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THE AIMS OF PUBLIC SCHOLARSHIP IN MEDIA LAW AND ETHICS

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This essay urges scholars in media law and ethics to reevaluate the extent and utility of their public-scholar efforts and to consider ways that they can transfer research-based knowledge to public audiences while also playing a more deliberate role in holding media and government institutions accountable. It suggests that the devolution of standards in mass communication, the increasing encroachments on media autonomy, and the broader collapse of power into fewer hands make this a particularly urgent moment for scholars to reengage the public and to abandon their feckless neutrality on public issues. The overarching aim of public scholars ought to be to serve as bulwarks against the unrelenting and asocial exercise of institutional power, and this essay suggests that media law and ethics scholars, because of the normative emphasis within their fields, are uniquely situated to serve that goal.

Keywords: public scholarship, law, ethics, transference, accountability

I. INTRODUCTION

One of the occupational hazards of life in the academy is that as faculty advance their research agendas, their attentions inevitably focus on narrower and narrower targets and on increasingly esoteric questions. Scholars are prone, as the old saying goes, to studying more and more about less and less until they know everything about nothing.

Those who do work in mass communication, and particularly those studying media law and ethics, should feel fortunate, however, that relative to their colleagues in other fields, their efforts are more clearly bound to the exigent questions of the day (indeed, they are often undertaken *because of* those linkages) and are more capable of being meaningfully translated to non-experts. Media law and ethics scholars have opportunities to nourish and redirect public dialogue on contemporary controversies that are unavailable or impractical for scholars in other fields.

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Still, too few faculty take seriously the public-scholar role,¹ and the overall yield of those efforts is hard to discern. Polls show profound public ignorance about the most fundamental First Amendment principles,² and about the ethical canons of journalism, advertising and public relations.³ Journalists and media organizations continue to be usurped and intimidated by government officials without triggering significant public outcry.⁴ And professional practices in mass communication have deteriorated to the point that these are now among the least trusted American institutions.⁵

¹ There are many definitions of public scholarship, but the following statement adopted by the faculty of the Department of Communication at the University of Washington provides a representative outline:

“Scholarship and citizenship go hand in hand. Although scholars in higher education ultimately work on behalf of their communities, their nations and the world, much of their scholarship stays within the traditional research process Scholars also directly engage the world beyond the academy, drawing on scholarship developed in the rigor of disciplinary tradition. Productive efforts of this kind, herein called public scholarship, may take many forms, such as popularization of research-based ideas in a variety of media and formats, facilitation of deliberation about such social values as equality, justice and freedom, and explanation or appreciation of texts, concepts, values or events. Such efforts can promote constructive dialogue with and among students, citizens, diverse communities, and political and cultural leaders.”

Faculty Statement on Public Scholarship, Department of Communication, University of Washington (2004), <http://www.com.washington.edu/program/publicscholarship/index.html>.

² FREEDOM FORUM, STATE OF THE FIRST AMENDMENT 2007 (2007). In this annual survey, 37 percent of respondents disagreed that “newspapers should be *allowed* to freely criticize the U.S. military about its strategy and performance.” *Id.* at 4. (Emphasis added). And 61 percent agreed that the “government should be allowed to *require* newspapers to offer an equal allotment of time to conservative and liberal commentators.” *Id.* at 10. (Emphasis added).

³ Both scholars and the public can be forgiven for some of this misapprehension, given the pace at which media practitioners are adjusting the moral guideposts of their professions. *See infra*, Part V.

⁴ In its 2007 World Press Freedom Index, Reporters Without Borders ranked the United States 48th out of 169 countries, citing, among other things, the decline in access to information and the surge of cases in which reporters have been subpoenaed. Reporters Without Borders, World Press Freedom Index 2007, http://www.rsf.org/article.php3?id_article=24025.

⁵ A 2006 Harris Poll shows that the public has more confidence in “Wall Street” than they do in “The Press,” and more confidence in “The White House” than in “TV News.” *Overall Confidence in Leaders of Major Institutions Remains Steady*, Harris Interactive, March 2, 2006, http://www.harrisinteractive.com/harris_poll/index.asp?PID=646.

It is too simple to suggest that these circumstances are entirely or even substantially the result of an abdication by scholars, and it is too much to assume that media law and ethics faculty can foment some sweeping cultural reversal. But they ought to *want* to lead that change and to be its catalysts, even if they are only one force among many. There are some scholars, to be sure, who are creatively repackaging their work for broader audiences and lending their expertise as news sources, guest columnists or public lecturers. But much of what people characterize as public scholarship is either too simple, too sequestered or simply too infrequent to have an appreciable impact. It also too often misses what should be the principal aim of most public scholarship: to serve as a bulwark against the unrelenting, asocial exercise of institutional power.⁶

This essay urges scholars in media law and ethics to consider that purpose in evaluating the extent and utility of their public-scholar efforts. It also suggests that this is a particularly urgent time for scholars to reengage the public—not merely by *informing* discussions of law and ethics issues, but by *driving* those discussions as well. The expanding power of government and corporations has heightened the need for robust scrutiny, as have the media's ethical failings, which are no longer limited to simple acts of omission but include some particularly brazen betrayals of public trust.⁷ Academics have a unique role to play in preserving the appropriate balance between freedom and restraint and in serving as the public's proxy in holding media institutions and professions accountable. Fortunately, those tasks are made easier by the peculiar features of these fields.

As for advertising professionals, a 2006 Gallup Poll indicates that the public regards them as even less honest than journalists, stock brokers and lawyers, and only slightly more trustworthy than car salesmen, with 11 percent of respondents saying their trustworthiness is “very high” and 35 percent saying it is “very low.” Lydia Saad, *Nurses Top List of Most Ethical and Honest Professions*, Gallup Online, Dec. 14, 2006, <http://www.gallup.com/poll/25888/Nurses-Top-List-Most-Honest-Ethical-Professions.aspx>.

⁶ The word “unrelenting” is used to emphasize the fact that power inevitably expands unless checked. As James Madison said, “men are not angels.” If they were, “internal and external controls would be unnecessary,” as would any informal mechanisms of accountability. THE FEDERALIST NO. 51 322 (James Madison) (Clinton Rossiter ed., 1961). The term “asocial” is used to differentiate neutral or benevolent uses of power from those that are primarily driven by self-interest. There is nothing inherently problematic about the possession or exercise of power. What is troubling is the degree to which it is coalescing in the hands of fewer people, the ways in which it is being exerted without regard for the social consequences, and the extent to which people are blithely acquiescing to what is a massive realignment of influence away from individuals and toward government, corporations and, to some extent, the media.

