“People Who Aren’t Really Reporters at All, Who Have No Professional Qualifications”: Defining a Journalist and Deciding Who May Claim the Privileges

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Abstract: In July, a federal appeals court ruled that a New York Times reporter must testify in the criminal trial of a former CIA officer accused of improperly disclosing classified information. In May, the DOJ confirmed it had obtained months of phone records of AP reporters and a “portfolio of information” about a Fox News correspondent. Criticism from the press and public was swift, and in response, the administration attempted to reassure the press that it would not be conscripted into the service of law enforcement. President Obama urged Congress to reintroduce a federal shield bill that would allow reporters to refuse to testify about their sources. The bill’s fate is uncertain, and it has generated a debate about the definition of a journalist. Innovations in technology have created new channels for people to communicate, complicating the effort to define a journalist. This article explicates the concept of journalist, drawing from the scholarly, legal, and industry domains. The authors hope to contribute to the ongoing debate about who may claim the legal privileges for journalists.

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“PEOPLE WHO AREN’T REALLY REPORTERS AT ALL, WHO HAVE NO PROFESSIONAL QUALIFICATIONS”: DEFINING A JOURNALIST AND DECIDING WHO MAY CLAIM THE PRIVILEGES

Jonathan Peters & Edson C. Tandoc, Jr.

INTRODUCTION

On July 19, 2013, two members of a three-judge panel for the U.S. Court of Appeals for the Fourth Circuit ruled that New York Times reporter James Risen must testify in the criminal trial of a former Central Intelligence Agency (CIA) officer accused of providing classified information to Risen.1 The opinion made clear that reporters do not have a First Amendment right to refuse to testify in criminal proceedings about their confidential sources.2 Notably, the Fourth Circuit covers Maryland and Virginia, where most national security agencies, such as the Pentagon and CIA, are located.3 Thus, if the decision stands, it could have a major impact on reporting about national security matters.4

1 United States v. Sterling, 724 F.3d 482 (4th Cir. 2013).
2 “There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source.” Id. at 493.
4 Id.
The case revolved around Risen’s 2006 book *State of War: The Secret History of the CIA and the Bush Administration*, which included a chapter about a CIA operation that inadvertently could have helped Iran develop nuclear weapons. Jeffrey Sterling, a former CIA officer, was accused of being Risen’s source and indicted for the “unauthorized retention and disclosure of national defense information,” in violation of the Espionage Act. When federal prosecutors subpoenaed Risen to testify in the Sterling case about his source, Risen refused. The subpoena expired in 2009, but more followed, eventually prompting a district judge to rule that Risen enjoyed a limited reporter’s privilege not to testify about certain source information. “A criminal trial subpoena,” the judge wrote, “is not a free pass for the government to rifle through a reporter’s notebook.” Federal prosecutors appealed to the Fourth Circuit, which, as noted above, held that Risen must testify. Since then, Risen has “vowed to go to prison rather than testify … and to carry any appeal as far as the Supreme Court.”

Needless to say, the Fourth Circuit’s decision came at an awkward time for the Obama administration, amid a heated national debate about the Department of Justice’s (DOJ) approach to leak investigations. Some sixty days earlier, the DOJ confirmed it had obtained months of phone records of Associated Press (AP) journalists while investigating the source of an AP story about a foiled terror plot. AP chief executive officer Gary Pruitt called the seizure a "massive and unprecedented intrusion" that provided the government a “road map to AP’s newsgathering operations.” One week later, the DOJ confirmed it had obtained a “portfolio of information” about Fox News correspondent James Rosen while investigating the source of a Fox story about nuclear tests in North Korea. The DOJ characterized Rosen as a criminal co-conspirator in order to obtain the “portfolio,” which included personal emails and records of Rosen’s visits to the State Department. Fox News executive vice president Michael

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5 Id.
6 Sterling, 724 F.3d at 488.
7 Savage, supra note 3.
10 See generally Sterling, 724 F.3d 482.
11 Savage, supra note 3.
14 Id.
16 Id.
Clemente said he was “outraged” and that Fox would “defend [Rosen’s] right to operate as a member of what up until now has always been a free press.”

Criticism of the DOJ was harsh and swift, and it came from all directions. Rep. Darrell Issa, R-Calif., chairman of the House Oversight and Government Reform Committee, said the DOJ “had an obligation to look for every other way to get [the information] before they intruded on the freedom of the press.”

Sen. Patrick Leahy, D-Vt., chairman of the Senate Judiciary Committee, said, “The burden is always on the government when they go after private information, especially information regarding the press or its confidential sources . . . I am concerned that the government may not have met that burden.”

Floyd Abrams, the First Amendment lawyer who won the Pentagon Papers case, said, “Accusing a reporter of being a criminal . . . for doing nothing more or less than asking questions of a government official about classified material . . . and to see certain documents, that’s what’s normally called journalism, not espionage.”

In response, the Obama administration took steps to reassure the press that it would not be conscripted into the service of law enforcement or, as one commentator put it, “dragged into a mass hunt for government leakers.” Attorney General Eric Holder announced in July, before the Fourth Circuit handed down its Risen decision, new guidelines to make it more difficult for DOJ lawyers to obtain reporters’ information.

And the administration is pushing for a federal shield bill that would allow reporters in some cases to refuse to testify about their sources.

President Obama asked Sen. Charles Schumer, D-N.Y., to reintroduce a shield bill that Schumer had pushed in 2009 called the Free Flow of Information Act, negotiated between the journalism industry and the White House. The
The bill had passed the Senate Judiciary Committee with a 15-4 vote in December 2009, but as it awaited a floor vote in 2010, controversy over WikiLeaks’ publication of classified documents caused some members of Congress to cool off, and the bill never received a vote. In a statement reintroducing the bill, Schumer referred to the seizure of the AP’s phone records, saying, “This kind of law would balance national security needs against the public’s right to the free flow of information. At minimum, our bill would have ensured a fairer, more deliberate process in this case.”

Whether or not that is true, the bill, co-sponsored by Sen. Lindsey Graham, R-S.C., would create a balancing test for a court to use before compelling disclosure from a reporter. The test would take into account the public interest in disclosure and in maintaining the free flow of information, with the balance favoring disclosure if the government can show that disclosure might help prevent a terrorist attack or other acts likely to harm national security. Originally, the bill defined a journalist entitled to invoke its protections as a person who has a “primary intent to investigate events and procure material” to inform the public by “regularly” gathering information through interviews and observations, then disseminating that information to the public. In addition, the person must intend to disseminate the information at the start of the newsgathering process.

