

‘Fair Play to All Sides of the Truth’: Controlling Media Distortions

*Thomas Gibbons**

Our knowledge and understanding of the world is significantly influenced by news and current affairs reporting by the media. Yet the media can provide only a partial account of the truth, because they are not an infinite resource and selections have to be made about what can be published or broadcast. Editors have considerable discretion to choose what information should be disseminated, albeit constrained by considerations such as journalistic ethics, proprietorial objectives, and the economics of the production process. They may strive to provide at least as full an account of the truth as is possible. Alternatively, they may allow, or be indifferent to the possibility, that even partial truth will be distorted in the stories that they tell. JS Mill said that, ‘Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites’ that ‘correctness’ can only be discerned through the process of struggle between them. He continued, ‘. . . only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth.’¹

This chapter examines whether there should be limits imposed on editors’ discretion, and whether law or regulation have a role in determining those limits. It first considers the case for the media having a special role in truth-telling and then reviews the evidence about journalistic news practice. It is argued that, where distortions occur as a result of commercial and institutional pressures in the industry, there are no grounds for privileging the media on the grounds of their

* Halliwells Professor of Law, University of Manchester. An earlier version of this article was delivered as a lecture at University College London, 26 February 2009. I would like to thank Eric Barendt and an anonymous referee for their helpful comments.

¹ JS Mill, *On Liberty* (edited by G Himmelfarb) (Penguin Books: Harmondsworth, 1974) 110, 111.

freedom of speech. A number of regulatory options are considered as ways of minimizing distortion, the preferred approach being a system of 'enforced ethics.'

The Media's Claim to Truth-Telling

In assessing whether editors are likely to select material for publication in the interest of enhancing truth, the media's own aspirations and their social function are important considerations. There is a dominant viewpoint that newspapers and broadcasters may be seen as the 'fourth estate' of the constitution, reflecting what James Curran has described as the 'liberal theory' of the media.² It is represented by the practice of investigative reporting as the ideal to which journalists subscribe. The theory characterizes the media as having a democratic role to act as a check on the state, so as to 'monitor the full range of state activity, and fearlessly expose abuses of official authority'. It also sees the media as agents of information and debate, assisting informed choice, by channelling information between the government and the governed and providing a forum for debate. As Curran indicates, this requires that the media should be fully independent from the state, which implies that they should be located in the free market and should be subject to no, or minimal, state regulation. The theory features, at least implicitly, in political discussion, as a rationale for minimizing regulatory interference with media content.³

The theory also plays a prominent role in constitutional and legal thought. Although the idea of freedom of the media does not find support as an independent principle,⁴ expression through the media is given special attention in free speech doctrine. There are many solemn declarations of the importance of the role of the media in court

² J Curran, 'Mediations of Democracy' in J Curran and M Gurevitch (eds) *Mass Media and Society* (4th edn, Hodder Arnold: London, 2005) 122–49. See also J Keane, *The Media and Democracy* (Polity Press: Cambridge, 1991); S Koss, *The Rise and Fall of the Political Press in Britain* (Fontana Press: London, 1990); L Gies, *Law and the Media: The Future of a Uneasy Relationship* (Routledge Cavendish: London, 2008) 92–4.

³ In the United Kingdom, versions of the liberal theory have been advanced in countering attempts to increase legal and regulatory oversight of the press and in securing a gradual deregulation of the broadcasting industry. For an historical account, see J Curran and J Seaton, *Power without Responsibility: The Press, Broadcasting and New Media in Britain* (6th edn, Routledge: London, 2003) chs 7 and 15.

⁴ E Barendt, *Freedom of Speech* (Oxford University Press: Oxford, 2005) ch XII; F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press: Cambridge, 1982) 106–9.

decisions in the United Kingdom and at the European Court of Human Rights. For example, Lord Bingham observed in *McCartan Turkington Breen* that:

the majority [of citizens] cannot participate in the public life of their society . . . if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.⁵

In the same case, Lord Steyn spoke of ‘the importance of the press acting as the ‘eyes and ears’ of the public’.⁶ In *Reynolds*, Lord Nicholls acknowledged that:

It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally. . . . The press discharges vital functions as a bloodhound as well as a watchdog.⁷

Again, in *Loutchansky*, Lord Phillips noted the public interest, ‘in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed’. He observed that, ‘The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist.’⁸

Similar sentiments have been expressed by the European Court of Human Rights and repeated in many judgments. The press is said to play an essential role in a democratic society. Although it must not

⁵ *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277, 291, in the course of holding that a press conference was a ‘public meeting’ for the purposes of statutory qualified privilege in defamation. ⁶ *Ibid*, 298.

⁷ *Reynolds v Times Newspapers*, [2001] 2 AC 127, 200, 205.

⁸ *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] QB 783, para 36.

overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest.⁹ Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. ‘Were it otherwise, the press would be unable to play its vital role of “public watchdog”.’¹⁰

Although these judicial comments contain empirical statements about the role of the media, their purpose is not to describe the reality of journalism but to impose normative standards on journalists’ activities. Nevertheless, they serve to legitimize an empirical assumption that the media have the capacity and willingness to serve democratic goals and, so far as possible, should be left alone so that they can fulfil them. Furthermore, the liberal theory presupposes that the media provide a positive service for democratic debate because they will tell the story as it really is—the metaphor of the watchdog connotes the idea of being on guard against false or misleading information, and that of the bloodhound connotes the idea that relevant information is being concealed. The inference is that the media will provide an alternative account that is genuine and credible.

The Problem of Distortion in the Media

The liberal theory of the media appears to be influential, yet there is a countervailing view, supported by much evidence, that the media have a tendency to distort our understanding of the world. As Curran shows, the operation of media organizations in the marketplace is not an automatic guarantee of independence and effective scrutiny of power. The media devote a relatively small part of their content to public affairs, including official wrong-doing, preferring to emphasize entertainment more generally. They also devote little time to wider sources of power including economic power. Furthermore, news may be managed to serve the media’s interests, whether they be the proprietor’s or the company’s more broadly.¹¹

⁹ *Castells v Spain* (1992) 14 EHRR 445; *Goodwin v United Kingdom* (1996) 22 EHRR 123; *De Haes and Gijssels v Belgium* (1997) 25 EHRR 1.

¹⁰ *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125.

¹¹ Curran, n 2 above, 129.

In addition, there is a tendency for commercially funded media to undermine intelligent and rational debate; rather, it emphasizes information that is 'simplified, personalized, decontextualized, with an emphasis on action rather than process, visualization rather than abstraction, stereotypicality rather than human complexity. . .'.¹² The media may not so much represent their readers and audiences in a democratic way as reflect their status as consumers of the information products which the media sells to them. So, even if the media do engage in some form of democratic scrutiny of the exercise of power, they will not necessarily provide accounts of the world that would provide authoritative alternatives to the versions offered by those in power.

