

Consent and Consequences: Journalists' Duty to Inform Subjects of Potential Harms

By

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Abstract

In Canadian journalism there is no law, professional requirement or expectation that journalists discuss with their subjects the potential consequences of the publication of personal information. Therefore, journalism subjects can be at risk of significant harms of which they may be unaware. These harms range from deception and loss of autonomy to loss of income, loss of employment and loss of family.

The situation in journalism stands in stark contrast to health practice and health and social science research where mandatory informed consent protocols require that any significant risks are disclosed to subjects/patients prior to their reaching a decision about participation. This thesis argues that consent transactions in journalism should similarly require a duty to discuss consequences but avoid the bureaucratic and rigid processes of informed consent protocols.

Finally, this thesis argues that a duty to protect subjects from harm is consistent with a duty to promote the public interest.

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Table of Contents

Abstract	i.
Acknowledgments	ii.
Chapter 1	1.
Chapter 2	28.
Chapter 3	60.
Chapter 4	98.
References	118.

Consent and Consequences: Journalists' Duty to Inform Subjects of Potential Harms

Chapter 1: Introduction

I. INTRODUCTION

Many years ago when I was working as a producer on a CBC national current affairs radio program, a two-line wire story caught my eye. A woman in her fifties was suing her elderly parents for failing to protect her from sexual abuse that had occurred over forty years earlier. The woman was not named, but I managed to track her down and she readily agreed to tell her story on the radio. And what a story it was. Her parents took in a male boarder when she was twelve. The house was small, but the boarder was able to repeatedly rape the girl with the parents in the house. She became pregnant for the first time at thirteen. Her parents responded to the news by forcing her to marry the boarder. A year later she was pregnant again. Her husband was violent and abusive, and when she was fifteen she was finally able to flee the marriage. Now, forty-plus years later, she wanted her parents to finally admit that they had failed her.

It was clear that the woman was fragile and, as she acknowledged, had battled depression on and off for many years. Yet, according to court documents, the essential facts of the case were undisputed. The interview with the woman was broadcast across the country at prime time. Several months later the woman contacted me. She'd been hospitalized with a severe depressive episode after the interview, something she felt was attributable to the negative impact of her public disclosures about her private life. Her intimate relationships had been shredded by her public utterances and the attention they focused on her and her children; awkward stares followed her at work and in the community. It had been too much.

The woman freely consented to the interview, and although fragile, she was competent to consent. I had no prior knowledge that her relationships would collapse post-interview, or that she would experience emotional difficulties as a result. And yet, I was not exactly shocked to learn this. Although still fairly new to my career, I had covered enough “social issues” stories to know that publicizing private information is not a neutral act; those who do frequently experience a shift in their lives, sometimes only fleeting, other times more lasting; sometimes the change is for the better, and other times things get worse. The woman, though, had no previous media experience, and no conception of how a single radio interview could alter her life.

Now, I look back and ask myself the following question: did I have an obligation to inform this woman that publicizing intimate information could have an impact on her life and her relationships? Back then, this question never occurred to me.

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According to the Office of Human Research Protection (OHRP) in the U.S., the “disclosure of personal information is a major, perhaps *the major* source of potential harm to subjects” in social and behavioural sciences research (Office of Human Research Protection, 2006). In the view of the OHRP, personal information requires respect, care and protection. In journalism, by contrast, there is considerable pressure to publicize, rather than protect, that which is personal. Details of people’s emotional or financial health, or traumatizing experiences, are sought after and valued as content by journalists for precisely the same reasons they are often (but not always) protected by academic researchers and health care practitioners: the potential impact of publicizing this information. In journalism, though, the term impact is not usually associated with subjects (nor is there the attendant consideration of potential consequences for them).

This may, in part, be explained by the fact that in journalism practice the standard for journalist/subject relationships is that they end when the interview is completed, or the story is published/broadcast (although this is not always the case). In journalism, the term impact is, by contrast, connected to audiences. High impact is seen as a positive outcome, measured by audience size and response, and low impact equals bad outcome, by the same measure. In calculations of impact in journalism, subjects are largely absent. This is not surprising given that there is little in the way of legal, professional or ethical obligations for journalists or their employers to consider the effect of their stories on the subjects of those stories.

At a time when the concept of individual responsibility has re-entered public discourse in this country, via a federal government keen to promote the idea in several of its policies (tougher mortgage requirements, a more punitive young offenders act, child care, etc.), some may view the responsibility for what happens to journalism subjects once they publicize personal information as belonging solely to the individual subject – that is, if the subject agreed, free of coercion, to participate in the story in the first place. But what if the subject is ignorant of (at least some of) the potential consequences when she consents to participate? And what if the journalist recognizes that there are potential risks for the subject, but fails to disclose this information prior to participation? Given that new, as yet untold, personal stories are generally privileged by journalists over those already publicly known, inexperienced journalism subjects are fairly common, and often just as common is their ignorance of consequences. I base this claim on the fact that no Canadian professional, legal, or ethical code, or professional norm, requires consent transactions between journalist and subject to contain discussion of potential

consequences. Further, as a former journalist with deep experience in first-person social issue stories, I can attest that a few years' work in this area is enough to develop an awareness of the existence of risks for subjects, but that this knowledge, for the most part, does not get communicated to subjects during the consent process, nor is this expected, let alone required, by managers and editors. Journalists are not omniscient; we cannot anticipate every possible consequence, or many times, even most of them. However, journalists often know more about the potential pitfalls of publicizing private information than do our subjects, yet rarely share this information.

Some may argue that "reality" shows and 24-hour cable news, with their insatiable appetite for human suffering, are now so ubiquitous, it is inconceivable that any potential journalism subject is ignorant of the potential downsides to publicizing private information. First, reality shows are not reality; they are orchestrated, scripted action programs starring amateur actors. Second, with both reality programming and cable news, the audience does not witness what happens to the subjects, and to their lives, when the cameras are shut off and the program or story is over.

The potential risks of harm for subjects participating in media stories range from being deceived, to having their autonomy and privacy violated, to negative impact on social relations (Smith Fullerton, 2004, pp 511-24), to loss of children, loss of income, loss of property, loss of insurance, and emotional harm such as depression, or even suicide (Rafferty, 2004, pp 121-136). Subject ignorance, combined with an absence of professional duty on the part of journalists, often results in inadequate protection for subjects during consent transactions.

In response, this thesis proposes that journalism organizations incorporate into their mandatory practice guidelines a professional duty to inform journalism subjects about potential harms. The development of such a principle can learn much from informed consent protocols in health care and social sciences where there is a professional and, in the case of health care practice, legal set of obligations for consent transactions referred to as informed consent. First developed in the context of medical negligence litigation, informed consent protocols evolved out of an understanding that interventions into the lives of patients/subjects frequently bring with them a level of risk of harm for these individuals. This situation imposes a set of obligations on the part of the practitioners/researchers to inform their subject/patients of any significant risks before proceeding.

In practice, informed consent (IC) is but an annotated permission slip. During an informed consent process, the practitioner/researcher offers the subject/patient a verbal or written explanation of a proposed research project or medical intervention. This explanation includes a disclosure of all *known* and *significant* potential consequences, both positive and negative, and the probability of occurrence for each. The practitioner/researcher then verifies that the subject/patient understands the information disclosed. Finally, the patient/subject is given the opportunity to accept or reject the proposition, presumably free from pressure or coercion.

As will be demonstrated in chapter 2, there are significant problems with current IC protocols in health practice and health and social science research. This thesis, therefore, will not argue for the adoption of IC protocols into journalism practice. Still,

critically analyzing IC is a valuable first step toward conceptualizing a better model of subject consent for journalism practice.

The lack of adequate protection for journalism subjects may be somewhat explained by the fact that the journalism profession does not, for the most part, perceive its subjects to be at risk of significant harm. Consideration of the impact of stories on journalism subjects is frequently viewed as outside the realm of journalistic duty. (Coleman and May, 2004, pp 283-4; Kennamer, 2005, p 87). As David Kennamer claims, journalists

...have often been unwilling to accept responsibility for the effects of their stories on their subjects or sources, using concepts of newsworthiness or the public's right to know to justify their actions and the harm they might cause, applying a rough-and-ready form of utilitarianism philosophy. ... [J]ournalists' vigorous defense of their own autonomy sometimes seems to call for an evasion of responsibility for the outcomes of their actions (Kennamer, p 87).

Any concerted effort to introduce strengthened consent protocols into journalism practice likely would be, at least initially, met with resistance. The aim of this thesis is to, at a minimum, offer a pre-emptive undercutting of arguments that may be launched by those in the profession who would oppose greater regulation around consent protocols. As it currently stands, the consent requirements in journalism are a few centuries behind medicine and decades behind social science and behavioural researchers. It is time we caught up.

II. GUIDING RESEARCH QUESTIONS

The guiding question for my thesis is as follows: During consent transactions, should journalists be obligated to inform prospective subjects of the potential

consequences of their participation? From the interrogation of this primary question there has emerged a set of secondary questions.

1. What can the development of more rigorous consent transactions between journalists and subjects learn from the historical development of informed consent in health care practice, and health and social science research?
2. How should harm be conceived in the context of journalism?
3. What is the relationship between subject harm and journalistic duty to inform?
4. Can a journalistic duty to inform subjects about potential consequences be reconciled with the prima facie duty of journalists to serve the public interest?
5. Should greater accountability to subjects during consent transactions be instantiated through the law, voluntary professional codes, mandatory professional guidelines, or some combination of these?

III. LITERATURE REVIEW

This review will first explore the issue of informed consent in journalist/subject transactions. For my literature search, I defined informed consent broadly so as to capture not only the literature on incorporating standard IC protocols into journalism, but also any work that grapples with an ethical obligation to inform subjects about potential consequences as a part of consent transactions. My research suggests that very little literature exists on the topic, even under the expanded definition. However, my justification for incorporating stronger consent protocols into journalism practice is based on the claim that journalists have an obligation to protect their subjects from unnecessary harm. The review will therefore begin with the literature that addresses the issue of informed consent in journalism practice, and then expand to include the literature on

journalistic duty to minimize or avoid harming subjects. For the most part, the literature on subject harm and journalistic duty can be characterized as follows — it argues that yes, journalists have certain responsibilities for at least some of their subjects, and that these responsibilities are usually justified by a duty to avoid or minimize the imposition of harm. As shall be discussed later in this section, this consensus does not hold when exploring what constitutes potential harm, what actions are required to meet the duty to minimize or avoid harm, what claims are used to bring moral force to this duty, and under what circumstances, if any, it can be overridden.

There are just three works written in English that substantially deal with informed consent and journalism practice. The most useful to my thesis is a work by Romaine Smith Fullerton (2004) in which she contends that journalists have a responsibility to those whom they cover and that this includes ensuring, as much as is possible, that media subjects have an understanding of the potential consequences of their participation (Smith Fullerton, 2004, p 515). Smith Fullerton lays out a set of compelling arguments in justifying her claim that child subjects can face significant risk of psychological harm when they participate in media stories. Most of her analysis focuses on “Hard Times”, a 1999 *Toronto Star* special series about a group of pre-adolescent children living in single-parent welfare families. She identified an inherent power imbalance between the adult journalists and the child subjects involved in the series, and concluded that this gap in authority, power and status would have made it difficult for the child subjects to inform the journalists that they wanted to withdraw their participation, or even that they would like certain information withheld. This then increased the possibility that the children felt embarrassed or humiliated once their personal information became public, information

that included, inter alia, excerpts from the personal diary of one of the girls (the idea of keeping a journal was suggested to the girl by *The Star*, and facilitated by its purchasing for her a blank book and a pen).

However, the risks that these child subjects faced were not just created by *The Star*; they were also the result of unequal power relationships with the children's parents, and their dire economic circumstances. It was the parents who were first approached by *The Star* for the series, and then asked to act as proxy consent for their children. *The Star* had underscored to the desperately impoverished parents the likelihood of significant donations from readers, once the series was published (*The Star* was correct; there were donations that included housing, offered post-publication), and it is possible that at least some of the children felt obligated, pressured or coerced by their parents to participate in the series in order to help economically benefit their families. Finally, Smith Fullerton identified the potential for the child subjects to experience a sense of abandonment once the journalist who befriended them and then spent many months in their company finished the story and exited their lives (Smith Fullerton, 2004, pp 511-24). Smith Fullerton argues that "... although journalists are expected to address sensitive social problems — child abuse, families living on welfare, or terminal illnesses ... the traditional tools of the trade do not really equip them to evaluate the potential psychological risks ..." to the subjects (Smith Fullerton, 2004, p 514). After marshalling her evidence of risk of harm to child subjects, Smith Fullerton concludes by urging serious consideration of the introduction of some form of informed consent protocols, based on social science research models, into transactions between journalists and subjects to offer greater protections to subjects.

However, the usefulness of Smith Fullerton's work is limited in two ways — first, her focus is exclusively on subjects who are children, rather than on the broader set of non-expert journalism subjects. As shall be demonstrated in the third chapter of my thesis, those journalism subjects potentially vulnerable to harm, and therefore in need of greater consent protections, include a group much larger and more diverse than just children. Second, her justification for the claim that journalists are responsible for their subjects is based on a tenuous argument — that journalists are public intellectuals, and therefore their interactions with subjects should mirror those of other research intellectuals, such as social scientists (Smith Fullerton, 2004, p 513). It is all too easy to challenge the contention that journalists are public intellectuals (for example, although it is increasingly difficult, one can still become a journalist with little formal education). However, as will be argued later, and in greater depth, journalists' responsibility for their subjects can be justified on grounds other than their membership in the club of public intellectuals.

Sandra Borden, in "Empathetic Listening: The Interviewer's Betrayal", asserts that "... fair practice of interviewing obligates journalists to obtain informed consent from their sources in advance of the interview" (Borden, 1993, p 222), and that this should include ensuring subjects understand the implications of participation. Borden, unlike Smith Fullerton, does not limit the set of subjects in need of protection to those who are children, or other specifically identified vulnerable groups. Borden's position is justified by the broad moral principle of the duty of professionals to protect others from unnecessary harm, thereby obviating the need to rely on Fullerton Smith's problematic contention that journalists are public intellectuals. Yet, Borden's conception of harm

here is limited to deception and, more narrowly, to the type of deception that occurs in interviews where the journalist appears empathetic (“flattering attentiveness, reassuring gestures, and encouraging responses ...”) to the subject, yet already knows that the story will portray the subject in a negative light (Borden, 1993, p 219). This focus on informed consent as a protective against just one, very specific form of deception is too limited. As Smith Fullerton demonstrates, and as I will argue in the third chapter of my thesis, the range of potential harms that could be imposed on journalism subjects is far broader than that which has been identified by Borden.

An additional weakness in Borden’s argument is that she permits the duty to protect subjects from harm, and therefore the requirement of informed consent protocols, to be over-ridden “in the service of the ideal community to which the journalist owes ultimate loyalty” (Borden, 1993, p 225). According to Borden, this is morally justifiable when the potential harm to the individual is proportionate to the potential benefit to the community, and when deception is a last resort (Borden, 1993, p 225). This ethical construction of subject versus community, however, seems to alarmingly shrink the terrain where the use of informed consent in journalism consent transactions would be acceptable.

Image Ethics: The Moral Rights of Subjects in Photographs, Film, and Television, edited by Larry Gross, John Stuart Katz and Jay Ruby and published in 1988, offers several essays that each grapple with the issue of informed consent in documentary film-making. Yet the discussion of informed consent for documentary film subjects is focused much more on visual representation of individual subjects than on the information they reveal and/or is revealed about them. The discussion is mostly framed

by U.S. case law on images and consent, and as such does not explore broadly enough the ethical terrain that exists beyond the law in this area, specifically the potential consequences for subjects of disclosing personal information. Publicizing images obviously can have all sorts of negative impacts on subjects; what people actually say, the stories they tell, is at least as potentially harmful, if not more, than their images.

The text does highlight the complications and shortcomings of informed consent protocols between documentary journalist and subject, but the analysis seems to rely heavily on the issue of whether or not permission was granted, and if so, whether it was valid. An exploration of just what is at stake for the subject, that is, what can potentially happen to a subject who is inadequately informed, is poorly explored. Finally, the duty to protect subjects is pitted against that of artistic integrity or artistic autonomy, a conflict that is, somewhat confoundingly, characterized as closely matched. While these essays do identify some of the harm that can result from subject participation in documentaries – invasion of privacy, embarrassment, and creating a false or misleading impression of subjects – this work does not fully map with the context of journalism practice.

Two other works – David Kennamer, 2005, and Renita Coleman and Thomas May, 2004 – address the issue of informed consent and journalism subjects, but as secondary foci in texts that primarily offer a comparison between journalism and social science research professionals. Both articles assert that journalism should instantiate more rigorous harm protections for subjects, and in doing so can learn from the guidelines and regulations surrounding human subject research, but both ultimately reject the idea that IC protocols should be instantiated into consent transactions with journalists (Kennamer, 2005; Coleman and May, 2004). Neither, unfortunately, offers much in the

way of explanation or exploration of their opposition to informed consent, nor do they attempt to work through what alternative forms of increased protection might look like. Kennamer merely states that journalists likely should not have the same formally mandated processes for their interactions with subjects as do social science researchers (Kennamer, 2005, p 87). Coleman and May contend that “[t]he point is not to impose a social science system of informed consent on journalists, but to start a discussion about journalists’ obligations and relationships, and to remind us that we have walked away from these discussions rather than take them up” (Coleman and May, 2004, p 284).

In other texts, the relationship between journalistic duty and subject harm does include discussion of subject consent, yet these texts characterize both consent and harm much more narrowly than the standards for informed consent, or discussion of potential consequences. For example, Stephen Klaidman and Thomas Beauchamp argue that the duty not to harm, or to minimize harm, is, in essence, a duty of care between journalist and subject, similar to the legal standard in negligence law. However, according to Klaidman and Beauchamp, meeting this obligation to limit or avoid harm during consent transactions merely requires that journalists inform potential sources or subjects that they are speaking to a reporter, and that what they say may be publicized (Klaidman and Beauchamp, 1987, p 99). Harms that may result from the publication of this information are absent from their formulation of ethical consent transactions. It is somewhat perplexing to this author that Thomas Beauchamp, one of the Godfathers of the discipline of bioethics, and one of the intellectual leaders in the development of informed consent in health care, does not claim that the journalistic duty to avoid or minimize harm to subjects requires a more comprehensive consent transaction than currently exists. In fact,

this text altogether fails to address the issue of informed consent in the context of journalism practice. Kennamer, who does raise, and quickly dismiss, the possibility of informed consent in journalism practice, similarly argues that to avoid harm during consent transactions, reporters need only to identify themselves to their sources, with the clear implication being that anything said could be used in a news story. According to Kennamer, this is sufficient disclosure to "... allow[] sources and subjects to make a considered judgment" about their participation in a media story (Kennamer, 2005, p 81). Kennamer also argues that the need to disclose this minimal amount of information can, in limited circumstances, be over-ridden. Philip Seib and Kathy Fitzpatrick suggest that if an interviewee is inexperienced, nervous or upset, "... it may be helpful to give reminders, 'do you really want me to use that?' But if they comprehend that this may be published, anything they say is fair game" (Seib and Fitzpatrick, 1999, p 153). Jeffrey Olen is able to identify that, in terms of ethical conduct, radio poses a particularly thorny problem for journalists and the issue of consent. Because of the compactness and unobtrusiveness of the recording technology, the subjects can readily forget that the tape recorder is running and say things they may not want broadcast. However, Olen does not see this as a justification for strengthening consent processes, or for withholding segments that a subject later requests not be aired (Olen, 1988, pp 80-81). Clearly conceptions of harm and consent are being narrowly defined in most of the literature, if the duty to avoid or minimize harm in consent transactions can be met under the meagre conditions described above.

