

# MEDIA LAW

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**Media Law Handbook**

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*But the peculiar evil of silencing the  
expression of an opinion is that it is robbing the  
human race; posterity as well as the existing  
generation; those who dissent from the opinion,  
still more than those who hold it.*

JOHN STUART MILL  
English philosopher and economist  
1806-1873

# Introduction

**T**houghtful people disagree about the proper role of the news media. Some believe that journalists should support government and supply the public only with information the government deems appropriate. Some believe the press instead should be the government's watchdog, searching out and reporting on abuses of power.

Some want the press to be an advocate, to champion causes, and to take political positions. Others believe the press should be objective and nonpartisan.

Some believe that the press should respect and reflect social institutions and traditions. Others believe that the press should question and challenge them.

This book suggests that despite these disagreements there are standards that describe the privileges and responsibilities of a free press in a free society.

**1<sup>st</sup> A free and independent press is essential to any free society.** But what do we mean by a free press? In this book, we mean a press that is not subject to undue government control and regulation, one that is free from undue financial influence from the private sector, including advertisers, and economic or business pressures from private sector businesses. A free and independent press provides its readers, viewers, and listeners with the information they need to participate fully as citizens in a free society.

**2<sup>nd</sup> A free press is courageous and will pursue those stories that are important to its readers and viewers, without fear or favor.** It will challenge assumptions, it will question authority, and it will seek truth, no matter where that search may lead—to the high-

est corridors of power, to the owners of the news organization, or even if it leads to death, as was the case with investigative Russian journalist Anna Politkovskaya, gunned down in a contract killing in Moscow in 2006.

**3<sup>rd</sup> A free press is responsible.** Perceptions of responsibility vary from country to country, and even from year to year. For many, the standard in times of peace and stability may seem very different than in time of war or national emergency. For example, just a few months after the September 11, 2001, attacks in the United States, a survey conducted by the Freedom Forum's First Amendment Center reported that 46 percent of Americans polled believed that the press had "too much" freedom, a figure that certainly was higher than before the attacks, or the 39 percent reported in the 2009 survey.

Yet some essential principles remain constant. A free press must seek truth and report it. It must be tireless in seeking and achieving accuracy. The press must never knowingly publish a falsehood.

Most societies would agree that even the most free press must exercise its freedom with a clear understanding that actions and editorial decisions have consequences, some of them significant.



The press has great power to affect the lives of millions of people. Like any other powerful institution, it must be prepared to listen to complaints, to explain its decisions to readers and viewers, and to acknowledge and correct mistakes. But it must also be prepared to take unpopular positions and to face critics bravely when important principles are at stake. Some may call this arrogance. I call it courage.

### Freedom of Speech and a Free Press

In the United States, where I live and where I do most of my research and teaching, the press is for the most part free from government controls as a matter of law. The First Amendment to the U.S. Constitution prohibits Congress, or state legislatures, from passing any statute that

abridges freedom of speech or freedom of the press.

That absolute language was drafted by revolutionaries shortly after the American War of Independence (1775–1783), during a time of great optimism, but also of great uncertainty. The nation's courts have, over the two hundred-plus years that followed, interpreted the First Amendment as powerful, but perhaps not quite absolute.

The United States Supreme Court has made clear that certain types of speech are not protected by the First Amendment: publishing details about troop movements in wartime, for example. Other exceptions would include restrictions on obscene speech or on so-called fighting words that could predictably incite violence or criminal actions. And the news media are almost always subject to



**Above:** Andrew Hamilton defended John Peter Zenger, publisher of the *New York Weekly Journal*, who was charged in 1735 with seditious libel for criticizing the Royal Governor. Hamilton argued the truth of Zenger's publication was a defense against seditious libel. The jury acquitted Zenger; an action Hamilton praised: "You have laid a noble foundation for securing to ourselves that to which Nature and the Laws of our country have given us a Right—The Liberty—both of exposing and opposing arbitrary power by speaking and writing Truth."



laws of general applicability—that is, laws that apply to everyone but that do not single out the press for special obligations or punishment. For example, laws that prohibit the interception of telephone conversations without permission apply to journalists as much as they do to corporations.

But even these exceptions are tempered by a strong tradition that there always will be a presumption against any government attempt to stifle the free press. As an American judge once wrote, the default position for the press is to publish. Government should bear the burden of justifying any restraints. This formula preserves the watchdog role of the press and facilitates government accountability.

