CHRISTOPHE VORLET FOR THE CHRONICLE

Irresponsible Journalists Are Jeopardizing Serious Investigations by the Press

By Christopher H. Pyle

IN THIS CENTURY, there have been two great eras in American investigative journalism. The first, in the early 1900's, was led by muckraking journalists Ida Tarbell and Upton Sinclair. Tarbell's massive *History of the Standard Oil Company* (1904) helped break up that monopoly. Sinclair's *The Jungle* (1906), which exposed unsanitary conditions in the Chicago meat-packing industry, led to the Pure Food and Drug Act.

The second era, in the early 1970's, was best exemplified by *Washington Post* reporters Bob Woodward and Carl Bernstein. With the help of confidential sources like "Deep Throat," they not only drove Richard Nixon and his "plumbers" from the White House, but helped to end 20 years of illegal wiretapping, burglaries, political surveillance, and "dirty tricks" by the Federal Bureau of Investigation and other agencies.

During both of those periods, it was possible to think of the press as playing an important role in the constitutional system of checks and balances—a role worthy of First Amendment protection. No longer. The irresponsibility and mean-spirited triviality of "gotcha" journalism in the 1990's has eroded confidence in the press. Courts, always hesitant to provide special legal protections for investigative journalists, have become even less inclined to protect those reporters from reprisal lawsuits for invasions of privacy and the use of deception in investigations. Meanwhile, advances in surveillance technologies have increased the capabilities of government agents to probe reporter-source relationships, and thereby deter whistle-blowing.

If the press doesn't wake up to those realities soon, its capacity to mount serious investigations may be seriously impaired.

I have some acquaintance with such matters. In 1970, as a former captain in U.S. Army Intelligence, I disclosed the military's surveillance of civil-rights and antiwar protesters—an extensive operation involving over 1,500 plainclothes agents and millions of files on the political activities of law-abiding Americans. I also recruited 125 former intelligence agents to describe that surveillance to members of Congress, the American Civil Liberties Union (which took the Army to court), and the press. Over the next three years, the Army Intelligence Command was forced to cease the spying, burn its files, and disband. Today, such an investigation would be much harder to conduct.

My inquiries depended on confidential sources. Most insisted on anonymity and trusted me to keep their identities secret. Some of that trust was personal; many had known me as an instructor in the legal section of the Army Intelligence School. But my sources also assumed that I might enjoy some protection because of my work as a journalist, a consultant to Senator Sam Ervin's Subcommittee on Constitutional Rights, a member of the legal team suing the Army, and a witness in Capitol Hill hearings. Today, after watching Ken Starr drag journalists, White House lawyers, and even Monica Lewinsky's mother be-

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fore a grand jury, sources like mine might not be so trusting.

Few of the reporters, lawyers, and Senate staffers to whom I relayed my sources' stories worried that their phones might be tapped. They still counted on the primitiveness of eavesdropping technology. Since then, however, wiretaps have become undetectable. Eavesdroppers don't have to huddle in basements any longer. They can get the phone company to route the intercepts to their offices, where they can be recorded and searched for key words and phrases by computers.

When I began my investigations, there was reason to believe that courts might shield the press from reprisals by government officials. In 1964, a liberal Supreme Court had protected *The New York Times* from a crippling libel suit by a Southern police commissioner who claimed, correctly, that an advertisement supporting Martin Luther King Jr.'s civil-rights protests contained errors of fact. To win a libel suit against a newspaper, the court ruled, public officials had to prove more than the negligent handling of facts. They had to prove malicious intent or reckless disregard for the truth.

In 1978, however, a more-conservative court refused to grant any First Amendment protection against the search, pursuant to a warrant, of the offices of *The Stanford Daily* newspaper for unpublished photographs of lawbreaking protesters. The press was not constitutionally special any more. Five years later, in a drug case involving a private couple (*Illinois* v. *Gates*), the Rehnquist court upheld a search warrant based solely on an anonymous letter.

Taken together, the *Stanford Daily* and *Gates* cases suggest that there is no longer any legal obstacle to the issuance of warrants to wiretap, bug, or search the files of reporters based on tips from unknown (and, possibly, made-up) sources. Nor need there be any suspicion that the reporters are breaking the law. It is enough that they may be in touch with people who are breaking the law. Given those precedents, potential whistle blowers now have good reason to doubt the capacity of the press to keep their identities secret.

I LEARNED of the military's spying on civilians while I was on active duty. Fortunately, the Army had neglected to label information about its domestic-spying practices secret (until I disclosed them), and nobody could seem to find the non-disclosure agreement that Army officials thought I had signed.

Today, however, no one in a sensitive government job can escape having to sign a non-disclosure pact. Indeed, intelligence agencies now compel their employees to sign two "agreements": one in which the employee promises not to disclose anything stamped "secret" (including evidence of government wrongdoing), and another in which the employee agrees to submit any writings about the agency for prepublication review. In cases involving former employees of the C.I.A., the Supreme Court found nothing wrong with the government coercing its citizen-employees to waive their First Amendment rights. Nor did the justices seem to care that publication delayed by slow review and lengthy wrangling is a right denied.

To stop my investigation, the Army needed only to identify some of my sources. If some had been exposed, others would not have risked talking to me. Breaking into my apartment was apparently deemed too risky, but (as a Freedom of Information Act query later revealed) the Army did try to get my mailman to record who wrote to me, in the hope that I would neglect to use safe "mail drops."

