CITIZEN-CRITICS, CITIZEN JOURNALISTS, AND THE PERILS OF DEFINING THE PRESS

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I. INTRODUCTION

> The fact of the matter is these petitioners are here today because they're Negroes and because they've been leaders in the fight for civil rights.
>
> That's all there is to this case.
>
> ---William P. Rogers, counsel for petitioners in *Abernathy v. Sullivan*[1]

Media lawyers frequently describe *New York Times Co. v. Sullivan*[2] as a great win for the press.[3] Certainly the Court's ruling saved the *New York Times* from financial ruin.[4] However, four Alabama ministers active in the Southern Christian Leadership Conference (SCLC), Ralph D. Abernathy, Joseph E. Lowery, Fred L. Shuttlesworth, and S.S. Seay Sr., were also targeted by Sullivan as defendants.[5] Despite testimony that the

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[1] Oral Argument at 108:00, Abernathy v. Sullivan, 376 U.S. 254 (1964) (No. 40), *available at* http://www.oyez.org/cases/1960-1969/1963/1963_39. Similar remarks were made by Samuel R. Pierce, another attorney for the ministers, who stated, "The sole purpose of this litigation is to suppress and punish expressions of support for the course [sic] of racial equality . . . ." *Id*. at 21:59. Fred Gray, who represented the ministers at trial, said that for white leaders of Montgomery, the case "was a matter of teaching these black ministers who were agitators a lesson and let[ting] them know that if you get involved in these type of things, we're gonna come at you on all fronts." KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN* 64 (Peter Charles Hoffer & N.E.H. Hull eds., 2011).

[2] 376 U.S. 254 (1964).

[3] *See, e.g.*, JAMES C. GOODALE, FIGHTING FOR THE PRESS: THE INSIDE STORY OF THE PENTAGON PAPERS AND OTHER BATTLES 4, 156, 162 (2013) (recounting conversation with Justice Stewart and stating that Stewart "seemed to understand the press and, of course, had voted for 'us' in the *Sullivan* case").

[4] *See id*. at 4 (noting that *Sullivan* and similar cases would have "put the *Times* out of business"); N.Y. Times Co. v. Sullivan, 376 U.S. at 278 n.18 (explaining that the newspaper had three other outstanding cases against it alleging total damages of $2 million).

[5] The ad listed the names of twenty southerners, mostly ministers, who "warmly endorse this appeal." N.Y. Times Co. v. Sullivan, 376 U.S. at 257. Only those four who resided in Alabama were named as defendants. *Id.* Anthony Lewis claims the four ministers were named as defendants "for a shrewd legal reason. The plaintiffs' lawyers calculated that having the ministers in there would prevent the *Times* from removing the cases from the state court to a federal court." ANTHONY LEWIS, MAKE NO LAW 13 (1991); *see also* HALL & UROFSKY, *supra* note 1, at 64 (recounting that the attorney for Sullivan conceded naming the Alabama ministers as defendants was designed to keep the case in state court). A federal district court ruled that the joinder of the ministers was fraudulent, *Parks v. N.Y. Times Co.*, 195 F. Supp. 919, 922 (M.D. Ala. 1961), but the Fifth Circuit found that the

ministers had not authorized the use of their names in the advertisement, "Heed Their Rising Voices," and learned of the ad only when Sullivan asked them for a retraction,[6] the jury found each liable for defamation along with the *New York Times*.[7] In partial settlement of the $500,000 libel judgment, Alabama authorities confiscated the ministers' bank accounts and sold automobiles and real estate owned by the ministers.[8]

Sullivan was not the only successful plaintiff; a few months after the *New York Times v. Sullivan* verdict, Earl James, mayor of Montgomery, also won a $500,000 verdict against the *New York Times* and the four ministers.[9] The financial persecution of the ministers drove the leadership of the SCLC out of the "toughest parts of the South."[10] As William P. Rogers, attorney for the ministers, told the Court, should the libel judgment against the

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joinder was not fraudulent, 308 F.2d 474, 481 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

[6] Oral Argument, *supra* note 1, at 7:20.

[7] N.Y. Times Co. v. Sullivan, 376 U.S. at 257.

[8] TAYLOR BRANCH, PARTING THE WATERS 580 (1988); HALL & UROFSKY, *supra* note 1, at 88; Oral Argument, *supra* note 1, at 18:16. The ministers' request for an injunction stopping the confiscation of their property was denied. *See* Abernathy v. Patterson, 295 F.2d 452, 455 (5th Cir. 1961) (noting the district court's denial of the ministers' motion for a preliminary injunction), *cert. denied*, 368 U.S. 986 (1962).

[9] BRANCH, *supra* note 8, at 391; *see also* New York Times Co. v. Sullivan, 376 U.S. at 295 (Black, J., concurring) (noting pending lawsuits in Alabama). The four ministers and the *Times* were also named as defendants in libel suits filed by Governor Patterson and two other Montgomery officials. LEWIS, *supra* note 5, at 13.

[10] BRANCH, *supra* note 8, at 580. Acting on the advice of its lawyers, the *Times* also kept its reporters out of Alabama for several years in the early 1960s. GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 255 (2006). Sullivan had served his complaint upon Dan McKee, a part-time Alabama "stringer" for the *Times*; lawyers for the *Times* challenged this service, *see N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 28–33 (Ala. 1962), and believed that serving papers on its reporters "would clutter the legal path the *Times* hoped to take." ROBERTS & KLIBANOFF, *supra*, at 235. The *Times* also faced lawsuits based on Harrison Salisbury's April 12, 1960 article on racial tension in Birmingham. For a discussion of the jurisdictional issues presented in that case, see *N.Y. Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966). Salisbury was also indicted for criminal libel by a Bessemer grand jury. For Salisbury's account of his experiences in Alabama, see HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR 392–402 (1980). Salisbury noted that the criminal and civil cases had a "scissors effect. If I appeared in Alabama to testify in the Birmingham civil libel action I could be arrested on the Bessemer criminal libel counts. If I went to Bessemer to defend myself on the criminal charges I would be subject to service in the civil action." *Id.* at 395. The objective of the Alabama actions was to "keep reporters out of the South." *Id.*

ministers stand, the cause of civil rights "will be set back a great many years."[11]

