

**MEDIAGATHERING VS. NEWSGATHERING:
GIVING THE FREEDOM OF THE PRESS CLAUSE
DUE RECOGNITION**

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The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, and be capable of reading them. I am convinced that those societies . . . which live without government, enjoy in their general mass an infinitely greater degree of happiness, than those who live under European governments. Among the former, public opinion is in the place of law, and restrains morals as powerfully as laws ever did anywhere. Among the latter, under pretense of governing, they have divided their nations into two classes, wolves and sheep. I do not exaggerate.

—Thomas Jefferson¹

I. INTRODUCTION

Thomas Jefferson clearly recognized the significance of the press, but the press of his time was limited to those companies that

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¹ Thomas Jefferson, *Letter to Edward Carrington*, in *THE FIRST AMENDMENT: FREEDOM OF THE PRESS* 73, 74-75 (Garrett Epps ed., 2008).

owned a printing press.² Today, technology allows the press and media to bombard society with information and entertainment.³ Despite this evolution, the courts refuse to address the issue of defining the press.⁴ Courts have been recognizing categorical exceptions to free speech for the past century, but they continue to ignore the category specifically cited in the First Amendment of the United States Constitution.⁵ This disregard for the Freedom of the Press Clause (the Press Clause) combined with fluctuating newsgathering tort law has created an opportunity for reform.

This Article will first examine the differences between news and entertaining television. Part II will focus on the journalist's perspective when discussing the different media genres.⁶ Next, in Part III, the Article will dissect the Press Clause through a linguistic and historical analysis.⁷ Part IV will identify an implied recognition of the press within current media law through the courts' use of press-specific terminology and criteria.⁸ Then, in Part V, the Article will explore current newsgathering tort law showing the fluctuating temperament courts have toward the press and newsgathering techniques.⁹ The Article in Part VI will briefly highlight some current proposals to create a stronger newsgathering legal policy.¹⁰

In Part VII, I propose that courts should recognize the press as a unique media genre but only in terms of newsgathering techniques.¹¹ This section will also define any key terms necessary to understand the

² Charles E. Clark, *The Press the Founders Knew*, in *FREEDOM OF THE PRESS: THE FIRST AMENDMENT IN ACTION* 33, 34 (Timothy E. Cook ed., 2005).

³ See Jaroslav Pelikan, *General Introduction: The Press as an Institution of American Constitutional Democracy*, in *THE PRESS*, at XVII, XXII (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (discussing how the technological evolution of media has impacted understanding of the press).

⁴ Erik Umland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 413 (2009).

⁵ U.S. CONST. amend. I.

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part IV.

⁹ See *infra* Part V.

¹⁰ See *infra* Part VI.

¹¹ See *infra* Part VII.

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scope of the proposal.¹² In addition, Part VII will also outline the details of my proposed three-factor test to assess who constitutes the press.¹³ Part VIII will provide illustrations of potential applications of the proposal.¹⁴ This section will also recognize potential criticisms of the proposition.¹⁵ Finally, Part IX will provide a brief conclusion and reiterate the objective of this Article.¹⁶

II. DISTINGUISHING BETWEEN DIFFERENT MEDIUMS

A. *News*

News is an oft-used term but one that is difficult to define.¹⁷ Because of this, courts are understandably reluctant to assign the title newsworthy to media content.¹⁸ Even journalists struggle to develop an appropriate definition for news.¹⁹ As Bernard Roscho observed in his book *Newsmaking*, “News is more easily pursued than defined.”²⁰ However, before proposing a constitutional recognition of the press, a working definition of news is necessary to distinguish the purpose and techniques involved in newsgathering compared to those of other media genres. Also, because law does not develop in a vacuum, the legal definition of news must evolve from the media industry’s understanding of the term news.

In order to develop a meaningful definition, this section will explore the functions of the news, the resulting speech, and the process of gathering the news.²¹ This analysis attempts to create a complete understanding of the news-reporting process from the conception of the idea to the publication of the story. Because the process varies between

¹² See *infra* Part VII.B.

¹³ See *infra* Part VII.C.

¹⁴ See *infra* Part VIII.

¹⁵ See *infra* Part VIII.

¹⁶ See *infra* Part IX.

¹⁷ BERNARD ROSCHO, *NEWSMAKING* 9 (1975).

¹⁸ See John A. Jurata, Jr., Comment, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 533 (1999) (explaining that courts’ treatment of newsworthiness is inconsistent because there is not any one definition).

¹⁹ ROSCHO, *supra* note 17, at 9.

²⁰ *Id.*

²¹ See *infra* notes 22-63 and accompanying text.

journalists, the resulting definition must be broad enough to properly reflect the news genre and, consequently, the press. In addition, the news is an evolving term; so, creating an immovable definition would restrict its accuracy to a single moment in time and from a single perspective.²² Therefore, the following discussion develops a broad, moldable concept.

First, the purpose of the news is often associated with the functions of the press.²³ This initial association suggests an inherent connection between the press and news.²⁴ Part IV will discuss this observation in more detail.²⁵ The most apparent function of news is to inform the public; however, almost every media informs the public on some level.²⁶ The news provides specific information—that which impacts the public interest.²⁷

Of course, a functional analysis of the news cannot ignore the economic functions, since news production companies are also business entities.²⁸ For example, news networks provide opportunities to advertising media, and in turn, the program itself may recruit a particular audience to make marketing on its airtime more appealing to advertisers.²⁹ However, the most powerful characteristic of news programs that attracts advertising is the sheer number of people in their audience; therefore, along with conveying important information, news programs strive to attract a large amount of viewers.³⁰

²² See STEVE M. BARKIN, *AMERICAN TELEVISION NEWS: THE MEDIA MARKETPLACE AND THE PUBLIC INTEREST* 5 (2003).

²³ See Diana Owen, “New Media” and Contemporary Interpretations of Freedom of the Press, in *FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION*, *supra* note 2, at 139, 143 (correlating news expectations to the open press model).

²⁴ See *id.*

²⁵ See *infra* Part IV.

²⁶ See *ROSHCO*, *supra* note 17, at 10 (explaining that humans desire a need to know the news and what is going on in their environment; thus, nearly all forms of communication involve sharing news).

²⁷ See *id.* (explaining that because humans desire news, all forms of communication provide information of public interest).

²⁸ EDWARD JAY EPSTEIN, *NEWS FROM NOWHERE: TELEVISION AND THE NEWS* 78 (1973).

²⁹ *Id.* at 79.

³⁰ *Id.*

In addition, many news outlets are not financially motivated, such as personal blogs or PBS programming.³¹ Nonprofit news organizations have the freedom to cover unpopular topics in unconventional ways, but the underlying motivation is still to disseminate information to an audience.³² Therefore, even when the primary goal is not financial, the function remains the same, and managers still conduct operations like a business.³³ For profit or not for profit, the success of a news company depends primarily on credibility and comprehensive coverage of events.³⁴

Next, any understanding of the resulting speech must originate from the functions of news.³⁵ The first function is to inform, but the term inform is insufficient to understand this purpose.³⁶ For example, Bernard Roshco discusses in detail the values that qualify the dissemination of information as news.³⁷ According to Roshco, journalists believe the news must be objective, timely, and responsive to visibility.³⁸ Therefore, the resulting speech must be bound by these criteria.³⁹ For example, news programs must restrain themselves from certain filming and reporting techniques to avoid hyperbole.⁴⁰

In his essay *Television News as Entertainment*, Leo Bogart stated that news “may be a new explanation or interpretation of already familiar events or a concatenation of known but isolated events into a single narrative that shows previously unknown relationships.”⁴¹ Of

³¹ Carl Sessions Stepp, *Journalism Without Profit Margins*, in *MASS MEDIA* 06/07, at 157 (Joan Gorham ed., 13th ed. 2007).

³² *See id.* (stating that news organizations that are not financially motivated, or commercialized, can focus on news and information that is not dictated by corporate interests).

³³ *See id.* at 158 (stating that although such noncommercial organizations may not be financially motivated or influenced, they still operate as a news organization and their employees are still dedicated to their profession).

³⁴ Leo Bogart, *Television News as Entertainment*, in *THE ENTERTAINMENT FUNCTIONS OF TELEVISION* 209, 224 (Percy H. Tannenbaum ed., 1980).

³⁵ *See infra* notes 36-63 and accompanying text.

³⁶ *See infra* notes 37-51 and accompanying text.

³⁷ ROSHCO, *supra* note 17, at 105.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See* EPSTEIN, *supra* note 28, at 156.