But legislators quickly disagreed on the definition, debating its breadth, flexibility, and specificity. Sen. Dianne Feinstein, D-Calif., at one end of the spectrum, said, “[T]he current version of the bill would grant a special privilege to people who aren't really reporters at all, who have no professional qualifications.” She said the bill should protect only “real reporters” who earn a salary, and she introduced an amendment to that effect. Schum er, at the other end of the spectrum, said, “The world has changed. We’re careful in this bill to distinguish journalists from those who shouldn’t be protected . . . But there are people.


26 Savage, supra note 24.

27 Id.

28 Id.


30 Id.

31 Id.

32 Id.


35 Irby, supra note 33.
who do real journalism in different ways than we’re used to. They should not be excluded.”

Ultimately, lawmakers compromised when Schumer crafted an amendment defining a journalist as a person employed by, or in contract with, a news outlet for at least one year within the last twenty years or three months within the last five years; a person with a “substantial track record” of freelancing in the last five years; or a student journalist. The amendment also covers “a person whom a federal judge has decided should be able to avail him or herself of the protections of the privilege, consistent with the interests of justice and the protection of lawful and legitimate newsgathering activities.” With those changes, the bill passed the Senate Judiciary Committee on September 12 by a vote of 13-5, sending it to the Senate floor.

The conceptual issue here is that the last 10 years have seen huge swings in media-consumption patterns, and innovations in technology, from mobile applications to the Internet, have created new channels for people to communicate with mass audiences. That has complicated the effort to define a journalist, an issue relevant under not only federal shield bills but also under the federal constitution, state shield statutes, state retraction statutes, and press credentialing policies, all of which contain language defining a journalist. Some definitions are broad enough to include bloggers and citizen journalists, while others are narrow enough to exclude them. It is time to consider this issue systematically by explicating the concept of journalist.

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36 Jackson, supra note 34.
38 Id.
39 Id.
42 Notably, in an editorial in its September/October 2013 issue, the Columbia Journalism Review reminded readers of Professor Rosen’s belief that the question “What are journalists for?” is one that “society must ask itself periodically, as times change and the demands on and of journalism change with them.” What Is Journalism For? A Range of Perspectives on the Question, COLUM. JOURNALISM REV., Sept./Oct. 2013, at 26, 27, available at http://www.cjr.org/cover_story/what_is_journalism_for.php. The editors went on to say that “[n]ow is one of those moments. Everything about our profession is up for debate. Congress is arguing about the definition of ‘journalist’; startups are experimenting with new business models and ways to deliver news to a mobile audience; people all over the world who don’t call themselves journalists are using social media and smartphones to record, broadcast, and comment on news.” Id.
Concepts are the building blocks of theory, and concept explication is a research method “concerned with the disciplined use of words.” It assumes that concepts, which people use to organize everyday experiences, can be linked to observations of those experiences in the real world. If a concept is not explicat-ed thoroughly, then the theories it produces—and the legal rules it produces—will rest on a weak foundation. As Professor Chaffee wrote, “Explication is quite different from other forms of definition. Its purpose is as much to strip away surplus meaning . . . as it is to uncover possible meanings . . . [T]he goal in explication is to center upon one meaning for the . . . context in which the researcher is working.” Thus, concept explication is the process through which (1) abstract concepts are systematically linked to observed variations of those concepts in the real world, and (2) scholars specify precisely what they mean when they use particular terms. Embedded in that process is the articulation of indicators (which indicate the presence or absence in the real world of the concept being studied) and dimensions (which are groupings of indicators that represent a facet or specifiable aspect of a concept).

This article centers upon one meaning of the word ‘journalist’ for legal purposes, drawing from the scholarly, legal, and industry domains. Although law review articles have discussed the problem of defining a journalist for legal purposes, none has used the process of concept explication to do so. For the scholarly domain, we reviewed academic works that defined a journalist or otherwise discussed the characteristics of a journalist. For the legal domain, we reviewed case law and statutes that defined a journalist or otherwise discussed the characteristics of a journalist. For the industry domain, we reviewed definitions of a journalist contained in the membership criteria of journalism organizations. In short, we explored the dimensions and indicators that others have used to define a journalist, and we used them to articulate a descriptive definition that reflects how the three domains define a journalist. We do not offer a normative definition, but we do offer normative comments on the descriptive definition.

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44 Id. See also Jack M. McLeod & Zhongdang Pan, Concept Explication and Theory Construction, in THE EVOLUTION OF KEY MASS COMMUNICATION CONCEPTS HONORING JACK M. McLEOD 4 (Jack M. McLeod & Sharon Dunwoody eds., 2005).
45 CHAFFEE, supra note 43.
46 Id. at 72.
47 See CHAFFEE, supra note 43.
48 See id. at 51–62.
I. SCHOLARLY DOMAIN

The field of journalism and mass communication is young compared with fields like psychology and sociology, and it lacks uniform definitions of its core concepts. For example, a review of popular dictionaries in the field yielded no definitions of journalism, journalist, or objectivity. Against that backdrop, our survey of the scholarly domain, in which we reviewed academic works defining a journalist or otherwise discussing the characteristics of a journalist, uncovered a number of dimensions of the concept, namely: medium, hierarchy and activities, outputs, social roles, and ethics.

A. Medium

We searched for references to journalists in the early scholarly literature dating back to the early 20th century, and we found only obituaries of prominent newspaper reporters admired for their work outside the industry, such as their passionate speeches, documentation of dialects, and essays on pronunciation. The obituaries were published in speech-communication journals, many years before Professor Schramm founded the first communication research institute at the University of Iowa. However, a 1938 editorial in the Washington Times criticized the growth of American journalism schools, saying journalism could be learned by being a journalist; the editorial equated journalism education with “learning the newspaper trade.”

