Legal Ethics, Volume 15, Part 1

Legal Ethics and the Media: Are the Ethics of Lawyers and Journalists Irretrievably at Odds?

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Descriptions of the relationship between lawyers and journalists range from 'uneasy'[1] and 'sometimes prickly'[2] to 'strained and often combatant'.[3] This paper explores the ethical frameworks within which lawyers and journalists work and analyses the differences between the two, especially in the context of court reporting. It begins with a consideration of whether or not journalists are members of a profession, recognising that one marker of a profession is the existence of an ethical code. The codes of ethics of both lawyers and journalists are compared and contrasted. The ethical frameworks are also superimposed over two fundamental but competing principles of justice in a Western democracy: the principle of open justice and the right to a fair trial. The struggle to reconcile these two principles creates tensions between lawyers and journalists. Finally, the paper examines the ethical principles that guide lawyers' interactions with journalists. The author concludes that the fundamental difference between lawyers and journalists lies in the journalist's lack of a client. In lacking a fiduciary duty to a client, the lens through which a journalist views court reporting is never going to match in focus with the view of the lawyer, whose duties to both an individual client and the court itself will inevitably clash with a journalist whose aim is to disseminate information, as quickly as possible, to a faceless public.

1. INTRODUCTION

Media interest in trials is often likened to a circus. David Sellars suggests that the role of ringmaster of such a circus belongs to the judge, who must 'assure that the "show" is fair,

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1 Hon Daryl Williams, Attorney General for the Commonwealth of Australia, 'The Courts and the Media: What Reforms are Needed and Why?' in *The Courts and the Media* (Halstead Press, University of Technology, Sydney, Rushcutters Bay, New South Wales, 1999) 13, 14.

2 ABC Radio National, Australian Broadcasting Commission, 'How Courts Interact with the Media', *The Law Report*, 10 November 1998, www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr981110.htm (accessed 12 December 2011).

3 Roderick Campbell, 'Access to the Courts and its Implications' in *The Courts and the Media* (n 1) 127.

orderly, and expeditious, and to delicately, yet firmly, walk the tightrope that balances the … right of access and the … right to a fair trial'.[4] This paper argues that the contest between lawyers and journalists is rooted in the struggle for dominance between these two rights.[5] This struggle is at the heart of the view that '[o]ne of the shibboleths of journalism is that journalists and lawyers are natural enemies'.[6] This paper analyses the reasons why such enmity exists, and suggests that the ethical framework within which journalists work is at odds with the ethics of lawyers.

Comparative analysis of justice and the media is not new.[7] The examination of the interconnecting roles of journalists and lawyers appears to be a global phenomenon.[8]

There are many similarities between lawyers and journalists. Both claim to be interested in the pursuit of justice. Both do their work through the use and manipulation of language. Both originally trained their members 'on the job' but now rely primarily on universities to educate new recruits. Both claim to adhere to a code of ethical conduct. One journalist put it thus: 'we all tend to be inquisitive, questioning, analytical, objective, not prone to jumping to conclusions, and occasionally passionate. In theory, we have a lot in common'.[9] Roderick Campbell, legal reporter with the *Canberra Times*, stated in 1999 that '[i]t is hard to think of two more opinionated and holier-than-thou professions than the law and journalism. Both camps engage in considerable nonsense about their respective Holy Grails, invoking "the public interest" or "the interests of justice" as they charge into the fray.'[10]

The paper begins with the question of whether or not journalists are members of a profession. This necessitates an analysis of the meaning of professionalism and the historical background of the moniker 'professional'. This includes a comparative analysis of the professional traits of lawyers and journalists. The paper then moves beyond the traits theory to examine the principle of open justice compared with the principle of the right to a fair trial. The paper argues that because journalists prize the principle of open justice above all else, this creates tension. Finally, the paper summarises the legal ethical position of lawyers speaking to journalists, providing the Australian *Haneef* case as an example. The paper concludes with the proposition that the ethics of lawyers and journalists clash on a number of levels.

4 David A Sellars, 'The Circus Comes to Town: The Media and High Profile Trials' (2008) 71 *Law & Contemporary Problems* 181, 199.

5 Of note is the existence in the USA of the Donald W Reynolds National Centre for Courts and the Media in the National Judicial College, which offers training to judges and court staff who are involved in high profile trials, with the purpose of fostering discussion about the inherent tensions between the right to a fair trial and the rights of the free press. See Sellars (n 4) 184.

6 Stuart Littlemore, *The Media and Me* (ABC Books for the Australian Broadcasting Corporation, 1996) 145. Stuart Littlemore QC is an Australian barrister who was once a high profile journalist and is in the rare position of having an insight into both camps.

7 See Giorgio Resta, 'Trying Cases in the Media: A Comparative Overview' (2008) 71 *Law & Contemporary Problems* 31, 34. See also RD Nicholson, 'The Courts, the Media and the Community' [1995] *Journal of Judicial Administration* 5.

8 See Resta (n 7) 32.

9 Campbell (n 3) 128.

10 *Ibid*, 127.

This paper contributes to that discussion by examining aspects of the ethics of both lawyers and journalists (focusing on the Australian position but also providing US examples), and draws some conclusions about the inevitability of irreconcilable differences between the two.

2. PROFESSIONALISM

2.1 Historical Background

The power of the media is recognised as an indomitable force in modern society. The anecdote of Edmund Burke, political theorist and member of the British House of Commons, looking up at the press gallery and declaring its members to be 'the Fourth Estate' and more important than all of the other three estates of Parliament,[11] has passed into Western folklore. Burke's remarks are an indication of how important and influential journalists had become by the eighteenth century. A century later, in 1855, William Rathbone Greg declared that '[j]ournalism is now truly an estate of the realm; more powerful than any of the other estates; more powerful than all of them combined if it could ever be brought to act as a united and concentrated whole … Not only does it supply the nation with nearly all the information on public topics which it possesses, but … it does all the thinking of the nation; saves us the trouble of weighing and perpending, of comparing and deliberating; and presents us with ready-made opinions clearly and forcibly expressed.'[12]

There is no doubting the power and importance of journalists in a democratic society, but are they members of a profession? This question has created protracted debate[13] but it remains critical in the context of ethics, because '[m]ost models of professional ethics are derived from [the service of] individual clients, and any public benefit is accrued as a by-product of this primary one-to-one relationship'.[14]

The three original professions were traditionally recognised as divinity, law and medicine.[15] By 1933 sociologists had decided that there were in fact five professions: divinity, law, medicine, education and armed service. In the 1950s and 60s, the traits theory of profes-

11 Which were, at that time, the clergy (the Lords Spiritual), the nobility (the Lords Temporal) and the Commons.

12 William Rathbone Greg, 'The Newspaper Press' *Edinburgh Review*, October 1855, cited in Kevin Williams, *Read All About It: A History of the British Newspaper* (Routledge, 2010) 99. Williams notes that 'this article is also attributed to Henry Reeve, the editor of the *Edinburgh Review* in which it was written'. Reproduced and quoted in A King and J Plunkett, *Victorian Print Media: A Reader* (Oxford University Press, 2005) 44–47.

13 See eg Clifford Christians, John P Ferré and P Mark Fackler, *Good News: Social Ethics and the Press* (Oxford University Press, 1993) 35, 79, 135 and 138.

14 Ian Richards, *Quagmires and Quandaries: Exploring Journalism Ethics* (University of New South Wales Press, 2005) 3.

15 See Ysiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis Butterworths, 5th edn 2010) 57. Notably, the medical profession did not include surgeons. In medieval times they were ranked with shoemakers, masons and glaziers, lower than barbers who sometimes did their job—hence the blood red stripes on the traditional barber's pole.

sionalism gained currency.[16] The 'traits' theory focused on identifying traits or characteristics of those who belonged to a profession.[17] The attributes of a member of a profession were said to include 'formal education to acquire specialised knowledge and skills and the entrance requirements to join the profession; monopoly of knowledge and skills; autonomy over terms and conditions of practice (self-regulation); a professional association; the commitment to a service ideal; and the provision of a greater good for society and collegial authority vested in a code of ethics'.[18] Goode argued that under the traits model, 'professional knowledge and skills should be abstract and esoteric but also applicable to the solution of practical problems'.[19] Freidson provides a thorough analysis of the various theories about professionalism, suggesting that a body of knowledge applied through the exercise of discretion is an important notion to explore in this context.[20]

2.2 Comparative Analysis of Professional Traits: Lawyers and Journalists

It is still accepted that members of a profession require training and education in order to obtain specialised knowledge and skills. A lawyer must first obtain specialised academic qualifications followed by a period of specialised practical legal training. The ability to call oneself and hold oneself out as a lawyer is strictly regulated. Conversely, although a degree in journalism is generally required these days for employment by a newspaper or television station, there is no requirement for any qualifications, experience or training in order to call oneself a journalist. No systematic body of knowledge is required to practise journalism. Anyone can set up an online blog, write an article for a newspaper or present a television program. The distinguishing point of reference that identifies a journalist is very unclear. Loren Ghiglione comments that '[t]he discombobulating digital revolution may blur the boundaries between journalists and nonjournalists or make clear that no boundaries exist'.[21] For example, courts are starting to turn their minds to the question of including online commentary when drafting suppression orders.[22]

16 Sharyn Roach Anleu, *Law and Social Change* (Sage, 2nd edn 2010) 83.

17 AM Carr-Saunders and PA Wilson, *The Professions* (Oxford University Press, 1933); William J Goode, 'Community Within a Community: The Professions' (1957) 20 *American Sociological Review* 194; C Greenwood, 'Attributes of a Profession' (1957) 2 *Social Work* 45, all cited in Roach Anleu (n 16) 83. See also Ross (n 15) 58–59.

18 Roach Anleu (n 16) 83. See also Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West, 1953) 95: 'a group pursuing a learned art as a common calling in the spirit of public service', cited in Su-Po Kao, 'The Legal Profession as an Intermediary: A Framework for Lawyers in Society' (2004) 7 *Legal Ethics* 39, 51.

