

ON THE RECORD: IS IT REALLY INFORMED CONSENT WITHOUT DISCUSSION OF CONSEQUENCES?

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Panel members: Meredith Levine (CHAIR), Kathy English, Esther Enkin and Julian Sher

A release goes out about a major new study linking increased reported cases of depression in young men to online gaming. A newsroom editor assigns a reporter with the command: "Get me a depressed gamer." The reporter does indeed find a young man through connections, sends him a text identifying her and her news organization and requesting an interview. He agrees to tell his story. The day after the piece is posted online and sent out on Twitter, the young man is called into his boss's office at the company where he's worked for five years as a security guard. His depression makes him a liability on the job, he's told as he's handed a pink slip. The young man did not anticipate his conversation with the reporter could have negative consequences.

This is a hypothetical but plausible story that raises many tough questions about consent transactions between journalists and non-expert subjects.

That's what the CAJ advisory committee discovered when we landed on the issue of informed consent, or, more specifically, on the methods journalists use to gain consent from their subjects and sources, especially those who are vulnerable and/or marginalized. We were caught between two really important competing values – serving the public interest and minimizing harm. Consent protocols felt like a rabbit hole that could undermine our ability to tell important stories.

Four panel members volunteered to take on the issue: Meredith Levine, a Western University journalism professor whose [thesis](#) focused on the issue- and three leading minds from the front lines of journalism practice – Toronto Star Public Editor Kathy English, CBC Ombudsman Esther Enkin and Julian Sher, Senior Producer for CBC's the Fifth Estate.

We began the discussion by posing five questions:

1. Does current media law on consent offer enough protection to subjects and sources?
2. How big a risk is there for bad things to happen to people because they are interviewed by journalists?
3. When it comes to vulnerable people, should journalists expand their role beyond public information provider to be advocate or caretaker?
4. How should we balance the principle of serving the public with the idea of minimizing the harm we impose particularly on vulnerable and marginalized subjects?
5. What proposals can we offer for doing a better job of consent with vulnerable and marginalized subjects?

As is perhaps to be expected, when views diverged, opinion split between the practitioners on one side and the educator on the other. As we explored further, though, the conversation began to shift. We read through and debated a set of arguments supporting strengthened consent protocols provided by Meredith Levine. And as journalists and citizens, we witnessed the increasingly horrific impact of social media bullying on young people. As a result, several members came to recognize that the simple construction of public interest on the one side and the needs of subjects and sources on the other failed to satisfactorily address the risk of harm participating in journalism stories may pose for inexperienced and vulnerable sources.

We remain committed to serving the public interest, but we have come to recognize the need to be mindful in our approach to sources, and that in an environment where every action and utterance can be magnified through social media, we must think about sources in a different way. The dialogue you are going to read here is an attempt to find a way that honours the value of public interest but is mindful of the potential harm.

Introduction to dialogue on consent

Under Canadian law the only information a reporter must disclose to a subject or source in order to obtain [legal consent to conduct an interview](#) and publish its contents is the reporter's name and that of their employer. This meagre consent requirement is not only legal but ethical according to the established norms of journalism practice which uphold a prima facie duty to the public interest. As

the American journalism scholars Philip Seib and Kathy Fitzpatrick argue, “To whom does a journalist owe his or her principal loyalty – source or public? Remove sympathy and the answer is easy: the public.” That’s a fair ethical standard when dealing with a media-seasoned public figure who understands what’s at stake before she opens her mouth, or presses send on an email or text. But does it need to be applied with more care and consideration when dealing with inexperienced, particularly vulnerable or marginalized (i.e. those without power or protection) members of society?

This question is being posed for one simple reason: sharing information with a reporter is not a risk free act. There is a range of potential consequences for subjects and sources. Not all of them are bad. Stories of personal struggle can lead to offers of financial aid and other kinds of help, support and attention. But negative things can happen too after these stories are published.

Subjects can end up feeling mild “source remorse” on seeing their words and life made public, or a stronger sense of public humiliation. More seriously, they could, as in the hypothetical scenario, lose their job, or get cut off from their insurance, experience strain on personal relationships and/or mental health problems.

In the online universe, the source may be subjected to ridicule or hostility in the comments that follow an online story or within social media.

Journalists with a few years of practice under their belt are indeed aware of the potential pitfalls associated with publicizing private information. Not every possible consequence can be anticipated or foreseen, but journalists often know more about these risks than do inexperienced subjects and sources. Yet we usually refrain from sharing this information. Yes, all of us – including subjects and sources – live in an age of social media, but most of us haven’t experienced firsthand a Facebook or Twitter flame-out.

