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The Public Benefits of Press Specialness

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Notice and Comment

Symposium on Margaret Kwoka's
"Saving the Freedom of Information Act"

In *Saving the Freedom of Information Act*, Margaret Kwoka offers a deep empirical diagnosis of FOIA's operational dysfunction. Her data make unmistakably clear that FOIA is falling far short of its public-serving aims. The story has a tragic arc. Kwoka shows us, at the front of her book, the Act's incredible potential as a tool of press watchdogging and public oversight, then demonstrates how and why it is incapable of achieving that potential. The reason is overinclusiveness. Federal agencies are so swamped by requesters with non-newsworthy, non-public-oversight purposes that they do not have the time, resources, or incentives to respond well to journalistic requests. By forcing FOIA to be everything to everyone, Kwoka explains, we have left it unable to provide any real system of accountability and transparency for anyone.

Kwoka's structural proposals are eminently sensible. She describes how we should disaggregate information services and disentangle the press function from all the many other functions, so that the press function can flourish. "Rather than trying to squeeze all of the public's needs for government information into FOIA," we need to reform the system to require or incentivize agencies to meet other information requests differently, leaving FOIA to do the work it was designed to do for the press—and, by extension, for all of us (p. 179).

The book's contribution—powerful in its own right—is actually even broader, because these FOIA dynamics serve as a microcosm of a much larger truth we have ignored to our peril for too long: the specialness of the press function sometimes requires separate, special protections for those performing it.

In many circumstances, of course, a broad umbrella of shared rights for the press and the public is perfectly adequate. We all have the right to choose the content of what we communicate and

the right to express ourselves without prior restraint from the government, for example, and there are few reasons to believe that asking the press and the public to share those rights diminishes the ability of either group to exercise them. They are not, and do not need to be, specific press freedoms. But there are also times when—statutorily, and even constitutionally—we should be providing unique protection to those who, if empowered with rights beyond those granted to all speakers, will use those rights to benefit society as a whole. In these areas, our ongoing refusal to conceptualize and legally recognize the specialness of the press function has robbed us of public benefits.

If, for example, the press is not treated as special for purposes of access to jails and granted something more than the access that is given to every member of the public, that shared legal status has consequences for the public. We cannot give every person in America the access, so without some press specialness, there is limited ability for any of us to keep an eye on the way our government treats incarcerated people. Similarly, as a purely practical matter, not all of us could feasibly be permitted to enter border facilities, or disregard curfews at times of unrest, or seek exceptions to officers' dispersal orders during protests, or occupy limited courtroom seats in a crowded criminal trial—and having *someone* acting as the eyes and the ears of the public in all of those settings is important. Likewise, if we need subsidies to help sustain coverage of local public meetings and investigation of important local issues, we cannot give these dollars to every citizen in the town; we have to make judgments about who is performing the true press functions that warrant them.

In all of these settings, as with FOIA, a system of equivalent rights may mean no meaningful rights at all. The consequences—for governmental accountability, community discourse, and the health of our democracy—are grave. Those performing the press function simply cannot do what we need them to do if they are clumped with everyone else. It harms them, but more importantly, it harms us.

Scholars who have advocated for an invigorated role for the First Amendment's Press Clause or suggested that modern debates about social-media regulation must be situated within the framework of that Clause will be thrilled to see what a cogent example Kwoka provides. And her work nudges us to think not

only about how important a differentiated treatment of the press might sometimes be, but also about who counts as the press for purposes of these protections—or, more properly, what counts as the *press function*, which has been the focus of much of my recent work. While some might suggest that in our new media landscape it has become increasingly difficult to identify "the press," and thus we should we should shy away from the endeavor of trying to protect it, the opposite is true. Never has it been more important for us to theorize the set of *functions* we need to support legally in order to continue to reap the public benefits that come from those functions.

Kwoka's study sheds light here. It hones in on the key press function of government oversight and shows the public benefits of it—enlightening audience members, uncovering waste and abuse, spurring policy change, exposing corruption, and checking the power of police and national security agencies. It illustrates the performance of this function by both legacy and non-legacy media. And it makes the case that this function is valuable and worthy of separate protection. We can (and should) continue to conceptualize the sorts of functions that might signal that press specialness is at work—for example, compensating for the public's own information-gathering and fact-checking limitations, acting as surrogates or proxies for an audience of regular listeners in the public, and engaging in what Justice Potter Stewart called the "organized, expert scrutiny of government." We can (and should) continue to consider the doctrinal frameworks in which that specialness can be legally acknowledged. The important first steps are to see that these functions matter to our waning public discourse and that expecting them to be protected in broad, undifferentiated legal structures is both unreasonable and dangerous.

Carving out these special protections for press functions in the places they are needed is all the more important as the legacy press decline. Newsroom closures, private-equity takeovers, and loss of advertising dollars to tech companies mean the media organizations that were once the primary instigators of public-serving, transparency-enhancing litigation and legislation (including FOIA itself) now cannot or will not invest in those legal efforts. In the past, the press had some sources of power it no longer enjoys—staggering resources, symbiotic relationships with government officials who did not yet have direct social-media access to voters, favorable judicial attitudes, and the broader ability

to engage in "self-help." In that more powerful legacy-press era, we might reasonably have expected that their efforts and influence would preserve many of our most important societal press functions. Today, they might not. Yet a healthy democracy continues to demand these functions. Kwoka's project shows the value of legal structures that both embrace the specialness of them and directly protect them.

The press is the recipient, but we are the beneficiaries.

RonNell Andersen Jones is Lee E. Teitelbaum Chair and Professor of Law at the University of Utah's S.J. Quinney College of Law and an Affiliated Fellow at Yale Law School's Information Society Project. Her scholarship focuses on the freedom of the press and the intersection between the media and the courts, with a particular focus on the U.S. Supreme Court.