⁷ See *infra* notes 47-52 and accompanying text.

II. THE SPECIAL NATURE OF LAW AND ETHICS RESEARCH

There are a number of challenges confronting faculty who seek to broaden the reach of their scholarly work and to insert themselves into public dialogues. But those obstacles are more easily surmounted by scholars who work in law and ethics than they are by scholars in other areas. The former have an advantage in that their research is more often targeted to current conflicts and to issues whose dynamics are understood by public audiences. A law or ethics scholar would have an easier time drawing the public into a debate about the privacy rights of public figures than a mathematician would have getting people to puzzle over the Riemann Hypothesis.⁸ The research contexts in law and ethics are ones with which most people can find some ready connection, even if the theories and methods employed are unfamiliar.

Partly for that reason, research in law and ethics is more capable of rapid diffusion within the public sphere.⁹ Most articles in other fields are so tightly focused that their influence is difficult to perceive, at least initially. Their contributions are usually more granular and their impact is felt only after a long process of accretion and after they have bonded with the ideas and discoveries of others. Most media law and ethics scholarship follows a similarly inconspicuous path. But it is easier to trigger major theoretical and doctrinal shifts—and to quickly charge-up public debates, even without reshaping the dominant paradigms—in these fields than in most others.

An early example is the work of George Washington University law professor Jerome Barron whose 1967 article¹⁰ and subsequent book¹¹ sought to upend the bedrock principle that government cannot limit the speech of some citizens in order to enhance the expressive opportunities of others. Barron argued that the First Amendment protects speech, not speakers, and therefore the government can impose restraints on gate-keeping institutions (e.g., metropolitan daily newspapers) to open channels of communication foreclosed to other members of a community. Barron's argument was rejected by the U.S. Supreme Court (in a case Barron litigated) in *Miami Herald Pub. Co. v. Tornillo*,¹²

⁸ See generally J. Brian Conrey, *The Riemann Hypothesis*, 50 NOTICES OF THE AM. MATHEMATICAL SOC'Y 341 (2003).

⁹ Media scholars seeking to disseminate their research can also take advantage of a number of print and online publications (e.g., *American Journalism Review*, *Columbia Journalism Review*, *Atlantic Monthly*, *Harper's*, *Salon.com*, *Slate.com*, etc.), which provide additional forums for their work and which are read by both public and academic audiences.

¹⁰ Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 641 (1967).

¹¹ JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* (1973).

¹² 418 U.S. 241 (1974) (striking down a Florida statute giving political candidates a right to reply to criticism leveled against them in the state's newspapers).

but it provided a compelling alternative framework that has informed the work of others¹³ and that continues to serve as the principal counter-thesis to the Court's speaker-based First Amendment model.¹⁴ There are scores of other examples from every time period and addressing every facet of media law and ethics: such as Mark Fowler's template for media deregulation in the 1980s,¹⁵ Jay Rosen's elucidation of public journalism in the 1990s,¹⁶ and Lawrence Lessig's work on intellectual property in the 2000s.¹⁷ Scholars in these fields are continually challenging consensus and reshaping the theoretical and doctrinal substructures. And many have succeeded in taking their cases to both expert and lay audiences.

Part of what makes these kinds of debate-shifting works possible, and certainly what helps streamline their integration into public discourse, is that there are some fundamental differences between law and ethics compared with other fields. Although there is both a normative and a positive-empirical dimension to all research, law and ethics scholars are generally more attentive to the former. This is reflected in something as basic as their conception of "theory." Most scholars conceive of theory as an overarching set of principles that help explain natural or social phenomena.¹⁸ Theory in those fields is *descriptive*; its purpose is to provide a meta-framework to explain

¹³ See, e.g., ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999), NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988), and BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (1983).

¹⁴ The Court's First Amendment jurisprudence is focused on the expressive autonomy of speakers and on the limits on government intrusions upon that autonomy. It prohibits discrimination among speakers, although the rights of all speakers depend to some extent on the medium they use. See *Reno v. ACLU*, 521 U.S. 844, 868-869 (1997) (distinguishing the rights of broadcasters, cable system operators and Internet communicators), and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) (distinguishing broadcasting from cable television).

¹⁵ Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

¹⁶ JAY ROSEN, *WHAT ARE JOURNALISTS FOR?* (1999).

¹⁷ LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) and *CODE: AND OTHER LAWS OF CYBERSPACE* (1999).

¹⁸ This is reflected in most dictionary definitions as well. See, e.g., MERRIAM WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2371 (2002) (Theory: "A judgment, conception, proposition, or formula (as relating to the nature, action, cause, or origin of a phenomenon or group of phenomena) formed by speculation or deduction or by abstraction and generalization from facts.").

processes and to predict outcomes based on the intermingling of certain variables.¹⁹ In law and ethics, however, theory is more *prescriptive*. Its purpose is not to explain phenomena but to provide a vision of how society, or some aspect of it, should be ordered.²⁰

In law and ethics, scholars are expected to focus on the social consequences of different legal and ethical arrangements and to propose remedies, in addition to supplying their diagnoses.²¹ That is not true all the time, of course, and it is not entirely unique among academic fields of study. But law and ethics scholars are often more inclined—and because of the nature of their fields, more able—to try to extirpate the theoretical pillars and to suggest social changes than are scholars in the hard sciences. In the sciences, the guiding principles are the products of nature. In law and ethics, the guiding principles are human constructs that are only as durable as the social consensus that holds them in place.²² One cannot convince others to reject $E=mc^2$ without overwhelming empirical data, but one can persuade others to reject the use of torture, for example, without producing anything more than a single, impassioned appeal to conscience.²³ This makes for less stable disciplines, but it also means there are unlimited opportunities to

¹⁹ Social and natural science theories are rooted in empiricism; legal theories are generally rooted in philosophy. This, of course, is a generalization. Some legal theories do more than propose some kind of social structuring. The marketplace of ideas theory, for example, not only provides a model for the regulation of expression, it also suggests or presumes a repeatable process that in the absence of government restraints, truth will be more likely to emerge from the clashing of viewpoints than if the government were to mediate the messages. This theory was expressed by Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting), although its roots lie in John Milton's 1644 tract against licensing by the British crown. JOHN MILTON, *AREOPAGITICA* (J.C. Suffok, ed., 1968).