If this view is taken to reflect faithfully some key characteristics of our media, it nevertheless describes them at an abstract level, in terms of the industry and its organization. To the extent that they are seen as creating problems for a free flow of information, their effects may be tempered by the belief that they are resisted by journalists. There are, indeed, notable exceptions to the general picture. Some newspapers do have honourable traditions of a more democratic style of journalism, and public service broadcasters are to an extent isolated from commercial pressures. More generally, there may be a sense that journalists subscribe to a different set of values and work hard, in difficult institutional and economic circumstances, to overcome the problems. However, the reality appears to be that journalism itself is structured by the organizations in which it takes place, and by the resources and budgets which are made available. These constraints have a critical effect on the ability of journalists to gather information and tell their stories.

Various studies¹³ have shown that certain sources dominate the news. Journalists are attracted to sources which are close at hand, reliable, well-informed, and likely to be newsworthy. Government and established institutions dominate the sources of news. This is because they have greater resources, they command greater legitimacy and authority, and they are routine suppliers of material. Their sources are

¹² Ibid, 130.

¹³ V Campbell, *Information Age Journalism: Journalism in an International Context* (Arnold: London, 2004) ch 4; Goldsmiths Media Group, 'Media Organisations in Society: Central Issues' in J Curran (ed), *Media Organisations in Society* (Arnold: London, 2000) 19–69, 34; P Schlesinger, *Putting 'Reality' Together* (Methuen: London, 1978).

supplemented by information from other professional information suppliers, such as pollsters, marketing agents, and public relations agencies. Furthermore, the evidence suggests that, once information has been obtained, the process of publication is equally slanted. The 'news values' of editors tend to favour stories which deal with the immediate, the topical, and matters of human interest. Furthermore, newspapers tend to reflect ideological biases and they may be willing to set news agendas to promote those viewpoints.

Recent evidence shows that these features of media practice continue to exist, and that they are endemic and systemic. The implication is that their deficiencies cannot be remedied by reliance on the ability and willingness of journalists to seek out and report the truth. It seems that the media are no longer assisting the functioning of a healthy democracy and may in fact be inhibiting it. In his book, *Flat Earth News*,¹⁴ the journalist Nick Davies provides an insider's view of the news industry, showing how it is increasingly difficult, if not impossible, for the ideals of journalism to prevail. He notes the influences on journalists that are routinely mentioned—the influence of the proprietor and of advertising.¹⁵ But he claims that there is a more basic problem, a failure of control over the gathering and testing of information.

What Davies describes as the 'news factory' is characterized by what has been called 'churnalism', the routine recycling of unchecked material. It is material that comes primarily from press agencies and from public relations operations; effectively, it is they who are choosing the material which is reproduced. Furthermore, that choice does not depend on any principles of significance. Instead, it is determined by commercial considerations of cost and convenience, against a background of low staffing and poor resources. The result is a highly selective diet of news which tends to reflect the interests of those who routinely supply it. It consists of relatively 'safe' ideas, and tends to give readers what they want to believe in. Just as significant is what is not reported as a result of this selection process. Davies emphasizes what has been a strong theme in related literature: that the greatest cause of distortion is omission.¹⁶ Overall, he paints a depressing picture of a news industry that seems structurally incapable of challenging and

¹⁴ N Davies, *Flat Earth News* (Vintage Books: London, 2009). The study also reports results from specially commissioned research conducted by the Cardiff School of Journalism.

¹⁵ See B McNair, *News and Journalism in the UK* (4th edn, London: Routledge, 2003).

¹⁶ Campbell, n 13 above, ch 5.

testing the information that it disseminates. The outcome is ‘Flat Earth’ news—news that is accepted as true because it appears so. What is interesting is that this phenomenon is not confined to the tabloid end of the market. According to Davies, only around 20 per cent of journalistic activity appears to involve traditional investigative techniques, and even the apparently ‘quality’ end of the market falls prey to churnalism from time to time.¹⁷

Other recent studies of the industry are consistent with Davies’ view. The House of Lords Communications Select Committee reported on *The Ownership of the News* in 2008,¹⁸ having gathered much evidence from the industry about the pressures of competing in a global 24 hour news world. It expressed particular disquiet at the potential for inaccuracy that the sheer speed of the 24 hour news cycle demands. From a different perspective, the Media Standards Trust has suggested a package of reforms to the system of self-regulation in the press¹⁹ as a response to what it considers to be increasing public disquiet and lack of confidence about poor journalistic practice. It should be acknowledged, however, that the problem may not be so acute in broadcast journalism, where the requirement to report news with due accuracy and due impartiality²⁰ imposes a critical constraint on what is presented. However, broadcasting often follows the press when setting its own news agendas and it shares some dependence on information provided by press agencies and public relations firms.

Characterizing Distortion

This chapter explores the implications of this situation for law and regulation relating to the media. The basic problem is that we appear to have a media industry that is no longer capable of delivering the kind of service that we expect it to contribute to our democratic culture. Indeed, its practice appears to be moving in the opposite direction and

¹⁷ Davies, n 15 above, 95 and ch 3 more generally. It is telling that Davies’ study did not include tabloid newspapers.

¹⁸ *HL Select Committee on Communication on The Ownership of the News, 1st Report* (HL Paper 122, 2007–08).

¹⁹ Media Standards Trust, *A More Accountable Press. Part 1: The Need for Reform* (2009), available at <<http://www.mediastandardstrust.org/resources/mediaresearch/selfregulationreview.aspx>>.

²⁰ Communications Act 2003, ss 319, 320.

actually impeding the flow of information and exchange of ideas that we might think is necessary for a healthy society.

It is first necessary to examine in more detail what might be meant by 'distortion'. At a basic level, the reporting of facts may seem to be straightforward, but it is now long accepted that it is difficult to isolate 'pure' facts and that social reality is constructed and interpreted in the context of broader frameworks of meanings.²¹ It is hard for one person's words to capture reality as another sees it, as the everyday practice of defamation law illustrates.²² But even if there may be agreement about the reporting of what might be called 'events', any wider 'truths' that they represent will typically be dependent on the inferences to be drawn from them.²³ There is a continuum from simple facts that can be easily verified to abstract generalizations about the state of the world. In the middle, there are various nuances of complex situations, typically involving judgments about the relevance of sets of facts and their interrelationships, whose veracity may be contestable. Those judgments of relevance may be made from various kinds of perspective. In the academy, theoretical modelling is an essential way of simplifying the pattern of events in order to arrive at a deeper truth, whether it be scientific understanding or political ideology. Drama and the arts depend on fiction to provide deeper insights about our existence. Indeed, taking a view contrary to the picture that was provided above, David Hare recently lamented the management of the BBC for relying too much on journalism: 'Television has always been run by journalists. Journalists distrust the central claim of fiction: that by lying you get to truth'.²⁴

These difficulties do not mean that truth is unobtainable but that it involves a process of discovery. As Lichtenberg has argued,²⁵ it is a 'regulative principle' an ideal for which we strive. Without it, we could

²¹ See P Berger and T Luckmann, *The Social Construction of Reality* (Penguin Books: London, 1967).

²² This is evidenced by the high volume of preliminary litigation on issues related to pleadings and the meanings of statements in issue.

²³ The law of defamation recognized this in the defence of justification, in particular, the distinction between specific and general facts: eg, see *Williams v Reason* [1988] 1 All ER 262; *Brookbinder v Tebbit* [1989] 1 All ER 1169.

