

# TRUTH IN JOURNALISM: OXYMORON OR LOFTY IDEAL?

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*There was things which he stretched,  
but mainly he told the truth.*

*That is nothing.*

*I have never seen anybody but lied, one time or another...\*\**

## Abstract

This article continues the earlier discussion, by the same author, on the meaning of 'truth' in philosophy and in the law.<sup>1</sup> That article identified notable dissonance on the meaning of 'truth' between the two discourses. It was noted there that deep divisions run within philosophy on the meaning of the term, while an examination of the term in the context of the law revealed tensions and significant ramifications arising from the potential for two, potentially conflicting, kinds of truth in a trial. This article examines truth in the context of journalism. It argues that although journalism espouses a lofty ideal – the communication of truth – the journalistic method presents considerable difficulty for the attainment of 'truth'.

## I INTRODUCTION

Like the mixed response to the meaning and status of truth in respect of the philosophical and legal discourses considered previously, the term

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\*\* Mark Twain, *The Adventures of Huckleberry Finn* (1979) 3.

1 This article has been adapted from a chapter in the author's PhD law thesis, which proposes reforms to the truth defence in Australian defamation law: see, Joseph M Fernandez, *Loosening the Shackles of the Truth Defence on Free Speech: Making the Truth Defence in Australian Defamation Law More User Friendly for Media Defendants* (PhD Thesis, The University of Western Australia, 2008). The first part of this article was published in the previous issue of this publication: see, Joseph M Fernandez, 'An Exploration of the Meaning of Truth in Philosophy and Law' (2009) 11 *University of Notre Dame Law Review* 53 (UNDALR). The author gratefully acknowledges earlier comments on this article by his PhD supervisors, Professors Michael Gillooly and Peter Handford of the University of Western Australia. Professor Niall Lucy, Dr Peta Bowden and Dr Fran Martin also provided useful comments. Any remaining lapses in this article are the author's entirely.

reveals similar ambiguities and ambivalence in the context of journalism. The previous article argued that the inquiry into the meaning of truth was particularly significant in the context of a discussion on the role of truth in the trial process, which often attracts criticism for failing to uncover or to heed the truth. This article continues that discussion by examining the meaning of truth in the context of journalism. The discussion in both articles occurs against a defamation law backdrop. There are two primary reasons for this. Firstly, defamation actions are a significant source of potential liability for the media and are widely acknowledged as a source of the ‘chilling effect’ on speech. Secondly, journalistic output countenances the court trial process in defamation actions where truth (or justification) is an established defence. It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.<sup>2</sup> While the truth defence is not the focus of this article, it would be useful to briefly note the significance of the truth defence in the present context. It is one of the few legal defences that explicitly recognises truth as ‘a complete answer to a civil action’<sup>3</sup> or a ‘complete defence’.<sup>4</sup> That defence has been recognised as the ‘oldest of all libel defences’;<sup>5</sup> the ‘principal defence’<sup>6</sup>; and an ‘important’ defence<sup>7</sup> – although for a significant period of English history, notably the period of the Star Chamber, the law’s position was ‘the greater the truth, the greater the libel’.<sup>8</sup> The truth defence manifests the broad recognition of the public ‘interest in the facilitation of the public’s right to know’.<sup>9</sup> The defence also impacts on the public interest ‘in the discovery of truth’.<sup>10</sup> The tendency for a conflict between the truth imperative in judicial and media contexts, the ambiguous nature of truth in these two contexts, and the strict demands of that defence, however, have been argued as having failed media defendants.<sup>11</sup>

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2 *Defamation Act 2005* (WA) s 25. This provision is uniform throughout Australia.

3 *Rofo v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4, 21 (Street ACJ).

4 *Li v The Herald & Weekly Times Pty Ltd* [2007] VSC 109 219 (Gillard J).

5 Wayne Overbeck, *Major Principles of Media Law* (2007) 126. Paul Mitchell, ‘The Foundations of Australian Defamation Law’ (2006) 28(3) *Sydney Law Review* 477, 478 notes that ‘the principle that truth was a complete defence to defamation had been established since at least the 14<sup>th</sup> Century’.

6 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) [120].

7 Don R Pember, *Mass Media Law* (2003/2004) 201.

8 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 67-68 (Deane and Toohey JJ).

9 New South Wales Law Reform Commission, *Defamation*, Report No 75 (1995) [2.1].

10 New South Law Reform Commission, above n 9, [2.1]. See also Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> ed, 2007) 7-13.

11 See generally Fernandez PhD Thesis, above n 1, 1.

While the definition of ‘journalist’ and ‘journalism’ remains contested<sup>12</sup> there are ‘widely held views of journalism and law as truth-seeking and fact-based institutions’.<sup>13</sup> Many a journalist would profess – as Jesus did before Pilate – that theirs is a vocation to bear witness to the truth. It is said that journalism ‘has a lofty ideal – the communication of truth’<sup>14</sup> and that it serves the public interest by truth-telling;<sup>15</sup> (we may briefly note here that *truth-telling* is to be distinguished from the concept of *truth*, the former giving rise to specific practical constraints that are not characteristic of truth more generally). The classic conundrum that haunts journalism has been put thus:

Over the last three hundred years, news professionals have developed a largely unwritten code of principles and values to fulfil the function of providing news – the indirect knowledge by which people come to form their opinions about the world. Foremost among these principles is this: **Journalism’s first obligation is to the truth.** On this there is absolute unanimity and also utter confusion: Everyone agrees journalists must tell the truth. Yet people are befuddled about what ‘the truth’ means.<sup>16</sup>

The discussion below considers various factors that contribute to the befuddlement. One immediate point to note is the professional primacy ostensibly accorded to truth in journalism and the profession’s apparent unanimity in this regard.

This desire that information be truthful is elemental. Since news is the material that people use to learn and think about the world beyond themselves, the most important quality is that it be usable and reliable... Truthfulness creates, in effect, the sense of security that grows from awareness and is at the essence of news. This basic desire for truthfulness is so powerful, the evidence suggests it is innate.<sup>17</sup>

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- 12 For a definition of ‘journalist’ see Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Discussion Paper, Project 90 (1991) Ch 7 n 1. See also Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Report, Project 90 (1993) Ch 4 [8]. For a discussion on the ‘attributes’ of journalists see David Conley and Stephen Lambie, *The Daily Miracle: An Introduction to Journalism* (3<sup>rd</sup> ed, 2006) 16-18, 22, 80, 237. Increasingly, however, the definition of ‘journalist’ or ‘journalism’ is under pressure as a result of modern technological advances and the increased avenues for ‘self-publishing’: see Matthew Collins, *The Law of Defamation and the Internet* (2<sup>nd</sup> ed, 2005) 33. There has been residual disagreement over who is a journalist and this partly ‘stems from the changed practices by which journalism is implemented’: see Barbie Zelizer, *Taking Journalism Seriously: News and the Academy* (2004) 40. The question of whether journalism is a profession is discussed below under heading III(A).
- 13 Marcus O’Donnell, ‘Preposterous Trickster: Myth, News, the Law and John Marsden’ (2003) 8(4) *Media and Arts Law Review* 282, 283.
- 14 Philip Patterson and Lee Wilkins, *Media Ethics: Issues and Cases* (4<sup>th</sup> ed, 2002) 18.
- 15 Lynette Sheridan Burns, *Understanding Journalism* (2002) 29.
- 16 Bill Kovach and Tom Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (1<sup>st</sup> ed, 2001) 37 (emphasis in original).
- 17 Kovach and Rosenstiel, above n 16, 37-38.

Journalists, it is said, have identified truth ‘overwhelmingly as a primary mission’.<sup>18</sup> Yet the public’s scepticism of journalism’s commitment to the truth is reflected in varying forms<sup>19</sup> and the increasing difficulty of ‘convincing individuals who have been battered by the tabloid press that “truth in journalism” is not an oxymoron’<sup>20</sup> has been noted.

## II A HISTORICAL BACKDROP

Historically, the quest for ‘the truth’ was identified as a cornerstone of the journalistic pursuit.

As the modern press began to form with the birth of democratic theory, the promise of being truthful and accurate quickly became a powerful part of even the earliest marketing of journalism. The first identifiable regular newspaper in England proposed to rely ‘on the best and most certain intelligence’. The editor of the first paper in France, though his paper was government owned, promised in his maiden issue, ‘In one thing I will yield to nobody – I mean in my endeavour to get at the truth.’ Similar promises to accuracy are found in the earliest papers in America, Germany, Spain, and elsewhere.<sup>21</sup>

The looseness of the term ‘truth’ in journalism is evident in the above quotation. Kovach and Rosenstiel appear to use ‘truth’ and ‘accuracy’ interchangeably, although the two do not mean the same thing,<sup>22</sup> as recognised early last century:

By the beginning of the twentieth century journalists were beginning to realise that realism and reality – or accuracy and truth – were not so easily equated. In 1920, Walter Lippmann used the terms *truth* and *news* interchangeably in ‘Liberty and the News’. But in 1922, in *Public Opinion*, he wrote: ‘News and truth are not the same thing... The function of news is to signalise an event, or make people aware of it. ‘The function of truth is to bring light to the hidden facts, to set them into relation with each other, and make a picture of reality upon which men can act.’<sup>23</sup>

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18 Kovach and Rosenstiel, above n 16, 37.

19 See, for eg, the consistent low ranking of newspaper journalists in the Roy Morgan Poll ranking of the image of various professions for professional ethics and honesty. In 2009 newspaper journalists were at No 28, three places from the bottom of the table and ahead only of advertising people and car salesmen: see Roy Morgan, *Image of 23/29 Professions Declines in 2009*, (2009) <<http://www.roymorgan.com/news/polls/2009/4387/>> at 14 March 2010.

20 Sharon Tickle, ‘The Truth, the Whole Truth, and Nothing But...’ in Suellen Tapsall and Carolyn Varley (eds), *Journalism: Theory in Practice* (2001) 89.

21 Kovach and Rosenstiel, above n 16, 39. See Mitchell Stephens, *A History of News* (3<sup>rd</sup> ed, 2007) xi-xxvii, for a convenient chronology of the development of news, dating from *circa* 40,000 B.C. when news spread ‘by word of mouth’. A more conventional view appears to be that ‘news’ (new information of topical interest) first appeared regularly in the West when Julius Caesar posted Senate discussions, called the *acta senatus*, outside the Senate building for Roman citizens to read: see Arnold S de Beer and John C Merrill, *Global Journalism: Topical Issues and Media Systems* (4<sup>th</sup> ed, 2004) 164.

22 See discussion under heading III(B)(1) below.

23 Kovach and Rosenstiel, above n 16, 40.

It took another sixteen years before journalism textbooks ‘were beginning to question how truthful the news could really be’.<sup>24</sup> The debate continued over the next fifty years and the point has been reached ‘where some deny that anyone can put facts into a meaningful context to report the truth about them’.<sup>25</sup> It is further said:

[T]he instinct for truth is no less necessary today – in the age of new media and proliferating outlets – than it ever was...The need for truth is greater, not less, in the new century, for the likelihood of untruth has become so much more prevalent. For that to occur, the next step is that journalists must make clear to whom they owe their loyalty.<sup>26</sup>

The present state of affairs concerning journalism and truth will become clearer in the discussion below.

### III SOME CRITICISMS OF JOURNALISM’S APPROACH TO TRUTH

An examination of journalism’s attitudes towards truth reveals ambivalence similar to that seen in the courts’ approach to truth discussed in the previous article.<sup>27</sup> A number of factors bear on journalism’s approach to truth and, while the following does not purport to represent a comprehensive catalogue, it is a useful starting point. The following discussion reveals how the journalistic craft, because of its ‘infrastructural’ features or institutional limitations, impairs the pursuit and communication of truth. The discussion in this part is organised under the following main headings: (A) truth in the professional framework; (B) factors to consider in journalistic truth; and (C) some responses to criticisms.<sup>28</sup> An understanding of these matters facilitates an appreciation of how the truth is constructed in journalistic production.

#### A *Truth in the Professional Framework*

It would be useful to first consider a threshold matter – what is a journalist, and is journalism a ‘profession’? The answer to these questions will illuminate, among other things, whether the grouping has any truth ‘attributes’<sup>29</sup> or professional commitment to truth, and whether there are

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24 Kovach and Rosenstiel, above n 16, 40.