The literature articulates additional journalistic duties to subjects, beyond issues of consent, that are linked, both implicitly and explicitly, to obligations to avoid or reduce

risk of harm to subjects. Some of the texts argue that the moral duty to protect subjects arises from the fact that journalists are professionals and therefore have certain moral obligations, including the avoidance or minimization of harm (Coleman and May, 2004; Borden, 1993; Klaidman and Beauchamp, 1986). Others argue that the duty to protect subjects from harm arises not from professional obligations – it should be noted that the claim that journalists are professionals is one that is contested in the literature – but from the journalists’ duty as citizens or members of a community (Black, et al., 1995; Christians, 1995; Cohen and Elliott, 1997; Hodges, 1986; Olen, 1988; Saunders, 2003). Louis Hodges, for example, argues that “[t]here is a general societal consensus that we owe it to others not to harm them. ... The greater our power to affect others becomes, the heavier becomes the moral duty” (Hodges, 1986, p 16).

In terms of specific duties aimed at avoiding or minimizing harm, the least contested of these in the literature is accuracy, or truth-telling. This duty is frequently cast as one owed to the public, yet libel law (Watson, 2002, pp 3-19), ethics literature (Borden, 1993; Kennamer, 1995; Klaidman and Beauchamp, 1986; Sanders, 2003) and the literature on diversity (Alia, 2004, for example) see the duty to accurately record the information provided by journalism subjects, and the broader context necessary to understand that information, as being additionally owed to the subject. Avoidance of deception – related to accuracy, but somewhat different in that deception of subjects in the literature tends to focus on interactions between journalist and subject, rather than on the information publicized – is also broadly discussed in the ethics literature (Alia, 2004; Black, 1993; Bok, 1978; Bok, 1982; Christians, 1995; Cohen and Elliott, 1997; Coleman and Wilkins, 2005; Keeble, 2001; Kennamer, 2005; Keiran, 1997; Keiran, 1998;

Klaidman and Beauchamp, 1987; Knowlton and Parsons, 1994; Malcolm, 1990; Russell, 2006; Saunders, 2003; Smith, 1999). Further duties to subjects identified in the literature include respect for privacy (Alia, 2004; Black, 1993; Bok, 1982; Christians, 1995; Cohen-Almagor, 2002; Cohen and Elliott, 1997; Coleman and May, 2004; Cummins Gauthier, 2002; Keeble, 2001; Kennamer, 2005; Keiran, 1997; Keiran, 1998; Klaidman and Beauchamp, 1987; Knowlton and Parsons, 1994; Russell, 2006; Saunders, 2003; Smith, 1999; Steeves, 2005). On a more abstract level, John Merrill argues that the journalistic duty of fairness requires consideration of the consequences to others, including sources and subjects, but fails to elaborate beyond this (Merrill, 1998, p 184). Despite the sensitivity to potential harm for journalism subjects expressed in this branch of the ethics literature, it remains surprisingly blind to the dynamic between consent and consequences.

A subset of the literature on responsibility ignores the issue of duty to subjects altogether. It is not that these texts deny the existence of journalistic duty, it is that they conceive of it being owed elsewhere. Social responsibility theory as articulated by John Nerone, et al., for example, argues that social responsibility in journalism "... means the triumph of the community over the lone individual" (Nerone, et al., 1995, p 78). The "individual" identified in this theoretical frame is the powerful media owner, not the media subject. Yet this conception of journalistic responsibility ignores completely the issue of responsibility to the subjects of these stories. And Seib and Fitzpatrick outline a set of journalistic duties that begin with society and end with self, but do not include any owed to subjects or sources (Seib and Fitzpatrick, 1999, pp 16-17).

Finally, it is important to note that although the journalism ethics literature does generally view duty to subjects as important, with the exceptions of Smith Fullerton (2003) and Christopher Meyers (2003) it is considered secondary to the larger journalistic duty to act in the public interest by informing the public, if the information is considered significant. Contrastingly, this thesis will construct the idea of duty to subjects as being congruent with, rather than in competition against, a duty to the public.

In addressing my research questions, my thesis will build on what has already been established in the literature — that subjects can be vulnerable to harm through their participation in journalism stories, and that this creates a correlative duty on the part of journalism professionals to avoid or minimize that harm. It will argue, as do Smith Fullerton and Borden, that this duty justifies including in journalism consent protocols a discussion of potential consequences. Yet, unlike these two, it will argue that this requirement should apply in most situations (potential exceptions will be discussed in the last chapter) and will offer a re-conception of harm for journalism subjects in justifying this position. This thesis will also reconstruct the subject in journalism. It rejects the instrumental interpretation often found in the utilitarian literature, that is, the subject as a means of getting at the story or, more broadly, getting at the truth. It also rejects the overly paternalistic and autonomy-denying view found in some of the harm literature where a journalist's duty includes determining for the subjects what might be harmful to them. Instead, borrowing heavily from informed consent protocols in human subject research, I will argue that the subject in journalism should be conceived of as an autonomous agent capable of determining her own course of right action, yet in order to make this determination, she needs to be adequately informed about potential

consequences. Therefore, my focus on journalistic duty in relation to subjects and consent ultimately views the greatest harm a journalist can impose on a subject as that of non-disclosure. It is not the job of the journalist to weigh the risks and the benefits of subject participation. This should be the job, and the right, of the subject. The historical role of the journalist is not to protect, but to inform, and this role ought to be broadened to include informing subjects about potential consequences.

In sum, my thesis will comprehensively explore the evolution of informed consent in health care and research, to better understand its strengths and weaknesses. It will conclude by taking the first steps toward working out what stronger consent requirements might look like in the context of journalism practice, something the literature consistently backs away from.

IV. THEORY

As Sissela Bok argues, the first step in dealing with an ethical dilemma is simply recognizing that it exists (Bok, 1978, p 24). After years of working as a journalist for a large, public broadcaster, I went back to school as a graduate student and was exposed to moral and applied philosophy. This exposure led to a re-conception of consent transactions between journalists and subjects as ethically problematized, and unnecessarily imposing harm. This thesis, like all works of applied philosophy, will first mobilize theory to construct its arguments, then turn to the greater challenge: thinking through, albeit here in a preliminary fashion, how the theory might be applied to specific situations. In building my theoretical framework, I will reject strict adherence to one philosophical school or genre, and instead range among competing philosophical ideas. A similarly heterogeneous approach proved essential to the intellectual development of

the concept of informed consent in health care practice and research. It is my contention that the development of stronger consent protocols in journalism will require the same degree of intellectual openness.

Again, the central theoretical claim of my thesis is as follows: more protective consent transactions should be developed for journalism practice. This position is justified on the basis that subjects' engagement with journalists for media stories potentially puts them at risk of harm, and oftentimes they are oblivious to this situation. This, therefore, imposes a correlative duty on journalists to disclose any significant risks of harm of which they may be aware.

There are three theoretical terms that are essential to the construction of this argument: harm, duty and consent. A substantial number of works in moral philosophy grapple with the concept of harm yet the term remains somewhat ambiguous. J.S. Mill is arguably the most influential theorist on the topic of harm. In *On Liberty*, he outlined what was later named the harm principle. He described behaviour toward others that he believed was unjustifiably harmful, and therefore ought to be prevented by the state. Yet, he neglected to define harm beyond declaring it an evil (Mill, 1859). To remedy the situation, Joel Feinberg, one of the most cited contemporary philosophers on the topic of harm, brought more precision and clarity to the term. Noting it is a concept that is often "both vague and ambiguous" (Feinberg, 1984, p 31), Feinberg simply characterized harm as the invading, "thwarting, setting back, or defeating of an interest" (Feinberg, 1984, p 34). One of the major tests for harm, in Feinberg's construction, is to determine whether the person is in worse condition than if the interest had not been invaded at all (Feinberg, 1984, p 34). The simplicity of Feinberg's work on harm, and the work of the neo-

Feinbergians such as Nils Holtug (Holtug, 2002), is of instrumental value in understanding potential harms for journalism subjects.

Harm, as Feinberg made clear, is about consequences; it is about the impact of an action, or inaction. On a broader theoretical level then, it is useful, when dealing with the concept of harm, to broaden the discussion to that of consequences. In teleological philosophy (or the philosophy of consequences), the moral rightness of an action is measured by its impact on others and on the community, rather than on the intention of the actor (Boetzkes and Waluchow, 2000). Many journalists, and journalism theorists, are attracted to utilitarianism, probably the most widely known teleological philosophy. It was developed primarily by Jeremy Bentham and J.S. Mill and asserts that actions should be governed on the principle of offering the greatest benefit to the greatest number of people (Retief, 2002, p 7). However, journalism's love affair with utilitarianism (or serving the public interest, in journalistic phraseology), is partly responsible, I would argue, for its failure to adequately protect individual subjects. This thesis argues that a focus on consequences should not be exclusively majoritarian, that attention must also be paid to potentially vulnerable individuals and groups. More specifically, it is concerned with what happens to journalism subjects, and related third parties, once information about them is publicized. To paraphrase Feinberg, are they in better or worse condition? And if the outcome is the latter, and not the former, what then are journalists obligated to do, if anything, to change this?

This leads to the second key theoretical term mobilized in my thesis: duty. Deontology, or the philosophy of duty, evolved out of the 18th century, primarily with the work of German philosopher, Immanuel Kant. In *The Doctrine Of Virtue*, Kant wrote

that “a *duty* is an action to which we are obligated.” (Kant, 1964, p. 21) In contemporary civil law, duty is created by “contract or operation of the law” (Garner, 1996, p 212). Kant, however, did not construct duty as a State imposed obligation; he considered duties mandatory, not discretionary, but he described them as actions freely chosen by moral human beings (Kant, 1964, p.20). Further, according to Kant, while the action may be un-coerced, the intention behind that action is what counts; it is only justifiable if its aim is moral rightness. Moral rightness, in turn, can be achieved only through the application of reason (Kant, 1964). So confident was Kant in the connection between reason and right action that he felt it impossible for reason to lead us astray in our moral decision-making (Williams, 1968). As Kant claimed, “... a conflict of duties and obligations is inconceivable” (Kant, 1964, p 23). Kant proposed the following universal law, or rational test, for judging right action: extrapolate out beyond the individual, and determine what would happen if everyone in the same situation acted as you did. If the outcome in this universalized context is negative, refrain from the action; if the outcome is positive, then this action is correct (Acton, 1970; Williams, 1968).

Kant’s philosophy, particularly his notions of duty and autonomy, were instrumental in the creation of informed consent in law, ethics and professional practice (Faden and Beauchamp, 1986). It is then important to explore his ideas but it is also important to understand the limitations of Kant’s work. Although Kant viewed it as impossible for reason to lead us astray in moral decision-making, history has taught us that in fact reason can lead to ends that are clearly wrong and harmful. Determining right action, as feminist theorists have argued (Gilligan, 1982; Little, 1996) and neuroscience research is beginning to reinforce (Damasio, 1994), requires more than the application of

reason; consideration of emotions and relationships is necessary in moral decision-making. Again counter to Kant, it is not always appropriate for individuals to be free to determine their duty. In the context of journalism practice, there is little time for contemplation of one's responsibilities. Further, the identification of one's duties is often more influenced by expediency and by the need to meet expectations of editors and employers, than it is the result of contemplating moral obligations. As shall be explored in the final chapter of my thesis, the imposition of duty, and the responsibility to see that it is carried out, must be protected by more than the discretion of the individual journalist. For a broader view of duty, I shall rely on the works of Clifford Christians (2007), Nel Noddings (2002), and W.D. Ross (1988) and others.

However, Kant must be defended against one common criticism: he and other deontologists are often accused by teleologists of being so devoted to the intention of actor that they consider the results of her actions irrelevant (Retief, 2002, p 76; Boetzkes and Waluchow, 2000, p 142). Yet Kant's universal law, described above, used as the test for right action, focuses squarely on consequences, that is, on what would happen if everyone did it (Auxter, 1982, p 3). A focus on journalistic duty does not sacrifice consideration of consequences. Quite the contrary, it is a sensitivity to potential consequences for subjects, and ultimately for the public interest, that led me back to the issue of journalistic duty. They are, it should be argued, irrevocably connected — neither duty nor consequences can claim moral force without being articulated in relation to the other.

The third term central to my thesis is informed consent. The concept was briefly introduced at the beginning of this chapter, and will be more fully explored in next

chapter, but it is important to connect the concept to my theoretical framework. There are two key theoretical ideas implied in the concept of “informed consent” — first the duty of the professional to inform the subject about the proposed intervention, with a particular focus on potential consequences, and second, the right of the subject to be informed *prior* to granting or refusing consent. It is then a concept that integrates deontological and teleological strains of philosophy, and further aims to use these ideas in the service of potentially vulnerable subjects, rather than exclusively focusing on the broader notion of the interests of the community or public. As will be demonstrated in the next chapter, informed consent theorists like Susan Sherwin (2000) and Michael Burgess (2000) are seeking ways to integrate the interests of the individual in informed consent transactions with those of larger groups and communities. Given the deep obligation that the journalism profession feels toward the public at large (at least theoretically), the introduction of stronger consent protocols into professional norms should similarly seek to integrate, rather than prioritize, the needs of one over the other.

The work of Nel Noddings (2002), an ethics of care theorist, and W.D. Ross, an early twentieth-century British deontologist who, unlike Kant, accepted moral uncertainty and saw duties as relative, rather than absolute (Ross, 1988), will help forge a theoretical framework for more protective consent protocols in journalism. Ross is particularly useful for any attempt to conceptualize a journalistic duty to inform subjects as it will likely require the type of flexibility, and case by case considerations (versus Kant’s inflexible universal law), advocated by Ross. Additionally, and perhaps most importantly, I am turning to the work of Clifford Christians, whose theory of a dialogic social ethics of duty pulls together feminist and deontological theory for the context of

journalism practice, and therefore combines a sense of obligation to others that is consistent with caring about both subjects and the public interest (Christians, 2007, pp 113-131). Finally, although there are many, and some quite profound, differences between journalism and health care practice and research, in the second chapter of my thesis I will identify the important similarities between the professions, similarities that underscore the need to strengthen consent protocols in the context of journalism practice. On a practical level, the literature on professions and professional codes will be helpful; Klaidman and Beauchamp (1987), Hodges (1986), and Michael Bayles (1981 and 1989) all provide important theoretical frameworks that bolster the claim of a journalistic duty to discuss potential consequences with subjects.

V. METHODOLOGY

The claims my thesis is making are theoretical, social, ethical and professional. The evidence I will mobilize in defending my positions are varied and diverse. First, the exploration of informed consent in health practice and health and social sciences research will include theoretical texts focusing on history, philosophy and law. It will also incorporate analysis of professional codes of ethics, government policy, legal cases, and specific institutional informed consent protocols. I will then compare this to the current standards of consent transactions in journalism through analysis of professional practice and ethical codes, and institutional policy.

The discussion of harm that follows will rely on theoretical work in this area (and the broader areas of duty and consequences), and “real life” examples from CBC radio that demonstrate potential risk of harm for subjects. Included in these examples are a documentary by a daughter about her father with Alzheimer’s; a series of interviews on a

current affairs program with a mother whose teenage son is mentally ill; a “tape talk” (an interview with a journalist who underscores his points by playing audio tape from “the field” for the host) about genetic testing in Newfoundland; and a documentary profiling two profoundly physically disabled young girls. Each example offers distinctive insights into the nature of risk for journalism subjects, and those related to them. I intentionally chose work from CBC radio as I have over a decade of experience working for this media outlet, and am well informed about decision-making processes (or lack thereof) on what materials to broadcast in, and what materials to protect from, the public domain. Further, CBC has the most protective consent protocols of any major media organization in Canada. Therefore, if there are risks of harm to subjects that result from these professional practices, we can then reasonably conclude that with other media organizations the risk is likely as great if not greater.

Additionally, practical discussion around how to incorporate stronger consent protocols into journalism practice will require examination of theoretical and practical materials concerning professional standards and practice in journalism.

VI. OVERVIEW OF THE NEXT CHAPTERS

Chapter 2 will begin with a justification for comparing consent protocols in health practice and health and social sciences, to those in journalism. It will then explore the historical evolution of consent practices in these areas through case law, philosophy, policy and institutional protocols. Some fundamental weaknesses of IC in both theory and practice will be identified and analyzed, as will some theoretical developments that are challenging IC practices. By understanding both the strengths and weaknesses of IC in these contexts, journalism will be better equipped to explore the issues around

incorporating stronger consent protocols in its profession. Chapter 2 will close with an examination of consent protocols as currently constituted in journalism practice, codes, policy and law.

An exploration of the nature of harm and risk of harm in journalism practice will comprise the bulk of Chapter 3 and do so by exploring Feinbergian and neo-Feinbergian characterizations of harm, by offering re-conceptions of deception and violations of autonomy and privacy in journalistic practice, and finally by analyzing the potential risks of harm to subjects participating in the four CBC radio examples. But establishing that there exists risk of harm of which journalism subjects may be unaware only partially justifies a claim for strengthened consent protocols in journalism. In the next section of this chapter, I make the case that journalists have a moral duty to prevent unnecessary harm to their subjects and that this duty includes disclosure of potential consequences prior to participation. Finally, I then defend against any claims that concern for protecting subjects undermines the *prima facie* duty to serve the public interest.

In my final chapter (4), I offer a theoretical frame — a dialogic social ethics duty — for shaping stronger consent protocols in journalism practice. I then explore some of the practical considerations for more rigorous consent protocols in journalism, including what type of information should a journalist be compelled to disclose, whether stronger protections can be achieved without limiting the public's access to important information and finally, what sorts of mechanisms should be used for introducing and monitoring compliance with stronger consent protocols.

Consent and Consequences: Journalists' Duty to Inform Subjects of Potential Harms

Chapter 2:

A Historical and Critical Overview of the Evolution of Subject Consent in Law, Health,
Social Sciences and Journalism

I. INTRODUCTION

The central question of my thesis is this: Should journalists be obligated to inform prospective subjects of any significant, potential consequences they are aware may result from participating in a journalism story? In unpacking this question it is necessary to first scrutinize how the issue of potential consequences for subjects is dealt with in other comparable professions: specifically health care practice and ethnographic research. As will be demonstrated in section II of this chapter, there are several similarities between ethnographic research and journalism: both professions depend on interviewing strangers, and both professions then require that those interviews be edited and transformed into narratives, with excerpts or quotes from the interviews used to support or debunk key assertions. Health care practice and research may seem, at first glance, to have little in common with journalism, but as a former journalist who has taught in a medical school and conducted medical research, I can attest that there are genuine similarities between health professions and journalism. For example, researchers/ health providers, particularly those in a public system, confront competing claims between individual subjects (or patients) and the community, as do journalists. Health care professionals, like journalists, depend on a combination of rapidly changing technology and first-person sources for information. Professional practice in both fields is fast-paced: Diagnoses or story foci in journalism and treatment plans are developed quickly, even though available information is frequently incomplete, often unreliable and subject to change. Yet despite these limitations there is the expectation in both fields that professionals will get it right, will be accurate in their assessments. Error can result in

harm to subjects in both fields, and even when error is absent, harm can still occur. And finally, error can also, in both professions, result in getting sued.