Below is a discussion of this issue that offers some significant difference in perspective.

1. Does current media law on consent offer enough protection to subjects and sources?

Response from English, Enkin and Sher

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We believe journalists must take every step to respect our sources and our interview subjects, but we see legal minefields here in any requirement that goes beyond identifying ourselves as journalists.

We believe this requirement is sufficient in that subjects are clearly informed that they are talking to a journalist. It presumes that subjects have free will in deciding whether to open themselves to a journalist's request for information. When they are adults, interview subjects and sources can make their own decisions once informed of what we are doing.

Response from Levine

I agree with English, Enkin and Sher that the law is the wrong place to address the issue of subject consent in journalism. But I strongly reject the claim that current legal requirements adequately deal with the issue. Consenting to an interview with little information beyond the name of the reporter and their employer should not be characterized as making an informed decision, or as an exercise of free will.

Just because sources know they are talking to a reporter doesn't mean they understand that what they say could be published. Journalists know this is the way the game is played, but this isn't necessarily the case for the average citizen.

How many Canadians even know what the term "on the record" means?

My Western journalism colleague, [Paul Benedetti](#), worked for many years as a reporter with the Hamilton Spectator. He recalls that there were many times when reporting on a story, he'd call someone up, identify himself as a reporter with the Spec and start asking questions which were gladly answered. But at some point during the interview it would become apparent that the subject/source didn't understand that what they were saying could end up in the paper. They just thought they were having a chat with a nice person. This led Benedetti to alter his consent transactions to ensure the subjects/sources knew they could be quoted.

Response from English, Enkin and Sher

We agree with Levine – reporters should make it very clear that they are talking to someone for publication in a paper or online, and what the interviewee is saying may be used. But if you are working in audio and/or video, it is pretty clear that an interview is being recorded.

Regardless of the medium, providing the broad context of the piece you are working on and how this person fits into the story is good practice. It is also good practice to ensure that people understand that what they say will not subsequently be unpublished if they come to have second thoughts about what they reveal to a reporter.

We commend the approach of Chicago Sun-Times columnist Neil Steinberg. [In his 2013 book, *You were Never in Chicago*](#). Steinberg describes “The Speech” – “a little preliminary warning I deliver to people who might not be fully cognizant, who might not be factoring in all the consequences of publicity.”

Here is Steinberg’s “speech”: “You understand I write for a newspaper. That I’m talking to you because I’m going to put what you say into an article, which will appear in the newspaper, which people will then read.”

Response from Levine

I’m pleased that the gap between us is narrowing on this question. I think Steinberg’s speech moves the consent conversation in the right direction, but it doesn’t quite go far enough.

Before I get to “the speech,” though, I have to challenge your argument about audio and video consent. More and more these interviews are recorded on mobile, multi-use devices. How would the inexperienced subject know that the smartphone sitting on a stand next to the reporter is recording the conversation and that the reporter plans to use the material in a story ... that is, unless they were told so by the reporter?

Now back to Steinberg’s interview speech, free will and informed consent.

Even if subjects understand that they are being interviewed for publication (in any form), this doesn’t mean, despite what Steinberg claims, that they are then “fully cognizant” of “all the consequences of

publicity.” His speech merely describes the nature of the proposed transaction – an interview for public consumption – but says nothing about the potential impact on the subject’s life when the content of the interview becomes public, that is, it says nothing about consequences. Making a decision about giving an interview without being provided information about potential consequences cannot be characterized as anything other than acting blindly. That’s [why in health care, consent](#) without discussion of potential consequences is considered invalid, as failing to meet the standards of *informed* consent.

2. How big a risk is there for bad things to happen to people because they are interviewed by journalists?

Response from English, Enkin and Sher

In each of our more than three decades of experience, we have found the most serious consequences for sources to be a rare occurrence. While “source remorse” is indeed something most journalists are familiar with, serious life and death implications are not the norm, even for investigative journalists breaking stories of serious public interest.

Response from Levine

The truth is we don’t really know how often and to what degree bad things happen to journalism subjects because of participation in media stories. It is not standard practice to have ongoing contact with sources and subjects; the relationship usually ends once a story is published. I agree that the chances of a subject committing suicide over an encounter with a journalist are low, but there is research out there that indicates that disclosure of personal information by the media has been a factor in some suicides.* From this and other research and from conversations with journalists, media ombudspersons and public editors, it is clear that bad things do happen to journalism subjects and some of the consequences, like job loss or insurance loss, are both unanticipated and pretty significant.

