What Were You Thinking? A Survey of Journalists Who Were Sued for Invasion of Privacy

By Paul S. Voakes

Forty-two journalists who had been sued for invasion of privacy were asked to reconstruct the thought processes that led to the publication (or broadcast) that brought the lawsuit. Findings indicate that the journalists were generally unaware of impending legal trouble; that they perceived these situations as fundamentally ethical to a slightly greater degree than they perceived them as legal; and that legal reasoning seems to take place in a "total context" of social factors. The study raises further questions about the relationship between ethical and legal consciousness in journalists' everyday decision-making.

Traditional scholarship in journalism law seems to proceed with a certain set of assumptions: That journalists know the relevant law, journalists obey the relevant law, and journalists will use the law to guide them through decision-making in the legal situations they encounter in the newsroom. But how accurate are these assumptions? As Pritchard has noted,[1] if such assumptions are not valid, then media-law research adds little to the understanding of mass communication behavior. This purpose of this article is to begin to test these assumptions, using the invasion of privacy as a field of inquiry.

More specifically, this study probes journalists' decision-making processes in newsgathering situations that resulted in lawsuits for invasion of privacy. Most of the empirical research in media law has been descriptive in nature: for example, studies have measured the perceived impact upon editors of a landmark U.S. Supreme Court decision,[2] or have gauged attitudes of journalists toward such controversial practices as the naming of crime victims[3] or the reporting of private aspects of politicians' lives.[4] This research, a necessary and valuable stage of inquiry, has in turn given rise to new questions: How do journalists conceive of the law? Why do they report the attitudes they do toward certain aspects of the law? What is the decision-making process in situations that result in legal claims? This study begins to answer these questions by focusing on journalists' awareness of the law's relevancy in the problematic situations they encounter in their news work.

The area of privacy was chosen for several reasons. There is a fairly uniform body of common law that defines the acceptable bounds of journalistic prying into citizens' personal matters. The common law of torts recognizes four categories of invasion of privacy, three of which often involve journalistic practice. "Disclosure of private facts" involves the

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publication of intimate, personal information where such publication would be "highly offensive to a reasonable person" and not of "legitimate public concern."[5] "Intrusion" is the physical or electronic invasion into another's solitude.[6] "False Light" invasion is the publication of "highly offensive, false publicity" about someone, with knowlege of the falsity.[7] This last tort closely resembles defamation with its concern about falsity, but it is usually included among the privacy torts nonetheless because it involves the disruption of the peace of mind that is brought by security and solitude. This study thus examined cases that fell under one or more of these three categories.

Also, privacy is a particularly controversial aspect of journalistic practice, both among journalists and in public opinion. A 1991 survey of public attitudes about the First Amendment found support for many manifestations of free expression, but little support for legal protection of reporting of public figures' mistakes of twenty years earlier, for example, or of reporting the sexual aspects of public figures' lives.[8] A survey for the Society of Professional Journalists found that most editors and news managers were "concerned" or "very concerned" about a rise in complaints that the media go too far in reporting private matters.[9] Weaver and Wilhoit have continued to find disagreement among journalists over such issues as whether the naming of rape victims or the use of personal photographs without permission is justified.[10]

Theory and Concepts

Why do people obey the law? The formal legal model predicts that when a law is adopted or changed, legal actors affected by the change will adjust their behavior to comply, or risk penalties,[11] and that their decisions will be grounded in a rational calculus of anticipated costs and benefits. For decades legal sociologists have set about exposing the gaps that divide these tenets from their empirical findings. Thirty years ago Skolnick found, for example, that not only are sanctions often too vague and distant to be considered in the real-time decision to commit a crime, but also that law-breakers develop a shared set of definitions that make sanctions even less relevant.[12] Skolnick has urged that legal obedience be studied in a "total context" that includes all the social factors, legal and extralegal, that might influence a decision to obey a certain law.

More recent empirical work has supported this critique, with findings that professionals in corporations are more often guided by professional values or even their own emotions than by expected legal consequences;[13] that the practical impact of even prominent court decisions is often minimal;[14] and that even when professionals are aware of a court decision affecting them, they often misunderstand its ruling.[15] Shuman adds that the traditional "rational-actor" model is especially problematic with tort law, which includes libel and invasion of privacy, because tort law is vaguer in its definitions than criminal law, its penalties are not well known, relevant court rulings are not well publicized, and there is no consistent pattern of circumstances for taking cases to court.[16]

As an alternative to the formal model, Tyler has offered a framework for the study of legal compliance that focuses on attributions, in which he sees two perspectives: the instrumental and the normative.[17] Instrumental thinking involves judgments about personal gains and losses that will result from obedience or disobedience. Tyler and others argue, however, that the instrumental model misses much of the dynamic that explains compliance

with the law. He instead places more stock in the normative perspective, which involves judgments about the legitimacy and moral correctness of the law. Tyler concludes from his own empirical work that the normative perspective influences compliance to a greater extent than the instrumental. Similarly, Rabin cites research in which moral compunctions about injuring others seemed to influence actions more so than more instrumental calculations of risks and rewards.[18] The normative perspective also raises the possibility that ethics, or applied moral reasoning, may be a principal influence on legal decision-making.