25 Kovach and Rosenstiel, above n 16, 40.

26 Kovach and Rosenstiel, above n 16 47-48.

27 See Fernandez, *UNDALR*, above n 1, especially, Part III.

28 See headings III(A); III(B); and III(C), respectively.

29 For an example of professional attributes see Stan Ross and Peter MacFarlane, *Lawyers’ Responsibility and Accountability: Cases, Problems and Commentary* (1<sup>st</sup> ed, 1997) 18, noting the following main attributes found by sociologists in determining a profession: (a) skill based and theoretical knowledge; (b) the provision of training and education; (c) testing the competence of members; (d) organisation; (e) an ethical code of conduct; and (f) altruistic service.

other rules of conduct peculiar to this grouping which potentially bear upon its pursuit and dissemination of truth. Such questions were not asked of the judiciary in the earlier article on the premise that judges overcome demanding professional hurdles to reach the Bench. It may be noted, for instance, that appointments are made by constitution or statute, and the responsibility for appointment is vested in the executive – the Commonwealth government for High Court and other Federal Court appointments, and State governments for State court appointments; and there are statutory criteria of eligibility which are usually limited to a period of admission or practice as a barrister and/or solicitor.<sup>30</sup> In addition, various statutory instruments directly govern judicial work.<sup>31</sup>

Membership to a profession traditionally signifies that the individual will be ‘held to a certain standard of conduct that goes beyond the norm for others’<sup>32</sup> through written or unwritten rules and attributes. Telling the truth is one of two ‘modern responsibilities’ imposed on journalists.<sup>33</sup> Scholars, however, disagree on journalism’s status as a profession.<sup>34</sup> Generally speaking, there are great difficulties in using the term ‘professional’ because another part of the definition of a ‘profession includes entering an occupation that involves a form of learning or science...By contrast, in everyday language, we hear, for example, that a person is a carpenter or plumber by profession’.<sup>35</sup> Journalism educator John Henningham has stated that many journalists claim that theirs is a profession while others do not care.<sup>36</sup> After examining journalism in terms of five professional criteria – service, knowledge, autonomy, professional organization, and ethical codes – he states that

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30 James Crawford and Brian Opeskin, *Australian Courts of Law* (4<sup>th</sup> ed, 2004) 63. In an earlier edition, however, Crawford described the appointment of judges as ‘not very exacting’: James Crawford, *Australian Courts of Law* (3<sup>rd</sup> ed, 1993) 61. See also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) Chapter 2.

31 For example, at Commonwealth level alone – *Judiciary Act 1903* (Cth); *High Court of Australia Act 1979* (Cth); *Federal Court of Australia Act 1976* (Cth); and *Family Law Act 1975* (Cth).

32 Burns, above n 15, 22.

33 The other is cited as the obligation to foster political activity: see Burns, above n 15, 23. The nature of the truth ‘responsibility’ is discussed below in the context of ethical code obligations: see headings III (A)(1) and (2).

34 Burns, above n 15, 23. Burns cites Lebacqz’s view that to belong to a profession is traditionally to be held to a certain standard of conduct that goes beyond the norm for others, and that it is on this basis that scholars have both defended and rejected journalism’s status as a profession (22-23).

35 Ross and MacFarlane, above n 29, 19.

36 John Henningham (ed), *Issues in Australian Journalism* (1<sup>st</sup> ed, 1990) 129. The author devoted an entire chapter to the question ‘Is journalism a profession?’ See also Media, Entertainment and Arts Alliance/Australian Journalists Association, Ethics Review Committee Report, *Ethics in Journalism* (1997) 3-6.

'it is evident that the occupation is in a somewhat ambiguous position'<sup>37</sup> but adds that despite the ambiguities there appears to be 'a process of professionalisation within the occupation'.<sup>38</sup> Ethicists Patterson and Wilkins take a less uncertain position and describe journalism as one of the 'traditional professions [which] has a lofty ideal: the communication of truth'.<sup>39</sup> In contrast, Baker suggests that newspaper reporting is 'not a profession - it's a craft, like making leather sandals' although he observes that 'there are times when the level of required skill is as high as that of any of the so-called professions'.<sup>40</sup> Journalism and related terms have been the subject of legal attempts at definition. The term 'journalism' received attention from the Australian Law Reform Commission for the purposes of privacy law reform. The Commission also expressed a preference for the 'plain English meaning' for the terms 'news', 'current affairs' and 'documentary' - in reality giving the terms, and in turn 'journalism' itself, a broad berth.<sup>41</sup> In the United States, the definition of 'journalism' was discussed in the context of legislative attempts to define the scope of protection arising from journalists' claims for the protection of confidential sources of information through 'shield law' (a reference to law aimed at protecting confidential sources). One approach taken in moves to introduce (into the US) *The Free Flow of Information Act* was such that a 'covered person' may not be compelled, except in limited circumstances, 'to provide testimony or produce any document related to information obtained or created as part of engaging in journalism'.<sup>42</sup> In that Bill 'journalism' was defined as 'the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or

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37 Henningham, above n 36, 153.

38 Henningham, above n 36, 153. The author notes further (at 151) that the existence of an ethics code does not in itself indicate that an occupation is a profession, nor does its absence indicate that an occupation is not a profession.

39 Patterson, above n 14, 18. On the same point - that journalism is a profession - see Burns, above n 15, 23.

40 Bob Baker, *Newstinking: The Secret of Making Your Facts Fall Into Place* (2002) 9.

41 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Chapter 42. Recommendation 42-1 [42.54] was that the *Privacy Act* should be amended to define 'journalism' to mean the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public: a) material having the character of news, current affairs or a documentary; b) material consisting of commentary or opinion on, or analysis of, news, current affairs or a documentary; or c) material in respect of which the public interest in disclosure outweighs the public interest in maintaining the level of privacy protection afforded by the model Unified Privacy Principles. See also Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (September 2007), especially [38.64] for the 'four main options' for defining the word 'journalism'; and Proposal 38-1 [38.70].

42 Section 2(a) *Free Flow of Information Act of 2009* (HR 985), which was passed by the US House of Representatives on 31 March 2009 <<http://thomas.loc.gov/cgi-bin/query/D?c111:3:./temp/~c11115X0b9::>> at 13 September 2010.

international events or other matters of public interest for dissemination to the public'.<sup>43</sup> A later iteration, however, avoided reference to the term 'journalism' and instead broadly prescribed protection for the 'covered person':

The term 'covered person' - (A) means a person who - (i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by - (I) conducting interviews; (II) making direct observation of events; or (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form; (ii) has such intent at the inception of the process of gathering the news or information sought; and (iii) obtains the news or information sought in order to disseminate the news or information by means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means...<sup>44</sup>

It is also in the context of shield law discussion in Australia that journalism's professional status has been affirmed. Shield laws have another relevance for present purposes and that is the potential they offer for journalists to access the truth. As for journalism's 'professional status', three law reform Commissions considered journalism 'a profession which falls under sections 126A and 126B of the *Evidence Act 1995* (NSW)'.<sup>45</sup> These sections did not expressly confer professional status on journalists but they created a category of privilege called a 'professional confidential relationship privilege'. Those sections were 'not directed expressly to apply to journalists and their sources'<sup>46</sup> but in *NRMA v John Fairfax Publications*<sup>47</sup> they were applied to a journalist-source relationship and it was held that the privilege was broad enough to encompass that

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43 Section 4(5) *Free Flow of Information Act of 2009* (HR 985), which was passed by the US House of Representatives on 31 March 2009 <http://thomas.loc.gov/cgi-bin/query/D?c111:3:./temp/~c11115X0b9::>> at 13 September 2010.

44 This was the meaning proposed in the Bill (s 448) as passed by the US Senate Judiciary Committee in s 11(2) *Free Flow of Information Act of 2009* <[http://thomas.loc.gov/cgi-bin/query/C?c111:./temp/~c111VgrfzD](http://thomas.loc.gov/cgi-bin/query/C?c111:./temp/~c111VgrfzD>)> at 13 September 2010. The amendments were reported by the Committee Chairman Senator Patrick Leahy on 11 December 2009 and the Bill remained before the full US Senate at the time of this writing.

45 Australian Law Reform Commission Report No 102 (2005), New South Wales Law Reform Commission Report No 112 (2005) and Victoria Law Reform Commission Final Report (2005), *Uniform Evidence Law*, (2005) [15.16]. See also *Broadcasting Services Act 1992* (Cth) s 202(4), which provides that it is a reasonable excuse for a journalist to refuse to answer a question or produce a document if doing so would tend to disclose the identity of his or her confidential source.

46 Des Butler and Sharon Rodrick, *Australian Media Law* (2007) 330.

47 [2002] NSWSC 563.



relationship.<sup>48</sup> The *Broadcasting Services Act 1992* (Cth) also provides assistance in the search for a definition of 'journalist'.<sup>49</sup> The Australian move towards journalist shield law has been chequered. The three Law Reform Commissions referred to above recommended that the uniform *Evidence Acts* be amended to provide for a professional confidential relationship privilege with some qualification.<sup>50</sup> More recently this led to Commonwealth legislation that better protects journalists' confidential sources. In the Bill, which at the time of this writing has passed the Lower House, 'journalist' is defined as 'a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium'.<sup>51</sup> The 2010 Bill provides that '[i]f a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained'.<sup>52</sup> The Australian States and Territories are under pressure to adopt similar law. Law-making in this area has been plagued by disagreement, primarily between the media and governments, as to the extent of protection that should be available to journalists.<sup>53</sup> A further sticking point has its roots in the complexities and vagaries of

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- 48 In that case the factors which Master Macready took into account included whether the occupation involved skills which in the past were acquired by practice and instruction as a cadet and now by tertiary courses; whether the journalist was acting in a professional capacity; and, to the extent that the provision in the *Evidence Act 1995* (NSW) was obscure about the meaning of the term, whether one could have regard to extrinsic materials. Extrinsic materials included the second reading speech where the Attorney-General, when introducing the amendments, indicated that the definition may include confidences imparted to doctors, other health professionals, journalists, social workers and other relationships in which confidentiality is an integral element: *NRMA v John Fairfax Publications* [2002] NSWSC 563 [149]-[152].
- 49 See *Broadcasting Services Act 1992* (Cth) s 202(5), for the purposes of s 202(4) of the Act which protects journalists' confidential sources: '*J*ournalist means a person engaged in the profession or practice of reporting for, photographing, editing, recording or making - (a) television or radio programs; or (b) datacasting content - of a news, current affairs, information or documentary character.'
- 50 See Australian Law Reform Commission, New South Wales Reform Commission, Victoria Law Reform Commission, above n 45, [15.36] and Recommendation 15-1.
- 51 *Evidence Amendment (Journalists' Privilege) Bill 2010* (Cth) Schedule 1, s 126G.
- 52 *Evidence Amendment (Journalists' Privilege) Bill 2010* (Cth) Schedule 1, s 126H.
- 53 The Australian States and Territories appear to have reached a stalemate on the introduction of similar legislation: see Joseph Fernandez and Pauline Sadler, 'A Shield Law for Journalists in Australia: the Never Ending Story?' in Pauline Sadler (ed), *Contemporary Issues in Law and Policy* (2010) 123, Parts C-E; Chris Merritt, 'States under Pressure on Shield Laws', *The Australian* (Sydney), 17 September 2010, 33. A Senate inquiry recommended by a 5:4 majority that provisions in a previous Bill introduced by the Commonwealth Attorney-General should be strengthened in favour of protection for journalists' confidential sources: see Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Amendment (Journalists' Privilege) Bill 2009* [Provisions] May 2009 (Report). See further Australian Press Council Annual Report No 33, 30 June 2009, 12-15.

modern publishing that gives rise to questions about who should qualify for journalistic status for the purpose of recognising shield protection. For example, should bloggers be recognised as journalists?<sup>54</sup> Notwithstanding the lack of a comprehensive and emphatic legal recognition of journalist-source confidentiality, it is arguable that Australian law has moved closer to affirming journalism as a profession. Such recognition has ramifications for the design of liability that journalists would attract through the practice of their profession or craft.

That brings us to the main concern in this section – the role of truth in journalism’s professional schema. It is said that the journalist’s ‘sole duty is to concentrate on discovering the truth’<sup>55</sup> and ‘[v]irtually every code of ethics begins with the newsperson’s duty to tell the truth under all conditions’.<sup>56</sup> Codes of ethics can generally be viewed as declarations to others as to what the group subscribing to the code is about.<sup>57</sup> Despite avowals of the primacy of the truth obligation in journalism,<sup>58</sup> some journalism ethics codes (a key component of media self-regulation) make no reference to ‘truth’ per se.<sup>59</sup> This stands in sharp contrast to those journalism ethics codes that explicitly refer to truth or profess a commitment to it.<sup>60</sup> Where reference is made in the professional practice

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54 See the proposal for a ‘safeguard’ concerning the definition of ‘journalist’ or ‘reporter’ in the 2010 Bill Parliamentary Debates, House of Representatives, 25 October 2010, 1243 (Graham Perrett, Moreton): ‘As an additional safeguard, this definition [of ‘journalist’] enshrined in legislation would ensure that rogues – who do not uphold the journalists’ code of ethics – are not able to hide their shonky reporting behind shield laws.’

55 Curtis D MacDougall, *Interpretative Reporting* (5<sup>th</sup> ed, 1968) 13. See also text accompanying above n16.

56 Clifford G Christians et al, *Media Ethics: Cases and Moral Reasoning* (8<sup>th</sup> ed, 2009) 57.

57 Media, Entertainment and Arts Alliance/Australian Journalists Association, Ethics Review Committee Report, above n 36, 1. Such codes are said to state the purposes, values and standards that others may use to understand the group, form expectations of it, and they also declare some of the standards by which the group wants to judge itself.

58 See, for example, the declaration that ‘Journalism’s first obligation is to the truth’ in text accompanying above n 16. See also text accompanying below n 202.

