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The Problem with Free Press Absolutism

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On March 3, 1993, James Perry brutally murdered three people.[1] He shot Mildred Horn multiple times through the eyes, strangled her 8-year-old quadriplegic son, and shot and killed the boy's nurse. Perry was a contract killer, and Horn's ex-husband had hired him to murder his family so that he could inherit his son's $2 million trust fund.

In preparation for the triple murder, Perry relied heavily on the detailed killing instructions and unapologetic encouragement found in two books: *Hit Man: A Technical Manual for Independent Contractors* and *How to Make a Disposable Silencer, Vol. II,* both published by Paladin Enterprises.[2] The victims' families sued Paladin for aiding and abetting the wrongful deaths of their loved ones.[3]

One would assume that a publisher of such shockingly unethical and harmful books would have few friends in the courtroom. Yet there was one group who did advocate in favor of Paladin—the mainstream news media. A group of prominent and respected news organizations including *The New York Times, The Washington Post,* ABC, Inc., the National Association of Broadcasters, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists filed an amicus brief in support of Paladin.[4]

Deciding the case against the publisher, Fourth Circuit Court of Appeals Judge Michael Luttig expressed bafflement that such reputable members of the press would support Paladin.[5] He stated:

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[1] *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 239 (4th Cir. 1997).

[2] *See id.* at 241.

[3] *See id.*

[4] *Id.* at 233.

[5] *Id.* at 265.

> That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.[6]

The news organizations, however, were unyielding: the rights of publishers on the periphery of the First Amendment, such as Paladin, must be defended in order to ensure the security of speakers at its core. Or, as the media amici wrote in support of certiorari to the United States Supreme Court, "it is most often the speech at the fringes of American life that defines the freedoms for those at the center."[7]

The press's advocacy on behalf of an unseemly speaker like Paladin Publishing is not unusual. Major news media organizations have a long history of coming to the defense of a number of speakers whose role in our public debate appears to have little in common with the journalistic work of newsgathering and reporting. News media advocates in recent years, for example, have provided legal support for the makers of animal cruelty videos,[8] a man convicted of falsely claiming to have earned military honors,[9] political propagandists,[10] an anti-gay church that routinely protested at military funerals, a student who held up a sign reading "Bong Hits 4 Jesus,"[11] and a conspiracy theorist who believed President and Hillary Clinton murdered their deputy counsel and engaged in a cover-up.[12] They have chimed in, moreover, even in cases where the regulations at issue included express exceptions for the news media.[13]

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[6] *Id.*

[7] Brief for ABC Inc. et al. as Amici Curiae Supporting Petitioner, Paladin Enterprises v. Rice, 523 U.S. 1074 (1998) (No. 97-1325), 1997 WL 33549427.

[8] *See* Brief for The Reporters Comm. for the Freedom of the Press et al. as Amici Curiae Supporting Respondent, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 2219305.

[9] *See* Brief for The Reporters Comm. for the Freedom of the Press et al. as Amici Curiae Supporting Respondent, United States v. Alvarez, 132 S.Ct. 2537 (2012) (No. 11-210), 2012 WL 249640.

[10] *See* Brief for The Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Appellants, Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 132714.

[11] *See* Brief for the Student Press Law Center et al. as Amici Curiae Supporting Respondent, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278), 2009 WL 542417.

[12] *See* Brief for The Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Respondent, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) (No. 02-954), 2003 WL 22038397.

[13] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 465 (2010).

While many of these cases undeniably raise issues that could directly affect the work of traditional journalists, the loyalties of the press typically go well beyond its own self-interest and seek to protect virtually all speakers. Indeed, the traditional modus operandi of journalists and their lawyers is to demand nothing short of what I refer to as "free press absolutism."

In her important new book, *The First Amendment Bubble*, Professor Amy Gajda exposes the many dangers of this all-encompassing attitude about constitutional rights for the press. Sure, there may have been a time when the news media could demand—and the courts and public would grant—near immunity for their work, making free press absolutism relatively costless. Yet Gajda provides example after example demonstrating that the courts no longer give the media a free pass.[14] And as the public and the courts' opinions about the press change, Gajda warns, the news media's thinking about their legal protections must change as well.[15] In place of free press absolutism, Gajda says, journalists must make "hard choices," specifically about "the ways that they define themselves and their craft."[16]

In her book, Gajda persuasively makes the argument that the rise of "quasi-journalism" is a core threat to the amount and kind of legal press protections that courts will be willing to enforce.[17] Journalists can no longer rely on their standby approach of "seeking to extend the boundaries of press rights to cover an ever-expanding universe of bloggers, activists, web merchants, provocateurs, and other quasi-journalistic publishers."[18] She suggests that in such times, journalists must sacrifice the breadth of their protections in order to achieve a more limited, but more sustainable, legal standing.

