

Lies, Damned Lies, and Journalism:
Why Journalists Are Failing to
Vindicate First Amendment Values
and How a New Definition of “The
Press” Can Help

Abstract	528
Introduction	530
I. Why We Need a New Definition of the Press	536
II. What’s Wrong With Journalism, and How to Find a Better Approach: The Balance Trap and Stenographic Journalism	539
III. The Problem of Defining the Press: Existing Models and a New Definition	542
A. The Institutional Model and Its Flaws.....	544
B. West’s Functional Model	551
C. A New Way to Define the Press.....	555
1. Rejecting the Balance Trap Approach.....	556
2. Press Membership Depends on Advancing First Amendment Values: Post’s Principle of Democratic Competence and the Press Clause.....	558

* Assistant Professor, Department of Government, American University; J.D. Harvard Law School 1996; B.A. Brandeis University 1993. I want to thank John Caddock, Alex Kreger, Max Looper, and Alex Severin for their essential research assistance and their insightful comments. I also greatly appreciate the thoughtful and helpful comments provided by Joseph Blocher, Louis Fisher, and Jen Gumbrewicz. As always, I am especially grateful to my wife, Jen Stark, for being involved at every stage of this Article.

3.	A New Definition of the Press to Recognize Journalism that Advances First Amendment Values of Truth and Democratic Competence	561
4.	Implementing the New Definition of the Press: Journalists Take the Lead in Building a Better Press Corps	565
	a. The Role of Journalists	566
	b. The Role of the Judiciary	570
IV.	How Can We Know Which Journalists Qualify as Bona Fide Members of the Press? Specific Case Studies	572
	A. How the Balance Trap Norm Makes It Poor Form to Call Out a Dictator for Lying	572
	B. Reporting on Reaction to a Lie Rather than the Lie Itself: A Mitt Romney Ad	579
	C. How the Balance Trap Norm Stands in the Way of Describing Reality When One Political Party Is Extreme	587
	1. Of Gridlock and Hostage Taking	588
	2. When Majority Support for Legislation Is a Failure: Reporting on Use of the Filibuster	595
	Conclusion.....	598

ABSTRACT

This Article identifies a specific problem—journalists who fail to provide the public with the accurate information needed to foster informed public opinion—and offers a specific solution: defining “the press” to provide protections and prestige only to those whose work actually advances First Amendment values.

American journalistic norms facilitate lying by politicians, candidates for office, and other public figures. Because many journalists are committed to the ideal of balance above truth, they are often incapable of calling out lies. Instead, they create a false equivalence by suggesting there are two sides to every argument. I call this the “balance trap” problem—journalism that insists on presenting, without comment, two sides to every story, even when one side is demonstrably false. Politicians and other public figures are able to exploit this reality by making false statements with impunity, secure in the knowledge that journalists will not expose their deceptions.

Scholars like Robert C. Post, Paul Horwitz, Mark Tushnet, and others have recently focused on the questions of whether false statements contain constitutional value and when false statements may be regulated by the government. Although Post's recent book, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State, does not focus on the problem of false statements disseminated by journalists, his concept of democratic competence is especially relevant to the balance trap problem. By extending press membership only to those journalists whose work advances First Amendment values of truth and democratic competence, we can move toward having a press corps that truly informs the public by providing accurate information and exposing false statements by elected officials and other public figures. This approach does not depend on suppressing any speech: by turning to the Press Clause, it is possible to advance democratic competence simply by redefining the press, meaning that only competent journalists will receive the status and protections associated with press membership, while other journalists will be free to practice balance trap journalism but will be denied press status.

Changing the way journalists do their work depends on a new definition of the press. Other scholars have defined the press in institutional (Horwitz, Frederick Schauer) or functional (Sonja West) terms, but, while these definitions identify a number of important considerations, each deals far too often in abstractions, failing to consider the work journalists are actually doing and whether their work merits press status. As a result, each definition is both over- and under-inclusive, providing press membership to balance trap journalists and denying press membership to some journalists who recognize the balance trap and reject it.

This Article does something new by describing a definition of the press that is based on specific examples of work journalists are doing and proposing a way to assess whether this work advances First Amendment values of truth and democratic competence. In addition, this Article does something new by identifying a central role for journalists themselves in defining press membership.

Other scholars who believe that members of the press deserve specific protections seek to define press membership primarily through courts or legislatures.

Ultimately, the goal of this Article is to give meaning to Oliver Wendell Holmes's assertion that "the real justification of a rule of

law is that it helps to bring about a social end which we desire.” Replacing balance trap journalism with journalism that gives Americans the accurate information they need to make informed decisions is a highly desirable social end. If we want to have a better press corps, we must begin with a definition of the press that has the potential to solve the balance trap problem by recognizing as members of the press only those journalists whose work truly advances First Amendment values.

INTRODUCTION

What happens when elected officials or candidates for office make false claims about a matter of public interest? In theory, journalists will expose these lies and politicians will pay a price for deception.¹ In practice, something quite different now happens in the United States. Instead of exposing lies, journalists help to legitimize them through an approach that insists on “treating both sides of the argument equally [even] when one is demonstrably false.”² Journalists are reluctant to call a lie a lie, as they fear this will make them look biased.³ They feel more comfortable with “he-said, she-said” coverage that simply describes what has been said without comment, leaving it to the public to decide who is right.⁴ The result is that a false equivalency can be created with regard to any matter of debate. As Paul Krugman puts it, “if one party declared that the earth was flat, the headlines would read ‘Views Differ on Shape of

¹ See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”).

² Rem Rieder, *Reporting to Conclusions*, AM. JOURNALISM REV. (Feb. 16, 2011), <http://www.ajr.org/article.asp?id=5010>; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 186 (2012) (“Reporters and editors seek safe ground by giving equal time to opposing groups and arguments and crafting news stories that convey an impression that the two sides are equally implicated.”).

³ See Rem Rieder, *Calling a Lie a Lie*, AM. JOURNALISM REV. (Nov. 30, 2011), <http://www.ajr.org/article.asp?id=5197>.

⁴ See *id.*; see also Jay Rosen, *We Have No Idea Who’s Right: Criticizing “He Said, She Said” Journalism at NPR*, PRESSTHINK (Sept. 15, 2011, 8:03 PM), <http://pressthink.org/2011/09/we-have-no-idea-whos-right-criticizing-he-said-she-said-journalism-at-npr/> (defining and explaining “he said, she said” journalism).

Planet.”⁵ Thomas Mann and Norman Ornstein observe that “[n]o lie is too extreme to be published, aired, and repeated, with little or no repercussion for its perpetrator.”⁶

The danger of this approach is that people will not be able to separate fact from fiction on matters of public interest, “that public discourse will end up with more falsity than truth, and that some of this falsity will be positively toxic.”⁷ Public discourse, which Robert Post defines as “the forms of communication constitutionally deemed necessary for formation of public opinion,”⁸ is polluted when it is flooded with misinformation.⁹ When public opinion itself is based on false information provided by journalists, democratic self-government is undermined,¹⁰ since “government action [in a democracy is] tethered to public opinion.”¹¹

The question, however, is whether the First Amendment leaves any room to address the problem I call the “balance trap”—journalism that insists on presenting, without comment, two sides to every story, even when one side is demonstrably false.¹² Traditionally, the First Amendment has “done little to prevent the problem of widespread

⁵ Paul Krugman, Op-Ed., *The Centrist Cop-Out*, N.Y. TIMES (July 28, 2011), <http://www.nytimes.com/2011/07/29/opinion/krugman-the-centrist-cop-out.html>.

⁶ MANN & ORNSTEIN, *supra* note 2, at 62.

⁷ Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 WASH. L. REV. 445, 472 (2012); *see also* MANN & ORNSTEIN, *supra* note 2, at 62 (“The audiences that hear [lies] repeatedly believe [them].”); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 919 (2010) (noting “increasing acceptance of patent factual falsity”). Horwitz believes that Schauer’s concern that the public will accept false statements may be overstated because the American public is increasingly well-educated and intelligent. Horwitz, *supra*, at 472. However, intelligence and education may not allow the public to separate truth from falsehood when each is presented as equally plausible, as I discuss in *infra* Part IV.

⁸ ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 15 (2012).

⁹ *See* MANN & ORNSTEIN, *supra* note 2, at 66 (“In the new age and the new culture, the negative and false charges are made rapidly and are hard to counter or erase. They also make rational discourse in campaigns and in Congress more difficult and vastly more expensive.”).

¹⁰ *See* POST, *supra* note 8, at 95 (“A people without knowledge is a people without power or sovereignty. To preserve the self-government of the people, we must preserve their access to knowledge.”); *see also* *Wieman v. Updegraff*, 344 U.S. 183, 196 (Frankfurter, J., concurring) (“That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible.”).

¹¹ POST, *supra* note 8, at 19.

¹² *See* Schauer, *supra* note 7, at 919 (suggesting that the “First Amendment can . . . do very little to solve [the problem of widespread factual falsity]”).

factual falsity.”¹³ In fact, “First Amendment theory and doctrine [has failed] to fully reckon with the role of facts, or ‘knowledge’ more generally, within public discourse.”¹⁴ This is not surprising—the United States has a free speech tradition that government cannot be trusted “to decide which ideas are true and which are false,”¹⁵ and therefore, the First Amendment’s Speech Clause requires viewpoint neutrality.¹⁶

Americans’ skepticism that government can be trusted to separate false ideas from true ones also applies “to propositions of fact.”¹⁷ The Speech Clause “does not permit restriction of noncommercial and nondefamatory factual falsity in the public sphere” and, given that such false speech cannot be prohibited, it is not clear whether anything “might be done to deal with th[e] seemingly increasing problem of public and influential factual falsity.”¹⁸ The idea of using the First Amendment and the courts to prohibit false public statements has largely been taboo.¹⁹

Despite the assumption that the First Amendment requires neutrality with regard to questions of truth and falsity,²⁰ a number of

¹³ *Id.*; see also *United States v. Alvarez*, No. 11-210, slip op. at 5 (U.S. June 28, 2012) (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for [suppressing or punishing] false statements.”).

¹⁴ Horwitz, *supra* note 7, at 472.

¹⁵ Schauer, *supra* note 7, at 916.

¹⁶ See POST, *supra* note 8, at 9 (“[D]eep and fundamental First Amendment doctrines . . . impose a ‘requirement of viewpoint neutrality’ on regulations of speech and . . . apply ‘the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.’” (footnote omitted)).

¹⁷ Schauer, *supra* note 7, at 916.

¹⁸ *Id.* at 917.

