

## Chapter 8

# RACIAL JUSTICE VS. THE FIRST AMENDMENT: HOW FAR IS TOO FAR TO PROTECT PRESS FREEDOM?

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*With press freedoms under increased pressure from the judicial system and media under increased pressure to maintain credibility with the public, how far is too far when outlets push the envelope with the First Amendment? Co-editor Bill W. Hornaday explores this question through an incident that arose during the capital murder trial of a southeast Texas man in connection with the racially motivated murder of James Byrd Jr. in 1998. Does CBS News perform a greater service by violating a court order to turn over unaired portions of a “60 Minutes II” interview—thus protecting the rights of the press to keep the confidence of its sources? Or does it come from turning over material that even prosecutors admit has marginal value?*

In the First Amendment, nestled between provisions that protect the right to worship freely and peaceably assemble, it is stated that Congress shall make no law “abridging the freedom of speech, or of the press . . .”<sup>1</sup> For the uninitiated journalist, this is a cozy phrase, an enticing lure, an invitation from the Founding Fathers that seems almost too good to be true.

Well, it is. To begin with, freedom of the press applies only to those who command media outlets—generally publishers, private owners and public conglomerates—that ultimately decide what is reported and what is not. Yet control of those freedoms by their “owner”—the United States of America—also is implied where the Constitution declares: “The judicial power of the United States, shall be

vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.” Such power “shall extend to all Cases in Law and Equity, arising under this Constitution . . .”<sup>2</sup> Similar powers also extend to the states and districts in which a crime is committed.<sup>3</sup>

In short, this gives courtroom judges considerable authority over how they wish to conduct a trial. They sequester jurors. They change venues. They issue gag orders. They allow, or prohibit, cameras in the courtroom. They can clear the entire gallery and close the doors to all spectators—including the media—if they wish. And they subpoena evidence they consider crucial to a trial’s fair and truthful conduct and its outcome.

Media outlets usually share similar sentiments toward truth and impartiality. Yet their loyalties—indeed their very livelihood—lean more toward their ability to inform and educate the public than toward adherence to constitutional principles. To that end, the press eagerly uses the First Amendment as a tool to promote the free flow of information, which sometimes calls for protecting a known source’s anonymity (usually when lives or employment are in jeopardy) or some information that source provides that is not widely known.

Without such protection, actions designed to hinder press freedom—or even the fear of such repercussions or measures—might result in long-term obstacles in gaining hard-to-obtain information that can serve the public. When stories of this nature involve the U.S. justice system, they can lead to clashes between media outlets and the bench, as was the case in Texas during the last of three murder trials for the death of James Byrd Jr. The battle lines drawn in this particular clash also brought to light several considerations in the communitarianism vs. utilitarianism debate.

## CASE NARRATIVE

**O**n June 7, 1998, the dismembered body of James Byrd Jr. was found in front of a cemetery on a road near Jasper, Texas. His brutal death was one of the grisliest race crimes in U.S. history and reignited a national debate over how much racial tolerance has been achieved more than three decades after landmark events such as desegregation and the Civil Rights Act of 1964.

Jasper lies in an area of Texas that is branded, deservedly or not, with a reputation for racial hatred due to the presence of white-supremacy groups and some residents who historically have sympathized with such views. In 2003 alone, the Southern Poverty Law Center tracked 24 active chapters of the Ku Klux Klan in Texas, along with other hate groups such as neo-Nazis, neo-Confederates and skinheads.<sup>4</sup> This legacy dates to the late 19th century,<sup>5</sup> when Texas was among the

South's "most lynch-prone states."<sup>6</sup> Between 1889 and 1918, at least 355 people, mostly blacks, died in Texas mob violence. Even in the years just before Byrd's death, several southeast Texas cities saw these high-profile racial episodes:<sup>7</sup>

- Hemphill (1987): Loyal Garner, a black Louisiana truck driver, was beaten to death in the Sabine County jail. Hemphill's police chief and two county deputies eventually were convicted of murder, although one deputy's conviction was overturned.
- Mount Enterprise (1987): Troy Lee Starling, a 24-year-old black man, was fatally shot in the neck by a state trooper after a high-speed chase in Rusk County. The trooper was cleared but Starling's family filed a civil rights suit.
- Cleveland (1988): Kenneth Simpson, a black man arrested for stealing an ink pen, died in his jail cell after he struggled with white officers, who were eventually cleared in the death. The police chief resigned under pressure the next year. The pen was found atop a vending machine in the police station lobby.
- Vidor (1994): Civil rights groups sued the Ku Klux Klan, accusing the group of making threats to stop the integration of an all-white housing project.