In 1970, Professor Steinberg observed that historically “the rise of journalism was identified solely with print.” That view persisted for years, even af-

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51 WARREN BOVEE, DISCOVERING JOURNALISM 1–14 (Greenwood Press 1999); see also, Barbie Zelizer, TAKING JOURNALISM SERIOUSLY: NEWS AND THE ACADEMY 13–45 (Sage 2004) (examining the different ways in which “journalism” is defined by academics, educators, and journalists).
52 Id.
53 See ROGERS, supra note 50.
54 Chas F. Lindsley, Henry Woodfin Grady, Orator, 6 Q. J. SPEECH EDUC., no. 2, 1920, at 28.
55 M. M. Mathews, Mrs. Anne Royall as an Observer of Dialect, 2 AM. SPEECH 204 (1927).
56 See generally Kemp Malone, Fay on Pronunciation, 2 AM. SPEECH 322 (1927).
58 President Hutchins on Journalism Schools, 22 MODERN LANGUAGE J. 640 (1938).
ter the coming of radio and television. A survey in 1977 comparing PR practitioners with journalists included no definition of a journalist, other than a person “working for daily newspapers.” But over time conceptions did change, and today journalism is not “understood as residing in a particular medium,” even if most journalists identify “with the medium to which they devote most of their time and from which they derive the greater part of their income.”

In this vein, it is useful to review more modern surveys of journalists and how the researchers identified their populations and samples. In a 2006 study of American and German journalists, for example, the researchers noted the difficulty of defining a journalist in the digital era. For their survey of American journalists, the researchers used registers of online journalists to identify their base population, ultimately selecting members of the Online News Association. However, for their survey of German journalists, the researchers struggled to identify their base population because of a “lack of listings and registers for online journalists” in that country. In the end, they identified the German base population by using a multi-step approach developed by Professor Scholl.

The Scholl approach requires the researcher (1) to distinguish journalism from other forms of mass communication, such as public relations or the arts, (2) to focus on organizations that provide content for print, broadcast, and online, and (3) to identify roles related to journalism. Notably, Scholl’s approach allows for the triangulation of certain characteristics of the concepts of journalist and journalism, rather than making one characteristic, such as medium, conclusive.

In a series of surveys published in 2006 comparing online and print journalists in the U.S., Professor Cassidy chose respondents based on a traditional definition developed by Professors Weaver and Wilhoit: individuals responsible “for the preparation or transmission of news stories or other information—all full-time reporters, writers, correspondents, columnists, photojournalists, news people and editors.” Professor Cassidy modified that design to include print journalists who worked “on the print edition of a daily

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60 Id. at 78.
62 Ugland & Henderson, supra note 41, at 255.
63 Bovee, supra note 51, at 29.
65 Id. at 174.
66 Quandt et al., supra note 64, at 174.
newspaper” and online journalists who worked “on the online edition of a daily newspaper with the job title editor, producer, or reporter.”  

B. Hierarchy and Activities

It may be unclear what makes a person a journalist, but to Professor Havemann it is clear what does not make a person a journalist: “The journalist ceases to be [one] if he cannot find an editor to print his product, and the editor soon ceases to be an editor unless the product finds an audience that is willing to pay for it.” In other words, a journalist is situated in a hierarchy of people and processes called “gatekeeping,” a theory used to understand message production in films, books, music, plays, and news. The process begins with a “communication worker” who creates a message out of an event that passes through gates—layers of copyediting and story selection—before publication or non-publication. Thus, the focus on gatekeeping locates journalists in an organization.

The nature of their work within the organization is of great importance, and references to journalistic activities are common in studies discussing the characteristics or work of a journalist. Professor Gans believes “how journalists choose the news cannot be fully understood without considering how they report and write, or film, their stories.” Similarly, Professor Johnston believes journalism is “the process of gathering, selecting, interpreting, and disseminating news.” And whatever the journalistic activities may be, Professors Weaver and Wilhoit believe employment undergirds them. The population of their earliest survey of American journalists, for their 1986 book The American Journalist, included “all salaried full-time editorial personnel employed by daily and weekly newspapers, news magazines, the news services, and the news departments of radio and television stations.”

However, a newer body of research and commentary has made the case that employment is not necessary. That body focuses on participatory and citizen

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69 Cassidy, supra note 67, at 12–14.
70 William F. Woo, Defining a Journalist’s Function, 59 Nieman Reps. 29, 33 (2005) available at http://www.nieman.harvard.edu/assets/pdf/Nieman%20Reports/backissues/winter2005.pdf (“At its core, the functional definition of journalism is much like the functional definition of a duck. If it looks like journalism, acts like journalism, and produces the work of journalism, then it’s journalism, and the people doing it are journalists. Whoever they are.”).
73 Id. at 40.
75 Donald H. Johnston, Journalism and the Media 2–3 (1979).
76 Weaver et al., The American Journalist: U.S. News People and their Work, supra note 40.
77 Id.
journalism, as defined by Professor Rosen: “When the people formerly known as the audience employ the press tools they have in their possession to inform one another.” Put another way, citizen journalism—sometimes called “guerilla” or “street” journalism—relies on citizens to play “an active role in the process of collecting, reporting, analyzing, and disseminating news and information.” It is not necessary, then, for the news producers to be employed by a news outlet. In that regard, Professor Gillmor, who founded the Center for Citizen Media to promote citizen journalism, believes the overarching point is that the Internet has made it possible to publish in real time to a worldwide audience, enabling a breed of grassroots journalists to take the news into their own hands, armed with laptops, cell phones, and digital cameras.

C. Outputs

In the first major national survey of American journalists, Professor Johnstone did not define a journalist, but he selected respondents by focusing on “full-time” employment and by distinguishing news and opinion from fiction, drama, and art. He believed that outputs could distinguish journalists from other communicators, and he described outputs in terms of target audiences, including in his survey only individuals whose outputs were “aimed at channels of mass communication targeted at the public at large.” Professors Weaver and Wilhoit did the same in their surveys, limiting them to “journalists who work for public communications media targeted at general audiences rather than special-interest groups.”

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78 Jay Rosen, A Most Useful Definition of Citizen Journalism, PRESSTHINK (July 14, 2008), http://archive.pressthink.org/2008/07/14/a_most_useful_d.html.
84 Id. at 5.
News is the most obvious type of journalistic output, but the definition of news is not self-evident, and news is not the only type of journalistic output. For example, Professor Meltzer believes that opinion customarily has constituted journalism. “Expressions of opinion,” she wrote, “have been readily accepted by the journalistic community in the present and in past eras when they are demarcated as such.” That belief comports with the larger body of academic literature concluding that an early conception of journalistic objectivity—a journalist as a human being must be objective and not view the world through any personal lens at all—is unattainable. Some amount of bias and opinion will bleed into news stories (prevailing conceptions of objectivity emphasize the journalist’s methods rather than the journalist), and otherwise opinion journalism itself is part of the news ecosystem.