Research in cognitive psychology has also suggested, however, that neither the formal model nor its informal alternatives, whether normative or instrumental, may be employed by the journalist in the heat of the deadline. Stocking and Gross, summarizing a large body of the literature in this field, propose that journalists, like most people, rely on heuristics, or cognitive shortcuts, to make sense quickly of a vast array of information they must process.[19] People often base decisions on small fragments of information, often relying heavily on stereotypes and routine "framing" of situations that may not be appropriate. Shuman has applied this literature to tort law theory and concluded that heuristics limit even more the likelihood that the legal actor will be aware of the law in her decision-making.[20] The routines may have had their origins in careful consideration of moral or legal obligation, but in the present they serve as shortcuts to a decision.

In order to help explain the process by which these decisions are made, whether deliberative or heuristic, a conceptual model has been developed that borrows heavily from Shoemaker and Reese's model of influences on media content.[21] Shoemaker and Reese suggest that a "hierarchy" of social influences can affect media content. Because content is determined by media decision-makers, it seems reasonable to propose that this "hierarchy" of influences actually affects the decisions that precede the formulation of content. Those decisions, in at least many journalistic situations, include legal and ethical decisions.

The influences operate at a variety of levels, but they are all manifest and measurable as components of the same "total context" that Skolnick observed as a realistic environment for legal decisions. The present model proposes seven channels of social influence upon a legal decision in journalism:

- Individual – the personal background and unique style that each journalist brings to her work;
- Small Group – the influence of peers and informal social constraints;
- Organization – company policies and other formal or structural influences;
- Competition – reaction to (or anticipation of) the work of competing media;
- Occupation – the influence of training, norms, codes, and other notions of professionalism;
- Extramedia – consideration of news sources, subjects

and audiences, and anticipation of their reactions;

• Law – both the formal and informal dimensions of media law.

The model regards the law as merely one of many potential influences on a decision in a situation with potential legal ramifications. At times several of the determinant channels can influence a single decision. At other times two channels can come into conflict, and the journalist must somehow resolve the conflict. For example, a reporter may be assured by the station's attorney that a story with embarrassing facts about a politician will not put the station at legal risk, but the reporter's "individual" respect for privacy and "extramedia" empathy for the news subject may override the legal influence, and the reporter would thus decide not to use the private information.

On the basis of the conceptual model and the literature, a number of hypotheses emerge:

H1: In recalling a situation that led to a legal dispute, journalists will assign the legal channels of influence a degree of salience that is less than the salience accorded to other social influences in the model. This reflects the basic thrust of Skolnick's axiom as to the "total context" surrounding a decision with legal ramifications. It also tests the validity of the "influences" model adapted from Shoemaker and Reese, which proposes that the law is one influence in a "hierarchy of influences" that affect a decision.

H2: Journalists will recall greater salience of normative than instrumental influences, and recall a more heightened awareness of the ethics of their situation than of any awareness of legal problems. This puts to the test Tyler's notion of the importance of the normative perspective. Also, an ethical framing of the situation suggests normative considerations, while the anticipation of strictly legal problems may suggest instrumental thinking.

H3a: During newsgathering and editing, routine daily news stories generate little ethical or legal awareness in the journalists.

H3b: Investigative projects prompt high levels of both ethical and legal awareness. If heuristics such as routine framing are present in journalistic decision-making, they should be most identifiable in routine stories. Unusual stories and situations, such as the investigative project, should engender the highest awareness of potential problems, either legal or ethical.

H4: The greater the level of discussion in the newsroom, the greater the awareness of a potential legal or ethical problem. This tests the notion of Tyler and others that interpersonal communication is a key factor in one's perspective on the law.

TABLE 1
Type of Story by Type of Invasion of Privacy

	Disclosure	Intrusion	False Light	Other	TOTAL
Routine Daily News	4	1	7	2	14 (33.3%)
Human-Interest Features	4	0	6	0	10 (23.8%)
Dramatic News Event	3	0	0	0	3 (7.1%)
Investigative Project	4	2	7	0	13 (31.0%)
Other	0	0	2	0	2 (4.8%)
TOTAL	15 (35.7%)	3 (7.1%)	22 (52.4%)	2 (4.8%)	42 (100.0%)

Note: Cells denote number of cases.

