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## THE PRESS AND DEMOCRATIC DIALOGUE

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Professor Sonja R. West has missed what it is that makes the press worthy of special treatment.<sup>1</sup> She describes the press as a subset of speakers who perform “unique constitutional functions.” She identifies these as “gathering and disseminating news to the public and providing a check on the government and the powerful.”<sup>2</sup> But the case for resuscitating the press clause cannot rest on that claim, because the press is not unique in performing those tasks.

There is nothing unique about the press as a news-gatherer. Most of what the press reports is information gathered by others. This is true of reporting by newspapers, television, magazines, and online news sites.<sup>3</sup> Most crime reporting relies on information gathered by the police, prosecutors, or defense attorneys, or collected in the course of judicial proceedings. News about more complex forms of wrongdoing — securities scams, collusive bidding, fraudulent bank dealings, anti-competitive business practices — is usually uncovered by government regulators or investigators. Information about fires, floods, and natural disasters comes from fire officials, law enforcement, and disaster-relief entities. News about the economy is gathered mainly by entities like the Federal Reserve, the Commerce Department, the Labor Department, and the stock exchanges. A great deal of news comes from scientists, economists, medical researchers, and other experts who report the results of their studies. News about demographics, lifestyles, fashions, and spending habits comes from vital statistics offices, the census bureau, and industry and trade groups.

To be sure, the press often adds value — for example, by making the information more easily digestible, or by adding historical or comparative perspective.<sup>4</sup> Journalists often provide expertise, skepticism, and institutional memory. Some of the news-gathering done by others occurs because the press is there to give it an outlet: an agency gener-

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<sup>1</sup> See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

<sup>2</sup> *Id.* at 2437 n.22. Professor West can’t be faulted for attributing this description of the press’s “unique constitutional functions” to the Supreme Court. *Id.* at 2443–44. But the Court doesn’t claim that the press performs unique constitutional functions; when that is the claim, more careful consideration of those functions is required.

<sup>3</sup> By definition, it is true of the many online news sites that merely aggregate the news reported by others.

<sup>4</sup> Consider, for example, “It was the fourth murder in the neighborhood this year;” “A study by another group of scientists reached a different conclusion;” “This was the third consecutive quarter of employment gains.”

ates a report because it seeks the publicity the report will attract or a prosecutor collects information about the suspect's background because the press seeks it.

Of course, in addition to reporting information gathered by others, the press reports news that enterprising journalists uncover through their own efforts. This is one of the ways the press serves as a check. Investigative journalism exposes venality, waste, or inattention in government, business, education, health care, sports, and other human endeavors. Our history is full of instances in which enterprising journalists have performed valuable public service. But increasingly, as staffs and resources of "legacy media" are decimated, the functions formerly performed by investigative journalists are being performed by other entities — not just by Wikileaks and whistleblowers, but independent organizations like the Center for Public Integrity<sup>5</sup> and the National Security Archive, which have the expertise, resources, and staying power to investigate subjects that are too massive or impenetrable for journalists.

The press also serves as a watchdog, providing what Justice Stewart called "organized, expert scrutiny of government."<sup>6</sup> But the press is rapidly abdicating that role — closing Washington and statehouse bureaus, withdrawing reporters from Congress and federal agencies, and reducing coverage of city halls and courthouses. The metaphor of a "fourth estate" sitting in the reporter's gallery keeping an eye on the three branches of government has diminishing contemporary relevance. The watchdog role has been largely ceded to interest groups; the watchful eyes of the National Rifle Association or the Sierra Club are more likely to provide a check on public officials today than those of the press.

The press was once the essential disseminator of news, but no longer. Everyone who gathers news now has the capacity to disseminate it to the public directly. But the ability to disseminate is not the same as the ability to engage an audience, and this is where the press's distinctive value lies today. The press creates communities in which democratic dialogue can occur. Without some core of shared information and common purposes, there can be no meaningful discussion of public issues. If bowling alone is sad, talking alone is pathological.

There are other ways to connect audience and news, of course, and non-press entities are ready and willing. Providers like Google are very good at delivering news selected solely based on the reader's pre-

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<sup>5</sup> A reporter for the Center for Public Integrity won the 2014 Pulitzer Prize for Investigative Reporting. See *2014 Pulitzer Prize Winners in Journalism, Letters, Drama and Music*, N.Y. TIMES, Apr. 14, 2014, at A19, archived at <http://perma.cc/T9SW-4NFK>.