Byrd, a black man, had been walking along the side of a county road at night when three men in a pickup truck pulled over and confronted him. First, he was beaten, then had a chain wrapped around his ankles. The chain was tied to the truck, which sped off and dragged him for nearly three miles.<sup>8</sup> Byrd's body ended up so badly mangled that his head and right arm were ripped off.<sup>9</sup>

Once authorities found the truck, they traced it to its owner, Shaun Berry, who was with two roommates—John King and Lawrence Brewer—on the night Byrd died.<sup>10</sup> Upon further investigation, all three were arrested and charged with capital murder. Brewer and King were tried first. Both were convicted and got the death penalty. In both cases, prosecutors asserted that Byrd's murder was staged to launch a new hate group known as the Texas Rebel Soldiers, a branch of the Confederate Knights of America that King and Brewer joined while serving in prison before Byrd's death.<sup>11</sup> But Berry was the only defendant to provide a police statement about the events that led to Byrd's death.<sup>12</sup> He told law officers—and "60 Minutes II" in an interview that aired shortly thereafter—that he only watched as Brewer and King beat Byrd.<sup>13</sup>

"I'm sorry to the Byrd family," said Berry, who told CBS anchor-reporter Dan Rather he feared for his own life and was guilty only of cowardice. "I'm sorry I didn't help James."<sup>14</sup>

This led to a dilemma that pitted "freedom of the press" against "justice for all."

When Berry's trial began in November, prosecutor Guy James Gray asserted

that Berry made inconsistent statements about Byrd's death. While Berry's attorneys insisted that Berry was not a racist, Gray claimed it was a ploy to help Berry dodge the death penalty.<sup>15</sup> To show Berry's alleged inconsistencies, Gray requested raw footage of Rather's interview, along with the presence of Rather and a CBS records custodian in court. He also wanted CBS producer Mary Mapes, who was present during Berry's interview, to turn over unedited tapes and a transcript of the interview.

Mapes' attorney Charles Babcock said the items were "the exclusive property of CBS" and that Mapes had no authority to personally turn them over.<sup>16</sup> Even if she did, CBS News President Andrew Heyward contended that "to turn them over to law enforcement can endanger a journalist's relationship with sources and hamper the ability to report freely and independently."<sup>17</sup> CBS further argued that footage of the Berry interview that did not air were the equal of a print reporter's notes and constituted confidential information. Mapes told State District Judge Joe Bob Golden that the transcripts were at her Texas home, but that she had never had the tapes and last saw them before Rather returned to New York from Berry's interview.<sup>18</sup>

Although Gray said he failed to understand why CBS would withhold "substantial evidence," he conceded that the transcript and tapes were not crucial to the state's case.<sup>19</sup> Of more importance, he said, was the need for a thorough prosecution.

"If you were trying a capital murder case," Gray asked, "wouldn't you want all the possible evidence you could get?"<sup>20</sup>

Golden twice found Mapes in contempt of court for failure to yield the tapes, and the Texas Court of Criminal Appeals declined to review the matter.<sup>21</sup> As a result, Mapes was ordered to report to the Jasper County Jail to serve indefinite time unless she came up with the tapes.

With journalistic and judicial interests now at a crossroads, their collision triggered a number of ethics-based questions:

- Was Judge Golden ethically justified in ruling Mapes in contempt and sentencing her to an indefinite jail term?
- Did Mapes and CBS act responsibly in withholding the material from Judge Golden?
- Most journalists understand the need to guard proprietary information that is not widely known or protect a source who requests anonymity, and how important it is not to break that trust. But how strong is a media outlet's interest in maintaining proprietary information once the source and the vast majority of the information in question already is publicly known?
- Should such information be guarded as vigorously as information or a source that

- is not widely known?
- If so, does any compromise in that stance threaten to erode the public's right to a free and independent press?
  - Can journalists abuse the First Amendment? Are there times when press freedom arguments are made more to attract attention to a particular media outlet than for the sake of the argument itself?
  - How far is too far when it comes to protecting sources or information?
  - Would media outlets be effective in reporting matters of critical public importance if sources or information were not protected?
  - Are media outlets in general as cognizant as they should be in realizing that newsgathering often means evidence gathering as well?
  - Are small or mid-sized outlets as well prepared as larger ones to deal with the potential legal issues that can arise?

