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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**

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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.

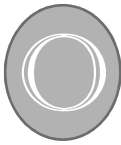
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# “PEOPLE WHO AREN'T REALLY REPORTERS AT ALL, WHO HAVE NO PROFESSIONAL QUALIFICATIONS”: DEFINING A JOURNALIST AND DECIDING WHO MAY CLAIM THE PRIVILEGES

*Jonathan Peters & Edson C. Tandoc, Jr.*

## INTRODUCTION



In 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.<sup>1</sup> The opinion made clear that reporters do not have a First Amendment right to refuse to testify in criminal proceedings about their confidential sources.<sup>2</sup> Notably, the Fourth Circuit covers Maryland and Virginia, where most national security agencies, such as the Pentagon and CIA, are located.<sup>3</sup> Thus, if the decision stands, it could have a major impact on reporting about national security matters.<sup>4</sup>

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<sup>1</sup> *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013).

<sup>2</sup> “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.

<sup>3</sup> Charlie Savage, *Court Tells Reporter to Testify in Case of Leaked C.I.A. Data*, N.Y. TIMES, July 19, 2013, at A1, available at <http://www.nytimes.com/2013/07/20/us/in-major-ruling-court-orders-times-reporter-to-testify.html>.

<sup>4</sup> *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.<sup>5</sup> 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.<sup>6</sup> When federal prosecutors subpoenaed Risen to testify in the Sterling case about his source, Risen refused.<sup>7</sup> 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.<sup>8</sup> "A criminal trial subpoena," the judge wrote, "is not a free pass for the government to rifle through a reporter's notebook."<sup>9</sup> Federal prosecutors appealed to the Fourth Circuit, which, as noted above, held that Risen must testify.<sup>10</sup> Since then, Risen has "vowed to go to prison rather than testify ... and to carry any appeal as far as the Supreme Court."<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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."<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> Fox News executive vice president Michael

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<sup>5</sup> *Id.*

<sup>6</sup> Sterling, 724 F.3d at 488.

<sup>7</sup> Savage, *supra* note 3.

<sup>8</sup> United States v. Sterling, 818 F. Supp. 2d 945, 955 (E.D. Va. 2011).

<sup>9</sup> Charlie Savage, *Judge Explains Letting a Reporter Protect His Source*, N.Y. TIMES (August 3, 2011), <http://mediadecoder.blogs.nytimes.com/2011/08/03/judge-explains-letting-a-reporter-protect-his-source/>.

<sup>10</sup> See generally Sterling, 724 F.3d 482.

<sup>11</sup> Savage, *supra* note 3.

<sup>12</sup> Kevin Johnson, *Appeals Court Orders 'New York Times' Reporter to Testify*, USA TODAY, July 19, 2013, available at <http://www.usatoday.com/story/news/politics/2013/07/19/risen-cia-iran-justice-department/2570125/>.

<sup>13</sup> Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013), <http://bigstory.ap.org/article/govt-obtains-wide-ap-phone-records-probe>.

<sup>14</sup> *Id.*

<sup>15</sup> *Justice Department Affidavit Labels Fox News Journalist as Possible 'Co-Conspirator'*, FOX NEWS (May 20, 2013), <http://www.foxnews.com/politics/2013/05/20/justice-department-obtained-records-fox-news-journalist/>.

<sup>16</sup> *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.”<sup>17</sup>

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.”<sup>18</sup> 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.”<sup>19</sup> 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.”<sup>20</sup>

In response, the Obama administration took steps to reassure the press<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup> And the administration is pushing for a federal shield bill that would allow reporters in some cases to refuse to testify about their sources.<sup>24</sup>

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<sup>25</sup> and the White House.<sup>26</sup> The

<sup>17</sup> *Id.*

<sup>18</sup> Sherman, *supra* note 13.

<sup>19</sup> Sherman, *supra* note 13.

<sup>20</sup> Noah Rothman, *Floyd Abrams Smashes DOJ for Investigating Reporters: That’s ‘Journalism Not Espionage,’* MEDIAITE (May 28, 2013, 5:57 PM), <http://www.mediaite.com/tv/floyd-abrams-smashes-doj-for-investigating-reporters-thats-journalism-not-espionage/>.

<sup>21</sup> It might be a tough sell, because under President Obama federal prosecutors have charged five government employees with crimes related to disclosure of classified information—more than all previous presidents combined. See Savage, *supra* note 3.

<sup>22</sup> Emily Bazelon & Eric Posner, *Secrets and Scoops, Part 2*, SLATE (July 22, 2013, 3:54 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/07/should\\_james\\_risen\\_have\\_to\\_testify\\_against\\_jeffrey\\_sterling\\_in\\_the\\_government.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/should_james_risen_have_to_testify_against_jeffrey_sterling_in_the_government.html).

<sup>23</sup> Charlie Savage, *Holder Tightens Rules on Getting Reporters’ Data*, N.Y. TIMES, (July 12, 2013), <http://www.nytimes.com/2013/07/13/us/holder-to-tighten-rules-for-obtaining-reporters-data.html>.

<sup>24</sup> Charlie Savage, *Criticized on Seizure of Records, White House Pushes News Media Shield Law*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html>.