Response from English, Enkin and Sher

While it's fair to say journalists do have little interaction with sources following publication of their stories, and likely can't know the full extent of consequences, we believe if something of consequence happened soon after publication, the reporter and/or news organization would likely know. Sources do contact reporters or public editors/ombudsmen if there is an issue of concern.

And we would further ask – how can we be certain of the cause and effect between publication of the article and the source's complaint or concern?

3. When it comes to vulnerable people, should journalists expand their role beyond public information provider to be advocate or caretaker?

Response from Levine

Journalists shouldn't transform themselves into social workers, risk experts or advocates for anyone. Our duty is to inform people, not to take care of them. Or to make decisions for them. But this duty to inform must extend to our subjects. They too are members of the public in need of information – in this case information from us about the possible impact of communicating with a journalist.

Response from English, Enkin and Sher

Journalists are not social workers. Our overriding [duty is to the public](#) and the public interest. It is of course important to think about the impact of our work on our sources but each situation will determine a unique answer. There cannot be a blanket solution.

4. How then do we balance the principle of serving the public with the idea of minimizing the harm we impose particularly on vulnerable and marginalized subjects?

Response from Levine

Let's be clear: 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, as Harvard philosopher Sissela 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.” Many journalism stories that use inexperienced and/or vulnerable subjects could still be told – the necessary information could still get out to the public – by using experts and advocates instead.

The real tension here, then, is not so much between duty to the public interest and duty to the subject, but between the vulnerable subject and good old storytelling. 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.

There is an absence of evidence that better informing subjects and sources will their reduce participation rates in media stories. Subjects might willingly 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.

Informed consent was imposed a few decades ago, despite much bitter resistance, on the work of anthropologists and sociologists. Follow-up research has demonstrated, though, that using informed consent protocols to recruit subjects did not lead to a decline in participation rates.

Response from English, Enkin and Sher

There are practical problems about how far journalists should go in informing sources of possible risks of talking to them. Where would journalists draw the line? What is the threshold for explaining consequences: that any interview might result in someone flaming someone in the comments section, or attract nasty tweets? What constitutes harm, and how can a journalist be responsible for determining that?

It would be disingenuous to suggest all journalists display sensitivity to their sources. Certainly, a great range of beliefs and behaviours toward sources exists among journalists and the news organizations they work within. Many journalists have been trained to believe that whatever any source says is fair game for publication or broadcast and give little thought to any consequences for sources.

In her 1990 book, *The Journalist and the Murderer*, writer [Janet Malcolm provoked much anger](#) and sparked widespread discussion among journalists for characterizing the journalist/source relationship as one of journalistic deception.

“Every journalist who is not too stupid or full of himself to notice what is going on knows what he does is morally indefensible,” she wrote. “He is a kind of confidence man, preying on people’s vanity, ignorance or loneliness, gaining their trust and betraying them without remorse.”

Referring to Malcolm’s thesis in his 1996 book, *News Values*, then Chicago Tribune publisher Jack Fuller [argued that expectations are key](#) to the ethics of the journalist/source relationship. “Both individuals go into the relationship with eyes open. Each has reason to respect and suspect the other. And each has reason to understand the nature of the game.”

Fuller made an important ethical distinction for journalists in how they deal with vulnerable people, not used to the media. “It is a different matter when the reporter deals with somebody who is unsophisticated, immature or otherwise vulnerable, or who does not understand the game,” he wrote.

And similarly [Robert J. Haiman in his 1999 report](#), “Best Practices for Newspaper Journalists” for the Freedom Forum Free Press/Fair Press Project, stated that “as a best practice, the news staff should consider whether it is fair to behave differently when questioning ordinary citizens unaccustomed to being interviewed than with people experienced and knowledgeable about the press.”

Empathy and sensitivity to sources has long been a journalistic value. Indeed we see this issue as central to journalistic fairness. And certainly all journalists have a duty to be fair. But determining how to be fair in gathering and presenting the news – to sources and to the public – remains a matter of journalistic judgment for individual journalists and their news organizations with the full understanding that any such judgments have an impact on the credibility of journalists and their organizations.

Response from Levine

Journalists and their editors engage in calculations almost daily on the issue of subject harm. Decisions are constantly made in newsrooms about whether or not to publish information that may

be upsetting or embarrassing to a source or subject, or potentially hurt them in some other way (risk of arrest, for example). And the measure is usually whether or not this information is in the public interest.

As my colleagues acknowledge, it is the journalists and their organizations that are defining, on a story by story basis, just what is this public interest that is said to be at stake. Given that we live in a complex society with many publics and many competing interests, how is it that journalists and their editors are left to determine among themselves what is, and what is not, in the public interest, and whether or not the information they would like to publish 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?