²⁰ The doctrinal rules that courts create flow from these broader theoretical frameworks. For example, the rule that public officials must prove actual malice (*i.e.*, “reckless disregard for the truth,” *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)) before they can succeed in a libel suit is the product of a theory about the primacy of political speech. *See generally* ERIC BARENDT, *FREEDOM OF SPEECH* 20-23 (1985) (noting that democratic self-governance is one of the principal rationales cited for protecting freedom of expression). *See also* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

²¹ As Ralph Waldo Emerson suggested, “[T]here is no good theory of disease which does not at once suggest a cure.” RALPH WALDO EMERSON, *The Preacher*, in 10 *THE WORKS OF RALPH WALDO EMERSON* 207 (Fireside ed. 1909).

²² Most work in media ethics, for example, is less focused on the meta-ethical search for universal rules than on normative and applied examinations that are bound by particular cultures and customs.

²³ In other words, one could make this argument from *principle* without examining empirical evidence about the utility of torture as an interrogation tactic.

modify core principles or exchange them for others, and therefore unlimited chances for scholars to exert their influence.

III. THE PURPOSE OF PUBLIC SCHOLARSHIP IN MEDIA LAW AND ETHICS

Media law and ethics are dynamic fields whose boundaries are continually being redrawn. They are also quite unusual in that their contours can significantly be shaped by those outside the academy.²⁴ The legal limits and ethical standards that guide the practice of mass communication are not determined by scientific discovery; they are artificial thresholds established through an ongoing societal negotiation.²⁵ The advantage of this malleability is that it creates extraordinary opportunities for the public to help determine which legal and ethical rules will be required or expected, and even which theories will predominate.²⁶ This is something that would not be possible in chemistry, physics, psychology or most other fields where scholars are the dominant arbiters of knowledge.

Unfortunately, the possibilities for public input are not matched by the realities, in part because there is a deteriorating relationship between the public and the other organizations and institutions that demarcate legal rules and establish ethical standards. Those organizations and institutions are increasingly unlikely to view the public as their principal, much less sole, constituency, and are more inclined to target its more pedestrian impulses than to serve its vital needs. Indeed, the whole notion of the “public interest” seems increasingly quaint in this period of exploding profligacy and corruption.²⁷

²⁴ This is certainly true with professional practices and ethical standards. It is less so with the philosophical foundations of professional ethics, which are more fully the province of ethics scholars. But that is largely because those ideas are less familiar to the public and because the public does not speak the language of moral philosophy. It is not because public and scholarly conceptions of ethics are in any way irreconcilable.

²⁵ These boundaries are negotiable, but that is not to say they are arbitrary. They are often rooted in principle and reflect the “fundamental presuppositions” of our society. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 326 (1962). They are also often supported by empirical evidence even though their adoption by society does not depend on empirical justifications as is the case in other fields.

²⁶ Of course these opportunities are often indirect. The public’s ability to shape legal and ethical boundaries is less about their active participation than about their collective will, as expressed through their media choices and feedback.

²⁷ The phrase “the public interest” continues to be rhetorically exalted by every American institution, but the massive gulf between word and deed suggests that the phrase has become more of a shibboleth than a guide star.

This is a perilous moment for America's principal institutions—government, corporations, media—and for American democracy itself. The health of the latter has always depended on there being a stasis among the key institutions and on their possession of some other-regarding concern²⁸ and a willingness, at least occasionally, to moderate the pursuit of their own interests. We have never achieved perfect equilibrium, but it appears more elusive now than at any time in the past few decades. The prevailing philosophy seems to discount the public interest as an orienting concern and assumes that the protection of those interests will occur as a natural by-product of the adversarial clashing of the institutions. It is an “invisible hand”²⁹ approach in which the just end is merely wished-for rather than being the *raison d'être*. It clearly overestimates the extent to which these institutions serve as counterpoise to each other, and it overlooks the manifold ways in which they actively conspire to enrich themselves at the expense of the public.

The American campaign finance system provides one small example. Corporations exert extraordinary and disproportionate influence on the American political process by enlisting high-paid lobbyists to push their agendas, making campaign contributions and doing other favors for political leaders in the hope of building goodwill or securing *quid pro quo* exchanges.³⁰ Politicians, meanwhile, have built an election structure that is heavily dependent on the purchase of advertisements, particularly broadcast air time.³¹ Success, therefore, depends on the accumulation of massive campaign war chests, which are largely filled with corporate dollars.³² This would be

²⁸ In other words, that they share some basic commitment to society as whole and are willing to engage in acts of *altruism*—that is, actions that benefit others to the detriment of themselves. Whether these actions are undertaken out of some deep-seated love (agape) for others, or whether they are the result of utilitarian calculations about what is necessary to preserve stability, self-interest must occasionally yield to the common interest if there is to be a society in the first place.

²⁹ See ADAM SMITH, *THE WEALTH OF NATIONS* (1776) (suggesting that the market works as an invisible hand to correct imbalances between supply and demand, and that there is nothing inherently problematic about individuals pursuing their own self-interest, because this often produces mutually beneficial outcomes).

³⁰ Public choice theory suggests that politicians are willing to make these bargains in order to sustain themselves, even if it results in government policy that is inconsistent with the collective will of the public. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

³¹ A study by PQ Media in 2007 estimated that more than \$3 billion would be spent on political advertising in the 2008 elections, with \$2.3 billion of that going to broadcast stations. Louis Hau, *Political Ad Spending Set to Climb Sharply*, FORBES.COM, Dec. 7, 2007, http://www.forbes.com/2007/12/07/politics-campaign-spending-biz-media-cx_lh_1207bizpolitics.html.

³² About 70 percent of the donations to federal candidates come from corporations, while only 2.6 percent come from labor organizations and 5.4 percent from ideological organizations. See

less problematic if the media aggressively monitored these relationships and exposed the influence-peddling. But the media organizations through which most people get their news³³ are essential cogs in this system and are primary beneficiaries of its largesse. Much of the money spent by politicians ends up in the hands of broadcast station owners for whom election season is their most bountiful time of year. Broadcasters have also found ways to exploit loopholes in the campaign finance laws to further fleece political candidates, who are willing to pay any price to get their message out.³⁴ And because broadcasters are arguably the most powerful lobby on Capitol Hill,³⁵ they have little trouble overpowering their public-interest counterparts and maintaining the current regime.³⁶ All of the institutional partners benefit from this arrangement, but the public certainly does not. And in the absence of a checking institution of comparable power,³⁷ the public must depend on rogue acts of magnanimity from the institutions or on the small amount of pressure exerted by ad hoc coalitions or overmatched public-interest groups.

Business-Labor-Ideology Split in PAC and Individual Donations to Candidates and Parties, 2008 Overview, Center for Responsive Politics, <http://www.opensecrets.org/overview/blio.php>.

³³ See FREEDOM FORUM, STATE OF THE FIRST AMENDMENT 2007 11 (2007) (noting that 61 percent of the public gets most of its news from television and radio and only 20 percent gets it from newspapers and 15 percent from online sources).