Method

The author attempted to locate all invasion-of-privacy lawsuits against the news media reported in the United States between 1990 and 1995. Most of the cases were located via *Lexis* or *Media Law Reporter*, and a small number were found reported in the trade press. The population consisted only of cases in which the principal tort claimed was disclosure of private facts, false light or intrusion. The search yielded a population of 82 cases,[22] and in early 1996 attempts were made to contact the journalist who seemed to have been closest to the newsroom decision-making in each case. Fifty-seven of those were successfully reached,[23] and 42 of them agreed to be interviewed for the study, with the understanding that their identities would be withheld from this report. Thus the adjusted response rate was 73.7%.[24]

The interviews were conducted by telephone with a protocol that included both closed-end and open-end questions. The questions were designed to have the respondents reconstruct some of their own considerations as they were preparing the story for broadcast or publication, either as reporters, photographers, or editors.[25] Interviews ranged between 20 and 60 minutes in duration.

Findings

The cases in the study yielded a broad distribution of types of privacy and types of media, but there was little variance in the actual legal results. The media defendants prevailed (either through dismissal or summary judgment, at trial, or on appeal) in 89.8% of the cases; plaintiffs prevailed in only 5.1% of the cases, and 5.1% were settled out of court with the terms of settlement undisclosed. These results reflect the earlier findings of Bezanson, Cranberg, and Soloski who found that plaintiffs succeeded in only 12% of the non-appropriation privacy cases they studied.[26]

In roughly half the cases (52.4%) in this study the principal tort was false-light invasion of privacy (Table 1). Disclosure of private facts accounted for 35.7%, and 7.1% were intrusion cases.[27] There was also fairly even distribution among the types of stories that brought on the lawsuits. The stories tended to be either routine, daily news stories (33.3%) or long,

TABLE 2
Means of Social Determinants of Decision-Making

Social Determinant	Mean
Individual	6.16
Small Group	4.72
Organization	3.63
Competition	3.35
Occupation	3.54
Extramedia	4.84
Law	3.44
(Formal)	(3.51)
(Informal)	(3.38)
Overall Mean	4.14

n=42

investigative projects (31.0%). But as the table shows, no type of story was significantly associated with a particular type of privacy suit.

The lawsuits were distributed across all media sizes: The median number of news-editorial employees in the organizations at the time of the suit was 54, but one-third of the cases involved organizations with more than 80 journalists, and one-third involved outlets with fewer than 20 journalists. More than half (57.1%) the defendant organizations were daily newspapers, and 19.0% were weekly newspapers (which included both "alternative" weeklies and the more traditional community weeklies). Daily television operations accounted for 14.3% of the suits, and nondaily television (e.g., evening newsmagazines) accounted for 7.1% of the cases. Only one case involved a magazine.

Hypothesis 1: Legal Influence. The first expectation was that journalists would assign weak influence to the legal channels, in relation to the influence of other channels. The data seem to support this hypothesis. Respondents were asked to assign a numerical rating (on a 1-10 scale) to each of 16 items, as a self-reported measure of how salient the item was in their thinking as they prepared the story. Each item represented one of the "social influences" in the Shoemaker-Reese model above, and there were two items for each social influence except the legal influence, which had four items. For example, "I remember wondering what the subject of this story would think when he or she first saw it" was an extramedia item, and "I remember thinking about our company's policy on situations like this" was an organization item. Because interitem correlation was strong (all at $p < .01$), items representing the same social influence were combined into an index for each category.

As Table 2 shows, the influential strength of the legal category, whether combined or broken into "formal" and "informal" dimensions, was hardly robust. The means of both "formal" and "informal" law were below the overall mean (but not significantly below). The median response for both

the formal-legal and informal-legal indices was 2 (on the 1-10 scale of salience).

In their open-ended responses, the journalists often shed light on reasons for certain closed-ended responses. In explaining their low resonance with the legal items, some respondents simply confessed low awareness or knowledge of the formal law. One former television reporter, for example, was sued for intrusion after her crew accompanied police on a raid: "Up until that point it had never occurred to me that the media might not be covered legally (for this type of news work). It had never come up and I'd been on search warrants before. And keep in mind that I was not – my education was on the streets. I worked my way up in the newsroom and I'd never taken a class on legal law. So I didn't realize . . ."

Only the mean of the individual channel was substantially higher than the overall mean. Several respondents saw themselves as more aware than their colleagues of moral or legal implications. This is the assessment, for example, of a producer of investigative reports for television: "I always think about ethics, sometimes in areas in which no other people would raise questions. I raise questions of, 'Am I being misleading in the way I'm approaching this story?' or, 'Am I being candid in my demeanor?' Those are the things I'm always plagued by."

For others, the strong individual influence is the product of a memorable personal experience. A recently retired newspaper reporter gave this account: "I had a person commit suicide as a result of my reporting one time, and it was – it wasn't because I had done anything wrong, but (after that) I always tried to be very, very careful and very fair."

Hypothesis 2: Normative or Instrumental, Law or Ethics? In both the closed-end tabulations and open-ended responses regarding social influences, however, little distinction is made between legal and ethical, and between normative and instrumental, perspectives. The second hypothesis attempted to discern whether one mode of thinking was in more evidence than the other – again, testing Tyler's proposition that normative reasoning is more influential than instrumental reasoning in situations like these. One means of testing the hypotheses is to classify the closed-ended items in the "social channels" set of variables as either instrumentalist or normative in nature. The items were thus sorted and combined into instrumental and normatives indices.[28] The means of the two indices are significantly different: 6.02 for the normative considerations, and 3.14 for the instrumental.