It is then useful to understand why health and social science professions evolved their consent practices into what is now known as informed consent. The chapter will begin with the introduction of informed consent into the ethnographic disciplines as the professional debates triggered by this change offer some interesting comparisons to journalism. The exploration will then move back in time and follow the evolution of informed consent in law, health and social sciences. The chapter will close with a contrasting analysis of how consent requirements are dealt with in journalism practice. The chapter will identify many weaknesses, some of them deeply discomfiting, in the theory and practice of informed consent in health and social sciences. Informed consent in these fields, however, is based on recognition that, at the risk of sounding redundant, consequences do matter and, because of this, effort must be made to inform prospective patients/subjects about their existence. Journalism will need to find its own way of dealing with the issue of consequences for subjects, as the adoption of an orthodox protocol of informed consent is neither practical nor advisable. Journalism will need to map its theoretical and practical terrain, but before it can do that it must learn from the terrain of others.

II. THE ETHNOGRAPHIC DISCIPLINES

In the mid-nineties a debate was roiling in the applied sociology and anthropology professions over the introduction of informed consent protocols into field research practices. First developed in the context of medical negligence litigation, informed consent is an annotated permission slip, and is used for subject/patient recruitment.

During an informed consent process, the practitioner/researcher offers the subject/patient a verbal or written explanation of a proposed research project or medical intervention. This explanation includes a disclosure of all *significant* potential consequences, both positive and negative, and the probability of occurrence for each. The practitioner/researcher then verifies that the subject/patient understands the information disclosed. Finally, the patient/subject is given the opportunity to accept or reject the proposition, presumably free from pressure or coercion.

Anthropologists and sociologists, however, were particularly resistant to the importation of informed consent into ethnographic research. Critiques in the literature often read like thinly veiled ad hominem attacks against IC proponents. Still, there emerged four coherent justifications for the rejection of IC protocols. First, professionals from ethnographic disciplines argued that they did not interfere with the minds and/or bodies of humans, as was sometimes the case with psychological and medical research (where informed consent protocols already existed); they were impartial observers and reporters on the lives of others, and therefore their research imposed negligible risk on their subjects (Bosk, 2000, pp 199-220). Second, it was claimed that the bureaucratic tone of informed consent protocols did not easily integrate with the trust-based relationships typically developed between subject and observer. Third, researchers are human beings, incapable of divining the future. Thus, “[f]ull disclosure [of potential consequences] is neither definable nor achievable” (O’Neill, 2002, p 44). Fourth, informed consent protocols would create an impediment to recruiting subjects and obtaining information from them (Fluehr-Lobban, 1994, p 6).

Charles Bosk, a prominent American ethnographer, was one of the IC opponents, that is, until the day “Dr. Bill Smith” (a pseudonym) walked into his office. Bill had just read the final draft of Bosk’s ethnographic study on him and his surgical colleagues, about to be published by a large, academic publishing house. Bill was ashen and crying uncontrollably; he had not slept the previous night, so devastated was he by how Bosk had portrayed him. Bill had willingly agreed to be a participant in Bosk’s study. And Bosk had taken care to ensure that he was accurate in his reporting. However, ethnographic studies are highly edited and interpretative exercises. What ends up being published is often not what the subject expects or anticipates.

Bosk’s experience with Bill Smith prompted him to write a self-excoriating analysis of his professional conduct, which included the following insights:

Ethnographers trade quite freely on an almost universal misunderstanding between our research subject and ourselves. For most subjects the opportunity to be studied is flattering: It feeds or confirms a sense of specialness; it is a vehicle for being lifted out of the ordinary. ... Because our subjects are flattered by our attention, we are allowed to obtain data that it is not necessarily in our subjects’ best interest to reveal. Few of us have ever ... inform[ed] our subjects of this fact. ...

We ethnographers betray our subjects twice: first, when we manipulate our relationship with subjects to generate data and then again when we retire to our desks to transform experience to text. This second betrayal is the one my subjects have felt most keenly. ... Yet we certainly do not warn our subjects of this. ... I lost my certitude in the harmlessness of my methods the day [Bill walked into my office]. (Bosk, 2000, pp 206-214).

Informed consent protocols were developed, in large part, as a means of protecting subjects against unanticipated and/or unreasonable harms. By exposing the significant risk of harm inherent in ethnographies – and the fact that subjects are

frequently unaware of the existence of these risks – Bosk and his supporters rendered irrelevant the arguments offered by colleagues against the introduction of IC protocols. By the late nineties, the Bosk side had prevailed – IC protocols had become mandatory for virtually all human subject research conducted in North America, including that of social scientists.

Bosk’s characterization of his work, and its ethical shortcomings, should be recognizable to many journalists, particularly those who specialize in the coverage of health and social issues. Substitute the word journalist for ethnographer and Bosk’s narrative offers a fairly accurate reflection of far too many encounters between subjects and journalism professionals. Unfortunately, the journalism profession (reminiscent of the ethnographic professions of the 1990s) does not, for the most part, perceive its subjects to be at risk of significant harm. Any concerted effort to strengthen consent protocols in journalism practice would likely be met with an impassioned resistance, and a set of arguments, similar to that expressed a decade ago by the ethnographers.

Providing greater historical insight into the evolution of informed consent in law, medicine and psychology will, I believe, strengthen my claim of the need to introduce some sort of changes into journalism practice and offer more weight to my argument that the combination of subject risk of harm and journalistic duty requires that we do more when it comes to consent transactions.

III. LEGAL HISTORY OF INFORMED CONSENT IN MEDICAL PRACTICE

The concept of informed consent was created through medical negligence case law. As a result, it is now a legal requirement in this country for health care practitioners and biomedical researchers to obtain “informed” consent from subjects/patients prior to

any intervention. This legal requirement, however, does not extend to social science and behavioural research. In these domains, informed consent has been instantiated through professional codes and government policy. Still, the legal ancestry of the concept is important, regardless of discipline, as all IC protocols reflect the influence of the courts. The legal history of IC covers a three hundred year time span; however, it is a story best told through three pivotal cases: one British, one American, and one Canadian.

In England in 1767, a Mr. Slater was recovering from a leg fracture when his doctors, Baker and Stapleton, prompted by scientific curiosity rather than medical necessity, decided to amputate his leg. They neglected to inform Mr. Slater of their intentions before the surgery. Mr. Slater, displeased to find himself less a leg, sued the doctors. The magistrates in the case ruled that patient consent should be a pre-condition for medical interventions, thereby setting the first legal standard for medical consent in the British Commonwealth and subsequently the U.S. (Brazell, 1997, p 391).

More than a century later, in 1914, a New York Supreme Court Judge, Benjamin Cardozo, affirmed the importance of patient consent in *Schloendorff v. Society of New York Hospital*. In that case, the facts showed that Mary Schloendorff entered a charity hospital with a stomach complaint requesting only an examination. Ms Schloendorff agreed to an “ether exam” (which rendered her unconscious) and during this procedure, her doctors discovered and removed a tumour. The surgical site then became infected and gangrene set in, ultimately leading to the amputation of limbs. Ms. Schloendorff sued the hospital for negligence on the basis that the surgery was performed without her consent. Her actions astonished the board of the charity hospital, and members spoke

publicly of her ingratitude. Still, Judge Cardozo held in favour of the plaintiff (Szczygiel).

The significance of Judge Cardozo's finding for Mary Schloendorff is that he grounded his decision in the principle of autonomy. As Judge Cardozo wrote, "... every human being of sound mind has a right to determine what shall be done with his own body [regardless of class or social status]" (Szczygiel). Today, autonomy still serves as the *prima facie* justification for informed consent in law, policy and applied ethics. Yet Cardozo's conception of patient consent, despite its inclusion of autonomous rights, fell far short of the legal requirements later developed for informed consent. Cardozo focused strictly on the issue of whether or not consent had occurred, and neglected to explore the broader issue of the quality of information offered by health care professionals in order to gain that consent (Mazur, 2003).

In Canada, this shortcoming was addressed in the 1980 Supreme Court decision, *Reibl v. Hughes*. Mr. Reibl, a 44-year-old Ford auto worker a year away from qualifying for a lifetime pension, was suffering from severe migraines. His physician, Dr. Hughes, identified the cause as a blocked carotid artery on the left side of his neck. Dr. Hughes strongly recommended surgery, stressing that without it, Mr. Reibl was at risk of stroke. The surgery successfully unblocked the artery, but it caused a stroke that left Mr. Reibl paralyzed and unable to work, thereby forcing him to forfeit his pension (Supreme Court of Canada, 1980).

Prior to the surgery, Dr. Hughes had failed to inform Mr. Reibl of the significant risk of stroke posed by the procedure, and of the fact that the surgery was unlikely to relieve the headaches. Most disturbing to Mr. Reibl was that the doctor had neglected to

mention that the risk of stroke without surgery became significant only in the distant future, that in the time Mr. Reibl had until he qualified for his pension, the risk of stroke was, in fact, minimal (Mazur, 2003, p 79).

Mr. Reibl sued Dr. Hughes for negligence, arguing that had he known in advance of the potential consequences of the surgery, he would have waited until after he had qualified for his pension before proceeding. In Canada, up until this time, the scope and quality of information disclosed by the health care provider during the consent process was determined by the standards of the medical profession. That is, the information offered by a physician to her patient was required to be no more than that typically disclosed by her peers. At this time, professional medical standards were still quite paternalistic and did not place much value on the disclosure of risk information. The S.C.C. Reibl decision, written by Justice Bora Laskin, changed this (Mazur, 2003, p 41).

First, it was determined that patients generally *do* want to know about risks of significant harm, before they consent to a procedure. Further, the court concluded, disclosure to patients during the consent process must include enough information to help them identify and weigh the risk of direct harms, such as stroke. But, the court decided, consideration of direct harms was not sufficient for a patient to make an informed decision. Knowledge of potential indirect harms — generally the socio-economic impacts that follow from direct harms — such as loss of pension is necessary for effective patient decision-making. Disclosure of both potential direct and indirect harms to an autonomous patient was deemed by the court to meet the standards for what it called “informed consent” (McLean, 1989, p. 95).

Finally, according to the Canadian Supreme Court, determining the amount and quality of information necessary to disclose to patients during consent processes should no longer be left to the health care provider, as it had previously with the professional standard. The S.C.C. instead established an “objective”, reasonable patient standard. Under this standard, what information the health provider is legally obligated to disclose to her patients is determined by what a reasonable patient would want to know, rather than what a physician thinks is relevant or prudent. What the reasonable patient would want to know, in turn, is set by the courts (Supreme Court of Canada, 1980).

Legal scholars have noted that the reasonable patient test, in many ways, weakens the patient’s right to self-determination, so eloquently advocated for in the Cardozo decision (McLean, 1989, p 90). Human beings often allow other factors, such as emotion (fear, jealousy, etc) and possible impact on primary relationships, to trump reason in their decision-making. These factors can be particularly dominant when we have catastrophic health and/or life and death decisions to make. Therefore, what the real patient would want disclosed may be quite different from what the theoretical, “reasonable patient” would choose. Further, because it is left to the courts, through case law, to determine what information ought to be disclosed, the patient is once again cut out of the action. Instead, the power has shifted from the physician to the judge, bypassing the patient, by substituting what is, in effect, one professional test for another (McLean, 1989, pp 90-96).

IV. CONSENT POLICIES AND CODES IN HEALTH CARE PRACTICE, AND HEALTH, BEHAVIOURAL AND SOCIAL SCIENCE RESEARCH

Once *Reibl v Hughes* set legal precedent in Canada, and influenced the courts in many other western countries, including the U.S., health care practices and policies rapidly shifted to reflect this new construction of patient consent. However revolutionary the *Reibl v Hughes* decision in 1980 was in terms of the law, the changes required to comply with it were in fact more incremental than radical. In the decades preceding the decision, other factors beyond the courts had been influencing the way patient consent was conceived of and practiced in the context of health care. First, in the 1960's and 70's, the U.S. spawned a highly effective patient rights' movement which, among other things, advocated for a greater role for patients in decision making around their care (Sharpe, 1997, p 198). And second, since World War Two, there had been a slow but dramatic evolution in the professional codes of medicine and psychology that helped nudge practice standards toward informed consent. The three most historically significant of these codes are: the Nuremberg Code, the World Medical Association *Helsinki Declaration* and the American Psychology Association's professional code.

In 1948, at one of the Nuremberg trials (*United States v Karl Brandt*), twenty Nazi physicians and three Nazi administrators were found responsible for atrocities committed on prisoners of war under the guise of biomedical experimentation. The Nuremberg Code was drafted as part of the judgment against the defendants. According to Ruth Faden and Tom Beauchamp, “[t]he Code was the first major curb on [medical] research in any country” (Faden and Beauchamp, 1986, p 153). The Code outlines ten simple principles for the conduct of medical experiments on human subjects, and begins with the

declaration that “[t]he voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent and should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit ...” Principle four states that: “[t]he experiment should be conducted as to avoid all unnecessary physical and mental suffering and injury”. And principle six asserts that: “[t]he degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment” (Nuremberg Code, 1948).

Several elements essential to informed consent protocols are expressed in this code: the autonomous rights of subjects, the potential risk of harm inherent in research on human subjects, and the stipulation that the risks of research not outweigh the perceived benefits. Still, the Nuremberg conception of consent falls short of the rigorous requirements of “informed consent”. The code fails to articulate either a duty on the part of researchers to disclose potential risks to subjects, or a duty to ensure this information has been adequately understood. However, the World Medical Association Declaration of Helsinki of 1964, and amended several times, did slowly introduce through its amendments a more *informed* conceptualization of consent for medical research (World Medical Association Declaration of Helsinki, 1964, 1975, 1983).

Psychology, in the early 1970’s, was the first non-medical discipline to adopt informed consent procedures, and did so in response to some regrettable human subject research. It was Stanley Milgram’s infamous fake torture experiments conducted at Yale University in the early sixties, and later written up in *Obedience to Authority*, that proved to be the proverbial straw that broke the camel’s back. These experiments took place

“[i]n an ingenious fake laboratory. ... A volunteer who had answered an advertisement in a New Haven newspaper was to give an increasingly painful electric shock to a person, presumably another volunteer, in response to every wrong answer to a test question” (Malcolm, 1990, p 4). In reality, no one received electric shocks; the volunteers taking the tests were, in fact, actors pretending to get electrocuted. However, the volunteers dispensing the shocks *believed* that the experiment was real. And the majority of them agreed to the requests to dispense torture (Malcolm, 1990, p 5).

Post-Milgram, and after much fractious debate, the American Psychological Association included the requirement of informed consent in its 1972 professional code. According to the code, “ethical practice requires the investigator to inform the participant of all features of the research that reasonably might be expected to influence willingness to participate....If the risk of consequences exists, the investigator is required to inform the participant of that fact.” (Faden and Beauchamp, 1986, quoting from the code, pp 184-5). The only element not found in the 1972 APA Code that exists in current informed consent guidelines is the duty to ensure subject comprehension. The APA proved decades ahead of other academic disciplines in terms of introducing informed consent protocols into research practice.

As stated in the opening to this chapter, ethnographers from sociology and anthropology were among the most resistant to the acceptance of informed consent protocols. In Canada, opposition became futile when, in 1998, the federal government introduced the Tri-Council Policy Statement on human subject research (from the Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and the Social Sciences and Humanities Research Council of

Canada). One of the central policies in the statement is the requirement of informed consent for almost all human subject research. In accordance with the Tri-Council statement, academic institutions and recognized funding bodies, for the most part, no longer approve human subject research unless the proposals include evidence of a commitment to comply with the Tri-Council informed consent guidelines. It is, however, left to institutional Research Ethics Boards (REBs) to evaluate the consent protocols before research is approved. Over the last couple of decades there has been a fair bit of research analyzing and assessing informed consent interactions between subject/patient and researcher/practitioner. One area where the instantiation of consent protocols did exceed expectations was in the recruitment and retention levels of subjects for research. Despite concerns expressed in this area, several studies indicate that informed consent protocols do not create disincentives for participation, even in ethnographic research (Sugarman et al., 1999, p s1-s42 and Fluehr-Lobban, 1994, p 4). It is important to note that if the somewhat rigid and formalized consent protocols required in ethnographic research did not deter subject participation, it is quite possible that strengthened consent requirements in journalism, particularly if they avoid inflexible and bureaucratic processes, would see a similar positive outcome. Later some serious concerns about informed consent in practice, concerns that should influence the development of new consent standards for journalism, will be discussed. However, it is important to first understand the theoretical underpinnings of informed consent practice.

V. INFORMED CONSENT IN ETHICAL THEORY

Informed consent is one area where the law, policy and practice begat theory rather than the other way round. The issue of patient/subject consent was largely ignored by moral philosophers and ethicists until the courts and legal profession brought public awareness to the issue in the 1970's and 80's (Faden and Beauchamp, 1986, p 88). But today that situation is somewhat reversed as moral philosophy plays a major role in shaping informed consent protocols and, arguably, exerting as much influence on these protocols as case law. This can, at least partly, be explained by the fact that health care institutions responded to legal decisions, such as *Reibl v Hughes*, by hiring moral philosophers to act as ethical consultants, or bioethicists, to help protect against future negligence claims arising from the issue of consent.

The dominant view among moral philosophers in health care ethics, consistent with jurists, is that consent protocols must be founded on the principle of autonomy. As physician and bioethicist Ranaan Gillon asserts, "... autonomy – the ability and tendency to think for oneself, to make decisions for oneself about the way one wishes to lead one's life ... is what makes morality, any sort of morality, possible" (Gillon, 2003, p 308). The concept of autonomy goes all the way back to ancient Greece, "where *autos* (self) and *nomos* (rule or law) were joined to refer to political self-governance in the city-state" (Faden and Beauchamp, 1986, p 8). It was moral and political philosophers in the seventeenth century, however, who conceived of a reductive form of autonomy – that of personal self-governance (Faden and Beauchamp, 1986, p 8). This view of autonomy is, in turn, echoed in the decisions of medical negligence jurists over the last century.

Immanuel Kant's conception of autonomy, however, is somewhat more complex, and as his work has profoundly influenced the development of informed consent protocols (that is, informed consent in institutional guidelines and practices), it is necessary to look to him to broaden our understanding of autonomy in this context. In the second formulation of his Categorical Imperative, Kant wrote that each individual should “ ‘[a]ct in such a way that [they] always treat humanity, whether in [their] own person or in the person of any other, never simply as a means, but always at the same time as an end’ ” (Boezkes and Waluchow, translating Kant, 2000, p 14). In his third formulation he argued that we should “treat others as autonomous agents, capable of self direction and action” (Boezkes and Waluchow, paraphrasing Kant, 2000, p 17). From Kant, then, we have both an understanding of autonomy – the right of individuals to self direction and action – and, further, an understanding of the duty of health care providers to treat patients as ends and not as means. This Kantian conception of autonomy, when expressed in informed consent protocols, is often referred to as “respect for autonomy” (Faden and Beauchamp, 1986, p 4). The words “respect for” that precede autonomy are intended to emphasize the correlative duty of health care providers to act in ways that promote a patient's right to autonomy. Therefore, the concept of autonomy in informed consent protocols is, arguably, as much, perhaps even more, about practitioner/researcher duties as it is patient/subject rights.

The operationalizing of “respect for autonomy” in informed consent protocols is generally understood to include the following four conditions:

1. Voluntariness – or the absence of coercion or pressure from health care practitioners or others.

2. Alternativity – a choice can only be autonomous if there are two or more options.
3. Competence – this is a complex and frequently debated term. However, Huibers and van 't Spijker characterize it as “the ability to gain a comprehensive view of the consequences of several options” (Huibers and van 't Spijker, 1998, p 68).
4. Adequate information – this element speaks directly to the duty of the practitioner to provide the patient with a comprehensive view of the options available, and the consequences of each. This relates back to condition (3) where the patients/subjects can only be deemed competent if they have been adequately informed.