In this Essay, I go a step further and submit that even in the "best of times" with the most press-friendly courts, the news media need not, and should not, espouse an "all for one and one for all" mantra when it comes to press freedoms. By adopting this overly zealous attitude, the press has hurt its own cause both legally, by weakening its argument for more expansive press rights, and also reputationally, by aligning themselves with disreputable speakers. This stubborn refusal to separate press from non-press speakers, moreover, leads to an underemphasis of the public benefits of the press's work and an overemphasis of its harms. Adopting the absolute principle that all speakers are the same, therefore, threatens to

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[14] AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 50–51 (2015).

[15] *See id.* at 86–87.

[16] *Id.* at 223.

[17] *Id.* at 229–30.

[18] *Id.* at 224.

limit the public's access to important information by failing to recognize that journalism, as Gajda describes it, "is special, important, and basically good."[19]

Journalists have long and proudly embraced the idea that they have assumed the mantle of defender of First Amendment rights for all.[20] While press critics often accuse the news media of demanding special rights and protections not granted to the general public, the media's actual court filings tell a different story.[21] In a close study of almost forty years of Supreme Court cases, Professor Erik Ugland found that media litigants have consistently rejected a "special rights" framework.[22] Rather, they have actively scorned legal arguments that distinguish the mainstream press from more fringe press entities or press speakers from the general public.[23] In fact, Ugland found, "they have been more diligent than the Court in avoiding arguments that separate speech and press and that imply the need for unusual scrutiny of restraints targeting media defendants."[24] Even when press litigants did advance legal arguments that made distinctions between speech and press, or between the press and other speakers, Ugland found that "they linked their claims to an egalitarian conception of the press in which the distinctions among communicators were made on the basis of function, not identity."[25]

Thus, the news media (usually newspapers) have fought vigorously for broad legal rights that served not only their interests but everyone's.[26] In a variety of legal contexts, from constitutional protections to statutory rights, it was the news media who "led the charge" for expansive and inclusive laws.[27] As former *New York Times* Supreme Court reporter Linda Greenhouse explained, the press:

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[19] *Id.* at 223.

[20] *See Advocacy*, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, http://www.asja.org/about/advocacy/ (last visited Apr. 6, 2016).

[21] Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 380 (2009).

[22] *Id.*

[23] *See id.* at 418–20.

[24] *Id.* at 380.

[25] *Id.* at 421.

[26] *See* Enrique J. Gimenez, *Who Watches the Watchdogs?: The Status of Newsgathering Torts Against the Media in Light of the* Food Lion *Reversal*, 52 ALA. L. REV. 675, 676-77 (2001).

[27] RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 570–571 (2011).

> sees itself as the embattled defender of the constitutional guarantees of free speech and freedom of the press. Each affront to those guarantees, serious or slight, is immediately seized as fresh evidence that the country is forsaking the ideals of the founding fathers and that the First Amendment itself is in peril.[28]

For its part, the United States Supreme Court agrees that the press and the public are a package deal.[29] The Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[30] The Court also has claimed repeatedly that "[t]he guarantees of the First Amendment broadly secure the rights of every citizen" and it does not "create special privileges for particular groups or individuals."[31] Based on this approach, the Court has held that the press has no additional rights of access to government information and places than the general public,[32] nor does it enjoy any special immunity for criminal or tort violations.[33] When the Court has held in favor of the press, such as finding a constitutional right of access to criminal trials[34] or a heightened protection for defamatory statements made about public officials,[35] it does so by granting the right to all speakers.

The problem is that the press is different—significantly different—from other types of speakers. And the courts know it. When the Supreme Court talks about the press, it does so with a rhetoric that recognizes the press's distinctiveness from the general public.[36] But more importantly, the Court has frequently recognized that the press has a unique and "historic, dual responsibility in our society."[37] That dual responsibility is to gather and disseminate news to the public and provide a check on the government

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[28] Linda Greenhouse, *Books of The Times Embattled Defender?* N.Y. TIMES (July 4, 1981), http://www.nytimes.com/1981/07/04/books/books-of-the-times-embattled-defender.html.