The findings suggest support for Tyler's proposition (that the normative perspective affects legal behavior to a greater degree than does the instrumental). But does a normative perspective in legal decision-making necessarily imply the presence of moral reasoning? The two concepts seem theoretically related, but a normative legal perspective may or may not involve the sort of reasoning that is normally ascribed to "ethics." To measure that connection the author examined the respondents' anticipation of legal, and then of ethical, problems their situations might have provoked. They were asked, "(When you were working on this story) To what extent did you think the story raised questions of law . . ." and "To what extent did you think the story raised questions of ethics . . ?" Table 3 suggests little difference; in fact, the means were identical. The median response for ethical anticipation was slightly higher than legal anticipation, at 6.5. But as Table 3 also shows, the responses tended to fall at either extreme of the scale, both for legal and ethical anticipation. The vast majority of

TABLE 3
Anticipation of Legal or Ethical Questions

	Legal Question	Ethical Question
Mean Response	5.45	5.45
Median Response	5.00	6.50
% of Responses of 1 or 2	39.50	44.70
% of Responses of 9 or 10	36.80	39.40

Note: Respondents were asked to recall, on a 1-10 scale, to what extent they thought their story raised questions of media law, and to what extent it raised questions of media ethics.

respondents felt either keenly aware or blissfully unaware that ethical and legal questions had arisen.

Not shown in the table is the high correlation between the responses to these two questions. Responses were associated at a significance of $p = .011$, which suggests that those who saw ethical questions in their situations also anticipated legal problems, and that those journalists who had no clue of legal trouble brewing also perceived no ethical questions. Thus despite a higher rate of salience for normative than for instrumentalist items, it does not seem to follow that awareness of the ethical dimension of a situation will be significantly higher than awareness of the legal dimension. It is noteworthy, however, that the legal considerations were in no measure stronger than the ethical.

This bimodal distribution of the "anticipation" responses raises the further question as to which other variables might be associated with high or low degrees of anticipation. Significant, positive correlations were found between *ethical* anticipation and individual, small group and extramedia influences. The extramedia was particularly strong, as it includes consideration of the impact upon the news subjects. One newspaper reporter, for example, explained an "extramedia" association that almost suggests a Rawlsian "Veil of Ignorance"[29]: "When I work on stories, including this one, I wonder, 'Wow, how is this person going to feel? How would I react to it? Boy, if this were me (in the story in question), I'd be really upset!'"

Those who assigned strong salience to small-group influences also tended to recall a high degree of anticipation of both legal and ethical problems. One television reporter, whose station was later sued over the broadcast of gruesome details relating to the death of a child, explained the small-group dynamic: "I think initially when we shot the video, I didn't think it would be controversial. But I could tell, from the reaction that we were getting from my co-workers – at times I could hear the debate on the phone (when she called in from a suburban bureau) – that it was going to be highly controversial."

The social-influence predictors of high *legal* anticipation were more varied: As with ethics, they included extramedia and small-group salience. But also included were the organization and, of course, the "law" items. Organizational structures often help raise a journalist's anticipation of legal problems. Several journalists described processes whereby a complex or investigative story is regularly shown to an attorney on retainer. Journalists at large news organizations often receive some legal training. One news

TABLE 4
Anticipation of Legal or Ethical Questions by Type of Story

Type of Story	Legal Question		Ethical Question	
	High	Low	High	Low
Routine Daily News	5	7	4	8
Human-Interest Feature	1	9	5	5
Dramatic News Event	2	1	2	1
Investigative Project	9	2	7	4
Other	2	0	1	1
TOTAL	19	19	19	19

producer at a television network ticked off a list of legal obligations involved in a certain reporting situation and concluded, "We all know this, because we've received from (the network) and its counsel regular briefings – we know that all these things raise legal issues."

Extramedia considerations also were correlated with anticipation of legal problems, but not in the same empathic spirit seen in the ethical anticipation. Several reporters and editors said, for example, that their news subjects already had litigious reputations, which raised the specter of a lawsuit even during the preparation of the story.

Hypothesis 3: Routines and Heuristics. There may be factors other than channels of social influence, however, that influenced the degree to which the journalists anticipated legal or ethical problems. The third hypothesis predicted that routines would lead to heuristics in decision-making, which would by definition bypass any detailed moral or legal reasoning. Table 4 shows levels of anticipation by type of story. The hypothesis appears to be supported only partially for legal anticipation, and even less soundly for ethical anticipation. Nearly all of those who worked on the "human interest" feature stories in the sample were unaware of brewing legal problems, and almost all of those who worked on the investigative projects were highly aware of legal issues.

