



## Relocating the Press: Toward a More Positive Notion of “Freedom of the Press”

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In the last decade, the journalism industry has seen declining advertising revenues, stagnating circulation numbers, and a continuing trend of reduced support from the government in the form of lost tax breaks and subsidies (Cowan & Westphal, 2010; Newspaper Association of America, 2013). The workforce in traditional newsrooms has dropped nearly 30% in a decade (Jurkowitz, 2014b). These developments have led to extensive documenting of the troubles conventional newsrooms face (Anderson, 2013; Herndon, 2012; McChesney & Nichols, 2011; Ryfe, 2012) and dire predictions about the future of the newspaper industry: “[T]his onetime ubiquitous medium is in its death spiral” (McChesney, 2013, p. 172).

Yet while traditional newsrooms are under threat, online publications have grown in both size and number. During 2013, three high-profile journalists left legacy media organizations to found or operate their own online-only publications: Andrew Sullivan moved from *The Daily Beast/Newsweek* to his independent site *The Dish* (Sullivan, 2013), Nate Silver moved his 538 blog from *The New York Times* to *ESPN* (Allen, 2013), and Glenn Greenwald left *The Guardian* to start *The Intercept*, an online-only publication funded by eBay’s Pierre Omidyar (Greenwald, 2013). This trend continued in 2014, with Kara Swisher and Walt Mossberg leaving *The Wall Street Journal* to found the independent tech blog *re/code* (*re/code*, 2014) and Ezra Klein leaving the *Washington Post*’s *Wonkbook* to start *Vox* (Klein, 2014).

As digital publications expand, their newsrooms grow as well. The 468 digital institutions surveyed by the Pew Research Journalism Project for its “State of the Media 2014” report, most of which started in the last decade, “have produced almost 5,000 full-time editorial jobs” (Jurkowitz, 2014a). Although this amount is not enough to replace the jobs lost in traditional media, these institutions provide a plausible (though uncertain) way forward for a struggling industry.

However, these online news organizations vary widely and raise a variety of questions about the future of the industry. Online publications struggle to find sustainable business models, employing banner and native advertising, paywalls, subscription fees, and tip jars to raise revenues to support increasingly ambitious operations. Local coverage is threatened by the difficulties of producing geographically focused

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material for a worldwide medium. "Content farms" pump out thousands of articles every day, making it increasingly difficult to determine the quality and origin of online articles.

This burgeoning online journalism landscape has implications for one of the backbone of American society: the freedom of the press. While the First Amendment specifies that "Congress shall make no law . . . abridging the freedom of speech, or of the press" (U.S. Constitution), the question of who constitutes "the press" and the exact freedoms to which "the press" is entitled remains unclear.

The careers of Sullivan, Greenwald, and Silver highlight the current ambiguity between citizen and journalist. These writers are clearly members of "the press" at this point in their careers, but each of their current positions evolved from their work writing independent, individually authored blogs. Greenwald published a private blog "Unclaimed Territory" at blogspot.com for over a year before he moved to *Salon*, *Guardian US*, and then *The Intercept* (Greenwald, 2013, 2014). Silver rose to fame with his independent *538* blog during the 2008 election before being hired by *The New York Times* and then *ESPN* (Allen, 2013). Though Sullivan was already an editor at *The New Republic* when he started his personal blog *The Daily Dish* in 2000, the format he developed at that independent website has evolved across *TIME*, *The Atlantic*, and *The Daily Beast* to become his current independent site (Huey, Nisenholtz, & Sagan, 2013).

At what point did these authors transition from "bloggers" to "journalists"? When they were first paid to write? When they gained a following of a certain size? Or were they members of the press from the moment that they produced material for public consumption? Trying to parse their careers according to these metrics raises more questions than it answers. And this is more than just an exercise in semantics: Without a clear definition for what constitutes a "journalist," it then becomes impossible to extend the protections afforded to the press to all those who merit them. It leaves independent journalists like Marcy Wheeler, winner of the 2009 Hillman Prize in the "Blog" category<sup>2</sup> (Sidney Hillman Foundation, 2009b) uncertain about their standing under shield laws and allows for the imprisonment of Josh Wolf, a videojournalist who spent more than 220 days in prison for refusing to disclose video he recorded at an anti-G8 protest in 2005 (CBC News, 2007).