³⁴ For example, although federal law requires that broadcasters give political candidates the rates they would normally give their best advertisers for a given time slot, broadcasters can charge whatever price they want for non-preemptable slots, which cannot be bumped by higher bidders. Because of the compressed time frames under which candidates operate, they are often willing to pay the exorbitant rates for those slots. See Hampton Stephens, *TV Interests Sit Out Campaign \$ Debate*, MULTICHANNEL NEWS, March 5, 2001, <http://www.multichannel.com/article/CA65151.html>.

³⁵ See Neil Hickey, *TV's Big Stick: Why the Broadcast Industry Gets What it Wants in Washington*, COLUM. JOURNALISM REV., Sept.-Oct. 2002, at 50. Broadcasters' influence is one manifestation of the theory of regulatory capture (or agency capture) in which members of a regulated industry are able to exert influence over government officials and processes in ways that serve their own interests at the expense of the public. See generally Jean Jacques Laffont & Jean Tirole, *The Politics of Government Decision Making: A Theory of Regulatory Capture*, 106 QUARTERLY J. OF ECON. 1089 (1991).

³⁶ Between 1998 and 2004, broadcasters spent more than \$186 million lobbying the federal government. Robert Morlino, *Broadcast Lobbying Tops \$186 Million*, Center for Responsive Politics, Oct. 28, 2004, <http://projects.publicintegrity.org/telecom/report.aspx?aid=406>.

³⁷ Vincent Blasi has emphasized the important role media organizations play in monitoring government institutions, and he points out that big, well-funded media institutions are necessary to combat the nearly limitless power vested in government. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521 (1977).

The problem of public disempowerment is also apparent in the more specific context of media law and ethics. The public does not play a meaningful role in shaping the ethical practices of most news organizations,³⁸ despite some organizations' attempts over the past few years to reconnect with audiences through focus groups and town-hall meetings.³⁹ News organizations are understandably protective of their autonomy, but their concerns about editorial interference can sometimes distance them from their audiences. That alienation is even more acute in advertising and public relations where media professionals often look at their audiences as targets rather than clients and where ethical restraints tend to be imposed only when the commercial utility of a message or tactic is outweighed by the public backlash it triggers.

The public's ability to shape the law is similarly constrained. Citizens have little access to the policymaking process, at least the most critical aspects of it,⁴⁰ and their

³⁸ The most ambitious attempt to engage the public in an examination of journalism ethics was the National News Council, which operated from 1973-1984. The NNC was comprised of media and non-media members who heard and resolved complaints by the public against the media. They issued formal written opinions in the most serious cases, and in doing so, sought to integrate public and media voices in the articulation of ethical standards. As it turned out, however, the media members dominated the Council and its decisions rarely challenged the legitimacy of conventional journalistic practices. See Erik Ugland, *The Legitimacy and Moral Authority of the National News Council (USA)*, 9 JOURNALISM: THEORY, PRACTICE & CRITICISM 285, 304 (2008) (noting that the Council's work was "far from revolutionary and may have done as much to entrench journalism's received tenets as it did to either validate or refashion them."). An earlier and more focused press-public collaboration was the Hutchins Commission whose final report was very influential (at least in providing a succinct diagnosis of the state of mass communication), but which is now more than a half-century old. See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

³⁹ This was more common in the mid-to-late-1990s when public journalism was an emerging concept and when editors sought to empower their audiences and improve their product by trying to better understand the desires of readers and viewers. See *Help Keep Town Hall Spirit Alive*, WIS. STATE J., Feb. 9, 2008, at A8 (describing the paper's 15-year experience with its We The People/Wisconsin project, which engages citizens in town-hall discussions of public issues, and which was started as an experiment in civic journalism). These approaches are less common today, and to the extent that they occur at all, they are more likely to be part of a news organization's efforts to commoditize its coverage by tailoring it to the interests of groups coveted by advertisers. The Federal Communications Commission used to require broadcasters to engage their audiences by seeking to understand the issues they wanted addressed, but this "ascertainment" policy was abandoned in 1984. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1078 (1984).

⁴⁰ The House and Senate's floor debates, public hearings and committee meetings are accessible to the public but are largely stages for political showmanship. The real power is exercised in private meetings with lobbyists and donors and in closed-door exchanges between congressional staffers.

representatives are often stymied by artificial roadblocks or are elbowed-out by their better-funded counterparts.⁴¹ There are also limits to what the participants in the legal system can accomplish. Judges are bound by the duties of their offices⁴² and by the nature of the cases filed in their jurisdictions. And lawyers, too, are often unreliable advocates of principle, because their desire to affect the law is limited by their obligation to their clients.⁴³ Even journalists, who tell the story of the law, can be corrupted by other interests and produce shallow or contorted portraits of these controversies.

In 2003, for example, after the FCC voted to relax its media ownership rules and thereby pave the way for more media consolidation,⁴⁴ there was considerable public outcry and agitation from both ends of the political spectrum.⁴⁵ But there was substantially less media coverage of this issue than was warranted, leading some to suggest that mainstream broadcasters had engaged in a “news blackout”⁴⁶ of the story in

⁴¹ See, e.g., the massive Telecommunications Act of 1996, which lifted or relaxed regulations in nearly every area of electronic communication, and which was largely drafted by industry lobbyists. PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 (1999).

⁴² Not only are courts expected to honor the principal of *stare decisis*, which requires that they presume the validity of their prior rulings, but they also risk losing their legitimacy if they get too far ahead of the public on social issues or stretch the limits of their jurisdiction. See Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50-51 (1961).

⁴³ A recent example of this occurred in the Privacy Act case filed by nuclear scientist Wen Ho Lee who had been accused by the government of espionage. Lee sued the government for improperly releasing confidential personnel information to the media, and to support some of his claims, he subpoenaed reporters from five different news organizations to reveal the identities of the sources who supplied this information. The reporters refused and were held in contempt. They eventually decided to contribute \$750,000 to help facilitate a settlement between the government and Lee rather than continue resisting the subpoenas. Reporters Committee for Freedom of the Press, *Settlement Reached in Lee Case Involving Reporter’s Subpoenas*, June 2, 2006, <http://www.rcfp.org/news/2006/0602-con-settle.html>.

⁴⁴ See Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003) (increasing the number of TV stations a single entity could own locally and nationally, and relaxing rules limiting the number of radio stations that could be owned within a market, among other things). The FCC’s rule changes were largely struck down in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

⁴⁵ Those opposed to the new rules included groups as disparate as MoveOn.org and the National Rifle Association (NRA). See Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645, 646-647 (2004).