59 The following codes of practice make no reference to ‘truth’: (a) The Australian Press Council *Statement of Principles*; (b) the Australian Commercial Radio *Codes of Practice and Guidelines 2010* governing news and current affairs; (c) the Australian Commercial Television Industry *Code of Practice 2010*; (d) *The Sydney Morning Herald* code of practice; and (e) UK Press Complaints Commission *Code of Practice*.

60 The following codes of practice or ethics codes make a specific reference to ‘truth’: (a) Media, Entertainment and Arts Alliance/Australian Journalists’ Association Code of Ethics (discussed below under heading III(A)(2)); (b) Society of Professional Journalists, United States, *SPJ Code of Ethics* <<http://www.spj.org/ethicscode.asp>> at 6 March 2010; and (c) the International Federation of Journalists, *Status of Journalists and Journalism Ethics: IFJ principles* <<http://www.ifj.org/en/articles/status-of-journalists-and-journalism-ethics-ifj-principles>> at 6 March 2010. The preamble to the SPJ code provides: ‘Members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy.’

codes to the truth imperative, it is not clear what ‘the truth’ means or is intended to mean in those codes.<sup>61</sup> The instances of reference and non-reference to ‘truth’ in the practice codes will be discussed next with a focus on the codes of Australia’s two main print journalism industry self-regulatory entities – the Australian Press Council (‘APC’), and the Media, Entertainment and Arts Alliance (‘MEAA’).<sup>62</sup>

### 1 *The Australian Press Council Code*

The APC oversees compliance with its Statement of Principles (‘the code’) by newspaper and magazine publishers. The code comprises a preamble, nine general principles and two notes to the principles.<sup>63</sup> The APC was formed to preserve the freedom of the press in Australia, ensure the maintenance of the highest journalistic standards, and serve

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The duty of the journalist is to further those ends *by seeking truth* and providing a fair and comprehensive account of events and issues’ (italics added). Clause 1 of the *IFJ Declaration of Principles on the Conduct of Journalists* provides: ‘Respect for truth and for the right of the public to truth is the *first duty* of the journalist’ (italics added).

- 61 See, for example, the SPJ Code of Ethics, above n 60. It provides that journalists have a duty to seek the truth. A section entitled ‘Seek Truth and Report It’ is followed by a list of clauses. The relevance of some of these clauses to ‘truth’ is unclear. While the first clause provides that journalists should ‘[t]est the accuracy of information from all sources and exercise care to avoid inadvertent error’ other injunctions in the same section are not immediately evident as being aids to the truth injunction – see, for example, the call to journalists to only resort to surreptitious methods of gathering information ‘when traditional open methods will not yield information vital to the public’; and the call to journalists to ‘[a]void stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status’. Arguably, while the injunction against surreptitious methods of information gathering may on its own be laudable, the proscription of such methods may on occasion be inimical to establishing the truth.
- 62 The two bodies are differently constituted and serve different functions but they both serve self-regulatory functions in journalism: see Senate Select Committee, *In the Public Interest: Monitoring Australia’s Media, Report by the Senate Select Committee on Information Technologies*, April 2000 [2.1]. The APC is a voluntary, non-profit organization, founded in 1976 following an agreement between the Australian Journalists’ Association (‘AJA’) and major publishers of the day. The AJA severed its formal links with the APC in 1987 and merged with other media associations to form the Media, Entertainment and Arts Alliance (‘MEAA’) in 1992. The MEAA is a registered trade union, which includes a number of other unions in the media, entertainment and arts industries: see Jonathan Gill (ed), *The Laws of Australia* (2001), ‘The Australian Press Council’ Vol 6, Item 6.5, 5 and 9; and Butterworths *Halsbury’s Laws of Australia*, Service 112, 509,102 [275-220]. In July 2005 the MEAA re-affiliated with the APC as a constituent body: see MEAA (2005) 17(2) *Australian Press Council News* 3; and Mark Pearson, ‘Press Body and Union Reunite’, *The Australian* (Sydney) 25 August 2005, 17.
- 63 The Statement of Principles currently in force was revised as at February 2009: see Revised Statement of Principles <<http://www.presscouncil.org.au/pcsite/complaints/sop.html>> at 11 March 2010.

as a forum for complaints about material published by the press.<sup>64</sup> The APC adjudicates complaints on the basis of the Code.<sup>65</sup> The following observations may be made about the code in respect of ‘truth’.

a) No reference to ‘truth’

There is no express reference to ‘truth’ in the entire code. The truth imperative is, at best, only implied. Principle 1 imposes the following obligation: ‘Publications should take reasonable steps to ensure reports are accurate, fair and balanced. They should not deliberately mislead or misinform readers either by omission or commission.’<sup>66</sup> This formulation of the principle, introduced in 2009, represents a recasting of the previous principle and has been described by the Council as ‘the most important’ revision.<sup>67</sup> The predecessor to Principle 1 provided as follows: ‘Newspapers and magazines (“publications”) should not publish what they know or could reasonably be expected to know is *false*, or fail to take reasonable steps to check the accuracy of what they report.’<sup>68</sup> No other clause in the code comes as close to these formulations in addressing the truth imperative. That said, however, the current formulation of Principle 1 may be characterised as a dilution of any semblance of the truth imperative that may have existed in the preceding formulation. The previous Principle 1 carried a negative injunction – it stipulated a prohibition on the publication of falsity. While this would not necessarily have promoted the attainment of truth, if indeed the APC’s aim was to commit to such an objective, the previous injunction against falsity could be construed as imposing a truth obligation. Principle 1 also calls on publications to take reasonable steps to ensure *accuracy* – not the *truth* – of what they report. As will be explained below, ‘accuracy’ is not synonymous with ‘truth’.<sup>69</sup> The predecessor to the current Principle 1, which was formerly Principle 2, was ‘rewritten to place more emphasis on the steps publications should take to establish the accuracy of matters they publish’.<sup>70</sup>

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64 Gill, above n 62, 5. The APC has been referred to by its critics as a ‘toothless tiger’: see Sally Walker, *Media Law: Commentary and Case Materials* (2000) 290; and as a ‘publisher’s poodle’: see Mark Pearson, *The Journalist’s Guide to Media Law* (3<sup>rd</sup> ed, 2007) 412. These epithets reflect the Council’s lack of enforcement powers and the strong representation of publishers in the Council’s make-up: see also, Australian Press Council <<http://www.presscouncil.org.au/pcsite/about/members.html>> at 11 March 2010.

65 Gill, above n 62, 5.

66 See Revised Statement of Principles, above n 63.

67 Australian Press Council, ‘New Principles and Procedures’ (2009) 21(1) *Australian Press Council News* 5.

68 Australian Press Council, Statement of Principles (2009) <<http://www.presscouncil.org.au/pcsite/apcnews/nov96/old.html>> at 15 March 2007.

69 This is explained below under III (B)(1)(b).

70 See Australian Press Council, Annual Report No 21, 43 (1997).

## b) Former 'truth' reference omitted

Especially noteworthy for the purpose at hand is the fact that, before the amendments that led to the present version, the code *did* contain a specific obligation concerning truth. Principle 2 in the 'Old Statement of Principles' read: 'A newspaper has an obligation to take all reasonable steps to *ensure the truth* of its statements'.<sup>71</sup> In addition, Principle 11 in the 'Old Statement of Principles' provided: 'A newspaper should make amends for publishing information that is found to be harmfully inaccurate by printing, promptly and with appropriate prominence, such retraction, correction, explanation or apology as will neutralise the damage so far as possible.'<sup>72</sup> Following the 2009 revision, Principle 2 now reads as follows: 'Where it is established that a serious inaccuracy has been published, a publication should promptly correct the error, giving the correction due prominence'.<sup>73</sup> According to the Press Council, the revised Principle 2 'places a greater emphasis on the prompt correction of errors'.<sup>74</sup> The omission of reference to 'truth' in the later codes is significant on at least two counts. There appears to have been a conscious abandonment of the reference to 'truth'. Furthermore, this omission is inconsistent with the approach taken in many established codes, including that of the other peak Australian journalism entity, the MEAA, which has clearly identified the pursuit of truth as a core journalistic value.<sup>75</sup>

## c) A dilution of the code?

The other amendments to the code are not immediately relevant to this discussion, although one brief point may be made at the risk of reading too much into it. The preamble to the old version stated that the APC 'will be guided' by the provisions listed there.<sup>76</sup> The current version however, while similar to its immediate predecessor, states that the APC 'will have regard' for the provisions. It may be asked whether the latter phrasing tends to dilute the force of the code provisions and, consequently, any mandate in relation to enforcing a truth obligation – if such an obligation was to be implied.

## 2 *The Media, Entertainment and Arts Alliance Code*

The MEAA oversees compliance with the MEAA Code of Ethics. This

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71 Australian Press Council, The Old Statement of Principles (November 1996) 8(4) Australian Press Council News <<http://www.presscouncil.org.au/pcsite/apcnews/nov96/old.html>> at 19 March 2010.

72 Australian Press Council, The Old Statement of Principles, above n 71.

73 Revised Statement of Principles, above n 63.

74 Australian Press Council, above n 67.

75 See Media, Entertainment and Arts Alliance, below n 77.

76 See Australian Press Council, above n 71.

code contains the following proclamation, which forms the opening statement in the current preamble: 'Respect for truth and the public's right to information are fundamental principles of journalism.'<sup>77</sup> Some things may be said about this provision.

a) 'Truth' not among numbered provisions

Although the MEAA code identifies respect for truth as a fundamental principle of journalism<sup>78</sup> the 'truth' commitment is not expressly reflected in the 12 clauses that are commonly referred to as MEAA code provisions. It is in the nature of a value statement rather than a specific obligation imposed on journalists. According to the MEAA, the special prominence that truth deserves is 'conveyed in the current MEAA code's emphatic opening "[r]espect for truth ...":<sup>79</sup> On the other hand, legally speaking, although a preamble is not insignificant,<sup>80</sup> it might be argued that a commitment as admittedly lofty as one to truth should have been reflected in the numbered provisions, which are phrased clearly as injunctions or rules. Furthermore, the truth imperative could have been more forcefully stated, for example, by imposing a specific obligation to seek the truth among the 12 code provisions. The MEAA's approach can be

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77 See, Media, Entertainment and Arts Alliance, Preamble to the Media, Entertainment and Arts Alliance journalists' Code of Ethics: 'Respect for truth and the public's right to information are fundamental principles of journalism. Journalists describe society to itself. They convey information, ideas and opinions, a privileged role. They search, disclose, record, question, entertain, suggest and remember. They inform citizens and animate democracy. They give a practical form to freedom of expression. Many journalists work in private enterprise, but all have these public responsibilities. They scrutinise power, but also exercise it, and should be accountable. Accountability engenders trust. Without trust, journalists do not fulfil their public responsibilities. Alliance members engaged in journalism commit themselves to Honesty, Fairness, Independence [and] Respect for the rights of others'. <[http://www.alliance.org.au/media\\_alliance\\_code\\_of\\_ethics/](http://www.alliance.org.au/media_alliance_code_of_ethics/)> at 19 March 2010. It may be noted here that this preamble differs slightly from the one in the MEAA's registered rules of 24 August 2005. In that version the reference was broadly to 'journalists'. In the current code, however, a reference to 'alliance members engaged in journalism' has been included, not surprisingly acknowledging the limited scope of the code's applicability – to alliance members.

78 Media, Entertainment and Arts Alliance, above n 77.

79 Media, Entertainment and Arts Alliance/Australian Journalists' Association, Ethics Review Committee Report, above n 36, 17.

80 In the context of ambiguity in a statutory provision, a court can obtain assistance from the preamble in ascertaining the meaning of the ambiguous provision: see *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J). See also Catriona Cook et al, *Laying Down the Law* (7<sup>th</sup> ed, 2009) 263 where the authors note that section 15AA, *Acts Interpretation Act 1901* (Cth) and its counterparts require the courts to prefer a construction of a provision that would promote the underlying purpose or object of the Act. See further *Interpretation Act 1984* (WA), section 31, which renders preambles in West Australian Acts even more important: 'The preamble to a written law forms part of the written law and shall be construed as a part thereof intended to assist in explaining its purport and object'.

contrasted with the Society of Professional Journalists' Code, which locates the truth ideal high up in its code. The first provision after the Preamble, which bears one of four bold headings in the code, reads: 'Seek Truth and Report It'.<sup>81</sup> A further observation may be made concerning the MEAA preamble. The preamble in an earlier recommendation for a Code revision gave *truth* a more prominent role. The first two sentences of that recommendation read: 'Journalists describe society to itself. *They seek truth*.'<sup>82</sup>

b) An apparent tension

The MEAA code appears to place respect for truth and the public's right to information on the same plane, without offering guidance as to which would prevail in the event of a conflict between the two.<sup>83</sup> Other journalism practice codes, however, reveal a similar ambiguity.<sup>84</sup> As seen earlier, however, on a rare occasion it is possible to find an emphatic declaration of allegiance to the truth in a journalism ethics code.<sup>85</sup>

c) Not a clear-cut commitment

The only remaining allusion to truth in the MEAA code lies in Clause 9: 'Present pictures and sound which are true and accurate. Any

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81 Society of Professional Journalists, above n 60.