19 William J Goode, 'The Theoretical Limits of Professionalization' in A Etzioni (ed), *The Semi-Professions and their Organization: Teachers, Nurses, Social Workers* (Free Press, 1969) 277, cited in Roach Anleu (n 16) 83.

20 Eliot Freidson, 'The Theory of Professions: State of the Art' in *Professionalism Reborn: Theory, Prophecy and Policy* (Polity, 1994).

21 Loren Ghiglione, 'Back to the Future—Questions for the News Media from the Past' (2008) 71 *Law & Contemporary Problems* 1, 5.

22 See eg *United States v I Lewis Libby*, No 05-394 (RBW) (DDDC, 10 January 2007), cited in Gary A Hengstler, '*Sheppard v Maxwell* Revisited—Do the Traditional Rules Work for Non-Traditional Media?' (2008) 71 *Law & Contemporary Problems* 171, 174.

One marker of a profession is said to be the existence of a code of ethics, or the adherence to ethical standards. Codes of ethics are said to promote trust between a profession and the public. Trust is a topic that appears often in texts about journalism.[23] Journalists need to be seen as trustworthy because they need credibility with their audiences. In order to understand what is happening, people need to be reliably informed, and so turn to trusted media for advice.[24] Whereas lawyers must develop a relationship of trust with their clients given the existence of a fiduciary relationship, journalists have no clients and no fiduciary relationship. However, the level of trust that is given to both lawyers and journalists by the community is known to be low. In the Reader's Digest 2011 list of most trusted professions in Australia, lawyers ranked higher (33rd out of 45) than journalists (40th out of 45). Judges were ranked in 21st place.[25] The question of trustworthiness is extremely relevant in the context of professionalism.

Despite the First Amendment, it was in America that the first journalistic code of ethics was drawn up, by the Kansas Editorial Association in 1910.[26] In 1923, the American Society of Newspaper Editors adopted a series of canons of journalistic conduct.[27] In 1924, the first textbook on newspaper ethics was published by Nelson Crawford of Kansas State University, describing the press as an 'instrument of public accountability and public service'.[28] In Australia, the New South Wales Country Press Association issued a Code of Ethics for its member newspapers in 1927. The Code addressed matters such as fair play, respect for privacy, truthful reporting and the elimination of scandalous and salacious material.[29] In 1942, the New South Wales district of the Australian Journalists' Association (AJA) drew up a draft code of ethics which was initially adopted by individual states and later adopted by the AJA at national level. There are also a variety of codes of practice in many workplaces. However, even though most countries have them, without educational support, ethical codes may be of little value.[30] 'Anyone who's worked in a newsroom knows that the Code of Ethics is generally put up on the wall. There's a lack of a culture where it's actually talked about or discussed.'[31] Some news organisations require compliance with a specific company code of ethics.[32] Christians *et al* argue that '[h]ortatory codes insisting that journalists tell the truth,

23 See eg Richards (n 14) 81.

24 See M Schudson, *The Power of News* (Harvard University Press, 1995), cited in Richards (n 14) 105.

25 Reader's Digest Australia, *Australia's Most Trusted Professions 2011*, www.readersdigest.com.au/australias-most-trusted-professions–2011.

26 C Christians, 'Chronology' in E Cohen and D Elliott (eds), *Contemporary Ethical Issues: A Reference Handbook* (ABC-CLIO, California 1997), 15; cited in Richards (n 14) 7.

27 C Lloyd, *Profession: Journalist* (Hale and Iremonger, 1985) 227, cited in Richards (n 14) 7. See also Ghiglione (n 21) 6.

28 Christians (n 26) 16.

29 Lloyd (n 27), cited in Richards (n 14) 14.

30 Richards (n 14) 55.

31 K Elgar, ABC Radio National, *The Media Report*, 13 March 1997, cited in Richards (n 14) 4.

32 See eg *The Guardian's Editorial Code*, http://image.guardian.co.uk/sys-files/Guardian/documents/2003/02/20/EditorialCode2.pdf; *The New York Times Code of Ethics*, http://judicial-discipline-reform.org/6TextAuthorities%20Cited%20toeC71/J%20Prof%20respon%20lawyrs%20journlis/18NYTimes%20on%20Integrity%20sep4.pdf; *The Sydney Morning Herald Code of Ethics*, www.smh.com.au/ethicscode.

promote justice, act honourably, and keep faith with readers are vacuous rhetoric'.[33] They argue that the publication of practical ethical guidelines can decrease unethical behaviour but only because behaving appropriately is dependent on following prescriptions. This argument can be equally applied to those lawyers whose ability to resolve ethical dilemmas arises not from ethical reasoning but purely from adherence to rules.[34]

Traits theorists maintain that members of a profession also have a relationship with each other, usually described as 'collegial'.[35] 'Members look to each other for professional recognition, control and protection.'[36] In addition, they internally regulate each other's conduct. Actual membership of a profession is achieved in part by adherence to a code of conduct which regulates conduct between members, between members and non-members, and between members and clients. In the context of the legal profession, it also regulates members' dealings with the courts and judicial officers. To be cast out of a profession because of a transgression of the rules is a serious sanction. If a lawyer is found guilty of professional misconduct, and is subsequently struck from the roll of practitioners, this effectively removes the lawyer's means of earning a living. In contrast, for journalists membership of a journalists' association is optional. For example, many Australian journalists belong to the AJA, a division of a trade union called the Media Entertainment and Arts Alliance (MEAA). Members are required to follow a code of ethics. The potential penalty for a journalist who breaches the Code is a censure or rebuke, or possibly a fine (of up to $1,000 for each offence). The worst that can happen is that the journalist is expelled from membership of the MEAA and that fact will be made public. In some instances, the employment of the offending journalist may be terminated. But there is no roll of journalists (in any country) from which a recalcitrant journalist can be struck. There are no disciplinary tribunals for journalists. There is nothing to prevent a sacked journalist from being employed by another media organisation, or working freelance. Indeed, the journalist might even be rewarded, especially if the unethical publication of a story generates a massive increase in sales or ratings.

2.3 The Role of the Client

Professional authority has been said to be 'based on and limited to superior technical competence'[37] and therefore (and importantly) the client of the professional is unable to evaluate the advice or service provided. The client therefore is obliged to trust the professional to perform the required tasks appropriately and competently.[38] More recent theories of client-centred practice have denounced the traditional paternalistic model, advocating that the provision of advice should occur as a partnership between the lawyer and the client, and

33 Christians, Ferré and Fackler (n 13) 138.

34 See Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007).

35 See Malcolm Waters, 'Collegiality, Bureaucratization, and Professionalization: A Weberian Analysis' (1989) 94 *American Journal of Sociology,* 945, 956, cited in Roach Anleu (n 16) 84.

36 Roach Anleu (n 16) 84.

37 Talcott Parsons, *Essays in Sociological Theory* (Free Press, 1954) 38, cited in Roach Anleu (n 16) 84.

38 Goode (n 19).

the client should have an equal role in decision making.[39] Irrespective of the chosen model of individual lawyers, of importance is the special relationship that exists between the lawyer (as a professional) and the client. The relationship with clients is fundamental to the notion of a profession. It presents a critical difficulty vis-à-vis the journalist's argument for recognition of professional status.

It is said that '[d]octors bury their mistakes, lawyers jail their mistakes, but journalists publish their mistakes for all the world to see'.[40] This is a reflection not of the severity of the mistakes, but rather a reminder of the fact that for a journalist, there is no doctor/patient or lawyer/client relationship. Any 'greater good' is performed on behalf of 'the public', an 'ill defined audience'.[41] The 'client' of the journalist is 'someone who shows up in a letter to the editor, who may even call once or twice, but is not the vivid, continuous, understandable presence that the client is to the other professions'.[42] Journalists have no particular person to whom they owe any duty when reporting a story. When reporting from the court, the journalist's function is to gather information, process it, and present a story that is pleasing to the editor before the deadline. This is in stark contrast to the role of the lawyer, who must act in the best interests of the client and facilitate the administration of justice.

The English word 'profession' comes from the Latin *professionum*, which means making a public declaration. It came to mean making a public vow or oath upon entering a learned occupation.[43] Before being admitted to the legal profession, a lawyer must swear (or affirm) an oath to the Court 'that [I] will diligently and honestly perform the duties of a practitioner of this Court and will faithfully serve and uphold the administration of justice'.[44] The public promise to fulfil those duties—to act in the best interests of the client, to facilitate the interests of justice, to avoid conflicts of interest, to perform duties without fear or favour to any person or group, is what binds the lawyer to the client, and it is at the heart of the fundamental difference between lawyers and journalists. It is the very source of the conflict between the court and the cover story, because journalists and media proprietors make no such oath to anyone.[45]

Journalists' commentary is sceptical of this view. One journalist states that '[d]espite the lofty rhetoric, it's plain as a pikestaff that most lawyers understand that their first duty is to the person or corporation paying their fees'.[46] However, deep as the pockets of the client may

39 See eg Gerard Egan, 'Sharing Empathic Highlights: Communicating and Checking Understanding' in *The Skilled Helper: A Problem Management and Opportunity Development Approach to Helping* (Cole, 2002); Stephen Ellmann, 'Lawyers and Clients' [1986–7] *UCLA Law Review* 717; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues* (1975–6) 5 *Human Rights* 1; David Binder and Susan Price, *Client Centred Counselling* (West, 1989); David Binder and Susan Price, *Legal Interviewing and Counselling: A Client-Centred Approach* (West, 1977).

40 Richards (n 14) 4.

41 *Ibid*, 3.

42 James Carey, 'Journalists Just Leave: The Ethics of an Anomalous Profession' reprinted in R Braid, W Lodges and S Rosenbaum (eds), *The Media and Morality* (Prometheus, 1999) 46, cited in Richards (n 14) 138.