As each of these questions swirl about the Jasper debate, within lies the central dilemma: Do Mapes and CBS comply with the judge's wishes? Or does Mapes go to jail on her company's behalf?

## FACTS

**B**efore surmising which outcome ultimately emerges—or making a snap decision on what Mapes should or should not have done—evaluate each of these dilemmas by pitting a utilitarian approach against a communitarian viewpoint through the use of the Pyramid Model.

This process starts with an outline of the basic facts of the case, which in this recap stand unaltered regardless of approach:

- James Byrd Jr. died violently in the presence of three young men;
- All three men were arrested and charged with murder;
- The case drew national attention because of its racial implications.
  - Byrd was black. The three suspects were white;
  - The case occurred in a part of the nation known for past racial hatred;
  - Prosecutors claimed Byrd's murder was staged to launch a new racial hate group;
  - Defendants John King and Lawrence Brewer had joined a white-supremacy group while in prison before Byrd's death.
- King and Brewer were convicted and sentenced to death by lethal injection;
- The third man, Shaun Berry, denied playing a direct role in Byrd's death.
  - He was the only defendant to give police details about Byrd's death;
  - He told law officers—and “60 Minutes II’s” Dan Rather—that he feared for his own life and was guilty only of cowardice as King and Brewer chained Byrd

- to Berry's truck and dragged him to his death;
- Prosecutors suspected Berry's statements were made to avoid the death penalty and sought evidence to prove their theory. Upon learning of Rather's interview with Berry, they sought unedited tapes and transcripts of the entire interview in an attempt to find inconsistencies with some of Berry's past statements;
- CBS objected to the request, arguing that compliance could endanger a journalist's relationship with sources and make it more difficult to report freely and independently;
- The judge in the case sided with prosecutors and ordered CBS to comply;
- CBS declined, prompting the judge to order CBS producer Mary Mapes to serve an indefinite sentence in county jail unless CBS changed its mind.

The rationale to create such a list is straightforward—to simplify the dilemma as much as possible by paring it down to its most basic facts. Of course, one may encounter any number of “side issues” that may add useful and even compelling perspectives. Under less formal approaches, the temptation—if not the tendency—is to let such observations either dominate or hold inordinate sway over the decision-making process, often at the risk of overshadowing or ignoring other key factors. By exercising patience and adhering strictly to the pyramid analytical model, these issues ultimately reemerge as principles, values and stakeholders within the case itself.

## THE UTILITARIAN PERSPECTIVE

**A**s the process enters its second stage and principles and values are examined, two philosophic approaches are apparent—the utilitarian viewpoint that most media embrace and the communitarian approach, which this book brings to bear.

### Principles/Values

Let's start with the utilitarian assumption. In the most basic of terms, the consequences of such an approach call for achieving “the greatest good for the greatest number” and an Enlightenment-rooted concept of individuality in which “the ends justify the means.” For CBS and the concerns it aired before the court, such an approach places freedom—as in freedom of the press—above all other principles in play.

The prosecution's request was not so much a judicial concern for CBS as a prevalent worry throughout the profession that press freedoms face a constant if not

expanding barrage from those who do not always find them in their best interest. Plenty of evidence exists to support such claims. For example, several initiatives by local, state and federal governments in recent years have restricted or tightened access to records that once were publicly accessible. Such efforts were in force well before—much less since—the “domestic security” concerns that arose following the terrorist attacks of September 11, 2001. Consider these observations by Chuck Lewis, head of the Center for Public Integrity, in 2003. His organization is a nonprofit, nonpartisan group that researches public policy issues such as information access:

There have been 300 roll-backs of the Freedom of Information Act since September 11th. All over America, at the state and local level, as well as the federal government. The Attorney General sent a message to every federal employee, when in doubt, deny any Freedom of Information request. We have other things like presidential papers being sealed off. We have reporters trying to cover things in Afghanistan being locked in a warehouse and not able to file their stories. Even before September 11th, we had one reporter’s home phone records seized by a grand jury without telling him or his news organization. There’s a lot of things happening with information, access to information, and efforts to stop journalism that I have not seen in 20 plus years of watching Washington and journalism and government interact. And it’s not just information. It’s not information for information’s sake. This is about health, safety, lives ... .<sup>22</sup>

It is also well known within the media industry that Rather, who also served as managing editor of CBS news operations, has long fought against the erosion of press freedoms. Since the mid-1970s, he has constantly warned that press freedoms such as source protection face gradual degradation due largely to legal precedents.<sup>23</sup> For example, if a certain type of press freedom is upheld in one particular ruling, a second ruling against that freedom in a similar or slightly different case possibly could be used as a successful legal argument against that freedom in a third case that mirrors the original.