This article argues for a new conception of the press that aligns the legal definition of a *journalist* with the role of journalists in a democratic society. Rather than a definition based on medium of publication or income derived from journalistic activities (both of which are used to define shield-law protections in certain states), I argue that journalism should be defined not by the person producing the content but by the nature of the content itself. Regardless of who produces it, *journalism* should include two things: (a) information that educates or informs about public issues or figures, and (b) the intent to distribute that information to a public audience.

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<sup>2</sup> The Hillman Prize is awarded by the Sidney Hillman Foundation to honor "journalists who pursue investigative reporting and deep storytelling in service of the common good" (Sidney Hillman Foundation, 2009a).

A change in our conception of journalism will undoubtedly be contested (in both society and the courts), but locating journalism within the product rather than the producer represents a crucial first step in the development of a press freedom that positively enables a free and independent press to *flourish* rather than simply protects the existing press from undue government interference. This revision reflects the realities of the current landscape, where quality journalism can come from a newsroom or basement, from a lifetime reporter with credentials or an individual with the time and desire to inform fellow citizens.

The remainder of this article will explore the role of the press in a democratic society and use existing case law and theoretical arguments for the importance of the press to suggest a definition for the press that will promote journalism as a positive rather than a negative right, as defined by Salmond:

A negative right entitles the owner of it to the maintenance of the present position of things; a positive right entitles him to an alteration of this position for his advantage . . . The former is a right to retain what one already has; the latter is a right to receive something more. (1913, p. 201)

### **Press and the Judiciary**

For the first 200 years of the Constitution, the Supreme Court largely ignored the issue of a free press. As Stewart (1975) notes, despite intense debates about the role of the press in a democratic society around the country, the belief that the Bill of Rights applied only to the federal government kept many issues of press freedom out of the federal courts. Even after the passage of the 14th Amendment, establishing the applicability of the 1st Amendment at every level of government, relevant 1st Amendment protections were largely talked about in terms of "speech" rather than "press" until the 1960s:

The cases that came to the Court during those years involved the rights of the soapbox orator, the nonconformist pamphleteer, the religious evangelist. The Court was seldom asked to define the rights and privileges, or the responsibilities, of the organized press. (Stewart, 1975, p. 632)

Prior to 1960, the Court was reluctant to allow the idea of press freedom to be used as a shield against regulation when said regulation "ends in no restraint upon expression" (*Oklahoma Press Publishing Co. v. Walling, Wage and Hour Administrator*, 1946, p. 621; see also *Associated Press v. National Labor Relations Board*, 1937; *Associated Press et al. v. United States*, 1945).

The Court addressed press protections on two notable occasions, however, establishing the distinction between press and speech in case law. In *Near v. Minnesota*, the Court found that the freedom of the press was "within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action" (1931, p. 697), formalizing the restriction on "prior restraint" at the state and local levels. The closest the Court came to defining the parties entitled to protections under the press clause of the First Amendment came in *Lovell v. City of Griffin* (1938) from the opinion of Chief Justice Hughes:

The liberty of the press is not confined to newspapers and periodicals . . . *The press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion.* (ibid., p. 452, emphasis added)

In the 1960s, the Court started to clarify the negative rights established in *Near*, finding that the government could not exercise prior restraint of published materials or punish a publisher for the publication of lawfully acquired material (Cox, 1980). In the 1970s, however, the Court extended press protection to the gathering of information from the simple dissemination of that information to the public. This recognition began with the Court's finding in *Branzburg v. Hayes*, in which they found that "without some protection for seeking out news, freedom of the press could be eviscerated" (1972, p. 681). At the same time, Justice White highlighted the difficulties associated with press-specific protections:

Sooner or later, it would be necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper and mimeograph just as much as of the large metropolitan publisher. (*Branzburg*, 1972, p. 704)

Though moving toward more positive rights for data collection, the Court showed reluctance to push for positive rights in distribution. While their finding in *Red Lion Broadcasting Co. v. Federal Communications Commission* (1969) upheld the FCC's "fairness doctrine," which required broadcasters (using a "scarce resource which is denied to others" [p. 368]) to present equitable coverage of opposing sides of an issue to promote the "public interest," this requirement was not extended to all media. In *Miami Herald Publishing Co. v. Tornillo* (1974), the Court struck down a Florida "right of reply" law, finding that the potential interference with editorial decisions outweighed expanded access to the "marketplace of ideas" that the statute might have enabled.

The first positive and format-independent press freedom was established in *Richmond Newspapers Inc. v. Virginia* (1980), when the Court found that the press was entitled to trial information the Virginia Supreme Court had withheld. Justice Stevens celebrated the finding as "a watershed case" that marked the first time the Court had "squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever" (p. 582).

### **Press and Democracy**

Though the history of the press in the judiciary shows how "freedom of the press" has been interpreted in America, examining the arguments for the importance of a "free press" is crucial for developing a working definition of the phrase. This task is complicated by the fact that press freedom was disputed during the writing of the Bill of Rights: "Different individuals, holding different philosophies, placed different interpretations upon the broad concept of freedom of speech, press, assembly and petition" (Emerson, 1977, p. 38).

Thomas Jefferson argued that the way to promote a working democracy is

to give [the people] full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. (1787/1955, p. 49)

Stewart (1975) focuses on the ability of the press to keep tabs on legislators:

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the on the three official branches . . . The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. (p. 634)

Curran (2005) summarizes the vision of the founders much more succinctly: [T]he primary democratic tasks of the media are to inform, scrutinize, debate, and present" (p. 120).

Pickard (2010), meanwhile, looks to the post-World War II Commission on Freedom of the Press (the "Hutchins Commission") as a watershed moment for the role of the press in democracy. The recommendations of the Hutchins Commission included the rights of the audience in the American conception of freedom of the press, claiming that "freedom of the press can remain a right of those who publish only if it incorporates into itself the right of the citizen and the public interest" (Leigh, 1947, p. 18, as quoted in Pickard, 2010).

Though distinct, these views share a common thread: a "press" that serves a democracy will (critically) gather and present information about the governing institutions to the public and will do so to serve the public interest.

### **A Press Worth Protecting**

The concept of the press as a conduit for information is key and provides a point from which a more robust, positive freedom of the press can develop. Chief Justice Hughes' opinion in *Lovell* and Justice White's opinion in *Branzburg* (quoted above) highlight the difficulty of clearly separating out the press: Any definition of *press* has to be broad enough to encompass any "publication which affords a vehicle of information and opinion" (*Lovell v. City of Griffin*, 1938, p. 452) while not eliminating all distinctions between the freedoms of press and speech.

I argue that a primary cause of this difficulty is the temptation to locate the press in the wrong place. In its historic role as the fourth estate, the press has always been a collection of institutions, and the members of the press have been the people affiliated with those institutions. This definition is

increasingly untenable in the digital age. Where previously there were limited “vehicles of information and opinion” available to the general public, now anyone with an Internet connection and an idea can access an audience of millions. Open-access online news magazines allow citizens to reach these large audiences with little editorial review. Individual blogs can catapult writers from obscurity to punditry practically overnight. Hobbyists with day jobs, working on their own time, investigate the inner workings of government.<sup>3</sup> Citizen journalists blur the line between professional and amateur, if such a line ever existed.

Given the importance of a free and independent press in a democracy and the tendency toward monopolization in the current media industry, these should be welcome developments. More than ever before, we are approaching Justice Holmes’ “marketplace of ideas” in which all ideas can be aired and judged on their merits. But outmoded ideas about those entitled to the protections of the press prevent us from fully embracing freedom of the press as a positive rather than a negative right.