¹⁹ *Id.* at 915 (“[T]he general weight of the American free speech tradition is such as to keep these matters [of regulating public non-commercial factual falsity] beyond the reach of constitutionally permissible government regulation.”); see also Horwitz, *supra* note 7, at 467 (stating that *United States v. Stevens*, 130 S. Ct. 1577 (2010), “suggest[s] that the First Amendment generally forecloses weighing the value of false speech at all”). In its past term, the Supreme Court invalidated statutory provisions in the Stolen Valor Act that had been used to convict respondent for lying about having received the Congressional Medal of Honor. *United States v. Alvarez*, No. 11-210, slip op. at 3 (U.S. June 28, 2012). The Court found the statutory provisions to be a content-based suppression of speech. However, the Court left open the possibility that the Act could be amended to punish false claims of having received military decorations or medals “made to effect a fraud or secure moneys or other valuable considerations.” *Id.* at 11.

²⁰ This assumption may, of course, be incorrect. Schauer observes “nearly all of the components that have made up our free speech tradition, in the United States and abroad . . . have had very little to say about the relationship between freedom of speech and questions of demonstrable fact.” Schauer, *supra* note 7, at 907. The free speech tradition

scholars have recently focused on “the constitutional status and social value of false statements of fact; . . . the constitutional value of true factual statements; and the relationship between First Amendment law and the institutions in which knowledge is produced and verified.”²¹ Paul Horwitz observes that scholars “basically agree that false statements lack epistemic and/or social value.”²² Mark Tushnet concludes that “when all is said and done, there really is no social value in the dissemination of falsehood, particularly knowing falsehood. If we can curb it without damage to other social values—including of course other statements covered by the First Amendment—we should.”²³ Robert Post asserts that “even as courts hold that ‘under the First Amendment there is no such thing as a false idea,’ they also permit the state to regulate the publication of false facts, even within public discourse.”²⁴ These scholars suggest that truth itself is a First Amendment value,²⁵ although they leave open the question of how this value can be advanced without suppressing speech.

that false statements are protected is rooted in a desire to protect debatable *opinions*, not demonstrably false statements of fact. *Id.* at 904–05. *But see Alvarez*, No. 11-210, slip op. at 3 (invalidating conviction of respondent who lied about having received the Congressional Medal of Honor as content-based suppression of speech).

²¹ Horwitz, *supra* note 7, at 462.

²² *Id.* at 468; *see Alvarez*, No. 11-210, slip op. at 8 (Alito, J., dissenting) (“Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”); *see also Alvarez*, No. 11-210, slip op. at 6–7, 9 (majority opinion) (although rejecting the argument that the Speech Clause cannot protect false statements, acknowledging that “[s]ome false speech may be prohibited even if analogous true speech could not”). Epistemic value is value relating to knowledge. Horwitz, *supra* note 7, at 446 n.9 (citing ROBERT AUDI, *EPISTEMOLOGY: A CONTEMPORARY INTRODUCTION TO THE THEORY OF KNOWLEDGE* (Paul K. Moser ed., 2d ed. 2002) and Matthias Steup, *Epistemology*, *STAN. ENCYCLOPEDIA PHIL.* (Dec. 14, 2005), <http://plato.stanford.edu/entries/epistemology/>).

²³ Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* 25 (Harvard Law Sch. Pub. Law Working Paper Series, Paper No. 11-02, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930; *see also* POST, *supra* note 8, at 29 (“Entrenched First Amendment doctrine affirms that ‘there is no constitutional value in false statements of fact.’” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974))).

²⁴ POST, *supra* note 8, at 29 (footnote omitted).

²⁵ *See, e.g.,* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 3 (1995) (“[T]he search for truth provides a unifying theory of both the Speech and the Religion Clauses and that it remains a viable First Amendment justification despite the philosophical attack on the intelligibility of the notion of truth.”).

Horwitz, Tushnet, Post, and other scholars are concerned with the question of whether false statements in public discourse may be punished.²⁶ While scholars may reject the notion that false statements contribute to the search for knowledge or have other social value, they may still be reluctant to punish “even deliberately false speech.”²⁷ In other words, scholars believe that false statements may poison public discourse,²⁸ but they are not sure what can be done about this. As Frederick Schauer puts it, “public and influential factual falsity” is a problem, but “[t]here is no easy answer to th[e] question” of how to solve it.²⁹ This article offers a solution to this dilemma—how to reduce false statements and “enhance public discourse”³⁰ without suppressing speech—in the specific context of journalism. To put it more plainly, this article suggests a way to use the First Amendment to advance truth and ensure that the public receives accurate information without suppressing speech. The proposed solution depends on focusing on the First Amendment’s Press Clause rather than the Speech Clause.

This Article identifies a specific problem—journalists³¹ who fail to provide the public with the accurate information needed to foster

²⁶ For instance, Horwitz and Tushnet both discuss the constitutionality of the Stolen Valor Act of 2005, 18 U.S.C. § 704, which provides criminal penalties for people who falsely represent that they have been awarded military decorations or medals. See Horwitz, *supra* note 7, at 457–62; Tushnet, *supra* note 23, at 4–10. The provisions of the Act at issue in *Alvarez* were invalidated by the Supreme Court. *Alvarez*, No. 11-210, slip op. at 3. Post discusses the extent to which government may punish citizens for making false statements in public discourse. POST, *supra* note 8, at 29–30. However, for speech *outside* public discourse, Post writes that constitutional requirements do not apply and state regulation is more readily justified. *Id.* at 34.

²⁷ See Horwitz, *supra* note 7, at 469.

²⁸ See, e.g., *id.* at 472.

²⁹ Schauer, *supra* note 7, at 917; see also Horwitz, *supra* note 7, at 473 (“If a central goal of the First Amendment is to improve the quantity and quality of knowledge in our society, but First Amendment doctrine is mostly disabled from suppressing false facts and does not necessarily protect true ones, is there anything left in our doctrine that can help us enhance public discourse, by increasing our knowledge or reducing the number of falsehoods in circulation?”). Horwitz considers some possible answers to his question, but he ultimately concludes that there are “few answers to the First Amendment’s epistemological problem [and i]t may be more important for now to ask the right questions than to supply an answer. . . . [W]e still face a large and important set of unanswered questions about the relationship between truth, falsity, freedom of speech, and the production and protection of knowledge.” Horwitz, *supra* note 7, at 486–87.

³⁰ Horwitz, *supra* note 7, at 473.

³¹ I use the term “journalists” to refer to anyone who disseminates information about newsworthy events to the public, whether or not that information is accurate, including those who follow the balance trap model. Not all journalists necessarily qualify as members of the press. See *infra* Part III.C.3. (defining criteria for press membership).

informed public opinion—and offers a specific solution: defining “the press” to provide protections and prestige only to those whose work actually advances First Amendment values.³² Journalists may very well do important work advancing such values in a number of ways,³³ but this Article will focus on one particular First Amendment value that bona fide members of the press can vindicate: informing the public by providing accurate information and exposing false statements of facts by elected officials or other public figures. Robert C. Post describes this as “democratic competence” which “refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge.”³⁴ In this context, bona fide members of the press can advance First Amendment values by “[e]quipping people to understand and evaluate concepts in public discourse.”³⁵ To put it more simply, bona fide members of the press can advance the First Amendment value of truth by providing the public with accurate information and rejecting the currently widespread journalistic practice that values false balance over truth. In fact, as Stephen Vladeck recently observed, Post’s concept of democratic competence “could well provide the missing

³² The ultimate goal is to give meaning to Oliver Wendell Holmes’s assertion that “the real justification of a rule of law . . . is that it helps to bring about a social end which we desire.” Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899). My goal in writing this paper is to develop a definition of the press that will help advance First Amendment values of truth and democratic competence, which is a fancy way of saying that the goal is to ensure that Americans are provided with the accurate information they need to make informed decisions about matters of political debate. See POST, *supra* note 8, at 33–34 (defining democratic competence, which is explained in more detail at *infra* Part III.C.2.).

³³ See RonNell Andersen Jones, *Litigation, Legislation and Democracy in a Post-Newspaper America*, 68 WASH & LEE. L. REV. 557, 570–71 (2011) (arguing that “newsgathering and the attendant provision of public affairs reporting is only one piece of what newspapers have done to preserve, stabilize, and advance our democracy” and citing work “newspapers and newspaper organizations” have done to “instigat[e], enforce[e], coordinat[e], and finance[e] legal change” as other examples of actions that advance democratic values). Jones asserts, for instance, that newspapers have been “the major force behind the adoption of open-meetings acts and open-records laws” as well as the Freedom of Information Act. *Id.* at 571.

³⁴ POST, *supra* note 8, at 33–34. Post does not himself argue that democratic competence is a reason to support protections for the press. See Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 439 (2012). However, Joseph Blocher concludes that “the press, like academia, should receive First Amendment protection under the principle of democratic competence” because the press plays an important role in “the dissemination and occasional creation of expert knowledge.” *Id.* at 440.

³⁵ Blocher, *supra* note 34, at 435.

theoretical justification for reinvigorating the First Amendment's Press Clause."³⁶

This Article does something new by using Post's theory of democratic competence as the foundation for developing a new definition of the press that is based on specific examples of the work that journalists are doing and proposing a way to assess whether this work advances First Amendment values of truth and democratic competence.³⁷ In addition, this Article diverges from scholarship that suggests courts and legislatures should play the primary role in defining press corps membership. This Article does something new by identifying a central role for journalists themselves in the process.

I

WHY WE NEED A NEW DEFINITION OF THE PRESS

When bona fide members of the press are distinguished from journalists and other speakers who are not entitled to Press Clause protections,³⁸ the public can separate competent press coverage from journalism that does not vindicate First Amendment values.³⁹

³⁶ Stephen I. Vladeck, *Democratic Competence, Constitutional Disorder, and the Freedom of the Press*, 87 WASH. L. REV. 529, 533 (2012).

³⁷ Scholars and judges may be reluctant to define who is and who is not a bona fide member of the press. See *First Nat'l Bank 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."); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 505 (2002) (observing that people will disagree about the desired functions of the press); Sonja R. West *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1029 (2011) ("To many jurists and scholars, the thought of identifying who constitutes the press reeks of government favoritism toward a privileged few and discrimination against other, less favored speakers."). This Article offers a way around these problems by looking to journalists themselves to set standards that will determine who is and who is not a bona fide member of the press.

³⁸ Speakers and journalists not entitled to Press Clause protection can still receive constitutional protection under the Speech Clause. See West, *supra* note 37, at 1034–35. They may also potentially receive nonconstitutional (e.g., statutory) protections, though this Article will argue that any protections tied to press membership should be reserved for bona fide members of the press.