⁴⁶ Charles Layton, *News Blackout*, COLUM. JOURNALISM REV., Dec./Jan. 2004, at 18.

order to satisfy their corporate owners who stood to benefit financially from the rule changes.

The exclusion of public voices and the failure to address public concerns is especially problematic in journalism and mass communication, because those organizations not only exert power through their relationships with their audiences, but also—in the case of news, at least—through their surveillance of other institutions. Unfortunately, many mainstream news organizations have been abandoning their role as public surrogates by de-funding investigative journalism,⁴⁷ loading up their programs with entertainment features,⁴⁸ using their news operations to promote the interests of advertisers or corporate parents,⁴⁹ applying business criteria instead of journalistic criteria to measure their success,⁵⁰ heaping attention on the wielders of power rather than the subjects,⁵¹ and slashing newsroom jobs as a first response to fiscal challenges.⁵²

To say that mainstream media companies are increasingly unresponsive to their audiences (or that they are too *want*-responsive instead of *need*-responsive) is no revelation. But it goes much deeper than that. Many of the ethical failings today are less the result of inadequacy than of deliberate strategies to exploit the trust of audiences.⁵³

⁴⁷ See, e.g., Steve Outing, *Investigative Journalism: Will it Survive?* EDITOR & PUBLISHER, Nov. 16, 2005.

⁴⁸ See, e.g., Lawrence K. Grossman, *TV News: The Great Celebrity Chase*, COLUM. JOURNALISM REV., July/Aug. 1998, at 23.

⁴⁹ Evening newscasts on local FOX-affiliated stations, for example, are filled with updates and features about other FOX shows like “American Idol.”

⁵⁰ See, e.g., DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* (2d ed. 2006) (describing the ascendancy of the “market model” in which profits are the dominant barometers of success, and contrasting it with the “public sphere” model in which success is tied to the advancement of public knowledge and the engagement of citizens in self-governance).

⁵¹ See, e.g., LAWRENCE C. SOLEY, *THE NEWS SHAPERS: THE SOURCES WHO EXPLAIN THE NEWS* (1992) (describing the emphasis in news reporting on the opinions of elites).

⁵² See generally, Joe Strupp, *Cuts Like a Knife*, EDITOR & PUBLISHER, Sept. 3, 2008, at 40.

⁵³ For example, broadcast and cable news organizations now increasingly fill their newscasts with unedited video news releases (VNRs), which are essentially micro-infomercials disguised as regular news segments. They look like news stories but are produced by companies to promote their products, and they are not—as audience members might reasonably assume—subjected to the same journalistic scrutiny and verification processes used by the news staff. See generally Lauren Aiello and Jennifer M. Proffitt, *VNR Usage: A Matter of Regulation or Ethics?* 23 J. OF MASS MEDIA ETHICS 219 (2008) (arguing that the undisclosed use of VNRs is unethical, whether or not it is illegal). The use of these kinds of tactics is particularly common among broadcasters, some of whom have even begun selling on-air interviews to local companies and organizations.

At the same time, government agents are ramping up their control of media content⁵⁴ while simultaneously acquiescing to corporate dominion over the communications infrastructure.⁵⁵

However scholars perceive these issues or gauge their severity, it is important that they appreciate their capacity to create change and their obligation to act when important interests (whether the public's or the media's) are threatened by policies or actions that their *reason* or *research* rejects. It will not do anymore for scholars to work in quiet isolation and to treat their publications as the end points of the research process. All societies need active scholars who are willing to work against the forces that misshape public discourse and public policy.

IV. WHAT PUBLIC SCHOLARS IN MEDIA LAW AND ETHICS SHOULD DO

What, specifically, can scholars accomplish in this environment, and what influence can they wield in the shadow of all this institutional might? Is it naïve to suppose that they can either dismantle these alliances or at least check their excesses? The public as a whole has been unable to do it, after all. Yet scholars are uniquely situated to address these issues. They have unique claims to the core knowledge in their fields, which is the essential fuel of any regime of accountability, and because of that expertise they have access to channels of communication that are unavailable to the public. They are regularly sought out as news sources and their submissions to op-ed

See Howard Kurtz, *Florida TV Station Cashes in on Interview 'Guests,'* WASH. POST, Oct. 16, 2003, at C1. But these ad-editorial entanglements are not limited to television. *The New Yorker*, for example, partnered with Target, allowing it to be the exclusive advertiser for the entire Aug. 22, 2005, issue. Stuart Elliott, *And What Would Thurber Say? A Single-Sponsor New Yorker*, N.Y. TIMES, Aug. 12, 2005, at C5. It also allowed Target to use the distinctive artistic style of *New Yorker* cartoons for all of its print ads in that issue, blurring the distinction between the editorial and advertising content, and the cover of that issue featured a series of red and white beach balls that were clear references to the trademark colors of the Target brand.

⁵⁴ The FCC has accelerated enforcement of its broadcast indecency rules, and it is exploring the possibility of regulating television violence. Congress, meanwhile, is debating whether to revive the Fairness Doctrine, the FCC policy that from 1949-1987 required broadcasters to address issues of public concern and to air competing points of view on those issues.

⁵⁵ For example, the FCC's public-interest requirements are rarely enforced against commercial broadcasters, the license renewal process has become a rubber-stamp with no serious evaluation of the public-interest contributions of the licensees, the FCC continues to push for deregulation of media ownership, and Congress has been unable to agree on legislation to prevent Internet service providers from charging fees to websites in order to ensure that their content is delivered promptly to end users.

pages and other public forums often have an imprimatur of credibility, by virtue of the authors' credentials and institutional affiliations, that helps ensure their dissemination.⁵⁶

Scholars are also better positioned than most others because of the nature of their professional charge, which is, essentially, to seek the truth and to speak about it truthfully. Although citizens, corporations and organizations are expected to pursue their self-interests, albeit with some underlying concern for society, scholars *qua* scholars are expected to maintain a neutral detachment in their explorations of evidence and ideas and to eschew the bargains many people make in seeking to improve their economic or social standing. Scholars' overriding professional fidelity is to knowledge, so they are less encumbered by the conflicting loyalties that tend to inhibit or taint the contributions of others. This is not to say that scholars have no biases or corrupting allegiances. But their default posture, like judges applying the law, is assumed to be one of selfless circumspection, and that is something most people appreciate even if they recognize, as most scholars do, that they are not always up to the task.