⁴¹ Bogart, *supra* note 34, at 215.

course, the actual medium is not as relevant as the content; so, journalists may convey the news through written word, sound recording, or filming.⁴² The medium itself should never define the news.⁴³

The news also has an inherent obligation to be truthful and, traditionally, as unbiased as possible.⁴⁴ However, filming and editing can never be completely void of perspective.⁴⁵ Even selecting which stories are newsworthy imposes the values of the journalist or news station onto the audience.⁴⁶ Norman Swallow noted:

Having drawn some conclusion, I think one's view and conclusion should be evident from the programme and should not be disguised. At the same time one must not suppress the evidence which disagrees with this conclusion. As far as time and facilities permit, one should present the whole story, but in doing so, one should make clear one's stand on the issue.⁴⁷

In presenting the whole story, any news report should have all the characteristics of a well-written novel—structure, conflict, rising and falling action, and a beginning, middle, and end.⁴⁸

In support of these inherent responsibilities in reporting the news, the courts have granted news-providing companies with broad editorial discretion to determine what is newsworthy.⁴⁹ Therefore, journalists, networks, and other news-producing entities must be cognizant of this obligation to balance interest, neutrality, and the truth, while also recognizing the potential influence of their own personal views.⁵⁰ An

⁴² See, e.g., NORMAN SWALLOW, *FACTUAL TELEVISION* 30 (1966) (listing possible methods of conveying news on television).

⁴³ See EPSTEIN, *supra* note 28, at 156.

⁴⁴ ROSHCO, *supra* note 17, at 105.

⁴⁵ See EPSTEIN, *supra* note 28, at 156.

⁴⁶ See SWALLOW, *supra* note 42, at 87.

⁴⁷ *Id.*

⁴⁸ EPSTEIN, *supra* note 28, at 153.

⁴⁹ See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (stating that “[t]he choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment”).

⁵⁰ See SWALLOW, *supra* note 42, at 20.

understanding of the purpose and the goals of the news shape the journalists' methods of acquiring information and developing stories.⁵¹

Therefore, the last aspect necessary to form a definition of news is to identify the unique process of gathering information.⁵² Edward Jay Epstein in his book *News from Nowhere* observed that "there have been few attempts by political scientists or sociologists to explore the processes by which news is gathered, synthesized and presented to the public."⁵³ Any exploration on this process has focused on "specialized groups of newsmen."⁵⁴

However, Roshco pointed out the seemingly obvious that "[n]ews cannot appear in the press unless it becomes known to newsmen."⁵⁵ He continued and remarked that this fact "leads to consequences that are not self-evident."⁵⁶ First, in order to investigate newsworthy stories, journalists need knowledge and access to newsworthy events and information.⁵⁷ The observability and visibility of newsworthy events and information vary from highly visible natural disasters to the low observability of an individual's financial struggle from lack of insurance.⁵⁸ In the pursuit of newsworthy information, journalists depend on a wide variety of techniques, and though some methods are common and routine, creative avenues often result in powerful stories.⁵⁹ Therefore, newsgathering is not limited to specific acts but instead to a specific purpose: to inform society on matters of public significance in an unbiased, timely manner.⁶⁰

⁵¹ See *id.* at 18 (discussing the effect that impartiality policies have on international news organizations).

⁵² See *infra* notes 53-63 and accompanying text.

⁵³ EPSTEIN, *supra* note 28, at xi-xii.

⁵⁴ *Id.* at xii.

⁵⁵ ROSHCO, *supra* note 17, at 61.

⁵⁶ *Id.*

⁵⁷ See *id.*

⁵⁸ See *id.* (explaining that natural disasters affect such a large portion of the population that awareness of those events would quickly spread without mass press coverage).

⁵⁹ See DAVID L. ALTHEIDE, *CREATING REALITY: HOW TV NEWS DISTORTS EVENTS* 155-69 (1976) (discussing the unique and aggressive newsgathering techniques that uncovered the Watergate scandal).

⁶⁰ See ROSHCO, *supra* note 17, at 105.

The process, purpose, and results of news overlap in their definitions, but isolating each portion develops fuller understanding of what constitutes news.⁶¹ The separate discussions emphasize the overarching criteria that define news.⁶² Even after this exploration, a single, exact definition of the news is an unreasonable objective, and one that would unintentionally restrict the scope of the term.⁶³ Therefore, the goal of this analysis is to create a broad understanding and to provide a new perspective shaped by the general values of the news.

B. *Nonnews Media vs. News*

After the tedious process of understanding the news, the definition for other media seems relatively simple—everything that is not the news. Though this is obviously an over-simplified definition, a definition of the actual nonnews media is not as important as determining the differences between news and nonnews. As Claude-Jean Bertrand stated in *Media Ethics & Accountability Systems*, “The boundary between journalism and entertainment has never been clear and it is growing less so[;] . . . most commercial media glaze most of their products with [entertainment].”⁶⁴ Therefore, this section will explore how news differs from nonnews in purpose, process, and result.⁶⁵ These distinctions are pivotal to my proposal, which is explained in Part VII.⁶⁶

First, as discussed in Part II.A, the news has one primary function—to inform the people of events with public significance in a timely, visible, and unbiased manner.⁶⁷ In comparison, nonnews media does not share those obligations.⁶⁸ Of course, nonnews media may inform the public, but societal expectation for such result is much lower than with news.⁶⁹ In fact, unlike news, the most accepted purpose for

⁶¹ See *supra* notes 17-60 and accompanying text.

⁶² See *supra* notes 21-22 and accompanying text.

⁶³ See *supra* note 22 and accompanying text.

⁶⁴ CLAUDE-JEAN BERTRAND, *MEDIA ETHICS & ACCOUNTABILITY SYSTEMS* 17 (2000).

⁶⁵ See *infra* notes 66-86 and accompanying text.

⁶⁶ See *infra* Part VII.

⁶⁷ See *ROSHCO*, *supra* note 17, at 105 (discussing the value framework of defining the news).

⁶⁸ See *ALTHEIDE*, *supra* note 59, at 11.

⁶⁹ See Hilde T. Himmelweit et al., *The Audience as Critic: A Conceptual Analysis of Television Entertainment*, in *THE ENTERTAINMENT FUNCTIONS OF TELEVISION*, *supra*

nonnews is entertainment.⁷⁰ But, as Leo Bogart remarked, the fantasy element of entertainment does not undermine the importance of the genre to society, but the element does separate entertainment from the news.⁷¹ The fantasy or fictional element of entertainment evades or distorts reality but at the same time allows the audience to reorganize their perception of reality by controlling the minutiae and explaining the inexplicable.⁷² Entertaining media also functions as an escape or a diversion from daily life.⁷³

Therefore, the resulting speech with nonnews media lacks the inherent obligation to be honest with the viewers.⁷⁴ When the primary purpose of the media is to entertain, the audience has little expectation of full disclosure even when the program portrays “reality.”⁷⁵ Arguably, reality shows can convey truths to the public regarding human nature or health issues.⁷⁶ But, the distinction between news and nonnews is the varying governing power of the truth and the public importance.⁷⁷ Though many reality shows are popular because of the public’s interest in the program contents, those contents are not necessarily created or uncovered in the public interest.⁷⁸

Finally, because the goals and purposes of nonnews media are so different from those of the news, the methods of creating nonnews programs are also distinct.⁷⁹ One scholar notes that “[r]ather than pursuing subjects in a balanced and rational manner, reality TV looks to

note 34, at 67, 91 (observing how certain viewers’ stylistic preferences lead them to rate entertainment shows as more informative).

⁷⁰ *See id.*

⁷¹ Bogart, *supra* note 34, at 238.

⁷² *Id.* at 239.

⁷³ *Id.*

⁷⁴ *See* ALTHEIDE, *supra* note 59, at 11 (observing that the people believe television news shows are more credible than other sources of media).

⁷⁵ *See* Bogart, *supra* note 34, at 238.

⁷⁶ *See* Justin Lewis, *The Meaning of Real Life*, in *REALITY TV: REMAKING TELEVISION CULTURE* 288, 288 (Susan Murray & Laurie Ouellette eds., 2004) (discussing audience expectation of authenticity but not necessarily factual truth in representations of reality on television).

⁷⁷ *See* Bogart, *supra* note 34, at 238.

⁷⁸ *See* Lewis, *supra* note 76, at 288.

⁷⁹ *See id.*

develop brands and to maximize audiences.”⁸⁰ The editing process and the final product are often a reflection of the director’s viewpoint, but while filming news, directors try to capture reality.⁸¹ In contrast, for example, some reality programs include “the extensive use of ‘actuality’ footage of their subjects.”⁸² This footage can be an arbitrary mix of professional and amateur footage arranged in a way to appeal to the “conventions of ‘liveness’ and ‘immediacy.’”⁸³ Often, nonnews media integrates some news reporting techniques to give a false impression of reality, which is a distinction from the goal of truth with news.⁸⁴

Because news and nonnews media are so drastically different in their results and methods of creation, nonnews should not receive the extended protections granted to the press as proposed in this Article.⁸⁵ Instead, the term news should only have a limited meaning that excludes other media genres. And, in order to create a dependable standard, the news should only be the product of the press.⁸⁶

III. A FRESH PERSPECTIVE ON THE FREEDOM OF THE PRESS

Famous linguist DeSaussure stated that language is like a chess game.⁸⁷ And, like the pieces of the chess game, words only have as much meaning and power as their position and context grants them.⁸⁸ Consequently, when determining the meaning of a law, the analysis begins with the words themselves and their location within the Constitu-

⁸⁰ GARETH PALMER, *DISCIPLINE AND LIBERTY: TELEVISION AND GOVERNANCE* 22 (2003).