³⁹ See Blocher, *supra* note 34, at 434 ("[W]ithout an account of why and how people in public discourse will be able to separate truth and expert knowledge from falsehood and chicanery—the basic premise that expert knowledge will inform participatory democracy will fail."). This is not to say that truth will naturally and inevitably win out if journalists give the public accurate information. See Schauer, *supra* note 7, at 909 (noting that people do not always act rationally and are influenced by numerous factors other than "the truth of a proposition" when deciding "which propositions [to] . . . accept[]"); see also Howard Kurtz, *Death Panels Smite Journalism*, WASH. POST (Aug. 24, 2009, 9:47 AM),

Journalists will then have an incentive to do work that advances First Amendment values. If they do not, they will not be identified as members of the press, and they will not receive specific constitutional and statutory protections or other benefits associated with press membership. These benefits and protections include: (1) protection from prosecution for refusing to testify about confidential sources, (2) protection from prosecution for methods necessary to conduct undercover reporting,⁴⁰ and (3) press credentials/membership in the congressional or White House press corps and attendant special access to elected officials and candidates for office.⁴¹ However, if

<http://www.washingtonpost.com/wp-dyn/content/article/2009/08/24/AR2009082400996.html> (arguing that the death panel myth “refused to die” even after journalists debunked it). However, by rewarding journalists who do provide accurate information to the public, as this Article suggests, we can at least attempt to provide a sounder foundation for public discourse. Perhaps more importantly, elected officials and public figures who know that journalists will actively debunk and expose false claims of fact may be less likely to make demonstrably false assertions. *See* Ezra Klein, *When Jim DeMint Hated Your Freedom*, WASH. POST (May 6, 2011, 3:47 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/when-jim-demint-hated-your-freedom/2011/05/03/AFFBScAG_blog.html (“It’s important that people realize how fake many of the policy arguments that go on in [Washington, D.C.] really are, and that the media is there to call out politicians who continually move the goalposts. Because if there are no referees on the field, anything can be made to sound like a policy argument, and it’s very hard for voters to tell when the players are being straight with them.”). Under the current framework, characterized by the balance trap model of reporting, elected officials and public figures rightly conclude that they can make false claims with impunity, knowing that most journalists will simply pass their assertions on to the public without comment.

⁴⁰ Courts have applied these protections to nontraditional journalists, including documentary filmmakers and book authors. *See, e.g.,* *Ayala v. Ayers*, 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009). However, the reason for providing such protections to non-traditional journalists is essentially the same as the reason I cite for providing protections to any member of the press: “bringing to light ‘newsworthy’ facts on topical and controversial matters of great importance.” *Id.* (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993)).

⁴¹ *See infra* Part III.C.4. (implementing my proposed new definition of the press; *see also* Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1268 (2012) (“Examples of such singling out [of the press for special access or treatment] abound: special access to government press conferences, press access to crime scenes, postal rate differentiation, special tax treatment (e.g., paper and ink taxes, use taxes, and the like), differential access to information in government and government officers’ hands (members of Congress, the President, governors, the military, etc.), and so forth. The obvious—and, indeed, the only possible—justification for this beneficence is that under the Constitution, the press fulfills a special role in our democracy that justifies granting it rights and privileges denied to others.”). In addition, as discussed in *infra* Part III.C.4., only bona fide members of the press should be eligible to receive awards and other recognition within their profession. Prestige and status can be powerful incentives in shaping journalistic norms. *See* Anderson, *supra* note 37, at 475. Journalists who

journalists fail to qualify for press status, their work will not be suppressed or prohibited. Free speech protections will still allow them to disseminate misleading stories that create a false equivalence between fact and fiction.⁴² They simply will not be recognized as members of the press and will not receive the prestige and protections associated with press corps membership.

Other scholars seeking to define the Press Clause⁴³ have alternatively concluded that it ought to protect either the “institutional press”⁴⁴ or individuals who perform important press functions (e.g., gathering and disseminating news).⁴⁵ Their work identifies a number of important problems, though gaps and unexplored questions remain. Most significantly for purposes of this Article, the existing scholarship deals far too often in abstractions, failing to examine what journalists are actually doing and why or even whether their work merits special⁴⁶ legal protection. The existing ways of defining the press do nothing to address, or even to acknowledge, the balance trap

recognize the problems of the balance trap approach should urge their peers to abandon that approach, as discussed in more detail in *infra* Part III.C.4.

⁴² This Article does not argue that journalists who are not bona fide members of the press are entitled to *no* legal protections. Their work would still be protected by the Speech Clause; they could, of course, continue to publish and distribute what they write. *See* West, *supra* note 37, at 1034–35 (stating that the Speech Clause protects right to disseminate speech). However, this Article argues that journalists who do not qualify as bona fide members of the press would not receive specific protections associated with the Press Clause or with statutes aimed at protecting the press, and they would not receive the prestige associated with press membership.

⁴³ Not all scholars agree that the Press Clause ought to have meaning that is separate and distinct from the Speech Clause. *See, e.g.*, Anderson, *supra* note 37, at 526–27. However, this approach would have the bizarre result of rendering the Press Clause “mere surplusage.” *See* West, *supra* note 37, at 1028 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)). I agree with West’s conclusion that the better approach is to give the Press Clause specific and distinct meaning.

⁴⁴ *See* Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45 (2006); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

⁴⁵ *See* West, *supra* note 37.

⁴⁶ By “special” legal protection, I do not mean preferential or privileged protection—I simply mean specific, different protection afforded to journalists who qualify as members of the press. *See id.* at 1046–47 (“[A] prominent part of the backlash against adopting an independent interpretation of the Press Clause both on and off the bench is the perception that doing so would necessitate giving the press ‘special rights’ It is important to emphasize that recognizing the independent significance of the Press Clause would result in a gain of constitutional protections only. No one, whether a member of the press or not, would lose the expressive rights that are already protected. There are no constitutional losers in this equation. Rather, placing newsgathering within the protections of the First Amendment [Press Clause] would allow the Court to acknowledge the important and distinct role of the press in informing the public and checking the government.”).

problem that plagues American journalism in the twenty-first century. A new definition of the press can help address this problem.

II

WHAT’S WRONG WITH JOURNALISM, AND HOW TO FIND A BETTER APPROACH: THE BALANCE TRAP AND STENOGRAPHIC JOURNALISM

In order to move toward the goal of a press corps that provides the public with the accurate information it needs to “distinguish[] good ideas from bad ones,”⁴⁷ it is necessary to consider the current state of journalism: what are journalists doing right, what are they doing wrong, and how can we develop a definition of the press that favors those who get it right.⁴⁸ Journalists fall short when they grant respectability to demonstrably false claims—either through the balance trap⁴⁹ or what has been described as the “stenographer model”⁵⁰ or “officials say” journalism.⁵¹

Journalists who fall into the balance trap create a problem of false equivalency by presenting a false statement of fact alongside the truth without comment. This approach has the effect of suggesting that each claim may have merit although, in reality, only one claim is factually correct.⁵² For example, a *PBS Newshour* story on climate change reported that climate change “skeptics remain unconvinced” that “humans are causing global warming,” offering in response only the tepid observation that these “views [are] challenged by scientific

⁴⁷ POST, *supra* note 8, at 34.

⁴⁸ This is discussed in more detail in *infra* Part IV, which addresses specific examples of what it means for journalists to get it “right” or “wrong.”

⁴⁹ Paul Krugman similarly describes this as “the cult of balance.” Paul Krugman, *The Cult that is Destroying America*, N.Y. TIMES (July 26, 2011, 5:09 PM), <http://krugman.blogs.nytimes.com/2011/07/26/the-cult-that-is-destroying-america/>.

⁵⁰ See Glenn Greenwald, *Arthur Brisbane and Selective Stenography*, SALON.COM (Jan. 13, 2012, 1:58 AM), http://www.salon.com/2012/01/13/arthur_brisbane_and_selective_stenography/singleton/.

⁵¹ Glenn Greenwald, “Officials Say” *Journalism*, SALON (June 17, 2012, 3:41 AM), http://www.salon.com/2012/06/17/officials_say_journalism/.

⁵² Glenn Greenwald, *Bob Schieffer, Ron Paul and Journalistic “Objectivity,”* SALON (Nov. 24, 2011, 1:57 AM), http://www.salon.com/2011/11/24/bob_schieffer_ron_paul_and_journalistic_objectivity/singleton/ (“The overarching rule of ‘journalistic objectivity’ is that a journalist must never resolve any part of a dispute between the Democratic and the Republican Parties, even when one side is blatantly lying. They must instead confine themselves only to mindlessly describing what each side claims and leave it at that.”).

evidence.”⁵³ In reality, “there is now an overwhelming scientific consensus that global warming is indeed happening and humans are contributing to it.”⁵⁴ Balance trap coverage like the PBS story on climate change creates the impression that there are two sides to every matter of political debate.⁵⁵ The problem, of course, is that there aren’t always two sides to each story: some claims are demonstrably false.⁵⁶ It is not biased to say so; it is simply describing reality.⁵⁷

The stenography or “officials say” problem is a similar one: journalists “uncritically writing down what people say and then leaving it at that.”⁵⁸ Stephen Colbert parodied this method of journalism at the 2006 White House Correspondents’ Dinner:

Here’s how it works. The President makes decisions. He’s the decider. The press secretary announces those decisions, and you people of the press type those decisions down. Make, announce, type. Just put ‘em through a spell check and go home. Get to know your family again. Make love to your wife. Write that novel you got kicking around in your head. You know, the one about the intrepid Washington reporter with the courage to stand up to the administration? You know, fiction!⁵⁹

Glenn Greenwald somewhat less colorfully describes “officials say” journalism as a “standard template of American [journalism] . . . [in which journalists] typically state as fact what are nothing more

⁵³ *Transcript of Teachers Endure Balancing Act Over Climate Change Curriculum*, PBS (May 2, 2012), http://www.pbs.org/newshour/bb/climate-change/jan-june12/teach-climate_05-02.html (including video and transcript).

⁵⁴ *Scientific Consensus on Global Warming*, UNION CONCERNED SCIENTISTS (Mar. 7, 2011), <http://www.ucsusa.org/ssi/climate-change/scientific-consensus-on.html>.

⁵⁵ See Vladeck, *supra* note 36, at 539 (observing that we live “[i]n an age where every controversial issue is often framed as just another debate with two sides”).

⁵⁶ See Schauer, *supra* note 7, at 897–98; see also MANN & ORNSTEIN, *supra* note 2, at 194 (“A prominent *Washington Post* reporter sanctimoniously told us that the *Post* is dedicated to presenting both sides of the story. In our view, the *Post* and other important media should report the truth.”); Leonard Pitts, Jr., *In Calling Out Mubarak’s Lies, CNN’s Anderson Cooper Reported the Truth*, MCCLATCHY (Feb. 18, 2011), <http://www.mcclatchydc.com/2011/02/18/108842/commentary-in-calling-out-mubaraks.html> (criticizing the balance trap approach, stating that “[t]hrough the axiom says that there are two sides to every story, that is not always the case. What was the other side of World War II? The civil-rights movement? Watergate?”).

⁵⁷ In fact, exposing false claims by pointing to the truth is recognized by the Supreme Court as the preferred approach to dealing with lies. See *United States v. Alvarez*, No. 11-210, slip op. at 15 (U.S. June 28, 2012) (“The remedy for speech that is false is speech that is true.”).

⁵⁸ Greenwald, *supra* note 50.