There are a number of strategies one might employ in order to advance the goals of public scholarship, and there are many definitions of the concept. Some strategies focus on public interaction,⁵⁷ others encourage public partnerships,⁵⁸ and others suggest that the public be given a role in shaping scholars' research questions.⁵⁹ In the context of media law and ethics, the most productive approaches are those that serve two critical objectives: *transference* and *accountability*. The former refers to the basic goal of translating scholarly research in ways that are meaningful and useful to non-experts. This is a core function highlighted in nearly every conception of public scholarship.⁶⁰ The

⁵⁶ Many media law and ethics scholars also have worked as media professionals themselves, or have some special familiarity with media systems, professional practices, and social networks so they are particularly well-equipped to promote their work and broker media appearances.

⁵⁷ See, e.g., Jeffrey C. Bridger & Theodore R. Alter, *The Engaged University, Community Development, and Public Scholarship*, 11 J. OF HIGHER EDUC. OUTREACH & ENGAGEMENT 175 (2006).

⁵⁸ See, e.g., *supra* note 1. This can involve things like commissioned research, service-learning projects or academic-public collaborations.

⁵⁹ See, e.g., Statement of Public Scholarship Committee, University of Minnesota (undated), <http://www.engagement.umn.edu/cope/archives/cholar.html> (“[P]ublic scholarship means optimizing the extent to which University research informs and is informed by the public good, maximizes the generation and transfer of knowledge and technology, educates the public about what research the University does, and listens to the public about what research needs to be done.”) (emphasis added).

⁶⁰ *Id.* See also *supra* note 1, using the term “popularization.” Scholars serve a similarly useful function when they synthesize existing research to provide the kind of scale and context that is often missing from examinations of public controversies. Debate about whether the Federal Communications Commission (FCC) should begin regulating television violence, for example,

second objective, accountability, gets less attention but is especially vital in light of the challenges to professional ethics, the threats to media independence and the broader collapse of power into fewer hands. Both transference and accountability, properly pursued, are also essential to serving the overarching purpose of public scholarship.⁶¹

Scholars can serve this transference function by acting as news sources, speaking to community groups, writing for trade or popular publications, or engaging in other acts that are designed to enhance the substantive quality of public discourse. This transfer of knowledge⁶² can help people to better understand their worlds and make better choices, provided it is done well. The promise of public scholars is that they will be able to cut through the cacophony of chirping pundits and provide richer assessments. Their role is to complicate the simple and to simplify the complicated by drawing upon their research and expertise to situate public issues in their proper conceptual, theoretical and historical context.⁶³ They can only do these things, however, if they avoid the trappings of the forum by resisting the pressure to reduce complex problems into the shallow dichotomies that are becoming the staples of popular discourse, particularly on television and radio.⁶⁴

Public scholars are most helpful when they are able to subvert those formulas and bring scale and perspective to public discussions. This is not just desirable; it is necessary, because there are real consequences when scholars fail to do these things. Media lawyers and media law scholars, for example, have long argued that the public's resistance to the journalist's privilege⁶⁵ protection is rooted in a false belief that it is a

should have as its foundation the rich body of existing research examining the relationship between violent content and violent behavior.

⁶¹ See *supra* note 6 and accompanying text.

⁶² I have deliberately avoided the phrase "contextualized knowledge," favored by some authors (see, e.g., Inna Kotchetkova, Robert Evans and Susanne Langer, *Articulating Contextualized Knowledge: Focus Groups and/as Public Participation?* 17 *SCIENCE & CULTURE* 71 (2008), because it is redundant. Knowledge without context is simply information. See *infra* note 63.

⁶³ We need to help move the public up the information-knowledge-wisdom hierarchy. See T.S. Eliot, *Choruses from The Rock* (1934) reprinted in T.S. ELIOT, *COLLECTED POEMS 1909-1962* at 148-149 (1963) ("Where is the wisdom we have lost in knowledge? Where is the knowledge we have lost in information?"). Others have suggested that "data" should precede "information" in this sequence. Russell L. Ackoff, *From Data to Wisdom*, 16 *J. OF APPLIED SYS. ANALYSIS* 3 (1989).

⁶⁴ Doing this could also serve another goal of public scholarship noted by Bridger and Alter: to "restore civility to [our] discourse." *The Engaged University*, *supra* note 57, at 175.

⁶⁵ The reporter's privilege is the right of journalists to refuse to comply with certain subpoenas seeking their testimony or work products, particularly those requiring disclosure of confidential sources. The U.S. Supreme Court refused to recognize the privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972), but many lower federal courts have recognized some form of the

special right⁶⁶ bestowed on the established media rather than a public right claimable by anyone who seeks to serve as a monitor of powerful interests.⁶⁷ By more clearly outlining the nature of the protection, whom it benefits and how it fits within the constitutional design, media law scholars can help the public make knowledgeable judgments.⁶⁸ Law professor Lawrence Lessig provided another example recently when he suggested that Congress' passage of the Copyright Term Extension Act,⁶⁹ and the Supreme Court's refusal to strike down that law,⁷⁰ were partly the fault of lawyers and legal scholars who failed to convey to Congress, the Court and the public the nature of the underlying controversy and the full effect of its enforcement.⁷¹ The same kinds of pitfalls and opportunities exist in the world of media ethics. Research showing a systematic bias in media coverage of a political candidate could, if revealed to voters, have a real impact on an election. And evidence of advertising strategies that shift traditional conceptions of truth-telling could affect the economic independence of consumers, but only to the extent that this knowledge is transferred to them.

privilege, and 37 states and the District of Columbia protect the privilege by statute. See Reporters Committee for Freedom of the Press, *Reporter's Privilege Compendium*, <http://www.rcfp.org/privilege/index.php>.

⁶⁶ See Michael Battle, *No Special Privilege*, USA TODAY, June 22, 2006, at 12A.

⁶⁷ The definition of "journalist" varies in the jurisdictions that recognize the reporter's privilege. But the trend in the federal courts is to employ an encompassing definition that protects anyone who serves a journalistic function. See *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (granting protection to those who have "the intent to use the material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.").

⁶⁸ I do not mean to suggest that all media law scholars do, or should, support recognition of the reporter's privilege; only that they should seek to ensure that the public's judgments on those issues are informed ones.

⁶⁹ This law extended copyright owners' rights by 20 years. Pub. L. No. 105-298. 112 Stat. 2827. Concern over the issue was triggered by Disney's copyright on Mickey Mouse, which was about to expire before Rep. Sonny Bono led the charge in Congress to extend the terms of all existing and future copyrights.

⁷⁰ *Eldred v. Ashcroft*, 537 U.S. 136 (2003).