⁸¹ *See* SWALLOW, *supra* note 42, at 21 (“Impartiality, in television, like chastity in fiancées, is much admired but hard to sustain. It is constantly subjected to the pressures of those for whom the objective truth is a thing to be concealed at all costs.”).

⁸² Chad Raphael, *The Political Economic Origins of Reali-TV*, in *REALITY TV: REMAKING TELEVISION CULTURE*, *supra* note 76, at 119-20.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See infra* Part VII.

⁸⁶ *See supra* notes 64-84 and accompanying text.

⁸⁷ JOSEPH H. GREENBURG, *Is Language Like a Chess Game?*, in *LANGUAGE, CULTURE, AND COMMUNICATION* 330, 332 (Anwar S. Dil ed., 1971).

⁸⁸ *Id.* at 336.

tion.⁸⁹ The Press Clause is in the First Amendment to the United States Constitution, immediately following the Freedom of Speech Clause and immediately preceding the Freedom of Expression Clause.⁹⁰

At the very least, the addition of the term press to the First Amendment suggests that the press is different—a fact the Supreme Court has not conclusively recognized.⁹¹ Significantly, the Freedom of Speech Clause is an independent statement providing for the protection of speech to all citizens.⁹² If the Press Clause simply meant that the press is included in the freedom of speech protection, the clause would be redundant.⁹³ When reading the entire First Amendment, no clause simply echoes another nor have courts read the Constitution in such a manner.⁹⁴ To the contrary, the generally accepted constitutional tenet is that the Framers did not write any unnecessary language into the Constitution.⁹⁵ Each clause has a separate and unique meaning that courts have recognized.⁹⁶ As noted in *The Freedom of the Press*, “Textually, courts are generally reluctant to treat any constitutional language as meaningless.”⁹⁷

⁸⁹ See, e.g., Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 900 (2008) (“All interpretive theories begin with the text; the words of the Constitution determine the parameters of possible meaning.”).

⁹⁰ U.S. CONST. amend. I.

⁹¹ C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* 11 (1997).

⁹² U.S. CONST. amend. I.

⁹³ See SCOTT GANT, *WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* 73 (2007) (“Justices who consider the views of the Founders as a principal source of guidance in interpreting the Constitution may also look skeptically at the prevailing view of the Press Clause, since it would have been unnecessary to include it in the First Amendment were it simply redundant of the amendment’s free speech guarantee.”); Potter Stewart, *Or of the Press*, in *THE FIRST AMENDMENT: FREEDOM OF THE PRESS*, *supra* note 1, at 281, 283 (“If the free press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.”).

⁹⁴ See, e.g., DIENES ET AL., *supra* note 91, at 11 (noting the Court does not interpret any language in the Constitution as meaningless).

⁹⁵ See, e.g., GANT, *supra* note 93, at 73 (“[N]o word was unnecessarily used in, or needlessly added to, the [Constitution].”).

⁹⁶ See, e.g., DIENES ET AL., *supra* note 91, at 11.

⁹⁷ *Id.*

The proximity of the Press Clause to the Speech and Expression Clauses does support the idea that the Press Clause relates to free speech and free expression.⁹⁸ But, just as speech is different from expression, the press must also have a unique significance.⁹⁹ A common critique of the Press Clause is that the Constitution does not define the term press.¹⁰⁰ However, the Constitution does not define speech, expression, or religion either.¹⁰¹ That fact does not diminish the power of those clauses.

Many scholars refer to the press as the fourth estate or the fourth check on the branches of government.¹⁰² This analysis assumes the press is an organized private business and treats the press as a single entity.¹⁰³ Interestingly, this perspective also discusses the freedom of the press as an obligation to hold the government accountable for its actions.¹⁰⁴ As the fourth institution, the press must represent the public and act as a watchdog.¹⁰⁵ This watchdog image is a common perception of the press that imposes a high standard of responsibility to protect less informed citizens and expose corruption.¹⁰⁶ Though journalists often favor this positive image, if the press is an institution, then the press is a limited classification based on status.¹⁰⁷

Consequently, creating a separate institution is not the most likely explanation for the clause for multiple reasons.¹⁰⁸ First, the Founders added the Press Clause to the First Amendment to prevent

⁹⁸ See GANT, *supra* note 93, at 58-59 (describing how courts, when referring to the rights of the press, only recognize the constitutionally protected rights of speech and expression as they apply to all citizens).

⁹⁹ See *supra* notes 91-97 and accompanying text.

¹⁰⁰ See, e.g., GANT, *supra* note 93, at 52 (noting the Constitution does not identify what qualifies as press).

¹⁰¹ See U.S. CONST. amend. I.

¹⁰² See, e.g., Stewart, *supra* note 93, at 283 (referring to the press as the fourth institution or the fourth estate).

¹⁰³ See *id.* at 283-85.

¹⁰⁴ *Id.* at 283.

¹⁰⁵ See, e.g., GANT, *supra* note 93, at 48-49 (noting that the press has been described as a watchdog).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 83.

¹⁰⁸ See *infra* notes 109-111 and accompanying text.

government licensing of the press, as was the tradition in England.¹⁰⁹ Therefore, the Founders would likely have avoided creating a press institution, especially one limited to professional journalists.¹¹⁰ Second, the language itself is only a partial clause, which does not support the idea that the clause creates the only constitutionally recognized estate outside of the three government branches.¹¹¹ The Founders would not likely have buried such a significant power in the middle of the First Amendment.

A structural interpretation recognizes the Press Clause “seeks to protect the structure of communications necessary for the existence of our democracy.”¹¹² Therefore, the clause protects “activities necessary to gather and disseminate the news.”¹¹³ This theory still elevates the status of the press and holds it responsible for advancing the democratic system.¹¹⁴ The language and purpose of the Press Clause—as discussed above—also support this interpretation.¹¹⁵

Because there is little indication how the Supreme Court would rule if it ever decides to reexamine the Press Clause,¹¹⁶ my interpretation of the Press Clause as protecting the newsgathering process is a plausible proposition. This is especially true because the structural theory of the Press Clause also supports the linguistic analysis above.¹¹⁷

¹⁰⁹ See Jefferson, *supra* note 1, at 74-75.

¹¹⁰ See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) (“The very task of including some entities within the ‘institutional press’ while excluding others . . . is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.”).

¹¹¹ See U.S. CONST. amend. I.

¹¹² DIENES ET AL., *supra* note 91, at 14 (quoting William J. Brennan, Jr., Assoc. Justice of the Supreme Court of the U.S., Dedicatory Address at the Dedication of the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173, 176 (1979)).

¹¹³ *Id.*

¹¹⁴ See GANT, *supra* note 93, at 66.

¹¹⁵ See *supra* notes 87-107 and accompanying text.

¹¹⁶ See GANT, *supra* note 93, at 77.

¹¹⁷ *But see* *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 495 (Cal. 1998) (“Turning to the question of constitutional protection for newsgathering, one finds the decisional law reflects a general rule of *nonprotection* . . .”).

Part VII extracts this theoretical recognition of the press and integrates it into a practical proposal.¹¹⁸

IV. NEWS TERMINOLOGY: EVIDENCE THAT COURTS ALREADY RECOGNIZE THE PRESS

Despite repeated denial that the press is special, the courts and legislatures have singled out the press in many circumstances.¹¹⁹ The terminology alone implies that news is more significant and more protected than other media. The following sections will highlight judicial recognition of the press and news through repeated word use.¹²⁰

A. *Newsworthiness*

The Restatement of Torts states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.¹²¹

However, courts often substitute the term newsworthiness for “legitimate public concern.”¹²² Because courts are so reluctant to make a quality determination on speech, the precedential guidance implementing this standard is not particularly useful.¹²³ Consequently, new-

¹¹⁸ See *infra* Part VII.

¹¹⁹ See GANT, *supra* note 93, at 87.

¹²⁰ See *infra* Part IV.A-D.

¹²¹ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

¹²² MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 367 (7th ed. 2005).