5. OK, we can't solve this. What do you propose we do?

Response from English, Enkin and Sher

This is an important discussion for journalists and critical to questions of journalism's credibility. We hope it leads to more individual and institutional thought and serious questioning about the values and norms regarding journalists and their sources, especially in regard to vulnerable subjects and those who have little experience with the media. At a minimum, news organizations should have a working understanding or definition of who "vulnerable" subjects are, and whether there are steps that should be considered before publicly identifying him or her and all of the information revealed to the journalist.

We recommend that news organizations take the time to deliberate on these questions and develop some guidelines and training for their news staff. As part of ethics courses in journalism school, it would be worthwhile to focus on this issue and the value of empathy in the relationships between journalists and vulnerable sources.

While we would resist any attempt to strengthen consent protocols in any formal manner implied by a "duty to inform," we believe some questions are worth exploring by journalists and their news organizations.

- Do we need to be more explicit to ensure sources understand they are on the record, i.e. what they say can be used?
- Is there a way that we can strengthen consent guidelines without choking journalism practice?
- Can we identify vulnerable sources who may merit different treatment? What are the criteria?

Response from Levine

I think these are excellent suggestions and questions, and despite the protestations of my colleagues, I do in fact believe, if seriously taken up by media organizations, they will lead to strengthened consent protocols. I'm not suggesting any of this will be simple or easy. The rapid pace of the news cycle, and the increased time pressures on reporters created by polypublishing, will often foreclose on opportunities for genuine dialogue with potential subjects and sources about potential consequences.

But if we limited our discussion of consequences to inexperienced subjects who journalists can reasonably perceive as at risk of significant harm, limited the process to verbal consent (journalists should be recording their interviews), and limited the time frame for decision-making, we just might be able to move our consent transactions in a more ethically supportable direction.

The truth is that journalists *do* engage in discussions about consequences with potential subjects and sources all the time, but we tend to keep those conversations focused on the potentially positive things that might happen for subjects if they participate in our media story. Perhaps the time has come to include acknowledgment, in the limited circumstances outlined above, of not only the potential benefits of sharing their information, but also some of the potential risks.

Over two decades ago, the [Danish Press Council interpreted](#) the language of that country's [Media Liability Act](#) to include the following directive: "Other people's confidence must not be abused. Special regard should be paid to persons who cannot be expected to realize the effects of their statements. Other people's feelings, ignorance or failing self-control should not be abused."

According to follow-up research, since introducing this language there has been no deleterious restriction of press freedoms. If anything, public confidence in journalists acting ethically has increased.

6. Final thoughts?

Response from Levine

John Stuart Mill described the public in a democracy is an aggregate of individuals, each possessing certain inalienable rights, such as freedom from coercion, tyranny and censorship. Key to the enjoyment of these basic freedoms was the right to be informed. Mill entrusted this key function of liberal democracy to journalism, which he felt should strive to provide all individuals with a full range of information, opinion and debate on issues vital to their well-being.

Today's journalists and their employers continue to echo Mill; the mission statements and guidelines from many media outlets describe their role as society's watchdogs, informing and educating the public. But if enabling public access to information is a core claim of journalism, how do we justify potentially undermining it when it comes to our relationships with inexperienced subjects and sources?

An obligation to inform inexperienced subjects about possible consequences should not be viewed as in opposition to the public interest, or more specifically to truth, accuracy and fairness; instead, it should 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. It is logically and ethically inconsistent (not to mention hypocritical) to withhold information, foreclose choice, undermine autonomy, etc. of subjects in the name of serving the public interest.

Finally, participating in a conversation about consequences not only protects subjects, it also protects journalists from unintentionally deceiving their subjects; holding back important information is deception.

Response from English, Enkin and Sher

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As Fuller tells us in *News Values*: “The crucial thing for journalists is to recognize that their trade does not exempt them from the basic moral imperatives that guide all other human relationships ...

“Pursuit of truth is not a licence to be a jerk.”

When dealing with traumatized or vulnerable people, it calls for a greater sensitivity and some reflection on whether the consent is truly informed and thought out. Like many journalistic endeavours, there are competing values. It is important to think it through in each case.

For example, [Jean Rafferty's](#) excellent essay in *Researchers and Their 'Subjects': Ethics, Power, Knowledge and Consent*. Or the more recent example of the [suicide](#) of transgendered golf club and con artist inventor who lied about who was outed [a Grantland article](#).