[29] *But see* Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014) (arguing that the Court has implicitly treated the press differently than other speakers).

[30] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010) (citations omitted) (internal quotation marks omitted); *accord* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.").

[31] Saxbe v. Wash. Post Co., 417 U.S. 843, 857 (1974) (Powell, J., dissenting).

[32] Pell v. Procunier, 417 U.S. 817, 834 (1974).

[33] Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (noting that the press receives "no special immunity from the application of general laws").

[34] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980).

[35] *See* N.Y. Times v. Sullivan, 376 U.S. 254, 283–84 (1964).

[36] West, *supra* note 29, at 746–49.

[37] FCC v. League of Women Voters of Cal., 468 U.S. 364, 382 (1984) (describing the dual responsibilities as "reporting information and . . . bringing critical judgment to bear on public affairs").

and the powerful.[38] These specific and unique press functions can be compared with the discussion of general speech values, which run the gamut from furthering truth-seeking to enabling individual self-realization.[39] These differing purposes between press and speech explain why speech has been found to protect decidedly non-press actions such as music, dance, art, video games, and non-verbal communication.

In many cases, the goals of all speakers—press and non-press alike—overlap. But in numerous others, they diverge. We see this separation most clearly in cases involving the pre-speech activity of information gathering.[40] It is here that the media's embrace of free press absolutism has been the most damaging to its self-interest. This is because newsgathering often involves situations in which the press needs rights or protections in order to fulfill its duties that are simply not practicable to give to everyone.

In contemplating its continued support for free press absolutism, the press should learn from the fall of its sister-theory, free speech absolutism. Much like free press absolutism, free speech absolutism is very appealing in the abstract. Speech absolutism provides a constitutionally overprotective approach that embraces the maximum number of speakers and messages. It further offers a bright-line rule that keeps the government out of the messy business of line-drawing. But much like speech absolutism, press absolutism fails by offering only one answer to a variety of complex questions.

Perhaps this is why, despite the unequivocality of the First Amendment's text, there are few legal thinkers who have embraced the notion that the freedom of speech is absolute. Even the earliest advocates for broad free speech rights knew there had to be limits. The most famous example (if arguably not the best example)[41] of why all speech cannot be protected is Justice Oliver Wendell Holmes's suggestion that even the "most stringent protection of free speech would not protect a man in

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[38] West, *supra* note 29, at 750 (stating that a review of Supreme Court precedent about the press reveals that the press has two primary constitutional functions).

[39] *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963) (arguing that freedom of speech furthers four main values including being necessary "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society").

[40] Comment, *The Right of the Press to Gather Information After* Branzburg *and* Pell, 124 U. PA. L. REV. 166, 181–91 (1976).

[41] WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 38 (1984) (suggesting that shouting "Fire!" in a crowded theater would be protected if the audience members were all deaf and watching a movie with subtitles).

falsely shouting fire in a theater and causing a panic."[42] By 1942, the Court stated that "the right of free speech is not absolute at all times and under all circumstances."[43]

Two Supreme Court justices, Justice Hugo Black and Justice William Douglas, made the most gallant effort to apply an absolutist approach to speech cases. Indeed, Justice Black declared repeatedly his confidence in absolutism, stating that the Constitution "'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.'"[44] Yet Black and Douglas never managed to convince their colleagues that absolutism was feasible or desirable. The other justices saw that there were a variety of speech cases in which some regulation was needed in order to avoid great harm.[45] These included perjury, child pornography, incitement of criminal activity, leaking of national security secrets, threats, defamation, copyright violations, and so on. As Dean Rodney Smolla has explained, absolutism ultimately failed "largely because it is simply too brittle to account for the many 'irresistible counterexamples' for which some accounting must be made."[46]

Treating unlike speech alike leads to problems of both over- and under-inclusiveness. Some speech that has low public value and causes great harm is protected, while other speech is not protected even though it has great public value and few harmful effects. Justice Black's experiment with absolutism demonstrates this well. According to Justice Black, while government cannot regulate speech, it can regulate conduct.[47] Thus, when he concluded that a law was "*directly* aimed at curtailing speech," he was

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[42] Schenck v. United States, 249 U.S. 47, 52 (1919).

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.

Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

[43] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571 (1942).