D. Social Roles

Our survey of the scholarly domain revealed that social roles are a dimension of the concept of journalist. Professor Harcup believes that journalistic work is different from factory work in part “because journalists play a social role,” and Professor Tuchman believes that the news media serve as windows to the world. Meanwhile, Professor Janowitz has written about two models of journalistic roles. The first, the gatekeeper orientation, focuses on “the search for objectivity and the sharp separation of reporting fact from disseminating opinion.” The second, the advocate orientation, focuses on a journalist’s role as “an advocate for those who are denied powerful spokesmen.” In either model, as Professor Johnston observed, a journalist is not a passive chronicler of events but “an analyst and interpreter of the events.”

The idea that journalists fulfill social roles has persisted in the Internet age. For instance, Professor Meyer wrote in 2002 that a journalist “needs to be a filter, as well as a transmitter; an organizer and interpreter, as well as one who

87 Id. at 63.
88 Id.
90 TONY HARCAP, JOURNALISM PRINCIPLES AND PRACTICE 3 (2d ed. 2009).
92 Janowitz, supra note 89.
93 Id. at 618.
94 Id. at 619.
95 JOHNSTON, supra note 75, at 108.
A complicating factor is that new forms of journalism have challenged some of the traditional ethical principles. Consider this excerpt of Courtney Radsch’s dissertation on citizen journalism, described as:

An alternative and activist form of newsgathering and reporting that functions outside mainstream media institutions, often as a repose to shortcoming in the professional journalistic field, that uses similar journalistic practices but is driven by different objectives and ideals and

96 Philip Meyer, PRECISION JOURNALISM: A REPORTER’S INTRODUCCION TO SOCIAL SCIENCE METHODS (2002).
100 Ugland & Henderson, supra note 41, at 243.
101 Id. at 242.
relies on alternative sources of legitimacy than traditional or mainstream journalism.  

And consider the debate surrounding WikiLeaks and its place in the journalism ecosystem. Professor Lynch said the site has “emerged as something of a strange bedfellow to a beleaguered industry,” to the extent it fights for free expression and open government but embeds those “principles in a framework of cyberlibertarianism that is frequently at odds with the institutional ethics of journalists and editors.”

Meanwhile, Professor Schudson distinguishes journalists from para-journalists, i.e., the “public relations firms, public information officers, political spin doctors, and the publicity staffs of a wide variety of institutions, both corporate and non-profit.” He believes they must be held to different ethical standards because of their different roles and objectives. Professor Knight agrees that ethical standards are critical, writing in 2008 that “the Internet promises everyone can be a publisher. But not everyone has the skills or training to be a journalist, defined by their professional practices and codes of ethics.”

These ideas and issues have contributed to debates about whether journalism is a profession. There is no qualifying exam to practice journalism, and many journalists, however they are defined, are not graduates of an accredited journalism school. Further, the Bureau of Labor Statistics has said that three conditions must be met for an occupation to be a profession: (1) prescribed educational standards, (2) governmental licensing, and (3) enforcement of performance standards by the profession. Similarly, Professor Johnstone believes that for “an occupation to be considered a profession, recruits to the field must be exposed to a body of abstract knowledge which is the particular province of the profession.” Those conditions are problematic as applied to journalists because

104 Id.
106 Alan Knight, Who is a Journalist?, 9 JOURNALISM STUD. 117 (2008).
109 John D. Stevens, Deeds Will Show if Journalists are Professionals, JOURNALISM EDUCATOR, October 1974, at 52.
110 JOHNSTONE ET AL., supra note 83, at 99–100.
they would, as Professor Stevens observed, run afoul of the First Amendment, 111 namely its protections against prior restraints (the licensing requirement acts as a prior restraint on the freedoms of speech and press). 112

F. Synthesis

Our review of the scholarly domain pointed us to dimensions of the concept of journalist: medium, hierarchy and activities, outputs, social roles, and ethics. However, those dimensions raise other issues. What activities are necessarily journalistic in nature? Must an output be directed at a mass audience? To what extent is employment a necessary indicator of activities and hierarchy? With those questions in mind, we turn to the legal domain.

II. LEGAL DOMAIN

Journalists are not exempt, ordinarily, from laws that apply to the general public. 113 However, in limited circumstances, journalists can claim special rights or privileges arising from the federal Constitution and various federal and state statutes. 114 Some of those legal sources contain language defining what it means to be a journalist, while others leave that question to the courts. 115 This section explores those sources in order to explicate the concept of journalist from a legal perspective, shedding more light on the dimensions of medium, output, and activities.

A. Federal Constitutional Law

Under the First Amendment, people who qualify as journalists can get “special standing” in some jurisdictions to claim a “privilege in legal proceedings to refuse to divulge the identity of sources and to reveal unpublished information.” 116 The major question is: “Who qualifies to claim it?” Few federal courts, until the 1980s and 1990s, had tried to answer that question, and some had said the privilege should not exist because it was too difficult to determine

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111 Stevens, supra note 109.
112 Near v. Minnesota, 283 U.S. 697 (1931) (holding, generally, that the government may not censor or otherwise prohibit a publication in advance, even if the publication might be punishable after publication).
113 Associated Press v. NLRB, 301 U.S. 103 (1937).
114 Ugland & Henderson, supra note 41. It is worth noting that state constitutional protections for speech and press do not provide helpful guidance in this regard. They have not originated meaningful attempts to define a journalist.
115 Id.
116 Calvert, supra note 49, at 413.
who qualified for it. In *Branzburg v. Hayes*, for example, the U.S. Supreme Court said:

The administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified 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 or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.  

The U.S. Court of Appeals for the Third Circuit addressed the question head-on in the case *In re Madden*, decided in 1998. The court articulated a multi-part test, holding that anyone asserting the privilege must satisfy three elements. Professor Calvert summarized them this way: “(1) the claimant was engaged in investigative reporting; (2) the claimant was gathering news; and (3) the claimant possessed the intent at the inception of the newsgathering process to disseminate the news to the public.” Thus, the test requires courts to define “two equally complex concepts, investigative reporting and news.” The court did not define either term, but it did note that the test automatically “does not grant status to any person with a manuscript, a web page or a film.”