All four of these conditions must be met (at least in theory) for patient consent to be considered valid (Huibers and van 't Spijker, 1998, pp 63-72).

VI. INFORMED CONSENT IN PRACTICE

How, though, does this work in practice? In the Tri-Council Policy Statement, for example, the principles outlined for informed consent protocols hew closely to the Kantian conception of respect for autonomy. That is, they emphasize the importance of voluntariness, alternativity, competence, disclosure of information, and the professional duties of beneficence and nonmaleficence. However, the principles move beyond Kant in one area: they reflect the more recent interest in incorporating distributive justice theory into consent guidelines. The policy statement says, for instance, that “distributive justice means that no segment of the population should be unfairly burdened with the harms of research. It thus imposes particular obligations toward individuals who are vulnerable and unable to protect their own interests” (Tri-Council Policy Statement, 2005, p i.6).

An examination of consent forms which provide some evidence of how informed consent is conducted on the front lines of health and social science research reveals remarkable similarities across disciplines, perhaps because of similarities in bureaucratic processes that have risen up around consent process. The forms describe, in varying detail, what it is that the participant is consenting to. There is usually a statement beginning with “the risks associated with this _____”, as well as one outlining any possible benefits. Most consent forms have a section outlining subjects’ rights, such as voluntariness, and the right to withdraw consent at any time, if applicable (not all medical procedures, once initiated, can be halted without significant risk to patient, e.g. bypass surgery). The name and number of a contact person who can answer any additional requests for information are provided. And finally, consent forms usually include a line for signature (for example, see Stanford University Standard Consent Form, 2006), although verbal consent is considered legally valid if the practitioner documents the consent in her notes (Rozovsky, 1990, p 104).

Yet, somewhat distressingly, a signed consent form provides no evidence that the subject/patient authorized consent free from coercion, or that she understood the contents of the document she signed. There is, therefore, no evidence that two of the four essential conditions for informed consent – patient/subject voluntariness and competence – have been met. Instead, the validity of informed consent forms seems to depend largely on the integrity of those executing them, as well as the time they have available to devote to consent processes, and their ability to communicate information and assess patient/subject comprehension. These observations are reinforced by the literature. According to Alderson and Goodey, consent transactions have become “a convenient

means of transferring responsibility for risk from the clinician or researcher to the informed patient, thus enabling treatment and research to proceed without serious risk of costly litigation. ... In many busy wards, clinics and surgeries consent tends to be treated as a simple or tedious formality” (Alderson and Goodey, 1998, p 1314) where the signing of a health consent form often more closely resembles the signing of an indemnity agreement than it does the protocol conceived of by the jurists, theorists and policy analysts who were instrumental in the creation and implementation of informed consent practices.

More troubling is that, as Jeremy Sugarman et al. discovered through a meta analysis of almost 400 empirical informed consent studies, a significant number of patients and subjects do not adequately understand what they are consenting to, particularly in terms of risks (Sugarman et al., 1999, pp s1-s42). Sugarman and his colleagues believe this is partially explained by the fact that most consent forms and oral disclosure of information are expressed at the university level – requiring a level of education that most subjects and patients lack (Sugarman et al., 1999, pp s1-s42). As physician and former editor of the *New England Journal of Medicine* Franz Ingelfinger wrote:

Informed consent with all its regulations and conditions, is no more than an elaborate ritual, a device that, when the subject is uneducated and uncomprehending, confers no more than the semblance of propriety on human experimentation. The subject’s only real protection, the public as well as the medical profession must recognize, depends on the conscience and compassion of the investigator and his peers. (Ingelfinger, 1972, pp 465-6)

Sugarman's meta analysis also revealed that research studies with an unacceptably high risk/benefit ratio for the patient/subject are still approved by funding bodies and ethics review boards, and are still able to recruit candidates (Sugarman et al., 1999, pp s1-s42).

To help understand why the informed consent practices suffer from such alarming shortcomings we can again turn to the literature. Some ethnographic and empirical studies of patients and subjects offer evidence that social power and complex relationships can undermine a patient or subject's ability to direct her decision-making. This reinforces the view taken by feminist and distributive justice moral theorists about the limits of autonomy as the prima facie principle in informed consent protocols.

VII. CRITIQUES OF THE PRIMACY OF AUTONOMY IN INFORMED CONSENT PROTOCOLS FOUND IN THE LITERATURE.

Barry Thorne claims that "... informed consent applies to individuals, each of whom is to be treated the same, and ignores social structure and deep-seated differences in power" (Thorne, 1989, p 293). This analysis of power dynamics is supported by the empirical literature. Again, the Sugarman et al. review demonstrated that almost forty percent of patients involved in medical research agree to join the studies to please the requesting physician on whom they depend for care. Other subjects consent or refuse participation based on reasons such as family wishes. (Sugarman et al., 1999, pp s1-s42)

Susan Sherwin, a feminist moral theorist, believes such findings can, in part, be explained by the flaws in the foundational principle of Kantian autonomy that governs informed consent protocols. Sherwin contends that the Kantian construction of the

individual as separate and “rational” and able to exert sovereignty over his or her body, even in times of dire illness, in fact undermines rather than supports patient/subject agency. According to Sherwin, the individual should instead be characterized as follows: “... much of who we are and what we value is rooted in relationships and affinities with others. ... Relational [individuals] are inherently social beings that are significantly shaped and modified within a web of interconnected (and sometimes conflicting) relationships” (Sherwin, 2000, p 82). Sherwin and other feminist scholars advocate for Kantian autonomy to be replaced by what they call relational autonomy. Relational autonomy would require that respect for autonomy be broadened to include an understanding of the individual in her social and political context. Further, it would require an understanding of how this context strengthens or weakens her capacity for self-governance, as well as an understanding of the breadth of socio/political issues influencing her decision-making (Sherwin, 2000, pp 69-87).

Distributive justice theorists are also challenging the prima facie role of autonomy in informed consent protocols, primarily in the context of human subject research. Here again there is a recognition that not all patients and subjects are equal because of differences in race, gender, “education, socio economic status, or lack of power” (Kahn, 1998, p 6), and hence some are more vulnerable than others to violations of autonomy during informed consent protocols. Distributive justice theorists propose an additional duty on health care providers or researchers to offer special or increased protection during consent protocols to subjects/patients deemed to be particularly vulnerable. It is, however, a return to a more paternalistic relationship between researcher/practitioner and subject/patient, the very thing that informed consent protocols were instantiated to help

defend against. It is for this reason that my theorizing around consent standards for journalism will not look to distributive justice models for guidance. Instead, I will take some of the offerings from feminist theorists, particularly around relational autonomy. I will, however, stop somewhat short of an ethics of care model.

VIII. GIVEN THE PROBLEMS, WHY LOOK TO INFORMED CONSENT AS A THEORETICAL GUIDE FOR CONSENT PRACTICES IN JOURNALISM?

The history of informed consent in law and health and social sciences has been critically reviewed. From law to practice to theory there are troubling flaws. In law, informed consent was developed to promote individual autonomy, yet the reasonable patient standard set by the courts for informed consent significantly undercuts this ethical principle. Further, the principle of autonomy, still dominant in informed consent theory and policy, is unable to adequately address the complex power dynamics between subjects/patients and practitioners/researchers, or the relational context of most individuals' lives. Finally, informed consent in practice is often little more than an indemnity agreement only partially understood by the patient or subject who signs it.

Still, despite these serious failings of informed consent theory and practice, it is important to recognize that the protocols were developed in response to a vital need: the risk of harm inherent in many encounters between health and social science professionals and their patients/subjects, of which many of these patients/subjects were often unaware. In these fields, members recognized (slowly, grudgingly and imperfectly) that this dynamic imposed on them a duty to inform their patients and subjects about potential consequences not just positive, but also negative. In journalism, by contrast, we

generally do not see our subjects and sources at risk of harm and further, we do not feel any moral obligation to discuss potential consequences. In the next chapter I will present and justify two claims central to my thesis: first that journalism subjects can be at risk of harm to which they may be oblivious, and second that journalists do have a moral duty to discuss consequences with their subjects. To bolster these claims, I will close this chapter with an examination of how one case of inadequate informed consent protocols in mental health research was responded to by both the health and journalism professions. This will then lead to a critical analysis of how professional codes and guidelines in Canadian journalism allow it to keep so silent on the issue of subject of consent and consequences.

IX. A CASE THAT RAISES QUESTIONS FOR BOTH JOURNALISM AND MEDICAL RESEARCH

In 1993, two behavioural researchers from a small-town university in England documented three novel cases of self-mutilation — blood-letting — and published their findings in the *British Journal of Psychiatry (BJP)*. A local newspaper journalist then reported on the research findings in her newspaper. The journalist’s story focused on one particular subject, identified in both the *BJP* article and the newspaper story as a female medical intern known as Ms C. The journalist’s piece included details about the medical intern not relevant to the blood-letting research, but noted in the *BJP* article, and too compelling to omit: “Ms C states that she was sexually abused by her father between the ages of 4 and 13 but the authenticity of this claim is in doubt” (Parkin and Eagles, 1993, p 247; Antommara, 2004, p 28). A friend of Ms C’s recognized her from the newspaper

article's description of her and brought it to her attention. She was devastated (Antommara, 2004, p 28).

Following this, Ms C launched a formal complaint with the General Medical Council in Britain. Ms C claimed that the informed consent process provided by the researchers was inadequate because it failed to provide her with enough information to weigh potential consequences – she was unaware, for example, that her participation in the case study carried a significant risk of loss of privacy and, in this case, attendant emotional pain and humiliation. Specifically, Ms C stated that she was not informed that the researchers would publish her status as a medical intern, her claims of sexual abuse, and the questioning of the veracity of her claims (Antommara, 2004, pp 28-32). Although the General Medical Council eventually decided that the researchers had met the minimum legal standards for informed consent, the story of Ms C, and its ethical implications, was widely discussed among medical researchers, and written up in academic journals, in both Great Britain and North America. In the academic community, what happened to Ms C is considered an ethical lapse, a chastening reminder of the risk to subjects when their personal information is publicized, of the fallibility of anonymity protection when dealing with individuals living in small communities. Journalists, however, paid no attention to the debate.

I contend, though, that the story of Ms C does trigger issues relevant to journalism practice, particularly in the coverage of health and social issues stories, where there is an increasing reliance on compelling narratives from average people, like Ms C, to dramatize the issue at hand. It demonstrates what can happen to these people when they agree to become media subjects (academic or mainstream) and participate in a “story” for

publication without being fully informed of the potential consequences of that decision. They are at risk of harm, but often ignorant of their situation.

The type of personal information that was published in the newspaper about Ms C is published or broadcast regularly in the media in health and social issue stories. A journalism profile of a subject that omits compelling personal information is often considered weak or dull. As mentioned in Chapter 1, personal details (such as the subject is a medical intern, or claims childhood sexual abuse) are sought after as content by journalists for precisely the same reasons they are often – but clearly not always – excluded from publication in medical and other academic journals: the potential impact of publicizing this information.

As was demonstrated earlier in this chapter, in health care practice, and human subject research disciplines, it is the awareness of possible negative impacts on subjects that led, in large part, to the development of informed consent protocols in the first place. Unfortunately, the journalism profession does not, for the most part, perceive its subjects to be at risk of harm (Kennamer, 2005). There is no sense of ethical urgency that might prompt the introduction of stronger consent protocols. By scrutinizing various Canadian codes and practice guidelines we can understand the degree to which consideration of negative consequences for journalism subjects and sources is absent.

X. SUBJECT CONSENT IN JOURNALISM PRACTICE AND CODES

Canadian law is fairly quiet on the issue of journalism subject/source consent, and to the limited extent that the issue is recognized in law, it is narrowly conceived of as the presence or absence of permission, and pays little attention to the quality of information

that was presented in order to gain that consent (Jobb, 2006, pp 291-3; Martin, 1997, p 159). The CRTC provides the most concrete legal directive on subject consent: an explicit regulatory prohibition against radio journalists broadcasting telephone conversations without the consent of the subject (CRTC, 1986, Chapter 948, Part 1.1 3 (e)). But again, consent is here seen as a “yes” or “no” proposition, rather than a process of decision-making that involves discussion of possible consequences.

i. Canadian Journalism Codes and Practice Guides

In journalism workplaces, consent protocols are generally meagre, and based more on custom than guidelines. Of the professional guides and codes for Canadian media companies examined for this paper, the Canadian Broadcasting Corporation offers the most clearly specified protocol for subject/source consent transactions. CBC’s Journalistic Standards and Practice document, under a section headed “Rights of Participants and Interviewees” states that “[c]are should be exercised not to take unfair advantage of members of the general public who may be ignorant of certain journalistic practices.” Yet, according to the CBC, this requirement can be met simply by informing subjects about the length and purpose of the interview, explaining what is meant by attribution of comments, and the difference between on and off the record (Canadian Broadcasting Corporation — Journalists Standards and Practices, 2004).

In the *Globe and Mail’s* Editorial Code of Conduct the issue of consent is not directly dealt with but the code does require that journalists “identify themselves and make it clear they are working on a story for the newspaper” (Globe and Mail Editorial Code of Conduct, 2010). There is no expectation that the journalist will communicate the purpose of an interview, nor is there an expectation that journalists will explain

journalistic norms, such as “on the record”, to ordinary citizens who become journalism subjects. The *Toronto Star* also requires reporters to self-identify. In its Policy Manual, it states that “[t]his policy has a legal as well as an ethical grounding: If a person knows that he or she is speaking to a reporter, it can be argued, in any subsequent libel action, that he or she CONSENTED to publication of the information” (Toronto Star Policy Manual, 2004, capitalization not added). Here, consent is connected to an understanding of a risk of negative consequences, but the potential impacts that *The Star* is concerned about are those that might affect its bottom line and its reputation, not those that might affect its subjects and sources. The primary Canadian voluntary journalistic codes – the Canadian Association of Journalists Statement of Principles and Ethics Guidelines (CAJ, 2002), the Radio-Television News Directors Association of Canada (RTNDA) Code of Ethics (RTNDA, undated), the Canadian Association of Broadcasters (CAB, 2002) Code of Ethics and the Canadian Newspaper Association (CAN, 1995) Statement of Principles – do not address the issue of subject consent, implicitly (as in duty to self-identify) or explicitly.

ii Release Forms

Subjects of television reports, documentaries and feature length pieces of reportage are often required by most outlets to sign “release” forms. While release forms do provide evidence of consent to participate, they are not, in and of themselves, consent documents: their primary purpose is that of a legal waiver, to protect media companies against any liability actions that may, in the future, be brought by the subjects for any reason. Further, the release forms usually offer no evidence that subjects have been informed about what, exactly, they have agreed to participate in, or are aware of any

negative consequences that may arise from their participation. While similar claims were made about many health and social science consent forms, in TV there is virtually no expectation that subjects should be informed about, or protected from, any eventuality. For example, the standard release form used by the Discovery Channel provides no description of the focus or purpose of the subject's appearance on camera. It does, however, require that subjects allow their contribution to be used in any form, at any time. Additionally, subjects must give away all rights, including (the impossible to define) "moral rights", if they are to participate (Discovery Channel, 2006, provided by anonymous source).

The use of release forms is rare at print outlets, and at CBC radio. However, at least one print outlet, the *Toronto Star*, occasionally uses these forms for in-depth pieces on "vulnerable populations". For example, for *the Star*'s 1999 series on Toronto children living on welfare, "Hard Times", the parents signed forms on behalf of their children that said, "I give [*the Toronto Star*] permission to publish details of our lives in the paper" (Smith Fullerton, 2004, p 517). The children signed no forms although they all appeared capable of consenting or refusing to participate in the series, whereas one of the mothers was developmentally handicapped (Smith Fullerton, 2004, p 518). For a 2006 series on winter camping with at-risk youth, the consent form was given to the campers themselves to sign. However, a parent or legal guardian could be designated as a proxy signatory. In either case, the consent form provided two options: being identified, or remaining anonymous. The consent form to be signed by the youth (but not the one for the guardians) did contain a small acknowledgement of potential risk. It stated, "I understand that some personal information about me may be revealed" (Toronto Star

consent form, 2006). Yet, there was no obligation to discuss what might be some of the attendant consequences of publicizing this personal information. The *Star* forms are, again, more closely aligned with legal waivers than with informed consent documents.

iii Privacy and Journalism Consent Under Federal and Provincial Laws

Under Canada's federal Personal Information Protection and Electronic Documents Act (PIPEDA), there are protections against the release of private information without appropriate consent. However, this Act offers no protection to media subjects inadequately informed during the consent process. First, the requirement of consent is not *informed* consent. Second, section 4(c) of the Act states that it does *not* apply to "any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes" (Personal Information Protection and Electronic Documents Act, 2000).

The Civil Code of Quebec and the Quebec Charter of Human Rights and Freedoms also offer protections against publicizing personal information (constructed as invasions of privacy) without consent. But, again, consent here is not informed consent (Civil Code of Quebec, 1991, Chapter III s. 35) and Quebec Charter of Human Rights and Freedoms, 2009, s. 5). Ontario, Saskatchewan, Alberta, Newfoundland and Manitoba have specific laws on the protection of health information but they "... only apply to custodians or trustees (doctors, hospitals, dentists, etc). The laws do not apply to individuals or to the media" (Couturier, 2005), once again offering no protection for ill-informed media subjects.

iv. Journalistic Duties Owed To Subjects and Sources

In North America, the U.S.-based Society of Professional Journalists (SPJ) is the only professional organization that directly addresses the issue of harm. The organization drafted its original code in 1926 and revised it several times, most recently in 1996, when a new section was added on the duty to minimize harm (Lodgson et al., 1997, p 227). It begins with the statement that “ethical journalists treat sources, subjects and colleagues as human beings deserving of respect”, yet that that section of the code goes on to state that the duty to minimize harm can be trumped by “public need” (Society of Professional Journalists Code of Ethics, 1996). When the CAJ, the Canadian counterpart of the SPJ, decided to create its own ethics code in 2002, it chose not to include any language on the subject of harm.

Although the issue of harm is not explicit in Canadian codes, the risk of harm to subjects, and a correlative journalistic duty to avoid or minimize harm, is implicitly expressed, to a limited degree, in several codes including the previously quoted section from the CBC’s “Rights of Participants and Interviewees” standards. The *Globe and Mail* Editorial Code of Conduct states that “[i]n dealing with people who are emotionally vulnerable and unaccustomed to talking to reporters, The Globe and Mail will take extra care to respect their dignity and feelings” (Globe and Mail Style Guide, 2010). And the Radio-Television News Directors Association of Canada Code of Ethics states that “[b]roadcast journalists will respect the dignity, privacy and well-being of everyone with whom they deal. ...” (RTNDA Code of Ethics, undated). Other policy documents and voluntary guides take more of a rights-based approach toward subjects, with a weak sense of duty implied by the notion of respecting these rights. The CAJ code, for example, under the heading of fairness, proclaims a “respect for the rights of people in the news”

(Canadian Association of Journalists Ethics Guidelines, 2002). This proclamation was likely borrowed from the *Toronto Star* Policy Guide, which makes, almost word for word, the same claim (Toronto Star Policy Guide, 2004).