²⁴ M Billington, 'The lame, the weak and the godawful' (*The Guardian* Interview with David Hare at the British Film Institute), *The Guardian*, 19 January 2009, available at <<http://www.guardian.co.uk/stage/2009/jan/19/david-hare-television>>.

²⁵ J Lichtenberg, 'In Defence of Objectivity Revisited' in J Curran and M Gurevitch (eds) *Mass Media and Society* (3rd edn, Arnold: London, 2000) 238–54, 249.

not make sense of grievances about news coverage that it is unfair, biased, sensational, misrepresents views or does not report impartially. They all 'imply the possibility of a contrast,' that particular claims are partial, distorted, or inadequate—that those who see things in one way are missing something important.²⁶ But that also provides an insight into the meaning of distortion. It occurs when the information needed for reflection on the meaning and significance of events is withheld or manipulated.

Here, the context is critical. Many factual questions can be resolved relatively simply, and distortions will typically amount to inaccuracy or lying. To establish more generalized and complex truths, sufficient information is required to resolve contestable interpretations of the circumstances. One kind of distortion is the partial truth, in which facts that are significant for understanding the fuller picture are omitted. For example, statistics about a firm's or government department's performance are reproduced in a story but without indicating that they are the claims of a one-sided press release. Another kind of distortion omits context. For example, a set of (factually correct) stories report that members of a social group (such as migrant workers, or an ethnic minority) have committed crimes, but do not mention that the behaviour is not representative. Again, a story about scientific findings does not reveal that they are based on a tiny sample, or the story emphasizes only a trivial result, or it fails to mention that the study does not reflect the weight of other research. Such omissions of significant pieces of information may be accompanied by exaggerated emphasis on others, perhaps encapsulated in the sensationalist headline.

In deciding whether to characterize 'less than complete' reporting as a distortion, some account must be taken of the real or implied motivation of the editor. If a newspaper decides to concentrate on a particular topic, for example, financial news, celebrity behaviour, or parliamentary politics, it would not be regarded as distorting the news merely because it did not offer a different diet of information. Similarly, it may not be necessary to put every UK story in a world context. Media partisanship implies the editor's ability to choose the themes that will interest the readership or audience. However, a distinction may be drawn between choosing an issue and dealing with it appropriately. Distortion occurs when choices are not actually being made, because there is too much uncritical reliance on recycled information,

²⁶ Ibid, 242, 243.

or when the level of coverage is not adequate for the comprehensiveness of the reporting that is being implicitly represented to the readership or audience. A 'quality' newspaper may wish to offer pronouncements about the state of the nation and make judgments about the importance and significance of events, whereas a tabloid may wish only to cater for its readers' prurient interests. In each case, the editor's aspiration provides the standard by which the adequacy of reporting can be assessed.

A more ambiguous situation may arise, however, one which applies to all sectors of the media, when an editor possesses information but chooses to release it only selectively. This may be done for one or more reasons to attract readers and audiences, by whetting their appetite for more, or to cause embarrassment, or to score political points. Is this a case of distortion or acceptable partisanship? The answer may depend on whether the report is self-contained or whether it forms part of a larger story. While an editor cannot be required to publish what he or she does not want, once a decision is made to release a partial account, the effect will obviously be to distort the fuller picture.

Journalists are only too well aware of the difficulties of rendering an adequate account of the truth. They have relied on the idea of 'objectivity' as a way of dealing with them, a concept which has been described as 'a cornerstone of the professional ideology of journalists in liberal democracies'.²⁷ Objectivity connotes the reporting of facts at face value, providing an empirical view of the facts as given and recorded in a neutral way. There is a reliance on attributable sources, especially quotes, as a standpoint for veracity.²⁸ However, this makes reporting especially vulnerable to dependency on press agencies, which specialize in such basic material. For that reason, and because objectivity typically entails the balancing of conflicting claims, albeit without analyzing them, it has the ironic effect of itself contributing to media distortion. This is because it may leave the impression that unequal viewpoints are equally plausible. Nevertheless, the role of objectivity in journalism is not uncontested.²⁹ For example, Davies argues³⁰ that

²⁷ Lichtenberg, n 25 above, 238. See also A Edgar, 'Objectivity, Bias and Truth' in A Belsey and R Chadwick (eds), *Ethical Issues in Journalism and the Media* (Routledge: London, 1992) 112–29.

²⁸ V Campbell, n 13 above, ch 7.
²⁹ Ibid. See also M Schudson, 'Four Approaches to the Sociology of News' in J Curran and M Gurevitch (eds) *Mass Media and Society* (4th edn, Hodder Arnold: London, 2005) 172–97.

³⁰ Davies describes it as the 'great blockbuster myth', a Flat Earth tale in itself!

journalism requires judgments about what is important, provided that they are honest and sincere. This is a view that appears to be accepted by the European Court of Human Rights, which has accepted that ‘journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation’ and that a ‘certain selectiveness of quotation’ will not make a report inaccurate and unreliable.³¹

Intervening to Reduce Media Distortion

Although the nature of the problem of media distortion has been identified for some time, there has been little willingness to find ways of dealing with it. The complexity of the issue is no doubt one deterrent. But the principal objection is that any intervention would amount to an interference with freedom of the media or, at least, the media’s freedom of expression. The objection rests on the ideas that media can claim some right to freedom of expression and that interference with their activities will be inconsistent with the justifications for giving special priority to the right—the familiar arguments based on truth, democracy and individual self-fulfilment.³² The difficulty is that the remedy would be particularly intrusive because it would need to be directed at the very workings of the media organizations themselves, the editorial discretion. There is an understandable reluctance to use the state’s power to constrain the freedom of owners and editors to choose what they wish to publish and how to present it.

This position is reflected in the current law. Liability for media expression is constrained by laws intended to protect a limited number of interests that may exceptionally override speech—reputation, privacy, national security, administration of justice. But the law does not go further in scrutinizing the scope of media expression. The regulation of accuracy and impartiality, currently found in broadcasting, is an exception. While there may be justifications for retaining it,³³ it is sometimes seen as an historical anomaly; it does not apply to the press (apart from limited self-regulation of ‘inaccurate, misleading or

³¹ *Selistö v Finland* (2006) 42 EHRR 8, para 63.

³² Schauer, n 4 above; Barendt, n 4 above, ch I.

³³ See the discussion of impartiality and fairness, below.

distorted information' by the Press Complaints Commission³⁴); and it is being resisted in development of new media.

The acknowledgement of the 'media freedom' objection means that the quality of news information is not a matter for law and regulation. Indeed, the courts have allowed journalists and editors much latitude in the way they choose to tell a story.³⁵ Their approach reflects more generally that of the European Court of Human Rights in holding that Article 10 of the European Convention on Human Rights protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.³⁶ Journalistic freedom in particular is regarded as including possible recourse to a degree of exaggeration, or even provocation.³⁷ If the media freedom objection is accepted, we appear to be left in the position that media distortions have to be accepted for the sake of the media's more important potential to contribute positively to society as a watchdog or democratic forum. It may seem that all that can be done, consistently with freedom of expression, is to exhort journalists and media organizations to act more professionally. Is there a way of breaking out of this moral and political stalemate, which amounts to a somewhat fatalistic resignation to the industry trends?