⁷¹ Lessig argued that although the initial trigger for passage of the statute was Disney's expiring copyright on Mickey Mouse, the case was really about the public's ability to use known cultural products to create new works, and about the ways in which innovation would be inhibited by vesting copyright owners with too much control over their work. Lawrence Lessig, *Free Culture: Copyright and the Future of Ideas* (Final Talk), public lecture at Stanford University, Jan. 31, 2008. Podcast available at <http://itunes.stanford.edu>.

The traditional public-scholar approaches represent a knowledge-as-power framework, and they are useful as far as they go. But they work as only an indirect kind of empowerment. They still require a deliberate effort by the audience to integrate and make use of that knowledge. What is needed now, however, is for scholars to broaden and intensify our public roles, to go beyond the transfer of knowledge by acting more aggressively as intermediaries between the government and the media, and between the media and the public. Many scholars resist this, because they fear an erosion of their credibility if they are perceived as advocates. That is a valid concern, but credibility is not endangered by what this essay proposes, which is not for scholars to abandon their neutrality in the exploration of ideas but rather (1) to fearlessly endorse policy proposals, legal standards or ethical practices that they believe are best, whether as matters of empirical evidence, principle, or both, (2) to plainly call out government officials who overreach in their efforts to control the media and, (3) to expose media professionals who do not live up to the commitments they make to their audiences. Certainly a fine line separates the *active* and the *activist*, but better that scholars occasionally step across that line than never approach it in the first place.

Accountability cannot be something that is incidental to what scholars do. It must be a goal they actively pursue as agents of the people in their relationship with the media, and as agents of the media in their relationship with the government.⁷² They can do this in part through transference strategies, but also more deliberately through the issues they choose to examine and in the research questions they pose. For some scholars, this might mean deliberately crafting research projects that address questions that are relevant to accountability goals. For others, it might simply mean considering the implications of their research on those questions to ensure they are not overlooked. A media law or ethics scholar who is interested in a historical topic, for example, might not design the project with accountability in mind, but the findings might help contextualize a current conflict.

Scholars can go still further by creating research centers and other organizational entities that serve accountability goals, like the Annenberg Public Policy Center at the University of Pennsylvania, headed by Kathleen Hall Jamieson, which addresses media and public policy,⁷³ and Free Press, a media reform organization launched by Robert McChesney as an outgrowth of his scholarly work.⁷⁴ These kinds of bodies can provide more sustained oversight than individual scholars acting alone, and they can provide scrutiny that is grounded in research-based knowledge—something that is rarely supplied by the proliferating horde of online commentators.

⁷² To say that scholars are “agents” of the public and the media is not to say they take direction from them. It simply means that they are attentive to public and media interests when those interests are threatened.

⁷³ See <http://www.annenbergpublicpolicycenter.org>.

⁷⁴ See <http://www.freepress.net>.

A focus on accountability also requires that scholars make it a priority to address the most pressing questions confronting society. This assertion should be obvious, but scholars often do the opposite. They scatter within their disciplines, staking claims to new areas of inquiry as a way of forging their professional identities.⁷⁵ They then reward each other for those efforts by exalting novelty over impact and by keeping alive the enduring conceit that their work's obscurity is somehow a marker of its value. While there is merit in taking a no-stone-unturned approach to scholarship, the current system of rewards tends to diffuse scholarly efforts and to push faculty into areas that may be interesting but that are often removed from the subjects of greatest consequence. Questions like "What is truth in advertising,"⁷⁶ "Who is a journalist,"⁷⁷ and "How do we define the public interest"⁷⁸ are not new, but they are undoubtedly salient and need to be continually reevaluated in changed contexts. Some questions and issues are bigger or more pressing than others, and they should be the focus of scholars' collective efforts, even though some of them will still need to keep exploring the more remote corners of their disciplines.

V. THE URGENCY OF PUBLIC SCHOLARSHIP IN MEDIA LAW AND ETHICS

Media law and ethics scholars are ahead of many of their academic colleagues in their willingness to engage the public and to find non-traditional outlets for their research and ideas. But there is more that they can do, and more that they must do to protect the

⁷⁵ There are certain theoretical frameworks and methodological approaches around which scholars tend to gravitate, and that clustering is generally useful. But when it comes to particular issues or subject areas, they tend to pull apart from each other.

⁷⁶ The current emphasis on clandestine advertising strategies (*e.g.*, guerilla marketing, product integration, buzz marketing) makes this especially salient. Because many of these tactics depend for their success on the audience believing something that is false, they are putting pressure on the traditional conceptions of truth in advertising.

⁷⁷ This remains a central question in both ethics and law. The federal courts are deeply conflicted about the existence and scope of the First Amendment reporter's privilege, among other legal protections, and the issue of journalistic identity is at the core of those disputes. That is certainly true in the realm of professional ethics as well where communicators share increasingly divergent conceptions of what kinds of messages are most credible and which media are most worthy of the public's attention.

⁷⁸ The Federal Communications Commission still regulates broadcast radio and television, imposing on them a unique obligation to serve the "public interest, convenience and necessity." The traditional justifications for this differential treatment (spectrum scarcity, the pervasiveness of broadcast signals), however, are withering with the proliferation and convergence of media, and lawmakers and judges are still trying to determine what the public ought to be able to expect (as a matter of ethics) and demand (as a matter of law) from mass media.

interests of both media professionals and the public. The problems today are especially acute. The ethical devolution within many quarters of the media professions, the expansion of corporate influence and the intrusion of government officials into media domains make this an especially pressing moment for scholars to reevaluate the aims of their research and other activities.

One area in which scholars have fallen down recently is in checking the excesses of the federal government (although they are certainly not alone in that failure). The powers of the federal government, particularly the executive branch, grew exponentially over the past eight years, and the Bush Administration wasted few opportunities to antagonize its perceived enemies in the press. The Justice Department dogged journalists with federal subpoenas,⁷⁹ seized their mail,⁸⁰ and searched their phone records.⁸¹ Some federal officials even publicly pondered whether to bring espionage charges against journalists who exposed the government's illegal wiretapping program⁸² and its rendition of prisoners to secret CIA prisons.⁸³ Public and scholarly resistance to these violations

⁷⁹ The prominent target of a federal subpoena was *New York Times* reporter Judith Miller who spent 85 days in jail for refusing to divulge the identity of the anonymous source who leaked to her the identity of undercover CIA agent Valerie (Plame) Wilson. Her attempt to quash the subpoena was denied. In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S.Ct. 2977 (2005). Miller is just one of dozens of reporters who have been subpoenaed in federal cases over the past several years. For an overview of those cases, see Reporters Committee for Freedom of the Press, *Special Report: Shields and Subpoenas in Federal Courts*, last updated June 27, 2008, at http://www.rcfp.org/shields_and_subpoenas.html.