Abernathy v. Sullivan was briefed and argued separately from the *New York Times* case at the Supreme Court; in addition to First Amendment claims, the ministers also raised due process claims that five members of the Court in Conference stated were grounds for reversal.[12] Yet when the Court announced the *New York Times* opinion, it combined the two cases and issued its ruling solely on First Amendment grounds.[13] The combination of the *Abernathy* and the *New York Times* cases tempers any effort to read the opinion as emphasizing press freedom. Stated differently, the actual malice standard announced in the *New York Times* opinion applied equally to the press and the "citizen-critic." Moreover, the core of the *New York Times* opinion emphasized the duty of citizens to criticize government officials;[14] Justice Brennan stressed that, at the heart of our democratic system of government, "the censorial power is in the people over the Government, and not in the Government over the people."[15] This sovereign duty of citizens could be exercised through speech or press channels.

In this Essay, I briefly describe the arguments raised by the ministers and conclude that a ruling on due process grounds would have allowed the opponents of the Civil Rights Movement to continue the assault upon those who challenged segregation. Moreover, the ruling on First Amendment grounds emphasized the equality of speech and press freedom. This equality is critical as

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[11] Oral Argument, *supra* note 1, at 110:54.

[12] *See infra* notes 16–20 and accompanying text.

[13] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264 (1964).

[14] *Id.* at 282; *see also id*. at 275 ("The right of free public discussion of . . . public officials was thus, in Madison's view, a fundamental principle of the American form of government.").

[15] *Id.* at 282. Although Justice Brennan used the phrase "central meaning of the First Amendment" in a different portion of the *New York Times* opinion, *id.* at 273, he later referred to the passage about censorial power as capturing the "central meaning of the first amendment." William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 15 (1965). *See also* N.Y. Times Co. v. Sullivan, 376 U.S. at 275 ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."); *id.* at 270 (noting founders' view of public discussion are a political duty); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

contemporary courts address the emergence of citizen journalists. Finally, the Essay notes the perils of judicial efforts to define the press.

II. THE DUE PROCESS CLAIM

The Court certainly had alternative avenues to rule in favor of the ministers without reaching the First Amendment.[16] For example, the ministers claimed a violation of the Due Process Clause because of a lack of evidence that they had authorized the ad.[17] Professor Dickson's account of the January 10, 1964 Conference discussion of *Abernathy,* based on the notes of Justices Douglas and Brennan, has Chief Justice Warren stating, "There is no evidence against these people. They did not put it in the papers. I would reverse on the *Shuffling Sam* case."[18] Justices Black, Douglas, Clark and Stewart also indicated they agreed with the Chief Justice on this point.[19] Nonetheless, the opinion announced the Court would not reach claims such as due process

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[16] In addition to the due process and First Amendment claims discussed below, the petitioners also raised equal protection claims due to a racially segregated courtroom, an all-white jury, and a judge who in a related case said that the Fourteenth Amendment was inapplicable in Alabama courts, governed by "white man's justice." Brief for the Petitioners at 3, Abernathy v. Sullivan, 376 U.S. 254 (1964) (No. 40).

[17] At trial all of the ministers testified that they had not authorized the use of their names in the advertisement. A sample of this testimony is reprinted in HALL & UROFSKY, *supra* note 1, at 62. John Murray, who helped prepare the ad for the Committee to Defend Martin Luther King, testified that the ministers' names were not in the first version of the ad brought to the *Times*. LEWIS, *supra* note 5, at 32; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. at 260 (noting the addition of names of ministers). Bayard Rustin, executive director of the Committee to Defend Martin Luther King, was not satisfied with the draft of the ad and instructed Murray to include the names of ministers whose churches were affiliated with the SCLC. Rustin insisted it was not necessary to get permission for the use of names "because they were all part of the movement." LEWIS, *supra* note 5, at 32; *see also* Oral Argument, *supra* note 1, at 5:03 (noting unauthorized use of names). For more on the creation of the ad, see HALL & UROFSKY, *supra* note 1, at 16–17. For background on Bayard Rustin and the Committee to Defend Martin Luther King, see JERVIS ANDERSON, BAYARD RUSTIN: TROUBLES I'VE SEEN 224–29 (1997); JOHN D'EMILIO, LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN 291–96 (2003).

[18] THE SUPREME COURT IN CONFERENCE (1940–1985), at 382 (Del Dickson ed., 2001). Dickson used the Justices' notes, often sentence fragments, to reconstruct Conference discussions. *See id.* at xix (describing the editing process). The *Shuffling Sam* reference is to *Thompson v. Louisville*, in which the Court held that a loitering and disorderly conduct conviction was "so totally devoid of evidentiary support" as to violate the Due Process Clause. 362 U.S. 199 (1960).

[19] THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 18, at 382.

because it was "sustain[ing] the contentions of all of the petitioners under the First Amendment's guarantees of freedom of speech and of the press."[20]

What if the Court had reversed the *Abernathy* case on the due process claim? Justice Brennan's opinion is striking in its lack of references to the "raw tyranny"[21] exercised by Alabama government officials towards civil rights activists.[22] Despite this omission, the Court was well aware, through contemporary cases such as *NAACP v. Alabama*,[23] and *Shuttlesworth v. Birmingham*,[24] of the extraordinary measures Alabama government officials had deployed to impede civil rights activities. Moreover, the attorneys for the ministers presented to the Court a vivid picture of government persecution of their clients.[25] Perhaps most importantly, the Justices were keenly aware of the extraordinary doctrine applied by the Alabama courts—the ministers' silence in the face of Sullivan's demand for a retraction meant that they had ratified the contents of the advertisement.[26] A due process ruling

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[20] 376 U.S. at 264 n.4.