The starting point is to note that claims for a right to media freedom are weak. First, the relationship between the media and freedom of expression is merely contingent: sometimes they do advance free speech, but sometimes they do not. That fact provides the basis for a set of reasons for not giving a special constitutional or legal status to the media: the media are simply a specialized manifestation of individual freedom of speech and there are no grounds for giving them privileged status—at the most, they can claim some recognition for their instrumental contribution to speech.³⁸ In addition, there are significant

³⁴ Press Complaints Commission, *Code of Practice* (2007) Clauses 1(i) and 1(ii) available at <http://www.pcc.org.uk/assets/111/Code_Aug_2007.pdf>.

³⁵ Recent examples are: *Attorney-General's Reference No 3 of 1999: Application by the British Broadcasting Corporation to set aside or vary a Reporting Restriction Order* [2009] UKHL 34, para 25 per Lord Hope; *Jameel (Mohammed) v Wall Street Journal SPRL* [2006] UKHL 44; [2007] 1 AC359, para 33 per Lord Bingham and para 51 per Lord Hoffman. See also *A-G v English* [1983] 1 AC 116, 143 per Lord Diplock.

³⁶ *Oberschlick v Austria (No 1)* (1998) 25 EHRR 357.

³⁷ *Prager and Oberschlick v Austria* (1996) 21 EHRR 1. However, the recent decision in *Lindon, Otchakovsky-Laurens and July v France* (2008) 46 EHRR 5 insists on a minimum degree of moderation and propriety.

³⁸ E Barendt, *Freedom of Speech* (Oxford University Press: Oxford, 2005) 419ff.

practical problems involved, such as defining journalists or adjudicating between different loci of speech within the organization. But these considerations can be deployed equally to show that there should be no special exemption for media organizations, as media organizations, when their expression transgresses acceptable boundaries.

Secondly, we can note some distinctions between the characteristics of media organizations and of individuals in communicating information. A significant dimension is the scale, breadth, ubiquity, unrelenting presence, and sheer reach of media bodies.³⁹ Another is the systematic nature of their information processing. The wider question, therefore, is whether freedom of expression can, or should, be invoked to protect the power of institutionalized speech. As Onora O'Neill⁴⁰ has suggested, traditional theories of freedom of speech have been articulated with individuals, not institutions, in mind. The media are engaged in organized production. It is not for benefit of individual journalists, or indeed editors, but for those who control the organization. So we might look again more closely at the rationales for protecting speech and ask whether they apply with equal weight to organized media, compared with individuals, including journalists. To assist with this, the enquiry may well be sharpened up by reversing the typical burden of free speech discussion. Rather than examining whether there are any justifications for interference with media speech, it will be interesting to ask whether any arguments can successfully be deployed to show why media organizations should be allowed to disseminate distorted information.

Potential Arguments for Allowing Distortion

The enquiry is framed in this way because it is assumed that not only inaccuracy, but also distortion, are not desirable. The implications of not interfering with media distortions are that they are condoned, or regarded as inevitable, or regarded as too costly (whether socially, politically or economically) to regulate. On the face of it, distortions of information do not contribute to the values which justify the free speech principle, the aspirations of seeking truth, realizing democratic

³⁹ J Curran and J Seaton, *Power Without Responsibility: The Press, Broadcasting and New Media in Britain* (6th edn, Routledge: London, 2003) 323ff.

⁴⁰ O O'Neill, *A Question of Trust* (Cambridge University Press: Cambridge, 2002) 94.

government, or acknowledging the worth of individuals. More directly, they may be regarded as positively damaging, for reasons which are primarily concerned with the quality of democratic life. In particular, lies have been described as ‘anti-democratic’⁴¹ and it has been claimed that calculated falsehoods deny dignity and autonomy because they undermine audience choices, the reputation of victims, and the convictions of speakers.⁴² As Lord Hobhouse observed, ‘Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed’.⁴³

However, these comments relate to deliberate falsehoods. It is hardly controversial to say that deliberate dishonesty in communication is regarded as wrong. Does the same principle apply to inadvertent falsehoods? According to Onora O’Neill, insofar as our society depends on trust for its effective functioning, both deliberate and careless distortions of the truth would seem to need strong discouragement.⁴⁴ But this is not only a matter of individual morality. The very process of democratic deliberation itself presupposes that distortions in information should be minimized. As Dryzek says, contestation is undemocratic if it is controlled by ‘public relations experts, spin doctors and demagogues’.⁴⁵

The apparent problem with the media industry is that it appears to be impeding the discovery of the truth in an organized and systemic manner. But in what circumstances can distortions be accepted, indeed justified? A number of possible answers need to be examined, with particular attention to the distinction between the individual and the media organization.

Distortion Assists the Discovery of Truth

One of the strongest arguments against interfering with media distortions is that there are positive benefits from disseminating them. This is

⁴¹ *Garrison v Louisiana* 379 US 64 (1964) 75 per Brennan J.

⁴² DAJ Richards, ‘Free Speech as Toleration’ in WJ Waluchow (ed), *Free Expression: Essays in Law and Philosophy* (Clarendon Press: Oxford, 1994).

⁴³ *Reynolds v Times Newspapers* [2001] 2 AC 127 at 238.

⁴⁴ O’Neill, n 41 above, 96. See also O’Neill, ‘Practices of Toleration’ in J Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press: Cambridge, 1990) ch 5.

⁴⁵ JS Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press: Oxford, 2000) 77.

the burden of the well known arguments for truth advocated by JS Mill. As Ten⁴⁶ has put it, there are three components to the argument: the ‘avoidance of mistake’ deals with the possibility that true facts and opinions may be suppressed when what is taken to be false is censored—we cannot completely be sure that what we suppress is false so it is better to let it be expressed. Here the emphasis is on the importance of true beliefs. The ‘assumption of infallibility’ component and the ‘necessity of error’ components deal with the importance of being confident that what we believe to be true is indeed true. To gain that confidence, freedom of expression is needed to be able to engage in discussion for the purpose of testing our beliefs. Furthermore, to know and appreciate the full grounds for our beliefs, we also need to expose them to testing against others’ opinions.

This set of arguments is advanced in favour of individual free speech but it has been challenged on the grounds that its principal weakness is, as Barendt puts it, ‘its questionable assumption that free discussion necessarily leads in a democratic society to the acceptance of truth . . .’⁴⁷ Assuming for the moment that it is possible to easily identify false information, the case for allowing it to circulate is not convincing. It is by no means clear that, if false claims of fact are disseminated, the true ones will rise above them. Nor is it likely that there will be widespread deliberation about contested facts, to enable the more plausible to be identified. In addition, rather like the economic concept of market contestability, the argument is essentially long-run, so necessarily ignores short-term harms to truth. It is even less convincing in the case of media information, given the media’s influence on the very process of discussion that is anticipated to test factual plausibility. Furthermore, the argument cannot apply to the systemic ignoring of material—where again the effect of the system may be to prevent the possibility of the true facts from countering the false.