Inconsistent reporter’s privilege laws across the nation create uncertainty about what investigative reporting is and who is covered. Some states define a journalist by medium, others by the income they derive from reporting. Further complications arise from the absence of a national reporter’s privilege, allowing federal prosecution in some cases when state-level shield laws prevent the state from bringing charges against a journalist (see, for example, the case of California videojournalist Josh Wolf [“Free Josh Wolf,” 2006]).

These problems result from the definition of *journalism* as the work produced by a “journalist” or a “journalistic institution.” This approach is flawed, ignoring that which makes journalism worth protecting: the ability to convey information about public issues to a mass audience. The common thread shared by Jefferson, Stewart, and Curran is the importance of the press as a vehicle for information, and it is precisely that point from which any discussion of *press freedom* should depart. Qualification should be based not on medium or financial considerations but rather on whether the product produced conveys information for public consumption. This conception of the press brings the recommendations of the Hutchins report back into the discourse as well, seizing the press from institutions and returning it to the audience, for whom journalism should be produced and to whom the benefits of press freedoms should flow.

Beyond that, determining eligibility for press protections based on whether content was meant to inform the public rather than on who produced it recognizes the frequency with which non-journalistic and journalistic endeavors appear together these days. It would allow courts to extend press protections to individuals posting on open-access news-magazine platforms without necessarily extending protection to the entire site. Most importantly, it would encourage the burgeoning citizen-journalism industry by establishing clearer (and more broadly applicable) eligibility for protections, allowing citizen journalists to pursue their own investigations with less fear of government reprisals.

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<sup>3</sup> For example, Marcy Wheeler (of [www.emptywheel.net](http://www.emptywheel.net)) started her career as a blogger while writing a book and won the 2009 Hillman Award for her coverage of the war on terror and the Scooter Libby trial in 2007 (emptywheel, 2013).

This is not a proposal for a final definition of what constitutes a reporter; rather, it is the beginning of a rethinking of the press that starts us down the road to a more complete conception of what we as a society want from journalists. But it is a radical rethinking, and it requires an almost complete annihilation of entrenched ideas about the press.

Any operationalization of this new schema will have to originate in legislatures and courts through laws that bring eligibility for press protections into the modern age (recognizing the varied media in which journalism can be produced) and case law that determines how these laws are to be interpreted and implemented. In both cases, a new vision for the press would engender debates about the public benefit and the lines between reporting and libel, as these issues would likely become murkier before they became clearer. But these decisions can borrow from the long history of institution-based press protections while extending those protections to reporters who might not have been eligible before and providing an environment in which journalists of all stripes can educate the public about the complex modern world.

Although this approach would represent an important first step toward a robust free press that helps serve the goals of a democratic society, it provides only the framework in which that press can develop rather than a final, perfectly realized vision of a democratic press. As Hindman (2008) notes, the "democratization" of the press online has done little to change existing power structures in the media landscape: Print journalism has long been dominated by educated white males, and the blogosphere as it exists now more often reproduces this hierarchy than upends it. Also, the press freedom described here will not prevent a restructuring of the legacy news industry as companies struggle to deal with declining advertising dollars and committed readers. But expanding the ranks of journalists to include all those interested in producing information for the public good can unleash underrepresented voices and remind readers of the value that a robust press can provide to society. And while freeing journalists from reliance on advertising-supported media platforms may entail a painful transition for the industry as it exists now, it also reduces the worrying amount of influence that those advertisers have on content (see Baker, 1994).

Though journalism is undergoing a painful transition, within this transition lies the chance for a stronger press than ever before: a press that can withstand the economic pressures of corporate interests because its members are so diverse as to make it impossible to influence all of them; a press that can bring a million viewpoints with varying level of expertise to bear on every issue, approaching the marketplace of ideas that Justice Holmes envisioned. But doing so requires a radical rethinking of what makes the press: both the actors that comprise it and the material that society wants it to produce. A press that locates journalism within the product rather than the producer is a step in that direction.

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