### Press Accountability

**B**ut who watches the watchdog? Who ensures that the press will be accountable? In some countries, the answer is the government. Laws, statutes, and codes spell out in detail the conduct required of news organizations. In these nations, journalists' rights often depend upon fulfillment of responsibilities. The rub is that the government's definition of responsibility may differ greatly from that of the press itself, or even the public.

In other countries, the answer is, the press itself, and its readers and viewers.

In some parts of the world, news organizations or individual journalists subscribe to ethical codes of conduct, like that of the National Union of Journalists in the United Kingdom. Other countries impose ethical standards as a matter of law. In the United States, individual news organizations have adopted their own ethical guidelines. Typically, these codes or guidelines set out the institution's rules governing financial and other conflicts of interest.

For example, an ethical guideline may prohibit a reporter from covering a com-

pany for which her spouse works. Or it may forbid a reporter to take part in a protest march, or to display a political sticker on the fender of his car or a placard in his front garden, or to wear a national flag in her lapel as she reports the news. Or it may prohibit a reporter from accepting even a nominal gift from a news source. Guidelines like these are intended to maintain both the reality and the appearance of journalistic independence.

It would seem unnecessary for ethical guidelines to address the necessity for accuracy and truth-telling. But after journalists like Jayson Blair of the *New York Times* either fabricated or plagiarized the news stories they submitted to their editors, many organizations have revised their ethics guidelines to make clear that neither practice can ever be accepted or condoned by a responsible news organization.

Sometimes ethics and the law intersect. In Northern Ireland, for example, Suzanne Breen, the Belfast-based editor for Dublin's *Sunday Tribune*, faced a legal and ethical dilemma. Breen had been telephoned by an individual who claimed responsibility for murdering two soldiers at Massereene Barracks in Antrim. The police demanded that she turn over her cell phone, computer records, and notes about her contacts with the paramilitary Real IRA organization. Breen resisted, arguing that to do so would breach her professional obligation to protect the confidentiality of her sources. She also candidly acknowledged that complying with the law enforcement demands could endanger her life, and the lives of her family members. But if she defied the order, Breen faced the prospect of up to five years in jail for contempt.

In June 2009, a judge in Belfast ruled that compelling Breen to surrender her news-gathering materials would put her life at risk in contravention of the European Convention on Human Rights.

By contrast, in the United States, *New York Times* reporter Judith Miller refused to cooperate in a criminal investigation seeking the identity of a government official who had revealed the identity of a covert intelligence agent. Miller defied orders to testify, even after judicial rulings that journalists possessed no special privilege to decline naming confidential sources. She spent 85 days in jail in 2005. Some judges and members of the public argued that journalists can never hold themselves above the law. But the ethics policies of most news organizations would require a reporter to honor a promise given to a source, even if it means going to jail.

Legal and ethical provisions vary from country to country. Reasonable people—and even journalists themselves—may disagree on how they should apply in a particular situation and whether they strike the proper balance between competing societal interests.

### Privacy and Libel

Is it ever appropriate for a reporter to violate an individual's privacy? In the United States, the Supreme Court has ruled that it is lawful for the press to

publish the name of an individual who has been sexually assaulted. But is it the right thing to do?

Is it right for a journalist to make fun of a public official or to lampoon a name or image that is sacred to a particular ethnic or religious group? In the United States, after the pornographic *Hustler* magazine satirized the outspoken clergyman Rev. Jerry Falwell, the Supreme Court ruled that a free society must tolerate even “outrageous” speech in order to guarantee robust public debate and discussion. As one justice once wrote, “There is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.”

On the other hand, in March 2008, the United Nations Human Rights Council adopted a resolution condemning “defamation of religions.” And many countries retain, and enforce, statutes that make it a crime to insult or “offend the dignity” of any person, even a public official—even if the underlying facts are true.

The Supreme Court of the United States has never upheld a government



Above: *New York Times* reporter Judith Miller was jailed for contempt of court for refusing to reveal a confidential source. Miller, accompanied by her legal team, leave the U.S. District Court in Washington, DC, on June 29, 2005.

attempt to stop the press from publishing classified information. Fierce debates over whether journalists can be criminally prosecuted under espionage laws arise periodically. In China, for example, theft of state secrets is a crime regardless of who does it, and the definition of state secrets is an expansive one. But even assuming that they do not break the law, is it right for journalists to publish classified information, especially when it is claimed that doing so will alert terrorists to surveillance techniques and undermine intelligence efforts to maintain safety and security?