Of course, the question of what is indeed true is the point of the discussion. Mill was very much aware of the complexity of truths, the fuller understanding that comes from weighing facts and perspectives, rather than identifying either absolute truth or falsehood. The implication is that even distorted media half-truths should not be suppressed, although he did not go so far as to say that half-truths should actively be promoted, if only to give assurance to believers.

⁴⁶ CL Ten, *Mill on Liberty* (Clarendon Press: Oxford, 1980) ch 8.

⁴⁷ Barendt, n.4 above, 11.

In the absence of any critical weighing of countervailing versions of the truth, there seems to be no positive benefit from allowing the distortion that partial truth creates, and it may well be harmful if its impact is emotional or non-rational.⁴⁸ However, even if we allow that the utility of suppressing falsehood may be empirical and contingent (on a case by case basis, we may need to weigh the costs and benefits of allowing truth to emerge against the harm of falsehood),⁴⁹ the case of media distortion is different. The issue is not so much a wish to censor the half-truths that the media do publish as a concern with the media's omission to put other half-truths into the contest to allow them to be weighed. The difficulty with the media is one of distribution of information—the limited circulation of potentially relevant material. Even if the circulation of half-truths is considered to be generally beneficial, there seems to be no reason why media half-truths should be dominant.

This is not to suggest that democratic debate can only be conceived in purely rationalist terms.⁵⁰ There is what has been described as an informal political sphere of power, position and passion: 'There are too many valuable products of the human mind that would be suppressed if the egalitarian and public-spirited norms of the ideal deliberation were to characterize all areas of public communication'.⁵¹ It may be said that media distortions are examples of the cut and thrust of debate, where sincerity and forcefulness of belief are demonstrated by the rhetoric and emotion of selecting material to persuade the listener. But, whilst acknowledging the importance of presentational style to democratic debate, which will rightly find its place in media coverage, it is important to recognize that the distorting effects on ultimate rational reflection have to be kept in proportion. If the effect of presenting one side of the truth through the media is to prevent it from being tested in a wider context, there will be no democratic benefit. This perspective does depend on the view that rational reflection is the ultimate arbiter of truth, even when dealing with rhetoric and persuasion.⁵² If that is

⁴⁸ It has been suggested that 'the truth argument is most apposite to true statements of fact and to dogma or opinion. It works less well in the realm of false statements of fact.' See D Milo *Defamation and Freedom of Speech* (Oxford University Press: Oxford, 2008) 57. See also Schauer, n 4 above, 74–5.

⁴⁹ See Schauer, n 4 above, ch 6.
⁵⁰ As a Habermasian ideal speech situation might imply; see J Habermas, *Between Facts and Norms* (Polity Press: Cambridge, 1996), 107–11.

⁵¹ See D Estlund, 'Democracy and the Real Speech Situation' in S Besson and JL Martí, *Deliberative Democracy and its Discontents* (Gower: Aldershot, 2006) 79.

⁵² Dryzek, n 45 above. See also, S Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Cornell University Press: London, 1996).

accepted, it seems to require constantly and actively checking for the rational, consistent with what Mill described as, ‘the real morality of public discussion.’⁵³

Distortion is a Price Worth Paying for the Media to Exist

A free media is considered to be one of the hallmarks of a liberal democratic society. But, for it to remain independent, it must be commercially viable. Is it too costly to the media to require them to eliminate all errors, including distortions? It is notorious that the traditional newspaper industry is in decline, with diminishing circulation resulting in much reduced income, especially from advertising. With the exception of public service broadcasting, which is relatively insulated from such pressures, it may be that distortion is necessary for the survival of the tabloids and is at least to be tolerated for other media? This view, that we need a press—however imperfect—rather than nothing at all, has found favour with some judges.⁵⁴ It is true that nobody forces the commercial media to exist and that their democratic role is a beneficial side-effect of their wider activities, which are indeed subject to global demands for more efficient news production. But the reality is also that commercial media do have a major influence on the sources and distribution of information. If the result of that is a negative impact on our understanding of the world, the onus may be on the media to demonstrate the net benefit of allowing that to continue.

One possible benefit is that, in telling distorted stories, the media are supplying readers and audiences with the information that they prefer. There may be, in economic terms, a ‘market for bias’. Some readers and audiences may want reassurance and confirmation about the opinions that they already hold, and they may not want to have broader issues discussed. Would that justify an editorial policy of, for example, only covering (true) stories about members of a particular racial group if they are about law breaking? We might think not if the editor also has ‘public’ aspirations. But the motives of editors, and their readers or audiences, may be less significant than the quality of information that is being disseminated across the democratic spectrum of debate.

Are there more significant issues at stake here, however? An important free speech argument which may be relevant is one advanced by

⁵³ Mill, n 1 above, 118.

⁵⁴ *A v B*, [2002] EWCA Civ 337; [2003] QB 195, para 11(xii) per Lord Woolf CJ; *Campbell v MGN* [2004] 2 AC 457, para 143 per Baroness Hale.

Raz.⁵⁵ Derived from his broader defence of the value of pluralism, it maintains that 'bad' speech is worth tolerating because of the general signals that censorship sends about the value of styles or ways of life: '... public portrayal and expression of forms of life validate the styles of life portrayed, and ... censoring expression normally expresses authoritative condemnation not merely of the views or opinions censored but of the whole style of life of which they are a part'.⁵⁶ Raz is concerned with a wide range of lifestyles, whether religious or cultural, but he also appears to include professional practice, noting that engaging in speech is a normal activity of 'economists, politicians, journalists or scientists' and that far reaching censorship can constitute their public condemnation. The social practice of free speech entails the possibility that some speech may be bad speech—'false, worthless, degrading, depraved, etc.'—but censoring those bad elements will undermine the wider benefits to pluralism of sustaining a tradition of speaking freely. Does this mean that media distortions cannot be criticized and must be tolerated? It partly depends on how far reaching the censorship is, but it also depends on the form in which the 'way of life' is conceptualized. Concerns about media distortion are not a condemnation of journalism. Rather, they lament the manner in which the organized media no longer appears to reflect the essence of the way of life that journalism represents.

Distortion is too Difficult to Identify for Regulatory Purposes

Even if it is accepted that some media distortions should be controlled, there is the problem of the censor. One of the most distinctive arguments in favour of giving special protection to free speech, and by implication, media speech, is a general distrust of government. It has been articulated most forcefully by Schauer,⁵⁷ and it has an important place in United States constitutional law.⁵⁸ The argument is not that the motives of government, politicians, and regulators cannot be presumed to be honourable, although that may be applicable, but that government tends to be incompetent. It cannot be trusted to make the necessary distinctions and determinations in terms of truth and falsity, or degrees of harm. It is better, therefore, to have minimal interference,

⁵⁵ J Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303–24, 316.

⁵⁷ Schauer, n 4 above, 85.

⁵⁸ Barendt, n 4 above, 54.

⁵⁶ *Ibid.*, 310.

because the consequence otherwise is likely to be a disproportionate suppression of justifiable speech.