If such precedents are allowed to pile up over time, it is feared that democracy itself may be diminished—a view based on the widely accepted premise that a free society thrives on a free press that serves a watchdog role.<sup>24</sup> As far back as the late 1970s, Rather noted this trend—as evidenced by the following passage—and urged media outlets to fight such assaults against press freedoms with equal or greater vigor.

I am eager to argue ... that such a right (protecting sources) is provided under the First Amendment. Not all newsmen agree. Some feel the issue is not big enough to make a stand on the Constitution, but falls more properly into the category of a lawyer’s

relationship with a client, or a doctor's with his patient .... For many years, journalists assumed that, in the end, the bench would defend this principle. But there is beginning to build a body of court cases that leave the issue as unsettled as ever.<sup>25</sup>

Stewardship falls next in priority, given the role that CBS assumed within the Byrd case. By electing to champion press freedom under a curious set of circumstances—essentially the protection of proprietary information even though its source and much of the content already was known—CBS found itself burdened with several considerations. Some were external. Not only could CBS' success or failure affect journalism as a profession, but the manner in which the network pursued the matter would register publicly as well—values that generally are moral in nature. Internally, CBS at some point acknowledged that the situation warranted a significant commitment of its time as well as legal and monetary resources—a choice that in turn triggered nonmoral considerations toward the organization's management. Within any corporation, much less a media organization, such sudden decisions can have a “ripple effect” that affects operations. Editorial personnel might be called away from assignments or spend less time on other projects because they are needed for the court case. Company attorneys might face similar diversions despite looming deadlines for other pressing matters. Financial considerations must be weighed as well. These can range from short-term costs such as outside counsel or travel and lodging to potential long-term effects on ratings, which can affect revenue and ultimately profits. In order to emerge under the best possible circumstances, CBS had to navigate these issues and others deftly and decisively—without question a rigorous exercise in stewardship.

In its pursuit of truth, CBS ultimately exhibited the same principle that prosecutors, the judge and most other parties in this case did—except that the perspective differs. CBS sought to ensure that future pursuits of truth and the avenues that allow it are as open as possible by fighting a potential erosion of trust between reporters and sources. For the justice system, the need exists for information that will allow it to expedite a murder case that already had taken a tremendous toll on the community and family members of the victim and the defendant. Certainly CBS recognized the importance for justice to be carried out. But its traditional media role as a watchdog of public institutions also called upon the network to see that this occurs fairly—that justice itself is not altered or misapplied outside the public's knowledge because the truth upon which it is based is withheld, delayed, misdirected or manipulated. Within the Byrd case, some might view CBS' actions as being at odds with its own mission. But as Rather's comments demonstrate, threats to press freedom are incremental—with fear of harmful accumulation over the long term. By taking short-term issue with the prosecution's request with the Byrd case, CBS hoped to promote its longer-term goal.

The principle of justice follows a similar path. CBS felt just as entitled to justice within its own legal circumstance as any other party with a stake in Berry's murder trial. Again, this is not to say CBS had no interest in justice concerning Berry's case or the justice system as a whole—as its aforementioned dependence upon truth demonstrates. Otherwise why interview Berry and air significant portions before a primetime audience, much less publicize the trial itself? It simply acknowledges that CBS is in the news business and—as a duty to its employees, viewers and other stakeholders—was obligated to address its needs above all others.

Because of such priorities, humaneness often takes a backseat under most utilitarian approaches. This case was no different. Fighting the prosecution's request and the judge's order could only delay the trial, which is hardly an outcome that applies to this principle. If any humaneness existed through this approach, it would be toward Berry—who CBS would be shielding if edited, unaired portions of the broadcast did contain key statements that were inconsistent with what Berry earlier told authorities. On the other hand, the same approach could work against Berry if the information CBS would protect could have helped Berry avoid the death penalty, yet somehow never came to light.