Two other federal appeals courts have taken similar approaches. In *Von Bulow v. Von Bulow*, the Second Circuit held that “the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.” The opinion went on to make two important points. First, the person invoking the privilege need not be a member of the “institutionalized press,” as long as she is engaged in “activities traditionally associated with the gathering and dissemination of news.” Second, “[t]he intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for ‘the press in its historic connotation comprehends every sort of publica-

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118 151 F.3d 125, 128–130 (3d Cir. 1998).
120 *Id.*
121 *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998).
122 811 F.2d 136, 144 (2d Cir. 1987).
123 *Id.* at 142.
tion which affords a vehicle of information and opinion.” 124 Those points are important because they are revealing of the Court’s attitude toward the dimensions of medium and activities.

For its part, the Ninth Circuit said in Shoen v. Shoen that “the journalist’s privilege is designed to protect investigative reporting.” 125 The court focused on the activity of the person invoking the privilege. “[W]hat makes journalism journalism,” the court said, “is not its format but its content.” 126 The court concluded that the privilege would protect information gathered in the pursuit of news, but the court did not define news. It simply acknowledged the importance of "newsworthy" facts about matters of public interest. 127

From those leading cases, which define a journalist by way of journalism, four general principles emerge: (1) the medium alone does not determine whether a person is a journalist; (2) the intent of the person asserting the privilege is important, because she must seek to disseminate information to the public; (3) the activity is important, too, because the person must be engaged in investigative reporting; and (4) the content disseminated must be news. 128

Notably, the third and fourth principles are not self-evident. What is investigative reporting? What is news? Although no federal court has answered those questions precisely, a few decisions are on point. By reviewing their reasoning, it is possible to identify some of the dimensions and indicators of investigative reporting and news. These cases do not converge on a single conception of either term, but their indicators and dimensions do point in one direction, toward a conception of investigative reporting that involves people who conduct interviews, analyze things, make recommendations, etc., and a conception of news that reflects the same indicators: quotes, analysis, recommendations, etc.

In Cusamano v. Microsoft, the First Circuit extended the privilege to a pair of business professors who conducted interviews before writing a book about two companies. The court said the interviews were protected because their “sole purpose” was “to gather data so that [the professors] could compile, analyze, and report their findings [about] management practices in the internet technology industry.” 129 In Summit Technology, Inc. v. Healthcare Capital Group, Inc., the District of Massachusetts said the privilege protected a financial advisor who researched companies for institutional investors. 130 His reports contained analysis, recommendations, and conclusions. Ten years later, in Tripp v. Department of Defense, the District Court for the District of Columbia extended the

124 Id.
126 Id.
127 Id.
128 Id.
privilege to a writer for the military publication *Stars and Stripes*. Concluding
that the writer had “engaged in newsgathering,” the court noted that she had “interviewed
a number of individuals while researching [the article], an activity which is a ‘fundamental aspect’ of investigative journalism.” The court also
said the writer “engaged in traditional newsgathering activities such as keeping
notes.”

In 2005, in *U.S. Commodity Futures Trading Commission v. McGraw-Hill Co.*, the District Court for the District of Columbia ruled that the privilege
applied to a publisher producing indices and price ranges for the natural gas mar-
ket. The court said the “reporter’s privilege is available only to reporters” and
referred to the importance of “engaging in editorial judgments.”

The court said the publisher’s indices and ranges included extra-market factors affecting “supply and demand,” and for that reason the publisher “engages in journalistic anal-
ysis and judgment in addition to simply reporting data.”

Those cases illustrate the nature of investigative reporting: it involves
people who conduct interviews, analyze things, make recommendations, draw
conclusions, describe things, keep notes, and make judgments. Presumably, then,
news as an output would reflect some of those elements, e.g., quotes, analysis,
recommendations, conclusions and descriptions.

**B. Statutes: Federal shield bills**

For years, members of the news media have worked with members of
Congress to build support for a federal reporter’s shield bill that would allow
journalists in legal proceedings to protect the identity of confidential sources and
unpublished information. Two such bills are before Congress, and whether or
not they pass, it is instructive to consider their definitions of a journalist.

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132 *Id.* at 58.
133 *Id.*
135 *Id.* at 32.
136 *Id.*
138 In the current legislative environment, it is difficult to game the bill’s chance of passing, but with strong co-sponsors in Schumer and Graham, the bill enjoys bipartisan support. As Schum-
er said when he announced the September 12 amendment defining a journalist: “We’re closer than
First, the House version, H.R. 1962, titled the Free Flow of Information Act of 2013, defines a journalist as a “person who, for financial gain or livelihood, is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.” The bill defines “journalism” as “the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”

Second, the Senate version, S. 987, also titled the Free Flow of Information Act of 2013, originally defined a journalist as any person who, regardless of medium, intends to “disseminate to the public news or information” about “local, national, or international events or other matters of public interest” by “regularly” gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing on such matters, after:

(I) conducting interviews; (II) making direct observation of events; or (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form.

Schumer amended that language September 12 to define a journalist as a person employed by, or in contract with, a news outlet for at least one year within the last 20 years or three months within the last five years; a person with a “substantial track record” of freelancing in the last five years; or a student journalist. The amendment also covers “a person whom a federal judge has decided should be able to avail him or herself of the protections of the privilege, consistent with the interests of justice and the protection of lawful and legitimate newsgathering activities.”

Putting aside the Schumer amendment, the Senate version’s definition is identical to that of the Senate shield bill proposed in 2009 and the House ver-
sion’s definition is similar to that of the House shield bill proposed in 2009. They represent the most recent attempts to adopt a federal shield, and generally their conceptions of a journalist, defining the practitioner by way of the practice, are closely related.

They say the medium alone does not determine whether a person qualifies. They say intent is important, because the intent must be to disseminate content to the public. They say the content disseminated must be news or information of public interest. They say a journalist must have engaged in certain activities (e.g., gathering, preparing, collecting, photographing, etc.). And they say a journalist must have engaged in those activities on a regular basis. The big difference is the professionalization of journalists in the House versions, which require that a journalist engage in journalistic activities for her “livelihood” or “substantial financial gain,” effectively excluding citizen journalists and unpaid bloggers.

C. Statutes: State shield laws

Thirty-three states and the District of Columbia have passed shield laws that allow journalists in legal proceedings to protect the identity of confidential sources and unpublished information. “Both the statutory language and the statements made by courts interpreting those statutes are reflective of an expert conception of the press,” most evident in references to money and employment. Florida’s shield law defines a journalist as “a person regularly engaged in [newsgathering] for gain or livelihood, who obtained the information sought while working as a salaried employee.” The D.C. law requires that a person be “employed by the news media,” and the Indiana law requires that a person be “an editorial or reportorial employee, who receives or has received income” for newsgathering. The Delaware law requires twenty hours of work per week as a reporter to qualify.