43 See Ross (n 15) 57.

44 Oath of admission, Supreme Court of South Australia.

45 On judges' oaths see Hon Daryl Williams (n 1) 16.

46 Campbell (n 3) 129.

be, the lawyer betrays the oath of admission at her peril. Despite the crudity of economics, it is also plain as a pikestaff that a lawyer who fails in her duty to the court can be removed from her position as an officer of the court.

3. THE PRINCIPLE OF OPEN JUSTICE v THE RIGHT TO A FAIR TRIAL

3.1 The Principle of Open Justice

The principle of open justice is said to be 'a fundamental tenet of the common law'.[47] 'The inveterate rule is that justice shall be administered in open Court.'[48] One of the most commonly quoted legal aphorisms is from the judgment of Lord Hewart in *R v Sussex Justices, ex parte McCarthy*: 'It is not merely of some importance but it is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[49] The principle of open justice enables the workings of the judiciary to be transparent.[50] 'This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected … The fact that courts of law are held openly and not in secret is an essential part of their character.'[51] In the words of a former Chief Justice of the United States, '[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing'.[52]

Members of the public are entitled to know what happens in the courts in order to 'maintain confidence in the integrity of the administration of justice'.[53] Most members of the public have neither the time nor the inclination to observe court proceedings, so the public relies on the media to report on them. Another important similarity between journalists and lawyers (particularly trial lawyers) is that both rely on the ancient human art of story-telling as the basis of their work. A journalist's job is to publish a story. A lawyer's job is also to tell a story, to a judge or a jury (or both). For both types of story-telling, what is required is thorough investigation, an abiding sense of scepticism and an overarching understanding that the 'whole truth' is not always the story that will be considered as the 'best story'.

47 *Scott v Scott* [1913] AC 417; endorsed by the Australian High Court in *Dickason v Dickason* (1913) 17 CLR 50, 51 (Barton ACJ).

48 *Scott v Scott*, *ibid*, *per* Earl Loreburn at 445.

49 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259.

50 For an historical review of the principle of open justice see *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50–52 *per* Kirby P, cited in David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 401; see also *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228, 233 *per* Bowen CJ.

51 *Russell v Russell* (1976) 134 CLR 495, 520 *per* Gibbs J.

52 *Richmond Newspapers Inc v Virginia*, 448 US 555 (1980), 571–2 *per* Burger, CJ, cited in Hon JJ Spigelman, 'Seen to be Done: The Principle of Open Justice—Part 1' (2000) 74 *Australian Law Journal* 290, 295.

53 See Rolph, Vitins and Bannister (n 50) 401.

It has been noted that in the USA 'the tension between a sensationalist, commercially motivated press and fair-trial rights … has reached a degree unmatched in the rest of the world'.[54] In the United States, the right to freedom of the press is enshrined in the country's constitution as the First Amendment: 'Congress shall make no law … abridging the freedom of speech, or of the press.'[55]

The Australian position is a little less clear. The Australian Constitution makes no reference to freedom of speech or freedom of the press, and Australia has no Bill of Rights. Formal protections from the state were not considered necessary in the drafting of the Australian Constitution.[56] In 1992 the majority of the Australian High Court decided that a freedom of political communication was implied into the Constitution due to the representative nature of Australian government.[57] In 1994, the High Court extended that notion of implied freedom of political communication to include the so-called 'constitutional defence' to a defamation action.[58] However, in 1997,[59] the High Court revised its view and held unanimously that the reasoning in *Theophanous* was no longer to be applied. The Court substituted an extended form of qualified privilege, noting that the Australian Constitution does not 'confer personal rights on individuals'[60] but that it 'operates as a restriction on legislative power'[61] because 'the freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.'[62] The High Court in *Lange* specifically contrasted the Australian position with the US position, stating that '[u]nlike the First Amendment … which has been interpreted to confer private rights, [the Australian] Constitution contains no express right of freedom of communication or expression'.[63]

However, Australia was a founding member of the United Nations and played a major role in the drafting and adoption of the United Nations Universal Declaration of Human Rights in 1948. Article 19 of the Declaration states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of fron-

54 Resta (n 7).

55 'The Constitution of the United States of America' (1788) am 1. The First Amendment was adopted on 15 December 1791.

56 See Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Lawbook Co, 2nd edn 2004) ch1 by Lawrence McNamara, 13–14.

57 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106. See also Butler and Rodrick (n 56) 14.

58 *Theophanous v Herald and Weekly Times* (1994) 124 ALR 1; *Stephens v West Australian Newspapers* (1994) 182 CLR 211, 233–4, cited in Butler and Rodrick, *ibid*, 14.

59 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

60 *Ibid*, 560.

61 *Ibid*, 561.

62 *Ibid.*

63 *Lange* (n 59) 567.

tiers.'[64] Members of the Commonwealth Parliament reaffirmed the principles of the Declaration on 10 December 1998 and pledged to support them.[65]

The Australia Press Council (APC), which represents the interests of newspaper proprietors, has published its own charter 'with the aim of preserving the independence of the press from government regulation'.[66] In its charter, the APC has interpreted Article 19 to include 'the right of the free flow of information to enable news and opinion of public interest to be freely available to the citizens of Australia'. The APC Charter states that '[a] free press is a symbol of a free people. The people of Australia have a right to freedom of information and access to differing opinions and declare that the following principles are basic to an unfettered flow of news and views both within Australia and across the nation's borders.'[67]

3.2 The Right to a Fair Trial

The right to free speech clashes with the right to a fair trial (guaranteed by the Sixth Amendment to the US Constitution). The right to a fair trial is expressed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[68] The US Constitution does not express any preference for which right might veto the other[69] but Anglo-Australian courts have expressed a clear view that the right to a fair trial should take priority.[70]

A recent American example of the amendment rights clash was the so-called Duke lacrosse scandal.[71] The pre-trial media frenzy in that case culminated in the removal and disbarment of District Attorney Michael Nifong, who was also convicted of criminal contempt of court for withholding evidence[72] and also for making 'approximately 150 statements to the media that he knew or reasonably should have known … had a substantial likelihood of

64 Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III)) (UDHR), Art 19.

65 House of Representatives, 'Debates', 10 December 1998, p 1811, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1998-12-10%2F0002;query=Id%3A%22chamber%2Fhansardr%2F1998-12-10%2F0000%22; see also Parliament of Australia, 'Research Note no 42 2001–02, Free Speech and the Constitution', 4 June 2002, http://parlinfo.aph. gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=free%20speech%20constitution;rec=0;resCount=Default.

66 See Australian Press Council, *Charter of a Free Press*, May 2003, www.presscouncil.org.au/charter-of-press-freedom.

67 *Ibid*.

68 A Chen, 'Introductory Remarks' in A Byrnes (ed), *The Right to Fair Trial in International and Comparative Perspective* (Centre for Comparative and Public Law, Hong Kong, 1997), cited in Sunita Patel, 'Cheque-Book Journalism in the US and UK: Fair Trial v Free Press' (2007) 12 *Media and Arts Law Review* 211, 219.

69 See Gavin Phillipson, 'Trial by Media: The Betrayal of the First Amendment Purpose' (2008) 71 *Law & Contemporary Problems* 15, 16.

70 See *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 27 *per* Mason CJ.

71 See Ronald L Dufresne and Judith A Clair, 'Moving Beyond Media Feast and Frenzy; Imagining Possibilities for Hyper-Resilience Arising from Scandalous Organizational Crisis' (2008) 71 *Law & Contemporary Problems* 201, 204–6.

72 Dufresne and Clair, *ibid*, 205.

prejudicing the criminal adjudicative proceeding'.[73] The Duke lacrosse case provides an acute example of the undermining by the media of the presumption of innocence by excessive news coverage of law enforcement officials promoting claims of guilt.[74] Entman and Gross cite the Duke lacrosse case as an example of pre-trial journalism that 'tends generally to treat the presumption of innocence as a formality, largely limited to using the word *allege*, without actually covering the story in a balanced fashion that makes clear the possibility that district attorneys, police, and judges (and juries) can make mistakes or have bureaucratic, psychological or political motives'.[75]

The principle of open justice includes a general entitlement to publish a report of open court proceedings. An open court is one to which members of the public have a right of access.[76] Most courts are 'open', although some proceedings are held privately, or 'in camera'. In such cases, members of the public, including the media, are not permitted to attend, and publication of what occurs in such a hearing could constitute contempt of court.[77] From time to time, a court may order that no reports may be made. These orders, called 'suppression orders' in Australia and 'protective orders' in the US,[78] are most often (but not exclusively) made in the context of criminal proceedings, arguably because most crime only becomes visible to the public through the lens of the media, creating a 'disentangled reality'[79] which has the power to shape public attitudes.[80] Such orders are at odds with the principle of open justice, and so are made only when necessary for the administration of justice. Texts written by and for journalists paint suppression orders in a bleak light and generally portray their existence as an unnecessary and intrusive restriction on journalistic freedom to publicise 'key information'.[81]

One commentator has suggested that the judiciary and journalism are 'society's two most important watch-dogs'.[82] In combat, which has sharper teeth: suppression orders and contempt of court charges or the cover story that can eliminate the chance of a fair trial? Suppression orders are contrary to the principle of free speech, which is upheld tenaciously in the United States where placing restrictions on the press is considered to prevent them from doing their job as a public watchdog.[83] The United States Supreme Court has allowed the

73 *NC Bar Files Amended Ethics Complaint Against DA Who Prosecuted Duke Lacrosse Team Rape Allegations* (24 January 2007), http://news.findlaw.com/cnn/docs/duke/ncbnifong12407cmp.html, cited in Sellars (n 4) 183.

74 Robert Entman and Kimberley A Gross, 'Race to Judgment: Stereotyping Media and Criminal Defendants' (2008) 71 *Law & Contemporary Problems* 93, 95.

75 Michael Nifong's comments were strongly influenced by his upcoming election campaign. See Entman and Gross (n 74) 95.

76 *McPherson v McPherson* [1936] AC 177.

