaves the whereabouts of more than 250,000 tons unknown.

Against that background, this week's assertions by Sen. John F. Kerry's campaign about the few hundred tons said to have vanished from Iraq's Qaqaa facility have struck some defense experts as exaggerated.

"There is something truly absurd about focusing on 377 tons of rather ordinary explosives, regardless of what actually happened at al Qaqaa," Anthony H. Cordesman, a senior analyst at the Center for Strategic and International Studies, wrote in an assessment yesterday. "The munitions at al Qaqaa were at most around 0.06 percent of the total."

Retired Army Gen. Wayne A. Downing, who served briefly as President Bush's adviser on counterterrorism and has criticized some aspects of the administration's performance, said yesterday he considered the missing-explosives issue "bogus."

Kerry has seized on the incident to press his charge that Bush mishandled the invasion of Iraq, failing, among other things, to secure sites containing dangerous Iraqi munitions, some of which were stored in bunkers marked with International Atomic Energy Agency seals to designate particular international concern.

Bush administration officials have refused to accept a statement issued earlier this month by a senior official of Iraq's interim government that the munitions disappeared after the April 9, 2003, fall of Baghdad "due to a lack of security." Iraqi authorities have not offered any supporting evidence, and Bush administration officials have suggested the explosives may have been removed earlier by Iraqi forces.239

No one, then or now, is fully certain of the absolute truth on the explosives, but the basic exploration of the issue in the Wash-


The same type of analysis could have been applied to the Dan Rather story or any of the phony stories highlighted in Section I. Finding absolute truth is not easy, but far too many stories have gone to press and broadcast without the trip to the house to make an earnest effort to count the socks, or at least adding the caveat that the number of socks is based only on theory and circumstantial evidence. There is a problem with time constraints often only in the context of achieving the scoop. However, none of the reports issued thus far focuses on time pressure as contributing to inaccuracy, nor are any of the recommendations made for reforms in those organizations such as CBS and the Times designed to eliminate or curb time pressure. The reforms focus on perceived truth controlling over actual truth. Jack Kelley’s story about heads rolling down the street following an explosion was allowed to run as a perceived truth. Finding actual truth would have required fact checking with officials or others who were on sight at the time the bombing occurred to ask the simple question, “Were heads severed from the bodies of the victims?” If that simple pursuit of truth had occurred, at least one portion of a Kelley story could have been corrected. Officials later confirmed during the investigation of the more than seven hundred Kelley stories that no heads were severed, a simple and absolute truth lost in the misperception of truth.

C. The Pursuit of Truth—That Testy Virtue of Productiveness

This pursuit of truth takes time, energy, and often routine and dull work. But, counting socks is the heart of absolute truth. Newsweek recently dismissed questions about its cover story, Martha’s Last Laugh, in which it had superimposed Martha Stewart’s head on a models body to reflect Ms. Stewart’s rumored prison weight loss. Ms. Stewart was emerging from prison as the magazine was in production so a true photo of the newly svelte

240. The line Mr. Kelley used in describing the bombing in a Jerusalem restaurant was, “Three men, who had been eating pizza inside, were catapulted out of the chairs they had been sitting on. When they hit the ground their heads separated from their bodies and rolled down the street.” Jacques Steinberg, USA Today Finds Top Writer Lied, N.Y. Times, Mar. 20, 2004, at A1. Interestingly, the subsequent investigation revealed that one editor had removed a line from the severed heads portion; that is, the notation, “with their eyes still blinking,” was deleted from the final version of the story. Jacques Steinberg, Journalists Say Paper Failed To Stop Deceit of Reporter, N.Y. Times, Mar. 29, 2004, at C1.

241. The reporters who did the follow-up investigation could find no mention or photographs of severed heads in the extensive police records. Id.
Stewart was not possible, at least so went the justification and rationalization for the doctored photo. Nonetheless, the photo is not truth and if it is to run, the readers deserve to know. Such a line of absolute truth should become a maxim as schools of journalism and media ethics courses attempt to teach ethics to those who will be part of the media. The credibility of the media depends on its forthrightness in pursuing absolute truth. Of course, the pursuit of absolute truth is not always glamorous, and its delegation to others deprives those who report of flavor, context, and often accuracy. Mr. Bragg's sin was far greater than not giving credit to an intern. Mr. Bragg's biggest sin was his representation that he had been there to capture the full flavor of the courtroom and the nature of the trial when he had not. Mr. Barnicle's sin was one of not verifying sources, or at least mentioning that the lines were not his originally, presuming we are to hold him at his word that he was not borrowing from Carlin. Blair, Cooke, Smith, Glass, and Kelley all found it infinitely easier to sit at the keyboard and fabricate rather than pursue that colorful and unique story. In the case of Mr. Rather and Ms. Mapes, the story may have been halted if the time had been taken for: (1) the simple pursuit of background checks on sources; (2) follow-up with document experts; and (3) the exploration of inconsistency in dates of the memos and times of service. These steps would have at least yielded sufficient questions that may have lead to even better stories such as: (1) Who forged the documents? (2) Why forge the documents? (3) Who had access to the documents? and (4) Why are the documents surfacing now?