<sup>25</sup> *Id.* A coalition of 60 media organizations, including the Society of Professional Journalists, the Newspaper Association of America, and the American Society of News Editors elicited 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.<sup>27</sup> 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."<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> In addition, the person must intend to disseminate the information at the start of the newsgathering process.<sup>32</sup>

But legislators quickly disagreed on the definition, debating its breadth, flexibility, and specificity.<sup>33</sup> 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."<sup>34</sup> She said the bill should protect only "real reporters" who earn a salary, and she introduced an amendment to that effect.<sup>35</sup> Schumer, 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

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support of President Obama and Attorney General Holder. See David Saleh Rauf, *Shield Law Showdown*, AM. JOURNALISM REV., Sept. 2010, available at <http://www.ajr.org/article.asp?id=4959>.

<sup>26</sup> Savage, *supra* note 24.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Kate Irby, *Senators Spar over Definition of Journalist in Seeking to Protect Them*, MCLATCHY (Aug. 1, 2013), <http://www.mcclatchydc.com/2013/08/01/198338/senators-spar-over-definition.html>.

<sup>34</sup> Henry C. Jackson, *Senate Takes Initial Step Toward Media Shield Law*, ASSOCIATED PRESS (Aug. 1, 2013), [http://www.huffingtonpost.com/2013/08/01/media-shield-law\\_n\\_3691066.html](http://www.huffingtonpost.com/2013/08/01/media-shield-law_n_3691066.html).

<sup>35</sup> Irby, *supra* note 33.

who do real journalism in different ways than we're used to. They should not be excluded."<sup>36</sup>

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.<sup>37</sup> 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."<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

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<sup>36</sup> Jackson, *supra* note 34.

<sup>37</sup> Press Release, Sen. Charles E. Schumer, Schumer Media Shield Bill Clears Senate Judiciary Committee on Bipartisan Vote (Sept. 12, 2013), *available at* <http://www.schumer.senate.gov/record.cfm?id=345700>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Mark Deuze, *What Is Journalism? Professional Identity and Ideology of Journalists Reconsidered*, 6 *JOURNALISM* 442, 450–52 (2005). See MITCHELL STEPHENS, *A HISTORY OF NEWS* (3rd ed. 2007); DAVID H. WEAVER ET AL., *THE AMERICAN JOURNALIST: U.S. NEWS PEOPLE AND THEIR WORK* (1986).

<sup>41</sup> Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 *J. MASS MEDIA ETHICS* 241, 248–51 (2007).

<sup>42</sup> 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](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.”<sup>43</sup> It assumes that concepts, which people use to organize everyday experiences, can be linked to observations of those experiences in the real world.<sup>44</sup> If a concept is not explicated thoroughly, then the theories it produces—and the legal rules it produces—will rest on a weak foundation.<sup>45</sup> 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.”<sup>46</sup> 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.<sup>47</sup> 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).<sup>48</sup>

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,<sup>49</sup> 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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<sup>43</sup> STEVEN CHAFFEE, *COMMUNICATION CONCEPTS 1: EXPLICATION 1* (1991).

<sup>44</sup> *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).

<sup>45</sup> CHAFFEE, *supra* note 43.

<sup>46</sup> *Id.* at 72.

<sup>47</sup> See CHAFFEE, *supra* note 43.

<sup>48</sup> See *id.* at 51–62.

<sup>49</sup> See, e.g., Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2007).

## I. SCHOLARLY DOMAIN

The field of journalism and mass communication is young compared with fields like psychology and sociology,<sup>50</sup> and it lacks uniform definitions of its core concepts.<sup>51</sup> For example, a review of popular dictionaries in the field yielded no definitions of journalism, journalist, or objectivity.<sup>52</sup> 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 20<sup>th</sup> century,<sup>53</sup> and we found only obituaries of prominent newspaper reporters admired for their work outside the industry, such as their passionate speeches,<sup>54</sup> documentation of dialects,<sup>55</sup> and essays on pronunciation.<sup>56</sup> The obituaries were published in speech-communication journals, many years before Professor Schramm founded the first communication research institute at the University of Iowa.<sup>57</sup> 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.”<sup>58</sup>

In 1970, Professor Steinberg observed that historically “the rise of journalism was identified solely with print.”<sup>59</sup> That view persisted for years, even af-

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<sup>50</sup> See EVERETT M. ROGERS, A HISTORY OF COMMUNICATION STUDY: A BIOGRAPHICAL APPROACH 1–125 (1994) (detailing the foundations of the study of journalism and communication); Guido H. Stempel III & Bruce H. Westley, *The Systematic Study of Mass Communication*, in MASS COMMUNICATION RESEARCH AND THEORY 1–2 (Guido H. Stempel III et al. eds., 2003) (discussing the origins of mass communication research).

<sup>51</sup> 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).

<sup>52</sup> *Id.*

<sup>53</sup> See ROGERS, *supra* note 50.

<sup>54</sup> Chas F. Lindsley, *Henry Woodfin Grady, Orator*, 6 Q. J. SPEECH EDUC., no. 2, 1920, at 28.

<sup>55</sup> M. M. Mathews, *Mrs. Anne Royall as an Observer of Dialect*, 2 AM. SPEECH 204 (1927).

<sup>56</sup> See generally Kemp Malone, *Fay on Pronunciation*, 2 AM. SPEECH 322 (1927).

<sup>57</sup> EVERETT ROGERS, A HISTORY OF COMMUNICATION STUDY 501 (1994).

<sup>58</sup> *President Hutchins on Journalism Schools*, 22 MODERN LANGUAGE J. 640 (1938).