So far as values are concerned, duty, leadership and professionalism quickly come to mind. There was a concern within CBS that press freedoms were at stake and, for the greater good of all—the media, the public, the justice system, democracy and even the accused—someone had to take a stand. Given its role as a major news network as well as Mapes' employer, CBS, at least morally and perhaps nonmorally as well, had an obligation to support its profession and its personnel. A failure to do so would reflect poorly on its dedication to the profession and its people and potentially could erode morale among network staff. Not only could the network lose respect among its peers, employees and perhaps some viewers as well, the long-term effects could affect how aggressively reporters pursue stories for fear of being left “high and dry” by management if legal issues emerge. Profit making was significant as well for a simple reason. How can news programs retain viewership and value to advertisers—thus prove profitable—if reportage and content become “watered down” because sources no longer trust the media as a safe refuge to come forward with the truth? Truth telling also was a prominent value—both morally and nonmorally. It is one that both prosecutors and CBS share, despite disagreement over how it should be conveyed. While prosecutors contended that the “whole truth”—or at least what was available—could not be told in the Berry trial without CBS' tapes, CBS argued that forced dissemination of Berry's statements might hinder future efforts to obtain truth from some source who might fear being compromised or endangered.

At this point, an interesting question emerges. Do such disputes relegate truth

to a mere commodity—an ethereal, yet real construct to be bartered for or traded? Or should truth stand above debates and be available to all parties concerned, particularly if human lives are at stake?

## THE COMMUNITARIAN PERSPECTIVE

**B**y its very nature, a communitarian approach must embrace fairness to realize success. It must balance the interests of individual freedoms and those of a larger society while preserving as much as possible the integrity of all sides involved. At times, it gravitates toward solutions that benefit localities—parties directly affected by an ethical dilemma and often those in the immediate surrounding area—before the wider world beyond them. Sometimes this represents a “greater good” because those parties effectively constitute a majority, other times not. In either case, it constitutes a departure from a utilitarian approach, which might impose a uniform solution upon an entire group of people without due consideration of how isolated groups may be affected.

### Principles/Values

Within the Byrd case, in which fairness is a central issue, it should not be surprising that justice is a prominent principle. Above all else, justice must be done. The methods by which it is achieved might vary, yet it cannot be realized without truth, in this case an equally important principle. In contrast to the utilitarian approach, in which CBS would prioritize its own legal interests over prosecutors’ demands, a communitarian perspective would call for a meeting of the minds, or compromise of sorts. This would allow CBS to effectively make its case to preserve press freedom, yet work with prosecutors to assure that the end goal of “justice for all” is carried out. For such a resolution to be effective, the integrity of each side must be preserved in the communitarian spirit—or else both sides risk losing the public’s trust—and truth is a necessity. Without truth, integrity is lost. And without both, justice cannot truly be achieved.

It is here that freedom enters the fray. Freedom allows the communitarian flexibility rather than rigid rules to achieve resolution. Many times, such debates boil down to arguments of short-term versus long-term implications. For CBS, it requires an expanded approach—or freedom—to move beyond the restraints of an argument solely based on long-term repercussions on press freedom. Yet freedom works both ways as well. If integrity is to be engendered into the debate, prosecutors

must follow suit as well—at least within the guidelines of their official duties as public servants (a burden that the media ultimately does not share)—and consider the implications beyond the short-term resolution of a high-profile murder trial. If one or both sides fail to do this—if they fail to embrace the freedom of looking beyond immediate interests even when they purport such interests to be on behalf of the community they serve—a communitarian solution becomes difficult to achieve. Yet when both sides exercise such freedom as a problem-solving tool, they often find themselves striving toward the same goal—in this case truth and justice for all—thus establishing common ground from which to build a consensus. Because it often takes “two to tango,” it is this caveat that makes freedom a pivotal and often crucial principle in the communitarian process. If communitarianism has one weakness, it is the difficulty to achieve such a solution if the discourse that surrounds it tends to be one-sided. If CBS is to embark on such an approach, it is incumbent upon the network—in arguing its press freedom concerns to prosecutors—to do so in such a manner that facilitates future discussion rather than alienate prosecutors and make them less willing to work as “partners” toward a communitarian solution.