This argument may be thought to be especially strong in relation to determinations about media distortion. As the earlier discussion indicated, there will be practical difficulties in making judgments about such a complex matter. However, the case is less convincing where those judgments are made, not by government, but by practitioners who are sensitive to the issues at stake. The argument does not provide support for allowing media distortions to take place but urges extreme caution in designing any regulatory scheme to deal with them.

In this context, the possible 'chilling effect' of regulation cannot be ignored; the uncertain prospect of being held liable may result in self-censorship, thereby denying a story to the public.⁵⁹ This has strong rhetorical appeal, implying that, if it were not for the law and regulation, the media would be running many more public interest stories. However, the evidence seems to be that they are not being inhibited by the law. It is the production process of the news 'factory' which is stopping investigative journalism from taking place.

Distortion Serves Interests More Important than Truth

For completeness, it may be acknowledged that, in some circumstances, there are overriding interests which may justify the reporting of distorted information. National security is an obvious example and, in areas of defence, the increasing practice of embedded journalism, and the continued use of the DA Notice system, testify to the advantages of managing information flows. The fact that these areas raise freedom of information questions for the media serves to demonstrate that they cannot provide support for allowing media distortion.

There is another area of interest, however, which may suggest that the moral status of distortion is more ambiguous than is supposed, and that it is unfair to apply stricter standards to the media. The interest in privacy is one that acknowledges the value of distorting information for the purposes of preserving dignity and preventing embarrassment. One of its dimensions is the maintenance of an image, and the point of privacy rights is to hold that we do not have to account for certain personal positions to the world at large. As a matter of personal

⁵⁹ See E Barendt and others, *Libel and the Media: The Chilling Effect* (Clarendon Press: Oxford, 1997).

morality and integrity, this may entail some degree of hypocrisy, but the law will not criticize that in the absence of a wider public interest at stake.⁶⁰ However, such personal standards, whether or not ethical, do not provide the benchmark for judging the media contribution to democratic debate. Individuals' wishes to distort personal information do not justify the media's wish to disseminate distorted information to the world at large.

Options for Controlling Distortion

If it is accepted that there is no objection in principle to reducing media distortion, any attempt to control it will be justified primarily by the wish to improve the quality of discussion and activity in democratic life. The media are now such an integral part of our means of social communication that we cannot decline responsibility for their activities.⁶¹ The liberal theory of the media, discussed at the beginning, offers some general standpoints for the media to assist citizens to monitor government and hold it to account. A prominent trend in recent democratic theory has been to examine the deliberative aspects of democratic participation⁶² and that has clear implications for the media's role in providing information and enabling it to be evaluated and channelled into public expression and decision-making.

A media that supports a democratic way of life might be expected to provide conditions for adequate⁶³ reflection on the issues and choices that require deliberation. This implies that the media must be more than mere distributors of information, although it does not require that they should engage in active 'public journalism'.⁶⁴ Nor does it require that the media should become rationalist deliberative spaces in themselves. But neither would we want a media version of the mob, where legitimate emotion is not tempered by reflection, based on reasoning and explanation. This suggests that editors should adopt a principle of what might be termed 'open journalism,' being critical, reflective and

⁶⁰ *Mosley v News Group Newspapers* [2008] EWHC 1777.

⁶¹ See R Silverstone, *Media and Morality: on the Rise of the Mediaopolis* (Polity Press: Cambridge, 2007).

⁶² See Dryzek, n 45 above; Chambers, n 52 above; A Gutman and D Thompson, *Democracy and Disagreement* (Belknap Press, Cambridge, Mass, 1996).

⁶³ Amounting to what Dryzek describes as 'non-coercive' reflection, not influenced by structures of interpretation or of power.

⁶⁴ See J Rosen, *What are Journalists for?* (Yale University Press: New Haven, 1999).

enquiring about organizational and economic power over information and its interpretation. It is reasonable to assume that readers and audiences cannot do that for themselves or do not have the resources required. The public function of the media is, therefore, to assist in understanding the ‘truth’ in much of its subtlety, by at least offering ‘fair play to all sides of the truth’.

It may be that these aspirations already have a place, at least implicitly, in systems of journalistic ethics.⁶⁵ However, the structure of the industry creates obstacles to their implementation and, in the absence of internal incentives to do so, some regulatory intervention may now be necessary. Bearing in mind the equally important need for sensitivity to concern about state censorship, a number of options may be considered.

Remedies for Falsehood

The law already provides remedies for falsehood—what could be conceived as an extreme form of distortion—notably in defamation. However, the recent development of the *Reynolds/Jameel* public interest privilege (responsible journalism) has moved in the opposite direction by effectively allowing a concession for certain kinds of faultless distortions.⁶⁶ There is a tension in the doctrine between allowing journalists to report without interference and not trusting them to make the correct judgments.

It is significant that the courts have not been willing to allow journalism itself to enforce good practice. While subscribing to the normative version of the liberal theory of the media, judges have expressed scepticism about the media’s willingness or ability to embrace it. Lord Nicholls observed in *Reynolds* that:

‘The defendant newspaper commends reliance upon the ethics of professional journalism. The decision should be left to the editor of the newspaper. Unfortunately, in the United Kingdom this would not generally be thought to provide a sufficient safeguard. In saying this I am not referring to mistaken decisions. From time to time mistakes are bound to occur, even in the best regulated circles. Making every allowance for this, the sad reality is that the

⁶⁵ eg, see International Federation of Journalists, ‘Declaration of Principles on the Conduct of Journalists’ (1986); and the UK’s National Union of Journalists, ‘Code of Conduct’ (1998).

⁶⁶ *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44; [2007] EMLR 14.

overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence.⁶⁷

In the same case, Lord Cooke observed that:

‘Although investigative reporting can be of public benefit, the commercial motivation of the press and other sections of the media can create a temptation, not always resisted, to exaggerate, distort or otherwise unfairly represent alleged facts in order to excite the interest of readers, viewers or listeners.’⁶⁸

Nevertheless, in seeking to mitigate liability on the basis of responsibility, the impact of *Jameel* is to re-position the defence in a way that draws on a view of journalism as a profession which can offer a coherent set of standards to enforce. For example, Lord Bingham stated that:

‘Lord Nicholls recognised (202–203), inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.’⁶⁹

Similarly, Lord Hoffmann said that:

‘But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor’s view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting.’⁷⁰

These remarks reflect a rather romantic view of journalism. First, journalism does not see itself as a profession but as a craft, so there is insufficient normative cohesion for ethical standards to be applied consistently across the industry. Secondly, there is an assumption that the court is only articulating, emphasizing and enforcing a set of norms

⁶⁷ Ibid, 202.

⁶⁸ Ibid, 219.

⁶⁹ Ibid, para 33.

⁷⁰ Ibid, para 51.

that already reflect good practice. Thirdly, if some judges believe that the operation of the defence will improve journalism,⁷¹ they fail to appreciate that the organizational pressures will not let it happen very often.