[21] The phrase comes from a statement issued by civil rights activists who were enjoined from marching in Birmingham in 1963. *See* Walker v. Birmingham, 388 U.S. 307, 323 (1967) ("This is raw tyranny under the guise of maintaining law and order.").

[22] Only Justice Black's concurring opinion referred to the hostility directed at those who favor desegregation. N.Y. Times Co. v. Sullivan, 376 U.S. at 294 (Black, J., concurring). Justice Brennan's first draft of the opinion included the following passage that was removed from the final: "A part of the scene in contemporary America is the struggle of Negroes to secure their constitutional rights . . . . The opposition engendered to this movement is also a fact familiar to every citizen." LEWIS, *supra* note 5, Appendix 1 at 21.

[23] 377 U.S. 288, 289–93 (1964) (recounting the procedural history of the Alabama judiciary's efforts to evade Supreme Court rulings regarding the NAACP). In the *fourth* Supreme Court ruling in this case, Justice Harlan wrote, "Should we unhappily be mistaken in our belief that the Supreme Court of Alabama will promptly implement this disposition, leave is given the Association to apply to this Court for further appropriate relief." *Id.* at 310.

[24] 376 U.S. 339 (1964), *rev'g* 149 So. 2d 921 (Ala. Ct. App. 1962) (reversing an Alabama appellate court ruling that Shuttlesworth was not guilty of interfering with the police, the crime with which he was charged, but which nonetheless upheld his conviction because he "could have" been convicted of simple assault). This decision was issued on the same date as *N.Y. Times Co. v. Sullivan*.

[25] For example, in their petition for certiorari, attorneys for the ministers claimed if the case "stands unreviewed and unreversed, not only will the struggles of Southern Negroes towards civil rights be impeded, but Alabama will have been given permission to place a curtain of silence over its wrongful activities." Petition for Writ of Certiorari at 17, Abernathy v. Sullivan, 376 U.S. 254 (1964) (No. 40).

[26] During the eight day period between receiving Sullivan's demand for a retraction and the filing of the suit, the ministers did not reply to Sullivan or attempt to place a retraction

would have left the ministers open to additional legal maneuvers designed to restrict the civil rights movement.

This explains why the Court addressed the claims of the ministers under the First Amendment. And, it explains why the Court in Section III of the opinion reviewed the evidence under the rubric of "effective judicial administration,"[27] and found that another trial was unnecessary because neither the ministers nor the *New York Times* knew the advertisement contained false statements.[28] Section III of the opinion was the most debated among the Justices; some such as Justice Harlan were concerned that preventing another trial had implications for federalism. Chief Justice Warren, though, wrote to Justice Brennan that

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in the *Times*. Oral Argument, *supra* note 1, at 7:55. At the conclusion of the evidence at the trial, the ministers asked for a directed verdict on the ground that there was no evidence to connect them with the advertisement. Parks v. N.Y. Times Co., 308 F.2d 474, 479 n.2 (5th Cir. 1962). This was denied and the trial judge instructed the jury that it could find the ministers ratified the use of their names, adding,

> and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning.

Id. The ministers excepted this instruction and the trial judge granted an exception. Brief for the Petitioners, *supra* note 16, at 47. The Alabama Supreme Court refused to rule on this exception, stating it was "too indefinite to invite our review." N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 45 (Ala. 1962). At oral argument, counsel for the ministers attacked the ratification instruction. Oral Argument, *supra* note 1, at 6:17. Several Justices questioned Sullivan's attorney at length about the ratification issue; most importantly, Chief Justice Warren's exchange with the attorney:

> CHIEF JUSTICE EARL WARREN: Mr. -- Mr. Nachman, it is not unknown to at least one member of this Court that he receives letters from various parts of the country claiming that he has made statements that are libelous on certain groups or certain individuals and demanding an apology for it.
>
> If that member of the Court has made no such statements, is he under obligations to -- to apologize or to deny that he made any such statements at the peril of being sued for libel and having that offered as sufficient proof to get a $500,000 verdict against him?
>
> MR. ROLAND NACHMAN, JR.: Your Honor, of course -- obviously, I'm not familiar with - - with the content of the letter but this letter our--
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> CHIEF JUSTICE EARL WARREN: Well, they were--
>
> MR. ROLAND NACHMAN, JR.: -- specified--
>
> CHIEF JUSTICE EARL WARREN: They're far worse tha[n] this one.

Id. at 26:45.

[27] N.Y. Times Co. v. Sullivan, 376 U.S. at 284; *see also* LEWIS, *supra* note 5, at 180–81 (discussing the addition of this phrase in the opinion).

[28] New York Times Co. v. Sullivan, 376 U.S. at 286–87.

under no circumstance should the Court order a retrial: "Otherwise we will merely be going through a meaningless exercise. The case would be remanded, another improvisation would be devised and it would be back to us in a more difficult posture."[29] This view carried the day as Justice Harlan withdrew his objection to Section III shortly before the opinion's announcement.[30]

III. THE FIRST AMENDMENT ARGUMENTS

> Were the libel theory of the Alabama courts below allowed to stand, . . . [a] veritable blackout of criticism, a deadening conformity, would follow inexorably. It requires little imagination to picture the destructiveness of such weapons in the hands of those who, only yesterday, used dogs and fire hoses in Birmingham, Alabama against Negro petitioners leading non-violent protests against segregation practices.
>
> —Brief for the Petitioners Abernathy, Shuttlesworth, Seay & Lowery[31]

The First Amendment arguments presented to the Court by the *New York Times* and Sullivan have been well discussed by other authors.[32] While the *New York Times* emphasized the impact of the libel judgment on press freedom,[33] the ministers argued the judgment interfered with "freedoms of speech, press, assembly and association."[34] The *New York Times* brief is largely bereft of a discussion of the Civil Rights Movement,[35] other than its

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[29] THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 18, at 383.