<sup>59</sup> Charles Steinberg, THE COMMUNICATIVE ARTS: AN INTRODUCTION TO MASS MEDIA 63 (1970).



ter the coming of radio and television.<sup>60</sup> A survey in 1977 comparing PR practitioners with journalists included no definition of a journalist, other than a person “working for daily newspapers.”<sup>61</sup> But over time conceptions did change, and today journalism is not “understood as residing in a particular medium,”<sup>62</sup> 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.”<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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.,<sup>67</sup> 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.”<sup>68</sup> Professor Cassidy modified that design to include print journalists who worked “on the print edition of a daily

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<sup>60</sup> *Id.* at 78.

<sup>61</sup> Oguz Nayman, Blame K. McKee & Dan L. Lattimore, *PR Personnel and Print Journalists: A Comparison of Professionalism*, 54 *JOURNALISM Q.* 492, 492 (1977).

<sup>62</sup> Ugland & Henderson, *supra* note 41, at 255.

<sup>63</sup> Bovee, *supra* note 51, at 29.

<sup>64</sup> Thorsten Quandt et al., *American and German Online Journalists at the Beginning of the 21st Century*, 7 *JOURNALISM STUD.* 171, 171–86 (2006).

<sup>65</sup> *Id.* at 174.

<sup>66</sup> Quandt et al., *supra* note 64, at 174.

<sup>67</sup> William P. Cassidy, *Gatekeeping Similar for Online, Print Journalists*, 27 *NEWSPAPER RES. J.* 6, (2006).

<sup>68</sup> WEAVER ET AL., *THE AMERICAN JOURNALIST: U.S. NEWS PEOPLE AND THEIR WORK*, *supra* note 40, at 14–15; DAVID H. WEAVER ET AL., *THE AMERICAN JOURNALIST IN THE 1990S: U.S. NEWS PEOPLE AT THE END OF AN ERA* 4 (1996).

newspaper” and online journalists who worked “on the online edition of a daily newspaper with the job title editor, producer, or reporter.”<sup>69</sup>

### B. Hierarchy and Activities

It may be unclear what makes a person a journalist,<sup>70</sup> 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.”<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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.”<sup>74</sup> Similarly, Professor Johnston believes journalism is “the process of gathering, selecting, interpreting, and disseminating news.”<sup>75</sup> And whatever the journalistic activities may be, Professors Weaver and Wilhoit believe employment undergirds them.<sup>76</sup> 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.”<sup>77</sup>

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

<sup>69</sup> Cassidy, *supra* note 67, at 12–14.

<sup>70</sup> 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.”).

<sup>71</sup> Ernest Havemann, *Journalists and Jargonists*, COLUM. JOURNALISM REV., July 1, 1966, at 12, 14.

<sup>72</sup> PAMELA J. SHOEMAKER & TIM P. VOS, GATEKEEPING THEORY 1 (2009).

<sup>73</sup> *Id.* at 40.

<sup>74</sup> HERBERT J. GANS, DECIDING WHAT’S NEWS 73 (2004).

<sup>75</sup> DONALD H. JOHNSTON, JOURNALISM AND THE MEDIA 2–3 (1979).

<sup>76</sup> WEAVER ET AL., THE AMERICAN JOURNALIST: U.S. NEWS PEOPLE AND THEIR WORK, *supra* note 40.

<sup>77</sup> *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.”<sup>78</sup> Put another way, citizen journalism—sometimes called “guerilla”<sup>79</sup> or “street”<sup>80</sup> journalism—relies on citizens to play “an active role in the process of collecting, reporting, analyzing, and disseminating news and information.”<sup>81</sup> 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.<sup>82</sup>

### 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.<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup>

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<sup>78</sup> Jay Rosen, *A Most Useful Definition of Citizen Journalism*, PRESS THINK (July 14, 2008), [http://archive.pressthink.org/2008/07/14/a\\_most\\_useful\\_d.html](http://archive.pressthink.org/2008/07/14/a_most_useful_d.html).

<sup>79</sup> JUDD CASE, RECOVERING THE RADICAL: BIOCYBERNETIC SUBVERSION IN GUERRILLA VIDEO PRIMER (2007).

<sup>80</sup> Tamara Witschge, *Street Journalists Versus 'Ailing Journalists'?*, OPENDEMOCRACY (Mar. 27, 2009), <http://www.opendemocracy.net/article/street-journalists-as-an-answer-to-ailing-journalism>.

<sup>81</sup> Shayne Bowman & Chris Willis, MEDIA CTR AT THE AM. PRESS INST., WE MEDIA: HOW AUDIENCES ARE SHAPING THE FUTURE OF NEWS AND INFORMATION (2003), *available at* [http://www.hypergene.net/wemedia/download/we\\_media.pdf](http://www.hypergene.net/wemedia/download/we_media.pdf).

<sup>82</sup> DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE (2006). For other perspectives on citizen journalism, see STUART ALLAN & EINAR THORSEN, CITIZEN JOURNALISM: GLOBAL PERSPECTIVES (2009); JACK ROSENBERRY & BURTON ST JOHN III, PUBLIC JOURNALISM 2.0: THE PROMISE AND REALITY OF A CITIZEN-ENGAGED PRESS (2009); MELISSA WALL, CITIZEN JOURNALISM: VALUABLE, USELESS OR DANGEROUS? (2012); Seth C. Lewis, Kelly Kaufhold & Dominic L. Lasorsa, *Thinking About Citizen Journalism*, 4 JOURNALISM PRAC. 163–179 (2010).