⁵⁹ Daniel Kurtzman, *Transcript of Stephen Colbert at the White House Correspondents’ Dinner*, ABOUT.COM, http://politicalhumor.about.com/od/stephencolbert/a/colbertbush_2.htm (last visited Oct. 26, 2012) (emphasis omitted).

than official assertions, and then append on to the end of the paragraph the rote phrase ‘officials say.’”⁶⁰ Greenwald criticizes this practice for “convert[ing] media institutions into little more than glorified press release outlets for the U.S. government and military.”⁶¹ “Officials say” journalism gives the public the incorrect impression that “[false] government claims a[re] verified fact[s] . . . [that have] been checked and confirmed by an independent media arbiter.”⁶²

“Officials say” journalism presents the same fundamental problem as balance trap journalism: it provides the public with false or misleading information that is given the appearance of authenticity. “Officials say” journalism is arguably more problematic—where balance trap journalism gives false claims the veneer of respectability, “officials say” journalism “converts government claims into journalistic fact.”⁶³ Like balance trap journalism, “officials say” journalism is not worthy of Press Clause protections or prestige.

Some journalists, to their credit, recognize, avoid, and reject the balance trap and stenography problem, calling out lies and exposing false claims when they are made. This Article proposes recognizing only these journalists as bona fide members of the press. Their work will receive the protections and prestige associated with press membership.

The ultimate goal of creating this new model is to improve the quality of information Americans receive so that the American project of democratic self-government is itself improved.⁶⁴ Paul Horwitz asks, “If a central goal of the First Amendment is to improve the quantity and quality of knowledge in our society, but First Amendment doctrine is mostly disabled from suppressing false facts and does not necessarily protect true ones, is there anything left in our doctrine that can help us enhance public discourse, by increasing our knowledge or reducing the number of falsehoods in circulation?”⁶⁵

⁶⁰ Greenwald, *supra* note 51.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (“[The press] is the means by which people receive that free flow of information and ideas essential to intelligent self-government.”). I agree that this is a normative description of the role the press can and should play, but it does not describe the actual work many journalists currently do, some of which is discussed in *infra* Part IV.

⁶⁵ Horwitz, *supra* note 7, at 473.

This Article proposes a way to answer Horwitz's question by developing a new definition of the press.⁶⁶ This can be done without suppressing any speech—journalists and other speakers will remain free to disseminate false claims, but only those journalists who expose false claims and give the public the information it needs to separate truth from fiction will qualify for press membership.⁶⁷

III

THE PROBLEM OF DEFINING THE PRESS: EXISTING MODELS AND A NEW DEFINITION

The Constitution plays a central role in creating the foundation for a press corps that can serve First Amendment values: it provides the starting point for analysis and discussion through the very idea that members of the press ought to receive special protections.⁶⁸ However, the Constitution does not provide specific guidelines for determining who or what “the press” is.⁶⁹ Part III.C.4. describes a framework for giving “the press” a specific definition that allows us to differentiate bona fide members of the press from those who do not truly inform the public. Members of the press would receive constitutional and statutory protections, as well as prestige associated with their

⁶⁶ This Article specifically focuses on journalism; Horwitz notes that Robert Post offers an answer that addresses these problems in a broader First Amendment context. *Id.* (citing POST, *supra* note 8). Post's approach does not discuss the specific problems I focus on here in the context of journalism and the Press Clause.

⁶⁷ Cf. Vladeck, *supra* note 36, at 535 (expressing concern that “[d]emocratic competence . . . might . . . empower the government (and perhaps other disciplinary practices) with stronger countervailing arguments justifying the suppression of speech in cases in which the First Amendment would otherwise apply”). My approach to defining the press advances democratic competence without suppressing any speech.

⁶⁸ It is well worth noting that the Constitution is not the only available avenue for press protections—statutory and other protections have been and can be provided. See Anderson, *supra* note 37, at 432 (“Nonconstitutional sources of special protection for the press are far more numerous [than constitutional protections]. The press gets preferential access to legislative chambers, executive news conferences, trials, war zones, disaster scenes, prisons, and executions. State and local statutes protect the press from otherwise legal police searches. More than half of the states have ‘shield laws’ creating ‘reporters’ privileges’ that are sometimes broader than the First Amendment version of that privilege. The press is exempted from some securities regulations and campaign-expenditure limitations. A federal statute exempts certain newspapers from antitrust laws. Some retraction statutes create defenses that are only available to newspapers. Newspapers and magazines get special postal rates. Broadcasters get free use of spectrum that other types of users must pay for.”).

⁶⁹ In addition, original intent or original meaning analysis does not provide clear answers. See West, *supra* note 37, at 1040 (“Virtually all who have studied the issue have conceded that the original meaning of the two clauses is not obvious.”).

recognized status. The courts should play a role in making this system work, although they are not the only necessary actors. Journalists would themselves play essential roles in giving the Press Clause real world meaning that honors bona fide press members whose work clears the debris away from political debate so that discussion can begin with the facts themselves.

Getting to the end point of having a press corps that vindicates democratic values begins with the text of the Press Clause itself—a clause that has often been ignored by the courts. In recent years, a number of scholars have observed that the courts have failed to give distinct meaning to the Press Clause.⁷⁰ In practice, the Press Clause has generally been given no meaning independent of the Speech Clause. The Supreme Court has “dismissed the [Press C]ause as a constitutional redundancy.”⁷¹

In an effort to remedy this problem, scholars have looked for ways to breathe life into the Press Clause by assigning it some specific, unique meaning. However, while their efforts promise to develop a framework that will achieve the essential task of protecting members of the press whose work vindicates First Amendment values, that promise has not yet been fulfilled. Each previous effort to give meaning to the Press Clause has left important questions unresolved. Part III.C.4. will build on earlier work to show how a more precise definition of the Press Clause can better reflect the reality of what journalists do (and do not do) and can point a way to improved press coverage that gives Americans the information we need to make informed decisions.

Scholars who look to give the Press Clause distinct meaning have offered alternative ways to define “the press” through either an institutional or functional approach. Although it is tempting to see this as an either/or choice, there are useful elements in each approach. My own proposed definition, discussed in Part III.C.4., builds on ideas presented by each of these approaches. Each existing definition addresses important problems and identifies worthy goals, and I do not mean to dismiss either out of hand. However, my approach will offer suggestions for filling in gaps in each existing model, most centrally by providing a way to base a definition of the press on work journalists are actually doing (and not doing). Before I present my

⁷⁰ See, e.g., Horwitz, *supra* note 44; Schauer, *supra* note 44; West, *supra* note 37.

⁷¹ West, *supra* note 37, at 1027–28.

own model for defining the press, I will explain how the existing institutional and functional models have been described.

A. The Institutional Model and Its Flaws

Frederick Schauer urges courts to think of the First Amendment, including the Press Clause, from an institutional perspective because institutions are a central part of modern life in advanced societies.⁷² He argues that judges who are indifferent to the reality of varied institutions will reach conclusions that incongruously apply a one-size-fits-all test to both professional journalists and the public at large when determining, for instance, who gets access to courtrooms or other government facilities.⁷³ Schauer criticizes courts for failing “to distinguish media from nonmedia, [or] individual speakers from magazine publishers.”⁷⁴ His central premise is that some institutions deserve First Amendment protections while other institutions (or, it seems, individuals not affiliated with institutions) do not, and recognizing this principle will lead to better judicial decisions.

For Schauer, the institutional approach is beneficial because it allows courts to provide protections to those “existing social institutions [that] in general, even if not in every particular, serve functions that the First Amendment deems especially important.”⁷⁵ It would also be beneficial because it would streamline judicial analysis: rather than having to apply the Press Clause to specific conduct, courts could simply ask “whether the conduct at issue was or was not the conduct of [a First Amendment] institution[].”⁷⁶ Applying this

⁷² Schauer, *supra* note 44, at 1259 (“[A]dvanced societies are experiencing a growing institutional self-reproduction and consequent institutional differentiation.”).

⁷³ *Id.* at 1262.

⁷⁴ *Id.* at 1264.

⁷⁵ *Id.* at 1274–75. “For all of these [First Amendment] institutions, the argument would be that the virtues of special autonomy—special immunity from regulation—would in the large serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their natural (or at least most comfortable) home within the boundaries of the First Amendment.” *Id.* Schauer refers here to colleges, universities, and libraries, but he adds that “we might imagine a conceptually similar treatment for the institutional press.” *Id.* at 1275.

⁷⁶ *Id.* at 1274. This would not mean that First Amendment institutions would have “absolute immunity” for “every action”—they would be entitled to “substantial legal autonomy with respect to a properly made” decision in their area of competence and expertise. Horwitz, *supra* note 7, at 485–86. For instance, “A [university] dean’s decision to approve or veto a tenure vote” would be entitled to judicial deference as “an academic decision that falls squarely within the infrastructural role of the university.” *Id.* at 486. The same dean’s “arbitrary decision to shoot trespassers on sight,” by contrast, “does not call for institutional autonomy or judicial deference.” *Id.*

approach, it seems certain that reporters for established newspapers and magazines would uniformly receive protection by virtue of their association with a recognized First Amendment institution, but bloggers or online writers unassociated with the institutional print press probably would not.⁷⁷

Schauer's analysis promises a rewarding payoff: defining an institutional press would allow the courts to give the Press Clause specific meaning that would vindicate First Amendment values, for instance, "checking government abuse" or "providing a forum for democratic deliberation."⁷⁸ Press Clause protections would attach only to deserving institutions actually advancing such values.⁷⁹ Because the Press Clause would no longer broadly apply to "the lone pamphleteer, the blogger, and the full-time reporter for the *New York Times*" alike (an approach which has meant in practice that the Press Clause offered no specific protections to anyone),⁸⁰ it could now be given distinct meaning.

However, Schauer's approach leaves behind a number of unresolved problems. Ironically, although Schauer offers the institutional approach as a way to bring legal analysis more in line with how the real world works,⁸¹ his analysis sidesteps some basic real world questions: do the institutions that he champions *actually* perform valuable functions that merit specific protection? If so, which ones, and why? Schauer provides a framework that could help answer these questions: "We first locate some value that the First Amendment treats, or should treat, as particularly important. Then we investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution whose identity and boundaries are at least moderately identifiable."⁸²

But Schauer does not apply his test to any specific institutions or activities and he does not discuss any specific examples of worthy (or

⁷⁷ See Schauer, *supra* note 44, at 1278 ("[C]ontemporary bloggers and others are perhaps right to be worried that such lines would be drawn to their disadvantage."). Or, if they did receive protections as a First Amendment institution, online writers not associated with an established print publication would likely receive a lower level of protection than print journalists. See Horwitz, *supra* note 44, at 60–61.

⁷⁸ Schauer, *supra* note 44, at 1275.

⁷⁹ See *id.*

⁸⁰ *Id.* at 1272.

⁸¹ See *id.* at 1259–60 (urging courts to resist "institutional blindness" that ignores the central role institutions play in advanced modern societies).