### Transparency

Despite these concerns, the term “transparency” has become a watchword in civil society. Both public and private institutions are exhorted to be more forthcoming about their operations, funding, and governance. The digitization of data and the ubiquity of the Internet can help. But universal access to information raises new issues about security and privacy, and it compounds the difficulties of protecting proprietary or copyrighted information. Ironically, some regard the technology that maximizes access to information as a threat

to other fundamental rights, such as the right to a private life or, as an American jurist once wrote, “to be let alone.”

Add to this volatile mix the legions of unidentified and seemingly ungovernable bloggers and citizen journalists, operating with gusto but without prior training or certification of any kind. There is no question that they contribute a lively counterpoint to the mainstream media. But will their tendency to challenge conventions and flout the rules lead to greater attempts to regulate the press?

These are not easy questions. Nor are there easy answers.

It is not easy to live with a free press. Doing so means that one is being challenged, dismayed, disrupted, disturbed, and outraged—every single day.

A free press is fallible and at times fails to live up to its potential. But developing democracies around the world demonstrate every day that they have the courage and confidence to choose knowledge over ignorance and truth over propaganda by embracing the ideal of a free press.

It is not easy to live with a free press. But I know I couldn’t live without it.

—*Jane Kirtley*



*Whereas recognition of the inherent dignity  
and of the equal and inalienable rights of all  
members of the human family is the foundation  
of freedom, justice and peace in the world,...*

UNIVERSAL DECLARATION OF HUMAN RIGHTS  
United Nations  
1948



# A Good Environment for Fostering Journalists

**N**ational legal systems vary. Civil law nations like Germany and France often adopt detailed and precise statutory schemes that govern the rights, duties, and obligations of journalists. In common law nations like the United Kingdom and the United States, a mix of statutes, regulations, and case law establishes broad legal principles that encompass press freedom, even if these laws do not always directly address journalists.

Regardless of the particular legal approach, good journalism flourishes where society respects and enforces the rule of law. The work of legal, theoretical, and philosophical thinkers, including Confucius, Milton, Rousseau, Meiklejohn, and Mill, among others, supplies the intellectual underpinning for contemporary media law and media ethics.

## International Standards

**I**nternational standards supply guarantees of free expression. But these standards also typically acknowledge certain legitimate grounds for the state's restriction of free expression. The Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in 1948, pronounces in Article 19 that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information

and ideas through any media and regardless of frontiers.

Article 29 then qualifies this right as:

...determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Similarly, Article 10 of the European Convention on Human Rights states:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

However, that absolute language is qualified further in this convention:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Many international documents, conventions, and treaties embrace a similar approach, among them the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights, as well as many others. The details differ, but all recognize freedom of expression as a fundamental

right, but one that can be limited by duly enacted laws tailored to protect equally compelling societal interests.