<sup>83</sup> JOHN W. C. JOHNSTONE, EDWARD J. SLAWSKI & WILLIAM W. BOWMAN, THE NEWS PEOPLE: A SOCIOLOGICAL PORTRAIT OF AMERICAN JOURNALISTS AND THEIR WORK 9 (1976).

<sup>84</sup> *Id.* at 5.

<sup>85</sup> WEAVER ET AL., THE AMERICAN JOURNALIST: U.S. NEWS PEOPLE AND THEIR WORK, *supra* note 40, at 219.

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.<sup>86</sup> For example, Professor Meltzer believes that opinion customarily has constituted journalism.<sup>87</sup> “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.”<sup>88</sup> 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.<sup>89</sup> 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,”<sup>90</sup> and Professor Tuchman believes that the news media serve as windows to the world.<sup>91</sup> Meanwhile, Professor Janowitz has written about two models of journalistic roles.<sup>92</sup> The first, the gatekeeper orientation, focuses on “the search for objectivity and the sharp separation of reporting fact from disseminating opinion.”<sup>93</sup> The second, the advocate orientation, focuses on a journalist’s role as “an advocate for those who are denied powerful spokesmen.”<sup>94</sup> In either model, as Professor Johnston observed, a journalist is not a passive chronicler of events but “an analyst and interpreter of the events.”<sup>95</sup>

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

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<sup>86</sup> See Kimberly Meltzer, *The Hierarchy of Journalistic Cultural Authority: Journalists’ Perspectives According to News Medium*, 3 JOURNALISM PRAC. 59, 62, 71–72 (2009).

<sup>87</sup> *Id.* at 63.

<sup>88</sup> *Id.*

<sup>89</sup> See Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149, 164–65 (2001); see also William B. Blankenburg & Ruth Walden, *Objectivity, Interpretation and Economy in Reporting*, 54 JOURNALISM Q. 591, (1977); Morris Janowitz, *Professional Models in Journalism: The Gatekeeper and the Advocate*, 52 JOURNALISM Q. 618, 626 (1975).

<sup>90</sup> TONY HARCUP, JOURNALISM PRINCIPLES AND PRACTICE 3 (2d ed. 2009).

<sup>91</sup> GAYE TUCHMAN, MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY (1978).

<sup>92</sup> Janowitz, *supra* note 89.

<sup>93</sup> *Id.* at 618.

<sup>94</sup> *Id.* at 619.

<sup>95</sup> JOHNSTON, *supra* note 75, at 108.

gathers and delivers fact.”<sup>96</sup> Professor Clarke has echoed that belief and sense of dynamic journalistic roles, writing in 2003 that journalists serve as “proxy witnesses and information-gatherers” for the public.<sup>97</sup> And, finally, Professor Woo observed in 2005 that the public benefits from journalism, insofar as journalists hold the powerful accountable and generate a conversation about matters of public concern.<sup>98</sup>

### *E. Ethics*

Our survey of the scholarly domain revealed that *ethics* is a dimension of the concept of journalist, because many attempts to define a journalist grew out of debates about the industry’s professionalization and the idea that journalists are bound by certain ethical principles, such as honesty and fairness in gathering and reporting the news, treating sources and subjects with respect, and acting “free of obligation to any interest other than the public’s right to know.”<sup>99</sup> For ethics purposes, “the motive for defining a journalist is . . . to separate credible contributors from less credible ones by establishing benchmarks of professional practice and measuring people against them.”<sup>100</sup> Moreover, “[b]y illuminating fundamental human values and moral imperatives, ethics helps give force and legitimacy to legal mandates.”<sup>101</sup>

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

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<sup>96</sup> Philip Meyer, *PRECISION JOURNALISM: A REPORTER’S INTRODUCCION TO SOCIAL SCIENCE METHODS* (2002).

<sup>97</sup> Judith Clarke, *How Journalists Judge the ‘Reality’ of an International ‘Pseudo-Event,’* 4 *JOURNALISM*, 50 (2003).

<sup>98</sup> William F. Woo, *Defining a Journalist’s Function*, *NIEMAN REPS.*, Winter 2005, at 31, 32–33.

<sup>99</sup> *Code of Ethics, SOC’Y OF PROF’L JOURNALISTS*, <http://www.spj.org/ethicscode.asp> (last visited Sept. 27, 2013); see also JOHNSTONE ET AL., *supra* note 83; Stephen D. Reese, *Understanding the Global Journalist: A Hierarchy-of-Influences Approach*, 2 *JOURNALISM STUD.* 173, 183–184 (2001); Uglund & Henderson, *supra* note 41, at 253.

<sup>100</sup> Uglund & Henderson, *supra* note 41, at 243.

<sup>101</sup> *Id.* at 242.

relies on alternative sources of legitimacy than traditional or mainstream journalism.<sup>102</sup>

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,”<sup>103</sup> 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.”<sup>104</sup>

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.”<sup>105</sup> 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.”<sup>106</sup>

These ideas and issues have contributed to debates about whether journalism is a profession.<sup>107</sup> There is no qualifying exam to practice journalism, and many journalists, however they are defined, are not graduates of an accredited journalism school.<sup>108</sup> 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.<sup>109</sup> 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.”<sup>110</sup> Those conditions are problematic as applied to journalists because

<sup>102</sup> COURTNEY C. RADSCH, *THE REVOLUTIONS WILL BE BLOGGED: CYBERACTIVISM AND THE 4<sup>TH</sup> ESTATE IN EGYPT* (2013) (unpublished Ph.D. dissertation, American University) (on file with author).