¹²³ See *id.* (“In a society that values openness, courts find it difficult to say that people have no legitimate concern in receiving information they apparently wish to receive.”).

sworthiness “is a ‘standardless’ standard, little more than a general guidepost highly susceptible to different interpretations.”¹²⁴

Currently, courts treat “legitimate public concern” very broadly and rarely address this issue directly even when an issue of privacy exists.¹²⁵ Justifying restrictions on speech solely on legitimate public concern may encroach on constitutionally protected speech based on content, which would then have to survive strict scrutiny.¹²⁶ Therefore, courts are reluctant to definitively determine if there is a legitimate public concern.¹²⁷ Though the term newsworthy is ambiguous, it is an implication that some reporting is more important to protect than others.¹²⁸ The term newsworthy also suggests that news itself is a higher category than other media.¹²⁹ In addition, in civil actions, the plaintiff bears the burden of showing that information is not newsworthy.¹³⁰ Therefore, the courts’ limited use of the term provides an opportunity to expand on both the definition and the application.¹³¹

B. *Newsgathering*

Similar to the term newsworthy, courts use the term newsgathering in many cases without providing a meaningful definition.¹³² Newsgathering, though a process directly tied to the dissemination of information, has never received the same protection as the news it-

¹²⁴ CARL R. RAMEY, *MASS MEDIA UNLEASHED: HOW WASHINGTON POLICYMAKERS SHORTCHANGED THE AMERICAN PUBLIC* 173 (2007).

¹²⁵ See FRANKLIN ET AL., *supra* note 122, at 367.

¹²⁶ RANDALL P. BEZANSON, *HOW FREE CAN THE PRESS BE?* 173 (2003).

¹²⁷ FRANKLIN ET AL., *supra* note 122, at 367.

¹²⁸ See Peter Gielniak, Comment, *Tipping The Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment*, 39 SANTA CLARA L. REV. 1217, 1244 (1999) (stating that there is inherent ambiguity in the term “newsworthy”).

¹²⁹ See *supra* Part II.B.

¹³⁰ *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998).

¹³¹ See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1097 (2009) (“[R]ecognizing that a bright-line test for newsworthiness is unworkable, courts should reframe their inquiries into journalistic news judgment in a way that is more genuinely deferential.”) (footnote omitted).

¹³² DIENES ET AL., *supra* note 91, at 14-15.

self.¹³³ Legal safeguards exist to protect the newsgathering process as courts acknowledge the necessity for journalists to be able to uncover information and investigate leads.¹³⁴ This preliminary protection prevents an indirect chilling effect on the freedom of speech and the freedom of the press.¹³⁵

Part V will explore newsgathering case law, but the fact that courts use the term newsgathering demonstrates some categorization of journalists' process of acquiring information and developing stories.¹³⁶ In addition, similar to their use of the term newsworthy, the courts ambiguously refer to newsgathering and never explicitly define the word.¹³⁷ Therefore, the term newsgathering provides another opportunity to develop law and policy regarding the activities of the press as separate from other forms of media.

C. *Newsperson's Privilege*

The newspaper's privilege or shield laws protect journalists from having to reveal their sources.¹³⁸ This concept first confronted the Supreme Court in *Branzburg v. Hayes*.¹³⁹ The Court refused—and still refuses—to exempt the press from subpoenas compelling them to disclose confidential sources.¹⁴⁰ However, most states have implemented shield laws with varying levels of source protection.¹⁴¹ Interestingly, the concurrence in *Branzburg* emphasized that the decision was appropriate for the specific facts of the case but allowed for the possibility of a future case where an exemption would apply.¹⁴² The term newspaper clearly identifies a separate category of journalists who qualify as new-

¹³³ *See id.*

¹³⁴ *Branzburg v. Hayes*, 408 U.S. 665, 681-83 (1972).

¹³⁵ *See id.* at 681 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

¹³⁶ *See infra* Part V.

¹³⁷ *See* DIENES ET AL., *supra* note 91, at 15 (stating that the dimensions of newsgathering are uncertain).

¹³⁸ GANT, *supra* note 93, at 118.

¹³⁹ *Branzburg*, 408 U.S. at 667.

¹⁴⁰ GANT, *supra* note 93, at 153-54.

¹⁴¹ *Id.* at 118.

¹⁴² *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring); GANT, *supra* note 93, at 62-63.

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spersons.¹⁴³ In addition to identification, by granting a special privilege, courts and statutes elevate newsmen to a higher status than nonnewsmen.¹⁴⁴ Therefore, the newsmen's privilege implies a judicial and legislative willingness to develop the laws of journalists' activities with less restriction on press activities.¹⁴⁵

D. Press Access Privileges

Despite overwhelming opinions that insist that the press does not have any privileges separate from those of the public, the government frequently reserves access to events, places, and information to the press.¹⁴⁶ For example, only "persons whose principal employment is to gather and report news" may visit the Federal Bureau of Prisons.¹⁴⁷ Also, the government will regulate access to certain countries like Iraq and Cuba, but will provide exemptions for the press.¹⁴⁸

Additionally, the government will issue press credentials to grant press access to designated government buildings.¹⁴⁹ For example, the House and Senate each have three separate press galleries for daily publications, nondaily periodicals, and radio and television media.¹⁵⁰ In addition to this allowance, journalists govern the press credentials needed to qualify to sit in these galleries.¹⁵¹ The White House also grants access to credentialed members of the press, issuing permanent or "hard" passes and daily passes.¹⁵² Though journalists are not the sole contributors to the credentials, they still have substantial influence on the criteria.¹⁵³

¹⁴³ See Amy Bauer, Note, *Blogging On Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J. L. SCI. & TECH. 747, 747-48 (2009) ("[M]ost state shield laws explicitly limit protection to professional journalists or newsmen affiliated with a traditional form of media like a newspaper or magazine.").

¹⁴⁴ See *supra* notes 138-43 and accompanying text.

¹⁴⁵ See GANT, *supra* note 93, at 118.

¹⁴⁶ *Id.* at 87.

¹⁴⁷ *Id.* at 94.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 95.

¹⁵⁰ *Id.* at 96.

¹⁵¹ *Id.*

¹⁵² *Id.* at 105.

¹⁵³ *Id.*

The Supreme Court also issues hard and daily passes.¹⁵⁴ Only approximately thirty journalists enjoy a permanent pass to the press section, but the Court also issues daily passes for some specific oral arguments.¹⁵⁵ Though the public may also attend the proceedings, the press has special seating that is available for reservation ahead of time by acquiring a pass.¹⁵⁶ In addition, until 2002, the Court prohibited the public from writing during proceedings—a necessity for journalists.¹⁵⁷

Clearly, the press receives less restricted access to almost all government events but often under the pretense that the privilege benefits society.¹⁵⁸ On the other hand, the special press access to restricted nations or regions provides a legitimate government interest for regulating journalists' information gathering activities—police powers and national security.¹⁵⁹ Prohibition on travel to certain dangerous or military zones protects citizens from potential injury and controls confidentiality of military operations.¹⁶⁰ This government interest is evidence that some statutory regulation on journalists' activities could survive rational basis review and perhaps even intermediate scrutiny.¹⁶¹

V. NEWSGATHERING TORT LAW: THE COURT'S FICKLE RECOGNITION OF THE PRESS

Courts refuse to grant full First Amendment protection to newsgathering techniques.¹⁶² For example, *Branzburg* emphasized that newsgathering does not shield liability from general applicability laws.¹⁶³ However, courts also recognize the necessity of newsgathering in exercising the First Amendment freedoms of speech and expression.¹⁶⁴ Therefore, production companies cannot circumvent the law

¹⁵⁴ *Id.* at 109.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 109-10.

¹⁵⁷ *Id.* at 110.

¹⁵⁸ *Id.* at 88.

¹⁵⁹ *See id.* at 94.

¹⁶⁰ *See id.*

¹⁶¹ *See* JOHN C. KNECHTLE & CHRISTOPHER J. ROEDERER, *MASTERING CONSTITUTIONAL LAW* 230 (2009) (explaining the varying levels of scrutiny).

¹⁶² *See, e.g.,* *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

¹⁶³ *Id.* at 682.

¹⁶⁴ *See, e.g., id.* at 707.

merely by claiming they are pursuing a newsworthy story.¹⁶⁵ But at the same time, government officials cannot strip the constitutional shield from routine newsgathering techniques by calling them tortious.¹⁶⁶ Despite this declaration, a common method of holding newsgathering companies liable is through tort law.¹⁶⁷

Some journalists argue that any laws that impede newsgathering necessarily limit the ability to provide thorough news stories.¹⁶⁸ However, throughout the newsgathering case law, many opinions acknowledge the importance of newsgathering when exercising the rights of speech and expression.¹⁶⁹ This section samples case law with opinions that discuss newsgathering.¹⁷⁰ This overview is not an in-depth exploration but aims to create a conversation between opinions, emphasizing the conflicting attitudes toward newsgathering.