77 See *Re F* [1977] Fam 58, 87 *per* Lord Denning MR.

78 They are called 'gag orders' by the media; see Hengstler (n 22) 176.

79 See P Grabosky and P Wilson, *Journalism and Justice: How Crime is Reported* (Pluto, 1989) ix.

80 See S Chibnall, *Law-and-Order-News: An Analysis of Crime Reporting in the British Press* (Tavistock, 1977) 226.

81 See eg Mark Pearson, *The Journalist's Guide to Media Law* (Allan and Unwin, 3rd edn 2007) 69–70; Chris McLeod, 'Wrestling with Access, Journalists Covering Courts' (2005) 85 *Reform* 15.

82 Rhonda Breit, 'Journalism in the Global Village' in S Tapsall and C Varley (eds), *Journalism Theory and Practice* (Oxford University Press, 2001) 213.

83 See A Friendly and R Goldfarb, *Crime and Publicity* (Twentieth Century Fund, 1967) 177.

scales to tip generously in favour of free speech when balancing it with fair trial requirements,[84] although in the United States the right to a fair trial has been referred to as 'the most fundamental of all freedoms'.[85] US courts from time to time issue 'protective orders' preventing lawyers, witnesses, parties or others connected with a case to comment on it, especially to the media.[86] Journalists refute the rationale behind the making of such orders (the protection of the accused's right to a fair trial) and refer to such orders as 'gag orders'. In Australia, where free speech has no constitutional force, a suppression order forbids the publication of a part or parts of a court proceeding. The order may relate to a person's name or other personal information, in order to mask a person's identity, or it may cover the entirety of a case.[87] Legislation prohibiting, restricting or empowering a court to prohibit or restrict reports of judicial proceedings varies around the country in Australia,[88] but by way of example, the South Australian government amended section 69A of the Evidence Act (SA) (with effect from 1 April 2007) with the intention of aligning the South Australia suppression legislation with the rest of Australia. This amendment requires a court, when considering making a suppression order, to 'recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings' and to be satisfied 'that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify the making of the order'.[89] In other words, if there is a serious threat to a party receiving a fair trial if certain information is published, an order might be made. In South Australia, the rights of a media outlet to make submissions prior to a suppression order being made and also to challenge a suppression order once it has been made are enshrined in the legislation, giving voice to the notion that collectively, the media provide an important vehicle for the passage of information to the public.[90]

Before granting a suppression order, the Supreme Court of South Australia will hear submissions from any party to the proceedings and any party whom the court holds has a right to make a submission.[91] Herein lies the conflict between lawyers and journalists. The more lurid and horrible the nature of the allegations, the more prejudicial will be the publication of those allegations. Counsel for the accused would argue that the greater the likelihood of public revulsion towards a set of allegations, the greater the chance of public revulsion towards the defendant, and therefore the greater the chance of there being a likelihood of prejudice

84 See Resta (n 7) 36, especially fn 23.

85 *Estes v Texas*, 381 US 532 (1965), 540, cited in Phillipson (n 69) 16.

86 See Hengstler (n 22) 176.

87 Evidence Act 1929 (SA), s 69A.

88 See Sally Walker, *Media Law: Commentary and Materials* (LBC Information Services. 2000) 497; Andrew Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice (2006) 27 *Adelaide Law Review* 279, 289.

89 Prue Innes (Chair), *Report of the Review of Suppression Orders and The Media's Access to Court Documents and Information*, commissioned by Australia's Right to Know, 13 November 2008, 17.

90 See eg *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 470 *per* Mahoney JA.

91 Evidence Act 1929 (SA), s 69A(5).

to the proper administration of justice. Counsel for a media outlet would counter-argue the public's 'right to know'. Not to publish such allegations would not be fulfilling their obligation to strive for journalistic truth (see below).

4. JOURNALISM ETHICS

4.1 Historical Analysis

Some of the literature suggests that 'little attention has been devoted to the specific ethical quandaries of journalists'.[92] Indeed, the titles of some scholarly works in the area of journalism ethics suggest that this is a fraught area.[93] Concerns about ethics in journalism do not appear to have been articulated until the late nineteenth century.[94] It has been said that '[t]he development of journalism ethics was often an attack on the style of the bohemian reporter and the sensational styles and interests of the working class and the immigrant. In this sense ethics reflected status and class conflict between middle class owners and readers and working class reporters rather than a high-minded attempt to articulate a satisfying moral code.'[95]

It has been noted that '[a]fter Crawford's *Ethics of Journalism* was published in 1932, the term "ethics" and its cognates disappear[ed] from book titles for forty years'[96] and by the 1980s, 'two of the most widely used journalism textbooks [in Australia] had little to say about [journalism] ethics beyond brief references to confidentiality of sources and whether or not to report suicides'.[97] Indeed, it has been said that '[j]ournalism ethics has been largely ignored by those who have concerned themselves with professional ethics'[98] and that 'much of the practice of journalism can be described and analysed "in terms of a set of concepts which are essentially ethical, terms like freedom, objectivity, truth, honesty, privacy"'.[99] One commentator has noted that '[h]istorically, any movement within journalism towards focusing on ethical issues has been undermined by a consistent thread of anxiety about the possibility of external regulation'.[100] Obvious parallels can be drawn with the legal profession here. John Merrill, a leading American media ethicist, said in 1975, 'when we enter the area of journalism ethics, we pass into a swamp of philosophical speculation where eerie mists

92 Richards (n 14) 2.

93 eg Richards (n 14); A Belsey, 'Journalism and Ethics: Can they Co-exist?' in M Kieran (ed), *Media Ethics* (Routledge, 1998) 1–4; E Goodwin, *Groping for Ethics in Journalism* (Iowa State University Press, 1987).

94 For a summative history see Richards (n 14) 6–7.

95 Carey (n 42) cited in Richards (n 14) 6.

96 Christians, Ferré and Fackler (n 13) 35.

97 Richards (n 14) 15.

98 *Ibid*, 1.

99 A Belsey and R Chadwick (eds), *Ethical Issues in Journalism and the Media* (Routledge, 1992) xi, cited in Richards (n 14) 1–2.

100 Ian Richards, 'Adjusting the Focus: Levels of Influence and Ethical Decision-Making in Journalism' (2002) 24(2) *Australian Journalism Review* 9, 10.

of judgement hang low over a boggy terrain'.[101] Of course, legal ethics are by no means less murky. Practising lawyers and academics of varying disciplines have devoted years, even their whole lives, to wading through the legal ethics swamp.[102]

Journalism ethics revolve around service to society and the public good or 'the greater good', the latter being a utilitarian notion propounded by John Stuart Mill in 1859 in his oft-quoted *On Liberty.*[103] During the twentieth century, the rise of social responsibility theory led to a focus on journalistic responsibility rather than libertarianism; it became generally accepted that the press should be subject to moral and ethical restrictions. Social responsibility theory does not provide a base or a philosophical starting point for individual journalists who are either not actually responsible to anyone at all, or, worse, equally responsible to the public, their sources, their editors, their proprietors and perhaps also themselves. This leaves the door to conflicts of interest wide open and banging in the wind with no one to close it. A journalist who is employed by a large corporation (and most are[104]) knows that shareholders are a higher priority than either the readers (or viewers or listeners) or the sources and certainly higher than the subjects of the stories. The question of whether or not the principle of open justice might clash with the imperative of a fair trial is an example of what Tim Dare describes as the 'decision-making procedures that are the focus of the actual accommodations between competing conceptions of the good in our community'[105] that are 'enormously complex'.[106]

4.2 The Concept of 'News'

The idea of the public good resonates through the AJA's Code of Ethics, which also focuses on the public's so-called but illusory 'right to know'. For example, journalists struggle with betraying the requirement that they '[d]o not suppress relevant available facts'.[107] It is in the public interest, they say, to know about matters that journalists bring to their attention. 'Adherents of the various and diverse conceptions of the good that are represented in our communities cannot be expected to agree on any single conception of the good,' argues Tim Dare.[108] Dare clarifies this statement by also arguing that '[t]hey can agree, however, on the form of procedures that will give them, if not what they want, at least what they need'.[109] Yet

101 JC Merrill and R Barney, *Ethics and the Press: Readings in Mass Media Morality* (Hastings House, 1975) 8, cited in Richards (n 14) 2.

102 There is an expansive literature on legal ethics, of which it is assumed that readers of this article are well aware. See eg R Spencer, 'Doing Good by Stealth: Professional Ethics and Moral Choices in *The Verdict* and *Regarding Henry*' in R Mortensen, F Bartlett and K Tranter (eds), *Alternate Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge, 2010).

103 John Stuart Mill, *On Liberty* (Watts & Co, 1938).

104 See Richards (n 14) 67.

105 Tim Dare, 'Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24, 27.

106 *Ibid*.

107 Australian Journalists' Association Code of Ethics, www.australian-news.com.au/codethics.htm.

108 Dare (n 105) 27.

109 *Ibid.*

the arguments surrounding the open justice debate would appear to refute this. Anglo-Australian courts have been telling us for centuries that what we need is a balance between the right to a fair trial and the principle of open justice, but that the former is paramount.[110] (Contradictory constitutional amendments in the USA have created an ongoing debate in that jurisdiction.) Journalists have been arguing for the same amount of time that the public *needs* to know about matters of social and societal interest. Whether or not a matter is indeed of 'interest' and therefore 'newsworthy' is determined by newspaper editors and news directors. 'The ethical dimension of the journalistic process commences at the point of deciding what to report and then extends into decisions about how the information will be presented, and to whom'.[111] There are no specific ethical principles for journalists engaged in court reporting. Hurst and White have argued that whilst 'there is a profound difference between information that people as citizens need to know and people as citizens want to know',[112] any news organisation should be free to publish both types of information.[113]

It is acknowledged that 'it is not up to individual lawyers to decide what interests will receive legal protection, what legal rights will be allocated to whom',[114] yet it would appear that individual editors have no qualms about deciding what facts or allegations will be determined to be in the public interest. Journalism ethics do not intrude on the concept of editorial freedom. One criticism of journalists is that editorial populism has led to a dilution of accurate and reliable news and responsible, balanced commentary.[115] In 1996 it was alleged that 'public confidence in media standards had fallen to its lowest level in living memory'.[116]

News 'is the source on which society depends for reliable information on topics of current interest, and for the elucidation of great principles of public polity'.[117] A study conducted in 1998 found that three elements must be satisfied for information to be 'news': interest, timeliness and clarity.[118] However, the criteria that determine the information's level of newsworthiness appear to be determined by market forces. Research has revealed that over the last 20 to 30 years, international news on network television has declined from about 45 per cent to 13.5 per cent. On the other hand, crime stories have tripled.[119] Investigative journalist Carl Bernstein (who shared a Pulitzer Prize for coverage of the Watergate scandal for the *Wash-*

110 *Hinch* (n 70).