[44] Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting); *see also* Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 156 (1973) (Douglas, J., dissenting) (stating that "[t]he ban of 'no' law that abridges freedom of the press is in my view total and complete").

[45] *See Beauharnais*, 343 U.S. at 254–56.

[46] Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623, 1632 (2005).

[47] *See* HUGO BLACK, A CONSTITUTIONAL FAITH 53 (1968) ("In giving absolute protection to free speech, however, I have always been careful to draw a line between speech and conduct.").

steadfast in his belief that it was unconstitutional.[48] This led him to vote against any regulation of speech, even if it was arguably of low value and caused great societal harm including obscenity, defamation,[49] and unauthorized disclosure of national security information.[50]

But when Justice Black concluded that the law in question was "aimed at conduct and *indirectly* affect[ed] speech," he was far more willing to uphold the regulation.[51] In such cases, he frequently gave great weight to countervailing interests such as private and government property rights and privacy. He thus voted to uphold government regulation of speech that was arguably high-value "core" political speech such as protests against the arrests of racial segregation demonstrators,[52] students wearing black armbands to protest the Vietnam War,[53] flag burning,[54] and Paul Robert Cohen's famous "fuck the draft" jacket.[55]

Justice Black's critics rightfully complained that his absolutism resulted in legal protections that were just as—if not more—subjective than other types of balancing approaches.[56] The definitional question of determining whether an act was primarily speech or primarily conduct gave judges great discretion. Likewise, by recognizing countervailing interests to speech, such as the rights of others to privacy, property, or tranquility, Justice Black was still making key value choices. One of his outspoken critics, James J. Magee, declared Justice Black to be an "undisguised . . . balancer."[57]

Free press absolutism, as I discuss it here, raises many similar, although not identical, issues. Both forms of absolutism struggle with a definitional problem—either how to determine what is speech (as opposed to conduct) or who is the press (as opposed to other speakers). In both

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[48] Barenblatt v. United States, 360 U.S. 109, 142 (1959) (Black, J., dissenting) (emphasis added).

[49] *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (Black, J., dissenting) (advocating that the First Amendment protected an "unconditional right to say what one pleases about public affairs" regardless of whether statements were made with actual malice).

[50] *See* N.Y. Times v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.").

[51] BLACK, *supra* note 47 at 61 (emphasis added).

[52] *See* Adderley v. Florida, 385 U.S. 39, 47–48 (1966); Cox v. Louisiana, 379 U.S. 536, 575 (1965) (Black, J., concurring).

[53] Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 525–26 (1969) (Black, J., dissenting).

[54] Street v. New York, 394 U.S. 576, 609–10 (1969) (Black, J., dissenting).

[55] Cohen v. California, 403 U.S. 15, 27 (1971) (Black, J., dissenting).

[56] *See* Sergey Tokarev, *Absolutism and Free Speech*, CIVIL LIBERTIES (Nov. 10, 2011, 2:29 PM), http://uscivilliberties.org/themes/2977-absolutism-and-free-speech.html.

[57] JAMES J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT 183 (1980).

cases, an absolutist approach ties the hands of the courts to recognize real-world differences in the benefits and harms at stake and to structure the rights for maximum public benefits.

In other articles, I have explained the differences between freedom of speech and freedom of the press.[58] Both historical evidence and Supreme Court doctrine suggest that while our speech rights are broad and ubiquitous, press freedoms should be reserved for those speakers who are fulfilling the unique press functions of informing the public on newsworthy matters and checking the government and the powerful.[59] The insistence that press speakers are no different than other types of speakers works to limit—not expand—our ability to protect and empower these unique constitutional actors. The result is a reduction in the amount of information the public receives and a weakening of our ability to scrutinize the government.

Like free speech absolutism, an absolutist approach to freedom of the press risks being both over- and under-inclusive. Generally, I have focused my attention in prior articles on the problem of the under-protection of press speakers.[60] If a right, once recognized, must be given to all, courts become understandably cautious about embracing broad constitutional protections.[61] Yet some of these rights and protections are ones that the press would use—and use effectively—for the greater public good. Non-press speakers, on the other hand, might abuse such rights. Thus, when the media fails to make the case that they need such protections in order to further their public informant and government watchdog duties, then they tend to lose. For example, judges have rationally concluded that we cannot give all speakers a testimonial privilege;[62] protection from search warrants,[63] access to government information,[64] proceedings,[65] or places,[66]

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[58] *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) [hereinafter *Awakening the Press Clause*]; Sonja R. West, *The Stealth Press Clause*, 48, 48 GA. L. REV. 729 (2014); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014); Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49 (2016).