[30] The dispute over section III of the opinion is discussed in LEWIS, *supra* note 5, at 171–82.

[31] Brief for the Petitioners, *supra* note 16, at 39.

[32] *See, e.g.*, LEWIS, *supra* note 5, at 103–26 (analyzing parties' First Amendment positions).

[33] *See, e.g.*, Brief for the Petitioner at 38, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (stating the libel judgment "abridges the protected freedom of the press").

[34] Brief for the Petitioners, *supra* note 16, at 2.

[35] The style of the *Times*'s brief is captured by the following description of the ad: "It was a recital of grievances and protest against claimed abuses dealing squarely with the major issue of our time." Brief for Petitioner, *supra* note 33, at 57.

description of "Heed Their Rising Voices." The ministers' brief, however, treated the libel action as part of a long line of "weapons" from "lynching, violence and intimidation, through restrictive covenants, Black Codes, and Jim Crow laws" used to perpetuate segregation.[36]

At a critical point, though, both the *New York Times*'s brief and that of the ministers stressed the impact of the libel judgment on criticism of the government. Alabama officials had found a way to reinstitute the Sedition Act, without its intent requirement or the double jeopardy limitation applicable to criminal actions.[37] In language that Justice Brennan would mirror in the opinion, attorneys for the ministers wrote:

> Criticism and discussion of the actions of public officials are a *sine qua non* of the democratic process. It may fairly be said that the genius of our Bill of Rights lies precisely in its guarantee of the right to speak freely on public issues and to criticize public officials' conduct on the assumption that only an informed people is fit to govern itself. First Amendment freedoms are the most cherished policies of our civilization vital to the maintenance of democratic institutions.[38]

The actions of the Alabama officials, the ministers argued, were "part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize[d]" the state's political system of enforced segregation.[39]

At oral argument in both cases, it became evident that the First Amendment protection petitioners were seeking was equally applicable to the *Times* and the ministers. During the *New York Times* oral argument, Justice Goldberg and Herbert Wechsler, attorney for the *Times*, engaged in the following colloquy:

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[36] Brief for the Petitioners, *supra* note 16, at 18.

[37] *Id.* at 38 (noting that the civil punishments exceeded the criminal punishment of seditious libel). This point was emphasized by Justice Brennan in the opinion. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964).

[38] Brief for the Petitioners, *supra* note 16, at 37 (internal quotation marks and footnotes omitted); *see also* Brief for Petitioner, *supra* note 33, at 41–51 (discussing seditious libel).

[39] Brief for the Petitioners, *supra* note 16, at 29.

> MR. WECHSLER: The proposition is that the First Amendment was precisely designed to do away with seditious libel, and seditious libel was the punishment of criticism of the Government and criticism of officials.
> MR. JUSTICE GOLDBERG: And this applies not only to newspapers but to anybody?
> MR. WECHSLER: Exactly; of course.
> MR. JUSTICE GOLDBERG: In other words, you are not arguing here for a special rule that applies to newspapers?
> MR. WECHSLER: Certainly not. We are talking about the full ambit of the First Amendment.[40]

In the *Abernathy* oral argument, Justice Harlan asked Sullivan's attorney, Roland Nachman, if "the basic constitutional question we're being asked to decide is one common to both cases."[41] Nachman, who argued both cases, agreed that it was.[42]

IV. PROTECTING SPEECH AND PRESS FREEDOM

In its briefs, the *New York Times* argued that the Alabama decision would adversely affect the press and groups seeking to use the press to express their views.[43] And, because Alabama held the newspaper to be as responsible for the ad as its sponsors, "it must surely have the same protection they enjoy."[44] In short, groups such as the Committee to Defend Martin Luther King

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[40] 58 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 696–97 (Philip B. Kurland & Gerhard Casper eds., 1975). In response to a question by Justice Stewart about the *Times* "or anybody else" accusing a public official of bribery, Wechsler stated that his argument would be the same. *Id.* at 697.

[41] LEWIS, *supra* note 5, at 138.

[42] *Id.*

[43] *See* 58 LANDMARK BRIEFS, *supra* note 40, at 321 (explaining that if allowed to stand, the Alabama judgment would have a grave impact "not only on the press but also upon those whose welfare may depend upon the ability and willingness of publications to give voice to grievances against the agencies of governmental power"); Brief for Petitioner, *supra* note 33, at 58 (stating that the "willingness of newspapers to carry editorial advertisements is [ ] an important method of promoting some equality of practical enjoyment of the benefits the First Amendment was intended to secure").

[44] Brief for Petitioner, *supra* note 33.

should have freedom to speak via paid advertising, and newspapers should have the freedom to publish such ads.

Justice Brennan's opinion for the Court rejected Sullivan's effort to categorize the ad as unprotected commercial speech,[45] stating the ad "expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[46] Mirroring Wechsler's argument,[47] Brennan said treating the ad as unprotected commercial expression

> would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.[48]

To avoid placing "a handicap upon the freedoms of expression," the Court held that statements do not forfeit constitutional protection because they were published in the form of a paid advertisement.[49]

The use of the broad phrase "freedoms of expression"[50] indicates that it did not matter whether the source of protection was the speech or press aspect of the First Amendment. This broad phrase is shorthand for the idea that the First Amendment equally protects press and speech freedom. The Justices repeatedly referred to both freedom of speech and press throughout their

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[45] Brief for Respondent in Opposition at 19, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[46] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

[47] Brennan even cited the same cases as presented in this aspect of the *Times* brief. *Compare id.* at 266, *with* Brief for Petitioner, *supra* note 33, at 58 (both citing Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939); and Associated Press v. United States, 326 U.S. 1 (1945)).

[48] N.Y. Times Co. v. Sullivan, 376 U.S. at 266; *see also id.* at 300 (Goldberg, J., concurring) ("And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views . . . will be greatly diminished.").