The results concerning routine daily news work were mixed. The majority of the respondents who had worked on routine daily stories reported low legal anticipation and low ethical anticipation – but not to a statistically significant degree. In recalling these low levels of anticipation, several respondents became defensive and attempted to explain their seeming inattention. One television reporter, like many of her counterparts, seemed to imply that ethical and legal reasoning are luxuries unavailable on deadline: "It was an extremely busy day, and I was in a news-gathering mode. And when you gather news for TV, you must have the pictures to go with the news. And that was the mode I was in. I did not reflect on how they might react or what they might think."

She seemed to be expressing, in a clipped, heuristic fashion, an occupational value that had taken precedence: It is important for journalists

to gather news in a visually interesting and timely manner. A newspaper reporter similarly described how his sense of professional news judgment would not allow for legal or ethical pauses during the reporting process: "When you find out that (law enforcement officers) are breaking and entering without a warrant, and getting a stooge to supply them with gasoline and a gun and everything else, to go on drug runs, then it's news. So I had no regard – I never thought about how (the subject) felt. It was a story!"

The closed-ended results also showed, however, that several other journalists on routine stories were by no means unaware of the ethical or legal implications of their stories. Their open-ended explanations suggest that many of the heuristic devices they use do in fact contain elements of legal or moral reasoning. One television reporter, for example, described a story which began with her unannounced "confrontation" interview of a man (the eventual plaintiff) on the steps of a courthouse. Her story suggests the presence of the moral value of minimizing harm: "And in the editing process we had some footage which showed him in a very bad light, a very bad light: trying to hit the cameraman and me with his briefcase. We talked a lot, my editor and I, about the circumstances in which this happened and why he reacted the way he did – after all, he was going to court to file a motion regarding his children – and we ended up not showing him like that, in the worst light."

Several other respondents' explanations indicated heuristics that seemed to be based in legal considerations. Many described not only regular scrutiny by attorneys of investigative stories but also the regular use of a media-law hotline (especially by smaller news organizations), and the habit of signaling to a senior editor any places in a story that may require legal checking. Others made decisions on their own with the apparent help of heuristics. One small-newspaper editor who was sued for false-light invasion of privacy said he had given no thought to legal matters because of the source of the story's information: "The information I had as the basis of the story came from the D. A.'s office, and they'd never told me anything false before. I felt a high degree of reliability in the source."

An investigative reporter at an alternative weekly, sued for false-light invasion, equated legal protection with the strength of her reporting: "I never, ever thought there were legal problems . . . I mean, I knew all the way through that it was really solidly researched."

Other heuristics displayed a more formal dimension of legal reasoning, however truncated. One supermarket-tabloid reporter was sued for writing a preposterous story about an elderly woman. "We write stories like this all the time," he said, "but I never envisioned that this woman would be alive." The dead-or-alive heuristic is used, he later explained, because reporters at the paper have been instructed that, for legal reasons, preposterous stories are to be invented about only deceased persons. Through a careless mistake by a file clerk, he added, he had been given the name and photo of someone who was not yet deceased, and that story led to the lawsuit. Several journalists at more "mainstream" organizations, ironically, were less correct than the tabloid writer in their own legal heuristics. In several cases they said they had reckoned that their subjects were public figures and that therefore the story content would be legally unassailable. The "public figure" heuristic is derived, however, from constitutional interpretations of libel law, not privacy law. While general "newsworthiness" is an important consideration in privacy, the public-or-

private status of the plaintiff has no direct bearing on an invasion-of-privacy claim.[30]

Feature stories, as Table 4 indicates, do not generate much awareness of potential legal problems. By their nature, these stories generally are written not to expose or embarrass public figures but rather to promote the unusual or positive qualities of a person or situation. In this study, however, feature stories prompted only three fewer lawsuits than investigative projects did (Table 1). One reporter's account reflects the surprise many other feature writers felt: "This story was published in a special section announcing the opening of our brand new sports facility. And it was a very positive profile about the man (the eventual plaintiff), because he had been the driving force behind it. And this (the problematic claim) was one line in a glowing profile of this man."

The hypothesis is strongly supported in terms of the legal awareness of investigative journalists. Again, the nature of investigative journalism is such that its content is more likely than other types of content to be perceived by subjects as defamatory or invasive, and the methods of investigative reporting likewise have sometimes raised questions of propriety. Nine of the eleven respondents associated with investigative projects reported high legal awareness. One television reporter who regularly investigated consumer complaints summarized the attitude: "The work has to be done with such a degree of integrity that it can withstand scrutiny in both law and ethics. My shorthand way of doing it is that we should do investigative reporting as if we were in a goldfish bowl, or as if there were 12 jurors looking over my shoulder at every stage."