This necessity dovetails smoothly into the principles of stewardship and humaneness, which rely largely on how freedom is used. A decision by CBS to comply with the judge’s order might be seen as the act of a socially responsible network that has compassion for persons that a delay in the trial may affect or a fiscally responsible company that judiciously picks its battles. Yet a decision to defy the judge’s order also might be viewed as showing equal integrity—particularly where the First Amendment flag is concerned—by acting on behalf of the journalistic community and deciding that the monetary cost would be a worthwhile long-term investment. Although the community’s search for justice would be fostered in the short term and possibly the long term by obeying Judge Golden, CBS argued mostly long-term service by battling a potential degradation of press freedom. Because CBS cited only potential harm to press freedom—and not a clear-cut case—the argument may seem weakened. But so long as CBS made a defensible case for its actions and demonstrated they were taken in due consideration of all parties involved, its stance would be more acceptable than one that either does not meet those criteria or fails to explain them adequately.

In the Byrd case, values connected to a communitarian approach lean heavily toward truth telling as well as diplomacy and negotiation. As noted earlier, the debate over “short-term” compliance with the judge’s order in an ongoing murder trial, or “long-term” benefits for society by defending press freedom entail different perspectives—both moral and nonmoral—on truth telling. If CBS is to seek a communitarian approach to the problem, a consensus on truth telling must be

reached. To reach this consensus, diplomacy and negotiation become significant values to be recognized as well. Duty, leadership and professionalism are of similar importance in both utilitarian and communitarian models in that CBS, as a major network directly involved in the case, has certain burdens and expectations that reflect on its profession, its potential future and its standing within it. Given the intricacies that diplomacy and negotiations often entail, how they ultimately reflect on CBS' regard for its role within the journalistic profession makes such values even more critical in a communitarian model. Regardless of philosophic approach, the profit-making nature of media outlets and their potential motivation are ubiquitous and should not be ignored in either framework. Without profits, there can be no CBS, no "60 Minutes II" and no critical interviews of crucial figures involved in topical matters of public interest—much less disputes to be approached in a communitarian or utilitarian manner.

## Stakeholders

Within both models, the stakeholders in this case reside in a relatively confined universe. Although there are many ways one could organize or prioritize their standing, the circumstances that surround the dilemma faced by Mapes and CBS seem to place stakeholders into three distinct categories:

Primary: The chief adversaries within this debate clearly are CBS News (and other media that could find themselves in a similar situation) and the justice system. From a utilitarian standpoint, CBS would appear to have the most to gain or lose in that it initiated an action that it argues is in the public's greater interest—as well as its own. For the justice system, the stakes would seem slightly less in that compliance with a judge's order is a matter of course—and that noncompliance is an attempt to impede the judicial process. From a communitarian view, a strong argument could be made for the justice system having the most to gain or lose in that, whatever the outcome, the effects have a direct reach over all of society—including the media. In other words, to what degree would the justice system be undermined if it is seen to treat the media with more deference than others who dare to defy a judge's order? However, the media can make that same argument. If CBS is seen to capitulate in its pledge to protect sources—even if those sources already are known publicly and the relevant information is far less confidential than in cases that typically call for such protection—to what extent would it truly undermine future news gathering methods? This too could have direct societal reach. For example, what if corruption in the justice system itself were to occur at some point in the future? Would a ruling against CBS ultimately prevent

a key member of the justice system itself from coming forward as a whistleblower? Such a possibility, while seemingly remote, bears consideration nonetheless.

Secondary: Following CBS/other news media and the justice system as the dominant entities in this case are those parties most directly affected by their actions. From a utilitarian standpoint, these groups include the public-at-large (viewers in CBS' case)—which puts its trust in the media for reliable and useful information about the world around them—and the accused (Berry). It is CBS' contention that the case, to a considerable extent, speaks to the regard that the public (which includes potential sources) has for the media's ability to expose corruption or other sensitive information at minimal risk to those who yield such information. A news outlet is only as good as its sources and without them, the ability to serve as a watchdog or in other roles toward public benefit are diminished. For Berry himself, similar considerations are valid with the additional caveat that CBS' actions—or lack thereof—will have a far more direct effect on his fate. After all, it is Berry who is on trial in this matter. From a communitarian stance, one might place the community-at-large—the city of Jasper, the surrounding county, perhaps even much of southeast Texas—slightly above the public-at-large. It is the lives of residents in that area that have experienced the most disruption—in terms of severity and immediacy—during the murder trials and could benefit by minimizing delays such as CBS has presented. Beyond that, those same people also are part of the public-at-large, whose perceptions of media trustworthiness would carry similar concern through communitarian and utilitarian perspectives.