111 Richards (n 14) x.

112 J Hurst and S White, *Ethics in Journalism—Report of the Ethics Review Committee* (Media Entertainment and Arts Alliance, Melbourne University Press, 1997) 22.

113 *Ibid*.

114 Dare (n 105) 31.

115 See eg Littlemore (n 6) 47.

116 *Ibid*, 159.

117 *The Age* (Australia), 17 October 1854, 1, cited in Richards (n 14) 12.

118 M Masterton, 'A Theory of News' in M Breen (ed), *Journalism: Theory and Practice* (Maclay Press, 1998) 85–103, cited in Ian Richards, 'Swirling Currents, Uncharted Waters: Journalism Ethics in the 21st Century' (1999) 26(3) *Australian Journal of Communication* 127, 128.

119 R McChesney, *Rich Media, Poor Democracy* (University of Illinois Press, 1999) 54–55, cited in Richards (n 14) 84.

ington Post) declared in 1992, 'We do not serve our readers and viewers, we pander to them. And we condescend to them, giving them what we think they want and what we calculate will sell and boost ratings and readership'.[120] A brief glance at any local newspaper, online news service or television news broadcast provides ample evidence that stories from the courts, especially the criminal courts, are considered to be newsworthy.[121] The reporting of court proceedings is the bread and butter of news and current affairs. Open any newspaper, watch any nightly television news programme, and there will be at least one story from the courts. Crime news is good for business. However, how court cases are reported appears to be influenced by whether or not the case is considered to be in the public interest, how highly the story will rate, how much information the journalist can find and what footage or soundbites the journalist can obtain to make it a newsworthy story. Market-driven journalism does not sit comfortably with accurate reporting.[122] 'The emphasis tends to be on the bare facts of the crime, the sentence, and the reaction of the victim, with no attempt to report the judge's reasons.'[123] In addition, journalists' reliance on stereotypes and the racial nature of crime coverage have been noted to affect the 'accuracy' of court reporting.[124] One Australian State Chief Justice has publicly expressed the view that the media ought to provide sound information and not just 'news'.[125]

4.3 Truth in Journalism

The most strident aspect of journalism ethics is journalism's respect for truth. This extends Mill's view that there is a risk of silencing the truth in silencing an opinion and that even a 'wrong' opinion might contain an element of truth that could help to find the whole truth.[126] The rationale is that in expressing a multitude of views, even if some of those views are incorrect, the truth will emerge. Whilst Mill advocated the defence of human liberty in the marketplace of ideas, it is questionable whether he envisaged surrendering the content and meaning of the right of the individual to powerful commercial forces that represent today's media.[127] Milton advanced the idea that the free competition of ideas furthers the search for truth and that if there is no freedom of expression, truth cannot prevail.[128] Accordingly, the journalist will want to publish as much information as possible about an event or a person, in order that the whole truth will eventually emerge, and the public will be accurately informed. The lawyer, on the other hand, acting in the best interests of her client, will argue that the client has the right to silence, the right to a fair hearing (including the ben-

120 C Bernstein, 'The Idiot Culture' *The New Republic*, 8 June 1992, 22 at 25, cited in Richards (n 14) 84.
121 For further discussion on the high interest in crime news see Resta (n 7) 33 and Patel (n 68) 213.
122 See Hengstler (n 22) 175.
123 Hon Chief Justice John Doyle, 'The Courts and the Media: What Reforms are Needed and Why?' in *The Courts and the Media* (Halstead, 1999) 13, 29.
124 See Entman and Gross (n 74) 93.
125 Hon Chief Justice John Doyle (n 123).
126 Richards (n 14) 17.
127 See Phillipson (n 69) 29.
128 See discussion in Patel (n 68) 216.

efits of the rules of evidence), and the right to hear all allegations before commenting or pleading.

Truth telling is said to be fundamental to journalism. Journalism students are taught to be sceptical. They are instructed, 'if your mother says she loves you, check it out'.[129] The first sentence of the preamble to the Australian Journalists' Code says: *Respect for truth and the public's right to information are fundamental principles of journalism.*[130] Similar sentiments are expressed in the Journalists' Codes of other countries.[131] Journalists argue that '[i]t's a journalist's job to be a witness to history. We're not there to worry about ourselves. We're there to try and get as near as we can, in an imperfect world, to the truth, and get the truth out.'[132] Because 'truth' is such a nebulous concept, so-called 'journalistic truth' is acknowledged in journalism texts to derive from four specific criteria which, together, are said to comprise what journalists call 'rational acceptability'. The four criteria are: accuracy, completeness, fairness and objectivity.[133]

The emphasis on accuracy ensures credibility with audiences. Errors in reporting detract from credibility. However, accuracy alone cannot by itself ensure journalistic truth, because accuracy needs to be paired with 'completeness'. 'In practice, this means reporting the views or opinions or actions of all the parties involved in a situation or event.'[134] The question of journalistic 'completeness' will always be a source of conflict between the journalist and the lawyer. '[A] journalistic report is [said to be] complete when the journalist is unable to obtain further (newsworthy details) or when additional information would not significantly affect what readers or viewers will tend to decide after reading or viewing it.'[135]

Australian journalists are ethically required to '[r]eport and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts'. They are specifically required 'not [to] suppress relevant available facts, or give distorting emphasis' and they must '[d]o [their] utmost to give a fair opportunity for reply'.[136] This then creates the clash: The journalist is ethically obliged *not* to suppress relevant available facts. This is diametrically opposed to the laws of evidence and contempt. Prior criminality, for example, is inadmissible in a court, yet is it in the public interest for a journalist to report on it? Some commentators[137] have proposed a theory of communitarianism, arguing that journalists should emphasise the 'common

129 Ghiglione (n 21) 7.

130 'Australian Journalists' Association Code of Ethics, www.australian-news.com.au/codethics.htm.

131 Richards offers three examples: in the Netherlands, 'respect for the truth and accurate informing of the general public are the overriding principles of the press'; in Belarus 'a journalist is obliged to give a truthful description of reality through detailed and comprehensive information'; and in the USA, the Code of the Society of Professional Journalists states that the journalist's duty is to further public enlightenment, justice and democracy 'by seeking truth and providing a fair and comprehensive account of events and issues', all cited in Richards (n 14) 18.

132 R Fisk, 'Interview with Matthew Rothschild' (1998) 62(7) *The Progressive* 36, cited in Richards (n 14) 1. Fisk is an acclaimed Middle East correspondent for London's *Independent* newspaper.

133 Richards (n 14) 28.

134 *Ibid*.

135 *Ibid*, 29.

136 Australian Journalists' Association Code of Ethics, www.australian-news.com.au/codethics.htm.

137 Christians, Ferré and Fackler (n 13).

good' over individual rights and also that the universal guiding principle for journalism should be 'the sacredness of human dignity'.[138] The former is at odds with the lawyer's ethical standpoint; the latter is not.

In an attempt to be as accurate as possible, a journalist may consider it necessary to publish everything possible about an accused person, perhaps what could be described as 'the whole truth'. However, the law stands in the way of the journalist telling the whole truth because there are certain categories of information which, if published, give rise to a charge of contempt of court.[139] Anything that might influence a jury might prejudice the accused's right to a fair trial, so is not allowed; publication of such information would constitute a contempt of court. For example, disclosure of an accused person's prior criminal convictions would be complying with the journalists' ethical obligation regarding 'completeness' but would be contrary to 'one of the most deeply rooted and jealously guarded principles of our criminal law'.[140] The courts have said that 'the public interest in free discussion and in alerting the community to risk does not warrant a desertion of the public interest in securing a fair trial'.[141] In addition, where an accused has the option of being tried by jury or by judge alone, media comment prior to such an election has been held to have the potential to corrupt potential jurors against the accused, and also to dissuade the accused himself from exercising his right to trial by jury for that very reason;[142] '[i]t is possible very effectually to poison the fountain of justice before it begins to flow'.[143] If prejudicial comment has been made, counsel may argue that the jury should be discharged. The trial judge has a vast discretion in relation to how the matter will proceed. For example, the jurors may be examined to determine whether they have indeed been tainted or influenced by the published material, or the jurors may be ordered to disregard any publicity. In Australia, the trial judge must decide whether the publication has had a 'real and definite tendency' 'as a matter of practical reality' to 'preclude or prejudice the fair and effective administration of justice'.[144]

But are jurors really so easily influenced? Does the right to a fair trial really have to mean that juries must be shielded from all external commentary? David Flint, citing the Jeremy Thorpe and the Kray twins cases in the United Kingdom and the OJ Simpson trial in the USA, argues that '[t]he assumption that jurors are putty in the hands of the media has been demonstrated to be untrue'.[145]

138 *Ibid*, 178, cited in Richards (n 14) 11.

139 For a comparative discussion of contempt laws and *sub judice* rules in the UK and Europe see Resta (n 7) 34.

140 *Maxwell v Director of Public Prosecutions* [1935] AC 309 (HL), 317 (Viscount Sankey LC).

141 Hinch (n 70).

142 *Director of Public Prosecutions v Francis* [2006] SASC 211.

143 *R v Parke* [1903] 2 KB 432, 438 *per* Wills J.