It should be noted, of course, that these stories are still there for a productive reporter, and they remain unexplored. This, perhaps, is yet another indication of the pervasiveness of ideological bias. The virtue of productiveness in journalism is similar to the virtue of skepticism in business—if it sounds too good to be true, it is too good to be true. The story is in finding why it is too good to be true. The example of Bethany McLean and her pursuit of Enron demonstrates the virtue of productiveness. She had completed the laborious task of investigating Enron and finding sources willing to talk about a story for Fortune. The story described Enron perfectly and was foreboding in terms of what could happen with the company. Her editor referred to her

243. See supra notes 93–101 and accompanying text (discussing the Bragg situation).
244. See supra notes 51–62 and accompanying text (discussing the Barnicle issues).
story as a "prescient" one that sunk. It only sunk, however, until she was proven correct. When Enron collapsed, she was the smartest reporter in the room. She became the foremost journalistic authority on Enron and has written what has been described as the definitive book on the company's collapse.245

D. Creating a Culture of Virtue

Like the businesses of the 2001–2003 era, too many media outlets during the past fifteen years have suffered from defective cultures—cultures that portend ethical collapse. Section I memorializes what can happen in those cultures with the seven factors that breed, condone, or ignore ethical missteps. To end on a positive note, one more question must be answered: How does an organization incorporate virtue ethics into its culture? No code or training can offer a facile solution that transforms a culture into one that pursues truth with productive zeal. Over time, however, the presence of certain cultural signals serves to inculcate the cultural virtues themselves. Based on the stories of media failures offered earlier and the presence of the seven negative cultural factors, there are seven recommendations for creating a culture of virtue in a media organization. Indeed, these same factors would work when adapted and applied to any business or organization.

First, no one is above a fact check. Icon, superstar, Pulitzer winner, and scoop commandeer all follow the same editorial process. Second, disagreement is important, dissent is critical, and both are welcome. Third, create some means of anonymous hotline for consumers, as well as for internal feedback, or use the same one. No matter how open editors and managers believe themselves to be, human nature is what it is, and the ability to report anonymously is often the only means employees will choose. Fourth, create a system for investigation and follow-up on the anonymous reporting line. Make sure that those with the authority to make changes are aware of the types of complaints coming in over the hotline. Annual reports on hotline disclosures help employees to see the openness, honesty, and willingness of managers to follow through when complaints arise. Fifth, maintain rules on conflicts of interest. A spat of disclosures in 2005 demonstrated how little is understood and even less held in high regard on the notion of conflicts of interest. Armstrong Williams, a pundit and television talk show host disclosed that he

was paid $240,000 by the Department of Education to promote
the "No Child Left Behind Program" of the Bush administra-
tion.246 His columns, television appearances, and personal
speeches all supported the program, but none disclosed his com-
pensation for the promotion of the program. Mr. Williams
was not alone. Only weeks later, Maggie Gallagher confessed
that she had received $21,000 for supporting the Bush administra-
tion's policies on strengthening marriage. She wrote of her
lapse, "Did I violate journalistic ethics by not disclosing it? I
don't know. You tell me." She added that it never occurred to
her to tell anyone.247

Apart from the monetary conflicts are the personal ideologi-
cal conflicts. The CBS debacle illustrates more than any other
the need to train journalists to not allow ideological conflicts to
create physical conflicts through direct contact with those who
are the subject of news stories. Just because a producer or
reporter wants Kerry elected president does not justify direct
contact with the campaign over upcoming stories. Sixth, aim for
diversity in staffing. Diversity here does not refer to race, gender,
or national origin, but rather, diversity in terms of political ideol-
ogy. Truth cannot be pursued when blinders prevent reporters
from raising questions or seeing issues. And seventh, count the
socks—do your work, no matter how mundane, and everyone
does the mundane because it is what gives the stories their depth,
insight, and inspiration.

This is a difficult business, this field of ethics. Adding media
to the complexities makes the climb more interesting and possi-
ably more difficult, if for no other reason than there is so much at
stake. Virtue in the media is not impossible. Where were our
minds? What were we thinking? We were thinking about ratings,
scoops, stars, ideology, and a host of other things that comprise a
culture of ethical collapse that interfered with the exercise of vir-
tue. Despite the last few dismal years for the media and ethics,
we may be at a crossroads where we are able to abandon the com-
plexities of philosophy, codes, and a refusal of absolute truths in
order to simply pursue the virtues of honesty and productiveness
with the rest being just details.

246. David R. Kirkpatrick, TV Host Says U.S. Paid Him To Back Policy, N.Y.
TIMES, Jan. 8, 2005, at A1, A10. Greg Toppo, White House Paid Journalist To Pro-
mote Law, USA TODAY, Jan. 7, 2005, at 1A.

WASH. POST, Jan. 26, 2005, at C01. Ms. Gallagher defended her actions in an
interview with CNN's Carol Costello. Columnist Denies Being Paid To Push Bush
27/gallagher/ (on file with the Notre Dame Journal of Law, Ethics & Public
Policy).