Tertiary: Additional parties that might have some significant stake in the case include current or potential advertisers from a utilitarian and communitarian viewpoint. Through the former, CBS likely would be concerned that advertisers might be turned off by its adversarial approach to the judge's orders. It also could be argued that if its worst fears are realized—and that an unfavorable decision makes it harder for CBS (or other media) to break news—that advertisers ultimately may choose other venues to communicate to the public. Through the latter, the potential polarization of some advertisers would seem less likely—at least in the short term—if the situation were to be quickly and amicably diffused. A utilitarian approach likely would give the community-at-large minimal consideration as a result of its relative size compared with other stakeholders, yet more than advertisers, who represent an even smaller group. A communitarian approach would place Berry at having the least to gain. Any material the prosecution obtains can only hurt his cause rather than help it under options that already are quite limited—life in prison or death by lethal injection.

## CASE RESOLUTION

Just before Mapes was to have reported to the Jasper County Jail, CBS surrendered a transcript of the full interview it conducted with Berry and posted it on its Internet site as well.

The decision to turn over a transcript rather than the tape itself acknowledges that a compromise of some sort was reached—one that largely met the aims of the court’s initial “comply-or-else” request. Because it met those aims, it seems the decision was largely communitarian in nature—although there remains room for some debate.

Why? Consider the remarks of CBS’ Heyward, who, according to a Cable News Network report, admitted in a prepared statement that his network had “exhausted every possible legal option” before submitting the material. This would seem to indicate a utilitarian intent—at least initially—until such a course proved impractical. The fact that a “greater good” for all sides was achieved by complying with the judge’s order would at first seem utilitarian as well—until it is noted that some compromise took place that allowed CBS to divulge only the transcripts.

Because some form of cooperation took place (likely grudgingly, based on Heyward’s comments) and because Heyward cites the principle of justice rather than freedom as “the most important aspect of the case,” a communitarian pathway seems to have prevailed—one that defused a potentially divisive situation and allowed the trial to proceed without significant further delay:

First, let us not lose sight of the most important aspect of this case. A heinous crime was committed, and, as citizens of this country, we believe those responsible must be brought to justice . . . However, we also believe that a crucially important principle was being threatened in this case: That a free and independent press is one of the cornerstones of a democracy. Journalists cannot be seen as tools of law enforcement or the judicial system. We believe that an attack on this principle is an attack on the First Amendment that can seriously hinder the public’s right to a free and open flow of ideas and information.<sup>26</sup>

Heyward conceded that CBS complied with the subpoena because no confidential sources or materials were involved, but attempted to place Judge Golden at the center of blame. “Defending that principle in this case,” he declared, “was not an easy task . . . The imminent threat by the judge to jail our producer, Mary Mapes, turned an important matter of principle into a media sideshow that diverted attention from the real story—the trial itself.”<sup>27</sup>

As for Berry, a jury found him guilty of capital murder—a crime that is punishable in Texas by death through lethal injection. Berry was spared death row.

Instead, he received a life sentence with no chance of parole for 40 years, by which time he will be 64 years old.

## ENDNOTES

<sup>1</sup>For this case, the author referenced John A. Krout, Arnold S. Rice and C.M. Harris, United States History to 1877, 8th ed. (New York: HarperCollins, 1991), 267. However, the text of the U.S. Constitution and its various amendments are widely available for review in printed and online formats.

<sup>2</sup>Ibid, 264.

<sup>3</sup>Ibid.

<sup>4</sup>Southern Poverty Law Center, “Intelligence Project: Monitoring Hate and Extremist Activity,” 2004 [Online]. Available at <http://www.splcenter.org/intel/>. Click the applet labeled “Hate Groups Map” on the left side of the page, then click the state of Texas when a United States map appears. When the state page appears, click the applet labeled “Ku Klux Klan,” which leads to a state-by-state list of Klan chapters active in the United States in 2003.

<sup>5</sup>*Handbook of Texas Online*, “Riots,” Joint project of The General Libraries at the University of Texas at Austin and Texas State Historical Association, 1997-2001. [Online]. Available at <http://www.tsha.utexas.edu/handbook/online/search.html>. Enter the word “riots” in the search box, then click the “search” applet, then click the title listed as RIOTS when it appears.