82 See Media, Entertainment and Arts Alliance/Australian Journalists' Association, Ethics Review Committee Report, above n 36, 14 (italics added). That recommendation in full was: 'Journalists describe society to itself. They seek truth. They convey information, ideas and opinions, a privileged role. They search, disclose, record, question, entertain, suggest and remember. They inform citizens and animate democracy. They give a practical form to freedom of expression. Many journalists work in private enterprise, but all have these public responsibilities. They scrutinise power, but also exercise it, and should be accountable. Accountability engenders trust. Without trust, journalists do not fulfil their public responsibilities. MEAA members engaged in journalism commit themselves to - honesty, fairness, independence [and] respect for the rights of others'.

83 For example, the 'information' may be that certain monies have been improperly dispensed from a particular business person's bank account to a government official, raising suspicions about the payment of a bribe, but the 'truth' may be that no nefarious activity had occurred.

84 For instance, although the Indianapolis-based Society of Professional Journalists code of ethics, above n 60, states in a bold heading at the outset 'Seek truth and report it, the clause that heading supports makes no reference to the truth. See also *The New York Times* ethical guidelines which provides as follows: 'Whatever the medium, we tell our audiences the complete, unvarnished truth as best we can learn it.': *The New York Times Company Policy on Ethics in Journalism* (2005) The New York Times Company <<http://www.nytc.com/company-properties-times-coe.html>> at 11 March 2010.

85 For example, the International Federation of Journalists' code, above n 60, provides in Clause 1: 'Respect for truth and for the right of the public to truth is the *first duty* of the journalist' (italics added). See further the observation that journalism's 'first obligation is to the truth' in text accompanying above n 16.

manipulation likely to mislead should be disclosed.' The terms 'true' and 'accurate' are not treated synonymously in this clause, unlike instances discussed earlier. While there is an implicit recognition of the importance of truth (albeit apparently much lower in the MEAA code's scale of priority), this requirement is confined to material captured in 'pictures and sound' and not, for example, through words. The profession's commitment to truth – 'the word that summarizes many journalistic ideals'<sup>86</sup> – is not as clear-cut as might have been expected, although in this regard, the MEAA code is superior to the APC's.<sup>87</sup> The MEAA, in a code review about a decade ago, noted:

Seeking truth is at journalism's core, as truth is one of the core goods of society. As one submitter observed: 'This is not to say that it is always easy to find the truth.' But surely, there must be a predisposition amongst journalists to seek out the truth and a corresponding aversion to the publication of falsehood by either act or omission.<sup>88</sup>

### 3 *Truth Imperative Lacks Prominence*

More can be done to counter the view that the avowed pursuit of truth by the press, for instance, tends towards rhetoric: 'The press's obligation to print the truth is a standard part of its rhetoric.'<sup>89</sup> Others argue that 'there is little doubt that journalists believe themselves to be engaged in pursuing the truth – not just free speech or commerce.'<sup>90</sup> The desire to seek out and present the truth does, indeed, seem to be one of the moral foundations of libertarian journalism.<sup>91</sup> As noted

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86 Gene Gilmore and Robert Root, *Modern Newspaper Editing* (1971) 242.

87 The AJA has made mention of 'truth' from as early as 1944 – see AJA Code of Ethics 1944-1984, in Media, Entertainment and Arts Alliance/Australian Journalists Association, Ethics Review Committee Report, above n 36, 121, where Rule 2 provided that each AJA member was bound by the Code: 'Not to suppress essential facts nor distort the truth by omission or wrong or improper emphasis.'

88 Media, Entertainment and Arts Alliance/Australian Journalists Association, Ethics Review Committee Report, above n 36, 16.

89 Christians et al, above n 56, 57. Note also, for instance, that it was observed in 1981 that codes of ethics are 'too vague to help resolve professional dilemmas': see Henningham, above n 36, 152, citing Pollock J C, *The Politics of Crisis Reporting* (1981). Despite this longstanding criticism, the state of the two codes discussed above leave much to be desired.

90 Kovach and Rosenstiel, above n 16, 41-42. The authors refer to the following example of journalists' responses to questions about their perception of truth (53): '[E]ven today journalists still believe in the importance of telling the truth. In our survey of journalists about core values, eight out of ten journalists working in national outlets, and more than seven out of ten working in local outlets, said they felt "there is such a thing as a true and accurate account of an event".'

91 John C Merrill, *The Imperative of Freedom: A Philosophy of Journalistic Autonomy* (1974) 166. He adds: 'One sign of virtue in journalism may well be a deep loyalty to truth. At least the pursuit of truth by the journalist surely takes wisdom, courage, temperance and justice.'



above, ‘*Truth* is the word that summarizes many journalistic ideals’.<sup>92</sup> Despite this claim, journalists tend to do little to define truth or critique its role in journalism. The term is often used but not explained. For example, Gilmore and Root, despite their view that truth ‘summarizes many journalistic ideals’,<sup>93</sup> (and contrary to Merrill’s claim that Gilmore and Root provide a ‘good discussion of journalistic truth’)<sup>94</sup> provide little guidance on the subject. On closer inspection, Gilmore and Root are dismissive of the need to adequately define the term. In fact, they go so far as to state: ‘The working newspaperman knows well enough what truth means in his situation and *doesn’t worry too much about Truth*’.<sup>95</sup> The importance of truth in journalism education is not clear either. It is said: ‘Truth must certainly be the key word in the journalist’s lexicon, however it may be conceived.’<sup>96</sup> Yet, as Burns notes: ‘Journalism educators tend to be more concerned with the motivation of journalists than the search for “truth”’.<sup>97</sup> Kovach and Rosenstiel answer the question ‘what does a journalist’s obligation to the truth mean?’ as follows:

The usual efforts to answer this question, at seminars or in philosophical tracts, end up in a muddle. One reason is that the conversation is usually not grounded in the real world. Philosophical discussions of whether ‘truth’ really exists founder over semantics. Another reason is that journalists themselves have never been very clear about what they mean by truthfulness. Journalism by nature is reactive and practical rather than philosophical and introspective. The serious literature by journalists thinking through such issues is not rich, and what little there is, most journalists have not read.<sup>98</sup>

Conventional explanations from journalists as to how they get at the truth make journalists seem passive and mere recorders of events. As Kovach and Rosenstiel state:

It is as if they think truth is something that rises up by itself like baking bread. Rather than defend our techniques and methods for finding truth, journalists have tended to deny they exist. Whether it is secrecy or inability, the failure by journalists to articulate what they do leaves citizens all the more suspicious that the press is either deluding itself or hiding something.<sup>99</sup>

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92 Gilmore and Root, above n 86, 242. See also text accompanying above n 86.

93 Gilmore and Root, above n 86, 242.

94 Merrill, above n 91, 166 n 6, was referring to Gilmore and Root, above n 86.

95 Gilmore and Root, above n 86, 242 (emphasis added).

96 Joseph B Atkins (ed), *The Mission: Journalism, Ethics and the World* (2002) citing John C Merrill and S Jack Odell, *Philosophy and Journalism* (1983) 172.

97 Burns, above n 15, 23.

98 Kovach and Rosenstiel, above n 16, 40-41. The authors state further (41): ‘Theories of journalism are left to the academy, and many newspeople have historically devalued journalism education, arguing that the only place to learn is by osmosis on the job. As even highly respected TV journalist Ted Koppel once said, “Journalism schools are an absolute and total waste of time” (reference omitted).

99 Kovach and Rosenstiel, above n 16, 41.

In journalism, a discussion of ‘truth’ tends to veer into the realm of other goals that journalists deem more attainable.<sup>100</sup> Merrill illustrates this point well with the following observation: ‘Most journalists think of truth as they do of objectivity – as temporary, splintered and incomplete. Accuracy, fairness, balance, comprehensiveness are generally related to objectivity by the journalist – and, therefore, have to do with truth.’<sup>101</sup> The virtual equation of objectivity with truth in that quotation reflects part of the confusion that afflicts the journalism community’s perception of truth and this takes us to the next discussion.

## B *Factors to Consider in Journalistic Truth*

A proper appreciation of the truth imperative in journalism requires an understanding of the profession’s mode of operation, the exigencies of journalistic production and its philosophical underpinnings. The following sections attempt to shed light on how these factors impact upon the journalistic quest, or lack thereof, for truth. Speaking in a related context, Kieran observes that we must have a grasp of these kinds of constraints to see if the moral and social demands that are so often made of the media are, in fact, possible and justifiable.<sup>102</sup>

### 1 *Objectivity, Accuracy, Fairness and Balance*

The terms ‘objectivity’, ‘accuracy’, ‘fairness’ and ‘balance’ commonly arise in journalistic discourse, and these arise to a greater extent than ‘truth’.<sup>103</sup> Each is seen as possessing qualities consistent with the journalistic quest

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100 Tickle, above n 20, 100, suggests that if truth is not attainable, journalists must strive at least to give society a credible description of itself: ‘Although the truth is slippery and journalists seem to have inadequate tools to deliver it, by concentrating on the essential skills and exhaustive practice, they will succeed eventually in their goal of presenting a credible description of society to itself. The journalistic record serves as a store of instant, if imperfect, history that constitutes a crucial element in public and national life.’

101 Merrill, above n 91, 166-167.

102 See Matthew Kieran, ‘News reporting and the Ideological Presumption’ (1997) 47(2) *Journal of Communication* 79, 81. Kieran notes that the nature of truth, objectivity, interpretation and evaluation in reporting, for example all entail theoretical commitments and practical obligations and duties. He notes further that even the narrative form of the news media must be investigated to arrive at an understanding of the pragmatic and genre constraints on journalists and the news media.

103 For an illustration of this point see a popular text, David Conley, *The Daily Miracle: An Introduction to Journalism* (2<sup>nd</sup> ed, 2002), which does not discuss ‘truth’ in the same detail that it discusses ‘accuracy’, ‘fairness’, ‘objectivity’ and ‘bias’. In the same text, the author’s ‘[f]undamentals on a journalist’s error-fighting checklist’ makes no reference to truth although it proffers advice on accuracy (at 139-140). The third edition, however, contains several index references to ‘truth’ but does not adequately discuss it: Conley, above n 12.

for truth: ‘The ideals of accuracy, objectivity, and fairness are all contained in the larger ideal of truth.’<sup>104</sup> These terms are considered here.

(a) Objectivity

The term is touted as a positive journalistic ideal<sup>105</sup> and more practicable to attain than ‘truth’ but the term is contentious. Objectivity ‘has been used to express a whole range of different metaphysical and epistemological ideas.’<sup>106</sup> There are ‘so many definitions of it’,<sup>107</sup> it is ‘continuously contested in practice’<sup>108</sup> and ‘our contemporary understanding of this idea is mostly a muddle’.<sup>109</sup> The term ‘objectivity’ is said to have a dichotomous relationship with ‘bias’.<sup>110</sup> Most journalists claim to have a high professional regard for it and believe they are striving for it<sup>111</sup> although it has been argued that objectivity is primarily a ‘strategic ritual’ for journalists<sup>112</sup> and the ‘great blockbuster myth of modern journalism’.<sup>113</sup>

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104 Gilmore and Root, above n 86, 243.

105 See also the view of O’Donnell, above n 13, 284, that much of the media’s power is derived from its neutral or objective status: ‘Law and media are integrally linked in classic liberal democratic theory, with the media being conceived as a “fourth estate” to the three arms of constitutional government: the parliament, the executive and the judiciary. In this theory both law and media gain much of their power through their apparently neutral or objective status. Objectivity in both cases is traditionally seen as the guarantee of fairness and fairness is seen as a mediator of justice. However, recent theory in both media and jurisprudential studies would see objectivity as a complex and – ironically – a far more ambiguous phenomenon’ (references omitted).

106 Max Kolbel, *Truth Without Objectivity* (2002) 21.

107 Merrill, above n 91, 156. It is also described as ‘a myth that figures prominently in journalistic role definitions’: see Conley and Lambie, above n 12, 403.

108 John Eldridge (ed), *Getting the Message: News, Truth and Power* (1993) 6.

109 Kovach and Rosenstiel, above n 16, 41. For a discussion of objectivity in law, see Richard A Posner, *The Problems of Jurisprudence* (1990) 7, cited in O’Donnell, above n 13, 284 n 10. Posner has identified three types of objectivity in law: (a) ontological (objectivity as producing a direct correspondence to an external reality); (b) scientific or experimental (it relies on the evidence of independently replicable results); and (c) conversational objectivity (here a court is *persuaded* that something is so).

110 On this point see discussion on ‘journalistic orientations’ under heading III (B) (2).

111 Merrill, above n 91, 156, states ‘most journalists claim to have a high regard for “objectivity” in journalism and believe that they are trying to reach it, albeit by different roads’. See further the discussion on the ‘Journalist as an Ideologue’ in Jim Willis, *The Mind of a Journalist* (2010) Chapter 5.

112 Gaye Tuchman, ‘Objectivity as a Strategic Ritual: An Examination of Newsmen’s Notions of Objectivity’ (1972) 77(4) *American Journal of Sociology* 660. Kovach, above n 16, 72 note: The term began to appear as part of journalism early in the 1920s, out of a growing recognition that journalists were full of *bias*, often unconsciously. Objectivity called for journalists to develop a consistent method of testing information – a transparent approach to evidence – precisely so that personal and cultural biases would not undermine the *accuracy* of their work (italics added).