Although some shield laws do not refer to particular media, most of them do. They identify the media that the statute covers, presumably excluding media not identified. Consider the Nebraska law, which is broader than most. It applies to people engaged in “gathering, receiving, or processing of information for

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146 The earlier House version said a journalist is any person “who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain.” Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).
147 Id.
148 Ugland & Henderson, supra note 41, at 8.
149 Id.
150 FLA. STAT. ANN. § 90.5015 (West 2011).
151 Ugland & Henderson, supra note 41, at 249.
152 Id.
153 Id.
any medium of communication to the public.”154 It goes on to say that the “medium of communication shall include, but not be limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.”155 Meanwhile, Ohio has two shield laws: one for newspapers and press associations,156 the other for broadcasters.157 Other state statutes “add vague qualifiers, such as the Indiana law that says individuals must be ‘bona fide’ employees of ‘legitimate’ news organizations and the Rhode Island law that requires that someone work for an ‘accredited’ news organization.”158

D. Statutes: State retraction statutes

When a media outlet makes a mistake, often it publishes a retraction—an apology that also sets the record straight. If the mistake harms someone, the retraction can be part of a settlement agreement that forbids the harmed person from suing the media outlet for libel.159 More than 30 states have passed retraction statutes that in limited circumstances protect media outlets from suit.160 Those statutes vary widely, and like shield laws, they often contain language hinting at what it means to be a journalist or to do journalism.

Many retraction statutes refer to particular media. To take three examples, California’s applies to the “publication of libel in a newspaper” or “slander by radio broadcast;”161 Florida’s applies to newspapers and broadcast outlets;162 and Georgia’s applies to broadcast outlets163 and any “newspaper or other publication.”164 The medium appears to matter, and in general the statutes do not define their terms, at least not precisely. One exception is Georgia’s definition of "other publication," which means any communication made to someone other than the libeled party.165 That definition comes from a Georgia Supreme Court decision saying the statute applies to any communication, regardless of medium:

It eliminates the difficult task of determining what is a “written publication” and who is the

154 NEB. REV. STAT. § 20-144-147 (2012).
155 Id. (emphasis added).
156 OHIO REV. CODE ANN. § 2739.12 (West 2013).
157 OHIO REV. CODE ANN. § 2739.04 (West 2013).
158 Ugland & Henderson, supra note 41, at 249.
160 PHILIP MILLER, MEDIA LAW FOR PRODUCERS 178 (2003).
161 CAL. CIV. CODE § 48a(1) (West 2013).
162 FLA. STAT. ANN. § 770.02 (West 2011).
163 GA. CODE ANN. § 51-5-12 (West 2013).
165 GA. CODE ANN. § 51-5-3 (West 2012).
“print media” at a time when any individual with a computer can become a publisher. It supports free speech by extending the same protection to the private individual who speaks on matters of public concern as newspapers and other members of the press now enjoy. In short, it strikes a balance in favor of “uninhibited, robust, and wide-open” debate in an age of communications when “anyone, anywhere in the world, with access to the Internet” can address a worldwide audience of readers in cyberspace.166

Other retraction statutes refer to particular types of persons. New Jersey’s statute applies to “the owner, manager, editor, publisher or reporter of any newspaper, magazine, periodical, serial or other publication.”167 It does not define those terms (e.g., who qualifies as an editor), but it also does not refer to particular media (e.g., print or broadcast). Similarly, Virginia’s statute applies to “the publisher, owner, editor, reporter or employee of any newspaper, magazine or periodical” facing a libel suit for any “article, statement or other matter contained in any such newspaper, magazine or periodical.”168 Again, it is unclear who qualifies as an editor, reporter, etc.

A retraction statute can also refer to types of media organizations. Ohio’s statute applies to any “newspaper company” that prints, publishes, or circulates a false statement in its “newspaper, magazine, or other periodical publication.”169 The statute defines “newspaper company” as any “person, firm, partnership, voluntary association, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of printing or publishing a newspaper, magazine, or other periodical sold or offered for sale in this state.”170

These statutes are a cross-section of the whole, and they show that state retraction statutes tend to focus on traditional news media and journalists, even if their text leaves some room for the courts to read the statutes more broadly.171 In general, the statutes expressly tie their protections to employment by a newspaper, magazine, or broadcast outlet.

170 Id.
171 Consider, for example, New Jersey’s statute, which applies to “the owner, manager, editor, publisher or reporter of any newspaper, magazine, periodical, serial or other publication.” N.J. Stat. § 2A:43–2. The statute does not define those terms, nor does it include an express employment requirement, and thus it is possible that “reporter” could be read to include a citizen journalist who publishes a story in a newspaper.
E. Synthesis

This section shed more light on the dimensions of medium, output, and activities. First, federal courts have read the First Amendment to say that medium does not matter, but state retraction statutes say medium does matter. Second, federal courts have read the First Amendment to say that journalists must disseminate news as an output, and a number of state shield laws say that journalists must be employed by the news media. But those terms—news and news media—are undefined and far from self-evident. Third, federal courts and the federal shield bills have defined journalists in part by their activities, e.g., interviewing, writing, analyzing, photographing, etc. And, finally, the current and former House versions of the federal shield bill, as well as the Schumer amendment and a number of state shield and retraction statutes, refer to income or employment in reference to activities. Which brings us to the industry domain, where money and employment play a major role.

III. INDUSTRY DOMAIN

The membership criteria of professional journalism organizations offer a window to the industry and its conception of a journalist. We used a comprehensive list of such organizations, available on the website of the American Journalism Review, to explore industry definitions of a journalist. We selected from this list 32 membership organizations (see Appendix), including those (1) for all types of journalists, and (2) for certain types of journalists, such as editors and photographers. We did not include any non-membership organizations (e.g., the Center for Media Literacy, an educational organization), and above all we attempted to select a subset of organizations that would represent the characteristics of the whole list.

We found that most of the organizations stratify their memberships, offering different types to different people. This allows them to attract not only practitioners but also students and non-journalists. Although we focused on the criteria for full membership, we also studied the criteria for associate and other memberships. The latter were revealing because they illustrated the indicators of a non-journalist. To locate the criteria, we reviewed the organizations’ bylaws, membership descriptions, and membership application forms. What emerged were four common bases for membership: outputs, activities, autonomy, and source of livelihood.