<sup>6</sup>Allan Turner, “Racial Hate Crimes Sordid Part of Texas History,” *Houston Chronicle*, 10 June 1998 [Online]. Available at <http://www.chron.com/content/chronicle/special/jasper/>. Click the applet labeled “The Reaction” on the main page, then click the top link titled “Jasper and Racism: Race Crimes Sordid Part of State History.”

<sup>7</sup>Ibid.

<sup>8</sup>Scripps Howard News Service, 26 October 1999.

<sup>9</sup>James Gunter, affidavit of probable cause, State of Texas and County of Jasper, 9 June 1998. [Online]. Available at <http://www.texasnaacp.org/jasper.htm>. See the links to the police report (scanned as images) on the main page. Each page of a seven-page copy of the affidavit is scanned individually.

<sup>10</sup>Ibid.

<sup>11</sup>Bryan Robinson, “Prosecutors try to subpoena CBS anchor Dan Rather in third Texas dragging death trial,” *Court TV*, 28 October 1999 [Online]. Available at [http://www.courttv.com/archive/trials/berry/102799\\_ctv.html](http://www.courttv.com/archive/trials/berry/102799_ctv.html)

<sup>12</sup>Gunter affidavit.

<sup>13</sup>Robinson, “Prosecutors try to subpoena CBS anchor Dan Rather ... .”

<sup>14</sup>Bryan Robinson and Clara Tuma. “Prosecutors face more of a challenge in third Texas dragging death defendant’s trial,” *Court TV*, 25 October 1999 [Online]. Available at [http://www.courttv.com/archive/trials/berry/102299\\_ctv.html](http://www.courttv.com/archive/trials/berry/102299_ctv.html)

<sup>15</sup>Robinson, “Prosecutors try to subpoena CBS anchor Dan Rather ... .”

<sup>16</sup>Associated Press, 29 October 1999.

<sup>17</sup>Reuters News Service, 29 October 1999.

<sup>18</sup>Associated Press, 29 October 1999.

<sup>19</sup>Reuters, 29 October 1999.

<sup>20</sup>Ibid.

<sup>21</sup>Court TV, “Prosecutors identify third dragging defendant as driver of truck for first time,” 10 November 1999. [Online]. Available at <[http://www.courttv.com/archive/trials/berry/111099\\_am\\_ctv.html](http://www.courttv.com/archive/trials/berry/111099_am_ctv.html)>.

<sup>22</sup>Public Broadcasting Network, “Transcript: Bill Moyers Interviews Chuck Lewis,” *Now with Bill Moyers*, 7 February 2003 [Online]. Available at <[http://www.pbs.org/now/transcript/transcript\\_lewis2.html](http://www.pbs.org/now/transcript/transcript_lewis2.html)>.

<sup>23</sup>Dan Rather and Mickey Herskowitz, *The Camera Never Blinks: Adventures of a TV Journalist* (New York: William Morrow & Co. Inc., 1977), 299-302.

<sup>24</sup>Ibid, 300.

<sup>25</sup>Ibid, 301.

<sup>26</sup>Cable News Network, “CBS turns over interview with murder defendant,” 10 November 1999. [Online]. Available at <<http://www.cnn.com/US/9911/10/dragging.death.cbs/>>.

<sup>27</sup>Ibid.

## ACTIVITIES/QUESTIONS FOR FURTHER ENRICHMENT

1. As an exercise to build familiarity with using the Point-of-Decision pyramid, revisit a couple of questions that served as a prelude to the “central dilemma” in the narrative portion of the case.

a. Was Judge Golden ethically justified in ruling Mapes in contempt?

b. Is a media outlet justified in protecting proprietary information -- particularly if the source of the information and majority of that information already is public knowledge? Students could be asked individually to weigh the merits from both communitarian and a utilitarian viewpoint, or be split into two teams -- one that takes a utilitarian approach and the other taking a communitarian approach.

2. The “facts” portion of the case warns of how side issues can be intriguing to those who weigh the considerations of an ethical dilemma, yet hold inordinate—and potentially dangerous—sway in weighing ethical dilemmas. This presents a pair of questions that students can consider:

a. Are there additional “facts”—in addition to the basic list the case author presented—that could prove useful in analyzing the case?

b. What are some examples of “side issues” that could be encountered when weighing an ethical dilemma? For example, if the judge has a history of adverse rulings against media outlets, is that a relevant “fact” that should be considered? Or is it merely a side issue that can cloud the examination?