[59] West, *supra* note 29, at 755–56.

[60] I have discussed how courts could identify press speakers in more detail in my article. Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2437 (2014) (arguing that "press speakers devote time, resources, and expertise to the vital constitutional tasks of informing the public on newsworthy matters and providing a check on the government and the powerful").

[61] *See Awakening the Press Clause*, *supra* note 58, at 1056–57 (describing this problem as the "boomerang effect").

[62] *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972) (considering reporters' argument that they should have testimonial privileges "because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future").

[63] *See* James S. Liebman, *Search and Seizure of the Media: A Statutory, Fourth Amendment and*

defenses to select tort or criminal liabilities such as fraud,[67] trespass[68] or eavesdropping;[69] or safeguards against government seizure of mail or phone records.[70] In these types of cases, where judges are given a choice between granting a right for everyone or no one, they tend to choose no one.

While under-protection of the press is a serious concern, Gajda's arguments shine needed light on the harms of an overinclusive approach to press freedoms as well. When we forbid drawing lines between different types of speakers, we end up protecting speakers who are not acting as watchdogs or conduits of information to the public.[71] Advocating for everyone to receive press rights means, Gajda states, that "journalists must necessarily welcome those quasi-journalists who today push the limits of First Amendment protection into places where courts and legislators would presumably never go."[72] Because these quasi-journalists do not follow the same ethical and professional standards as actual journalists, they can do serious damage to the public and the courts' view of journalism. The press, meanwhile, is left unable to take advantage of the

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First Amendment Analysis, 28 STAN. L. REV. 957, 967 (1976).

[64] Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 636 (1974–75) ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.").

[65] *See, e.g.*, Soc'y of Prof'l Journalists v. Sec'y of Labor, 832 F.2d 1180, 1184–86 (10th Cir. 1987) (dismissing on mootness grounds a district court order stating that, while the press and the public did not have a statutory right to cover a hearing by the Mine Safety and Health Administration, they did have a constitutional right to do so).

[66] *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 15–16 (1978) (denying press access to jails and prisons, and noting that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control").

[67] *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 506 (4th Cir. 1999) (stating that reporters are not immune from fraud, breach of duty of loyalty, and trespass claims).

[68] Le Mistral, Inc. v. Columbia Broad. Sys., 402 N.Y.S.2d 815 (App. Div. 1978) (upholding a finding of liability against a television station after its news crew entered the property of a restaurant that had been cited for health code violations).

[69] *See, e.g.*, Deteresa v. Am. Broad. Co., 121 F.3d 460, 472 (9th Cir. 1997); Dietemann v. Time, Inc., 449 F.2d 245, 249–50 (9th Cir. 1971); *cf.* Shulman v. Group W Prods., Inc., 955 P.2d 469, 493 (Cal. 1998) (noting that an intrusion of privacy committed as part of newsgathering might trigger some constitutional protections for the reporter).

[70] Charlie Savage & Scott Shane, *Justice Dept. Defends Seizure of Phone Records*, N.Y TIMES (May 14, 2013), http://www.nytimes.com/2013/05/15/us/politics/attorney-general-defends-seizure-of-journalists-phone-records.html.

[71] Or, at least, speakers who are not fulfilling the functions with regularity. In a prior article, I refer to these speakers as "occasional public commentators." *See Awakening the Press Clause*, *supra* note 58, at 1070.

[72] GADJA, *supra* note 14, at 245–46.

reputational trust it is able to earn. The blurring of the line between journalists and quasi-journalists can also lead journalists to see themselves and their duties differently. Without the ability to self-identify as a unique speaker, journalists are tempted to stoop to the levels of quasi-journalists. Thus, Gadja says, "journalists must work against the perception—and, in some cases, the reality—that the two have become one."[73]

The instinct behind the news media's embrace of free press absolutism is a commendable one. Journalists are, by their nature, believers in the value of more voices, the importance of equality, and the fear of government power. Thus to media advocates, the idea of abandoning free press absolutism amounts to legal blasphemy. But the warning cry of Gajda's book suggests it is, indeed, time for the press to focus its fighting power on winning its own legal battles and leave the others to protect themselves.[74]

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[73] *Id.* at 246.

[74] *Id.* at 249.

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