<sup>103</sup> Lisa Lynch, “*We’re Going To Crack the World Open*”: *Wikileaks and the Future of Investigative Reporting*, 4 *JOURNALISM PRAC.* 311, 317 (2010).

<sup>104</sup> *Id.*

<sup>105</sup> Michael Schudson, *SOCIOLOGY OF NEWS* 3 (2003).

<sup>106</sup> Alan Knight, *Who is a Journalist?*, 9 *JOURNALISM STUD.* 117 (2008).

<sup>107</sup> See, e.g., Steven Greenhut, *Journalism Is an Act, Not a Profession*, *REASON* (July 12, 2013), <http://www.reason.com/archives/2013/07/12/journalism-is-an-act-not-a-profession>; Philip Meyer, *Journalism’s Road to Becoming a Profession*, *NIEMAN REPS.*, Winter 2002, at 107, available at <http://www.nieman.harvard.edu/reports/article/101425/journalisms-road-to-becoming-a-profession.aspx>.

<sup>108</sup> JOHNSTONE ET AL., *supra* note 83; WEAVER ET AL., *THE AMERICAN JOURNALIST: U.S. NEWS PEOPLE AND THEIR WORK*, *supra* note 40; WEAVER ET AL., *THE AMERICAN JOURNALIST IN THE 1990S: U.S. NEWS PEOPLE AT THE END OF AN ERA*, *supra* note 68.

<sup>109</sup> John D. Stevens, *Deeds Will Show if Journalists are Professionals*, *JOURNALISM EDUCATOR*, October 1974, at 52.

<sup>110</sup> JOHNSTONE ET AL., *supra* note 83, at 99–100.

they would, as Professor Stevens observed, run afoul of the First Amendment,<sup>111</sup> namely its protections against prior restraints (the licensing requirement acts as a prior restraint on the freedoms of speech and press).<sup>112</sup>

### *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.<sup>113</sup> However, in limited circumstances, journalists can claim special rights or privileges arising from the federal Constitution and various federal and state statutes.<sup>114</sup> Some of those legal sources contain language defining what it means to be a journalist, while others leave that question to the courts.<sup>115</sup> 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.”<sup>116</sup> 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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<sup>111</sup> Stevens, *supra* note 109.

<sup>112</sup> *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).

<sup>113</sup> *Associated Press v. NLRB*, 301 U.S. 103 (1937).

<sup>114</sup> *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.

<sup>115</sup> *Id.*

<sup>116</sup> *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.<sup>117</sup>

The U.S. Court of Appeals for the Third Circuit addressed the question head-on in the case *In re Madden*, decided in 1998.<sup>118</sup> 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.”<sup>119</sup> Thus, the test requires courts to define “two equally complex concepts, investigative reporting and news.”<sup>120</sup> 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.”<sup>121</sup>

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.”<sup>122</sup> 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.”<sup>123</sup> 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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<sup>117</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>118</sup> 151 F.3d 125, 128–130 (3d Cir. 1998).

<sup>119</sup> Calvert, *supra* note 49, at 426.

<sup>120</sup> *Id.*

<sup>121</sup> *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998).

<sup>122</sup> 811 F.2d 136, 144 (2d Cir. 1987).

<sup>123</sup> *Id.* at 142.



tion which affords a vehicle of information and opinion.”<sup>124</sup> 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.”<sup>125</sup> 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.”<sup>126</sup> 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 “news-worthy” facts about matters of public interest.<sup>127</sup>

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.<sup>128</sup>

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.”<sup>129</sup> 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.<sup>130</sup> 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

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<sup>124</sup> *Id.*

<sup>125</sup> *Shoen v. Shoen*, 5 F.3d 1289, 1293 (1993).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Calvert, *supra* note 49, at 430–31.

<sup>129</sup> *Cusamano v. Microsoft*, 162 F.3d 708, 715 (1998).

<sup>130</sup> *Summit Tech., Inc. v. Healthcare Capital Grp., Inc.*, 141 F.R.D. 381 (D. Mass. 1992).

privilege to a writer for the military publication *Stars and Stripes*.<sup>131</sup> 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.”<sup>132</sup> The court also said the writer “engaged in traditional newsgathering activities such as keeping notes.”<sup>133</sup>

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 market.<sup>134</sup> The court said the “reporter’s privilege is available only to reporters” and referred to the importance of “engaging in editorial judgments.”<sup>135</sup> 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 analysis and judgment in addition to simply reporting data.”<sup>136</sup>

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.<sup>137</sup> Two such bills are before Congress, and whether or not they pass,<sup>138</sup> it is instructive to consider their definitions of a journalist.

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<sup>131</sup> *Tripp v. Dep’t of Defense*, 284 F. Supp. 2d 50 (D.D.C. 2003).

<sup>132</sup> *Id.* at 58.

<sup>133</sup> *Id.*

<sup>134</sup> *U.S. Comm. Futures Trading Comm’n v. McGraw-Hill Co.*, 390 F. Supp. 2d 27 (D.D.C. 2005).