⁸² *Id.* at 1275 (footnote omitted).

unworthy) journalism.⁸³ In Part IV, this Article adapts Schauer's test to help determine which specific journalists (as opposed to existing institutions) are currently vindicating First Amendment values through their work. These individuals—regardless of their existing institutional affiliation or lack thereof—deserve the protections and prestige associated with press membership.⁸⁴

In addition, the institutional approach Schauer suggests will almost certainly be both over-inclusive and under-inclusive. If journalists are defined as members of the press simply by virtue of working for a recognized institutional press outlet, some (perhaps many) of these journalists will receive protections and status even though their actual work is not deserving.⁸⁵ On the other hand, there will be some (perhaps many) deserving journalists who are not recognized as members of the press merely because they are not affiliated with a recognized First Amendment institution. Indeed, Schauer acknowledges these problems, though he believes they are outweighed by the benefits associated with the institutional

⁸³ This is not a criticism, merely an observation—Schauer notes that his work was intended to be preliminary: “I have not here attempted to say very much about what an institutional approach to the First Amendment would look like, and perhaps this Article should be understood as an argument for why the seeming arguments against an institutional approach should be deemed inadequate.” *Id.* at 1279 (emphasis omitted); see also Frederick Schauer, *Institutions As Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1764 (2007).

⁸⁴ It is possible to define my model as a modified institutional approach. Rather than defining press membership based on affiliations journalists have with existing institutions (e.g., all reporters for the *New York Times* receive protection), my approach could be seen as creating a press corps that could qualify as a new First Amendment institution. I am more interested in the question of which individuals qualify for press membership and believe, for the reasons discussed in this Article, that an institutional approach defining press membership based on a journalist's affiliation with an existing institution will not solve the balance trap problem I discuss. In fact, an institutional approach that defines press membership based on affiliation with existing institutions (e.g., newspapers, magazines) will reward many journalists who follow the balance trap model. However, this Article is not meant to be a wholesale rejection of the institutional model, and I do not believe my approach is irreconcilable with that model—it may simply be a modification of it.

⁸⁵ See *infra* Part IV (discussing reporting for well-recognized news outlets that does not advance First Amendment values and providing examples of balance trap reporting); see also Blocher, *supra* note 34, at 429 (“[E]xtending First Amendment protection to particular forms of communication traditionally employed by the institutional press could exacerbate problems of over- and under-breadth. The characteristic media associated with the press—newspapers and magazines, among others—often convey information that is not in any real sense a matter of public discourse.” (footnote omitted)).

approach.⁸⁶ Moreover, Schauer suggests that a certain looseness is inevitable.⁸⁷ But it is possible to be more precise than Schauer suggests without giving up the benefits of a meaningful Press Clause that corresponds to the real world we live in. By focusing on individuals rather than existing institutions, we can address the problems of over- and under-inclusiveness.⁸⁸

Like Schauer, Paul Horwitz endorses an institutional approach to the First Amendment, including the Press Clause,⁸⁹ and identifies a number of benefits to be gained from the institutional approach: (1) it can bring legal doctrine more in line with “the complex real world”;⁹⁰

⁸⁶ See Schauer, *supra* note 44, at 1274 (“[A] recast First Amendment could more consciously treat these institutions in rulelike fashion, with the institutions serving as under- and overinclusive, but not spurious markers of deeper background First Amendment values. Like a speed limit sign that moves the inquiry from dangerous driving to whether the driver was or was not driving in excess of the posted speed, a First Amendment doctrine that embodied the same approach to institutions would analogize certain institutions to rules. An institutional First Amendment would thus move the inquiry away from direct application of the underlying values of the First Amendment to the conduct at issue and towards the mediating determination of whether the conduct at issue was or was not the conduct of one of these institutions.” (emphasis added)); see also Schauer, *supra* note 83, at 1764 (“To grant special protection to the institutional press under the Press Clause of the First Amendment, for example, is not to deny that there will be unfortunate applications of that protection that a more particularized or contextual approach might avoid. No plausible definition of the institutional press is going to exclude from that category—and the protections it might putatively deliver—the *National Enquirer*, for example, and its more down-market equivalents. And a putative positive constitutional right of journalistic access emanating from such protection is as likely to be availed of by Geraldo Rivera as by Bob Woodward or Linda Greenhouse. Nevertheless, it may still be the case that granting protection to all who fit the definition of the institution will, despite the overinclusiveness of the category, be more effective in serving some value than will be applying the value directly to individual cases.”).

⁸⁷ See Schauer, *supra* note 44, at 1278–79.

⁸⁸ A defender of the institutional approach might argue that this is precisely why an institutional approach is needed: case-by-case analysis designed to test which individuals qualify for press status is simply impracticable and courts are hesitant to do such work. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring). My suspicion is that much of this concern has to do with the assumption that judges would have to perform this laborious, case-by-case analysis. This Article offers an alternative: journalists themselves would often perform the initial task of identifying bona fide members of the press. See *infra* Part III.C.4. This would spare judges the difficult, even “painful,” task of subjective, case-by-case analysis. See West, *supra* note 37, at 1029.

⁸⁹ Horwitz, *supra* note 44, at 55 (arguing “in favor of an institutional vision of the Press Clause” (emphasis omitted)); see also Horwitz, *supra* note 7, at 482–85; PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (forthcoming Nov. 2012).

⁹⁰ Horwitz, *supra* note 44, at 55. “[The institutional approach] offers a way of thinking about the First Amendment that actually responds to the differentiation that is apparent in the real world between different kinds of speech institutions—the different contexts in which speech occurs, the internalized norms of conduct that constrain the speakers in each

(2) it gives deserving institutions the power of self-governance, allowing those institutions “that play a substantial role in contributing to the world of public discourse that the First Amendment aims to promote and preserve” to shape their own internal “norms and practices”;⁹¹ (3) “it may avoid being either overprotective or underprotective of any given institution”;⁹² (4) it gives courts a way to avoid the uncomfortable and difficult task of determining which categories of journalists qualify for specific protection;⁹³ and (5) it ensures that the Press Clause receives distinct meaning that provides “press speakers [with] different rights than individual speakers.”⁹⁴

Each of the goals Horwitz identifies is desirable, but each can be achieved without taking an institutional approach to the Press Clause. The problem, as with Schauer’s approach, is that Horwitz’s institutional approach relies on generalizations and abstractions. For instance, in considering whether and how to deal with blogs as a First Amendment institution, Horwitz asserts that “[t]he established news media typically operate subject to a set of ethical and professional norms” while blogs, and bloggers, do not.⁹⁵ But do these norms in fact produce work that vindicates First Amendment values? Not all norms are beneficial—for instance, the balance trap is itself a norm, but it is not one that produces work worthy of specific press-related protection. It is necessary to consider specific work in order to reach conclusions about its value.⁹⁶ If the goal is to develop an approach based on “actual functions and practices . . . that merit recognition [under the] First Amendment,”⁹⁷ then it is essential to examine those actual functions and practices in some detail. Like Schauer, Horwitz does not address specific examples of journalism that do and do not deserve protection. Moreover, Horwitz’s generalization that print journalists work one way and bloggers another is certain to be both over- and under-inclusive.⁹⁸ Some individual print journalists who do

institution, and the social values served by the kinds of speech that are central to different kinds of institutions. It is far more attuned to the actual speech- and press-oriented social practices the First Amendment serves to promote.” *Id.* at 57 (footnote omitted).

⁹¹ *Id.* at 56–57.

⁹² *Id.* at 57.

⁹³ *Id.*

⁹⁴ *See id.* at 55.

⁹⁵ *Id.* at 59.

⁹⁶ *See infra* Part IV (discussing specific examples of journalism—both good and bad).

⁹⁷ *See* Horwitz, *supra* note 44, at 56 (internal quotation marks omitted).

⁹⁸ Horwitz argues that the institutional approach “may avoid being either overprotective or underprotective of any given *institution*.” *Id.* at 57 (emphasis added). My point is that it

not merit press status will receive it, while some online journalists who do deserve protection will not.⁹⁹

Horwitz identifies two additional and important benefits that can flow from an institutional approach: (1) judicial deference to self-governance by the press, and (2) assigning specific and distinct meaning to the Press Clause so that it is not a legal nullity crowded out by the Speech Clause.¹⁰⁰ With regard to the first goal, if self-governance by the press is desirable,¹⁰¹ there is a way to move further in this direction.¹⁰² On the second point, the institutional model is neither the only nor the best way to give specific meaning to the Press Clause, and in light of other problems with the institutional approach (at least as it currently stands), the approach discussed in Part III.C.4 is a preferable alternative.

Although Horwitz urges courts to “defer to . . . institution[al] capacity for self-governance” in his model,¹⁰³ it is still the courts that

will, unavoidably, be both over and underprotective of *individual* journalists. This is something the institutional approach is likely to accept as an inevitable problem that is outweighed by the benefits of the institutional approach. *See supra* Part III.A.

⁹⁹ Horwitz suggests that as “norms develop[] in and around the blogosphere,” blogs may “develop[] . . . an institutional framework that may collectively do much of the verification, correction, and trust-establishing work that established news media institutions do individually.” Horwitz, *supra* note 44, at 60. If this occurs, Horwitz suggests, then blogs, collectively, might qualify as a First Amendment institution, although blogs would not necessarily be treated with the same respect as traditional print journalism. *Id.* at 61 (“[I]t would be clear that the Press Clause protects more than one institution, and that the content of the rights pertaining to each must *vary according to the nature and practices of each institution.*” (emphasis added)); *cf.* Blocher, *supra* note 34, at 429 (“[A] focus on traditional media would fail to capture many modern means of maintaining the public sphere. In the recent democratic revolutions across the Middle East, for example, social media such as Twitter—‘traditional’ only in the loosest sense of the term—effectively functioned as the press.”).

¹⁰⁰ Horwitz, *supra* note 44, at 55–56.

¹⁰¹ I agree that it is. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1085 (2008) (asserting that “courts defer to other institutions when they believe that those institutions know more than the courts do about some set of issues, such that it makes sense to allow the views of the knowledgeable authority to substitute for the courts’ own judgment” (emphasis omitted)); *see also* Schauer, *supra* note 7, at 918–19 (suggesting that private actors, as opposed to First Amendment regulation, have the potential to address the problem of “increasingly widespread public acceptance of consequential (and thus dangerous) factual falsity”).

¹⁰² *See infra* Part III.C.4 (Implementing the New Definition of the Press).