Whatever the rights and duties expressed in Canadian journalistic codes and policies, in each they can legitimately be over-ridden by the “public interest”, a term so vague that it could be, and often is, used to justify almost any violation of subject rights. In fact, the most impassioned articulation of journalistic responsibility found in the codes and policies was directed toward this conveniently opaque concept of the public (which public?), its needs (whose needs?) and its interests (whose interests?). The *Toronto Star*'s policy book opens with the bold heading of responsibility, and underneath is the following declaration. “The Star has responsibilities to its readers, its shareholders, its employees and its advertisers. But ... its overriding responsibility is to the society which protects and provides its freedoms” (Toronto Star Policy Guide, 2004). Nowhere in the section on responsibility is mention of subjects or sources. The Canadian Newspaper Association's Statement of Principles asserts that “[t]he newspaper's primary obligation is fidelity is to the public good” (Canadian Newspaper Association Statement of Principles, 1995). The Canadian Association of Journalists Statement of Principles states that “... we serve democracy and the public interest” (Canadian Association of Journalists Statement of Principles, 2002). And the CBC, in the preamble to its *Journalistic Standards and Practices* under a section titled “Responsibility”, casts this concept exclusively as being owed to the public. Sources and subjects are absent from this conception (CBC Journalistic Standards and Practices, 2004).

After close scrutiny of Canadian law, codes and policies on journalist/subject relationships, it is clear that consent is an issue largely overlooked and when acknowledged, it is narrowly defined. Journalistic duty to subjects is minimal, and to the extent that duties do exist, they are secondary to those owed to the conveniently ill-defined public or public interest. Given these standards of practice, it is then not surprising that journalists and their employers tend to discount the potential risk of harm to their subjects and sources. Yet to justify the claim that journalism consent processes need to be strengthened, it must be demonstrated that journalism sources/subjects can be exposed to risks of harm of which they may be unaware. And second, the case must be made that journalists do have a moral duty to inform potential sources/subjects about any serious potential risks that they are aware of. Chapter 3 will set out the theoretical justification for both the claim that journalism subjects are at risk of harm to which they may be unaware and further that journalists have a moral duty to inform potential subjects about any risks of which they are aware.

Consent and Consequences:

Journalists' Duty to Inform Subjects of Potential Harms

Chapter 3

Harm and Duty in Journalism Theory and Practice

I. INTRODUCTION

Where they exist, consent requirements in Canadian journalism, with the exception of the broadcast of telephone interviews, are generally limited to self-identification. The CBC sets the highest Canadian standards with its requirement that journalists go beyond identification and inform potential subjects of the focus and purpose of the story. But the CBC consent process, if measured against the standards in health and health and social science research, would be deemed invalid and unethical as it does not obligate journalists to disclose potential consequences to their subjects, nor must journalists ensure that subjects understand what they have consented to. But, does this matter? Are journalism subjects at risk of harm because journalism takes a much narrower view of consent than do these other professions? If so, what sorts of harms are journalists exposing their subjects to? And even if it can be demonstrated that journalism subjects are indeed at risk of harm of which they may be unaware, does this necessarily impose on journalists and their organizations a duty to inform about potential consequences? To explore these questions, this thesis will examine four CBC national current affairs radio stories later in this chapter.

CBC national current affairs radio has been chosen for two reasons: First, I spent a decade working there which provided me with a strong grounding in the culture and expectations around the journalist/subject relationship. And second, again, the CBC has the most fully articulated consent guidelines of all major Canadian media outlets. Each of the examples has been chosen based on two key criteria: the subjects profiled were

inexperienced with the media and, in different ways, vulnerable to harm because of this inexperience, and each of the stories also meets the test of good journalism. All four focus on important social and health issues about which the public ought to be better informed. The stories are as follows: *Once is Lost*, a very humanizing portrait of a man with Alzheimer's produced by his daughter which aired on *Outfront* in the fall of 2005; *Ana Grows Up*, a documentary from *The Sunday Edition*, profiling two profoundly physically disabled young girls whose families cannot get the funding needed to keep them safely at home; *Arson Boy and Arson Boy's Mom*, a series of stories which ran on *The Current* between 2003-6 about a family whose severely mentally ill teenage son cannot access treatment in rural Saskatchewan; and *Who Owns Life?* a tape-talk (an interview with a journalist who underscores his points by playing audio tape from "the field" for the host) about critical problems with genetic testing in Newfoundland, a location considered a goldmine for genetic research due to the homogeneity of the population. The tape-talk ran on *This Morning* in 2000.

It could, and should, be argued that our society is strengthened by the publication of these issues through emotionally powerful, first-rate journalism. However, these stories also trigger serious ethical concerns about the role current consent strategies play in putting subjects at risk of harm, a situation to which they may be oblivious for the simple reason that there is no law or practice standard that requires them to be informed of this.

This chapter will explore the nature of harm and duty in the context of journalism practice and how these ideas can be harmonized with journalism's role as protector and promoter of the public interest. In the next sections I will define harm and risk of harm

and argue that current journalism consent transactions are in and of themselves potentially harmful because they involve deceit and violations of autonomy, and enable journalism/subject relationships that are unequal, objectifying and too permissive of unnecessary violations of privacy. A more robust conceptualization of these harms in the context of journalism practice will be offered as a first step in countering these wrongs and in creating the theoretical framework for strengthening consent protocols in journalism practice. By analyzing the four CBC examples and moving from the purely theoretical plane to the “real world” of journalism, I will provide more concrete evidence of the limitations of current CBC consent requirements, and because of this, evidence of the potential risks of harm imposed on journalism subjects by their participation in these stories. Building on this evidence, I will present a correlative justification for the claim that journalists and their organizations have a moral duty to inform about potential harms. I will close the chapter by offering a reinterpretation of the journalist’s prima facie duty to the public interest and here cast it as being congruent with, rather than in opposition to, the journalism subject.

II. DEFINING RISK AND HARM IN THE CONTEXT OF JOURNALISM PRACTICE

Before harm in the context of journalism practice can be adequately analyzed, it is first important to define it and to distinguish between risk of harm and actual harm. Risk of harm is about calculating and conceptualizing what *may* happen prospectively, whereas determining actual harm requires, in effect, an autopsy of past events and their impacts. When it comes to potential harm for subjects, then, we must look at not only harms but at risk of harm. According to Deborah Lupton, “... risk is often used to denote

a phenomenon that has the potential to deliver a substantial harm, whether or not the probability of this harm eventuating is even estimable” (Lupton, 1999, p 8). The techno/scientific view of risk, from which informed consent protocols borrow, tends to focus on issues around “how well a risk has been identified or calculated, the seriousness of a risk in terms of its possible effect, how accurate ... are the causal and predictive models used. ...” (Lupton, 1999, pp 17-18). Additionally, Lupton argues that risk “is not a static, objective phenomenon, but it is constantly constructed and negotiated as part of the network of social interaction and the formation of meaning” (Lupton, 1999, p 29). In other words, calculations of risk may be unreliable, changeable and susceptible to social influences. What counts is not accuracy so much as whether or not those involved perceive risk of harm, to what degree, and what considerations prompt them to respond, or fail to respond, to those perceived risks.

Characterizing what exactly constitutes a harm is far from simple. Joel Feinberg, a leading liberal theorist on harm, suggests it is a vague and ambiguous term that attempts to account for a complex situation, a situation that, according to Feinberg, involves an indefensible action against another(s) to which they have not *fully* consented (Feinberg equates full consent with *informed* consent) and which results in the “... invading, thwarting, setting back, or defeating of an interest”. The test of whether or not someone has been harmed is whether or not things are worse for the person than before the alleged harm (Feinberg, 1984, pp 31-105). Nils Holtug attempts to address the acknowledged vagueness of Feinberg’s conception of harm by providing more specificity. He categorizes the types of interests at stake as those that “... frustrate a person’s basic desires, typically by rendering unavailable the means required to pursue ... health,

emotional stability or financial status” (Holtug, 2002, p 373). Mathew Kieran’s conception of harm is also closely aligned with Feinberg but he uses the measure of autonomy violations and assesses harm on the basis of whether an action is destructive of the “... conditions required for meaningful choice” (Kieran, 1997, p 135).

In journalism practice, it is helpful to conceive of harm in two distinct categories. First, there is a set of direct harms largely caused by the journalists’ actions or inactions during the consent and interview process. Such harms include deceiving a subject, violating her autonomy and allowing for the violation of her privacy. There also exists a set of secondary or indirect, but by no means less significant, harms which descend in the wake of direct harms and include a range of negative consequences that result from the publicizing of personal information. In the literature these are frequently conceived of as emotional and psychological harm. However, as will be demonstrated through the CBC examples, potential harms to subjects that result from the publication of their personal information also include things like loss of financial resources or property, loss of family, loss of insurance and loss of employment.

In the next sections this paper will offer re-conceptions of three direct harms that arise from the journalist/subject relationship: deceit, violation of subject autonomy and violations of subject privacy, and explore how standard consent transactions enable these harms and increase the risk of a range of indirect harms.

III. DIRECT HARM #1: DECEPTION

To deceive is to mislead or to fail to disclose information, according to Wilkens and Coleman (Wilkins and Coleman, 2005, p 92). They conceive of journalistic deception as falling into three categories: active deception where the journalist lies in

order to obtain information, misrepresentation where a journalist might present herself as someone else, such as a doctor or a lawyer, and passive deception where journalists allow themselves to be mistaken for members of the public (Wilkins and Coleman, 2005, p 94). According to the literature, deception is so widespread it is virtually encoded into professional practice. For example, Coleman and May find that “journalists ... often have a relationship with sources based on deception” (Coleman and May, 2004, p 283). Borden argues that “[m]any journalists, in fact, seem to subscribe to the notion that a little deception is necessary to get at the larger truth.” Their claims are backed up by two studies of journalists and their relationship with deception. Coleman and Wilkins, in a comprehensive study of professional journalists, found that fewer than ten percent rejected the practice of withholding information from news sources while, contrastingly, ninety-nine percent rejected making an untrue statement to their audience (Coleman and Wilkins, 2005, p 99). The second study was of the newsroom at a small-sized city’s TV station which was conducted by Tom Luljak. Luljak found deceptive practices appallingly frequent and that “... the use of deception in newsgathering is casual and routine, so much so that journalists hardly even think of it as deception” and tend not to view their behaviour as questionable (Luljak, 2000, p 11).

As disturbing as these findings are, the characterization of deception generally found in the journalism literature (not to mention practice) is too narrow. The literature usually limits its depiction of deceptive acts to those involving lies or distortions about the identity and/or focus and purpose of the story (see, for example, the three categories of deception outlined by Wilkins and Coleman earlier in this section). By this measure, then, CBC’s policy on subject/journalist interactions, again the most rigorous of any

major Canadian media organization, is sufficient to prevent deception because of its requirement to disclose the focus and purpose of a story. Yet this construction of deception operates somewhat like a large-holed colander applied to the draining of angel hair pasta: too little is captured, too much is lost. By turning again to Sisella Bok we can build and justify a hardier version of deception and one that is clearly harmful. Bok characterizes deception as affecting

... the objectives seen, alternatives believed possible, the estimates made of risks and benefits. Such a manipulation of the dimension of certainty is one of the main ways to gain power over the choices of those deceived. And just as deception can initiate actions a person would otherwise never have chosen, so it can prevent action by obscuring the necessity for choice (Bok, 1978, p 19).

Under Bok, then, journalism consent transactions that do not involve disclosure of potential risks of harm must be considered deceptive, if the journalist had some awareness of the risks but did not share that information. It is unrealistic to expect journalists to anticipate all possible consequences, yet a few years in the profession provides journalists with sufficient experience and wisdom to anticipate at least some of the consequences of publicizing personal information. Thus, many typical journalism/subject consent transactions in Canada could be characterized as deceptive and will likely continue this way as there is, as yet, no expectation, either legally or professionally, that this information should be shared with potential subjects.

IV. DIRECT HARM #2: AUTONOMY VIOLATIONS AND UNEQUAL POWER RELATIONSHIP

As was discussed in the last chapter, ethicists and legal scholars view withholding information that is relevant for decision-making not only as deceptive but

also as a violation of autonomy which is itself considered a harm. These violations are strengthened and reinforced by an aspect of many journalist/subject relationships: they are relationships of exchange, but not an exchange of equals. In fact, it is understood to be a violation of journalistic standards and practice – a tainting of objectivity – to allow subjects any role in question generation, editing or presentation of the story. Thus, the subject, to varying degrees, abdicates control over elements of her life to the journalist. Although the subject can choose which questions to answer and how to answer them, the power, in most circumstances, still rests with the journalist. It is the journalist who decides which questions to ask, how to ask them, how to edit the answers, and in what frame to present the content. As Janet Malcolm wrote in *The Journalist and the Murderer* (a text that, in many ways, can be considered journalism's equivalent to Bosk's expose of the professional/subject relationship in anthropology): “[t]he moral ambiguity of journalism lies not in its texts but in the relationships out of which they arise – relationships that are invariably and inescapably lopsided. The ‘good’ characters in a piece of journalism are no less a product of the writer’s unholy power over another person than are the ‘bad’ ones” (Malcolm, 1990, p 161). Feminist social science researchers, particularly anthropologists, have identified similar problems resulting from “unequal power hierarchies” between subject and researcher. They have argued that not only the harms are unevenly distributed between subject and researcher, but so are the benefits (with researcher getting the lion’s share); the same might be said of journalism (Wolf, 1996, p 2).

But how does this power imbalance contribute to further violations of autonomy, and therefore harm? In journalism, subjects have, primarily, an instrumental value. They

and their stories are the means through which journalists draw in audiences. They are, in essence, objects first, subjects second. As Jean Rafferty confesses, “[i]t is certainly easy to forget as a journalist that your interviewees are human beings too. Once you have their words on the paper in front of you it is as if what they say has become your property they are there to do with what you will ...”(Rafferty, 2004, p 135). Jeffrey Olen similarly frames the situation for broadcast journalists and their subjects: “[o]nce a person puts himself before the camera, he is vulnerable – to the whim of the interviewer and to such post-production decisions as editing” (Olen, 1988, pp 79-80).

Another example of how journalists objectify their subjects is the naming of stories for internal office or program use. Here, journalists often use wit and irony at the expense of those they cover. In the case of the Saskatchewan farm family, three episodes of their story on *The Current* were slugged Arson Boy, the fourth, Arson Boy’s Mom. Such nomenclature strips subjects of their humanity and reduces them to comic book or cartoon figures of one dimension, animated and shaped according to the needs of, and/or for the amusement of, the journalist and her colleagues. Another example comes from my time at CBC when a former journalism colleague who, in the immediate aftermath of the 1998 Swiss Air crash off Peggy’s Cove, Nova Scotia, made the very matter-of-fact comment that he was lucky to have been working on a morning program as it meant that he got first crack at the story before everyone was all over it. To this journalist the crash was an act stripped of its consequences and its impact on the lives of countless people; it was a tragedy reduced to a juicy journalism story to be competed for with the sources and subjects mere pawns in the competition.

If there is a tendency, a journalistic norm even, to reduce subjects to their instrumental value, that may be wrong but does it necessarily harm the subjects? If using subjects, even with the best of intentions (for how else in current practices can we tell stories if journalists do not use subjects and sources as an essential ingredient in the formula?), is almost inevitable in journalism, the profession is treating people as means and not ends. According to Kant, it is a violation of an individual's autonomy to use her this way, and again, violating someone's autonomy is, in and of itself, considered harmful. Subjects can, and often do, end up feeling used and exploited by journalists, and the experience can be emotionally painful (Malcolm, 1990, pp 3-4). But the situation can be more complex than that. Of even greater concern is that reducing subjects to almost objects to be used for some greater end allows journalists to justify imposing even more harm. This relationship begins with the consent process and its withholding of information, its focus on seducing the subject into saying yes for our ends, not theirs (although journalists often justify it as for the sake of the public), and continues through to the end of the relationship.

V. DIRECT HARM #3: PRIVACY

“Privacy is probably the greyest moral area for journalists and unwanted publicity perhaps one of the greatest causes of suffering to ordinary people. Privacy invasions reveal us at our most hypocritical” (Saunders, 2003, p 78). But when we speak of privacy invasions, what is this thing that is being invaded? Later this section will build somewhat on the idea of privacy about to be offered here, but given the fact that it is the liberal democratic tradition of journalism practice that is being scrutinized in this thesis, it is important to begin with a liberal democratic conception of privacy. Ken Gormley refers

to the writing of Alan Westin and Charles Fried in his contention that "... privacy is connected to a citizen's ability to regulate information about themselves, and thus control their relationships with other human beings such that individuals have the right to decide when, how and to what extent information about them is communicated to others" (Gormley, 1992). Sandra Marshall focuses on the emotional and psychological aspects of privacy by connecting the term to

... concepts such as self-fulfillment, self-respect, personal dignity and security, autonomy and identity, and in general the integrity and immunity of the person, and it differentiates itself from consequences of its negation; feelings of defenselessness, and nakedness, fear and embarrassment, bewilderment, distress and emotional upset (Marshall, 1988, p 149).

And Candace Cummins Gauthier explores the particular emotional and psychological dynamics of privacy invasions for journalism subjects and frames the situation as follows: "... the public gains power ... to discuss, evaluate, condemn [the subjects]..." (Cummins Gauthier, 2002, p 26). In the next section, some of the CBC examples will allow us to connect violations of privacy with the sorts of impacts all three scholars describe.

One of the limitations, however, with the current conceptualizing of privacy violations in the context of journalism practice is that it is generally articulated in relation to public figures or debates about if and when non-public figures cross the threshold and become persons with whom the public has a legitimate interest. This second category inevitably refers to those who are victims of crime, or are accused of a crime (see, for example, Seib and Fitzpatrick, 1997; Russell, 2006; Smith, 1999; Cummins Gauthier, 2002; and Saunders, 2003). Yet, focusing the debate about privacy and journalism

around public figures and/or if a subject is a public figure ignores a huge category of journalism stories and their subjects where the issue of privacy needs to be considered. In health and social issue journalism in particular, personal narratives of “ordinary” people whose very lack of qualification as public figures of any sort – including involvement with crime – make their narratives emotionally and often morally compelling are a commonly used tool. It seems impossible to include these subjects in the debate about privacy in journalism when it is almost always framed in the context of public figures, characterized as inevitable, with the central tension being not if, but how much privacy, to violate (Kenamer, 2005, p 84).

This leads to a second weakness with the conceptualization of privacy in the journalism literature: violations of privacy are characterized as the equivalent of theft of property, that is, something that has been stolen or at the very least, taken against the subject’s will. However, violations of privacy should be considered with more subtlety and complexity to capture the dynamics of interviews with inexperienced subjects. The information that subjects reveal to journalists is often freely given, not disclosed against their will. It is only retroactively, once personal information is publicized and the impact of those disclosures is felt, that the experience may be reconceived of by the subject as a privacy violation. At the time of the interview, by contrast, it may have felt like sharing a story from their life with someone who was interested. The best journalism interviews, particularly those for broadcast, often depend on a forgetfulness: so intimate and engaged is the conversation that the subject forgets the recorder exists, and the fact that she is speaking to a journalist. And even if a subject does not forget this, if she is inexperienced with the media she has no ability to anticipate how a one-on-one

conversation transforms in meaning and impact once its contents are publicized, that is, until it is too late.

In situations where subjects reveal personal information that they would have kept private if they had better understood the context and consequences of revealing it publicly, it seems that, again, a discussion of potential consequences during consent transactions, and perhaps ongoing, occasional reminders that the subject is being interviewed or talking to a journalist, would reduce the risk of further harm. Priscilla Regan offers a view of privacy that might be more helpful to journalists and journalism subjects, and she does so by rejecting the liberal justification for its importance: “[m]ost privacy scholars emphasize that the individual is better if privacy exists. I am arguing that society is better off if privacy exists. I argue that society is better off because privacy serves common, public and collective purposes” (Regan, 1995, p 20). Under Regan’s construction, then, journalists can simultaneously promote both subject privacy and the public good by engaging in discussions about consequences.