In *Dietemann v. Time, Inc.*, magazine company employees deceived the plaintiff into letting them into his house under false pretenses.¹⁷¹ Here, the court focused on the magazine employees' surreptitious recording of the conversations.¹⁷² The opinion stated that investigative newsgathering is an ancient practice that has been historically successful without the advent of hidden cameras and recorders.¹⁷³ Basically, this case refused to allow the technological evolution of newsgathering techniques.¹⁷⁴ In addition, the court also held the magazine company liable for intrusion, claiming the First Amendment does not protect news media from "calculated misdeeds."¹⁷⁵

¹⁶⁵ *Id.* at 690.

¹⁶⁶ *See, e.g.*, *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 59 (Ct. App. 1986) ("We agree that illegal conduct by a reporter is not privileged simply because the ultimate purpose is to obtain information to publish. But the First Amendment protects the ordinary news gathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious.").

¹⁶⁷ *See id.* at 63 (citing numerous cases where liability was based on tortious conduct).

¹⁶⁸ *See, e.g.*, *Branzburg*, 408 U.S. at 679-80.

¹⁶⁹ *See, e.g.*, *id.* at 707 ("[N]ews gathering is not without its First Amendment protections . . .").

¹⁷⁰ *See infra* notes 171-214 and accompanying text.

¹⁷¹ *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971).

¹⁷² *Id.* at 249.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 250.

Over twenty years later, a different circuit court came to a very different conclusion in *Desnick v. American Broadcasting* where, among other claims, the plaintiff asserted a claim of trespass because the defendants acted as patients to expose the poor quality of the plaintiff's eye clinics.¹⁷⁶ However, unlike in *Dietemann*, the court determined that the high standards of defamation protected newsgathering techniques as long as the result was not defamatory and the technique did not invade an established personal right.¹⁷⁷ The court reached this conclusion despite recognizing the sensationalistic tendencies of investigative journalism.¹⁷⁸ Therefore, the court interpreted the Supreme Court's defamation holding as providing safeguards against newsgathering, though not to the extent which exempts the press from tort or contract liability.¹⁷⁹

Additionally, the plaintiff argued that a television network falsely represented that the report on him would be fairly balanced.¹⁸⁰ There the court found that the facts were not particularly egregious, nor were they part of a broader deception scheme.¹⁸¹ More specifically, Judge Posner noted that the deception was almost a tool of the trade given the ruthless nature of investigative journalism.¹⁸² Also, the court recognized that the broader scheme of deception was to expose the plaintiff's bad practices.¹⁸³ This case was pivotal in that it recognized the significance of newsgathering and applied defamation standards to justify this protection.¹⁸⁴

The same year as *Desnick*, another court came to a very different conclusion in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*¹⁸⁵ However, the facts in *Food Lion* were more egregious and the newsgathering

¹⁷⁶ *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1347-48 (7th Cir. 1995).

¹⁷⁷ *Id.* at 1355.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Id.* at 1348.

¹⁸¹ *Id.* at 1354-55.

¹⁸² *Id.*

¹⁸³ *Id.* at 1355.

¹⁸⁴ *See id.*

¹⁸⁵ *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 812-13 (M.D.N.C. 1995).

techniques were more involved than in *Desnick*.¹⁸⁶ In *Food Lion*, television network journalists infiltrated a Food Lion grocery store by becoming employees.¹⁸⁷ To do so, the network created elaborate lies about the names and backgrounds of the undercover journalists.¹⁸⁸ The plaintiff brought multiple causes of action, and the court permitted claims for fraud, trespass, and breach of fiduciary duty.¹⁸⁹

Of course, the court prohibited any claims arising from the actual publication of the story, which the First Amendment clearly protects.¹⁹⁰ However, the court did not address the impact of only protecting the resulting speech and not the newsgathering process.¹⁹¹ By permitting the network to use the tortiously obtained information, the holding may not deter potentially tortious newsgathering techniques.¹⁹²

By 1999, aggressive newsgathering and programs like reality shows prompted extensive litigation that targeted the tactics of acquiring information.¹⁹³ In *Wilson v. Layne*, the Court addressed a 42 U.S.C. § 1983 claim on qualified immunity, but the implications of the decision impacted newsgathering techniques.¹⁹⁴ The Court prohibited the common practice of ride-alongs where the press would accompany po-

¹⁸⁶ See generally *id.* (finding that the defendants engaged in wire and mail fraud and committed other serious offenses).

¹⁸⁷ *Id.* at 814-16.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 824.

¹⁹⁰ See *id.* at 822 (“However, this Court also finds that based upon the Supreme Court’s analysis in *Hustler*, the First Amendment bars Food Lion from recovering publication damages for injury to its reputation as a result of the *Prime Time Live* broadcast.”).

¹⁹¹ See generally *id.* (finding that the causes of action stemming from defendant’s conduct could go forward, but never discussing any hypothetical effect this may have on the newsgathering process).

¹⁹² See Gyong Ho Kim, *Extreme Departure Test as a New Rule for Balancing Surreptitious and Intrusive Newsgathering Practices with Competing Interests: The Use of Hidden Cameras vs. the Right to Be Let Alone*, 10 UCLA ENT. L. REV. 213, 271-72 (2003) (noting that, even after *Food Lion*, “[j]ournalists sometimes use suspect and intrusive newsgathering methods that may break the law”).

¹⁹³ FRANKLIN ET AL., *supra* note 122, at 500.

¹⁹⁴ *Wilson v. Layne*, 526 U.S. 603, 606-14 (1999).

lice officials when they conducted searches.¹⁹⁵ There the Court implied that the practice promoted the invasion of privacy because it violated the Fourth Amendment.¹⁹⁶ This decision marked a climax of the judicial trend of intolerance toward insidious newsgathering.¹⁹⁷

In *Shulman v. Group W Productions, Inc.*, the court determined the newsworthiness of a filmed segment by balancing the legitimate public interest in the event against the privacy of the complaining individual.¹⁹⁸ There a journalist filmed an automobile accident and subsequent rescue in an emergency-transport helicopter.¹⁹⁹ The recorded segment followed a doctor attending to a female victim of a car accident that left her paralyzed.²⁰⁰

The court assessed the two elements of intrusion and concluded that the journalist's actions intruded into a private matter and could be highly offensive to a reasonable person.²⁰¹ In determining whether the conduct was highly offensive, the court factored in any legitimate motive to gather news.²⁰² The court never confronted the factor directly but used general conclusions about newsgathering to justify the offensiveness.²⁰³ For example, the court discussed routine techniques compared to extreme methods—without fully addressing the tactics in controversy in terms of a legitimate purpose.²⁰⁴ Compared to *Desnick*, this case provides evidence of the current trend to favor liability for newsgathering techniques.²⁰⁵

¹⁹⁵ *Id.* at 605-06.

¹⁹⁶ *Id.* at 613-14.

¹⁹⁷ See Gajda, *supra* note 131, at 1078 (noting that following *Wilson* the Supreme Court ruled for journalists “on strikingly narrow grounds”).

¹⁹⁸ *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998).

¹⁹⁹ *Id.* at 476.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 493-95.

²⁰² *Id.* at 493-94.

²⁰³ See *id.*

²⁰⁴ *Id.* at 494 (“Between these extremes lie difficult cases, many involving the use of photographic and electronic recording equipment. Equipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for newsgathering, but may also be used in ways that severely threaten personal privacy.”).

²⁰⁵ See *id.* at 479.

In *Bartnicki v. Vopper*, the Supreme Court determined that a law prohibiting the use of illegally obtained information was unconstitutional.²⁰⁶ Again, the opinion weighed the invasion of privacy issue against the public interest in the obtained information.²⁰⁷ Though recording the conversation was illegal, the information revealed was pertinent to the public interest and thereby overrode the privacy interest with the First Amendment right to free speech.²⁰⁸ The key difference between *Shulman* and *Bartnicki* was that, in *Bartnicki*, there was an unconstitutional wiretapping statute prohibiting the publication of overheard information, whether intentional or unintentional.²⁰⁹ The Court in *Bartnicki* focused on the government's interest and the State's tailoring of the statute to that interest rather than the newsgathering portion.²¹⁰ This case demonstrates the sensitivity of courts to issues regarding speech compared to an aversion toward aggressive newsgathering techniques.²¹¹

This collection of case law indicates a fluctuating tolerance for invasive newsgathering techniques.²¹² One consequence of this muddled case law is a plaintiff must bring multiple causes of action against newsgathering companies, which results in haphazard newsgathering tort law.²¹³ This often prompts reactionary decisions that apply an excessive ad hoc analysis limiting precedent to those exact facts, which leads to ambiguous standards.²¹⁴ Newsgathering law is fickle and chaotic, which invites substantial reform.

²⁰⁶ *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

²⁰⁷ *Id.* at 518.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 526.

²¹⁰ *Id.* at 529-34.

²¹¹ *Id.* at 527 (“As the majority below put it, “[i]f the acts of “disclosing” and “publishing” information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.”) (alteration in original) (citation omitted).

²¹² *See supra* notes 171-211.