<sup>135</sup> *Id.* at 32.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., *A Short History of Attempts to Pass a Federal Shield Law*, NEWS MEDIA & THE LAW (Fall 2004), available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2004/short-history-attempts-pass-f#sthash.Ax9dMBWU.dpuf>; Press Release, Society of Professional Journalists, SPJ Celebrates Passage of Shield Law Bill from Committee (Dec. 10, 2009), <http://www.spj.org/news.asp?ref=942>; Press Release, Society of Professional Journalists, SPJ Encourages Journalists to Support Shield Law After Introduction in Congress (Feb. 11, 2009), <http://www.spj.org/news.asp?ref=860>; Press Release, Society of Professional Journalists, SPJ Gives Support to Federal Shield Law Legislation (May 18, 2006), <http://www.spj.org/news.asp?ref=586>.

<sup>138</sup> 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 Schumer 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.”<sup>139</sup> 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.”<sup>140</sup>

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”<sup>141</sup> 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.<sup>142</sup>

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.<sup>143</sup> 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.”<sup>144</sup>

Putting aside the Schumer amendment, the Senate version’s definition is identical to that of the Senate shield bill proposed in 2009,<sup>145</sup> and the House ver-

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we’ve ever been before to passing a strong and tough media shield bill.” Press Release, Sen. Charles E. Schumer, *supra* note 37.

<sup>139</sup> Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. § 4(2) (2013).

<sup>140</sup> *Id.* at § 4(5).

<sup>141</sup> Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

<sup>142</sup> *Id.*

<sup>143</sup> Press Release, Sen. Charles E. Schumer, *supra* note 37.

<sup>144</sup> *Id.*

<sup>145</sup> Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

sion's definition is similar<sup>146</sup> to that of the House shield bill proposed in 2009.<sup>147</sup> 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.<sup>148</sup> "Both the statutory language and the statements made by courts interpreting those statutes are reflective of an expert conception of the press,"<sup>149</sup> 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."<sup>150</sup> 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.<sup>151</sup> The Delaware law requires twenty hours of work per week as a reporter to qualify.<sup>152</sup>

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.<sup>153</sup> 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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<sup>146</sup> 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).

<sup>147</sup> *Id.*

<sup>148</sup> Ugland & Henderson, *supra* note 41, at 8.

<sup>149</sup> *Id.*

<sup>150</sup> FLA. STAT. ANN. § 90.5015 (West 2011).

<sup>151</sup> Ugland & Henderson, *supra* note 41, at 249.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

any medium of communication to the public.”<sup>154</sup> It goes on to say that the “[m]edium 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.”<sup>155</sup> Meanwhile, Ohio has two shield laws: one for newspapers and press associations,<sup>156</sup> the other for broadcasters.<sup>157</sup> 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.”<sup>158</sup>

#### *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.<sup>159</sup> More than 30 states have passed retraction statutes that in limited circumstances protect media outlets from suit.<sup>160</sup> 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;”<sup>161</sup> Florida’s applies to newspapers and broadcast outlets;<sup>162</sup> and Georgia’s applies to broadcast outlets<sup>163</sup> and any “newspaper or other publication.”<sup>164</sup> 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.<sup>165</sup> 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

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<sup>154</sup> NEB. REV. STAT. § 20-144-147 (2012).

<sup>155</sup> *Id.* (emphasis added).

<sup>156</sup> OHIO REV. CODE ANN. § 2739.12 (West 2013).

<sup>157</sup> OHIO REV. CODE ANN. § 2739.04 (West 2013).

<sup>158</sup> Ugland & Henderson, *supra* note 41, at 249.

<sup>159</sup> KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 176 (8th ed. 2012).

<sup>160</sup> PHILIP MILLER, *MEDIA LAW FOR PRODUCERS* 178 (2003).

<sup>161</sup> CAL. CIV. CODE § 48a(1) (West 2013).

<sup>162</sup> FLA. STAT. ANN. § 770.02 (West 2011).

<sup>163</sup> GA. CODE ANN. § 51-5-12 (West 2013).

<sup>164</sup> GA. CODE ANN. § 51-5-11 (West 2012).

<sup>165</sup> 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.<sup>166</sup>

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.”<sup>167</sup> 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.”<sup>168</sup> 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.”<sup>169</sup> 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.”<sup>170</sup>

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.<sup>171</sup> In general, the statutes expressly tie their protections to employment by a newspaper, magazine, or broadcast outlet.

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<sup>166</sup> *Mathis v. Cannon*, 573 S.E.2d 376 (2002).

<sup>167</sup> N.J. STAT. § 2A:43-2 (2013).

<sup>168</sup> VA. CODE ANN. § 8.01-48 (West 2012).

<sup>169</sup> OHIO REV. CODE ANN. § 2739.14.

<sup>170</sup> *Id.*

<sup>171</sup> 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*,<sup>172</sup> 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*.

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<sup>172</sup> *Journalism Organizations*, AM. JOURNALISM REV., [http://www.ajr.org/News\\_Wire\\_Services.asp?MediaType=11](http://www.ajr.org/News_Wire_Services.asp?MediaType=11) (last visited Oct. 7, 2013).

### 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.”<sup>173</sup> Works of fiction, poetry, and self-published blogs do not count for membership purposes.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

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.”<sup>178</sup> Online articles and active blogs are acceptable.<sup>179</sup> Similarly, the Garden Writers Association offers active membership only to “published” gardening or horticultural communicators.<sup>180</sup>

### 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.”<sup>181</sup> Although the

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<sup>173</sup> *Membership Criteria*, AM. SOC’Y OF JOURNALISTS & AUTHORS, <http://www.asja.org/how-to-join/who-is-eligible.php> (last visited Oct. 7, 2013).