As a means of influencing a reduction in media distortions, however, the responsible journalism defence is of little assistance. Apart from being confined to defamation, since it is, precisely, a defence, it operates only in circumstances where journalists choose to engage in serious activity, behave responsibly, yet make a mistake. There is no requirement to conduct serious activity, so the media can still take a risk that they may be sued. But, more importantly, the law is not concerned about what selection choices are made, including decisions not to cover material at all. At the most, the law of defamation requires that journalists give serious consideration to the balance of evidence when drawing conclusions about the inferences it will support. However, it seems to show considerable deference to journalists' 'professional' judgments about the scope of enquiry.⁷²

Impartiality and Fairness

As indicated previously, the problem of media distortion is rooted more in the press than in broadcasting. Ofcom's Broadcasting Code⁷³ imposes obligations of accuracy and due impartiality in reporting news and current affairs, and also requires the subjects of reporting to be treated fairly. The BBC positively embraces a set of journalistic values based on truth and accuracy; serving the public interest; impartiality and diversity of opinion; fairness; independence; and accountability.⁷⁴ A particular feature of impartiality, as it has been elaborated by broadcasters over many decades, is that it requires much more than a balancing of viewpoints. It requires material that is broadcast to be placed in a broader context in order to assist the audience's

⁷¹ eg in *Jameel*, n 66 above, Baroness Hale stated that 'We need more such serious journalism in this country and our defamation law should encourage rather than discourage it,' 150.

⁷² See *Charman v Orion Publishing Group* [2007] EWCA Civ 972.

⁷³ See *The Ofcom Broadcasting Code* (October 2008) available at <<http://www.ofcom.org.uk/tv/rfi/codes/bcode/>> s 5.

⁷⁴ See BBC, *Editorial Guidelines* available at <<http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/>>. See also *The Neil Report* (BBC: London, 2004) available at <http://www.bbc.co.uk/info/policies/pdf/neil_report.pdf>.

understanding of the issues.⁷⁵ Impartiality goes some way, therefore, in dealing with distortion by seeking to minimize the incidence of partial truths. It does not necessarily cover the wider process of selection, involving the setting of the news agenda. However, in the area of public service broadcasting, especially represented by the BBC, it is clear that a broad diet of regional, national and international news and current affairs is a defining part of the remit.

Newspapers have not been willing to embrace obligations of impartiality, because it entails interference with editorial discretion. It is regarded by some theorists as interfering with freedom of speech because it prevents journalists from making a statement about their partisan viewpoint while at the same time attributing a different, 'neutral' viewpoint against the journalist's better judgment.⁷⁶ In a multi-channel broadcasting environment, there are increasing pressures to relax the obligation of impartiality for all but the public service providers and to allow partisan broadcasting news. Ofcom has stated, indeed, that it may be inappropriate to impose impartiality requirements in the new media marketplace. Partly, this appears to be because impartiality is associated with a 'public service' remit, and that should not be imposed on all content providers. Partly, it seems to be based on the belief that the marketplace will be filled with sufficient competing outlets so that the consumer will be able to judge the relative quality of different news providers' offerings. Ofcom has suggested that journalists should earn the trust and credibility of the audiences and users, who should be free to choose what news to obtain.⁷⁷ What Ofcom does not say is how those choices can be made in an informed manner.

There are certainly difficulties in making impartiality work in a practical way. Deciding the salience of information, and interpreting it for the audience, are matters which require critical reflection by editors and journalists. It also detracts from the ability of journalists to publish their own judgments about states of affairs. Furthermore, there may be a concern that impartial news coverage will be rather bland because its point—to provide a more rounded view of events—will necessarily

⁷⁵ See T Gibbons *Regulating the Media* (2nd edn, Sweet and Maxwell: London, 1998), pp.100-20.

⁷⁶ eg, see Schauer, n 4 above, 127; L Alexander, *Is There a Right to Freedom of Expression?* (Cambridge University Press: New York, 2005) 29ff.

⁷⁷ Ofcom, *New News, Future News: The Challenges for Television News After Digital Switch-over* (2007) available at <<http://www.ofcom.org.uk/research/tv/reports/newnews/newnews.pdf>>.

inhibit strong and passionately held viewpoints from being expressed. Within broadcasting practice itself, however, impartiality has always been recognized as not requiring crude balance, and there can be many opportunities for personal viewpoint programmes to be aired within a broader critical context.⁷⁸

Nevertheless, it may not be appropriate to require it of all journalism because, in dealing with distortion of the truth, its aspirations are directed at providing the more abstract levels of understanding which, desirable as they may be, should be encouraged but not imposed on all kinds of reporting. However, in the absence of an impartiality requirement, there is a potential gap between information that is fully contextualized and information that is overtly biased. The concern is that the gap may be being filled by the selective dissemination of information that is not subject to critical examination and therefore distorts the readers' or audiences' otherwise fuller understandings.

Self-regulation

For the press, doubts about its ethical practice have been sought to be resolved through self-regulation. However, the current scheme, operated by the Press Complaints Commission ('PCC'),⁷⁹ does not deal with the kinds of distortion discussed in this chapter. The PCC's code does provide for general, but limited, obligations of accuracy and fair reporting, but it does not attempt to pronounce on the kinds of material that should be included in a story in the first place. More generally, the PCC's governance and effectiveness have been subject to forceful criticism.⁸⁰ There are strong reasons to doubt whether the press industry is really committed to improving journalistic practice and to enforcing acceptable standards. This is because the basic values of the media as an industry are not in tune with the values associated with journalistic ethics. Self-regulation can only be fully effective where the policy objectives which are required in the public interest are aligned with the economic objectives of the industry.⁸¹

⁷⁸ For a recent discussion of the problems see BBC Trust, *From Seesaw to Wagon-wheel: Safeguarding Impartiality in the 21st Century* (2007) available at <http://www.bbc.co.uk/bbctrust/our_work/other/century21.shtml>.

⁷⁹ Available at <<http://www.pcc.org.uk/>>.

⁸⁰ eg, see Media Standards Trust, n 19 above; G Robertson and A Nicol, *Media Law* (5th edn, Penguin: London, 2008) 757–96.

⁸¹ Arguably, this is why the Advertising Standards Authority has been relatively successful in its self-regulation. For a general discussion of the issues see J Baldwin and

This is not to say that self-regulation cannot work in the press. A number of newspapers do have internal codes of practice.⁸² They also have readers' editors or ombudsmen, which act not only as a channel for complaints from readers but also encourage continual monitoring of internal practice.⁸³ But other approaches appear to be motivated as much by the wish to engage with the readership as to develop principles for ethical practice. Schemes are more likely to be successful in encouraging the latter where the internal culture of the organization has a sense of open journalism rather than the running of stories that are calculated to maximize circulation.⁸⁴ But the underlying difficulties are that, not only are ombudsman schemes not found across the industry, they do not cater for the kinds of distortion being discussed here.

A System of 'Enforced Ethics'

It is no longer satisfactory to rely on self-regulation to deal with problems of distortion in the media. At the same time, although the arguments for not regulating in this area are fairly weak, there may be residual concerns about freedom of speech. To be more specific, the arguments for regulating the media as an industry are weak, but it is the threat to journalists' and other individuals' free speech that gives concern. Yet, decisions about reporting the state of the world are undeniably complex. Taken together, these points suggest that the preferred approach to minimizing distortion should be to encourage the industry to provide a solution to the problem.