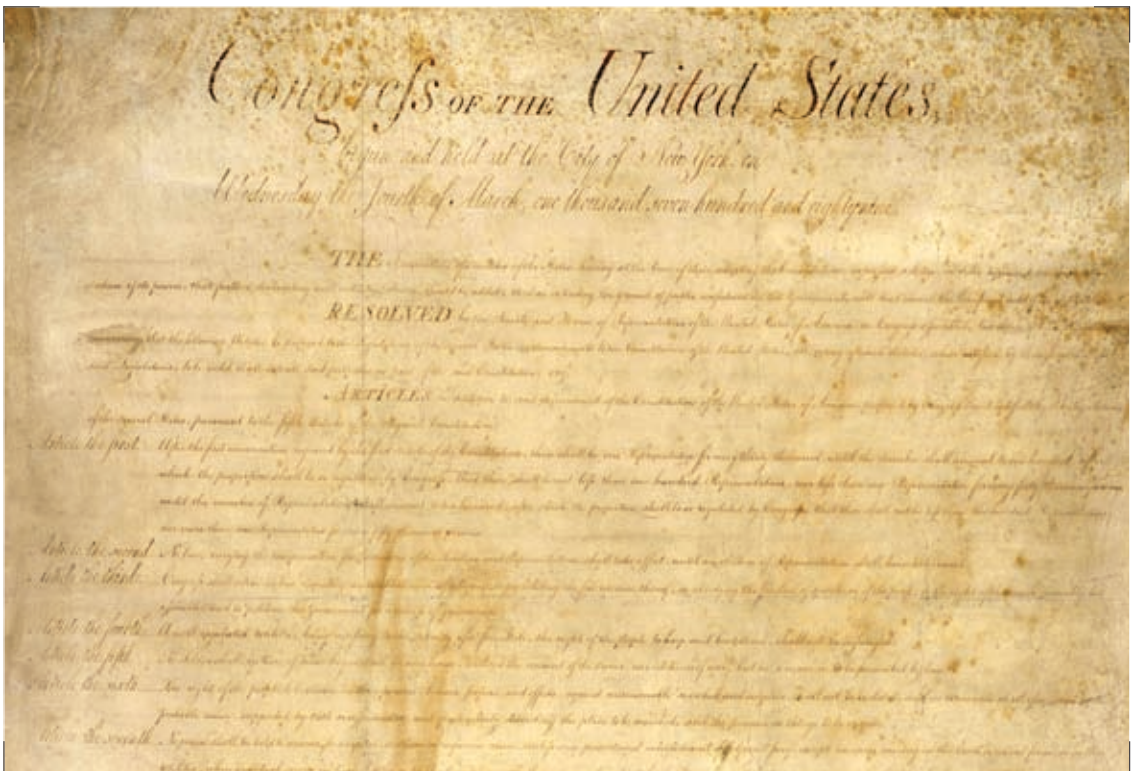
### National Standards

National constitutions also frequently guarantee press freedom. For example, Article 25 of the Belgian Constitution, which dates from 1831, provides that:

The press is free; censorship can never be established; security from authors, publishers or printers cannot be demanded. When the author is known and resident in Belgium, neither the publisher, nor printer, nor distributor can be prosecuted.

The First Amendment to the United States Constitution, ratified in 1791, is similarly absolute:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,



Above: Freedom of the press is explicitly protected under the First Amendment of the Bill of Rights in the U.S. Constitution.

and to petition the Government for a redress of grievances.

Other national constitutions acknowledge the right of free expression but do not regard it as absolute. For example, Article 8 of the Senegal Constitution guarantees freedom of expression and opinion “subject to the limitation imposed by laws and regulations.” Similarly, Article 36(1) of the Constitution of the Kyrgyz Republic explicitly declares that the “mass media are free” but then qualifies that statement in Article 17(2):

Restrictions to the exercise of rights and freedoms is allowed by the Constitution and laws of the Kyrgyz Republic only for the purposes of ensuring the rights and freedoms of other persons, public safety and order, territorial integrity and protection of constitutional order. But in doing so, the essence of constitutional rights and freedoms shall not be affected.

It is probably fair to say that no country in the world regards the cherished universal or fundamental right of free expression as absolute. It is subject to limitation and modification when competing rights are deemed to outweigh it. As a result, some press freedom laws can weaken rather than strengthen the protections afforded a free press.

### Laws That Discourage Journalists

**C**ensorship—government-imposed restraint on freedom of speech and expression—poses the greatest single threat to a free press. Censorship can take many forms:

- › compulsory licensing schemes;
- › mandatory pre-publication review;
- › imposition of gag orders during the pendency of a legal proceeding;
- › extraordinary taxes or fees;

- › withdrawal of legal protection that would ordinarily be granted to other businesses or citizens.

The threat of post-publication sanctions, such as criminal fines or incarceration, can be as intimidating and crippling to the ability of a news organization to operate as any prior restraint.

More subtle, but equally problematic, are mandates that impose certain duties or responsibilities on the press. Some autocratic countries and democracies require that the press publish “checked facts” or “the truth.” For example, Article 20(d) of the Constitution of Spain states, “The rights are recognized and protected...of freely sending or receiving true information by any medium” [emphasis added].

Government desire for accurate reporting is understandable. In former dictatorships, where propaganda and the promulgation of falsehoods were commonplace, the public is eager to learn a variety of facts from many different sources. And it is a basic tenet of ethical journalism that no reporter wants knowingly to disseminate an untruth.

But requiring accuracy only raises more questions: What is truth? Who decides? The government?

Certainly all journalists should aim to be accurate. But often the perception of truth will change over time. As a breaking news story unfolds, what initially appeared to be a fact may turn out to be false.