Hypothesis 4: The Importance of Discussion. Respondents were also asked the extent to which discussion about the legal and ethical aspects of their stories had taken place before the publication or broadcast. About 60% of the respondents recalled some kind of informal discussion about the legal aspects of the story, but only 44% recalled any discussion about ethics. Nearly 40% said an attorney had been consulted before the publication or broadcast. The presence of discussion was strongly associated with the journalists' anticipation of legal and ethical problems. When there had been discussions about ethics, the ethical anticipation was high; when there had been informal discussions about the legal aspects of the story, legal anticipation was high. There was also a significant correlation ($p = .02$) between the newsroom's consultation with an attorney on the story and the respondent's legal awareness. These results seem to support the contention of Tyler, Conrad, and others that interpersonal communication is a key factor in one's perspective on the law.

Conclusions

The findings suggest that these 42 respondents, despite their apparent lack of legal awareness, were not the illegally intrusive, invasive villains of American journalism that their legal plights alone might suggest. If most of the respondents perhaps proceeded as they did because they assumed they were legally safe, it is because they were. The overwhelming majority of these suits resulted in a vindication of the defendants' journalistic practice. The open-ended responses, by and large, reflected at least some attention to professional standards and duties and little of the callous attitudes that have been ascribed to journalistic invasion of privacy. It is noteworthy also that among the closed-ended measures of social influences, competition scored lowest, indicating little salience in the decision-making.

Outcomes notwithstanding, however, these journalists did not seem particularly adept at recognizing when legal trouble is brewing in the stories they are producing. Of the 42 journalists interviewed, only 19 recalled a heightened sense of awareness (that is, higher than 5 on a 1-10 scale) that their work might be raising legal questions. That is not to imply that journalists as an occupational group are particularly negligent. Many litigation defendants – even those who work with constant awareness of the law – are surprised to learn they are being sued. The results do affirm, however, the vitality of Skolnick's "total context" of legal decision-making. Among an array of social determinants and influences, the legal influences, whether formal or informal, scored lower than the overall mean of influences. As much of the literature on legal compliance has suggested, most people in professional work settings tend not to engage in legal analysis in most situations; they are guided more often, in the case of journalists, by such factors as small-group cues, extramedia influences, and by their own personal (and extralegal) sense of propriety.

This study also explored whether, within the social context of legal decision-making, a certain set of values, normative or instrumental, would have more salience, and whether this might affect a journalist's ethical (as distinct from legal) awareness. The normative items seemed to resonate more clearly than the instrumental, and this could help explain why the respondents' overall degree of ethical anticipation was as high as their degree of legal anticipation. The results suggest that the journalists, whether or not they consciously considered the legal implications of a situation, were nonetheless guided by a duty to moral responsibility and a basic acceptance of the rule structure that governs their work.

Could it be that the frequent usage of cognitive short-cuts in journalistic work has short-circuited any such moral or legal considerations? The study's exploration of heuristic devices found evidence both to support and to counter that notion. Many of the quick leaps in reasoning displayed in the open-ended responses reflected occupational or organizational norms that seemed only distantly related to law or ethics. Many others, however, seemed to be reflections, perhaps routinized over years of work, of moral reasoning or some kind of legal training.

While these specific findings cannot be generalized beyond the journalists in the study, they do suggest some implications for news media managers, for media educators, and perhaps even for scholars interested in the dynamic interaction of law and ethics. There was a strong correlation between newsroom discussion and awareness, both ethical and legal, and the small-group influence was one of the most salient in the hierarchy of influences. This suggests encouraging routine, informal discussion about the legal or ethical aspects of a story in progress. The results also suggest, however, that journalists quite often will forgo the "luxury" of discussion and instead base decisions on their own routines and heuristics. But these are not beyond the realm of an organizational culture by any means. Managers can encourage "rules of thumb" or a few policies-in-brief (as opposed to a lengthy "company code of conduct" that is likely to be forgotten in a lower drawer) that are grounded in legal advice or moral reasoning, or both.

This in turn implies a relationship between ethics and law in the newsroom and ethics and law in the college classroom. The journalists in this study seem frequently to have used heuristic shortcuts in lieu of legal or moral reasoning, as a function of such social influences as daily time

constraints and peer norms. The overall effect, however, may well be the reification of a kind of unreflective, intuitive approach to evaluating the content and the gathering of news. If legal and moral decision-making in the newsroom is not all it could be, it seems that journalism educators as well as newsroom managers bear some responsibility. Journalism educators can choose either to emulate professional practices and recreate professional circumstances for their students, or take advantage of the opportunities for more prolonged, more independent reflection that a classroom setting provides. If heuristics result at least in part from a lack of more specific knowledge (legal or otherwise) and a lack of experience in reasoning techniques, then journalism courses have an opportunity to supply some of that knowledge and experience. The goal would be the creation of an ethically and legally sound framework on which future journalists could rely when they face tough decisions in their news work. The heuristic impulse may always be present in daily work, but it can at least be based on sound principles.