[49] *Id.* at 266.

[50] The phrases "freedoms of expression," "freedom of expression," or "free expression" appear several times in Justice Brennan's opinion. *Id.* at 266, 269, 271, 285, 292.

opinions. For example, Justice Brennan found that Alabama failed to provide the "safeguards for freedom of speech and of the press" that are required by the First Amendment.[51] The repeated references to speech and press are more than stylistic. The standard adopted by the Court required that public officials suing for libel would have to prove the defendant, whether a citizen-critic or a member of the press, acted with actual malice. As shown by its application to the *New York Times*, the ministers in *Abernathy*, and subsequent cases,[52] the actual malice standard equally protects the press and the citizen-critic.

Nor does it matter whether protection for expression stems from the Speech, Press, or Petition Clauses, as shown in *McDonald v. Smith*.[53] There, the Court rejected a claim that speech occurring under the petition clause was absolutely protected from liability for defamation. The Court stated,

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for

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[51] *Id*. at 264; *see also id*. at 256, 265, 268 (referring to protection for speech and press); *id*. at 296 (Black, J., concurring) (stating that the First Amendment leaves "the people and the press free to criticize officials" with impunity); *id*. at 298, 304 (Goldberg, J., concurring) (writing that the First Amendment affords to the "citizen and the press" an absolute privilege to criticize official conduct). Although there are several instances in the opinion in which Justice Brennan refers solely to freedom of the press, these do not undercut the unity of speech and press freedom. Each single reference to the press or freedom of the press involved a quotation by Madison or Jefferson. *See, e.g.*, *id*. at 271 (quoting Madison who stated that "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press"). There are also references in the opinion solely to speech. *See, e.g.*, *id*. at 272 ("Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error.").

[52] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 80–81 (1964) (protecting speech of district attorney); Henry v. Collins, 380 U.S. 356, 356, 358 (1965) (protecting speech of citizen who charged county attorney and chief of police as participants in a "diabolical plot"); St. Amant v. Thompson, 390 U.S. 727, 730 (1968) (protecting speech of candidate).

[53] 472 U.S. 479, 485 (1985); *see also* Bond v. Floyd, 385 U.S. 116, 136 (1966) (rejecting efforts to limit the speech of legislators and concluding that the "interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators").

> granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.[54]

In a concurring opinion in *McDonald*, Justice Brennan noted that the Framers "envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority."[55]

Whether labeling an activity as protected under the Speech Clause or the Press Clause, or using a broader term such as "freedoms of expression," the outcome is the same. This is significant for the development of alternative forms of expression that do not fit neatly into traditional concepts of speech or press.

V. CITIZEN JOURNALISM

In 2011, the First Circuit found that a citizen, Simon Glik, had a First Amendment right to use his cell phone to record the actions of police officers making an arrest on the Boston Common.[56] Glik had no media affiliation, a fact the First Circuit noted "is of no significance."[57] The right to gather news under the First Amendment is "not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press."[58] In an important passage, the appellate court commented on the technological developments that are behind the citizen journalist[59] movement, stating:

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[54] *McDonald*, 472 U.S. at 485 (internal citations omitted).

[55] *Id.* at 489 (Brennan, J., concurring).

[56] Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).

[57] *Id.* at 83.

[58] *Id.*

[59] Citizen journalism is

> 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 relies on alternative sources of legitimacy than traditional or mainstream journalism.

Karin Deutsch Karlekar & Courtney C. Radsch, *Adapting Concepts of Media Freedom to a Changing Media Environment: Incorporating New Media and Citizen Journalism into the Freedom of the Press Index*, 5 ESSACHESS: J. FOR COMM.

> [C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news gathering protections of the First Amendment cannot turn on professional credentials or status.[60]

Asking whether Glik was a member of the press was both irrelevant[61] and potentially troubling.

The citizen journalism movement emphasizes civic engagement,[62] a perfect reflection of Justice Brennan's view of

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STUD. 13, 16 (2012), *available at* http://ssrn.com/abstract=2161601. Karlekar and Radsch add, that by

> juxtaposing the term "citizen," with its attendant qualities of civic mindedness and social responsibility, with that of "journalism," which refers to a particular profession, to describe online and digital journalism done by amateurs, underscores the link between the practice of journalism and its relation to the political and public sphere.

Id. at 18.

Jay Rosen proposes a more succinct definition: "When the people formerly known as the audience employ the press tools they have in their possession to inform one another, that's citizen journalism." Jay Rosen, *A Most Useful Definition of Citizen Journalism*, PRESSTHINK (July 14, 2008), http://archive.pressthink.org/2008/07/14/a_most_useful_d.html.

[60] *Glik*, 655 F.3d at 84.

[61] Similarly, in a recent case the Seventh Circuit avoided assessing whether the ACLU's "police accountability program," which intended to record the public activities of police officers, was a press activity. ACLU v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012). Instead, the appellate court recognized that making audiovisual recordings was protected under the speech and press aspects of the First Amendment. It emphasized that "[t]o the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government." *Id*. at 599.

[62] Scholars who study citizen journalism emphasize the importance of civic engagement. Professor Nip writes, "While the phrase 'user-generated content' may be a more comprehensive term, I prefer 'citizen journalism' because of its association with public life." Joyce Y.M. Nip, *Routinization of Charisma: The Institutionalization of Public Journalism Online, in* PUBLIC JOURNALISM 2.0, at 135, 139 (Jack Rosenberry & Burton St. John III eds., 2010). Similarly, Davis Merritt notes that at the "core" of citizen journalism are "people motivated to tell other people about facts and events they believe are important and

citizens' duty to comment on public affairs.[63] Citizen journalism moves the "citizen-critic" into online outlets such as blogs, an environment that embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[64] Because the value of expression does not depend upon the identity of its source,[65] efforts to separate the citizen journalists from the press are constitutionally flawed. Stated differently, the constitutional value and protection of expression does not depend upon whether it emanates from an institution recognized as the press.