²¹³ *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 822 (M.D.N.C. 1995) (listing the many causes of actions brought by plaintiff).

²¹⁴ *See* *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 43 n.18 (Cal. 1971) (“Because the categories with which we deal—private and public, newsworthy and nonnewsworthy—have no clear profile, there is a temptation to balance interests in ad hoc fashion in each case.”), *overruled by* *Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552 (Cal. 2004).

VI. EXAMPLES OF CURRENTLY PROPOSED SOLUTIONS

Newsgathering law requires stabilization and, as a result, solutions are necessary; however, many propositions fail to address overarching issues and are too narrow to effectively impact newsgathering law.²¹⁵ For example, one current proposal is to implement a structured method of self-regulation, which has been successful in other professional fields such as with lawyers.²¹⁶ Specifically, Alissa Halperin proposes in her article *Newsgathering After the Death of a Princess* that press councils should develop and enforce an ethical standard for reporters.²¹⁷ On the one hand, this is a logical idea because internal councils would have the most informed perspective.²¹⁸ But, the councils have no real power, and self-regulation is not effective.²¹⁹

Amy Gajda, in her article *Judging Journalism*, suggests another solution to determine appropriate newsgathering techniques.²²⁰ Her proposal is to institute a reasonable professional journalist standard similar to the reasonable person standard.²²¹ This standard would require expert testimony to determine whether certain newsgathering techniques are too extreme.²²² This proposition also eliminates liability when experts disagree about any particular technique.²²³ Gajda's suggestion is realistic because implementation is simple on its face; courts would simply require experts, instead of allowing judges or juries, to determine fairness of newsgathering techniques.²²⁴

²¹⁵ See *infra* notes 216-36 and accompanying text.

²¹⁶ Alissa Eden Halperin, Comment, *Newsgathering After the Death of a Princess: Do American Laws Adequately Punish and Deter Newsgathering Conduct that Places Individuals in Fear or at Risk of Bodily Harm?*, 6 VILL. SPORTS & ENT. L.J. 171, 208 (1999).

²¹⁷ *Id.* at 208-15.

²¹⁸ *Id.* at 217 (“The press council could be comprised of a fair balance of interests or could be solely comprised of media members.”).

²¹⁹ *Id.* at 209-10.

²²⁰ Gajda, *supra* note 131, at 1097-98.

²²¹ *Id.*

²²² *Id.* at 1097 (“News organization liability should be confined to instances where journalists broadly agree that a challenged disclosure is beyond the pale of professional judgment.”).

²²³ *Id.* at 1098.

²²⁴ *Id.*

Arguably, fellow journalists would be best equipped to determine if a certain technique is too extreme or harmful.²²⁵ However, this standard would severely limit the power of the courts to regulate newsgathering, rendering challenges to the techniques ineffective.²²⁶ Though a simple suggestion, the impact would be far too great for any practical consideration—at least in the current judicial climate.²²⁷ In addition, this blanket standard fails to address the issue of inconsistent application of tort law.²²⁸

Frederick Schauer offered a third proposal in his article *Uncoupling Free Speech*.²²⁹ He suggested a structured compensation plan for victims barred from recovering damages solely because of the First Amendment.²³⁰ This suggestion may be appealing to some victims because the legal fees would be minimal and the process would be more efficient than a traditional suit.²³¹ On the other hand, most compensation plans either cannot account for personal, nuanced differences that generally allow some victims to recover more than others or would require substantial research to develop a comprehensive scheme.²³² In addition, a structured compensation plan would allow journalists and media companies to perform a dependable cost-benefit analysis.²³³ This

²²⁵ *Id.* (“The test would not be whether judicial fact-finders concluded that the defendant-journalist’s actions failed to live up to the highest aspirations of the profession.”).

²²⁶ *Id.* at 1100 (“Such deference might seem extreme, particularly in light of the very real potential of journalistic inquiry to wound and the substantial public value of personal privacy.”).

²²⁷ *See id.*

²²⁸ *See supra* Part V.

²²⁹ Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1343-44 (1992).

²³⁰ *Id.* at 1347.

²³¹ *Id.* at 1347-48.

²³² *Id.* at 1347 (“Although the administrative costs and details of such a program would be formidable, and although the risks . . . would be significant, those risks should be measured against the costs under the status quo, pursuant to which an injury that would plainly be compensated but for the First Amendment goes uncompensated.”).

²³³ *Id.* (“If there were a special victim’s compensation scheme for cases in which only the First Amendment prevented recovery, . . . then the publisher would have no more reason to refrain from publishing an article with potential physical consequences than it does now.”).

plan is less likely to deter invasive newsgathering techniques and again fails to confront the issue of inconsistent precedent.²³⁴

Overall, none of these proposals address the core issues of reforming newsgathering law. Instead, each idea provides a narrow and superficial solution to a much larger problem.²³⁵ However, the proposals may be appropriate to integrate into a larger scheme to reform the newsgathering rights of the press.²³⁶

VII. RECOGNIZING THE FREEDOM OF THE PRESS CLAUSE

A. *A Modest Proposal*

Though the Founding Fathers separated the press from other speech in the First Amendment, courts have been reluctant to recognize the press as a separate category.²³⁷ As this Article has explained, judicial opinions frequently imply a qualitative difference between the news and other speech.²³⁸ Therefore, though the creation of a new category may seem like a bold proposition, the implementation would be a natural process—one that has already begun.²³⁹

This proposition does not include further content regulation. The First Amendment clearly protects the freedom of speech; so, this suggested reformation focuses only on the Press Clause.²⁴⁰ Currently, courts recognize some categories of unprotected or less protected speech,²⁴¹ but this proposition focuses on a stricter policy for the creation process for nonnews media, not a limit on publishable content.²⁴² The effect of imposing regulations on the process before the speech may indirectly restrict some content.²⁴³ However, the focus of this pro-

²³⁴ *Id.*

²³⁵ *See supra* notes 220-34.

²³⁶ *See infra* Part VII.

²³⁷ *See supra* Part III.

²³⁸ *See supra* Part IV.

²³⁹ *See infra* notes 240-45 and accompanying text.

²⁴⁰ U.S. CONST. amend. I.

²⁴¹ KNECHTLE & ROEDERER, *supra* note 161, at 456-97.

²⁴² *See infra* notes 284-85 and accompanying text.

²⁴³ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

posal is to secure the utmost protection for the press and newsgathering²⁴⁴ while also allowing courts to prevent nonnews companies from profiting on tortious and criminal conduct behind the veil of newsgathering and under the guise of public interest.²⁴⁵

This proposal encourages state and federal legislation to regulate newsgathering and mediagathering using standardized terminology.²⁴⁶ Once legislation exists using the terms newsgathering or mediagathering, the next step determines which term applies to the journalist's activity in controversy. This step is an application of a proposed three-factor test that integrates terminology that the courts already utilize.²⁴⁷ Then, if the journalist challenges the statute, whether the law addresses newsgathering or mediagathering will determine if strict scrutiny or rational basis should apply in a constitutional analysis.

The next section will define the existing legal terms as well as any additional necessary terms, including the proposed term—mediagathering.²⁴⁸ Following that section will be an explanation of the three factors of the test to determine whether strict scrutiny or rational basis will apply.²⁴⁹ This threshold test is a practical application of factors to determine what constitutes press activity, which is exactly the right protected by the Freedom of the Press Clause of the First Amendment.²⁵⁰ The factors will focus primarily on the activities leading up to the speech and not the speech itself and will help ensure a consistent standard for press newsgathering.²⁵¹ The three-factor test will add stability to newsgathering law.²⁵²

²⁴⁴ *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 61-63 (Ct. App. 1986) (emphasizing that newsgathering techniques cannot be stripped of their constitutional protections by calling them tortious).

²⁴⁵ See *infra* notes 284-85 and accompanying text.

²⁴⁶ See *infra* Part VII.B.

²⁴⁷ See *infra* notes 284-85 and accompanying text.

²⁴⁸ See *supra* Part VII.B.

²⁴⁹ See *supra* Part VII.C.

²⁵⁰ See *supra* Part III.

²⁵¹ See *infra* Part VII.C.

²⁵² See *infra* Part VIII.

B. Defining the Language

This Article has attempted to develop a practical and applicable understanding of the news.²⁵³ Now, in order to create a useful test, this Article must provide specific criteria to the key terms. This will provide a practical framework for the application of the three factors. Also, many of the definitions overlap with each other.²⁵⁴ Though this may feel elliptical, these terms are inextricably intertwined both in this theory and in reality.²⁵⁵ Therefore, some circularity is inevitable and does not necessarily undermine the usefulness of the definitions.²⁵⁶

The first crucial term is the press.²⁵⁷ Part of the courts' reasoning behind not recognizing the press is the need to prevent institutionalized reporting.²⁵⁸ This was the same fear that prompted the addition of the Freedom of the Press Clause originally.²⁵⁹ Therefore, the most appropriate definition for the press would depend on activity and not status.²⁶⁰ This way, the right is not reserved to a specific group of people.²⁶¹ Instead, any person who engages in newsgathering activities will qualify as a member of the press.²⁶²

²⁵³ See *supra* Part II.