¹⁰³ Horwitz, *supra* note 44, at 56 (“Under this approach, *the Court would identify those institutions that merit recognition as First Amendment institutions.* Those institutions would then be granted significant presumptive autonomy to act, and the courts would defer substantially to actions taken by those institutions within their respective spheres of autonomy.” (emphasis added) (footnote omitted)).

identify which existing institutions are deserving of what level of deference and protection. This Article suggests a different, less court-centered approach.¹⁰⁴ Journalists would play a central role in defining the press corps. In order for this to work effectively, journalistic norms would have to change.¹⁰⁵ Courts and legislators would defer to journalistic self-policing when possible¹⁰⁶ and ensure that individuals identified as bona fide members of the press receive specific constitutional and statutory protections extended to the press as such. In addition to giving the press itself more room for self-governance, this approach would reduce the concern judges may have about determining which individual journalists are and are not worthy of protection.¹⁰⁷

Finally, the institutional approach is not the only way to give the Press Clause unique meaning. An alternative approach¹⁰⁸ is based in part on what Horwitz describes as a “functional approach” to defining “the press.”¹⁰⁹ In contrast with an institutional approach, a functional approach would provide “some form of heightened protection . . . for *individuals or institutions* when they engage in activities that meet some definition of the practice of journalism.”¹¹⁰ This is a promising alternative, as it would hold all would-be members of the press to the same standard—print journalists associated with a recognized First Amendment institution would not get a free pass and online journalists not associated with any institution would not automatically be downgraded.

Horwitz ultimately rejects the functional approach, in large part because he concludes it does not “accurately describe the unique features and promises of . . . separate institution[s],” (e.g., blogs and the traditional press).¹¹¹ Horwitz also worries that the functional approach raises a definitional problem: “What is journalism, exactly? And which aspects of journalism—editorial judgment, newsgathering,

¹⁰⁴ It would be possible simply to make this press-centered approach part of the institutional model, but, for the reasons given here, other problems with the institutional approach suggest the need for an alternative framework.

¹⁰⁵ See *infra* Part III.C.4.

¹⁰⁶ In some cases, journalists appearing before courts will not have been evaluated or identified by their peers as bona fide members of the press (or not). In these cases, courts would perform the initial task of determining whether journalists merit press status.

¹⁰⁷ Horwitz, *supra* note 101, at 1063–64; West, *supra* note 37, at 1029.

¹⁰⁸ Discussed *infra* Part III.C.4.

¹⁰⁹ Horwitz, *supra* note 44, at 51–52.

¹¹⁰ *Id.* at 51 (emphasis added).

¹¹¹ *Id.* at 54.

or something else—deserve special protection?”¹¹² These are valid concerns.¹¹³ Ultimately, however, a functional approach to defining the press is a preferable alternative to the existing institutional approach, although the functional approach needs to be refined and modified in order to fully achieve its potential.¹¹⁴

B. West’s Functional Model

Sonja West sees more promise in a functional approach¹¹⁵ than Horwitz does, though she shares some concerns identified by the institutional model. West agrees with Horwitz and Schauer that it is a problem for the courts to have rendered the Press Clause a “constitutional redundancy,” giving it no separate meaning from the Speech Clause.¹¹⁶ She charges that it “is problematic on several levels” to fail to give the Press Clause independent meaning.¹¹⁷ First, it makes no sense as a matter of textual analysis—everything in the Constitution must mean something, but refusing to give the Press Clause distinct meaning renders it “mere surplusage.”¹¹⁸ In addition, failing to specifically define the Press Clause means failing to protect “reporters who, as members of the press, endeavor to inform the public and to check the government.”¹¹⁹

West observes, like Schauer and Horwitz, that one way to explain why the courts have declined to give the Press Clause distinct meaning is that it is not an easy task to define “the press.”¹²⁰ She agrees that it is important not to have a definition of the press that is overinclusive—if everyone who disseminates information is defined as “the press,” then the Press Clause becomes meaningless.¹²¹ Instead

¹¹² *Id.* at 53 (emphasis omitted).

¹¹³ Though Horwitz himself does not see the definitional concerns as “carry[ing] too much weight.” *Id.* at 54 (emphasis omitted). His main objection to the functional approach is that it does not take into account institutional differences. *Id.*

¹¹⁴ Discussed *infra* Part III.C.4.

¹¹⁵ West distinguishes her approach from functional approaches others have offered. West, *supra* note 37, at 1054–56.

¹¹⁶ *Id.* at 1027–28.

¹¹⁷ *Id.* at 1028.

¹¹⁸ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

¹¹⁹ *Id.* at 1028–29.

¹²⁰ *Id.* at 1029, 1047–48.

¹²¹ *Id.* at 1056–57.

of the institutional approach,¹²² however, West offers a functional approach¹²³ as a way to give the Press Clause meaning, defining members of the press as “[individual] journalists [who] are repeat players who gather and disseminate news in a planned and consistent manner.”¹²⁴ West asserts that, as repeat players, these journalists can be held accountable by the public, as well as by “professional or industry norms.”¹²⁵ This is designed to be a narrow definition of the press. Neither the public at large nor “the occasional public commentator” will qualify for constitutional or statutory press protections.¹²⁶ However, unlike the institutional approach, West’s framework leaves open the possibility that an individual “not associated with an established media outlet . . . may gain recognition as a member of the press over time if she publishes regularly and builds a consistent audience.”¹²⁷

West answers Horwitz’s definitional concerns about the functional model by identifying “unique functions of the press.”¹²⁸ She describes two unique press functions as (1) “gather[ing] and convey[ing] information to the public about newsworthy matters,” and (2) “serv[ing] as a check on the government by conveying information to the voters about ‘what [their] Government is up to.’”¹²⁹ However, she cautions that her definitional efforts are not intended to be the last word, noting that she “make[s] no pretense of settling the definitional question”¹³⁰ and “[r]easonable minds can debate how to define [the press].”¹³¹

West’s definition of the press, though admittedly preliminary, offers some significant potential benefits and a starting point for further exploration, although there are also some problems that need to be addressed. One strength of her approach is that she seems to

¹²² West suggests that the institutional approach may be underinclusive. *Id.* at 1063–64. It can also be *over*inclusive, as discussed in *infra* Part IV.

¹²³ *Id.* at 1068–69 (“[T]he most promising avenue is to focus on the unique functions of the press qua press . . . by examining those functions that a free press fulfills in our democracy that are different from the values served by our speech freedoms, we can close in on a meaningful definition.”).

¹²⁴ *Id.* at 1061.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1067.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1068–70.

¹²⁹ *Id.* at 1069–70 (fourth alteration in original) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989)).

¹³⁰ *Id.* at 1068.

¹³¹ *Id.* at 1061.

address problems associated with the institutional model. West’s approach moves toward a definition of the press that promises to reject abstraction and begin with the specific work journalists do. West also promises to avoid the over- and under-inclusiveness associated with the institutional model.¹³² On closer examination, however, West’s functional model does not yet fulfill its potential to resolve these problems.

While West aims to make her definition of the press “narrower, and thus more meaningful,”¹³³ her definition remains overly broad. Under West’s model, one could qualify as a member of the press by “gather[ing] and convey[ing] information to the public about newsworthy matters”¹³⁴ or by conveying information to the voters about “what [their] Government is up to,”¹³⁵ especially when such information is provided by “journalists [who] are repeat players who gather and disseminate news in a planned and consistent manner.”¹³⁶ This is the kind of work that has the potential to vindicate First Amendment values, but only if the definition is made more precise. West’s model is over-inclusive—there are many ways to regularly provide information to the public about newsworthy matters or what government is doing, but not all are worthy of protection. For instance, under West’s definition, a mouthpiece or propagandist for the government could qualify as a member of the press as long as he or she regularly reports on newsworthy matters.¹³⁷

The problem is that West’s model provides no way to make judgments as to what specific kind of reporting advances First Amendment values. As long as journalism can fit into a broad general category—for instance, by providing information about “newsworthy matters” or what government is doing—it will qualify for protection under West’s model, especially when such journalism is delivered by

¹³² *Id.* at 1061.

¹³³ *Id.*

¹³⁴ *Id.* at 1069.

¹³⁵ *Id.* at 1069–70 (alteration in original) (quoting *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 780 (1989)).

¹³⁶ *Id.* at 1061.

¹³⁷ This is undoubtedly not what West had in mind as journalism worthy of protection. *See id.* at 1058 (“It makes practical sense to give certain rights and privileges only to those [members of the press] who have demonstrated that they are more likely to use these protections responsibly and for the public good rather than to give similar rights to anyone with a computer.”). However, her definition of the press unintentionally leaves room for unworthy applicants.

repeat players. This approach would allow Press Clause protection for a daily television news program or newspaper column that simply reports, without comment, the government's version of newsworthy events.¹³⁸ West would counter that, so long as such reports appear regularly, journalists can be held accountable by the public or by professional norms for disseminating misinformation.¹³⁹ However, if the public is not given enough information to allow it to distinguish truth from fiction, and if professional norms value the balance trap approach as a legitimate, or even a preferred form of journalism, then these checks will fail -- as they have under our current system.

One solution is to make the functional definition more precise and to ground it in specific examples of work that journalists do.¹⁴⁰ Some leading questions can help focus the inquiry: are *all* "newsworthy" stories equally valuable to the public, even if they are reported in a way that gives the public false or misleading information about significant events? How can we separate valuable press coverage of newsworthy events from work that *looks* like serious reporting but, in fact, is not? Is it enough for would-be members of the press to report on what government is doing, even when that means simply serving as a conduit for the government to describe its actions to the public through its own chosen narrative?

Finally, West's model, like the institutional model, is too court- or legislature-centered. In her analysis, it will be judges and legislators who flesh out the definition of the press.¹⁴¹ I aim to give journalists

¹³⁸ For example, government-produced video news releases ("VNR"s) have, in the past, been distributed to local television stations and "broadcast . . . without any acknowledgement of the government's role in their production." David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged TV News*, N.Y. TIMES (Mar. 13, 2005), http://www.nytimes.com/2005/03/13/politics/13covert.html?_r=0. Under West's framework, a journalist presenting such "news" to the public could qualify for Press Clause protection and status. For more examples of VNRs, see Glenn Greenwald, *Rep. Smith on His Controversial Bills*, SALON (May 22, 2012, 10:05 AM), http://www.salon.com/2012/05/22/rep_smith_on_his_controversial_bills/singleton/; Michael Hastings & Rebecca Elliott, *Senate to Consider "Propaganda" Amendment This Week*, BUZZFEED (May 21, 2012, 8:55 PM), <http://www.buzzfeed.com/hastingselliott/senate-to-consider-propaganda-amendment-this-wee-69ow>; and *State Propaganda: How Government Agencies Produce Hundreds of Pre-Packaged TV Segments the Media Runs as News*, DEMOCRACY NOW! (Mar. 14, 2005), http://www.democracynow.org/2005/3/14/state_propaganda_how_government_agencies_produce.

¹³⁹ West, *supra* note 37, at 1061.

¹⁴⁰ See discussion *infra* Parts III.C.4, IV.

¹⁴¹ West, *supra* note 37, at 1069 ("Through a proper analysis of the unique functions of the press qua press, *the Court* can identify characteristics that avoid the disconcerting conformity and favoritism of the elite while still allowing us to recognize and benefit from the press's knowledge, skills, and dedication." (emphasis added)); *id.* at 1058 ("It therefore

themselves the opportunity to define an improved press corps,¹⁴² subject to limited court review.