113 Nick Davies, *Flat Earth News* (2008) 111. The author adds: ‘All stories have to view reality from some particular point of view – just like somebody walking into a room has to view it from a particular point. The story can’t be everywhere at once’.

One of the main problems with any discussion of objectivity is that there are ‘so many ways of viewing it, so many definitions of it’.<sup>114</sup> One approach views objectivity in the context of the journalistic method.<sup>115</sup> Other approaches consider objectivity in the context of ‘reportorial discernment and sensitivity’ or against concepts of ‘fact’ and ‘factuality’.<sup>116</sup> On the one hand, objective journalism is viewed as being factual, accurate and composed of verifiable information.<sup>117</sup> The first rule of journalism is to get the facts straight.<sup>118</sup> The fact-based approach insists on reportorial detachment and neutralism and it glorifies the separation of fact and reportorial opinion.<sup>119</sup> On the other hand, it is suggested that objectivity ‘requires more than simply seeing an event or object dispassionately and neutrally; it requires the observer to become related in some way to that which is being reported.’<sup>120</sup> Proponents of this view argue that it is fallacious to suggest that a lack of journalistic interest is a condition for recognising the truth. On the contrary they argue that ‘journalism that reaches furthest toward objectivity, would also be that which involves the interest of the reporter. It is impossible for a journalist to detach himself from his story if he is to give an honest and full account.’<sup>121</sup> On this approach, objectivity is not monolithic. It is capable of varying, even conflicting, shades. This would render debatable the common assertion that ‘objective sources are best. They have nothing to win or lose from a situation.’<sup>122</sup>

The illusory nature of objectivity lies at the base of the search for substitutes. Kovach and Rosenstiel note that ‘[o]ver time, journalists

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114 Merrill, above n 91, 156.

115 Kovach and Rosenstiel, above n 16, 74. They note further: ‘In the original concept... the method is objective, not the journalist’.

116 Merrill, above n 91, 156.

117 Merrill, above n 91, 156.

118 See Frank Morgan, ‘What is Journalism?’ in Myles Breen (ed), *Journalism: Theory and Practice* (1998) 58. Morgan’s other injunctions to journalists include being ‘sceptical’ and looking ‘behind the facts for the underlying truth’.

119 Merrill, above n 91, 156. Gilmore and Root, above n 86, 242 reinforce this point: ‘The reporter should keep himself out of the story, and the editors should see that he does.’ For a more recent illustration of controversy in this area see Jack Herman, ‘Facts and opinions – A Press Council Case Note’ (2007) 19(2) *Australian Press Council News* 8. The controversy arose from Press Council Adjudication No 1344 concerning questions about the blurring of fact and opinion in news reports.

120 Merrill, above n 91, 157, quoting Erich Fromm, *Man For Himself: An Inquiry Into the Psychology of Ethics* (1966) 111: ‘objectivity is not, as it is often implied in a false idea of “scientific” objectivity, synonymous with detachment...How can one penetrate the veiling surface of thing to their causes and relationships if one does not have an interest that is vital and sufficiently impelling for so laborious a task?’ According to Fromm, all productive thinking, observing and communicating is stimulated by the interest of the observer.

121 Merrill, above n 91, 157.

122 Conley and Lambie, above n 12, 158.

began to reject the term *objectivity* as an illusion'<sup>123</sup> while Fuller goes even further: 'No one has ever achieved objective journalism, and no one ever could. The bias of the observer always enters the picture, if not colouring the details at least guiding the choice of them.'<sup>124</sup> Close to objectivity is accuracy,<sup>125</sup> which is discussed next.

#### (b) Accuracy

Another term often used in close proximity to 'objectivity' and a vital aspect of 'truth' is 'accuracy'. Newsrooms, it is said, 'rightly make a fetish of accuracy about names and addresses. But reporters must at least be careful about accurate quotation, or about the accuracy of the impression which results from the way facts are put together'.<sup>126</sup> Are the two terms - 'truth' and 'accuracy' - synonymous or distinct? One view is that accuracy is an 'important facet of truth'.<sup>127</sup> On this view the two terms are not synonymous. The two terms are, however, vulnerable to being treated synonymously as Friedlander and Lee appear to have done by referring to 'truth and accuracy' as 'one ethical consideration that has no flexibility'.<sup>128</sup> The dictionary definition of 'true' also appears to treat truth and accuracy synonymously.<sup>129</sup> 'Truth' and 'accuracy' have distinct properties. A claim may be accurate but not necessarily true in respect of obvious imputations that arise. While it may be 'accurate' to state simply that a certain individual was at a particular address at a particular time, without saying that a bank heist occurred at that address at that time, it would not necessarily be true that the individual was involved in that bank heist.<sup>130</sup> As Conley and Lamble state, 'a story can be perfectly accurate while also being perfectly unfair'.<sup>131</sup>

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123 Kovach and Rosenstiel, above n 16, 74. A British study has also found that the objectivity goal is not as prominent as it once was: see Conley, above n 12, 403.

124 Jack Fuller, *News Values: Ideas for an Information Age* (1996) 14-15. Note, however, Fuller's qualification: 'I don't use bias here as a term of opprobrium. One might have an optimistic bias or a bias toward virtue' (at 15).

125 Gilmore and Root, above n 86, 242.

126 Gilmore and Root, above n 86, 242. A critique of the injunction to reporters to be careful about 'the accuracy of the impression' must be left for another time.

127 Gilmore and Root, above n 86, 242.

128 E J Friedlander and J Lee, *Feature Writing for Newspapers and Magazines: The Pursuit of Excellence* (5<sup>th</sup> ed, 2004), 319.

129 Anne Godfrey-Smith et al (eds), *The Australian Reference Dictionary* (Australian ed, 1991) 828. See further Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 106, where the author, after noting that a defamation 'defendant will not lightly assume the burden of proving the *truth* of a comment', goes on to say that the 'breadth or nature of the comment made may render the *proof of its accuracy* practically impossible' (emphasis added).

130 See Gillooly, above n 129, 41.

131 Conley and Lamble, above n 12, 404: 'Unfairness can entail neglecting to mention an important point or failing to interview a vital source, especially someone who has been criticised. A story can be unfair if it is not balanced from top to bottom, or if a person criticised does not get a right of reply until the end of the story.'

Accuracy lies at the upper end in the objectivity, fairness and balance scale discussed above.<sup>132</sup> In journalism, accuracy alone does not acquit journalists of their obligation to uphold the truth or present the facts fairly. As is the case with the approach taken by the courts, truth and fairness (or justice) are distinguishable from one another. As noted by one Law Reform Commission, 'in every case the ultimate aim of the justice system must be to deliver justice, which is not always the same as delivering truth'.<sup>133</sup> Furthermore, in journalism, whatever virtue might be ascribed to accuracy, it is also clear that journalists are reliant on cooperation from those in possession of accurate information, to release that information, in order to attain accuracy.<sup>134</sup> Such an approach, however, risks a diluting of the journalistic obligation to attain accuracy, by spreading the responsibility for the attainment of accuracy to others. That risk is compounded by the omnipotence of corporate information management practices and the prevalence of the 'spin' phenomenon.

(c) Fairness and balance

Given the difficulties of attaining accuracy, other 'substitutes'<sup>135</sup> have been suggested over the years, although upon closer examination these substitutes are also imperfect.

Probably the two most common [substitutes] are fairness and balance. Yet both, under scrutiny, become inadequate. Fairness is too abstract and, in the end, more subjective than truth. Fair to whom? How do you test fairness? Truthfulness, for all its difficulties, at least can be tested. Balance, also, is too subjective. Balancing a story by being fair to both sides may not be fair to the truth, if both sides do not in fact have equal weight...And in those many cases where there are more than two sides, how does one determine which side to honour?<sup>136</sup>

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132 Joseph Pulitzer, after whom journalism's Pulitzer Prize is named, is credited with having laid down 'three rules - accuracy, accuracy, accuracy': see Conley, above n 12, 157.

133 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Report No 92 (1999) [7.11].

134 See, for instance, Australian Press Council, *Adjudication No 1187* (January 2003), Para 1: 'The obligation of newspapers to report matters accurately and fairly can only be given effect if there is cooperation between journalists and the public figures and organizations about whom they report.'

135 Kovach and Rosenstiel, above n 16, 46.

136 Kovach and Rosenstiel, above n 16, 46. The authors also state that fairness and balance should never be pursued for their own sake or invoked as journalism's goal (at 77): 'Balance, for instance, can lead to distortion. If an overwhelming percentage of scientists, as an example, believe that global warming is a scientific fact, or that some medical treatment is clearly the safest, it is a disservice to citizens and truthfulness to create the impression that the scientific debate is equally split...often there are more than two sides to a story. And sometimes balancing them equally is not a true reflection of reality. Fairness, in turn, can also be misunderstood if it is seen to be a goal unto itself. Fairness should mean the journalist is being fair to the facts, and to a citizen's understanding of them. It should not mean, "Am I being fair to my sources, so that none of them will be unhappy?"' For a discussion on how balance is measured, see Deborah Kirkman, 'Getting the Balance Right' (2008) 20(1) *Australian Press Council News* 1.

Other commentators have gone further to suggest that accuracy and balance are epistemologically incompatible.<sup>137</sup> Hackett, for instance, notes that ‘balance’ and ‘accuracy’ are incompatible at an epistemological level because one (balance) suggests that knowledge can be attained by balancing competing, incompatible world views; while the other (accuracy/non-distortion) implies that truth is accessible through singular straight facts.<sup>138</sup> From the above discussion it is clear that the concepts of truth, objectivity, accuracy, fairness and balance, all have their difficulties and journalism as a profession has failed to speak with clarity on these concepts. A satisfactory principle of practice remains elusive.

## 2 *Journalistic Orientations*

This topic was not addressed in the discussion on truth and the courts in the previous article.<sup>139</sup> This does not mean that such a discussion cannot occur in that context.<sup>140</sup> No compelling evidence has been presented to demonstrate that judicial orientations are an issue in respect of court decisions generally. The view has, in fact, been expressed that judicial orientations are not a major concern in relation to the courts generally.<sup>141</sup> There are, however, strong indications, if not evidence, of the role of

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137 Robert Hackett, ‘Decline of Paradigm? Bias and Objectivity in News Media Studies’ (1984) 1(3) *Critical Studies in Media Communication* 229, 230, notes a tension between balance and accuracy: ‘In journalistic practice, the goals of balance and accuracy (non-distortion) may not always be compatible.’

138 Hackett, above n 137, 233: ‘A relativist, Mannheimian epistemology underlies the notion that bias is avoided by balancing between competing, incompatible worldviews, each with its own (limited and partial) validity. By contrast, the goal of avoiding distortion implies a positivistic, non-relativist affirmation of the ultimate knowability of “the straight facts” whose visibility is temporarily obscured by the biased journalist’.

139 See Fernandez, *UNDALR*, above n 1.

140 See, for instance the comments of former High Court Justice Michael Kirby in Michael Kirby, ‘Judicial Activism’ (1997) 27(1) *University of Western Australia Law Review* 1, 17: ‘Judges vary in their inclination to develop or change the law. Some are by nature conservative, some activist, and some selectively evidence both tendencies at different times’. See also Daryl Williams, ‘Judicial Independence and the High Court’ (1998) 27(2) *University of Western Australia Law Review* 140. A further and rare example of an admission of judicial bias is noted in *Toobey v Peach* [2003] NTCA 17 [9], where the Court noted the magistrate’s concession in the hearing at first instance that he was ‘biased at least in relation to the function that I must discharge here today’. For a more recent discussion on this point see Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006).

141 See, for instance, the observation by the former Chief Justice of the High Court, Murray Gleeson, that there is a useful practical indicator of the judiciary’s general reputation for impartiality – Murray Gleeson, ‘Public confidence in the courts’ (Speech delivered to the National Judicial College of Australia, Canberra, ACT, 9 February 2007) 10-11 <[http://www.hcourt.gov.au/publications\\_05\\_2.html#MurrayGleeson](http://www.hcourt.gov.au/publications_05_2.html#MurrayGleeson)> at 13 March 2010: ‘The readiness with which politicians, the media, and interest groups demand a judicial enquiry as the procedure for investigating controversial and sensitive issues surely reflects the fact that the judicial process enjoys a certain reputation for integrity’.