²⁵⁴ See *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

²⁵⁵ See, e.g., *id.* ("The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill, or the like . . .").

²⁵⁶ See Barbie Zelizer, *Definitions of Journalism*, in *THE PRESS*, *supra* note 3, at 66, 76 ("We might remember that no one definitional set has been capable of conveying all there is to know about journalism. But taken together, they offer a glimpse of a phenomenon that is rich, contradictory, complex, and often inexplicable. . . . [R]ecognizing their uneasy coexistence can help us see how the press might work better in contemporary democracy.").

²⁵⁷ David A. Anderson, *Freedom of the Press*, 80 *TEX. L. REV.* 429, 446-51 (2002) (presenting the evolving nature of the term from its inclusion in the First Amendment to the Supreme Court's interpretation today).

²⁵⁸ Jefferson, *supra* note 1, at 74.

²⁵⁹ *Id.* at 74-75.

²⁶⁰ See *GANT*, *supra* note 93, at 86 ("If the Court reexamines the nature of press freedom, what is crucial, however, is that it recognize any special 'press' rights conferred by the First Amendment must be based on *activity*, not *status*.").

²⁶¹ See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 *HOUS. L. REV.* 1371, 1411 (2003) (arguing that protection should be afforded to anyone engaged in journalistic pursuits).

²⁶² *Id.*

Next, journalists will be any person involved in mediagathering or newsgathering.²⁶³ This will be a general term to indicate individuals are part of the media without judging the quality of their involvement.²⁶⁴ A journalist may be part of the press during certain activities and simply part of the media for others.²⁶⁵ Any individual may be a journalist.²⁶⁶ Again, the designation as a journalist depends on the activity, not the individual's status.²⁶⁷

Courts have been using the term newsgathering for nearly a century, but they use the term loosely to describe any activity involved in the output of media.²⁶⁸ The “news” portion of the term is meaningless.²⁶⁹ Because this proposal pivots on the distinction between news and nonnews, newsgathering will have a much more narrow scope than courts have applied. Newsgathering will only include activities where an individual pursues newsworthy information.²⁷⁰ Though some legal standards require routine newsgathering techniques, here, the term will not be as limited. Otherwise, newsgathering would be slow to evolve and perhaps punish creative journalism.

In order to preserve the meaning of newsgathering, another term must exist to contrast the actions of the press from other media genres. Therefore, the term mediagathering will encompass all other activities in pursuit of information that are not newsgathering. Courts have not used the term mediagathering, but the term appropriately describes the process of creating nonnews media.²⁷¹ Just as the press compiles and

²⁶³ See Zelizer, *supra* note 256, at 66 (discussing the term journalist).

²⁶⁴ Berger, *supra* note 261, at 1411.

²⁶⁵ See *id.* at 1413 (stating that there would be no need for special protections afforded to those engaging in fictional works that are not intended to be held out to the public for truthfulness).

²⁶⁶ *Id.* at 1411.

²⁶⁷ GANT, *supra* note 93, at 86.

²⁶⁸ ROSHCO, *supra* note 17, at 61-64.

²⁶⁹ See *id.*

²⁷⁰ See *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)) (“Legitimate public interest does not include ‘a morbid and sensational prying into private lives *for its own sake*’”).

²⁷¹ See *Michaels v. Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823, 841-42 (C.D. Cal. 1998) (analyzing what is considered newsworthy in the context of entertainment contrasted with privacy interests).

gathers news to create a newsworthy story, a journalist or production company will compile media information to create entertainment.²⁷²

Finally, the term newsworthy will determine the value of the information pursued.²⁷³ The determination of newsworthiness is not a judgment on the resulting speech.²⁷⁴ The focus of the evaluation is the significance of the information to the public.²⁷⁵ This removes the term from the generally accepted concept of privacy as described in *Shulman*.²⁷⁶ However, this definition preserves the concern with public interest.²⁷⁷ As relevant to this proposal, newsworthiness will not be a balancing test. It will simply be a qualitative assessment of the relevance of the information to the public.²⁷⁸

C. The Three-Factor Test

If the courts are to afford a higher level of protection to the press, the standard for the press must also be high. Gant explains that one concern with an extension of press rights to all individuals is that rights to more people will result in fewer rights to all.²⁷⁹ This test will allow courts to provide more rights by limiting who receives the rights—based on activity not status.²⁸⁰ The first factor assesses good faith and intent.²⁸¹ The second examines the actual techniques.²⁸² The final factor completes the story, ensuring a logical relationship between the purpose and the actions.²⁸³

²⁷² *Id.*

²⁷³ See *ROSHCO*, *supra* note 17, at 72 (using newsworthy to describe significant events that journalists should pursue).

²⁷⁴ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (holding that First Amendment protection is properly afforded to matters of public concern).

²⁷⁵ *Id.*

²⁷⁶ *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998).

²⁷⁷ *Id.*

²⁷⁸ See *infra* notes 291-93 and accompanying text.

²⁷⁹ *GANT*, *supra* note 93, at 179.

²⁸⁰ *Id.* at 86.

²⁸¹ See *infra* notes 284-85 and accompanying text.

²⁸² See *infra* notes 286-90 and accompanying text.

²⁸³ See *infra* notes 291-93 and accompanying text.

The first factor is whether the primary purpose was to pursue newsworthy information.²⁸⁴ As is common with many intent determinations, this factor will investigate both subjective and objective intent.²⁸⁵ If a court determines that a party has the subjective intent to pursue nonnewsworthy information, the objective analysis is unnecessary. On the other hand, if the court determines a party has the subjective intent to pursue a newsworthy story, the next step is an objective analysis.

Also, any showing of bad faith stops the factor analysis, and the court should conclude that the journalist's activity is mediagathering. In the context of this factor, bad faith is not the same as a subjective intent to pursue nonnewsworthy information. Instead, bad faith requires intent to cause harm with the information itself or the information gathering process. This bad faith intent must be the primary purpose and must override any intent to pursue a newsworthy story. Also, the burden of proof for bad faith should be on the plaintiff with an opportunity for rebuttal by the defendant.

The second factor is whether a reasonable professional journalist would deem the techniques excessive when pursuing a newsworthy story.²⁸⁶ This factor actually implements another scholar's suggestion but in a different manner than proposed.²⁸⁷ As discussed previously, Amy Gajda proposed a reasonable professional journalist standard.²⁸⁸ When isolated, this standard gives journalists too much discretionary power over newsgathering.²⁸⁹ However, a professional journalist is likely the best expert to testify to what is excessive or acceptable.²⁹⁰

²⁸⁴ See *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) ("Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material.").

²⁸⁵ See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954) (quoting *First Nat'l Exch. Bank v. Roanoke Oil Co.*, 192 S.E. 764, 114 (Va. 1937)) ("In the field of contracts, as generally elsewhere, 'We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'") (citation omitted).

²⁸⁶ Gajda, *supra* note 131, at 1098.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See *id.*

²⁹⁰ *Id.* ("The standard suggested here would require expert testimony concerning journalists' own understanding of their ethical and professional obligations. Ethical

Also, unlike in Gajda's proposal, here the standard applies in the limited capacity of part of a factor to determine whether a journalist's methods fall within the scope of a regulation—not whether a specific party should be liable for his or her actions.

The third factor is whether the reasonably foreseeable result is a newsworthy story. Though this seems to judge the actual speech, the purpose of this factor is to connect the first and second factors by determining whether the party's actions would reasonably lead to newsworthy information.²⁹¹ Additionally, this factor will not preclude journalists from acting on a hunch.²⁹² Instead, this factor simply requires a logical connection between the actual newsgathering techniques of the journalist and the purpose of those actions.²⁹³

VIII. ILLUSTRATIONS AND POTENTIAL CRITICISM

A. Illustrations

A proposal is only as strong as the impact it will have on the law and on society. Therefore, this section will discuss the possible effects of the three-factor test and the shift to rational basis review.²⁹⁴ This proposal depends on the creation of laws regulating the newsgathering and mediagathering process.²⁹⁵ The three-factor test will allow legislatures to use the two terms with a practical application and a consistent standard.²⁹⁶ In addition, the rational basis review will allow states and Congress to create stricter regulation on mediagathering techniques than newsgathering.²⁹⁷ These standards will also grant freedom of the press

standards would thus be relevant, but court inquiry would properly be refocused on the professional judgments of journalists rather than journalistic instincts of judges and jurors.”).

²⁹¹ See *id.* at 1099 (explaining that “the burden would be on the plaintiff to prove broad agreement among journalists that such a report was not newsworthy.”).