In an earlier article I explained how the Hughes Court during the 1930s began using the terms "freedom of speech" and "freedom of press" interchangeably, indicating that street corner speakers and pamphleteers did not have less protection than journalists.[66] The opinion in *New York Times* is a continuation of this doctrinal trend. Although the Court from 1979 to 1990 signaled in footnotes that it was an open question as to whether non-media defendants were protected under the Court's defamation doctrine,[67] a majority of the Justices during that period stated that non-media defendants had the same protection as media defendants. For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[68]

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exchange thoughts about the meaning of the facts and events. That's undoubtedly a form of journalism, but also a form of public life, the way democracy is expressed and experienced." Davis Merritt, *What Citizen Journalism Can Learn from Public Journalism*, *in* PUBLIC JOURNALISM 2.0, at 21, 28 (Jack Rosenberry & Burton St. John III eds., 2010); *see also* DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE 139 (2004) (stating that blogs written by nonprofessional journalists "are a sign of something vital" and that "[b]logs can be acts of civic engagement").

[63] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting that "public discussion is a political duty" (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))).

[64] *Id.*

[65] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . .").

[66] William E. Lee, *Modernizing the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing*, 13 WM. & MARY BILL RTS. J. 1219, 1223–24 (2005).

[67] *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 133–34 n.16 (1979) (noting the Court had never decided this question); Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n.6 (1990) (reserving judgment "on cases involving nonmedia defendants").

[68] 472 U.S. 749 (1985). For a discussion of the Court's extensive internal deliberations on *Dun & Bradstreet*, see Lee Levine & Stephen Wermiel, *The Landmark that Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1 (2013).

Justices White and Brennan, the two Justices then remaining from the *New York Times* era, wrote separate opinions emphasizing that the First Amendment "gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech."[69]

Justice Brennan's comments are of particular importance because they expand on the meaning of *New York Times*. First, he noted that the Court in *New York Times* held the First Amendment "shields *all* who speak in good faith from the threat of unrestrained libel judgments."[70] The claim that constitutional protection should be confined to the press "misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection."[71] Second, there were definitional problems in any attempt to separate media from non-media entities, a prescient comment in the pre-Internet era. Any distinctions would likely be "born an anachronism" due to transformations in technology and economics of the communications industry, Justice Brennan noted.[72]

Finally, Justice Brennan quoted a 1788 decision by the Pennsylvania Supreme Court interpreting its constitutional protection of freedom of the press as meaning that every citizen had a "right of investigating the conduct of those who are entrusted with the public business . . . . The true liberty of the press is amply secured by permitting every man to publish his opinions . . . ."[73] This passage ties into Professor Volokh's recent study showing that the phrase "press freedom" originally meant "the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the

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[69] 472 U.S. at 773 (White, J., concurring in the judgment).

[70] *Id.* at 776 (Brennan, J., dissenting) (emphasis added).

[71] *Id.* at 783.

[72] *Id.* at 782. This view would be reiterated by Justice Kennedy in *Citizens United*, when he stated that due to the advent of the Internet and the decline of print and broadcast media, "the line between the media and others who wish to comment on political and social issues becomes far more blurred." Citizens United v. FEC, 558 U.S. 310, 352 (2010).

[73] *Dun & Bradstreet*, 472 U.S. at 776 n.2 (quoting Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788)).

publishing industry."[74] These concepts were restated by Justice Brennan when he wrote that every citizen has "an equal right to self-expression and to participation in self-government."[75] Necessarily then, the constitutional rule announced in *New York Times* does not vary according to the means of communication, nor whether protection emanates from either the speech or press facets of the First Amendment.

VI. THE PERILS OF DEFINING JOURNALISTS

Legislatures define journalists or the press in a dizzying variety of ways, sometimes to exempt the press from generally applicable laws and sometimes to exempt the press from restrictions imposed on the expression of other communicators. State shield laws are an example of the former exemption, and as long as legislatures do not use impermissible factors, such as viewpoint discrimination, they are free to craft definitions of the press as broadly or narrowly as they prefer.[76] The latter type of exemption, such as the statute at issue in *Citizens United* exempting press corporations from a restriction on the expression of corporations, presents significant constitutional problems. As the Court held in *Citizens United*, the speech of media corporations is not entitled to greater protection than the speech of other corporations.[77] Justice Kennedy's *Citizens United* opinion noted the increasing difficulty of distinguishing the press from other speakers, partly due to the emergence of the Internet. His remarks, however, were in the context of a law exempting press corporations from a restriction on the speech of other corporations.[78] As I have previously written,

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[74] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012); *see also id.* at 474 ("[F]reedom of the press was understood as the freedom of everyone to publish, just as the freedom of speech was the freedom of everyone to speak.").

[75] *Dun & Bradstreet*, 472 U.S. at 783.

[76] *See* William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 670–71 (2006) [hereinafter Lee, *The Priestly Class*] (describing the variations in state shield law definitions of journalists). The problem of defining journalists has been one of the key sticking points in recent congressional deliberations about a federal shield law. *See* William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27, 35–37 (2012) [hereinafter Lee, *The Demise of the Federal Shield Law*] (describing the impasse in Congress over a federal shield law).

[77] Citizens United v. FEC, 558 U.S. 310, 351 (2010).

[78] *Id.*

while the press is not "*entitled* to constitutionally-compelled exemptions from laws restricting the speech of other speakers," legislatures may exempt the press, however defined, from those laws that do not restrict speech.[79]

My focus in this portion of the Essay is not on the lines that legislatures have drawn between the press and other communicators. Rather, my interest is when judges seek to distinguish the press from other communicators for constitutional purposes.