A. Outputs

Producing outputs is a common theme in the membership criteria. The American Society of Journalists and Authors (ASJA) evaluates applications based on clips and work samples. The articles must be “from major publications.” Works of fiction, poetry, and self-published blogs do not count for membership purposes. The focus on outputs is particularly noteworthy among the special-interest organizations. The Society of American Travel Writers requires prospective members to fill out a 10-page application that identifies at least five categories of membership. An applicant can meet the requirements of a membership category by earning a sufficient number of “points,” derived from scores awarded to work samples submitted with the application, which includes a chart summarizing the point system. For example, the category for freelance journalists requires 72 points to be a member; an article published in a newspaper with a circulation of less than 40,000 persons gets one point, while an article in a newspaper with a circulation of more than 750,000 persons gets 10 points.

The International Food, Wine & Travel Writers Association (IFWTWA) also requires prospective members to submit work samples; two to four links to their “most recent articles, photographs, or broadcasts.” Online articles and active blogs are acceptable. Similarly, the Garden Writers Association offers active membership only to “published” gardening or horticultural communicators.

B. Activities

Closely related to output are journalistic activities, the practices that indicate the doing of journalism, such as writing, editing, recording, and so on. The Society of Professional Journalists (SPJ) describes itself as an organization of people “engaged in directing the editorial policy or editing and preparing news and editorial content of independent news media products.” Although the
group allows journalism students and educators to be full members, it distinguishes them from professional journalists. The Regional Reporters Association (RRA), a group of reporters covering local stories in Washington D.C., accepts any person “who reports, edits, supervises or is otherwise engaged in the production of news.”

The National Association of Black Journalists (NABJ) grants full membership to “working journalists” and “full-time freelance journalists” who “produce, gather, and disseminate news.” Similarly, the American Society of News Editors limits regular membership to people who “gather and disseminate news and information.” Finally, Investigative Reporters and Editors (IRE) offers professional-class membership to people “substantially engaged in reporting and/or editing.”

C. Autonomy

A few definitions touched on the concept of autonomy. The Association of Health Care Journalists grants full membership to journalism faculty members, freelancers spending at least 50 percent of their time working for news organizations, and reporters working in news organizations “without health care industry ties.” Excluded are people who write for science journals published by trade groups, as well as company- or government-owned publications and websites. The Association of Food Journalists, Inc. (AFJI) says that only “persons employed or contracted in positions as reporters, writers or editors by a legitimate news or media organization that is supported by advertising and/or paid subscriptions and who spend not less than fifty percent (50%) of their time on food news”

182 Id. It is worth noting that SPJ delegates in August 2013 considered a resolution to change the organization’s name to the Society for Professional Journalism, in effect to change the focus from the people who practice journalism to the practice of journalism itself. The resolution failed, but the organization’s president, David Cuillier, created a task force to consider the issue. In doing so, he said, “There are compelling philosophical issues, such as how do you define ‘professional journalist’? How do you define journalism, or ‘professional’ journalism? This is especially relevant as we talk about the federal shield law.” Jim Romenesko, Society Of Professional Journalists Considers Changing Its Name To Society For Professional Journalism, ROMENESKO (Aug. 30, 2013), http://jimromenesko.com/2013/08/30/society-of-professional-journalists-considers-changing-its-name-to-society-of-professional-journalism.


188 Id.
are eligible for membership. Excluded are people working for publications supported by trade associations, advocacy groups, and government agencies.

The Society of Environmental Journalists (SEJ) excludes people engaged in lobbying or public relations, while the Association of Capitol Reporters and Editors (Capitolbeat) excludes from its voting members all people reporting for the “house organs of any organization or movement.” Likewise, North American Agricultural Journalists (NAAJ) offers membership to newsgatherers who are “independent of agricultural organizations and businesses.”

D. Livelihood

The dominant theme across the criteria is source of livelihood. The American Society of Business Publication Editors grants membership to people “employed in an editorial capacity by a business publication.” Associated Press Sports Editors (APSE) grants membership to writers and editors “employed by” and who “work for” sports publications. Indeed, this emphasis on employment is part of the eligibility criteria of the NABJ, the AHCJ, and the AFJI. Some organizations do not require employment but focus on income. This opens membership to freelance journalists. The ASJA defines professional freelancers as people who “make a living” by writing and who have a “sustained professional career.” The Asian American Journalists Association (AAJA) offers full membership to people “who receive a majority of their income and spend the majority of their worktime involved in journalistic work.” Similarly, the National Association of Hispanic Journalists (NAHJ) grants regular membership to people “whose principal means of support is earned in the gathering, editing or presentation of news.” Finally, the American Society of Media Photographers grants general membership to photographers “who have three or more consecutive years...
of publication experience, and whose primary source of earned income (greater than 50%) is from the licensing of their photography.\textsuperscript{198}

\textit{E. Synthesis}

Our review of the industry domain, which provides a window to the industry and its conception of a journalist, revealed four broad bases of membership in professional journalism organizations: \textit{outputs}, \textit{activities}, \textit{autonomy}, and \textit{source of livelihood}. The first among equals is \textit{source of livelihood}, with a number of organizations noting that employment or income is a necessary condition of joining. In other words, a member must be employed by a news outlet or earn her livelihood from practicing journalism in order to be a member.

IV. DISCUSSION AND CONCLUSION

This article explicates the concept of journalist, drawing from the scholarly, legal, and industry domains. We have identified conceptual dimensions and indicators common to all domains (\textit{medium}, \textit{activities}, \textit{output}, and \textit{employment}), and we have identified conceptual dimensions and indicators unique to one domain or the other (scholarly definitions referred to the \textit{social roles} of the press, and legal definitions referred to the \textit{intent} of the person doing journalism). We now attempt to articulate a definition that unifies the conceptions of the three domains. To be clear, we do not offer a normative definition here. We offer a descriptive definition based on the dimensions and indicators that others have used to define a journalist.

Several conceptions of journalist referred to \textit{medium}. It was used in the scholarly domain to select the base populations of surveys of journalists, and it was used in the industry domain, largely rejecting their use in membership criteria, to show that innovations in technology have changed the journalistic landscape. In the legal domain, some shield and retraction statutes tied their protections to particular media, while the federal courts and federal shield bills did not require a person to be associated with particular media in order to claim their protections. All in all, it seems that the older the source, the more likely it is to refer to \textit{medium} as a necessary condition of being a journalist.