In the journalistic literature on harm the focus tends to be on emotional or psychological harm. As we shall see in the next section where the CBC radio examples are analyzed, recognition of these potential harms is legitimate. However, the risk of harms to subjects that can accrue upon the publication of their personal narratives goes well beyond the emotional and psychological to a set of negative consequences that range from losing your property to losing your family.

VI. FOUR CBC NATIONAL RADIO CURRENT AFFAIRS EXAMPLES

1. Once is Lost broadcast on *Outfront*, November 15th, 2004

Outfront, a program that featured first-person documentaries, focused on a father with Alzheimer's disease in this episode. Writer Barbara Harrison of Elora, Ontario, shares with listeners the story of her father, a former United Church Minister and intellectual now enrolled in an Alzheimer's day program. The documentary does a powerful job of humanizing an Alzheimer's sufferer by presenting Barbara's father as vital, alive, and despite struggles to locate certain words, an elegant orator. The opening scene presents the father during his one-on-one music therapy session playing the water drums as his music therapist sings an infantilized version of "My Bonnie Lies Over the Ocean". Barbara's opening narration describes the scene this way: "He looks uncomfortable. He's following the instructions of the therapist, but he's not quite sure what he's doing. And I have a feeling he's not quite sure why he's doing this" (Outfront, 2004). Throughout the documentary Barbara provides the listener with scenes that demonstrate the extent of her father's incapacity and confusion. He doesn't recognize his wife's name on the tombstone when they visit her gravesite. Then when he is informed of whose headstone they are looking at he expresses surprise to learn that she was born in South Africa, where he too is from, and where they met, married and had their children.

The father sounds extraordinarily gentle and loving on tape, and Barbara acknowledges that he is. In another scene Barbara arrives at her father's house. He greets her with a kiss and says, "Oh you look so beautiful. ... When I think back you were the first one in the family, and the lady who died, your mother, we wondered if we were ever going to have a child. ... I was so delighted to have this in my life. ... You know how much we love you do you?. ... I want you to be happy" (Outfront, 2004).

But his profound love for her is not the only aspect of the relationship Barbara wants to share with listeners. Embedded in this portrait of a man with Alzheimer's are a few decades of ill-contained resentment from Barbara toward her father. She has not forgiven him for her adolescence when her father "... was never there for me". Barbara then informs us that her resentment is based on more than her father's pre-occupation with the needs of his congregations, that "... from time to time he would explode, and I remember being quite fearful, because I didn't know what would set him off. I remember a time ... he threw his dinner plate directly at me. That was the nature of our relationship at the time. It was very stormy. We'd push each other's buttons and we'd get very angry" (Outfront, 2004).

Her father does not recall any of this. He can only remember love. When Barbara tells him on tape that "... sometimes we didn't get along", when she was younger, he responds with surprise, compassion and agonized despondence. He says, "I apologize. Knowing that I was not nice to you, I don't like the thought. Knowing that I was not nice to you makes me feel so terrible. Darling I love you, very, very much. But how to express it?" (Outfront, 2004).

From the extent of the cognitive impairment demonstrated through the documentary, it is likely that Barbara's father was not competent to consent to participate in the documentary. Again, Barbara describes her father in his weekly music therapy session this way: "... he's not quite sure what he's doing. And I have a feeling he's not quite sure why he's doing this" (Outfront, 2004). He can't recognize the name of the woman he was married to for several decades. Given this, how valid was his consent to have his private health information, and the extent of his cognitive impairment, broadcast

on national radio? Does he have the ability to assess the impact these disclosures might have on his life? Does he, at any given moment, remember or know or accept that he has Alzheimer's? If not, how might hearing this on the radio affect him? However, there is no requirement under current consent guidelines at CBC or anywhere else in Canada that subjects be competent to consent, or that they have the capacity to understand the possible consequences of their participation.

More troubling with this story than the publicizing of the health information is its unstated but clear purpose of being a vehicle which Barbara can use to settle old scores with her father. This puts her father at high risk of experiencing emotional harm once the story is broadcast. Given her father's cognitive impairments it is difficult to frame the publicizing of old grievances as anything other than the duping of a frail and vulnerable old man. He was, it is obvious, now ignorant of the past, or her interpretation of it, clearly stunned on tape by her portrayal of their earlier relationship as "difficult"; he has no previous knowledge, or has no capacity to remember, that his daughter felt this way (Outfront, 2004). He may even have been ignorant of her intention to use this documentary to discuss the past. Either way, it could be argued that he was used. Without her father's participation, Barbara Harrison would not have a documentary, would not be able to tell the story she clearly wanted to tell. He was her means to an end. What did Barbara's father feel (for the Alzheimer's disease in this case did not impair the father's capacity to feel; in fact, his emotions are now so very close to the surface and deeply lived) when he heard, broadcast to the nation and around the world on the internet, his daughter's fairly blistering condemnation of him as a father and a man when she was growing up, words she would have recorded in the safety of the studio or some other

quiet place, with her father far away and out of earshot? Even if her father was not cognitively impaired, one could not imagine him being immune to the impact of these public declarations. Under CBC Journalist Standards and Practices, journalists have an obligation to reveal the focus and purpose of their stories to their subjects, but the stated focus and purpose of this documentary was to tell the story of a father living with Alzheimer's; Barbara's complicated feelings for her father were not framed as the focus. Only a consent standard that required a discussion about possible consequences would have required her to reveal that she intended to discuss these feelings on air.

2. Ana Grows Up, a documentary for *The Sunday Edition*, January, 2006.

In this documentary, thirteen year old Ana and her single mother take a camping trip outside of Ottawa with Ana's best friend Delaney, who is two years younger than Ana, and Delaney's twin sister Ashley and their single mother. Ana and Delaney are both profoundly physically disabled. Ashley suffers from Attention Deficit Disorder. The documentary highlights the unfairness of the Ontario government's refusal to support families with disabled children who need financial assistance to buy necessary but expensive equipment such as lifts for the bathtub, so growing children can still be cared for at home. Ironically, if the children were given up by their parents and placed in foster care, those foster families would receive provincial funding for necessary equipment. Below are transcripts from two back-to-back scenes in the documentary. The first captures the three girls alone in a tent at night at the campsite. The second is with the mothers sitting outside drinking wine while their daughters sleep in the tent.

Scene inside tent:

Narration: And there they are in the dark, three little girls. ... Neither Ana nor Delaney can get up to wake their mothers in the night, neither can turn themselves

over, swat a mosquito, or sit up if they hear something. And for all three girls new fears creep up in the night.

Ashley: Why am I like this? Did I do something? Was I supposed to be like this? Why am I like this?

Ana: When I get mad sometimes I just feel like killing myself.

Ashley: Well I think about it sometimes ... when I get really, really mad.

Delaney: I shouldn't be saying this, but sometimes I feel like why does it have to be me and not somebody else? Sometimes I just feel like killing myself. I wish I could just die on the bed. I would be like, "Yeah it's over!"

Delaney (crying): It scares me because my mom has a very bad back and she can't lift me. And if she hurts herself, me and Ashley are going to have to go into a foster home.

Scene outside tent with two mothers:

Ana's mom: We know lots of people who've had to give their kids up to foster parents. Ana has friends whose parents have had to give them up and it scares her. You know, "Mommy is that what happens; you have to give your kids up when they're disabled?"

Narration: Their children are scared because they might end up in a foster home. There is equipment. ... But these women can't afford the equipment for their daughters. ...

Ana's mom: The fear is always in the back of your mind. Oh my god in a year from now when she's another five or ten pounds, am I going to have to give up my daughter? Am I going to have to place my kid? But I won't. ... (The Sunday Edition, 2004)

This documentary does not permit indifference. The words from the transcript fail to capture the emotional power of the scared voices of those three little girls in their tent at night. It is a riveting story that leaves us unable to reach any other conclusion but this: a terrible injustice is being imposed by the state on disabled children and their families. But at what cost to these participants is this message being delivered?

It is unlikely that the consent process prepared these little girls for what they might encounter at school on the Monday morning after the documentary aired their private suicidal thoughts, fears and self-loathing. It is unlikely that the consent process prepared these girls because there is no legal obligation or professional expectation for the journalist who made this documentary, or her editors or managers, to do so. What might they have encountered? Given that their schoolmates are in their early teens and lacking in emotional maturity, it is reasonable to assume that the girls might experience some feelings of shame and/or embarrassment about their disclosures on national radio. They may also be exposed to teasing and taunting from schoolmates. These experiences, in turn, may have increased their suicidal feelings.

The nocturnal disclosures were made in a secluded tent in the wilderness late at night. When the girls revealed their most intimate thoughts as the night wore on, did they even remember that a tape recorder was running? Did they yet have the cognitive maturity to think far enough ahead to what it might be like once that information reached the ears of their schoolmates? But a good journalist knows their stories generate talk and gossip and action and reaction, and a good journalist knows that when vulnerable little children confess suicidal thoughts and fears that their mothers are no longer capable of looking after them, and that information is publicized, things can happen.

With this documentary, though, the risks to the subjects go beyond the emotional and psychological damage. The children were not anonymous; their names and that of their community were broadcast. Further, information was revealed about their single mothers' increasing inability to adequately care for the girls as they grew bigger and heavier. What the girls feared most was being forced into foster homes because of this.

Ironically, it is possible that the publication of this information increased that risk.

Anyone from the CAS, or a health care professional or teacher or neighbour, or in fact anyone at all, listening to that program may have felt concerned for the safety of the girls, and if so, they were legally obligated to take action and report the family. According to section 72(1) of Ontario's Child and Family Services Act, Ontarians are required to report any child they suspect is not being adequately cared for at home (Child and Family Services Act of Ontario, 1990). Any journalist with even limited experience covering child welfare issues in Ontario would be familiar with this Act.

3. Arson Boy and Arson Boy's Mom from *The Current*, four episodes between April, 2003, and January, 2006.

The Current ran four stories about Arson Boy and his family from Outlook, Saskatchewan, a rural farming community with a population of seven hundred. The first, a documentary broadcast on April 13th, 2003, focused on the critical lack of resources for mentally ill youth in the rural communities around that province. The story is introduced by the host with the following narration: "Our next story is disturbing on two levels. A family living in rural Saskatchewan discovers that their 12-year-old son has mental health problems. ... He's threatening people and he's burned down the family's million-dollar milking barn" (The Current, 2003). The documentary describes the boy's behaviour leading up to the barn burning: rubbing a caustic substance on the fur of a barn cat and literally burning it alive, threats of violence made to his father and sister, and a death threat letter sent to a female farm hand (The Current, 2003).

But, according to the documentary, the family did not learn that the boy was responsible for burning down the barn until two months after the incident when he

confessed it to the local RCMP. The family then immediately drove the boy to Royal University Hospital in Saskatoon where "... the doctor would not admit the boy. ... [so] the parents made a desperate move. They left the hospital without their son. ... Later that evening they were informed that a group home in Saskatoon would take their son ... but it required that they make their son a ward of the state" (The Current, 2003).

The parents, distraught that the only way to get help for their severely ill son was to legally sever their parental bonds, sent angry letters to politicians. The Saskatchewan Party took an interest, contacted the family and helped them set up a press conference, something the family had no experience with. At the conference the parents are described as "... nervously [telling] their story" (The Current, 2003).

The documentary ends with the revelation that the boy is now "undergoing treatment for what has been diagnosed as schizophrenia-like symptoms" (The Current, 2003). We never hear from the boy in this story or in any of the follow-up stories; instead his mental illness and treatment are revealed by his parents, who along with the boy, are anonymous to protect the boy's privacy. In the first story, however, their tiny community is named and other identifying bits of information are revealed. In the second installment of the story, which is an interview with the mother, the name of the group home where the boy is staying and the city in which he is living are identified. Further, the mother lists her son's medications (The Current, 2004). They are not identified by her as antipsychotic medications, but they are common enough that many listeners would be able to recognize them as such.

By the third installment of the story, broadcast in 2005, we learn that after the parents publicized their story through the media, they experienced two unintended

consequences. First, their son was charged with arson by the police, over two years after the initial incident. The son had first confessed his crime to the RCMP, but it was not until after *The Current* documentary aired, and well over a year after the confession, that charges were laid. And second, because of the arson charge, the insurance company which had originally agreed to pay for the rebuild of the million-dollar barn, is now refusing to because arson was the cause of the fire (The Current, 2005). The final installment of the Arson Boy series is broadcast in January, 2006. It is a sound montage from the family farm on moving day. They lost their fight with the insurance company and have been forced to sell; it is heart-wrenching to listen to.

The issue of basic consent is complex in the Arson Boy story. There is no reason to doubt the parents' consent to participate or their knowledge of the focus and purpose of the stories. But the real subject and focus of the stories is their son for whom they are, by the time the stories begin airing, no longer legal guardians and therefore ineligible to make decisions on his behalf. Further, even if they were still his legal guardians, the boy was old enough to "own" his health information and therefore it was not for his parents to disclose without his consent (Bala and Bala, 1996). Yet, ironically, because the parents were no longer his guardians, it was not illegal for them to disclose this information, as such disclosures are illegal only if done by custodians or trustees (Personal Information Protection and Electronic Documents Act, 2000) . Yet, again, is it ethical? Did the boy want this information disclosed about himself? The journalists did not mention any contact with the boy.

Although all of the Arson Boy stories were broadcast across the country and around the world, there is an inverse relationship between proximity and potential for

harm. The risk of embarrassment and humiliation to the boy did not necessarily grow as the story moved in distance to larger audiences, but could have instead stayed focused locally as community talk and gossip were triggered and re-triggered after the broadcast. It was only at the local level that the boy might have had to contend with stares and whispers, or perceived stares and whispers as he moved about his life. Similarly, the risk of harm to the disabled girls in *Ana Grows Up* did not grow in proportion to the size of the audience; any harm they may have experienced because of the broadcast of their story was likely locally imposed.

But Arson Boy was anonymous as a means to protect him, something not offered the girls. Yet, the story of the medical student who self-mutilated (from the last chapter) showed just how faulty anonymity is as a protective device. Similar to the medical student, this boy was not protected by anonymity because the identifying details that were broadcast would have been enough to reveal him to those in his community. It is reasonable to assume that most of the seven hundred residents of Outlook were able to figure out who among them had a dairy barn burned down and a twelve-year-old son who no longer lived at home. There is a difference between anonymity and confidentiality. Anonymity does not protect privacy; even without our names we leave too many markers to remain anonymous.

But again here, as with *Ana Grows Up*, the potential for negative consequences as the result of personal information being publicized goes beyond psychological and emotional harm. For this family, it was only after their plight was broadcast on national radio that their son was charged with arson (although the journalists and the family express confidence that the charges will be dropped). And it was only after the first

broadcast that the insurance company reneged on its promise to pay the insurance. And because there was no insurance settlement the family lost their farm and with it their livelihood. From what was caught on tape, the parents were surprised and unprepared for these outcomes. They had no previous experience with publicizing personal information and did so in the hope that it would pressure the provincial government to provide treatment for their son, without making him a ward of the state. Had they known in advance some of the risks of this action, would they have calculated that the potential benefits were worth the costs? Perhaps. But, their surprise over the consequences clearly indicates that they had not considered these possible outcomes, or were aware that they existed, before deciding to tell their story to the media. Would, however, a strengthened consent process have given them the opportunity to weigh these risks? Journalists are not omniscient; yet even a fairly green journalist ought to realize that when you begin publicizing the fact that you have an arsonist in the family, there may be consequences.

4. Who Owns Life? a tape-talk broadcast on *This Morning* on March 20th, 2000

This tape-talk highlighted a specific case of genetic research gone amok in Newfoundland.

In 1998, researchers at Baylor University in Texas made repeated research recruiting phone calls to men from the extended Mercer family living in the community of Grand Falls, Newfoundland. The calls, often made at night, had recruiters informing Mercer men that they were at risk of sudden death from a genetic, cardiovascular disease called Arrhythmogenic Right Ventricular Cardiomyopathy. The recruiters then requested that the men participate in a study aimed at mapping the gene that causes the disease.

Arrhythmogenic Right Ventricular Cardiomyopathy is not treatable, is almost always fatal

and tends to strike men in their prime: fifty percent of those with the disease literally drop dead by the age of 40, and eighty percent by age 50 (*This Morning*, 2000). All that was required of the participants was the donation of blood samples to be used for gene mapping and, eventually, for susceptibility testing. When this story was broadcast on *This Morning*, the name of the family implicated by the research and the community in which they lived were both identified in the story. Here is a transcript from a segment of that story.

DAVID MERCER: My brother Graham would have had his masters. That September he was teaching, doing a class for one of the professors there. That is when he collapsed while teaching in class. They tried to revive him. No warning. And he was such a young person, you know, twenty-eight. That was in June 1997.

SHARON MERCER: In May of 1998 we got a call from Baylor College.

BAN YOUNGHUSBAND (GENETICIST, FACULTY OF MEDICINE, MEMORIAL UNIVERSITY):

The researchers that came to Grand Falls were from the Baylor College of Medicine in Texas. They are headed by a medical doctor who originated in Newfoundland, Robert Roberts, Bob Roberts. And his research team made contact with families here through local physicians who I believe were trying to help out their patients.

DAVID MERCER: They told me they wanted an appointment when the whole town was there and asked for a blood sample. It was like they came in for a couple of days and then they were gone, right?

SHARON MERCER: Right. They weren't very patient, I should say. You know, they wanted to get us in really, really fast and when we got in there we weren't really impressed. You know they took a few minutes and they explained a few things and it was like they were in and out and that was it.

YOUNGHUSBAND: My understanding is that these families were coerced. They received multiple phone calls. They often received phone calls at night. They had no need to phone them at night and tell them they believed they were in danger of having sudden death. They were met in hotel rooms or hospital waiting rooms and had consent forms sort of thrust before them and asked to sign them, and things like that. It was really quite

emotional. I mean they were made to fear for their health from phone calls from Texas. All this behaviour is inappropriate for research (This Morning, 2000).

The community did not hear back from the researchers about the results of the research (their fear-based participation was prompted by their understanding that they, or members of their family, might personally benefit from this testing). However, a few years later an article was published in the journal *Genomics* indicating that the researchers had been successful in mapping the location of the gene (Li, 2001). For the community, the experience was profoundly negative. They took to referring to the researchers as The Texas Vampires.

The Baylor researchers refused interview requests made by the journalist for the *This Morning* story, but the university's director of public affairs read a letter on air, denying any ethical impropriety. *Who Owns Life?* focused, to a large extent, on the consent process: the pressure exerted on research participants, and the lack of information provided by researchers about the study, its goal and its possible impact on participants' lives. Since the story broadcast in March, 2000 there have been several developments. First, the researchers were reprimanded by their institution and had their research privileges revoked (Research Protection, 2004). The lead researcher, Dr. Robert Roberts, originally from Newfoundland, returned to Canada and since 2004 has been the CEO and Chief Scientific Officer of the University of Ottawa's Heart Institute (University of Ottawa, Heart Institute, 2010). Further, the Newfoundland provincial government commissioned a report on the conduct of genetic research in Newfoundland (Newfoundland and Labrador Department of Community and Health Services, 2003) and publication of this story played a role in the 2008 Newfoundland legislation on the

protection of health information. This act clearly states that the collection of health information must be done without deception or coercion (Newfoundland, 2008).

Who Owns Life? illustrates the kinds of harms that can be imposed on ordinary people when informed consent in research is poorly executed, and strongly served the public interest by helping to bring about important changes (including, as some would argue, the reverse brain drain return of Dr. Robert Roberts to Canada). But ironically, the CBC consent process used in advance of the interviews with David and Sharon Mercer for Who Owns Life? may have left unexplored some crucial questions about consequences.