In *Branzburg v. Hayes*, the Court rejected a First Amendment-based privilege for journalists to refuse to testify before grand juries, in part because the *judicial* administration of this privilege "would present practical and conceptual difficulties of a high order."[80] Justice White added,

> 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.[81]

In effect, regardless of the technology employed,[82] press freedom is constitutionally defined as covering more than the "organized press."[83] Stated differently, labels such as citizen journalist or lonely pamphleteer do not confer lesser constitutional protection to

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[79] Lee, *The Demise of the Federal Shield Law*, *supra* note 76, at 31; *see also* Lee, *The Priestly Class*, *supra* note 76, at 676–78 (noting that a legislative definition of journalists is preferable to ad hoc determinations by the judiciary).

[80] 408 U.S. 665, 704 (1972). Legislatures were free "to fashion standards and rules as narrow or broad as deemed necessary" to provide a statutory privilege. *Id.* at 706.

[81] *Id.* at 704.

[82] Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (stating that the press in "its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion").

[83] *Branzburg*, 408 U.S. at 705 (stating that the informative function asserted by the organized press is also performed by "lecturers, political pollsters, novelists, academic researchers, and dramatists").

those who are outside the institutional structures of newspaper and broadcast organizations.

Following *Branzburg,* a number of courts parsed the opinion and found support for a limited First Amendment-based testimonial privilege.[84] But in doing so, these courts have not limited the privilege to the traditional news media, thus avoiding the definitional problem highlighted in *Branzburg*. Instead, these courts have focused on whether the newsgatherer "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."[85] Under this intent test, courts have found the privilege applied to specialized publications such as an oil industry newsletter,[86] a medical newsletter,[87] and investment analyst reports,[88] as well as to specialized professions such as academic researchers,[89] a documentary filmmaker,[90] and an investigative book author.[91] Citizen journalists with the appropriate intent would qualify for a privilege under this test.

When courts venture outside the intent test, the analysis has not been pretty. Consider, for example, a libel case brought against blogger Crystal Cox. Cox claimed in a pretrial motion that she was "media" and entitled to certain constitutional protections unavailable to non-media defendants.[92] The trial court rejected

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[84] S*ee, e.g.*, Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (stating that Justice Powell's concurring opinion supports a constitutional privilege). In a yet to be published article, based on Justice Powell's *Branzburg* papers and interviews with his clerks, I conclude that Justice Powell was opposed to a constitutional privilege for journalists.

[85] Von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987).

[86] McGraw-Hill, Inc. v. Arizona, 680 F.2d 5, 5 (2d Cir. 1982).

[87] Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 78 (E.D.N.Y. 1975).

[88] Summit Tech. Inc. v. Healthcare Capital Group, Inc., 141 F.R.D. 381, 381 (D. Mass. 1992).

[89] Cusamano v. Microsoft Corp., 162 F.3d 708, 708 (1st Cir. 1998).

[90] Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 434 (10th Cir. 1977).

[91] Shoen v. Shoen, 5 F.3d 1289, 1289 (9th Cir. 1993).

[92] Obsidian Finance Group, LLC v. Cox, No. CV-11-57-113, 2011 WL 5999334, at *1 (D. Ore. Nov. 30, 2011). After trial, Cox changed her position and argued that the press and others who speak to the public are entitled to the same constitutional protection. Memorandum in Support of Defendant Crystal Cox's Motion for New Trial and in the Alternative for Remittur at 9, Obsidian Finance Group, LLC v. Cox, No. 3:11-cv-000557-HZ, 2012 WL 487846 (D. Ore. Jan. 4, 2012). Moreover, Cox argued that she should not have been held liable without a jury finding of negligence and that presumed damages should not have been awarded with a jury finding of actual malice. *Id.* at *8. Judge Hernandez denied this motion, ruling that "it is not enough to say that the Court's cases support a conclusion

this claim, noting that Cox had failed to offer any evidence of her "status as a journalist."[93] For example,

> there is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting "the other side" to get both sides of a story. Without evidence of this nature, defendant is not "media."[94]

In addressing Cox's motion for a new trial, U.S. District Court Judge Marco Hernandez expanded on his reasoning and the factors "traditionally associated with the media."[95] The judge did not indicate the source of these factors,[96] or how he had concluded that they were "traditional" factors, but added that one who blogs

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that media and non-media defendants must be treated alike. Defendant's motion rests on the unsupported premise that the Court's cases require some degree of fault in all defamation cases." Obsidian Finance Group, LLC v. Cox, No. 3:11-cv-57-117, 2012 WL 1065484, at *12 (D. Ore. Mar. 27, 2012). Because the case involved a private figure and a matter of private concern, Judge Hernandez believed that a finding of fault was unnecessary. *Id*. at *7. The Ninth Circuit, however, recently found the case involved a matter of public concern. Thus, the jury should have been instructed it could not find Cox liable for defamation unless it found she acted negligently. Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284, 1292 (9th Cir. 2014).

[93] Cox, who is not a lawyer, represented herself at trial and did not offer any cases in support of her motion. *Cox*, 2011 WL 5999334, at *5.

[94] *Id*. While this Article was in press, the Ninth Circuit rejected these factors, stating that "a First Amendment distinction between the institutional press and other speakers is unworkable." *Cox*, 740 F.3d at 1291.

[95] *Cox*, 2011 WL 5999334, at *7.