Several conceptions of journalist referred to \textit{output}: the industry definitions requiring prospective members to submit work samples, the legal definitions requiring privilege claimants to be producers of “news,” and the scholarly definitions requiring researchers to identify their base populations by distinguishing people who produce news from people who produce entertainment or art.

With so many variations, output itself must be broken down. On the one hand, to think of output as form is to associate it closely with medium. The medium once limited the form an output could take, but the Internet changed that. It can distribute text, audio, and video in the same output. On the other hand, to think of output as a manifestation of journalistic practices puts it close to activities. A news story reflects the work—the journalistic activities—that went into creating the story. Thus, defining journalists by way of their activities includes their outputs. Another layer is the audience: An output is directed to an audience. The danger here is a line-drawing problem not addressed in any domain. How much of an audience do you need for it to be a journalistic one? Does this mean the bigger your audience, the more of a journalist you are? It is unclear based on the literature how to answer those questions.

Several conceptions of journalist referred to social role. In the scholarly domain, researchers found that journalism is different from other types of work because of its role in society, e.g., to hold the powerful accountable and to generate a social conversation about matters of public concern. There is a hint of social role, too, in the legal domain, insofar as legislators and judges have designed the reporter’s privilege to protect the free flow of information in democracy. More generally, social roles are negotiations between society’s expectations and an actor’s perception of that expectation. When someone says a journalist is serving a watchdog function, it is a reference to the role of protecting a democratic society. This is consistent with industry definitions that mention autonomy from government and interest groups.

But how does a journalist fulfill a role? Here again we refer to activities. Journalistic work occurs within an organizational hierarchy, with journalists located at different levels of the news-production process. And to some extent ethics governs the activities. Specifically, ethical principles like honesty and fairness govern journalistic activities like newsgathering and reporting. This supports the idea that outputs are manifestations of journalistic activities, which are done on a regular basis (many of the industry definitions refer to the doing of journalism regularly). It is unclear what would be sufficiently regular, because the references to regularity do not offer any guidance, other than the Schumer amendment—and it says only that a journalist is (1) a person employed by, or in contract with, a news outlet for at least one year within the last 20 years or three months within the last five years, or (2) a person with a “substantial track record” of freelancing in the last five years.

200 See, e.g., Join or Renew SEJ Membership, SOC’Y OF ENVTL. JOURNALISTS, supra note 191. The SEJ excludes people engaged in lobbying or public relations.
Many industry definitions said income earned from journalistic activities is required to be a journalist, and so did several legal definitions. Among the scholarly definitions, some researchers said employment or income mattered, while others said the opposite. At any rate, income is easy to measure, but focusing on it leads to an elitist conception of a journalist that offends the First Amendment, which protects both the institutional press and the lonely pamphleteer. The definitions that refer to income do not state why income is a necessary dimension, but there is a reason that income, measured by employment or earnings, can be important: It is part of a journalist’s capital, and it is part of an organization’s capital. Together, they sustain journalism insofar as income represents “compensation for value creation.”\textsuperscript{202} Which brings us back to social role. Income earned from journalism can ensure that journalists are able to fulfill their roles in a regular manner, enlightening the public, supporting social interaction, and facilitating democracy.\textsuperscript{203}

Relying on those dimensions and indicators, we have arrived at a definition that unifies and reflects how the scholarly, legal, and industry domains define a journalist: A journalist is someone employed to regularly engage in gathering, processing, and disseminating (activities) news and information (output) to serve the public interest (social role). Breaking it down, to be employed means the person’s primary source of livelihood comes from journalistic activities, including the gathering, processing, and disseminating of news and information. The person’s role is to serve the general and public welfare (e.g., reporting on issues and events that are central to society’s wellbeing in matters of health, safety, order, morality, economics, and politics). As an output, news and information reflect not only journalistic activities (e.g., processing in the form of analysis or judgment) but also the ethical principles (e.g., honesty and fairness) that govern those activities. Finally, the person must engage in the gathering, processing, and disseminating of news and information on a regular basis (the exact meaning of regularity is open for debate).

In closing, against the backdrop of that definition, which unifies the conceptions of the three domains, we offer a few normative comments. With regard to activities, output, and social role, the definition is broad enough to include many of the people pioneering new forms of journalism. From contributors to CNN iReport, to editors at Circa, to reporters at the New York Times, all are capable of gathering, processing, and disseminating news and information to serve the public interest. Some do it better than others, some have more resources than


\textsuperscript{203} Id.
others, and something is gained when reporting is done by stable organizations with money, logistics, and legal services—but all are capable.

By referring to employment, however, the definition delivers a fatal blow to the people engaging in many new forms of journalism. The definition would not include unpaid bloggers and citizen journalists who gather, process, and disseminate news and information on matters of public concern—because they do not derive their primary source of livelihood from their journalistic activities. To the extent the definition is used to decide who may claim the legal privileges of journalists, it puts a large number of actors in the journalism ecosystem in the position of fulfilling community needs for news, however well the actors do so, without the assurances that keep traditional journalists safe when their work provokes a backlash. That is unwise.

Further, the definition might de-incentivize innovation in news production and distribution by limiting shield protections to traditional outlets and journalists. That would be problematic because the digital revolution is dispersing the production and distribution of news. The concern here is that the Internet has created what Professor Benkler calls the “networked fourth estate,” which combines “elements of both traditional and novel forms of news media.” As those forms evolve, perhaps as they become more collaborative and interactive, it is possible that the people behind them will not qualify for narrowly drawn shield protections. Thus, they would face an increased risk of liability connected with their journalistic activities, and that increased risk might deter innovation. Whether this is an imminent or remote possibility, we do not know. It deserves further study, exploring the extent to which innovation in news production and distribution is predicated upon legal risk and legal protections, including the reporter’s privilege.

In the end, we acknowledge that the definition is neither perfect nor exhaustive, and we emphasize that we do not offer it as a normative definition. We offer it as a definition that unifies the conceptions of the three domains and the dimensions and indicators that others have used to define a journalist. We hope that at the very least it contributes to the ongoing debate about who may claim the legal privileges for journalists.


205 See id.

## APPENDIX

### List of Professional Organizations

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<tr>
<th>Organization</th>
<th>Website</th>
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<tr>
<td>American Copy Editors Society</td>
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