A spectacular example occurred on September 11, 2009, when the CNN and Fox cable television networks reported that the U.S. Coast Guard had opened fire on a suspicious vessel in the Potomac River in Washington, D.C., not far from the Pentagon, where President Barack Obama was attending commemorative services. Relying on information obtained by listening to police scanners, CNN also used the social-networking application Twitter to



report, “Coast Guard confronts boat as Obama visits Pentagon, police scanner reports say shots fired.”

The *Chicago Tribune* reported that it took almost 30 minutes for the networks to determine that they had overheard open radio transmissions—during which personnel made “bang bang” noises and stated, “We have expended ten rounds”—that were part of a routine training exercise, not an attack. White House Press Secretary Robert Gibbs chided the networks for causing panic, observing, “Before we report things like this, checking would be good.” CNN claimed that before reporting the incident, it had contacted the Coast Guard’s public affairs office and been told that the Coast Guard was unaware of any activity on the river. The Coast Guard did not apologize for its part in the incident, other than to promise that it would review both “our procedures and the timing of this exercise.”

Commentators criticized the news media for rushing to disseminate the story, suggesting that the networks should have withheld it until they were able to verify the details. But this example illustrates the difficult tightrope that news organizations walk when reporting breaking news. In an increasingly competitive media marketplace, the pressure to be first with a story is intense. The old Associated Press maxim, “Get it first, but get it right,” seems almost quaint in a 24/7 world, where not only mainstream media, but bloggers and other “citizen journalists” can observe and report events instantly.

Should CNN and Fox have been subject to government sanction for having made a good-faith error in their reporting? In the United States, the answer would be “no.” But in other countries, such a mistake might lead to a fine or the loss of a license.

As troubling as the Coast Guard incident may be, at least the factual discrepancies were quickly resolved. With issues like global warming or the financial or

health crises, the facts emerge more gradually. How can journalists determine the truth at any given point? And what is the responsibility of the government, or of the public, to define and interpret the facts? The reality is that journalism is only one means of ascertaining truth. In a free society, it is up to members of the public, not a governmental entity, to review the facts from a wide variety of sources before deciding what is true.

In one prominent example, the U.N. Security Council in 1996 called on Rwanda to identify and close radio stations it contended had fomented hatred and incited acts of mass violence there. The case raised an important question: Should the media be held responsible for the violent acts of their viewers, listeners, or readers?

Punishment may also await those who challenge the accepted wisdom concerning historical incidents. In Turkey, it is a crime to refer to the mass killings of Armenians during World War I as genocide. In 2007, the neo-Nazi Ernst Zündel was imprisoned in Germany after publishing statements denying that the Holocaust occurred, a violation of the German Criminal Code.

A corollary to the problem is created when the government declares what the



Above: Ernst Zündel, author of *The Hitler We Love and Why* and publisher of *Did Six Million Really Die?*, was handed the maximum allowable sentence under German law in 2007 for inciting hatred and denying the Holocaust. Holocaust denial is a specific criminal offense in several European countries.

truth is in the enactment of insult laws that prohibit criticism of monarchs, politicians, or other public officials, national symbols, or a particular race or religion. Dozens of countries throughout the world, including some in the European Union, former Soviet Union, Asia, Africa, and Latin America, have enacted such statutes. Although the precise language varies, it is invariably both broad and vague, easily manipulated by governments to punish dissent and to silence criticism.

Another dimension arises when the effort to suppress unwelcome publications crosses national boundaries or is initiated by non-state actors. Most notoriously, in February 1989, the Iranian spiritual leader Ayatollah Ruhollah Khomeini issued a *fatwa* offering a bounty for the death of the British author Salman Rushdie, whose novel *The Satanic*

*Verses* Khomeini declared “blasphemous against Islam.” In September 2005, the Danish newspaper *Jyllands-Posten* published editorial cartoons depicting the Prophet Mohammad. Again blasphemy was charged. Violent protests and threats on the lives of the cartoonist followed. Blasphemy charges are not leveled only by Muslims. Not until July 2008 did the British House of Lords vote to abolish the common law crimes of blasphemy and blasphemous libel.

### Compulsory Licensing

**A**nother mechanism to discourage journalists is the use of compulsory government licensing. This usually is justified as helping to ensure that only those with appropriate qualifications engage in the profession of journalism. But, as Leonard Sussman of the New York-based



**Above:** Flemming Rose, center, commissioned the controversial cartoons caricaturing the Prophet Mohammad published by the Danish newspaper *Jyllands-Posten* in 2005. The cartoon sparked heated public debate about the balance between satire and censorship.

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