C. A New Way to Define the Press

Although the existing institutional and functional models for defining the press have flaws, they also provide some useful starting points for developing an alternative definition. Each model has the laudable goal of giving distinct meaning to the Press Clause. The institutional model promises to bring legal doctrine more in line with “the complex real world”¹⁴³ and to give press the power of self-governance.¹⁴⁴ West’s functional model aims at a definition of the press that is sufficiently narrow to give the Press Clause real meaning and is based on unique functions the press performs. However, each model has trouble fulfilling these highly desirable goals. The institutional model relies on abstractions and generalizations and produces a definition of the press that is both over- and under-inclusive. West’s model promises a narrow definition of the press but remains overly broad.

Most importantly, each of the existing models for defining the press fails to consider the actual work journalists do.¹⁴⁵ The

appears that *if judges must choose* between granting these rights to everyone or no one, they will choose no one.” (emphasis added)); *id.* at 1061 (“[T]he *Court* is capable of crafting a usable, albeit imperfect, definition [of the press]” (emphasis added)); *see also id.* at 1062–68 (discussing ways in which legislatures have defined the press).

¹⁴² Since many journalists currently embrace the balance trap as a norm, building a better press corps will depend on changes to journalistic norms. I provide some suggestions as to how these changes can be accomplished in Part III.C.4.

¹⁴³ Horwitz, *supra* note 44, at 55; *see also id.* at 57 (“[The institutional approach] offers a way of thinking about the First Amendment that actually responds to the differentiation that is apparent in the real world between different kinds of speech institutions—the different contexts in which speech occurs, the internalized norms of conduct that constrain the speakers in each institution, and the social values served by the kinds of speech that are central to different kinds of institutions. It is far more attuned to the actual speech- and press-oriented social practices the First Amendment serves to promote.” (footnote omitted)).

¹⁴⁴ *Id.* at 56–57.

¹⁴⁵ Defining “the press” and praising its worthy activities without considering specific examples of the work journalists are actually doing is reminiscent of writing a biography of an artist without giving specific examples of his or her work. *See* John Adams, *The Indomitable Will of Gustav Mahler*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/02/books/review/gustav-mahler-by-jens-malte-fischer-book-review.html?page-wanted=all> (“A serious book about Mahler that assumes its reader will not want musical examples cannot do justice to its subject. Would one write a biography of Shakespeare and not include lines from the plays?”).

institutional model generally assumes that existing institutions, such as newspapers and magazines, are doing work worthy of protection. West's functional model defines worthwhile press functions so broadly that balance trap journalism would qualify for protection. What is needed is a definition of the press that is based on the valuable work journalists actually do, or should do. My definition of the press aims to protect only those journalists whose work advances First Amendment values.¹⁴⁶ Successfully articulating and applying this definition depends on (1) identifying specific First Amendment values that competent journalism can advance, and (2) identifying specific examples of journalism that does, and does not, advance these values.

1. Rejecting the Balance Trap Approach

As Schauer, Horwitz, West, and others have observed, there are important, even essential, reasons to give independent meaning to the Press Clause. Most centrally, by doing so, we can give status to members of the press who vindicate First Amendment values—for instance, journalists whose work informs “competent democratic citizens.”¹⁴⁷ This work would give Americans the information they need to separate truth from fiction and to recognize when a public figure is saying something which is simply not true. The problem, however, is that many of the journalists whom we might reflexively think of as candidates for press corps membership—for example, reporters for respected national newspapers—do not actually do such work. In covering public debate, journalists often fall into the “balance trap.”¹⁴⁸

¹⁴⁶ Eugene Volokh has argued, citing evidence from the Framing-era as well as “the years surrounding the ratification of the Fourteenth Amendment,” that Press Clause protections are available to “‘every citizen,’ even people who aren’t members of the publishing industry.” Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 468, 498 (2012). My conclusion is not incompatible with his: the question to ask, when determining whether someone is eligible for Press Clause protections, is not whether they are a member of the publishing industry but, rather, whether their work advances First Amendment values of truth and democratic competence. Every citizen (or person) is therefore potentially eligible for Press Clause protections: whether they actually qualify depends on whether they do work that is worthy of membership in the press corps.

¹⁴⁷ See POST, *supra* note 8, at 88 (observing that Justice Felix “Frankfurter argue[d] that democracy can succeed only if persons are educated to become competent democratic citizens”).

¹⁴⁸ Specific examples of balance trap journalism are discussed *infra* in Part IV.

The balance trap model is enticing because it seems to satisfy journalistic aspirations to objectivity and neutrality.¹⁴⁹ But there are not always two sides to every story and there are not always two roughly equivalent ways to understand reality. When reporters follow the balance trap model, they create a false equivalency that incorrectly suggests to readers that each side of the “debate” has a fair point to make and choosing between the two positions is simply a subjective decision. Politicians can skillfully exploit the balance trap model by taking positions that are factually incorrect, resting assured that reporters will dutifully pass their incorrect statements along to the public without comment. My definition of the press is designed to address this problem, which none of the existing models fully addresses: how to provide press status only for journalists whose work advances First Amendment values of truth and democratic competence.

¹⁴⁹ See Jay Rosen, *So Whaddya Think: Should We Put Truth-telling Back Up There at Number One?*, PRESSTHINK (Jan. 12, 2012, 2:05 PM), <http://pressthink.org/2012/01/so-whaddaya-think-should-we-put-truth-telling-back-up-there-at-number-one/> (“Something happened in our press over the last 40 years or so that never got acknowledged and to this day would be denied by a majority of newsroom professionals. *Somewhere along the way, truth-telling was surpassed by other priorities the mainstream press felt a stronger duty to.* These include such things as ‘maintaining objectivity,’ ‘not imposing a judgment,’ ‘refusing to take sides’ and sticking to what I have called the View from Nowhere. . . . [T]he drift of professional practice over time was to bracket or suspend sharp questions of truth and falsehood in order to avoid charges of bias, or excessive editorializing. Journalists felt better, safer, on firmer professional ground—more like pros—when they stopped short of reporting substantially untrue statements as false. One way to describe it (and I believe this is the correct way) is that truth-telling moved down the list of newsroom priorities. Other things now ranked ahead of it.”); see also Jay Rosen, *The Twisted Psychology of Bloggers vs. Journalists*, PRESSTHINK (Mar. 12, 2011, 10:13 PM), <http://pressthink.org/2011/03/the-psychology-of-bloggers-vs-journalists-my-talk-at-south-by-southwest/> (“Voice is something you learn to take out of your work if you want to succeed in the modern newsroom. You are supposed to sacrifice and learn to report the story without attitude or bias creeping in.”). The balance trap model is so powerful that the *New York Times* public editor wondered whether the *Times* should be a “truth vigilante”—in other words, should “news reporters” have “the freedom to call out what [they] think[] is a lie,” to “challenge [incorrect statements of] ‘facts’ that are asserted by newsmakers they write about.” Arthur S. Brisbane, *Should the Times be a Truth Vigilante?*, N.Y. TIMES (Jan. 12, 2012, 10:29 AM), <http://publiceditor.blogs.nytimes.com/2012/01/12/should-the-times-be-a-truth-vigilante/>. But see Greenwald, *supra* note 50 (describing Brisbane’s question as “basically the equivalent of pondering in a medical journal whether doctors should treat diseases, or asking in a law review article whether lawyers should defend the legal interests of their clients . . . reporting facts that conflict with public claims . . . is one of the defining functions of journalism, at least in theory”).

2. *Press Membership Depends on Advancing First Amendment Values: Post's Principle of Democratic Competence and the Press Clause*

Although he does not explain how his framework should be applied, Frederick Schauer provides a way to move toward a more useful definition of the press: “We first locate some value that the First Amendment treats, or should treat, as particularly important. Then we investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution [or individual] whose identity and boundaries are at least moderately identifiable.”¹⁵⁰ I will adapt Schauer’s test in developing a new definition of the press. Those individuals who advance such a value would be defined as bona fide members of the press. The first step is to identify First Amendment values that the press can vindicate. Then, I will consider how we can determine which would-be members of the press actually advance these values in their work.

In his recently published book, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Robert Post argued that “the function of First Amendment doctrine is to protect First Amendment values.”¹⁵¹ Post identified two First Amendment values that are especially relevant to public opinion and self-government. First, there is democratic legitimation, which is vindicated when people “who are permitted the opportunity to make public opinion responsive to their own subjective, personal views . . . come to regard themselves as the potential authors of the laws that bind them.”¹⁵² The second value is democratic competence, which provides “the cognitive empowerment of persons within public discourse, [and] in part depends on their access to disciplinary knowledge.”¹⁵³ Post observes that these values appear to be in tension. While democratic legitimation “precludes content discrimination”¹⁵⁴ because everyone must have an equal

¹⁵⁰ Schauer, *supra* note 44, at 1275 (footnote omitted). Schauer presents this as a way to define institutions worthy of Press Clause protection. For the reasons given in *supra* Part III.A, I conclude that it is better to ask which *individuals* deserve such protection, and I have modified Schauer’s test accordingly.

¹⁵¹ See POST, *supra* note 8, at 77.

¹⁵² *Id.* at 27–28.

¹⁵³ *Id.* at 34. As noted *supra* note 8, by “public discourse,” Post means “the forms of communication constitutionally deemed necessary for formation of public opinion.” *Id.* at 15.

¹⁵⁴ *Id.* at 25.

opportunity to shape public opinion,¹⁵⁵ democratic competence requires content discrimination that separates truth from fiction.¹⁵⁶ Democratic legitimation demands that “[f]ools and savants alike are equally entitled to address the public,”¹⁵⁷ but democratic competence demands that self-government proceeds from “factual truth.”¹⁵⁸

Post suggests that truth itself is a First Amendment value, noting that “there is no constitutional value in false statements of fact”¹⁵⁹ and acknowledging that “courts . . . permit the state to regulate the publication of false facts, even within public discourse.”¹⁶⁰ However, he concludes that “within public discourse the value of democratic legitimation enjoys lexical priority” over truth and democratic competence.¹⁶¹ In other words, false statements made in public discourse are generally protected speech—content discrimination is subordinated to the interest of allowing everyone to make his or her case in an effort to shape public opinion. Consequently, even though “an educated and informed public opinion will more intelligently and effectively supervise the government,”¹⁶² courts are reluctant to permit regulation of factual misstatements unless there is proof of “some guilty state of mind, like negligence or the deliberate intent to mislead.”¹⁶³

Because the state is generally prohibited from setting standards for accuracy in public discourse that would allow the public to rely on factual statements, “[w]ithin public discourse, the message of the First Amendment is *caveat emptor*.”¹⁶⁴ As a result, “[m]embers of the general public can rely on expert pronouncements within public discourse only at their peril.”¹⁶⁵ This includes journalism. The First Amendment bars government from suppressing factually incorrect speech, and the state would have no grounds for “regulating the *New*

¹⁵⁵ *See id.* at 22.