144 *Hinch* (n 70), cited in Michael Chesterman, 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why Not Both?' in *The Courts and the Media* (Halstead, 1999) 71, 72. In the *Hinch* case, a radio journalist broadcast the prior convictions of the accused Michael Glennon shortly before his trial. See the comments of Deane J in that judgment in relation to the expectation that jurors must be true to their oaths, even after sensationalised and prejudicial media reporting.

145 David Flint, 'The Courts and the Media: What Reforms are Needed and Why?' in *The Courts and the Media* (n 144) 13, 32–33.

The ability of a journalist to divulge and report information is largely controlled by the laws relating to contempt and defamation. It is up to the journalist (and the editor or news director) to decide how the information will be treated. Contempt laws do not have any effect until a person has been charged. This means that any story can be published that might be considered to be 'in the public interest' (provided that it is not defamatory). In Australia, press freedom was extended for a period of time under the *Theophanous*[146] line of cases, although the so-called 'Constitutional defence' has now been curtailed by *Lange*[147] (see above). Consideration must also be given to whether publication of certain information might prejudice a person's right to a fair trial should the person ever be charged with an offence. Such considerations are generally motivated by whether or not any sanctions will ensue, although recent media discussion in Australia reveals that even some journalists believe in the supremacy of fair trial rights.[148]

4.4 Accuracy

It is well established that journalists are allowed to report court proceedings as long as the report is fair and accurate.[149] However, it is the issue of accuracy that appears to be a major source of tension between journalists and not only lawyers, but judges as well. A common judge's lament is that a carefully considered judgment or sentence has been misreported.[150] South Australian Chief Justice Doyle commented on national radio that 'over time there have been quite a few instances of reporting of cases which have ranged from the glib and superficial, to probably the misleading and tendentious. So judges tend to get rather resentful about that, and I think over time, a kind of hostility had built up, I think which was interfering with a good working relationship.'[151]

Today, television news and daily tabloids provide more than just information. News is a source of entertainment and, more importantly, a product for sale. Legal stories make great 'info-tainment'. Stories involving the law have all the hallmarks of a good narrative: sadness, tragedy, loss, pain and redemption. The involvement of sex or death can almost guarantee a best-seller. Whilst courts make decisions based on information provided within the framework of the adversarial system (including the rules of evidence), journalists must create stories out of these decisions and render them 'newsworthy'. During that transformation, accuracy and completeness may well be reduced in priority behind the constraints of deadlines and column space. There is nothing in the Australian Journalists' Code of Ethics providing guidance on how to be an ethical practitioner when presenting news as 'info-tainment', other

146 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104.

147 *Lange* (n 59).

148 See eg Janet Albrechtsen, 'The Rights of the Media End where the Right to a Fair Trial Begins' *The Australian*, 31 March 2010, 14: 'There is far greater public interest in ensuring a fair trial for an alleged pedophile than providing a media platform for the public to watch his fall from grace.'

149 *R v The Evening News, ex parte Hobbs* [1925] 2 KB 158, 167–8 *per* Lord Hewart CJ.

150 See Jon Faine, 'The Role of Radio in Legal Reporting (2004/5) 85 *Reform* 12.

151 ABC Radio National (n 2) 9.

than clause 6: 'Do not allow advertising or other commercial considerations to undermine accuracy, fairness or independence.'[152]

The dilemma faced by court reporters has been acknowledged at length.[153] The job is often delegated to junior journalists with no legal training other than brief instructions on how to avoid defamation suits and contempt proceedings. Impatient editors might instruct them to cover several hearings in one day, sometimes requiring the distillation of thousands of words of transcript and judgment or sentencing remarks into a few sentences. Unlike other colleagues, the court reporter has 'no sources, no leaks, no information derived from casual contacts, no off the record briefings and no doorstops. You can't interview the newsmakers.'[154] Added to the solitary nature of court reporting are the pressures of reduced newsroom staffing, pressure to report quickly and the search for the 'scoop', all of which detract from strict adherence to ethical codes.[155] As Suzanna Lobez notes, '[t]he media want sharp and snappy vision or sound bites, in time for the deadline. The judges want painstaking clarity, fairness to all parties, and no ambiguity as they apply the law and create precedent.'[156] Lawyers are trained to be thorough and accurate, and so have trouble condensing their knowledge into media-friendly soundbites.[157] Journalists 'look at the human story rather than get bogged down in the legal minutiae'.[158] In addition, the 'boundaries between journalism and literature [have become] increasingly blurred'[159] as 'many of the techniques of fiction writing have become standard techniques in journalism … [especially] in the 1960s and 1970s with the rise of New Journalism (note the upper case): "The idea was to give the full objective description, plus something that readers had always had to go to novels and short stories for: namely, the subjective or emotional life of characters".'[160] 'New Journalism records facts, quotes and anecdotes, but it exploits the literary devices of fiction to present them in new ways. Quotes, for example, become dialogue, anecdotes become scenes.'[161] In reporting court matters, the journalist is obliged to provide an accurate report within the framework of a narrative.

It is little wonder that lawyers and judges criticise journalists for reporting that is incomplete and superficial.[162] But it is important to recognise the plight of the journalist 'without

152 Australian Journalists' Association Code of Ethics, www.australian-news.com.au/codethics.htm.

153 Faine (n 150).

154 Patrick Keyzer, 'What the Courts and the Media Can Do to Improve the Standard of Media Reporting of the Work of the Courts' in *The Courts and the Media* (n 144) 150, 153, citing L Greenhouse, 'Telling the Court's Story' (1996) 105 *Yale Law Journal* 1537, 1539–40 and 1543.

155 See Ghiglione (n 21) 6.

156 ABC Radio National (n 2).

157 Observations by Peter Brennan a lawyer, legal columnist and regular radio interviewee, quoted in Clare Buttner, 'Stop Being Boring and Get Famous' *Lawyers' Weekly*, 13 April 2007.

158 Janet Fife-Yeomans, 'Fear and Loathing: The Courts and the Media' (1995) 5 *Journal of Judicial Administration* 39, 40.

159 Richards (n 14) 25.

160 Tom Wolfe and Edward W Johnson (eds), *The New Journalism* (Picador, 1975) 41, cited in Richards (n 14) 25.

161 M Dunleavy, *Feature Writing* (Deakin University, 2nd edn Geelong 1993) 54, cited in Richards (n 14) 25.

162 Hon Chief Justice John Doyle (n 123) 29.

legal training, attempting to grasp the gist of a 150 page judgment handed down at 10.30 a.m. in time for a 4.00 p.m. deadline and subject to all the other regrettable vicissitudes of news production'.[163] Reporting of extremely complex cases, such as High Court cases, presents even greater challenges. Quite simply, '[t[he subtleties of decision making by seven independent judges are ill-suited to the ten second grab of the nightly news'.[164] Further, judges tend to be remote, faceless and nameless. As noted by America's Linda Greenhouse, in a sample of 1,200 randomly selected adults, 59 per cent could name the Three Stooges but 55 per cent could not name one Supreme Court Justice.[165] Judges are now recognising that the courts need to assist the media to ensure that accurate information is communicated to the public,[166] and much has been done recently in Australia to facilitate this.[167] However, the day-to-day practical reality of journalism results in the urgency of breaking news as the overarching arbiter when it comes to journalistic decision-making, rendering unworkable or impractical many of the recommendations that may flow from research or policy advice.[168]

In the USA, the *Sheppard* case[169] is widely regarded as precedent for the principle that responsibility for safeguarding the fairness and integrity of a trial rests solely with the judge.[170] The court in that case determined that the trial judge 'should have adopted stricter rules governing the use of the courtroom by newsmen' and 'should have more closely regulated the conduct of the newsman in the courtroom'.[171]

163 Keyzer (n 154) 152.

164 George Williams, 'The High Court and the Media' in *The Courts and the Media* (n 144) 136, 140.

165 Linda Greenhouse, 'Telling the Court's Story' (1995–6) 105 *Yale Law Journal* 1537, 1539.

166 See eg Hon Chief Justice John Doyle (n 123) 27.

167 For example, the appointment of Court Media Liaison Officers, the provision of judgment summaries and judges being accessible for interviews, and court protocols allowing access to court documents. For a discussion of these innovations see Hon Justice Bernard Teague, 'Access to the Courts and its Implications' in *The Courts and the Media* (n 144) 112. For further commentary see: RD Nicholson, 'The Courts, the Media and the Community' (1995) 5 *Journal of Judicial Administration* 5; Initial? Teague, 'The Courts, the Media and the Community—A Victorian Perspective' (1995) 5 *Journal of Judicial Administration* 22; Fife-Yeomans (n 158). See also ABC Radio National (n 2); Federal Court of Australia, *Media Access to Court Documents*, www.fedcourt.gov.au/courtdocuments/mediadocuments_print.html; Federal Court of Australia, *Media Access to Transcript*, www.fedcourt.gov.au/courtdocuments/mediatranscript_print.html. For examples of accessibility of evidence from state courts in Australia see Supreme Court Act 1935 (SA), s 131; District Court Act 1991 (SA), s 54; Environment, Resources and Development Court Act 1993 (SA), s 47; Magistrates Court Act 1991 (SA), s 51; Coroners Act 2003 (SA), s 37.

168 See Jane Johnston, 'Shall We Dance: Who's Leading Whom in the Journalism-Justice Shuffle?' (2002) 24 *Australian Journalism Review* 131, 139.

169 *Sheppard v Maxwell*, 384 US 333 (1966).

170 See Hengstler (n 22) 172.

171 *Sheppard v Maxwell* (n 169) 350.