[96] The factors identified by Judge Hernandez resemble those used in part by a New Jersey appellate court in 2010. *See* Too Much Media, LLC v. Hale, 993 A.2d 845, 859 (N.J. Super. Ct. App. Div. 2010) ("Defendant has produced no credentials or proof of affiliation with any recognized news entity, nor has she demonstrated adherence to any standard of professional responsibility regulating institutional journalism, such as editing, fact-checking or disclosure of conflicts of interest."). These factors were subsequently ruled in 2011 by the New Jersey Supreme Court as "not required" by the state shield law. Too Much Media, LLC v. Hale, 20 A.3d 364, 382 (N.J. 2011).

could be considered as "media" if they possessed some of the characteristics listed.[97] Cox had offered no proof relevant to any of the characteristics. In addition, the judge noted that after receiving a demand from the plaintiffs that Cox cease posting defamatory material, she offered the plaintiffs "PR," "search engine management," and online reputation repair services for $2,500 per month.[98] "The suggestion was that defendant offered to repair the very damage she caused for a small but tasteful monthly fee. This feature, along with the absence of other media features, led [the judge] to conclude that defendant was not media."[99]

A similar focus on professional standards and ethics was rejected in a 2013 New Jersey case involving Tina Renna, writer and editor of a blog focusing on waste, corruption, and mismanagement in Union County, New Jersey. Two of Renna's posts claimed that county employees used county generators for personal use in the aftermath of Hurricane Sandy. When served with a subpoena, Renna invoked the state shield law.[100] The state claimed Renna was not a journalist due to factors such as use of profanity on the blog, spelling and grammar mistakes on the blog, failure to issue corrections, and failure to acknowledge bias to her readers.[101] In addition, the state asserted that her investigatory techniques were not as "thorough" as "traditional or professional journalists."[102]

The Superior Court of Union County found Renna met the standards for the state privilege; although her writing was not akin to that of a professional such as Matt Drudge or Arianna Huffington, the shield law did not limit its protection to professionals.[103] Further, while many of her posts "devolved into ad hominem attacks" characterizing county employees as Nazis, the statute was not limited "only to those who uphold certain

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[97] *Cox*, 2012 WL 1065484, at *7 (noting that to be considered "media" one did not have to possess all or most of the characteristics presented).

[98] *Id.*

[99] *Id.*

[100] *In re* Jan. 11, 2013 Subpoena By the Grand Jury of Union Cnty., 75 A.3d 1260, 1262–63 (N.J. Super. Ct. Crim. Div. 2013).

[101] *Id.* at 1269.

[102] *Id.*

[103] *Id.* at 1271.

journalistic standards in their writing and conduct."[104] And although Renna referred to herself as a "watchdog" and "citizen activist," the court ruled that "[b]eing a reporter and citizen watchdog are not mutually exclusive."[105]

The Renna case, despite its interpretation of a state shield law, provides a useful framework for constitutional questions involving emerging citizen journalists. By discounting adherence to professional practices and ethics, the New Jersey court avoided the primary mistake of Judge Hernandez—assuming that a communicator's protection depends upon compliance with "professional" behavior and ethics.

The history of journalism is populated with unsavory characters with questionable practices and ethics. Consider, for example, Jay Near, a blatant anti-Semite whose scandal sheet, the *Saturday Press*, would not serve as a paragon of journalism practice or ethics.[106] Nonetheless, the Supreme Court held that his freedom to publish was abridged by the application of a Minnesota law enjoining scandalous publications.[107] Yet, Judge Hernandez's test and the claims of New Jersey in the Renna case include professional practice and ethics factors, factors that have never been used by the Supreme Court to define First Amendment protection. Indeed, the notion of "professional standards" of journalists has been rejected by the Court.[108] Because industry

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[104] *Id.*

[105] *Id.* at 1272.

[106] *See generally* FRED FRIENDLY, MINNESOTA RAG (1981) (recounting the history behind *Near v. Minnesota*). The story of Near's *Saturday Press* is intertwined with that of his previous newspaper, the *Twin City Reporter*, which Near's partner Jack Bevins used for blackmail. *See id.* at 32–37. Bevins may have been the only newspaperman who also operated a brothel on the side. *Id.* at 36. The record presented to the Supreme Court included samples of Near's anti-Semitic writings, *Near v. Minnesota*, 283 U.S. 697, 724 n.1 (1931) (Butler, J., dissenting), and the "long criminal career" of the *Twin City Reporter*. *Id.* at 731–32. Justice Butler characterized the content of the *Saturday Press* in the following terms: "In every edition slanderous and defamatory matter predominates to the practical exclusion of all else." *Id.* at 724.

[107] *Near*, 283 U.S. at 720 ("The fact that liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint. . . ."); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 54 (1988) ("The art of the political cartoonist is often not reasoned or evenhanded, but slashing and one-sided.").

[108] In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Justice Harlan's plurality opinion advocated that in defamation cases involving public figures, recovery is permissible "on a showing of highly unreasonable conduct constituting an extreme departure from the

practices and ethics are not uniform,[109] it is perilous to attempt to divide press and non-press with these elusive measures. Other factors noted by Judge Hernandez, such as education and affiliation with "recognized" news outlets, cut against the Court's belief that freedom of the press is a "fundamental personal right."[110]

VII. CONCLUSION

What would the *New York Times* opinion have been like without the companion *Abernathy* case? It is unlikely the Court would have constructed a rule just for the "organized press." Weschler's comments at oral argument counseled against that outcome. Perhaps more importantly, principles that protect the expression of all, such as the sovereign rights of citizens and the impermissibility of seditious libel, permeate the opinion. The *Abernathy* case provides an essential backdrop for the understanding that *New York Times* protects the "freedoms of expression."[111]

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standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. 130, 155 (1967). This standard was "emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule." Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 (1989). As Justice Stevens observed in *Harte-Hanks*, "Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court." *Id.*

[109] *See* Too Much Media, LLC v. Hale, 993 A.2d 845, 882 (N.J. Super. Ct. App. Div. 2010) (noting "industry practices vary widely"). *See generally* CONRAD FINK, MEDIA ETHICS 31 (1995) (noting the journalists do not unanimously agree on concepts such as objectivity); Margaret Sullivan, *As Media Change, Fairness Stays Same*, N.Y. TIMES, Oct. 27, 2013, at SR12 ("Journalism is changing drastically, and the once-prized quality of objectivity is increasingly dismissed by some as outdated and pointless."). For a contemporary debate on journalism standards, see Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), *available at* http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html.

[110] *See* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) ("Freedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment.").

[111] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).