David Mercer revealed himself on radio to belong to a family of men who have a high, genetic risk of sudden death from cardiac arrest. In Canada both insurance and pension plans are exempt from anti-discrimination laws, thus it would be legally allowable to discriminate in these areas on the basis of genetic make-up, unless the law is changed (Jones, 2000). And there is no federal legislation that offers protection of genetic information, such as exists in countries like Norway (Jones, 2000). Therefore, David's employer or insurer, upon hearing of his genetic risk for heart attack, could legally fire him or cut off his insurance. But it is more than just David who may be affected by the broadcast of this story. There are implicated third parties: the thousand other men who are part of the Mercer extended family, many of whom do not now live in Grand Falls. Once the documentary aired, they too became exposed to the same employment and insurance risks as David, and they have perhaps been exposed to an additional risk: some of these men may have kept this information from loved ones for fear of rejection (Wertz and Fletcher, 1991, p 215).

The world of genetic research continues to grapple with how to deal with the implications of gathering genetic information, including the fact those who are genetically related to research subjects can potentially be affected by the information that is discovered. Therefore, we cannot reasonably expect that the practice of journalism can adequately cope with such fallout. However, it is important for journalists to recognize that there is a relationship between coverage of genetic stories and consequences such as the future employability and/or insurability of the subjects of their stories, and if they are aware of this information they should discuss it.

So far in this chapter, it has been demonstrated that the standard journalism consent protocols are in and of themselves potentially harmful in that they are deceptive and violating of autonomy. Further, returning to Gormley's conception of privacy as being connected to our ability to control personal information and its impact on our lives (Gormley, 1992) and Marshall's depiction of privacy violations as potentially imposing "... feelings of defenselessness, and nakedness and fear and embarrassment, bewilderment, distress and emotional upset" (Marshall, 1988, p 149), it is possible to imagine that at least some of these consequences were experienced by at least some of the subjects of the CBC stories analyzed above. Barbara Harrison's father, Ana and Delaney, Arson Boy and his family and members of David Mercer's family may have lived through what Gormley and Marshall describe, once their stories were broadcast and information about them was disseminated and interpreted in ways that they did not anticipate (or in the case of Arson Boy and the Mercer men, perhaps they were not even aware that this information was going to be disseminated).

The examples from CBC radio also provided evidence that for journalism subjects the risk of harms ranges well beyond the psychological and emotional damage, to loss of livelihood, to criminal charges, to loss of employment, and to the removal of children from their homes. But can we claim that the broadcast of these stories caused the bad fortune in the case of Arson Boy, or increased the risk of harm to the Mercer Men, or the disabled girls in Ottawa? That is a challenging question. As Feinberg argues, it is often difficult “to distinguish between the cause of harm and the welter of other causal factors” (Feinberg, 1984, p 121). But the point of this thesis is not to prove harm, but to identify the risk of harm posed by the publication of personal information, and the likelihood that this risk was not communicated to the subjects in advance of the interviews, because discussion of potential consequences for subjects is not required of CBC journalists or any other journalists in Canada.

The analysis of journalism codes and practice guidelines offered in the previous chapter demonstrated that journalists claim a duty to protect and promote the public interest. In the next sections of this thesis, it will be argued that we must also claim a duty to protect our subjects from unnecessary harm, and that central to this duty must be an obligation to inform them about consequences of which they may be unaware. Finally, this position will be defended against charges that it runs counter to our duty to the public interest.

VII. DUTY

In moral theory, if there is harm, correlatively, there is a harmer; someone is responsible for causing that harm (Feinberg, 1984). But are journalists responsible for the harm that may result from their subjects participating in journalism stories if they (the

journalists) are aware of potential risks but fail to communicate this information to their subjects? Deni Elliott argues that since journalists willingly take credit for the positive impact of their work, they must also take responsibility for negative consequences. It is, according to Elliott, logically inconsistent to be the cause only when the consequence is positive and not the cause when the consequence is negative (Elliott, 1997, p 7). But if journalists do not intend harm to their subjects can they, and/or their editors and employers, be considered responsible for harms that visit their subjects as the result of their participation in a journalism story? In much of the liberal theory on harm, moral blameworthiness is highly correlated with intention. However, it should be argued that if a journalist knows that subjects are potentially confronting negative consequences of which they are unaware, and if the journalist fails to disclose this information, any later claims that she did not *intend* her actions to put the subjects at risk of harm should be discredited given her prior knowledge of the risks.

VIII. DUTY JUSTIFIED BY PROFESSIONAL OBLIGATIONS.

The work of Klaidman and Beauchamp supports my contention that journalists have a duty to prevent harm to their subjects and does so by applying the basic principles of negligence to the idea of harm in journalism practice. They argue that as professionals, journalists have a duty of care toward their subjects and if they fail in this duty, they should be considered responsible for any harm that results:

Anyone who is not sufficiently careful automatically invites moral blame as well as legal penalty for omissions as well as for actions. To be morally blameworthy, however, a harm must be caused by carelessness resulting from failure to discharge a socially, legally or morally imposed duty to care or behave reasonably toward others (Klaidman and Beauchamp, 1987, p 99).

Klaidman and Beauchamp justify their claim of a duty of care in journalism on the basis that the professional standards implied by a duty of care “are developed for persons possessing or claiming special knowledge, expertise, or skill” and that this applies to journalism (Klaidman and Beauchamp, 1987, p 99). Justifying any moral duty on the basis that journalists are professionals is, it turns out, staking the justification on highly contested territory.

According to the “father” of the literature on professions and professionalism, Michael Bayles, no generally accepted definition of a profession exists (Bayles, 1989, p 7; Bayles, 1981, p 28). However, Bayles does identify some basic characteristics of a profession: extensive training is required, the work involves a significant intellectual component, and it provides an important service (Bayles, 1981, p 28). These criteria do, it could be argued, apply to journalism. However, Bayles later added two additional criteria for a profession: significant monopolistic control over the provision of the services and entry into them, and generally not subject to public control (Bayles, 1989, pp 11-12). As journalism is not subject to educational or licensing requirements (the first of the two additional conditions of a profession) many argue that this disqualifies it from professional status (Coleman and May, 2004, p 276; Seib and Fitzpatrick, 1997, p 8; Olen, 1988, pp 29-30). The arguments over whether or not we are indeed a profession can become somewhat tedious; however, there is one important issue to consider in terms of the journalist-subject relationship: if we are professionals with a responsibility not to harm our subjects does this then imply that our subjects are in fact our clients? Coleman and May would argue yes (Coleman and May, 2004, p 277). And it would seem so do Klaidman and Beauchamp in their construction of a duty of care to subjects and sources.

However, this view is strongly rejected by many scholars and practitioners on the basis that it erodes journalistic autonomy and a duty to the public interest (Olen, 1988, pp 29-30).

As Isabel Aswad notes:

If a journalist had to classify themselves as professionals that treat their clients or scientists that use their subjects, they would have no choice but to classify themselves with scientists. Working for sources (i.e. doing public relations) contradicts journalists' appreciation for their independence from sources' interests. ... (Aswad, 2006, p 931).

There is, however, a way to justify the claim that journalists have a duty not to harm their subjects without getting mired in debates about professionalism and clients.

As Louis Hodges so eloquently expresses, and as briefly noted in the first chapter:

We owe it to others not to harm them. The roots of responsibility lie in the fact that we are both individual and social beings whose decisions and actions affect others. The very fact that we have the ability or power to affect each other deeply, either for good or for ill, requires that we act responsibly toward each other if society is to endure. The greater our power to affect others becomes, the heavier becomes our moral duty. (Hodges, 1986, p 16).

Few theorists, even libertarians, would argue that journalists lack the power to greatly affect their sources; therefore, regardless of an obligation to the public interest, journalism still remains obligated not to harm its subjects. In fact, as John Stuart Mill, in *On Liberty*, claimed, there is only one justifiable limit to freedom and that "... is to prevent harm to others" (Mill, 1859).

IX. THE SUBJECT VS. THE PUBLIC

Any claim that journalists have a duty to their subjects, however, must directly confront a powerful counter-claim: journalists' prima facie obligation to serve the public

must take precedence over all other considerations. Seib and Fitzpatrick pose the following question: "... to whom does a journalist owe his or her principal loyalty – source or public? Remove sympathy and the answer is easy: the public" (Seib and Fitzpatrick, 1997, p 147). The principle of a duty to the public interest is generally expressed as commitment to truth, accuracy, fairness, and holding the powerful to account. Imposing harm on subjects is generally considered justifiable if it serves these ends (Klaidman and Beauchamp, 1987, p 94; Elliott, 1997, p 6; Keiran, 1997, p 130). Jean Rafferty, reflecting the dominant view, takes the following position: "I believe that the primary duty of the journalist is to the story, and the wider audience, not to the person interviewed ..." (Rafferty, 2004, p 126). But as even Rafferty acknowledges, it is the journalist and her organization which usually get to define, on a story by story basis, just what is this public interest that is said to be at stake (Rafferty, 2004, p 127). Given that we live in a complex society with many publics and many competing interests, how is it that journalists and their editors can claim for themselves the right to determine what is, and what is not, in the public interest, and whether or not the information justifies imposing harm on subjects and sources? What particular skills and societal authority allow journalists to make these decisions competently and in a manner that reflects an attempt to harmonize many competing needs and values?

As Bok argues, the public's right to know, or serving the public interest, is often used as code "... to create a self-evident legitimacy which is not borne out by rigorous argument" (Bok, 1983, p 115). To counter this, Anita Allen offers several specific and limited categories of what the public has a right to know, and therefore publicizing this information legitimately meets the standard for serving the public interest. According to

Allen, included in the right to know is information that allows us to: monitor government, inspect government record, hear debate among members of the public, know enough about candidates to make an informed vote, monitor businesses' and nonprofits' use of public funds and impact on public welfare (Allen, 2003, p 75). As shall be discussed in the next chapter, many health and social issue stories (including the four CBC examples) meet at least one of these criteria, yet potentially harmful personal information about ordinary citizens often does not need to be included in order to adequately inform the public about these issues. In fact, in most social issue and health stories, advocates and experts can provide the same essential facts and information as do first-person subjects. The real tension here, then, is not so much between duty to the public interest and duty to the subject, but between the subject and good old story-telling. An expert or advocate, no matter how well-versed in an issue, generally does not provide the same opportunities for compelling content – get out your hanky, audience glued to their sets or to their newspapers variety – as do first-person narratives.

However murky and convenient is this notion of public interest or public good, it is still a vital principle, and not one that should be undermined. Yet, an obligation to inform potential subjects about possible consequences should not be viewed as in opposition to the public good, or more specifically to truth, accuracy and fairness; instead, it must be seen as operating in service of these same goals. Failing to disclose to a potential subject possible consequences of which a journalist is aware is failing to uphold the truth, to uphold accuracy, to uphold fairness and to uphold the public good.

Liberal theorists such as John Stuart Mill view the public in a democracy as an aggregate of individuals, each deserving of freedom from coercion, tyranny and

editorial censorship, and owed the right to be informed (Mill, 1859). The function of the media in this formulation of democracy, and according to many theorists and practicing journalists, is to facilitate individual rights and freedoms by providing citizens with a full range of information, opinion and debate. Today's media justify their existence by echoing Mill and emphasizing their role in informing and educating the public (Carey, 1997, p 236). The individual rights and freedoms that the media view as their duty to promote and protect are the same as those found in the four Kantian conditions of valid consent – voluntariness, alternativity, adequate information and therefore competence – merely articulated in a somewhat different vernacular. If protecting against the violation of these rights and freedoms is a foundational claim of the western media and their stated end, it is then logically and ethically inconsistent (not to mention hypocritical) to violate these very rights and freedoms (of ordinary subjects) as a means of achieving this end — that is, by withholding information, foreclosing choice, undermining autonomy, etc. Journalism's ability to in effect segregate subjects and sources outside of its duty to public interest, or the community, has allowed journalists to believe that we can harm the former without harming the latter when in fact this is often not the case (Awad, 2006, p 934).

X. CONCLUSION

What is being proposed in this thesis is quite simple: when a journalist is aware of potential significant consequences, there ought to be a duty to ensure that information is shared with inexperienced subjects. By doing so, both the individual and the community can be protected from unnecessary harm. Still, the duty to minimize, or even avoid, harm is not necessarily understood as a duty to inform about harm. A journalist

might suddenly decide that it is her duty to consider potential harms to her subjects. But if her obligation is limited to consideration of harm, and therefore does not require a discussion of harm, the journalist is then paternalistically deciding *for* the subject what is harmful to her, and what is not, and whether the imposition of these harms is justified. Making these choices for the subject, without her knowledge that there even exist harms to contemplate, is a clear violation of her autonomy and therefore is substituting one harm for another. Further, the journalist might unilaterally decide that her duty to minimize harm to her subject requires her to kill her interview/story. But this may not be what the subject wants, even after being briefed on possible negative consequences. Subjects in fact might be willing to expose themselves to a range of harms for a variety of complex reasons: to educate the public, to put pressure on a government about a particular policy, to get attention, to feel valued and so on. Therefore, the moral obligation to minimize or avoid harming others is not sufficient protection for subjects. In journalism practice, as in much of health and social science research, avoiding unnecessary harm should require first and foremost, disclosure of potential significant negative consequences, and then let the subject decide for herself her course of action. The potential subject in journalism then must be conceived of as not only a person with information to share, but also a person who is herself in need of information.

This chapter has illustrated how three direct harms — deception, violations of autonomy and invasions of privacy — are in fact enabled by the current standard of consent transactions in Canada. Strengthening consent transactions to be more protective of potential subjects will require that journalism reframe how it perceives deception, the journalist/subject relationship and privacy in order to better capture the way these direct

harms can be imposed on journalism subjects and can lead to further harms. A justification for a journalistic duty to subjects has been offered, one that is morally consistent rather than at odds with the duty to uphold the public interest. Lastly, it has been argued that a duty to inform about potential consequences is not a call to create a paternalistic relationship between the journalist and her subject; instead it is a declaration of independence. The next chapter will offer some theoretical direction for better consent protocols in journalism so subjects can be better prepared for consequences. It will also begin the discussion about how consent protocols might be implemented in journalism, and the inevitable shortcomings of any attempts to better protect subjects through better consent transactions.

Consent and Consequences: Journalists' Duty to Inform Subjects of Potential Harms

Chapter 4

Protecting the Subject and the Public: Strengthening Consent Protocols

I. INTRODUCTION

In the last chapter it was argued that journalism subjects are at risk of harm and often oblivious to their situation. This justifies a journalistic duty to inform subjects about any significant risks of which they (the journalists) are aware *before* the subject makes a decision about participation. This chapter will briefly critique possible theoretical frames through which stronger consent protocols in journalism might be developed. Utilitarianism and deontology will be rejected as too limited; an ethics of care framework will bring us closer to a workable set of principles but is still problematic in terms of practical solutions. Clifford Christians, in what he categorizes as a social ethics of duty, a theory that includes the works of W.D. Ross, will offer the best potential for a theoretical platform.

This chapter will then examine some of the practical issues involved in instantiating stronger consent protocols in journalism practice. These include what additional information needs to be disseminated through consent transactions to make them more protective of subjects, what are the alternatives to publicizing risky information, and what sorts of mechanisms could be used to instantiate and monitor stronger consent protocols in journalism practice. As part of this exploration, the four CBC examples will be revisited and tested against the suggested changes to consent protocols to assess whether or not we can continue to tell important stories with more exacting consent standards.

II. IDENTIFYING A THEORETICAL FRAME FOR THE DEVELOPMENT OF STRONGER CONSENT PROTOCOLS.

It is a challenge to locate a theoretical framework for consent transactions that offers increased protections to journalism subjects without at the same time unnecessarily curbing the essential work of journalism; that is, the work of delivering to the public stories that keep them informed about important issues. Traditionally, journalism has depended on utilitarian theory, with its emphasis on maximizing benefit for the greatest number of people, for justifying its values and practices. But as Christians argues, the weakness of utilitarian theory is that "... [a]sking only what produces the most good is too limiting. It does not cover the ordinary range of human relationships and circumstances. ... [It] renders irrelevant other moral imperatives that conflict with it ... leaving out whatever cannot be calculated" (Christians, 2007, p 120). In the last chapter, we saw this reflected in journalism's tendency to ignore the impact of journalism stories on journalism subjects.

Informed consent in health practice and health and social science research is, alternatively, largely justified by Kantian deontological (duty) theory, expressed as respect for the autonomy of others. Yet, a strict deontological approach relies exclusively on reason to identify right action which, as we saw from the feminist critique of Kantian ethics in chapter two, is faulty as it fails to recognize humans as relational beings whose decision-making processes necessarily call on faculties beyond reason. Further, deontology, like utilitarianism, assumes that each of us, if we submit to a governance of strict rationality, would arrive at the same conclusion, an assumption that ignores essential differences in power, race, gender and culture. Finally, a common characteristic

of both theories is that they are, as Christians terms it, “single consideration” theories (Christians, 2007, p 113) that lead to a narrow set of rules which can be, by their blinkeredness, potentially harmful. As Linda Steiner describes it: “[p]rinciples invite reflection, while rules exclude it. ... Even as general statements – perhaps because they are only abstract statements – ethical universals [central to both deontology and teontology] per se do not articulate moral solutions” (Steiner, 1997, p 65). As Nel Noddings proclaims, “... we need a social philosophy that will guide us, not prescribe for us” (Noddings, 2002, p 69).

An ethics of care gets us closer to a viable theoretical framework. As Christians expresses it, “reciprocal care and understanding — rooted in human experience and not in formal consensus — are the basis on which moral discourse is possible” (Christians, 2007, p 124). Nel Noddings contends that many tenets of liberalism, particularly the liberties of choice, so valued by journalists, should not be discarded under an ethics of care framework. Instead an ethics of care can create a richer, more positive view of what constitutes a liberal self, one that is not atomized but exists as part of a web of inter-dependent relationships (Noddings, 2002, pp 70-90) According to Noddings, an ethics of care embraces the concept of rights but views them as logically “... originating with needs” rather than reason (Noddings, 2002, p 53). Under Noddings’ construction of an ethics of care, then, we get a justification for disclosing known significant consequences to journalism subjects: their need for protection from harm bestows on them the right to be informed. This, in turn, imposes on the journalist the obligation to disclose potential consequences to subjects. Communicating this information is not a selfless act executed at the expense of the journalist’s interest in getting the best possible story, but an act

which enhances the social network to which the journalist belongs and is dependent on for her own well-being personally and professionally. It is this same social network that forms the public to which the journalist is also obligated to provide information: this time in response to the public need to keep informed about important issues which, according to Allen, translates into a right to know (Allen, 2003, p 75). Yet, the ethics of care literature offers little in the way of practical guidance on how to harmonize the needs and rights of individual subjects with that of the public.

There are two additional problems with relying on an ethics of care framework. First, being “in relationship” is not necessarily being in a positive place; it depends on the quality of the relationship. And even in a genuinely caring relationship, there can be a smothering, mother-knows-best quality to the care. There is a risk, then, with an ethics of care framework, of depriving the subjects of agency, of defining them exclusively as vulnerable and in need of protection, of making decisions *for* them, or even *with* them, rather than enabling autonomous decision-making. How would a model of care be constructed around a subject who is powerful, and in control? Does such a person need “care” or merely information necessary for decision-making? The second problem with this model in the context of journalism is that it, in practice, can be dialogic to an extreme. Dialogue is of course something to be valued. However, as Linda Steiner points out, under the traditional ethics of care schema, no solution can be reached until all the issues are addressed, various points of view are taken into account, and a determination is made about which are most relevant to the situation (Steiner, 1997, pp. 72-3). But as Steiner herself acknowledges, the downside to this rigorous, dialogic process is that “dialogue may not be sufficiently helpful to someone who needs to make a

decision” (Steiner, 1997, p 72). In the context of journalism, there must, realistically, be room for accelerated decision-making. It is because of these limits that I will ultimately reject relying exclusively on an ethics of care framework to inform strengthened consent in journalism.