5. LEGAL ETHICS: WHAT MAY A LAWYER SAY TO A JOURNALIST?

5.1 Ethical Constraints

Nowhere does the difference between lawyers and journalists appear more starkly than in the situation of court reporting. Whilst orders made by judges are generally available to the public, '[m]ass media reporters are the people in fact responsible for translating what courts write into a form the public can digest'.[172] Most journalists who report on court and legal matters are familiar with the legal jargon involved in trials and legal disputes. However, familiarity does not necessarily equate to understanding. Journalists are rarely legally trained, and they appreciate the assistance of lawyers to clarify information, explain the status of a particular case, or even just to spell names. 'Translating' a judge's orders into language that can be understood by journalists and the public is most likely to be in the best interests of a client and a useful way of ensuring that the facts are reported accurately. If lawyers are prohibited from speaking to the media because of a suppression order or an ethical restraint, it is argued by some that this perpetuates the reporting of inaccurate information. 'The question becomes: Do you want [reporters] to do the story with good information or do you want them to find some so-called expert out there?'[173]

Lawyers are constrained by ethical considerations in relation to what they can or cannot say to a journalist (or indeed to anyone other than the client) about a client's matter. The ethical position of the relationship between lawyers and journalists is codified to a large extent. Regulation of the legal profession in Australia is currently in a state of flux, whilst a new national legal profession is debated. Proposed legislative reform would enact one set of professional conduct rules governing all lawyers across the country, replacing the current eight state and territory based codes. For now, each state has a code based on a model set of Rules which were published by the Law Council of Australia (a representative body that has no regulatory authority) in 1997 and revised in 2002.[174] All of the states and territories have adopted their own versions of the *Model Rules*.

In the movie *Chicago*,[175] Richard Gere, in the role of Billy Flynn, coaches his client to lie to the press about her past as well as in relation to the circumstances of the murder with which she is charged. By the end of the press conference, Flynn is the puppet master, choreographing the dance, as he controls the strings of the marionette journalists who repeat the refrain 'they

172 Ruth Bader Ginsburg, 'Communicating and Commenting on the Court's Work' (1994–5) 83 *Georgetown Law Journal* 2119, 2121. See also Vicki Waye, 'Who are Judges Writing For?' (2009) 34 *University of Western Australia Law Review* 274, especially 275 and 296.

173 Jerrianne Hayslett (ed), *Confidentiality in the Courts and the Media: The Gathering Storm: National Conference on Courts and the Media*, National Judicial College (US), Washington, DC (2005), 47, cited in Hengstler (n 22) 178.

174 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=01EC79F6-1C23-CACD-2252-D298393FBFA0&siteName=lca.

175 *Chicago*, Miramax Films, 2002, directed by Rob Marshall.

both reached for the gun'. This bitingly cynical portrayal of the role of the lawyer in dealing with the media encapsulates the rationale behind ethical rules restraining what lawyers can actually say to journalists. The attitude of a lawyer to the ethical rules about dealing with the media may be influenced by their attitude to legal ethics. The traditional adversarial lawyer will argue that she must advance her client's interests with the maximum zeal and commitment permitted by the law. This may mean speaking to the media as a strategic approach. The primary consideration will then be to have the client's instructions to speak to the media. The moral activist lawyer,[176] who believes that 'lawyers should use legal practice to change people, institutions and the law to make them conform more to general ideals of social and political justice',[177] might also speak to the media as a strategic approach.[178] The responsible lawyer,[179] who 'focuses on the lawyer's role as an officer of the court and guardian of the legal system',[180] may regard speaking to the media as inappropriate. In all instances, lawyers must consider whether talking to a journalist is in fact in the best interests of the client. Whether or not a practitioner will speak to a journalist about a particular matter must always be decided based on the particular circumstances of each individual case.

Rule 19 of the Australian *Model Rules of Professional Conduct* governs what lawyers may say to the media. The section containing this Rule is entitled 'Integrity of Hearings'.[181] One might at first consider that this is a somewhat obfuscatory euphemism. Why is the section not entitled 'Dealing with Journalists' or 'Interactions with the Media', or 'Answering Questions from Reporters'? Indeed, the word 'journalist' is mentioned only once in the entire section. The word 'media' is not mentioned at all. In contrast, the relevant rule in the American Bar Association *Model Rules*[182] is unambiguously entitled 'Trial Publicity'.

The reason for the generic terminology used in Rule 19 may well be a deliberate nod to the emerging question that is the subject of comment amongst journalism academics: What is a journalist? Journalism is said to be 'in a state of dynamic change, with journalists, news organisations and scholars claiming journalism is under threat'[183] and that 'there is little agreement on what journalism is'.[184] The 'Integrity of Hearings' moniker recognises that anyone can set up a blog, write something on Facebook, or 'report' an event on Twitter. We are all part of 'the media'. The internet has forever changed the relationship between media coverage of legal proceedings and the public.[185] Whilst serious concerns have already been raised

176 See Parker and Evans (n 34) 28–31.

177 *Ibid*, 29.

178 See eg Laura Anderson, 'Migration System Racist, says Rau Lawyer' *The Advertiser*, 27 September 2005, www.theadvertiser.news.com.au/printpage/0,5942,16733780,00.html (accessed 12 December 2011).

179 Parker and Evans (n 34) 24.

180 *Ibid*.

181 Australian *Model Rules* (n 174) r 19.

182 See American Bar Association, *Model Rules of Professional Conduct*, r 3.6, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

183 Rhonda Breit, 'How the Law Defines Journalism' (2008) 30 *Australian Journalism Review* 13.

184 *Ibid*, 14; Richards (n 100) 24–25.

185 See Marcy Wheeler, 'How Noninstitutionalised Media Change the Relationship between the Public and Media Coverage of Trials' (2008) 71 *Law & Contemporary Problems* 135, 135–6.

in relation to online publishing,[186] it has also been argued that the blogosphere is well suited to the coverage of criminal justice issues because of the virtual community that is created and the debate that ensues.[187] In any event, acknowledging the online atmosphere[188] provides an important insight into the rationale behind the Rule, that the merits of a case are to be decided by the courts, not the media.

By contrast, the US *Model Rules* arguably sanction trial by media. Whilst US lawyers must not make comments to the media if they know or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, a lawyer may make a statement 'that is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the [lawyer] or the … client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.'[189] This rule is aimed at criminal proceedings and is intended to apply equally to prosecution and criminal defence counsel. There is no equivalent to this Rule in any Australian jurisdiction.

Rule 19 of the Australian *Model Rules* sets out what Australian legal practitioners may say to journalists. It has been noted that this rule merely 'reminds solicitors of [their] two important obligations' (to the court and to the client).[190] Not all states have adopted Rule 19. In some states, only the Bar Association has adopted the rule, whilst the local Law Society may not have incorporated it into the rules relating to solicitors. The author's home jurisdiction, South Australia, has abandoned a very strict version of Rule 19 in favour of a new rule which prohibits a solicitor from publishing or taking 'steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice'.[191] The former prohibition against expressing personal opinions has been discarded.

In Queensland, Rule 19 was adopted in 2007 in a limited form in relation to solicitors, but in its entirety in relation to barristers. Solicitors in Queensland are prohibited from publishing or taking steps towards the publication of any material concerning current proceedings for which the practitioner is engaged which may prejudice a fair trial of those proceedings or prejudice the administration of justice. New South Wales, the most populous state having the most lawyers, has not adopted Rule 19 at all. Victoria is similarly silent on the issue, with no restrictions at all. The Western Australia Bar Association, however, has the strictest version of Rule 19. In 2006, the President of the Western Australian Bar Association stated that '[m]edia appearances and attributed media comment by a lawyer on behalf of a client

186 See eg S Walker, 'Changing Journalism in a Changing World: The Changing Legal Environment', 19 *Australian Journalism Review* 91, 94.

187 KC Johnson, 'The Duke Lacrosse Case and the Blogosphere' (2008) 71 *Law & Contemporary Problems* 155, 169.

188 The role of the internet in influencing juries was exposed in Australia most recently in the case of *R v K* [2003] NSWCCA 406, 23 December 2003, and *R v Tayyeb Skeith* [2004] NSWCAA 38, 4 March 2004. These cases are discussed by Michael Chesterman in 'Criminal Trial Juries and Media Reporting' (2005) 85 *Reform* 23.

189 ABA *Model Rules* (n 182) r 3.6(c).

190 Russell Grenning, principal advisor of corporate relations at the Queensland Law Society, quoted by Clare Buttner, 'Media Gag Rule Rejected' *Lawyers Weekly*, 2 July 2007, 3.

191 Law Council of Australia, *Australian Solicitors' Conduct Rules*, June 2011, adopted by the Law Society of South Australia, www.lawsocietysa.asn.au/other/profstand.asp.

… have a distinct tendency to cause that lawyer to be publicly linked with a client, or the client's cause … Such linkage is generally inconsistent … with the status of a lawyer as a member of an honoured profession and the overriding need to permanently maintain independence and professional integrity.'[192] Conduct Rule 58 of the Western Australian Bar Association now allows barristers to make only 'off the record' statements to any media representative; no published statements may be attributed to any barrister. 'On the record' statements may only be made with the express approval of the President of the WA Bar Association.[193] It could be said that this position is that of the 'Responsible Lawyer' who sees her role as first and foremost an officer of the court.[194]

The United States Supreme Court has ruled[195] that lawyers have a limited First Amendment right to speak to the media about trials in which they are involved.[196]

The US Supreme Court held that statements to the media would be disallowed where they are 'substantially likely to have a materially prejudicial effect' on the proceedings.[197] Notwithstanding the First Amendment, courts in the USA from time to time attempt to limit media contact. For example, the trial court in *Atlanta Journal Constitution v State of Georgia*[198] ordered parties, counsel and witnesses to respond to any media enquiry about the trial with 'No comment'. This decision was overturned on appeal as being too broad and going beyond what was permitted in Georgia's *Professional Conduct Rules*.[199]

It would appear that prosecuting attorneys are in the practice of speaking to the media in the USA. This rarely happens in Australia. The American Bar Association *Model Rules of Professional Conduct* prohibit attorneys from making extrajudicial statements that they know or reasonably should know 'present a substantial likelihood of materially prejudicing an adjudicative proceeding'.[200] Prosecutors are specifically prohibited from making comments that 'heighten public condemnation of the accused'.[201]

As in Australia, each of the states in the USA has its own code of professional conduct, modelled on the ABA *Model Rules*. By way of example, the relevant rule in California (and also in New York) permits statements by attorneys to the media, including the identity, residence, occupation and family status of the accused. Also permitted is a warning of danger concerning the behaviour of a person involved, when there is reason to believe that there exists

192 KJ Martin QC (now Martin J), *Conduct Rule 58—Statements to the Media*, www.wabar.asn.au/images/conduct rule58.pdf.

193 For more information on this see www.wabar.asn.au/Uploads/Images/conductrule58.pdf.

194 Parker and Evans (n 34) 24.

195 *Gentile v State Bar of Nevada*, 501 US 1030 (1991).