‘orientations’ in relation to journalism.<sup>142</sup> Journalists, not unlike others, have biases, orientations and values that cannot be ignored in considering the way they convey their information. Baker expresses the proposition with brutal frankness:

Editors relentlessly insist that reporters walk into each new assignment with no preconceptions. What’s ironic – and what most editors never mention – is that the best reporters purposely begin shaping biases as soon as they begin gathering facts on a particular assignment. This is part of their response to the staggering complexity of the world they have to cover. To succeed, they have developed a sophisticated information-processing system, one that takes fullest advantage of the human brain’s natural ability to organise. [A reporter’s] ability to string words together and organise facts on paper will be crippled if he does not psych himself into the correct attitude – the proper *stance* – for the gathering of information.<sup>143</sup>

Merrill, who considers this issue in some detail, states that ‘a wide variety of interests, ideologies, educational levels and cultural backgrounds, special talents, and so on’ affect the work of journalists.<sup>144</sup> Journalistic orientations, if they are not inherent, must be introduced for professional efficacy.<sup>145</sup> Thus, having an orientation is not necessarily purely an unavoidable incident of the human nature, but in the news discourse, an occupational necessity, for it is the task of the journalist to make events ‘meaningful in news discourse’.<sup>146</sup> Journalistic ‘orientations’ may be divided into: (i) binary classifications;<sup>147</sup> and

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142 An illustration of the point may be seen in Australian Press Council data which shows that over a 20-year period from 1988 almost one third of the complaints to the Council fell under the following headings – *bias, distortion, imbalance* and *unfair treatment*, representing a total of 2247 complaints out of a total of 7881 complaints – see Australian Press Council ‘Complaints Statistics 2008-2009 (2009) <<http://www.presscouncil.org.au/psite/complaints/statistics/stats09.html>> at 13 March 2010.

143 Baker, above n 40, 7. Newman notes that for a good understanding of news and of journalism ‘one must be ever mindful of the fact that participants in the news process have values’ that go to make up a particular world view: J Newman, *The Journalist in Plato’s Cave* (1989) 54.

144 Merrill, above n 91, 143.

145 John Hartley, *Understanding News* (1988) 87: ‘In order to make *anything* meaningful, the initiator of a message must not only *have* an orientation towards the event itself, but *also* an orientation towards the receiver of the message’ (italics added).

146 Hartley, above n 145, 87.

147 According to the binary classifications, which are not comprehensive or mutually exclusive, journalists are: (a) *involved* (the reporter should report the truth as they see it) or *aloof* (the journalist takes a disinterested approach); (b) *Dionysian* (symbolising emotion and intuition) or *Apollonian* (symbolising reason, order, wisdom and pragmatism); *poetic* (the journalist goes below the surface to present a fuller picture using a less dogmatic style) or *prosaic* (the journalist stresses literalness and accuracy and believe facts to be objective); *personalist* (the journalist displays sensitivity to people connected with the story) or *factualist* (the journalist is less concerned about the consequences to people involved and presents facts dispassionately); and *existentialist* (stresses intuition, emotion and subjectivism that facilitate a more complete and realistic picture) or *rationalist* (the approach is more scientific): see Merrill, above n91, 145-149.



(ii) journalistic allegiances or loyalties.<sup>148</sup> The existence of so many classifications creates problems of selection, overlap and distorted and simplistic thinking about the matter classified,<sup>149</sup> but they provide a starting point for understanding journalistic orientations. Two points may be made about such classifications. First, they acknowledge that the journalistic approach to truth occurs within particular frameworks that influence the content and the way in which ‘information’ or ‘the truth’ is presented. The second, simply stated, is that there are primarily two journalistic orientations – the subjective and the objective.<sup>150</sup> This way of looking at it is starkly similar to the law’s subjective and objective tests in determining criminal responsibility, and even there neither test, on its own, is considered entirely satisfactory in determining truth.<sup>151</sup>

### 3 *Characteristics of News*

Journalism’s primary goal is news.<sup>152</sup> Does this also mean that “news” means the telling of all that is true? There is no ‘comprehensive and universally accepted definition’ of news<sup>153</sup> and ‘even professional journalists, editors, and news producers have difficulty defining news’.<sup>154</sup> *The New York Times* renowned slogan dating back to 1897 is: ‘All the news that’s fit to print’.<sup>155</sup> As Merrill notes, this is a proclamation that

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148 According to this mode of classification journalistic allegiances can be identified as being: (a) *to people* (the journalist tends to be more personal, polemical, opinionated, subjective and humanistic); (b) *to institutions* (their main allegiance is to their organisation or other group or institution); (c) *to ideologies* (they are loyal to a cause, a social idea, philosophical or political concept, a program, or a movement); and (d) *to events or facts* (they are event-oriented and not judgmental or polemical and their allegiance is to the event or the facts of the event): see Merrill, above n 91, 151-152.

149 Merrill, above n 91, 144 and 151.

150 Merrill, above n 91, 152.

151 For a discussion of the operation of the two tests see New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) especially [2.10] and [2.63]. The subjective test focuses on the ‘character and predisposition of the defendant’ while the objective test considers the issue from the standpoint of the ordinary reasonable person. See *Ridgeway v R* (1995) 129 ALR 41, 94 (McHugh J) for an example of criticism of both tests.

152 de Beer and Merrill, above n 21, 163. The authors state that ‘at the end of the day, global journalism is *all about news*’ (italics added). Conley and Lamble, above n 12, xii states: ‘Reporting involves two skills: gathering news and writing it’.

153 See de Beer and Merrill, above n 21, 163: ‘The definition of news in many studies falls short of a comprehensive and universally accepted definition. In fact, there is doubt whether there can be a definition of what constitutes news which will be acceptable to all.’

154 Conley and Lamble, above n 12, 77.

155 The slogan of the *Rolling Stone* magazine in the United States is ‘All the news that fits’. However, there is a potentially telling difference between these slogans or self-representations. The *New York Times* appears to envisage legal, moral and ethical limitations while *Rolling Stone*, in a satirical tone, appears to envisage only space limitations.

certain matters, even if truthful or contributing to the truth, which are not considered 'fit' will not be printed.<sup>156</sup> He puts it bluntly: 'Therefore, *The Times* is explicitly saying *what all journalists believe and practise*: truth is what journalists consider fit to call truth, just as *news is what they decide is news* – nothing more and nothing less'.<sup>157</sup> News is an 'intangible concept' with various schools of thought as to what it means.<sup>158</sup> These views include the following – that news is manufactured, or discovered, or, decided upon, or selected<sup>159</sup> – and views of news that tend to be more cynical.<sup>160</sup> As such, there is not much emphasis on news theory in journalism training.<sup>161</sup> It is said that news reporting and truth seeking ultimately have different purposes. The function of news is to signalise an event, whereas the function of truth is to bring to light the hidden facts, to set them into relation with each other, and to make a picture of reality on which people can act.<sup>162</sup> The

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156 Merrill, above n 91, 167. It is suggested that the phrase was used to emphasise 'the thoroughness and sobriety of ethical newspapering': see Gilmore and Root, above n 86, 240.

157 Merrill, above n 91, 167 (emphasis added).

158 de Beer and Merrill, above n 21, 163.

159 de Beer and Merrill, above n 21, 163 See also 167: '[N]ews as a *concept* is not synonymous with an event. Instead, news can be seen as an attempt by individual journalists and their media organizations to capture the essential framework of particular events and trends by *retelling* them in the form of news reports. Such exercises are usually carried out by journalists working within the context of specific news policies defined by particular cultural, political, economical, ethical, and journalistic frames of reference. The latter are constructed by means of various factors that may include the nature of the publication, the policies of the institution, the policy of what is considered newsworthy or of special news value, the editorial organization of the publication, the quality of competition with other forms of media, the demographic profile of the readers, and the accompanying wants and needs of the publication's audience. All these elements should then again be considered against the background of societal forces, such as the political, economic, cultural, technical, geographic, and general media setup of a particular country...'

160 See, for instance, the view that, 'When a dog bites a man, that is not news because it happens so often. But if a man bites a dog, it's news'. For this and similar references see Conley and Lamble, above n 12, 79. See also former Chief Justice Murray Gleeson, above n 141, 13-14: 'Bad behaviour attracts attention. Commitment to the service of the public does not. Consumers of information have an appetite for bad news; naturally, commercial providers of information bear that in mind. If a bridge collapses that is news. Why would anyone publish a story about a bridge that remains standing?'

161 de Beer and Merrill, above n 21, 165 note: 'Part of the problem of finding a generally accepted version of what news is has been the trend in journalism circles for the past few decades to regard the practice of journalistic skills as more important and relevant than the development of sound conceptual and theoretical foundations of what actually constitutes news. Consequently, since *there are no hard and fast rules* of exactly what defines news, journalists tend to familiarise themselves with the concept of news and related aspects such as newsworthiness and news values through a process of "osmosis" or newsroom socialisation' (italics added, references omitted).

162 See Conley and Lamble, above n 12, 79.

view that news is 'simply a reflection of reality, untainted by bias, inaccuracy, or oversight'<sup>163</sup> has been correctly dismissed as 'not very realistic'.<sup>164</sup>

Journalism's identification of the *characteristics of news* creates fertile ground for the subjugation of truth. These characteristics include: the story's impact or relevance; the proximity of the audience to the event; the prominence of the people involved; currency – when selectors decide that particular topics interest the audience at a given time; whether the story is odd or unusual; relativity – the assigning of an arbitrary priority to competing stories; timeliness – recent events supersede older events; and the conflict element – murder, mayhem and madness have priority.<sup>165</sup> Space limitations do not permit the full consideration of how these characteristics impact upon the truth imperative. An illustration would suffice. Take the timeliness criterion.<sup>166</sup> Timeliness demands of the journalist the prompt production of a news story under pain of the knowledge that 'news value diminishes with time'.<sup>167</sup> While timeliness has its virtues, its most obvious weakness is that the 'rush to be first with the news can lead to inaccuracy'.<sup>168</sup> The pressures of timeliness and apprehension of legal risk also contribute to the well worn newsroom edict, 'if in doubt, leave it out'.<sup>169</sup> Observing this edict leads to an obvious potential danger – leaving something out because of doubt may be inimical to truth.

#### 4 *Commercial Imperatives and Exigencies of News Production*

Commercial imperatives and the incidents of news production impose heavily on journalists' ability to convey the truth. While it may be

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163 See Julio Borquez, 'Newsmaking and Policymaking: Steps Toward a Dialogue' in Robert J Spitzer, *Media and Public Policy* (1993) 35 citing Graber, *Mass Media and American Politics* (1989).

164 Borquez, above n 163, 35.

165 See Sally White, *Reporting in Australia* (2<sup>nd</sup> ed, 2000) 17, and generally 10-22. See also Conley and Lamble, above n 12, 82-97; and de Beer and Merrill, above n 21, 169-171.

166 Newman, above n 144, 48: It is described as '[t]he one quality of the report which is necessary to make it "news"'.

167 Melvin Mencher, *News Reporting and Writing* (8<sup>th</sup> ed, 2000) 72.

168 White, above n 165, 16.

169 Conley and Lamble, above n 12, 159: They call it the 'best advice'. See also Eric Barendt et al, *Libel and the Media: The Chilling Effect* (1997) 191, where the authors state that this attitude is exemplified by most magazine editors and publishers, who take such an approach when they doubt their ability to present a legally sustainable defamation defence. This approach also afflicts other kinds of publishing activity. See *Taylor & Francis Books: Instructions for Authors* (2001) 46, where the text provides, in part, the following advice under the heading 'How the risk of libel/defamation can be reduced': 'Sometimes the risk of defamation can be reduced – if not entirely removed – by making a relatively minor change...More often, however, it is safer simply to leave out any statements where there is any suspicion of libel or defamation. *If in doubt, leave it out*'.

‘unrealistic to expect a journalist never to make an error’,<sup>170</sup> a range of factors contribute to a journalist’s ability to meet her or his truth obligation. These factors can be surmised by the words of Lord Hoffmann in the *Naomi Campbell* case – of particular relevance is the argument for latitude in the ‘practical exigencies of journalism’ in the following passage:

In my opinion, it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure.<sup>171</sup>

These ‘practical exigencies’ can be further identified as including the following factors: the nature of periodicity;<sup>172</sup> the perils of operating at high speed;<sup>173</sup> news language imperatives;<sup>174</sup> law, work culture and practices, human frailty, and the journalist’s experiences;<sup>175</sup> shrinking budgets and longer shifts;<sup>176</sup> routines, professionalisation and organisational and commercial imperatives;<sup>177</sup> reader expectations, editorial conventions, and self-serving sources;<sup>178</sup> and ‘unrelenting’<sup>179</sup> pressures to produce news

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170 Conley and Lamble, above n 12, 159.

171 *Campbell v MGN Limited* [2004] 2 All ER 995, 1012-1013 (Lord Hoffmann).

172 See discussion in Newman, above n 143, 42-44. The author notes that the publisher of a public journal has deadlines to meet and is not normally under the same pressure as a book publisher (42-43).

173 A prominent Australian newspaper group CEO, John Hartigan of News Limited has noted that ‘[j]ournalists are required to exercise very careful judgment about complex issues at high speed. We are going to make mistakes. We are expected to find certainty where there is none. To have hindsight before, not after, we are making the tough calls. When journalists don’t get it right it’s usually not because we are malicious. It’s because we are fallible’: see John Hartigan, ‘Andrew Olle Lecture’ (Lecture delivered at the Sofitel Wentworth, Sydney, 19 October 2007) <[http://www.news.com.au/?from=ni\\_story](http://www.news.com.au/?from=ni_story)> at 25 October 2007.

174 See also Mark Day, ‘Freedom of Speech Undefined’, *The Australian* (Sydney), 12 April 2006, 12: ‘Journalists write for ordinary people, not judges and lawyers playing semantic games, and do so under pressure and in conditions that those in their lofty legal eyries would never understand.’