The final set of implications concerns the distinctions journalists draw between law and ethics. Journalism education programs typically distinguish media law from media ethics for pedagogical purposes, but in the working world of journalism it appears that the distinction is blurred. Legal and ethical awareness seemed to be highly correlated in all the closed-ended measures, and in many open-ended responses the respondents readily mixed legal considerations with the ethical. In journalism, as in most fields of endeavor, sound legal behavior and morally upright behavior both seem rooted in the same value system. If journalists make a good-faith effort, for example, to discover facts from a variety of sources and present them with a sense of balance; if they avoid misrepresentation of themselves or of the facts they learn; if they consider with empathy the likely impact of their work, then it is likely that their work will not only be morally defensible but legally defensible. But sound legal behavior, of course, does not guarantee moral probity. There are many instances in which journalistic behavior that is morally indefensible is still legally defensible (thanks largely to the broad cover of the First Amendment). To the extent that journalists are still likely to become involved in those kinds of situations, the distinctions between law and ethics are still important.

It may even be that legal acumen is less important than ethical awareness in the newsroom. The journalist who is well-versed in the law may know which actions and words approach the boundaries of liability without actually crossing them. But if legalistic reasoning becomes a substitute for moral reasoning, the news media may find themselves drifting away from important social and moral responsibilities. At a more pragmatic level, this study has shown that legal correctness cannot prevent the filing of lawsuits. Even legally sound journalism, when perceived by its subjects as ethically insensitive, can induce a lawsuit.

This study was exploratory in nature, and it would be risky to infer too much from its results. The group studied was a specifically identified population of journalists who were sued, rather than a probability sample of all journalists, so these results enjoy limited generalizability. Furthermore, respondents were asked to recall specific cognitive events that took place (in some cases) years earlier. Their reconstruction of the decision-making, colored since then by the adversarial nature of a lawsuit, cannot be as accurate as any observed, real-time measurement.

But the study has nonetheless shed some light on processes and relationships that are rarely studied and not well understood. Further investigation is warranted, especially in probing specifically for ways in which journalists distinguish law from ethics, for ways in which their heuristics are constructed in morally or legally ambiguous situations, and for more evidence of a distinction between normative and instrumentalist perspectives in legal behavior. It would also be important to know whether journalists who have *not* been sued recently share the same attitudes as those in the present study.

These questions are important, not only for a broader understanding of the everyday processes of moral and legal reasoning, but for journalism. The fact that the media defendants prevailed in nearly all of these privacy suits is no cause for relaxation among journalists. In their landmark study of libel, Bezanson, Cranberg, and Soloski uncovered 106 cases of invasion of privacy (not including appropriation) in ten years (1974 to 1984).[31] The present study found 82 cases reported in only five years – a reflection, perhaps, of a broader, increasingly negative public perception of journalistic behavior. And the reported cases discovered here surely represent only a small portion of all claims of invasion of privacy filed against news outlets. Even if a media defendant ultimately prevails, the cost of a legal defense – both psychologically for the journalist and financially for the media company – can create a "chilling effect" on future behavior as severe as any plaintiff victory would be. No newsroom policy can guarantee against ethical lapses or lawsuits. But to ignore legal and ethical reasoning in journalism is to squander an opportunity to make journalism more credible, more responsible, and more just.

NOTES

1. David Pritchard, "A New Paradigm for Legal Research in Mass Communication," *Communications and the Law* 8 (August 1986): 51-67.

2. See, for example, Douglas A. Anderson and Marianne Murdock, "Effects of Communication Law Decisions on Daily Newspaper Editors," *Journalism Quarterly* 58 (winter 1981): 525-28, 534; and Ben Silver and James Bow, "Effects of *Herbert v. Lando* on the News Process," *Journalism Quarterly 60* (spring 1983): 115-18.

3. See, for example, Rita Wolf, Tommy Thomason, and Paul LaRocque, "The Right to Know vs. The Right of Privacy: Newspaper Identification of Crime Victims," *Journalism Quarterly* 64 (summer-autumn 1987): 503-507.

4. See, for example, Bruce Garrison and Sigman Splichal, "Reporting on Private Affairs of Candidates: A Study of Newspaper Practices," *Journal of Mass Media Ethics* 9 (1994): 169-83.

5. *Restatement (Second) of Torts*, Section 652D (1977).

6. *Restatement (Second) of Torts*, Section 652B.

7. *Restatement (Second) of Torts*, Section 562E.

8. Robert Wyatt, *Free Expression and the American Public* (Murfreesboro, TN: Middle Tennessee State University, 1991).

9. Debra Gersh, "Heightened Sensitivity: SPJ Survey Shows News Media are Getting More Sensitive to the Privacy Concerns of Their Audiences," *Editor & Publisher*, 9 February 1991, 36.

10. David H. Weaver and G. Cleveland Wilhoit, *The American Journalist in the 1990s: U.S. News People at the End of an Era* (Mahwah, NJ: Lawrence

Erlbaum Associates, 1996).

11. Mark Galanter, "The Future of Law and Social Science Research," *North Carolina Law Review* 52 (October 1974): 1060-1089.