⁸⁰ In 2003, for example, an Associated Press reporter in the Philippines sent a package to a co-worker in the United States that was confiscated by the FBI even though the quarantined documents in that package were from public records. See *FBI Returns Lab Report to News Service*, ASSOC. PRESS, May 11, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=11455>.

⁸¹ U.S. Special Prosecutor Patrick Fitzgerald searched the phone records of two *New York Times* reporters in order to discover the identities of anonymous sources who leaked details of a planned government raid of two Islamic charities. The reporters' challenge to the search was denied in *New York Times v. Gonzalez*, 459 F.3d 160 (2d Cir. 2006).

⁸² *New York Times* reporters James Risen and Eric Lichtblau broke the story of the National Security Administration's domestic surveillance program in 2006 and subsequently won the Pulitzer Prize. After later publishing a story about the Treasury Department's anti-terrorism bank-monitoring program, Republican Congressman Peter King of New York urged that the *Times* be investigated for treason. Rani Gupta, *Reporters or Spies?* 30 NEWS MEDIA & THE LAW 4 (Fall 2006).

⁸³ *Washington Post* reporter Dana Priest won a 2006 Pulitzer Prize for breaking this story. President Bush called Priest's reporting "disgraceful." Michael Tomasky, *Keller Must Stay*, AM. PROSPECT (Web only), June 30, 2006, <http://www.prospect.org/cs/articles?articleId=11689>.

was muted, in part because the government defended itself by raising the specter of security breaches and terrorist attacks.

Many news organizations, meanwhile, have done little to inspire the public's confidence and to position themselves as the victims in these battles. There are many journalists doing exceptional reporting today, but their work is increasingly crowded out by sensational and commercialized material that is of little value to audiences but that yields bigger returns for owners and advertisers who are wresting more control over content choices and are killing professionalism in the process. The public-interest spirit of journalism is slowly giving way to the same ruthless self-focus that pervades much of the rest of corporate America. Not only is there a lack of commitment to serious news, the whole concept of news is being transformed by media owners who treat it as just another commodity that can be crafted and arranged in any way that serves the bottom line. Many mainstream media organizations, in their efforts to accommodate their owners and to maximize profits, have changed news at a molecular level by amalgamating it with commercial content and creating unseemly hybrids that the audience is left to detect.

The same kind of cynical manipulation is now pervasive in advertising and public relations. Professionals in those fields have always worked from a different set of rules than journalists, but they have still embraced some common standards that the public has come to expect and that they have enshrined in professional codes of ethics like those of the Public Relations Society of America⁸⁴ and the American Association of Advertising Agencies.⁸⁵ Advertising and PR professionals have engaged in a compact with their audiences by virtue of these public pronouncements, and by virtue of the other ground rules of communication that have evolved over time,⁸⁶ through which they have confessed their intent to influence us but with a concomitant promise not to deceive. In the past few years, however, many advertising and PR professionals have changed those rules without alerting their audiences and without rescinding the explicit assurances that remain in their ethics codes. The AAAA and PRSA codes clearly prohibit deception and false testimonials, among other things, yet their members routinely disguise commercial messages as news (through payola,⁸⁷ video news releases⁸⁸ and other arrangements⁸⁹),

⁸⁴ The PRSA Member Code of Ethics was most recently revised in 2000 and is available at http://www.prsa.org/aboutUs/ethics/preamble_en.html.

⁸⁵ The AAAA Standards of Practice was first adopted in 1924. It was most recently revised in 1990 and is available at <http://www2.aaa.org/about/association/Pages/standardspractice.aspx>.

⁸⁶ One of these is the allowance we give to advertisers to engage in puffery—harmless exaggerations about their products (*e.g.*, “Sleeping on a Sealy mattress is like sleeping on a cloud”). As long as this hyperbole is obvious to us, we have no standing to claim we have been deceived.

⁸⁷ This refers to any payment given to a broadcaster in exchange for airing particular content. Federal law prohibits these pay-for-play deals in broadcasting, but they are still common. The

integrate their products into non-commercial contexts,⁹⁰ and employ guerilla marketing tactics in which commercial pitches are camouflaged within ordinary human encounters.⁹¹

These changes in advertising and public relations are not simple tactical adjustments. They are part of a fundamental reordering of the relationship between these communicators and their audiences. Conventional advertising, as author Malcolm Gladwell notes, has always been about “trying to persuade us, or trying to charm us,” but it hasn’t usually “been about trying to trick us.”⁹² Unfortunately, trickery is becoming conventional. And it will continue to be normalized unless scholars and consumers insist on something different.

VI. CONCLUSION

Clearly there is a role for public scholarship to play in an environment where many advertising and PR communicators unabashedly disregard their promises to their audiences, where news organizations cast aside their public-service commitments, and where government officials aggressively interfere with the newsgathering and watchdog functions of journalists. The public needs allies who can work with them to hold these institutions accountable. Scholars need to answer this call by speaking out in public forums, educating the public, using research to document the excesses of government and the betrayals of media companies, and proposing new normative frameworks to both reorient professional practices and promote the proper balance between freedom and restraint.

Doing those things will involve more than just taking research to the public. It will require a reevaluation of the issues that scholars address and the questions they pose.

FCC has recently initiated a crackdown on these practices, however. *See* Notice of Apparent Liability for Forfeiture, Comcast Corporation, DA 07-4005, Sept. 21, 2007.

⁸⁸ *See supra* note 53.

⁸⁹ *Id.*

⁹⁰ Product placement is increasingly common in news programming and can include anything from the display of Starbucks coffee mugs on anchor desks to the profiling of particular products in segments on fashion trends or hot gift ideas.

⁹¹ *See* Rob Walker, *The Hidden (In Plain Sight) Persuaders*, N.Y. TIMES MAGAZINE, Dec. 5, 2004, at 68, describing, among other things, a sausage company’s tactic of paying people to act as enthusiastic devotees and to promote their products at neighborhood barbeques and in private conversations.

⁹² MORLEY SAFTER, *Undercover Marketing Uncovered*, 60 MINUTES (interview with Malcolm Gladwell), July 25, 2004. Transcript available at <http://www.cbsnews.com/stories/2003/10/23/60minutes/main579657.shtml>.

It will require an attitudinal shift in academia about the intellectual value of public-scholar initiatives. It will require institutional support, particularly by promotion and tenure committees. And it will require that scholars abandon their feckless agnosticism on the most important questions of the day, particularly when their research and reason clearly point to the answers. Scholars do not enhance their credibility by sitting on their hands in the ivory tower; they merely ensure their irrelevance.