<sup>6</sup> Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

viously demonstrated interests. Many legacy media are also rushing to embrace “personalized news.”<sup>7</sup>

But a polity in which citizens are attentive only to their individual interests is not a polity at all. It is like a town meeting with no moderator and no agenda; freedom of speech may be maximized, but to no common purpose. Democracy requires dialogue, and dialogue requires some agreement about the subjects to be discussed. What the press does, usefully though not uniquely, is organize public dialogue. News outlets sift, select, and package the news, and in so doing create a community among people who share the outlet’s conception of news sufficiently to subscribe, tune in, or click.<sup>8</sup>

This is exactly what some people most dislike about the press; they view the press as an elite deciding what the public agenda should be. That’s what it is, of course; website operators or news directors or editors decide what to give their audience, constrained only by their own editorial judgment and the need to hold (or expand) the audience. But that’s the way organized society works: school boards decide what children should learn, universities decide what to offer their students, preachers decide what spiritual nourishment their flocks require.

I don’t claim that the press is the only entity that can organize democratic dialogue. Political parties serve some of the same functions; interest groups and religious organizations may do so also. Undoubtedly other mechanisms will evolve in the brave new world of communications technologies. But for now at least, the press is the principal organizer.

Freedom of religion is analogous. Organized religion is by no means the only source of the values that the religion clauses protect. When the Framers chose to protect freedom of conscience by protecting freedom of religion, it was not because religion does anything unique. There are other sources of spirituality, other guardians of morality, other belief systems. But in the eighteenth century, the church was the obvious and principal keeper of those values. We continue to give religion special constitutional protection, and deny it to these other keepers, because religion is the one the Framers told us to protect.

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<sup>7</sup> If this concept of journalism becomes the norm, it will confirm Judge Alex Kozinski’s view that news organizations “are no different from any other entrepreneurs, except maybe that their products are so much more dispensable.” Alex Kozinski, *How I Stopped Worrying and Learned to Love the Press*, 3 COMM. L. & POL’Y 163, 174 (1998).

<sup>8</sup> The closest Professor West comes to appreciating this is her acknowledgement that the press “serves a gatekeeping function by making editorial decisions regarding what is or is not newsworthy.” West, *supra* note 1, at 2444. That view of the press’s function is too limited. The press is not just a gatekeeper; it is a full participant in public dialogue, identifying issues, originating ideas, and critiquing the ideas of others. Its guide is not just newsworthiness, but its members’ own values and perspectives. The press is an institutional actor in democracy. For the latest of many recognitions of the press as a democratic institution, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 144–173 (2013).

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Like the press, religion is hard to define. Religion now takes many forms the Framers could not have contemplated. By singling out the spiritual source most familiar to them, they succeeded in preserving a sphere for spirituality and freedom of conscience. It may not be commodious enough to protect all whom we might include if we were starting from scratch to protect havens for the spirit and conscience, but it sets aside large tracts where the state is not allowed to meddle. Similarly, the press clause need not protect all who now serve functions that might be thought of as press functions, but it is important to protect at least some of them.

One of the obstacles to recognition of the press clause is the habit of thought instilled by the speech clause jurisprudence. We have become so attached to the idea that all speakers must be treated equally that we have trouble imagining a right that protects a constitutional value without protecting all who serve it. But we can and should think differently about the press clause.

Another difficulty we have in identifying the press for constitutional purposes is that we started two hundred years too late. The meaning of religion for First Amendment purposes has evolved gradually, one decision at a time. The meaning of the press needs to also develop incrementally; it is unrealistic to expect its constitutional meaning to emerge full-blown.

The case for enforcing the press clause is not dependent on any belief that the press is unique. Insisting that there is something unique about the press invites rejection of demands for enforcement of the press clause: thoughtful skeptics look for functions that the press performs uniquely, and if they find none, they conclude that there is no need to activate the press clause. It is enough that the press is one of the entities that usefully serve these functions, and is the one the Framers saw fit to recognize. Protecting them all would be impossible, and protecting none would be intolerable.

My difference with Professor West may seem like a quibble. I am as certain as she that the press clause was intended to have, and should be given, constitutional significance.<sup>9</sup> The protected entities under my vision of the press might not be much different from those under hers. But that is not the point; we will never reach that question if the claim for recognition of the press clause is based on the easily refutable claim that the press performs unique constitutional functions in gathering and disseminating information and checking power. The stronger case for constitutional protection of the press rests on its role as an organizer of democratic dialogue.

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<sup>9</sup> See generally David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455 (1983); David A. Anderson, *Freedom of the Press*, 80 TEXAS L. REV. 429 (2002).