<sup>174</sup> *Id.*

<sup>175</sup> *Membership Criteria*, SOC’Y OF AM. TRAVEL WRITERS, <http://satw.org/index.php/membership/join> (last visited Oct. 7, 2013).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *IFTWA Memberships, Guidelines, Benefits & Application Link*, INT’L FOOD, WINE & TRAVEL WRITERS ASS’N, <http://ifwtwa.org/ifwtwa-memberships-guidelines-benefits-application-link> (last visited Oct. 2, 2013).

<sup>179</sup> *Id.*

<sup>180</sup> *Individual GWA Membership Application*, GARDEN WRITERS ASS’N, [http://www.gardenwriters.org/gwa.php?p=about/join\\_individual.html](http://www.gardenwriters.org/gwa.php?p=about/join_individual.html) (last visited Oct. 2, 2013).

<sup>181</sup> *Society of Professional Journalists Bylaws*, SOC’Y OF PROF’L JOURNALISTS (Sept. 27, 2011), <http://www.spj.org/pdf/spjbylaws.pdf>.



group allows journalism students and educators to be full members, it distinguishes them from professional journalists.<sup>182</sup> 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.”<sup>183</sup>

The National Association of Black Journalists (NABJ) grants full membership to “working journalists” and “full-time freelance journalists” who “produce, gather, and disseminate news.”<sup>184</sup> Similarly, the American Society of News Editors limits regular membership to people who “gather and disseminate news and information.”<sup>185</sup> Finally, Investigative Reporters and Editors (IRE) offers professional-class membership to people “substantially engaged in reporting and/or editing.”<sup>186</sup>

### 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.”<sup>187</sup> Excluded are people who write for science journals published by trade groups, as well as company- or government-owned publications and websites.<sup>188</sup> 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”

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<sup>182</sup> *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>.

<sup>183</sup> *Bylaws of the Reg’l Reporters Ass’n*, REG’L REPORTERS ASS’N, <http://www.rra.org/bylaws.html> (last visited Oct. 2, 2013).

<sup>184</sup> *Membership Guidelines*, NAT’L ASS’N OF BLACK JOURNALISTS, <http://www.nabj.org/?RenewJoin> (last visited Oct. 2, 2013).

<sup>185</sup> *Bylaws*, AM. SOC’Y OF NEWS EDS., <http://asne.org/content.asp?admin=Y&contentid=170> (last visited Oct. 2, 2013).

<sup>186</sup> *Membership Application*, INVESTIGATIVE REPORTERS & EDS., <http://ire.org/media/uploads/membershipapplication11.pdf> (last visited Oct. 2, 2013).

<sup>187</sup> *Membership: Categories*, ASS’N OF HEALTH CARE JOURNALISTS,

<http://healthjournalism.org/membership-categories.php> (last visited Sept. 26, 2013).

<sup>188</sup> *Id.*

are eligible for membership.<sup>189</sup> Excluded are people working for publications supported by trade associations, advocacy groups, and government agencies.<sup>190</sup>

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.”<sup>191</sup> Likewise, North American Agricultural Journalists (NAAJ) offers membership to newsgatherers who are “independent of agricultural organizations and businesses.”<sup>192</sup>

#### 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.”<sup>193</sup> Associated Press Sports Editors (APSE) grants membership to writers and editors “employed by” and who “work for” sports publications.<sup>194</sup> Indeed, this emphasis on employment is part of the eligibility criteria of the NABJ, the AHJ, and the AFJ. 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.”<sup>195</sup> 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.”<sup>196</sup> 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.”<sup>197</sup> Finally, the American Society of Media Photographers grants general membership to photographers “who have three or more consecutive years

<sup>189</sup> *Better Know a Media Org: AFJ*, MEDIABISTRO, [http://www.mediabistro.com/mediajobsdaily/better-know-a-media-org-afj\\_b1492](http://www.mediabistro.com/mediajobsdaily/better-know-a-media-org-afj_b1492) (last visited Sept. 26, 2013).

<sup>190</sup> *Id.*

<sup>191</sup> *Join or Renew SEJ Membership*, SOC’Y OF ENVTL. JOURNALISTS, <http://www.sej.org/get-involved/join> (last visited Sept. 26, 2013).

<sup>192</sup> *Bylaws, art. II § 1*, N. AM. AGRIC. JOURNALISTS, <http://www.naaj.net/about/bylaws> (last visited Sep. 21, 2013).

<sup>193</sup> AM. SOC’Y OF BUS. PUBL’N EDITORS <http://www.asbpe.org/register> (last visited Sep. 22, 2013).

<sup>194</sup> *Bylaws*, ASSOCIATED PRESS SPORTS EDITORS (last amended June 25, 2011), available at <http://apsportseditors.org/apse-bylaws/>.

<sup>195</sup> *Who is Eligible?*, AM. SOC’Y OF JOURNALISTS & AUTHORS (Last visited Sep. 22, 2013) <http://www.asja.org/how-to-join/who-is-eligible.php>.

<sup>196</sup> *Join AAJA-MN*, ASIAN AM. JOURNALISTS ASS’N, (last visited Sep. 22, 2013) <http://www.aajamn.com/join-aaja-mn.html>.