Today, such measures would be less necessary. The government could intercept my e-mail or hack into the computers of anyone suspected of leaking sensitive information to me. Civil-liberties groups fear that authority for such monitoring might be allowed under a proposed federal program called FIDNET.

My first article disclosing the Army's spying was published by *The Washington Monthly* on January 6, 1970. Ten days later, a meeting was held at the Army's Counterintelligence Analysis Division at which, according to a participant, it was proposed that I be killed. The proposal was rejected, and I was put on Nixon's "enemies list" instead. That led to an audit of my taxes. Today, intelligence agents might be tempted, instead, to destroy my credit rating with some less traceable computer hacking.

In 1971, Army colonels tried to persuade Republican staffers that my impending testimony before Senator Ervin's committee was not to be trusted, because I had, they claimed, fathered three illegitimate children. Today, it would be easier (and less risky) to leak such falsehoods to Internet gossips who, with the help of copycat reporters, can now be trusted to turn dubious allegations into accepted truths by incessant repetition.

Serious reporting scored some notable successes during the Watergate years: Most of the political-surveillance files had to be destroyed. But legislation that might have reformed the F.B.I., the C.I.A., and Army Intelligence never passed. As a result, the government can still use informants with impunity. The police, for example, still do not need judicial permission to infiltrate suspicious groups or the news media. Nor do law-enforcement officials generally have to account for their informants' actions, especially if the informants are not called to testify.

In contrast, courts have been reluctant to protect investigative journalists from government probes and reprisal lawsuits. The more-recent court rulings suggest a judicial backlash against the gotcha journalism that has increasingly supplanted serious reporting. To be sure, not every reporter in the Watergate era was a Woodward or a Bernstein; today, excellent reporters still pursue important stories. But over all, respect for journalists has declined. In place of Seymour Hersh, who exposed the My Lai massacre in the early 1970's, and David Burnham, who documented the Internal Revenue Service's abuses in *A Law Unto Itself* (1989), we have Web gossip Matt Drudge. Instead of serious whistle blowers like Daniel Ellsberg, who leaked the Pentagon Papers, and A. Ernest Fitzgerald, who exposed Pentagon waste, we have dirt dishers like Lucianne Goldberg and Linda Tripp.

If gotcha journalism advanced debate over important issues, it might be excusable. But it doesn't promote civic discourse; it strives only to expose the private indiscretions of public persons to snickering commentary.

Elegies for the good old days are always suspect, but standards of responsible journalism have declined. While investigating the Army, I came across an F.B.I. report on the sex life of Martin Luther King Jr. Publishing that report could have advanced my cause, but disclosing the documents' contents would also have discredited Dr. King's memory and goals, hurt his family, and invaded the privacy of the women he was alleged to have slept with. It did not take me a nanosecond to know what to do with such garbage. I later met several journalists who had come across similar material, who also had decided not to publish it while King was still alive.

In 1976, Senator Frank Church's Select Committee on Intelligence (for which I also worked) disclosed J. Edgar Hoover's efforts to drive Dr. King to commit suicide rather than suffer disclosure of his private indiscretions. Even then, however, the committee never identified King's alleged partners.

TODAY, media conglomerates care little about whose reputations they harm, whose privacy they invade, or what work they disrupt. Their objective is to boost ratings or circulation, and with them revenues from advertising. The journalistic jackals have their counterparts in political attack dogs who would rather defeat an adversary by exposing his sex life than by debating his ideas.

Courts, no less than private citizens, are appalled by such behavior and find it increasingly difficult to credit the media with a constitutional function. Judges will still protect paparazzi from the celebrities they harass, but are less sympathetic to television producers who deceive people in order to catch them, on film, in the act of breaking laws. In 1997, for example, ABC television lost a very expensive case to the Food Lion supermarket chain. Food Lion did not deny in court that its handling of food was unsanitary or that its employees had repackaged outdated meat. Rather, it alleged that undercover reporters had, by obtaining employment and using hidden cameras, committed trespass and fraud. The jury returned a $5.5-million verdict against the network.

In 1998, NBC—which had previously faked fiery truck crashes in a news segment on vehicle safety—was sued for lying to truckers to film an exposé of unsafe driving. In June 1999, ABC's *PrimeTime Live* lost a $1.4-million lawsuit brought by a psychics' hot line, because the reporter for the network lied about her identity and deceptively filmed the psychics with a camera hidden in her hat. Television crews who ride along with the police, or wire emergency medical technicians to record the agonies of crash victims, are also losing (or having to settle) expensive suits over their invasions of privacy.

As outrages by gotcha journalists multiply, judges are increasingly willing to let juries second-guess reporters as to what is or isn't newsworthy. Unable to specify what should remain private or leave such decisions to the media, courts are increasingly disposed to pass the buck to jurors, who—as with obscenity—are presumed to know what is private (*i.e.*, not newsworthy) when they see it. As one might expect, juries, unlike judges, don't look at each other's decisions, so the legal rights of reporters are beginning to vary, case by case, year by year, jurisdiction by jurisdiction.

The outlook is not totally bleak. In October, a U.S. Court of Appeals invoked the First Amendment to wipe out all but token damages against ABC for its Food Lion investigation. Even so, the costs of that and other expensive "slap" suits cannot be lost on media moguls for whom money is the bottom line.

There's good reason to be concerned about what irresponsible journalism is doing to privacy as well as to the capacity of the press to conduct serious investigations. The demand for profits, however, seems increasingly to override the ethical and professional standards of reporters and their editors. That's troubling, because the need for serious investigative journalism will come again. When it does, we can only hope that some protections for the investigators and their confidential sources will remain.

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