175 Tickle, above n 20, 89.

176 Tickle, above n 20, 98.

177 O’Donnell, above n 13, 285. Former Commonwealth Attorney-General, Daryl Williams, writing in the context of media coverage of the courts notes in Daryl Williams, ‘The Courts and the Media: What Reforms are Needed and Why’ (1999) 1 *UTS Law Review* 13, 15 that ‘the media must entertain and produce profits for its owners and its responsibility to understand legal processes goes only to the extent necessary to fulfil these obligations’.

178 Christians et al, above n 56, 57.

179 Julianne Schultz, ‘Beyond the Searchlight’ (2005/06) 36 *The Walkley Magazine*, 19. The author also notes: ‘The demand is for more and shorter chunks. Just as the 30-second grab on TV news has contracted to five seconds, so the considered feature in a major newspaper has shrunk from 3000 to 1200 words... While it is true

more quickly and with greater brevity. It has also been noted that various forces are converging to create 'a new journalism of asserting, which is overwhelming the old journalism of verification'.<sup>180</sup> Journalists are expected to 'subdue into harmony' a cacophony of news resources and 'organise into a coherent picture a riot of impressions, a chaos, a bedlam of attitudes and opinions'.<sup>181</sup> This concept is reflected well in the 'first draft of history'<sup>182</sup> metaphor, along with the attendant flaw that, as with history, selection and interpretation will take place creating not a world of unassailable facts but provisional accounts.<sup>183</sup>

Broadly speaking, therefore, news is a provisional kind of truth – the best that can be said quickly.<sup>184</sup> As Tiffen has noted: 'Covering the news is an infinite, impossible task. News is therefore an exercise in imperfection, the product of a series of compromises. It is not surprising that errors and misjudgements occur'.<sup>185</sup> Or as a prominent Australian investigative journalist has put it:

The practice of journalism is far from precise. It is not like watchmaking, building nuclear reactors or finding a cure for cancer. I put it a bit closer to bookmaking. Journalists are caught up in an eternal rush, calculating the odds of what will become objective truth, based on limited primary information and intelligence. We stay in front by being right more often than not, rather than always right. No one is always right. And remember, the essential objective is profit rather than saving the world.<sup>186</sup>

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that a lot can be said with few words, a lot must also be left out. See further Leo Bowman and Stephen McIlwaine, 'The Importance of Enquiry' in Suellen Tapsall and Carolyn Varley (eds), *Journalism: Theory in Practice* (2001) 104: '[J]ournalists must work in obedience to extremely stringent time and space constraints that make news commercially possible but which are foreign to the natural progression of social inquiry...It is rarely possible for a journalist to tell the *whole* story in any one report'.

180 Kovach and Rosenstiel, above n 16, 46. The authors also repeat their observation from an earlier work that 'various forces were converging to weaken journalists' pursuit of truthfulness, despite the continuing allegiance most journalists profess to it'.

181 Eldridge, above n 108, 4.

182 The expression, 'the first rough draft of history' is attributed to *Washington Post* editor Benjamin Bradlee: see Conley and Lambie, above n 12, 79.

183 Eldridge, above n 108, 6.

184 Fuller, above n 124, 5. He also notes: 'Even at its most presumptuous, the news does not claim to be timeless or universal. It represents at most a provisional kind of truth, the best that can be said quickly. Its ascription is modest, so modest that some of the most restless and interesting journalists have had trouble making any claim of truth at all'. See further Rupert Murdoch, 'Speech to the American Society of Newspaper Editors' (Speech delivered to the American Society of Newspaper Editors, Washington DC, 13 April 2005) <<http://www.guardian.co.uk/media/2005/apr/14/citynews.newmedia>> at 13 March 2010: 'They don't want to rely on the morning paper for their up-to-date information. They don't want to rely on a god-like figure from above to tell them what's important. And to carry the religion analogy a bit further, *they certainly don't want news presented as gospel*' (italics added).

185 Rodney Tiffen, *News and Power* (1989) 28.

186 Chris Masters, *Not for Publication* (2002), Preface, vii.

## 5 *Narrative Models*

The narrative models that journalists employ to tell their stories can bear heavily on the way stories are told and in turn influence the way meanings or imputations are conveyed and ultimately influence the existence or otherwise of liability arising from the publication of those meanings or imputations. These models<sup>187</sup> are too many to consider here. However, to provide insight into how the chosen narrative model influences the way a story is told, two examples will be considered.

### (a) The function of myth in news reporting

Defining ‘myth’, as with defining ‘truth’, is acknowledged as a task that evokes ‘fear and trembling’.<sup>188</sup> A myth has been described as a narrative that draws on ‘mythic sources of power...a story form that harnesses sufficient narrative power to assist the audience in breaking through the mundane into the possible [and] archetypal stories which play a crucial social role’.<sup>189</sup> Myths signify values associated with concepts.<sup>190</sup> News is a myth-maker.<sup>191</sup> Bird and Dardenne make a telling observation: ‘News stories, like myths, do not “tell it like it is” but rather, “tell it like it means”’.<sup>192</sup> Choosing to *tell it like it is* and purporting to *tell it like it means*, however, opens a Pandora’s box of ramifications for any claim to conveying the truth, not least of all because of the complexity associated with *meaning* itself.<sup>193</sup> One of the primary functions of the news in any medium is continuously to signify myths through the everyday detail of newsworthy events.<sup>194</sup> O’Donnell states:

The idea that journalism is a literary, imaginative production rather than merely an objective account is inherent in the common designation of media reports as news “stories”. A variety of theoretical models have been developed with post news

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187 See, for example, Conley and Lamble, above n 12, 136-7 where the authors mention the traditional, narrative, point of view and radical clarity models.

188 O’Donnell, above n 13, 287 citing Mircea Eliade, *The Quest: History and Meaning in Religion* (1969) 72. On the one hand the term has been viewed ‘dismissively’ and its existence disputed, and on the other, it is said to have proven ‘resilient as a theoretical framework across fields as diverse as theology, linguistics, anthropology, law and media studies’.

189 O’Donnell, above n 13, 288-289.

190 Hartley, above n 145, 28.

191 Hartley, above n 145, 30.

192 Elizabeth S Bird and Robert W Dardenne, ‘Myth, Chronicle and Story: Exploring the Narrative Qualities of News’ in James W Carey (ed), *Media, Myths and Narratives: Television and the Press* (1988) 71. The same authors also state (at 82): ‘While news is not fiction, it is a story about reality, not reality itself.’

193 For example, a linguistic approach suggests that the law should recognise every utterance as having both an *illocutionary* (or intended) force and a *perlocutionary* (or perceived) effect: see Andrew T Kenyon, *Defamation - Comparative Law and Practice* (2006) 18.

194 Hartley, above n 145, 29.

as cultural storytelling. Myth, narrative strategies, core plots, fairytale, frames and ritual have all been used as paradigms to discuss both the structures and cultural effects of news.<sup>195</sup>

(b) The inverted pyramid

This term describes the way facts are organised in news production.<sup>196</sup> The traditional form of news writing, as MacDougall has noted, is called the *inverted pyramid*. It begins with the climax (or the end of the story) and involves crowding as much information as possible into the first paragraphs.<sup>197</sup>

Given a schedule of facts to arrange in the form of a newspaper article, he selects the most important fact or climax of the story he has to tell and puts it at the beginning. The second and most important fact comes second, the third and most important fact third and so on.<sup>198</sup>

This form of organization could very easily run into difficulty, not least of all because facts ‘can be untrue’.<sup>199</sup> However, this construction is vigorously defended in newsrooms.<sup>200</sup> Further, in the process of constructing the pyramid, the narrator engages in weaving the information accessed, ‘knitting together’ an apparently transparent neutral discourse of the contending melee of accessed voices. What the story means, then, depends on the successful integration of a known and trusted institutional discourse and an “authentic” representation of the ‘factual’ world of phenomena ‘out there’.<sup>201</sup>

### C Some Responses to Criticisms

Defenders of the journalistic institution advert to the primacy of truth in journalism – ‘truth’ of a kind that differs from *absolute* or *philosophical* truth. They call it *journalistic truth* or a *functional form of truth* that is arrived at after a *sorting out process*. Kovach and Rosenstiel describe this home grown ‘truth’ as follows:

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195 O’Donnell, above n 13, 286. He further notes that scholarship on myth and other narrative structures in the media has identified particular themes of storylines in news stories, as well as pointed to the general mythic structures or orientation of certain news forms and products (at 289).

196 For a more detailed discussion, see, for instance, MacDougall, above n 55, Chapter 3.

197 MacDougall, above n 55, 50. See also the observation that news discourse may exhibit a thematic realisation structure that is basically (1) top down; (2) relevance controlled; and (3) cyclical (in instalments): Teun A Van Dijk, *News as Discourse* (1988), 48.

198 MacDougall, above n 55, 50.

199 See also the quotation attributed to Fromm, below n 205.

200 Some justifications offered for the inverted pyramid form of organization are – it facilitates reading; it satisfies curiosity; it facilitates page makeup and it facilitates headline writing: MacDougall, above n 55, 51.

201 Hartley, above n 145, 114-115.

This is the first principle of journalism – its disinterested pursuit of truth – is ultimately what sets it apart from all other forms of communications ... Citizens and societies depend, out of necessity, on *accurate* and reliable accounting of events to function. They develop procedures and processes to arrive at this – what might be called functional truth ... This is what journalism is after – a practical or functional form of truth. It is not truth in the absolute or philosophical sense. It is not the truth of a chemical equation. But journalism can – and must – pursue truth in a sense by which we can operate day to day.<sup>202</sup>

The ‘journalistic truth’ that journalists pursue, however, demands more than mere accuracy if all that accuracy generates is a range of facts, whose final outcome is a distortion because ‘mere accuracy can be a kind of distortion all its own’.<sup>203</sup> Fromm reinforces this point in his observation that ‘it is well known that there is no more effective way of distortion than to offer nothing but a series of “facts”’.<sup>204</sup> Facts by themselves can be meaningless and untrue.<sup>205</sup> The journalist’s responsibility therefore, clearly extends beyond the conveyance of hard fact. Journalistic responsibility must in every instance entail attention to the way facts are interpreted. Although mere accuracy is not an end in itself, it is a prerequisite to truth and ‘it is the foundation upon which everything else builds: Context, interpretation, debate, and all of public communication. If the foundation is faulty, everything else is flawed’.<sup>206</sup>

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202 Kovach and Rosenstiel, above n 16, 42.

203 Kovach and Rosenstiel, above n 16, 43. The authors refer to the findings of the *Hutchins Commission* in 1947, which, in outlining the obligations of journalism, warned about the dangers of publishing accounts that are ‘factually correct but substantially untrue’: see Commission on Freedom of the Press, *A Free and Responsible Press* (1947) 22. On the same page the Commission stated further: ‘It is no longer enough to report *the fact* truthfully. It is now necessary to report *the truth about the fact*’. See also Merrill, above n 91, 154, citing the work of Dr William Stephenson: ‘[Dr Stephenson] has insisted that *fact* is not enough. What is needed is what he calls “factuality”. Something that goes beyond the surface and verifiable splinters of information and statements by this source or that something that brings the intelligence and insights and sensitivities of the reporter to bear on the story. Something that fills in the gaps; something that puts flesh on the dry bones of fact and makes the story live in greater and more realistic dimensions’.

204 Erich Fromm, *The Revolution of Hope: Toward a Humanized Technology* (1968) 53: ‘To put it briefly, “facts” are interpretations of events, and the interpretation presupposes certain concerns which constitute the event’s relevance. The crucial question is to be aware of what my concern is and hence of what the facts have to be in order to be relevant’.

205 Fromm, above n 204, 52: ‘What are facts? In themselves, even if correct and not distorted by personal or political bias, facts cannot [sic] only be meaningless, they can be untrue by their very selection, taking attention away from what is relevant, or scattering and fragmenting one’s thinking so much that one is less capable of making meaningful decisions the more “information” one has received.’ See also, Gilmore and Root, above n 86, 242 who likewise caution about the use of facts, noting that reporters must be at least as careful ‘about the accuracy of the impression which results from the way facts are put together’.

206 Kovach and Rosenstiel, above n 16, 43.



## IV TRUTH THEORY, THE COURTS AND JOURNALISM

The discussion thus far<sup>207</sup> has examined the meanings variously ascribed to ‘truth’ in philosophy, and how the courts and journalism approach their mission in respect of truth. The next question is: What correlations may be suggested between truth in philosophy and the work of the courts and of journalism? The question is asked in the hope that it will shed light on whether the courts, journalism (or both) have legitimate claims to being institutions for which truth is an institutional priority. The answer to that question is relevant in the effort to better appreciate the “truth claims” of each. Especially where discord as to the meaning and content of ‘truth’ in a given circumstance holds the key to legal liability, for instance, in the operation of the truth (or justification) defence in defamation law. The exercise in the context of such a defence calls for the media defendant to demonstrate that the matter complained of was true and for the court to decide whether the truth was established.