This option will only be sketched out here, but it has two components, reflected in the phrase 'enforced ethics'. The underlying idea is to oblige the media industry actively to take steps to minimize inaccuracy and distortion, but for the interpretation of what that means to be made

M Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press: Oxford, 1999) ch 10.

⁸² eg, see *Guidelines: The Guardian's Editorial Code* (April 2007) available at <<http://image.guardian.co.uk/sys-files/Guardian/documents/2007/06/14/EditorialCode2007.pdf>>. There also exists an international association, the Organization of News Ombudsmen, which seeks to disseminate good practice: see the ONO website at <<http://www.newsombudsmen.org/index.htm>>.

⁸³ eg, see 'Readers' Editor Terms of Reference', *The Guardian*, 14 May 2009 available at <<http://www.guardian.co.uk/theguardian/2009/may/14/readers-editor-terms-of-reference>>.

⁸⁴ Without implying that its practice is necessarily exemplary, the corporate structure of The Guardian Media Group, directed by the Scott Trust's commitment to journalistic values, may be regarded as more likely to be successful in securing internal self-regulation. However, its structure is the exception.

by reference to a set of ethical standards that journalists are required to articulate and review. A weaker version would require media organizations to establish their own readers' editors/ombudsman schemes, with appropriate mechanisms for securing institutional independence, prominence and compliance. This version would be weak to the extent that news organizations treated the position as a presentational device rather than demonstrating commitment to better quality journalism.

A stronger version of enforced ethics would involve a duty not to distort, to be imposed on media organizations. It is important to note that it would not be imposed on journalism itself, but on the organized production process, the systemic side of distortion. Editorial freedom is no longer a sufficient guarantee.⁸⁵ It may have connoted a notional set of standards but it is no longer clear what they are or whether they are being followed. That may be indicated by the relative absence of voluntary internal self-regulation, possibly reflecting the relative priority being given to news production over quality. There is now a need for some institutional process to accompany a revived ethical discussion. It may appear a contradiction in terms, but a system of enforced ethics would be a way of requiring the industry to 'self-regulate' effectively, but by reference to its practitioners own ethical aspirations, whilst not involving direct governmental interference in the content of journalism.

A new institutional framework would need to be established to carry this out. It is that institution which would determine what counts as inaccuracy and distortion. It would deliberate in open discussion, with public consultation and input, adopting models of policy development already followed by Ofcom and the BBC. Its role would be to articulate guidelines for making editorial judgments about what should go into the news and how it should be presented. Membership would primarily be drawn from journalism, including academics, with members of the public and of media organizations. However, the latter would not be dominant and this would not be a revived version of the PCC's Editors' Code Committee.

This option differs from a system of enforced standards, such as those recommended in the Calcutt report.⁸⁶ While its scope is much

⁸⁵ cf T Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] Public Law 279-99.

⁸⁶ *Report of the Committee on Privacy and Related Matters* (Calcutt's Report) (Cm 1102, 1991).

broader and, of course, much more intrusive into everyday media activity, it would not impose standards by law. However, it does envisage that the duty not to distort would be imposed by law. The aim would be to enable the practice of journalism to have an impact within the industry it serves, enabling it to resist the countervailing economic and institutional forces that encourage distortion, by mandating media owners to take account of it. Such an approach would be consistent with various calls from within journalism to revive debates about its practice.⁸⁷ More broadly, it would be consistent with a deliberative approach to democracy.

The duty to minimize distortion is envisaged as applying to newspapers, broadcasters, press agencies and other forms of organized news production. It would not apply to ISPs nor to bloggers (who are assumed to be insufficiently organized). Magazines and propaganda sheets could be exempted from the duty in return for explicit and prominent statements of transparency about their standpoints and editorial interests.

The duty is envisaged as operating in two ways. First, it could be the basis for complaints about reporting. They would ideally be considered by a body which replaces the PCC. A more intrusive complaints mechanism would allow complaints about the substance of news reporting. Given the scope of 'distortion', however, it could well become overwhelmed with intractable disputes about detail, a problem that is evident in the operation of the BBC Trust's Editorial Standards Committee and that of Ofcom's Content Board.⁸⁸ A less intrusive mechanism would adopt a 'reviewing' model, examining the processes that the organization put in place to minimize distortion, but without requiring a definitive finding that distortion had occurred. It is a separate question but, under either mechanism, the complaints/reviewing body might well have the power to impose sanctions on the industry for non-compliance. To different degrees, both these approaches will be regarded by some as being too interfering,

⁸⁷ eg, see the evidence submitted to the *HC Select Committee on Culture Media and Sport on Self-Regulation of the Press, 7th Report* (HC Paper, 2006–07); see also the *HC Select Committee on Culture Media and Sport on Privacy and Media Intrusion, 5th Report* (HC Paper (2002–03) 458). There are also strong academic contributions to the debate, a notable focus being the Reuters Institute for the Study of Journalism at the University of Oxford.

⁸⁸ For an earlier analysis of the kinds of problem involved, see T Gibbons, 'The Role of the Broadcasting Complaints Commission: Current Practice and Future Prospects' (1995) 1 *Yearbook of Media and Entertainment Law* 129–59.

potentially cumbersome, and uncertain of success. There is also the possibility that the whole scheme could be hijacked by complainants who wish to use it as a platform to advance their own partisan viewpoints. But it is, nevertheless, removed from full-scale state regulation. It offers journalism an institutional structure for dealing with the difficult problems of distortion on its own terms, informed by its own internal dialogues, but sensitive to the media's wider role. In the absence of some such scheme, the news industry is likely to continue to produce the selective diet of information that currently characterizes so much media output.

The idea of enforced ethics could also operate in a different way and be used to assist the development of legal doctrine. It could elaborate the notion of professionalism that is being discussed in the law of defamation, and it could also form the basis for the appropriate code to be used in making privacy determinations under section 12 of the Human Rights Act 1998. But it would require a different attitude from the courts, entailing a more critical approach to journalists' and editors' claims for freedom to tell stories exactly as they want. In particular, it might support a distinction between the way the story is phrased, where no intervention might be appropriate, and the choice of sources used to validate its telling, where a stricter approach might be justified.

Conclusion

Media distortion has become a serious threat to the functioning of a healthy democracy. Yet there are understandable concerns about using law and regulation to interfere with editorial decisions, since a free media also have an undeniably positive effect on the circulation of information and opinion for democratic discussion. However, there appears to be cogent evidence that the internal functioning of the media is itself inhibiting the achievement of its more noble aspirations. A system of enforced ethics is suggested as a way to finesse the problem thereby created. Other options have been suggested to enhance the media's capacity to serve democratic interests. Improved transparency about media ownership, and therefore the editorial line, is one.⁸⁹ An integrated approach, with public service broadcasting at its core, is

⁸⁹ Gibbons, n 86 above; Barent, n 4 above, 106.

another.⁹⁰ However, those solutions are both narrower and wider than the particular difficulty with media distortions require. A minimal interference from the law, directed at the industry and not individuals, is required for progress to be made and to harness journalists' good will and expertise.

⁹⁰ See Curran, n 2 above; Keane, n 2 above. See also Barendt, n 4 above, mooting the idea of 'modest' public service requirements for national newspapers, 450.