196 See Robert A Clifford, 'Working with the Media in a High Profile Case: Maintaining Ethical Standards', 2005 ABA Annual Meeting, Section of Litigation, 4–7 August 2005, www.americanbar.org/tools/digitalasset abstract.html/content/dam/aba/migrated/litigation/mo/premium-lt/prog_materials/2005_abaannual/02b.pdf.

197 Clifford (n 196), citing *Gentile v State Bar of Nevada* (n 195) 2.

198 *Atlanta Journal Constitution v State of Georgia*, 266 Ga App 168 (2004).

199 Clifford (n 196) 3.

200 ABA *Model Rules* (n 182) r 3.6(a), cited in R Michael Cassidy, 'The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle' (2008) 71 *Law and Contemporary Problems* 67, 69.

201 ABA *Model Rules* (n 182) r 3.8(f), cited in Cassidy (n 200).

a likelihood of substantial harm to an individual or the public interest. If the accused has not been apprehended, an attorney may give information necessary to aid in the apprehension of that person; the fact, time and place of arrest; the identity of the investigating and arresting officers or agencies; and the length of the investigation.[202]

5.2 The Haneef Case

Whether or not a breach of the relevant conduct rules relating to speaking to journalists will amount to professional misconduct remains to be tested. One case in Queensland that attracted vast media publicity in 2007 involved barrister Stephen Keim SC, who was engaged to act for Dr Mohamed Haneef. Dr Haneef was questioned in relation to an incident at Glasgow International Airport on 30 June 2007 and charged with an offence under the Anti-Terrorism Act (No 2) 2005 (Cth). Dr Haneef was released on bail but his work visa was cancelled 'on the ground that he was reasonably suspected of having an association with criminals and was not of "good character"'. The cancellation of his visa meant that Dr Haneef was immediately subject to immigration detention. The barrister, Mr Keim, released to a journalist a copy of a record of interview (of his client) by the Australian Federal Police (without instructions and without the knowledge of Peter Russo, his instructing solicitor[203]), said by some to be a bid to prove Haneef's innocence.[204] The AFP Commissioner lodged a complaint against Keim with the Queensland regulatory body, the Queensland Legal Services Commissioner[205] alleging that the release of the interview constituted unsatisfactory professional conduct or professional misconduct (a more serious allegation). The matter was referred to the Queensland Bar Association, which found that there had been a breach of Rule 60, especially as the barrister had not obtained his client's instructions to release the interview, but recommended that the breach did not constitute either unsatisfactory professional conduct or professional misconduct. The Legal Services Commissioner made a similar decision.[206] No disciplinary action was taken against the barrister. Charges against Dr Haneef were later dropped.

Mr Keim said: 'I believed that the public would be well served by facts, as opposed to anonymous leaks, and the Minister's claims based on unpublished and, therefore, untested information … I had no doubts that this was lawful; ethical; in my client's best interests; and the right thing to do.'[207] The then Australian Federal Attorney General argued vehemently that Keim's actions were unethical.[208]

202 ABA *Model Rules*, *ibid*, r 3.6(b)(6).

203 See Australian Broadcasting Corporation, ABC Radio, 'The Haneef Brief: Criminal Defence Lawyer, Peter Russo', transcript of *Sunday Profile*, 26 August 2007, www.abc.net.au/sundayprofile/stories/s2014834.htm.

204 See Paul Maley and Hedley Thomas, 'Different Laws would have Caught Haneef, says Andrews' *Herald Sun*, 24 August 2007, www.news.com.au/heraldsun/story/0,21985,22299479–662,00.html (accessed 12 December 2011).

205 Francesca Bartlett, 'The Ethics of "Transgressive" Lawyering: Considering the Defence of Dr Haneef' (2009) 28(2) *University of Queensland Law Journal* 309, 313.

206 *Ibid*, 314.

207 Stephen Keim, 'Dr Haneef and Me' (2008) 33 *Alternative Law Journal* 99, cited in Bartlett (n 205) 319.

208 Bartlett, *ibid*, 314–15.

No complaints were lodged against Dr Haneef's solicitor, Peter Russo, although he stated his own strong opinions to the media about the matter that could have been construed as falling foul of the requirement that they be 'uncoloured by comment or unnecessary description', notwithstanding that he was clearly acting 'honestly and fairly, and with competence and diligence in the service of [his] client', as required by the *Professional Conduct Rules*.[209] As Keim suggested, Russo's approach of talking to the media in such a way arguably achieved the most amazing piece of advocacy. Although Russo has stated that he did not actively seek the media,[210] he has been described as 'unashamedly us[ing] the media to combat the highly politicised prosecution of his client'.[211] He turned an unknown and fearsome 'terrorist suspect' into a real person undergoing a very difficult ordeal—a person with whom people could identify and empathise.[212] In other words, the lawyers assisted in the publication of narrative journalism. In an ironic twist to the prickly relationship between lawyers and journalists, Peter Russo complimented the 'commendable and disciplined journalism with respect to detecting and disclosing some of the government-generated misinformation. It disclosed a presence in our media of persons willing to question and scrutinise the Government in a case where there was a real power imbalance between my client and the Government. For this, my client and I are grateful.'[213]

The lawyer's role as advocate beyond the court became a very real issue here. The solicitor's actions could well be said to be 'poisoning the potential pool of jurors should Dr Haneef be brought to trial'.[214] If the result is that the client is denied a fair trial, then arguably the lawyer has not acted in the client's best interests. Alternatively, in providing to the public opinions and information about the client, that might otherwise be inadmissible as evidence, the lawyer has breached his duty as an officer of the court to uphold the administration of justice. Actively seeking to convince the public of certain matters is a role not usually associated with a lawyer. Indeed, this is the role usually reserved for journalists—and it is why journalists are often criticised. This 'unholy power' of journalists to 'make or break an individual in terms of public perceptions of that individual, and the ability to encourage or mislead their public with regard to those perceptions',[215] is particularly poignant in the context of legal stories. Should the journalist have the right to make or break that individual, or should it be left to the courts? It follows, therefore, that the question should also be asked of lawyers. From an ethical standpoint, the question has to be asked in light of the overarching question of whether actively seeking to convince the public is in the best interests of the client, coupled with ensuring that doing so is not breaching one's duty to the court. It is surely possible for that to occur, but the circumstances of each individual case will determine how far the role of the lawyer might extend. In addition, the lawyer, as an officer of the court, is obliged to

209 Bartlett, *ibid*.
210 See Australian Broadcasting Corporation (n 203).
211 See *ibid*.
212 Keim (n 207).
213 Peter Russo, 'Haneef; Peter Russo's Story', *Proctor*, Queensland Law Society, November 2007, 23 at 24.
214 Keim (n 207).
215 Richards (n 14) 27.

defer to the rules of the court and uphold the administration of justice. If an individual lawyer believes that revealing evidence and talking to the media are in the interests of justice, then if it can be done without breaching the duty to the court, then so be it. However, it is not the right of the lawyer but the right of the client. It could be said that Keim's actions arguably went too far, not because of what he did, but because he did not obtain instructions from his client beforehand. This was most likely a tactical decision made on the basis that an objection from the client would be unlikely, but without instructions it was arguably unethical, on the basis that a lawyer must always obtain instructions before acting.

6. CONCLUSION

Law students are often told that they are entering a noble profession, a position of privilege. So too are students of journalism, who are taught that their 'noble purpose' is 'as sentries who watch and warn; guides who search, map and explain; scribes who listen and record; witnesses with courage to speak; … advocates for the weak; and keepers of the collective memory'.[216] However, lawyers and journalists serve different masters. While both may claim to hold their respective ethical codes dear, the ethical considerations will never coincide. It has been argued that the tension between the two camps is exacerbated because neither side behaves appropriately. 'The media know, et cetera, et cetera. If only it were true. The legal system claims that it does right by all, without fear or favour, and acts only in the interests of justice, et cetera, et cetera. If only it were true.'[217] On the other hand, whilst 'the obligations the courts and the media owe to the public are quite different',[218] a spirit of optimism suggests that the paths of lawyers and journalists may be able to continue in parallel, even if they do not converge, as 'partners in a mutual democratic enterprise to which both must acknowledge responsibility'.[219]

This paper has shown that the ethical positions of lawyers and journalists are sometimes diametrically opposed because their ethical goals are so different. This divergence of views is most poignant when recognising that lawyers must act in the best interests of the client, in addition to respecting their role as officers of the court. It is certainly true that some lawyers may use the media in the best interests of their clients. Similarly, journalists may also use lawyers to great effect in producing a story. Journalists, whilst acting in the public interest, are also motivated by self-interest: deadlines, circulation, ratings, shareholder interests and newsworthiness. The appreciation of story-telling is an important part of what it means to be human. It follows that the right to a fair trial will always struggle for supremacy before a voyeuristic public with an insatiable appetite for a good story.

216 P Chadwick, 'Ethics Journalism' in M Coady and S Bloch (eds), *Codes of Ethics and the Professions* (Melbourne University Press, 1997) 244. Paul Chadwick was a lawyer and journalist, then (2001 to 2006) the Privacy Commissioner of Victoria, and then ABC's Director of Editorial Policies (2006). See Australian Broadcasting Corporation, 'ABC Director of Editorial Policies Appointed' 20 December 2006, www.abc.net.au/corp/pubs/media/s1815753.htm.

217 Campbell (n 3) 127.

218 Hon Daryl Williams (n 1) 14.

219 Greenhouse (n 165) 1561.