²⁹² See *id.* at 1100 (“[I]f reasonable journalists merely disagreed about coverage, there could be no liability.”).

²⁹³ See *id.* (“Even if a challenged disclosure fell in the shadowlands of professional news judgment, condemned by some and defended by others, it would be immune from judicial sanction.”).

²⁹⁴ See *infra* notes 295-318 and accompanying text.

²⁹⁵ See *supra* Part VII.C.

²⁹⁶ See *supra* Part VII.

²⁹⁷ See *infra* notes 303-07 and accompanying text.

to any individual engaged in newsgathering, which will facilitate greater access to unofficial sources of news.²⁹⁸

To illustrate a possible practical application of the three steps of the proposal, this section will begin with possible legislation.²⁹⁹ As an example of a likely regulation, the Court in *Smith v. Daily Mail Publishing Co.* determined that government officials cannot constitutionally punish publication of lawfully obtained truthful information about a matter of public significance.³⁰⁰ In response, a state or federal legislature may enact a statute that applies only to mediagathering regulating the scope of the phrase “lawfully obtained.”³⁰¹ Currently, unlawfully obtained generally refers to whether a journalist obtained information by theft, fraud, or similar means.³⁰² In contrast, with this proposal legislatures can create a statute that deems any information that is tortiously created as unlawfully obtained.³⁰³

For clarity, the law should include the term mediagathering; but even if the law retains the language “public significance,” with a meaningful definition of the press and newsworthiness, courts can make objective quality assessments to determine what is of public significance. Then, the courts can determine whether a journalist’s activity falls within the scope of the statute. As is common for any laws relevant to the Constitution, the defendant may challenge the constitutionality of the statute. If the regulation limits mediagathering techniques, the court will apply a rational basis analysis.³⁰⁴ Under rational basis, the statute must be rationally related to a substantial government interest.³⁰⁵ The government interest in limiting tortious activity during mediagathering

²⁹⁸ See Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in *FREEDOM OF THE PRESS: THE FIRST AMENDMENT IN ACTION*, *supra* note 2, at 1, 15 (“One might also consider policies that might encourage a variety of news outlets . . . or that might facilitate greater access to unofficial sources of news.”).

²⁹⁹ See *infra* notes 300-18 and accompanying text.

³⁰⁰ *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 105-06 (1979).

³⁰¹ See *Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001) (determining the impact of lawfully obtaining unlawfully obtained information).

³⁰² *Id.* at 530 & n.13.

³⁰³ See *supra* notes 300-02 and accompanying text.

³⁰⁴ See *supra* notes 296-98 and accompanying text.

³⁰⁵ *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 303 (1982).

falls within protecting the health, safety, and welfare of the public.³⁰⁶ And, laws penalizing tortious mediagathering would be rationally related to that government interest.³⁰⁷

For example, in *Deteresa v. American Broadcasting Co.*, the cause of action derived from a state statute that prohibited intentional wiretapping.³⁰⁸ The statute did not address the use of the surreptitiously obtained information but focused on the act of wiretapping.³⁰⁹ Though the court did not address the constitutionality of the statute, the dissent identified a substantial government interest in protecting the privacy of the citizens of California.³¹⁰ This conclusion suggests the statute may survive all levels of scrutiny if the court also finds the statute narrowly tailored.³¹¹

In contrast, the statute in *Bartnicki* penalized the publication of the secretly obtained information.³¹² This distinction changed the Court's focus from newsgathering to speech.³¹³ As a result, the Court imposed intermediate scrutiny for the content-neutral law of general applicability.³¹⁴ The Court did note that the government's interests served by the statute are legitimate but that it disagrees with the implementation.³¹⁵ This Article's proposal suggests that the statute could prohibit intentional wiretapping instead of intentional disclosure, which would be within the suggested boundaries of the *Bartnicki* opinion.³¹⁶ Then, if the statute only imposed limitations on mediagathering, the law would only have to survive rational basis review.³¹⁷ In addition, the Court's

³⁰⁶ *See id.*

³⁰⁷ *See infra* notes 329-32 and accompanying text.

³⁰⁸ *Deteresa v. Am. Broad. Cos.*, 121 F.3d 460, 463 (9th Cir. 1997).

³⁰⁹ *Id.* at 472 (Whaley, J., concurring in part and dissenting in part).

³¹⁰ *Id.* at 470.

³¹¹ *See id.*

³¹² *Bartnicki v. Vopper*, 532 U.S. 514, 523-24 (2001).

³¹³ *Id.* at 527-29.

³¹⁴ *Id.* at 526.

³¹⁵ *Id.* at 529 ("The Government identifies two interests served by the statute—first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted.").

³¹⁶ *Id.* ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.").

³¹⁷ *See supra* notes 304-07 and accompanying text.

apprehension about balancing privacy and public concern would be integrated into the statute's language. Within the three-factor test to determine whether an act is newsgathering, the quality assessment of the information would inherently weigh those interests.³¹⁸

B. Potential Criticisms

The primary target for disapproval in any mediagathering regulation is that the ultimate goal of mediagathering is the speech or expression itself—freedoms the First Amendment explicitly protects.³¹⁹ Therefore, nonnews companies may weigh the costs of violating mediagathering laws against the benefits of publishing the story.³²⁰ However, this cost-benefit analysis issue is common to all civil liabilities because a popular remedy is financial damages. Unlike Schauer's proposal to create a compensation plan for newsgathering, though, the three-factor test mitigates the usefulness of a cost-benefit analysis by permitting legislation outside of tort law.³²¹ This proposal allows for both criminal and civil penalties.

Another likely critique of this proposition is that any regulation on mediagathering inherently regulates the actual speech. Because this Article's proposition addresses the process before the publication, an inherent effect on speech and expression is inevitable.³²² However, the three factors intentionally avoid an assessment of the speech resulting from the mediagathering or newsgathering.³²³ Instead, they focus on the significance of the pursued information to the public.³²⁴

³¹⁸ See *supra* notes 294-317 and accompanying text.

³¹⁹ U.S. CONST. amend. I.

³²⁰ See Geoffrey R. Stone, *WikiLeaks, the Proposed SHIELD Act, and the First Amendment*, 5 J. NAT'L SECURITY L. & POL'Y 105, 114 (2011) (arguing that a balancing of cost and benefits to publishing a story may be more appropriate than overprotection of some news outlets freedom to publish).

³²¹ Schauer, *supra* note 229, at 1343.

³²² See *supra* Part VII.C.

³²³ See *supra* Part VII.C.

³²⁴ See *supra* Part VII.C.

IX. CONCLUSION

If this Article accomplishes only one objective, then that would be to demonstrate that the Press Clause does identify the press as a unique category and should provide members of the press additional rights than those afforded to the general public.³²⁵ Also, because one purpose of the Press Clause was to prevent government licensing of the dissemination of news,³²⁶ the term press should not apply to a stagnant designation of professional members of the press as an institution.³²⁷ Instead, the government should acknowledge the inherent differences in the processes, purposes, and results between news and nonnews media and base the designation of press members on the activities of individual journalists.³²⁸

Finally, in order to effectively apply the Press Clause and reform regulation of journalists' activities, both legislatures and the judiciary must actively recognize the press.³²⁹ Preexisting laws and judicial terminology demonstrate that lawmakers and judges do distinguish the press, though both bodies deny this trend.³³⁰ Therefore, the best way to implement change is to build upon current laws and judicial language to create more consistent regulation of journalists' activities.³³¹ And, this Article's proposal addresses the reluctance of both the legislative branch and judicial branch.³³²

The three-factor test will encourage legislation regarding newsgathering and mediagathering because both terms will have meaningful, limited definitions.³³³ Then, the test will provide clear guidance to courts on how to determine whether an act is newsgathering or mediagathering.³³⁴ Finally, a determination based on the three factors will indicate what standard of constitutional review applies to the statute in

³²⁵ See *supra* Part III.

³²⁶ Jefferson, *supra* note 1, at 74.

³²⁷ See GANT, *supra* note 93, at 86.

³²⁸ See *supra* Part II.

³²⁹ See *supra* Part VII.A.

³³⁰ See *supra* Part IV.

³³¹ See *supra* Part V.

³³² See *supra* Part VII.

³³³ See *supra* Part VII.B.

³³⁴ See *supra* Part VII.C.

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controversy.³³⁵ Though the proposal is detailed and multifaceted, the implementation would be natural once appropriate laws are enacted to regulate newsgathering and mediagathering techniques.³³⁶

Hopefully, this proposal will prompt reformation of newsgathering law. Though the overall purpose should remain the same, the details of the proposition should evolve over time, adjusting to gaps, criticisms, and changing standards in news- and mediagathering techniques. However, the reformation must begin by fully recognizing the Press Clause of the Constitution.

³³⁵ See *supra* notes 279-80 and accompanying text.

³³⁶ See *supra* Part VIII.