12. Jerome H. Skolnick, "Coercion to Virtue: The Enforcement of Morals," *Southern California Law Review* 41 (summer 1968): 588-626. See also Stewart Macaulay, "Law and Behavioral Science: Is There Any There There?" *Law & Policy* 6 (April 1984): 149-87.

13. Toni Makkai and John Braithwaite, "The Dialectics of Corporate Deterrence," *Journal of Research in Crime and Delinquency* 31 (spring 1994): 347-73.

14. Jerry Wiley, "The Impact of Judicial Decisions on Professional Conduct: An Empirical Study," *Southern California Law Review* 55 (January 1981): 345-89.

15. Daniel J. Givelber, William J. Bowers, and Carolyn L. Blitch, "Tarasoff, Myth and Reality: An Empriical Study of Private Law in Action," *Wisconsin Law Review* (winter 1984): 443-97.

16. Daniel W. Shuman, "The Psychology of Deterrence on Tort Law," *University of Kansas Law Review* 42 (fall 1993): 115-68.

17. Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

18. Robert L. Rabin, "Deterrence and the Tort System," in *Sanctions and Rewards in the Legal System: A Multidisciplinary Approach*, ed. M. L. Friedland (Toronto: University of Toronto Press, 1989), 79-94.

19. Holly S. Stocking and Paget Gross, *How Do Journalists Think?* (Bloomington, IN: ERIC, 1989).

20. Shuman, "The Psychology of Deterrence in Tort Law," 161.

21. Pamela J. Shoemaker and Stephen D. Reese, *Mediating the Message: Theories of Influences on Mass Media Content* (White Plains, NY: Longman, 1996).

22. The number of invasion of privacy suits filed during this period was no doubt higher than 84, but because results of state courts of original jurisdiction are not routinely available in national publications or databases, the cases found for this study were mostly appellate cases. The few cases that were discovered at the original-jurisdiction level had been found in the trade press (usually because of some unusual feature in the case).

23. Attempts to contact an appropriate respondent failed for a variety of reasons: Some had left their news organizations, and attempts to trace them failed; some news organizations no longer existed; others failed to respond either to letters or to repeated telephone messages.

24. Refusals were usually attributable to one of three reasons: the journalists could not be satisfied that academic researchers could protect their identities; they understood that the case might still be pending and had been advised by an attorney not to discuss it; or they simply did not want to revisit the unpleasantries of the suit,which one refusing subject described as "the worst nightmare of my life."

25. The protocol followed this sequence: Subjects were first asked to discuss their understanding of the recent history of the lawsuit (as a "warmup" question) and then asked to recall the time immediately before the broadcast or publication of the material that led to the suit. They were asked to what extent they had thought their story subjects would react to the publication, to what extent they had thought the story raised questions of law, and to what extent they had thought the story raised questions of ethics. Each question was answered numerically (on a scale from 1 to 10) and

followed up with an open-ended explanation of each numerical answer. Respondents were then asked to rate numerically the salience of the indicators of the social influences in the Shoemaker-Reese model. The protocol also included demographic items such as age, education, gender, and size of media organization.

26. Randall P. Bezanson, Gilbert Cranberg, and John Soloski, *Libel Law and the Press: Myth and Reality* (New York: The Free Press, 1987).

27. The remaining 4.5% of the cases represented some combination of defamation and privacy torts, with no single area of law dominating the resolution.

28. The following items were classified as normative in nature: "I think I relied on my own religious or moral upbringing for guidance" (Individual channel of influence); "I was relying on the personal values and beliefs that I bring to my work, regardless of whatever rules we're expected to follow" (Individual); "I remember wanting to consult with a co-worker or an editor before proceeding on the story" (Small Group); "I remember thinking about whether what I was doing was journalistically professional or unprofessional" (Occupation); "I remember wondering what the subject of the story would think when he or she first saw it" (Extramedia).

The following items were classified as instrumentalist in nature: "I remember thinking about what my co-workers would do, or had done, in a similar situation" (Small Group); "I remember thinking about whether this kind of story fit, or didn't fit, the image of our particular news organization" (Organization); "I remember thinking about our company's policy on situations like this" (Organization); "I remember thinking about whether these are the kinds of stories that would raise our profile, or get our news organization talked about more" (Competition); "I remember thinking about whether we needed stories like these to stay ahead of our competition" (Competition); "I remember trying to find out whether there was anything about this in our profession's codes of ethics" (Occupation); "I remember wondering what my other sources and contacts would think when they first saw the story" (Extramedia); "I remember wondering if we would get sued for any reason because of this story" (Legal); "I remember thinking about whether my company would stand behind me if any legal trouble arose from this story" (Legal); "I remember trying to find out whether there was any recent court decision or law concerning this situation" (Legal); "I remember trying to recall facts from media law classes or media law seminars I have attended" (Legal).

29. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Belknap Press, 1971).

30. Don R. Pember, *Mass Media Law* (Madison, WI: Brown & Benchmark Publishers, 1997), 262, 270.

31. Bezanson, Cranberg, and Soloski, *Libel Law and the Press*, 116.