### A *Truth Theory and Journalism*

Viewing truth in journalism from a philosophical standpoint, it can be said that both *correspondence* and *coherence* principles govern journalistic writing. These two principles were discussed in the previous article<sup>208</sup> and will be briefly recalled here. According to classical *correspondence* theory, a statement is true if it corresponds to a fact and false if it does not correspond to a fact.<sup>209</sup> The correspondence theory is simply the proposition that when this or that happens, it really is so and that the statement concerning it is true.<sup>210</sup> The *coherence* theory, on the other hand, measures truths by their ‘fit’ within a given system.<sup>211</sup> The basic core the theory is the notion that beliefs, judgments or whatever truth-bearers are taken to be are true or false according to whether they fit in - cohere with the body of other beliefs that are true.<sup>212</sup>

While journalism’s lofty ideal is the communication of truth,<sup>213</sup> and although ‘absolute correspondence is an illusion’,<sup>214</sup> journalistic truth is more amenable to the correspondence theory than legal truth. This is

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207 See also Fernandez in *UNDALR*, above n 1.

208 See Fernandez, *UNDALR*, above n 1, Part II)A(1) and (2).

209 Fernandez, *UNDALR*, above n 1, 59.

210 Fernandez, *UNDALR*, above n 1, 59.

211 Fernandez, *UNDALR*, above n 1, 61.

212 Fernandez, *UNDALR*, above n 1, 62.

213 See text accompanying above n 14.

214 Heike Jung, ‘Nothing but the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure’ in Antony Duff et al *The Trial on Trial* (2004) 148.

because unlike legal truth, which comes to rest at a fixed point in the trial process, journalistic truth is open to review indefinitely and competing notions of the truth coexist until the 'ultimate truth' emerges.<sup>215</sup> Modern journalism borrows its notion of truth from the Enlightenment which cast truth in terms now referred to as a 'correspondence theory' of truth which asserts that truth should correspond to some external set of facts or observations.<sup>216</sup> Correspondence principles, however, face strong competition from coherence principles. It is argued that coherence must be the ultimate test of journalistic truth.<sup>217</sup> Fuller notes that journalists 'need to write and edit for coherence'.<sup>218</sup> As Fuller states further:

In short, people want knowledge, not just facts or data. Regardless of what the radical skeptics argue, people still passionately believe in meaning. They want the whole picture, not just a part of it. They are wary of polemics, which are everywhere.<sup>219</sup>

### B *Truth Theory and Defamation Law*

In applying the truth theory specifically to defamation law, the starting principle in the truth defence bears repeating. The aim of the defence is to protect the speaker against a successful claim for defamation if the defamatory statement complained of is true.<sup>220</sup> What theory of truth then applies in defamation law's truth defence? A proper answer to this question must be contingent on the precise question in relation to the particular plaintiff. That is, it is not possible to answer the question in a vacuum, nor as if the only thing that mattered was whether the person was defamed. The nature of the truth defence is far more complex than that and is beyond the scope of this work. However, for present purposes the answer to the question, what test of truth applies in defamation law's truth defence, may be briefly stated. Both the coherence and correspondence theories may apply in a given circumstance. And these theories will apply in a multiplicity of ways in a given defamation action, for instance, when determining if the plaintiff has a valid complaint and when determining whether the defendant has made out a valid defence.

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215 See discussion in Patterson and Wilkins, above n 14, 19.

216 Patterson and Wilkins, above n 14, 19.

217 See Kovach and Rosenstiel, above n 16, 43 citing Fuller: '[T]here are two tests of truth according to philosophers: One is correspondence. The other is coherence. For journalism, these roughly translate into getting the facts straight and making sense of the facts. Coherence must be the ultimate test of journalistic truth...'

218 Fuller, above n 124, 194.

219 Fuller, above n 124, 194.

220 See, for example, the principle from *Rofo v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4, 21.

Ideally, the test of truth should be guided by *correspondence/substantive truth* principles. In practice, the truth-certifying processes of the courts and of journalism tend to render this ideal difficult to attain. The question ‘did he really do it?’ (or ‘is this really so?’), so as to justify the defamatory publication is open to diverging legal outcomes that illustrate the chasm between two kinds of truth discussed in the previous article – coherence (formal legal truth) and correspondence (substantive truth). Hence, in a case where the plaintiff succeeded in a defamation action against the media that referred to him as a paedophile, it may have been true that the plaintiff could justifiably be described as a paedophile if evidence of such an allegation was ruled permissible and found credible by the court.<sup>221</sup> Similarly, defamatory statements about a politician’s sex life may have been established as true if witnesses did not lie in their testimony.<sup>222</sup>

## V CONCLUSION

The discussion in this article and the previous one have revealed significant tensions concerning the meaning of truth across the three sectors – philosophy, law and journalism. These tensions also afflict each of the sectors internally. The term ‘truth’ is trapped in multifarious meanings, arising in different contexts, disciplinary realms, discourses and interpretive communities and it is constantly in tension with ‘untruth’. Bailey has stated that ‘the *only way* in which we can understand “truth” and “untruth” is to see them as rhetoric, as concepts used primarily for persuasion. They are political words, weapons for use in competition for power.’<sup>223</sup> The view that this is the ‘only way’ to understand the term is an over-statement, but it accentuates the essence of the present discussion. Although a universally applicable meaning of the term remains elusive, the term remains significant. For the purposes at hand it suffices that the discussion in this article and the previous one<sup>224</sup> has established the following two key points.

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221 In *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 541, in which the plaintiff succeeded, the court refused to permit such evidence. See also Chris Merritt, ‘Evidence Denied to Marsden Hearing’, *The Australian* (Sydney), 6 June 2006, 3.

222 For an example of how such a scenario might occur, see the perjury charges laid against United Kingdom politician Tommy Sheridan and his wife for providing allegedly false testimony in the former’s defamation action against the *News of the World* in 2006. Sheridan was awarded £200,000 in damages in that action: see Melanie Reid, ‘Tommy Sheridan Perjury Trial Delayed after Defence Teams Ask for More Time’, *Times* (online), 27 October 2009 <<http://www.timesonline.co.uk/tol/news/uk/scotland/article6891309.ece>> at 19 March 2010.

223 Barry Allen, *Truth in Philosophy* (1993) 174 citing F G Bailey, *The Prevalence of Deceit* (1991) 128.

224 Fernandez, *UNDALR*, above n 1.

First, the term ‘truth’ defies a universal meaning that can be applied across the discourses, disciplines, bodies of knowledge and purposes that need to be served. This is because ‘truth is particular to, and constructed within, specific modes of life and the “truth” of one mode cannot be judged against the “truth” of another’.<sup>225</sup> As Malpas has observed:

[S]peaking the truth is not a matter of enunciating some finite set of true propositions that uniquely capture the truth, the whole truth and nothing but the truth about the world. The truth about the world is that there is no finite set of truths to be spoken. There is a multiplicity of ways of speaking truly about the world, and that this is so does, indeed, follow from the fact that the world and our speaking about it can be distinguished – it is a consequence of the very objectivity of the world. Any particular object or event will always admit of a variety of true descriptions of it.<sup>226</sup>

The definition of ‘truth’ varies from discourse to discourse. Getting at the truth involves a procedure ‘where all the different moral, pragmatic and logical strands are inextricably intertwined and the justification is of the procedure as a whole’.<sup>227</sup> There can therefore be no guarantees as to the truth.<sup>228</sup> Any claim that prevailing court rules, processes, mechanisms, laws and legal principles actively facilitate the attainment of an incontrovertible ‘truth’ is open to challenge because the court’s truth-certifying processes are vulnerable on several fronts. This conundrum, however, is not the sole preserve of the legal framework. Journalism and journalistic output is also similarly afflicted. Examining truth in journalism can be characterised as an exercise in what social scientists call *boundary-work rhetoric*.<sup>229</sup> That is, it is an attempt to draw a boundary between journalists’ discourses and their routine practices, and those of other professional communicators.<sup>230</sup> It is also axiomatic that any interpretation

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225 Zenon Bankowski, ‘The Jury and Reality’ in Mark Findlay and Peter Duff (eds), *The Jury Under Attack* (1988) 8.

226 Jeff Malpas, ‘Speaking the Truth’ (1996) 25 (2) *Economy and Society* 156, 172.

227 Bankowski, above n 225, 18.

228 Malpas, above n 226, 173, notes: ‘And truth is also a labour, since not only is there always a multiplicity of possible ways of speaking the truth, but there is no *a priori* guarantee that our speaking is, on any particular occasion, true. That can only be ascertained in conjunction with others and through our careful consideration of the particularities of argument, evidence and the object in question – and even then truth remains ever so fragile a notion.’

229 Tickle, above n 20, 89. The term ‘boundary-work rhetoric’ is the, ‘rhetorical strategy of one group wishing to distinguish itself from another’. See also, Samuel P Winch, *Mapping the Cultural Space of Journalism* (1997) 3. As Winch explains: ‘For example, medical doctors draw a boundary – within their discourse and routine practices – between what they do and what faith healers do. Likewise, journalists who consider themselves mainstream draw boundaries between what they do and what other mass communicators do’.

230 Tickle, above n 20, 89.

of reality is mediated by language<sup>231</sup> and by other semiotic systems.<sup>232</sup> On this approach, 'truth in journalism' can be separated from truth not only in other professional communications but also in other discourses, for example, law, philosophy and religion. Applying the boundary principle to a given event, it is possible to see how potentially varying journalistic perspectives can emerge applying different truth philosophies.<sup>233</sup> As Kovach and Rosenstiel note, it is more helpful and more realistic 'to understand journalistic truth as a process - or continuing journey toward understanding - which begins with the first-day stories and builds over time',<sup>234</sup> where stories go through phases;<sup>235</sup> and where 'being accurate is most difficult' in the first hours of an event.<sup>236</sup>

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231 Tickle, above n 20, 89. Tickle provides a useful summary of principal works in the analysis of language (at 93). See Hartley, above n 145, 20-37.

232 The term 'semiotic' refers to the study of sign and symbol systems and the study of patterned human behaviour in communication in all its modes: see Alan Bullock, Oliver Stallybrass and Stephen Trombley (eds), *The Fontana Dictionary of Modern Thought* (2<sup>nd</sup> ed, 1988) 769.

233 Tickle, above n 20, 91-94, illustrates the point using the Holocaust. She argues that *realists* would have no difficulty accepting the veracity of the Holocaust from eyewitness accounts. The *continental rationalists* would agree with the *realists* that after material evidence of the occurrence of the Holocaust had been tested and found to be congruent with eyewitness accounts, then it could be accepted as true. The *British empiricists'* position on the Holocaust would be to only accept the absolute veracity of the Holocaust if they had been present to witness it and if the events could be replicated. The *post-modern* view of reportage of the Holocaust would be that it could only ever be an incomplete, subjective account limited by the ability of the journalist to represent reality. *Post-modern* journalists charged with representing the Holocaust would have great difficulty saying anything of lasting significance and would run the risk of offending a large section of the community because they see all accounts are equally valid and would not, for example, privilege a Jewish survivor's account over an SS officer's.

234 Kovach and Rosenstiel, above n 16, 43. See further (44-45) where the authors trace the way news stories develop and the place of truth in that scheme: 'Once they have verified the facts, reporters try to convey a fair and reliable account of their meaning, valid for now, subject to further investigation [here reporters are] striving to provide, "the best obtainable version of the truth" ...[at this level] the individual reporter may not be able to move much beyond a surface level of accuracy...But the first story builds to a second, in which the sources of news have responded to mistakes and missing elements in the first, and the second to a third, and so on. Context is added in each successive layer. In more important and complex stories, there are subsequent contributions...This practical truth is a protean thing which, like learning, grows as a stalagmite in a cave, drop by drop over time'.

235 Bowman and McIlwaine, above n 179, 104-105, identify three phases of story development, each requiring a different approach to research. It helps in assessing the type of enquiry needed and a range of stories may be constructed around any given topic: (a) Level 1 (which concentrates on what has happened, the information originates from the source, and the story preparation is influenced by time constraints); (b) Level 2 (where more time is available to go deeper and to answer *how* and *why* questions) and (c) Level 3 (which looks at more deep-seated matters that set the stage for the event itself).

236 Kovach and Rosenstiel, above n 16, 45-46.

The second point established in this article and its precursor is – neither the courts, nor journalism can claim a monopoly on being arbiters of the ‘truth’. This is significant in the design of legal liability involving the media. In the defamation law context, the ‘truth’ that defamation law insists upon for a satisfaction of the truth defence, is truth only for the purposes of the courts’ truth-certifying process. Consequently, the media defendant’s inability to meet a defamatory imputation through the defence of truth and the requirement that the truth of the defamatory imputations be proven, does not necessarily mean that the defamatory imputation concerned was untrue in a substantive sense, or in the correspondence sense. As observed, the legal inquiry process is not conducive to establishing substantive truth or to establishing whether ‘he really did it’.<sup>237</sup> And as shown in this article the journalistic method is similarly vulnerable to failure. However, a key distinguishing feature is that the journalistic calling and method generally installs truth as its lynchpin or, at the very least, does not altogether preclude the attainment of truth in the substantive/correspondence sense.

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<sup>237</sup> Fernandez, *UNDALR* above n 1, 82 - 83.