Christians suggests journalism embrace what he termed a dialogic “social ethics of duty”, one that is broad enough to include feminist ethics and traditional notions of duty. As Christians argues, “a dutiful act itself fosters an integration of personhood with community. ... The self exists in dialogue with community — the community an organic whole in contrast to Mill’s atomistic aggregate. Duty is not obedience to formal law, but a dialogical self seeking through responsive relations a responsible fit with the total ...” (Christians, 2007, pp 121-122). Under this social construction of duty, the journalist and the subject act responsibly towards each other and towards themselves not necessarily because of reason, or because of “caring”, but because it is not only right, but it is necessary in our interdependent world. This is generally congruent with a feminist ethics of care but, as we shall see, a focus on duty can allow more room for the journalist to engage in practical but flexible decision making.

Christians argues that the work of early twentieth century philosopher W.D. Ross belongs in the category of dialogic social ethics of duty, as we can read into Ross a notion of duty that extends beyond the individual to the idea of communal duty (Christians, 2007, p 122). Ross’ work is additionally helpful as his understanding of right action encompasses more than reason: “... the presence of effective and instinctive emotions is by no means adverse to the operation of the sense of duty” (Ross, 1988, p 172).

Perhaps most helpful to journalistic decision-making is that Ross distinguishes between prima facie and actual duties. “Actual duties are those that emerge in specific circumstances, when one evaluates the competing duties at stake and determines which, in the case, should be acted on. ... Prima facie duties are broad and abstract; actual duties are specific and contextual” (Meyers, 2003, p 85). There are no a priori absolutes, no rigid use of rules that pre-determine course of action — something journalists tend to chafe at — and instead there is a reliance on wisdom, experience and intuition for adjudicating conflicting professional duties. The theory is also somewhat forgiving; it recognizes uncertainty, recognizes that it is impossible for humans to predict all possible outcomes when weighing our decisions. The obligation is to try, in each situation, to act according to what is believed to be right and to hope that this corresponds to that which is good (Meyers, 2003, pp. 84-94). And this should apply in instances where the time for decision-making is extremely limited. Under Ross, the answer to the question of whether our actual duty on any given story belongs more to the subject or to the public is this: it depends on the situation and the factors involved.

Utilitarianism and deontology have been rejected as guiding theoretical frameworks for journalism because they are too limiting. And ethics of care, under Noddings’ construction, moves us closer but does not readily lend itself to the context of time-sensitive decision-making. Applying a reading of Christians’ dialogic social ethics of duty to the work of W.D. Ross allows the greatest flexibility for making the best possible decision under the circumstances. Under this theoretical frame, journalists must consider their duty both to their subject and to the public, and then attempt to genuinely determine right action in light of these considerations. As a result, consent transactions

will, in many situations, necessarily involve more disclosure. What follows in the next sections is an attempt to address some of the questions that will emerge as practical issues around stronger consent protocols are confronted and the direction of right action is sought. As shall be illustrated, determining a journalist's duty is closely connected to determining what a subject needs to know, what the public has a right to know, and whether or not disclosing personal information about a subject is necessary in order to uphold this right.

III. STRENGTHENED CONSENT IN JOURNALISM: WHAT ARE THE PRACTICAL ISSUES TO CONSIDER?

It is important to begin with language. *Informed* consent is quite simply a requirement that consequences be discussed with, and that their implications be understood by, potential subjects. Yet, the term conjures uncomfortable images of clipboards and paper work, impractical bureaucratic processes and unnecessary limits on journalistic freedom. Strengthened consent protocols in journalism should resist the label of informed consent for these reasons. Further, a closer scrutiny of the term reveals that the words carefully chosen to signify a prima facie principle of respect for autonomy actually contradict that principle. The word *informed* is fine, but *consent* is problematic. It implies that the whole purpose of the process is to get to *yes*, that informed consent is a process to achieve *consent*. Conceptually, the idea of dissent, or saying no, is not included. A more critical view is that the term reveals a bias, or preference, that it is implicitly coercive, that refusing participation is rebellious, oppositional. Several health care organizations now use the term "informed decision-making" in lieu of informed

consent. This, however, does not necessarily mean that the decision-making strategies employed by these organizations are no longer coercive, no longer fixed on getting to yes. Alternatively, some might argue that by utilizing the term informed consent at least the motives of the researcher and practitioners are transparent, that is, the process is really about getting legal consent, whereas informed decision-making merely conceals the agenda. Preferring transparency over idealism, this thesis has settled on the acceptable, albeit far from satisfying, term of strengthened consent for journalism practice. It is making no claims that any new processes will meet the ideals of *informed* consent, nor is it pretending that in this case what is being analyzed is anything beyond the consequences of getting to yes.

What would a strengthened consent transaction look like? If the interview is recorded, and most interviews are these days, then oral consent should be considered valid. What sorts of discussions should the journalist engage in about consequences? Again, as Onora O'Neill, a British bioethicist concedes, "[f]ull disclosure is neither definable nor achievable" (O'Neill, 2002, p 44), particularly in journalism given that the potential subjects are usually strangers to the journalists. It is unfair and unrealistic to expect journalists to correctly identify and anticipate all potential harms (or even the most burdensome) that could descend upon their subjects as a result of their media participation. Journalists are human, after all, and human beings lack omniscience. Yet, in health care and social sciences, an inability to accurately anticipate consequences is insufficient justification for abandoning attempts to do so. O'Neill and other consent theorists (and the legal system) view the limited protection offered by consent protocols as preferable to no protection. The same argument can apply to journalism.

What can reasonably be expected is disclosure of any *significant* potential consequences, both positive and negative, of which the journalist is aware. This thesis has focused on negative consequences for the simple reason that during consent processes, journalists already do a very good job of selling the positive consequences of participation; what is needed is additional information about potentially negative consequences so the subject can weigh them against the positive. How much information needs to be communicated then? Klaidman and Beauchamp have a test for “substantial understanding” that could be adapted here for the journalism subject. The authors developed this test to address the question of how much information must the journalist provide her public in order to adequately inform them on a specific issue. They focus on the materiality of information, or its significance to effective decision-making around important issues (Klaidman and Beauchamp, 1987, pp 32-40). For journalism subjects, it makes sense to similarly focus on providing them with enough material or relevant information for them to make reasonably informed decisions.

If we return to the four CBC examples, we can begin to get a measure of what kind of information, and how much, might be required to meet the test of materiality. In *Once is Lost*, the documentary about the father with Alzheimer’s, this would require disclosure of the daughter’s intention to publicly criticize her father as a person and a dad. This disclosure should be made to both the father and his current wife who would legally be his proxy decision-maker. A further conversation needs to be had with the father’s proxy decision-maker about whether or not it is consistent with the father’s values to publicize the extent of his impairments for the positive benefit of humanizing and debunking some of the myths about Alzheimer’s. With *Ana Grows Up*,

conversations need to happen about the risks of disclosing the extent to which the mothers are struggling to provide for their children. I would also argue that the journalist has a moral duty to discuss with the mothers and the girls, after she has collected the tape, or even while she is collecting it, the potential consequences of disclosing suicidal feelings and self-loathing to a large audience. With Arson Boy, his diagnoses and medications should not be publicized as this is his private health information and he owns it. However, revealing that he is troubled and burned down the family barn is something the family could legitimately discuss on air, as long as they are aware that a public acknowledgement of arson can bring with it consequences. Given that the parents have gone public as part of an effort to regain their legal status as their son's parents, it could well be that this desire to go public would remain undiminished. Finally, there is Who Owns Life?, the tape-talk about genetic testing in Newfoundland. Realistically, consent cannot be gained from the implicated others (the 1,000 other men in the Mercer family); however, David Mercer should be reminded that insurance and employers may learn of this information through the broadcast.

How long would it take for the journalist to share this information for any of these stories? Not more than five minutes. It may take the potential subjects longer than this to make a decision – they may want to ruminate on the potential consequences and weigh them against the potential benefits – but given that none of these stories belong in the category of breaking news, extra time for decision-making should not render the story too stale to broadcast. Once the journalists have disclosed potential consequences, they can go on to the next phone call and story. They are not obligated to sit around and wait.

But what if strengthened consent processes, applied to any of these stories, resulted in refusal to participate, or refusal to talk about important aspects of the story? Is the journalist then failing to serve the public interest? To respond to these questions we must return to Anita Allen and the kind of information the public has a right to know. Allen's list again includes information that allows us to monitor government, the conduct of officials and candidates, government records, debate among members of the public, businesses' and non-profits' use of public funds, and issues that impact on public welfare (Allen, 2003, p 75). This last category should include important information about significant private interests and their actions regardless of whether they are funded by the government (for example, the actions of the big investment banks on Wall St. in the lead-up to the financial collapse of 2008).

All of the CBC examples, it could be argued, are about issues that affect public welfare, and therefore meet the test for the public's right to know. But, if these specific subjects never told their stories on air, could the public still be informed about the issues they represent? Yes. Finding a family dealing with Alzheimer's is, unfortunately, like shooting fish in a barrel these days. If Barbara's father backed out of the story, Barbara could not make her documentary, but this story could be told through other subjects and journalists. If Ana and Delaney and their families decided not to participate in their story, an alternative would be to look for a family that had already been forced to give their children to foster care because of lack of adequate funding. This removes the risk of the children being removed from their home because that harm has, unfortunately, already been imposed. In the story of Arson Boy, if the parents decided the risks of participation were not worth it, the vital issue of lack of resources for mentally ill

children and adolescents in rural Saskatchewan could still be publicized; so could the fact that the only way parents can get emergency treatment for their children is to make them wards of the state. There are experts and advocates who could present this information. Finally, the problems with genetic testing in Newfoundland could still be told by someone other than David Mercer should he have decided to back out. There are one thousand other Mercer men. And, the journalist could still interview the several local bioethicists and physicians who ended up playing a role in this story, and who from their own professional experience with protection of patient information, would be careful about disclosing too much identifying information about the family.

However, it is also very possible that the subjects would still agree to participate, although they may want to limit some of the information they reveal. I would argue that when dealing with particularly vulnerable subjects, facing significant risks, such as the disabled girls and their families, the journalist must be willing to invest more time in discussions about participation and that they not necessarily be considered front-end activities but instead be seen as ongoing. As Carolyn Anderson and Thomas Benson argue, "... [i]deally consent is processural, not contractual" (Anderson and Benson, 1988, p 84).

In other words, when there is a lot at stake, there ought to be room for subjects to change their minds. Cancelling participation or asking that certain comments be deleted does not necessarily require relinquishing authorship. Again, the subjects who are the focus of this thesis are not politically or economically powerful people being asked to participate in accountability interviews; they are largely subjects who can be described as "average citizens" (whatever average implies). If these subjects retrospectively recognize

that some utterance made to a journalist could cause them significant *unnecessary* harm, it is then wrong for the journalist to claim “too bad, you were on the record, you knew the tape recorder was running”. Allowing vulnerable subjects more control is equalizing the relationship, whereas the status quo allows the relationship to be too lopsided, in terms of power, toward the journalist. Richard Keeble quotes BBC documentary film-maker Richard Graef, whose films are usually on very sensitive topics:

The notion of any kind of collaboration evokes a kind of journalistic capitulation that would send shivers down the spine of many film-makers [and journalists]. But in our experience, the sense of collaboration allows the participants to keep their dignity not only during the filming – when they could ask for the camera to be switched off, or us to leave – but crucially during and after transmission. (Keeble, 2001, p 36).

It may be worth exploring more of these types of collaborations with highly vulnerable subjects.

But what if the story is an important breaking story, and the journalist is expected to post something immediately? The type of personal narratives that we are looking at as being potentially harmful if disclosed are generally not needed for communicating the basic facts involved in health and social issue stories. Rather these personal narratives add colour, texture, and sometimes depth to the stories. In other words, they are often used for follow-up stories that are focused on providing more context and meaning to the original news item. This lag should allow subjects more time for decision-making and journalists more time to look for alternatives. However, in situations where this is not the case, or in situations where there is time for decision-making but the journalist considers the subject’s story vital to the public interest: it is best to return to Allen’s list to determine the journalist’s duty. Using her criteria, journalists should evaluate whether or

not a particular personal narrative must be included in the domain of the “public’s right to know”. The journalist, along with her editors, can then determine whether there is enough at stake for the public to trump concerns about potential harm to the subject. A sense of proportionality should apply here: the greater the power a potential subject has to harm others, or a community, by the withholding of this information, the less we owe it to them to protect them from harm. If, for example, an investment banker is about to short sell stock that will bankrupt many nations and send the world into a major economic depression, then the potential financial harm to the subject by publicizing her intentions must be over-ridden by the potential consequences to the public if these actions remain private until after the fact. Most individuals with power, such as politicians and business leaders, it should be noted, do not need to be informed of the potential harms involved in their publicizing personal information because they already have considerable previous experience with the media, and have further been media trained to think about consequences before they speak.

IV. HOW TO IMPLEMENT STRONGER CONSENT PROTOCOLS

If consent protocols are strengthened in journalism, who drafts the codes, who oversees them and who decides whether or not a situation warrants an exemption are all issues that come into play. Addressing these questions requires that we first decide what sort of mechanisms should be used to develop and maintain any changes to consent protocols. Is it best for any new practices to be strictly voluntary, overseen by journalism peers at professional organizations such as the CAJ? Or should changes be mandatory

and instantiated through organization-based practice guidelines? Or should this task be delegated to politicians and civil servants through provincial and/or federal legislation?

Many journalists and theorists are concerned that externally imposed accountability mechanisms will undercut freedom of the press, particularly if they are government controlled. These fears may be well-grounded. For example, our current Prime Minister, Stephen Harper, has a well-documented contempt for the media and a tendency for iron-fist control of all things that he can bring under his jurisdiction.

John Merrill argues that the only means of achieving ethical behaviour is through internalized codes where we develop our own ethical standards to guide us, rather than relying on external sanctions to prevent inappropriate actions (Russell on Merrill, 2006, p 238). Howard Becker challenges this view:

The idea of finding moral people, or training them to be moral, in lieu of sanctions, just isn't workable. A system without sanctions fails to deter precisely those who most need deterring: people who are not moved by that logic or who, recognizing its validity, nevertheless find other considerations equally or more appealing. Appeals to morality simply do not solve problems of this kind, even when the principles are generally agreed to (Becker, 1988, p xvi).

Working with voluntary codes for professional organizations such as the CAJ or CBA is another possibility. However, voluntary codes, by their very nature, tend to lack teeth. But introducing mandatory codes for members of these organizations is not realistic. In 1923 the American Society of Newspaper Editors and in 1985 the Society for Professional Journalists both attempted to introduce mandatory codes. Both attempts failed on the same grounds: there was concern (a very real one in the case of the ASNE) that any attempts to punish members for violations of mandatory codes could end in

expensive lawsuits. The codes remained voluntary for these legally protective reasons (Smith, 1999, p 19).

In the current environment, the best way to move forward may be to put public pressure on media organizations to include in their mandatory guidelines the requirement that journalists inform subjects about potential consequences. The CBC is the logical place to start as it is already a leader in terms of consent protections for subjects in Canada. Further, as our public broadcaster, the CBC owes it to Canadians to conform to the highest possible standards when it comes to protecting members of the public from unnecessary harm. If the CBC can take a lead in this area, and publicize its actions, it may put pressure on other media organizations to adopt similar standards. Mandatory workplace guidelines are, admittedly, an imperfect solution as in any media organization the needs and interests of workers and owners must necessarily diverge, and new language introduced into practice codes risks becoming yet another tool to be used against what is, these days, a very beleaguered workforce. Abe Rosenthal, when he was editor of *The New York Times*, argued that codes should cover everyone in the journalism process, including owners (Smith, 1999, p 20). Rosenthal is onto something, but implementing this would be extremely problematic unless the codes were developed and monitored by an independent commission.

There is a possibility of introducing a small change in journalism consent transactions through legislation that would not interfere with the freedom of the press. The journalistic exemption in PIPEDA could be narrowed to include only journalism subjects and sources who are public figures and, conversely, fuller consent would be required for journalistic invasions of privacy for non-public figures. Second, strengthen

language on invading privacy without consent in provincial human rights codes. In both cases, the test of valid consent would be based on whether or not known significant potential consequences were disclosed, and understood, by subjects. Finally, we need to open up this discussion to the public. Just how much harm, and in what circumstances, should be considered allowable in the course of conducting journalistic work, is not something that ought to reside in the exclusive, walled-off domain of journalism organizations. Part of what motivated this thesis is concern that the journalism profession has largely claimed for itself the right to decide, in the name of the public interest, whom it can harm and how much. If in the public's name a risk of harm is being imposed on unwitting subjects, then the public ought to be brought into the conversation about how to deal with this issue. A public discussion on this issue could and should in fact be broadcast by the CBC.

V. CONCLUSION

This thesis began with a primary research question: during consent transactions, should journalists be obligated to inform prospective subjects of the potential consequences of their participation? What followed was an exploration of the evolution of informed consent practices in health practice and health and social science research, and a critical analysis of harm and duty in journalism theory and practice. Engaging with this material led to the conclusion that, yes, there ought to exist a journalistic duty to inform subjects about consequences. Justifying this position required the interrogation of an additional set of questions:

1. What can the development of more rigorous consent transactions between journalists and subjects learn from the historical development of informed consent in

health care practice and health and social science research? Despite all its failings, informed consent was developed in these professions in response to a pressing need: subjects and patients were at risk of harm and often unaware of the situation. The same, I argue, is true of many journalism subjects.

2. How should harm be conceived in the context of journalism? Journalists tend to resist the notion that their work can impose harm on their subjects and sources. A close examination of the risk of harm for journalism subjects, however, reveals that it does indeed exist, and that sometimes the risk can be considerable. Further, there is evidence that the subjects are often unaware of this situation.

3. What is the relationship between subject harm and journalistic duty to inform? In a civil society all citizens have the duty to prevent or minimize harm to others. Journalists are not exempt from this duty which, in the context of journalism practice, should be seen as including the obligation to inform potential subjects about the risk of negative consequences.

4. Can a journalistic duty to inform subjects about potential consequences be reconciled with the prima facie duty of journalists to serve the public interest? Yes. These two duties are generally interdependent, rather than oppositional. Subjects are part of the public, and any civil society is weakened by unnecessary harm imposed on unwitting and vulnerable members. Finally, most journalism stories that publicize the personal information of inexperienced subjects can be communicated to the public without these disclosures.

5. Should greater accountability to subjects during consent transactions be instantiated through the law, voluntary professional codes, mandatory professional

guidelines, or some combination of these? Instantiating strengthened consent protocols will be a challenging task. This thesis has identified a few areas where we can begin: with public discussion that, it is to be hoped, results in pressure on the CBC to strengthen its guidelines, and perhaps even lead to some adjustments to PIPEDA and provincial human rights legislations.

Where there is risk of harm there is duty: individual and communal. The risk of harm to journalism subjects has been exposed; it is time for journalism to embrace its duty to act in response. Stronger consent transactions will not rid journalism practice of the potential to harm subjects, but at least it might force awareness that the potential risk of harm does indeed exist and that journalists have an obligation to respond.

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