<sup>197</sup> *Membership Sign-Up*, NAT’L ASS’N OF HISPANIC JOURNALISTS, <http://members.nahj.org/imispublic/source/members/newmembersignup.cfm?step=1> (last visited Sept. 21, 2013).

of publication experience, and whose primary source of earned income (greater than 50%) is from the licensing of their photography.”<sup>198</sup>

### *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: *outputs*, *activities*, *autonomy*, and *source of livelihood*. The first among equals is *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 (*medium*, *activities*, *output*, and *employment*), and we have identified conceptual dimensions and indicators unique to one domain or the other (scholarly definitions referred to the *social roles* of the press, and legal definitions referred to the *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 *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 *medium* as a necessary condition of being a journalist.

Several conceptions of journalist referred to *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.

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<sup>198</sup> *Membership Categories*, AM. SOC’Y OF MEDIA PHOTOGRAPHERS, <http://asmp.org/articles/membership-categories.html> (last visited Sept. 21, 2013).

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.<sup>199</sup> 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.<sup>200</sup>

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.<sup>201</sup> 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.

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<sup>199</sup> See, e.g., Jo Bardoel & Mark Deuze, *Network Journalism: Converging Competences of Media Professionals and Professionalism*, 23 AUSTRALIAN JOURNALISM REV. 91 (2001).

<sup>200</sup> 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.

<sup>201</sup> See, e.g., *SPJ Code of Ethics*, SOC'Y OF PROF'L JOURNALISTS, <http://www.spj.org/ethicscode.asp> (last visited Sept. 21, 2013) (“Journalists should be honest, fair and courageous in gathering, reporting and interpreting information.”).

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."<sup>202</sup> 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.<sup>203</sup>

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

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<sup>202</sup> Robert G. Picard, *Why Journalists Deserve Low Pay*, CHRISTIAN SCIENCE MONITOR (May 19, 2009), <http://www.csmonitor.com/Commentary/Opinion/2009/0519/p09s02-coop.html>.

<sup>203</sup> *Id.*

others, and something is gained when reporting is done by stable organizations with money, logistics, and legal services<sup>204</sup>—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.<sup>205</sup> 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.”<sup>206</sup> 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.



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<sup>204</sup> See Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Oct. 19, 2009, 1:00 PM), [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php?page=all](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all).

<sup>205</sup> See *id.*

<sup>206</sup> Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.—C.L. L. REV. 311, 315 (2011).

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*QUORUM*

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**APPENDIX***List of Professional Organizations*

American Copy Editors Society	<a href="http://www.copydesk.org/">http://www.copydesk.org/</a>
American Society of Business Publication Editors	<a href="http://www.asbpe.org/">http://www.asbpe.org/</a>
American Society of Journalists and Authors	<a href="http://www.asja.org">http://www.asja.org</a>
American Society of Magazine Editors	<a href="http://www.magazine.org/asme/">http://www.magazine.org/asme/</a>
American Society of Media Photographers	<a href="http://asmp.org/">http://asmp.org/</a>
American Society of News Editors	<a href="http://asne.org/">http://asne.org/</a>
Asian American Journalists Association	<a href="http://www.aaja.org">www.aaja.org</a>
Associated Press Managing Editors	<a href="http://www.apme.com/">http://www.apme.com/</a>
Associated Press Sports Editors	<a href="http://apsportseditors.org">http://apsportseditors.org</a>
Association of Capitol Reporters and Editors	<a href="http://capitolbeat.files.wordpress.com">capitolbeat.files.wordpress.com</a>
Association of Food Journalists, Inc.	<a href="http://www.afjonline.com">http://www.afjonline.com</a>
Association of Health Care Journalists	<a href="http://www.healthjournalism.org">http://www.healthjournalism.org</a>
Criminal Justice Journalists	<a href="http://www.reporters.net">http://www.reporters.net</a>
Football Writers Association of America	<a href="http://www.sportswriters.net/">http://www.sportswriters.net/</a>
Garden Writers Association	<a href="http://www.gardenwriters.org/">http://www.gardenwriters.org/</a>
International Food Wine & Travel Writers Assoc.	<a href="http://www.ifwtwa.org/">http://www.ifwtwa.org/</a>
Investigative Reporters and Editors, Inc.	<a href="http://www.ire.org">http://www.ire.org</a>
National Association of Black Journalists	<a href="http://www.nabj.org/">http://www.nabj.org/</a>
National Association of Hispanic Journalists	<a href="http://nahj.org/">http://nahj.org/</a>
National Lesbian & Gay Journalists Association	<a href="http://www.nlgja.org">http://www.nlgja.org</a>
National Press Club	<a href="http://press.org">http://press.org</a>
Native American Journalists Association	<a href="http://www.naja.com">http://www.naja.com</a>
North American Agricultural Journalists	<a href="http://www.naaj.net">http://www.naaj.net</a>
Online News Association	<a href="http://ona.site-ym.com/">http://ona.site-ym.com/</a>
Regional Reporters Association	<a href="http://www.rra.org">http://www.rra.org</a>
Religion Newswriters Association	<a href="http://www.religionwriters.com/">http://www.religionwriters.com/</a>
Society for Features Journalism	<a href="http://featuresjournalism.org/">http://featuresjournalism.org/</a>
Society of American Business Editors and Writers	<a href="http://sabew.org">http://sabew.org</a>
Society of American Travel Writers	<a href="http://www.satw.org">http://www.satw.org</a>
Society of Environmental Journalists	<a href="http://www.sej.org">http://www.sej.org</a>
Society of Professional Journalists	<a href="http://www.spj.org/">http://www.spj.org/</a>
South Asian Journalists Association	<a href="http://www.saja.org">http://www.saja.org</a>