¹⁵⁶ *Id.* at 25.

¹⁵⁷ *Id.* at 28.

¹⁵⁸ *Id.* at 29.

¹⁵⁹ *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

¹⁶⁰ *Id.* (footnote omitted).

¹⁶¹ *Id.* at 34.

¹⁶² *Id.* at 35.

¹⁶³ *Id.* at 30. And even when such proof exists, courts may still be reluctant to permit suppression of factual misstatements. *See United States v. Alvarez*, No. 11-210 (U.S. June 28, 2012).

¹⁶⁴ POST, *supra* note 8, at 31.

¹⁶⁵ *Id.* at 44.

York Times if the newspaper were inclined to editorialize that the moon is made of green cheese.”¹⁶⁶

Post’s analysis concludes that First Amendment doctrine simply does not leave room for the state to enforce exacting standards for truth in public discourse. Accordingly, for Post, the only way to protect the creation of expert knowledge and verifiable truth produced by that knowledge is outside public discourse—in the university classroom, for example, where the professor-student relationship “constitute[s] a professional relationship, analogous to the relationship between a lawyer and her clients.”¹⁶⁷ Because students can reasonably rely on the accuracy of information conveyed to them by their professors, their professors can “properly . . . be[] held accountable for the professional competence of [their] lectures.”¹⁶⁸ This contrasts with newspaper readers who rely on the accuracy of information in the *New York Times* at their own risk.

While Post rightly observes that the First Amendment would prevent suppression of factually incorrect claims in newspapers or other news outlets, he does not consider¹⁶⁹ the possibility of vindicating First Amendment values of truth and democratic competence in another way, one that does not require suppressing speech. It is, in fact, possible to advance the First Amendment value of truth in public discourse without suppressing any speech.

The solution to the problem Post suggests—how to advance truth and democratic competence in public discourse without suppressing speech—can be found by turning to the First Amendment’s Press Clause.¹⁷⁰ Post rightly points out that access to accurate facts is necessary for informed public opinion, but too quickly concludes that there is nothing to be done about plainly false statements published in

¹⁶⁶ *Id.* at 67.

¹⁶⁷ *Id.* at 69.

¹⁶⁸ *Id.*

¹⁶⁹ Perhaps because this was simply beyond the scope of his book.

¹⁷⁰ Post speaks generally of “the First Amendment” when he refers to protections for journalism: “[T]he First Amendment would prohibit government from regulating the *New York Times* if the newspaper were inclined to editorialize that the moon is made of green cheese.” POST, *supra* note 8, at 67. To be more precise, the Speech Clause would prohibit such regulation. See West, *supra* note 37, at 1031–32 (“All speakers, whether deemed members of the press or not, retain their strong rights of expression, which include a right not to be subjected to government regulation based on the content of their speech.”). I argue that the Press Clause should not protect such editorializing—journalists who disseminate factually incorrect statements may be protected under the Speech Clause, but such work should not qualify for Press Clause protection.

newspapers.¹⁷¹ That may be correct if one considers government suppression of false statements to be the only way to ensure public access to accurate news stories. The Press Clause, however, points the way to other options.

By using the Press Clause rather than the Speech Clause to address the problem of journalists disseminating false information, we can find a solution that does not depend on suppressing speech. Only journalists who reject the balance trap and provide the public with accurate information are worthy of press status because only these journalists are advancing First Amendment values of truth and democratic competence. Journalists who disseminate false information without comment advance no First Amendment value.¹⁷² Therefore, under the test I have adapted from Schauer, their work is simply not worthy of Press Clause protection and prestige.¹⁷³

3. A New Definition of the Press to Recognize Journalism that Advances First Amendment Values of Truth and Democratic Competence

I have identified values “that the First Amendment treats . . . as particularly important” and that members of the press can advance: truth and democratic competence,¹⁷⁴ which do the work of providing the public with accurate information about matters of public interest. Continuing to adapt Schauer’s test, the next task is to “investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution [or

¹⁷¹ POST, *supra* note 8, at 44 (“Biologists can with impunity write editorials in the *New York Times* that are such poor science that they would constitute grounds for denying tenure within a university. Members of the general public can rely on expert pronouncements within public discourse only at their peril. Such pronouncements are ultimately subject to political rather than legal accountability.” (footnote omitted)); *see also id.* at 67 (“[T]he First Amendment would prohibit government from regulating the *New York Times* if the newspaper were inclined to editorialize that the moon is made of green cheese.”).

¹⁷² *Id.* at 29 (“[T]here is no constitutional value in false statements of fact.” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974))).

¹⁷³ *See* Schauer, *supra* note 44, at 1275; *see also* West, *supra* note 37, at 1068 (stating that the definition of press should be based on “those functions that a free press fulfills in our democracy that are different from the values served by our speech freedoms”). The prestige associated with membership in the press corps includes access to powerful government officials, the right to attend presidential press conferences, and the right to ask the president questions. For more discussion of the role of the press corps, see Part III.C.4.a.

¹⁷⁴ *See* Schauer, *supra* note 44, at 1275.

individual] whose identity and boundaries are at least moderately identifiable.”¹⁷⁵ In other words, which individual journalists (if any) do work that actually contributes to democratic competence by helping to build “educated and informed public opinion”?¹⁷⁶ Although Post’s discussion does not consider this specific problem, much of what he has to say about vindicating the value of democratic competence can be applied to the problem of identifying journalists whose work merits Press Clause protection.

Post identifies “important lessons [to be drawn] from commercial speech doctrine.”¹⁷⁷ Although he does not make this connection himself, some of these lessons can be applied by analogy to the problem of journalists who disseminate false information to the public without comment.¹⁷⁸ Post asserts that the fact that courts permit government suppression of misleading commercial speech “demonstrates that entrenched First Amendment standards do indeed protect the flow of information so as to enhance the quality of public decision-making.”¹⁷⁹ The state is justified in “engag[ing] in content discrimination to regulate and suppress the circulation of ‘misleading’” commercial speech because “the constitutional value of commercial speech lies in the information that it carries.”¹⁸⁰ Although Post would caution against directly applying these principles to journalism because journalism, unlike commercial speech, is “speech within public discourse,”¹⁸¹ his observations are highly applicable to the balance trap problem.

Since journalism, like commercial speech, has constitutional value because of the information it carries, only reporting that provides accurate information to the public deserves recognition as bona fide press activity. Giving press status to journalists whose work conveys reliable, rather than misleading, information to the public serves the value of democratic competence. This approach aims to improve “the flow of accurate information to the public and so actually advance the constitutional purpose of public education.”¹⁸²

¹⁷⁵ *See id.*

¹⁷⁶ *See* POST, *supra* note 8, at 35.

¹⁷⁷ *Id.* at 42.

¹⁷⁸ *See* Vladeck, *supra* note 36, at 533 (“[D]emocratic competence’ could well provide the missing theoretical justification for reinvigorating the First Amendment’s Press Clause.” (footnote omitted)).

¹⁷⁹ POST, *supra* note 8, at 42.

¹⁸⁰ *Id.* at 41.

¹⁸¹ *See id.* at 41–42.

¹⁸² *See id.* at 42.

Post might respond that journalism must first further the value of democratic legitimation, which depends on “the equal right of every speaker to participate in the formation of public opinion.”¹⁸³ However, since we are not talking about *suppressing* any speech, there is no problem in requiring that journalism receiving Press Clause protections and prestige advances democratic competence. Under my approach, journalists would not be prohibited from disseminating false information to the public—they would be free to do this, they simply would not receive Press Clause protection for such work. The Speech Clause is not implicated as no speech is suppressed.¹⁸⁴

There is an additional reason why concerns about regulating the dissemination of misleading information do not apply to the problem of separating competent journalism from journalism not worthy of Press Clause protections—journalists are not acting as citizens exercising their “equal right . . . to participate in the formation of public opinion.”¹⁸⁵ Journalists can be compared to other professionals Post discusses—university professors or lawyers, for example. As clients and students are “entitled to rely on the truth and accuracy of a professional’s judgment,”¹⁸⁶ the public is entitled, or ought to be entitled, to rely on the truth and accuracy of reporting.¹⁸⁷ Members of the public should be able to reasonably assume that reporting they read, see, or hear presents accurate information—in fact, there is no other sufficient reason to extend Press Clause protections to journalism.

¹⁸³ *Id.* at 41.

¹⁸⁴ See West, *supra* note 37, at 1028 (stating that the Speech Clause protects “freedoms to publish and to disseminate speech”).

¹⁸⁵ POST, *supra* note 8, at 41.

¹⁸⁶ *Id.* at 47 (emphasis omitted); see also *id.* at 69 (“[A university professor’s] relationship to the students in his classroom constitute[s] a professional relationship, analogous to the relationship between a lawyer and her clients.”)

¹⁸⁷ *But cf. id.* at 23 (“Within public discourse . . . the First Amendment ascribes autonomy equally to speakers and to their audience, so that the rule of caveat emptor applies. A member of the general public who foolishly removes his silver fillings upon reading a dentist’s book is held responsible for his own bad decision.”); *id.* at 44 (“Members of the general public can rely on expert pronouncements within public discourse only at their peril.”). But Post’s analysis proceeds under the Speech Clause, not the Press Clause: there may be good reason to afford speech protections to journalists who disseminate false information to the public, and I do not argue otherwise. However, that is a separate question from the question of whether to extend Press Clause protections and status to such journalists.

If members of the press merit Press Clause protections and prestige because they advance First Amendment values of truth and democratic competence, then their work should be judged accordingly. Post asserts that “the right question to ask about a teacher [who seeks protection under the principle of academic freedom] is whether he is competent.”¹⁸⁸ I would ask a similar question in the context of defining the Press Clause: the right question to ask about a journalist seeking protection under the Press Clause is whether he or she provides the public with accurate information that advances First Amendment values. Like teachers or lawyers, journalists ought to be “held accountable for the[ir] professional competence”¹⁸⁹ and for the same reasons—because their relationship with their readers, listeners, or viewers justifies public faith in the information journalists disseminate.

I can now set forth a specific definition of the press. Journalists can qualify¹⁹⁰ for press status if: (1) they regularly disseminate factually accurate information to the public about newsworthy matters, including “facts that conflict with public claims”;¹⁹¹ while (2) rejecting the balance trap, stenographic style, or other approaches that incorrectly provide the public with a sense of false equivalence on matters where there is a clear distinction between what is true and what is false.¹⁹²

Journalists who do this kind of work vindicate First Amendment values of truth and democratic competence. This definition is fairly abstract and is best understood by considering specific examples of journalism that would and would not qualify for Press Clause protections and prestige.¹⁹³ But first, it is important to explain the

¹⁸⁸ *Id.* at 67 (quoting Robert M. Hutchins, *The Meaning and Significance of Academic Freedom*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1955, at 73).

¹⁸⁹ *Id.* at 69.

¹⁹⁰ As noted, there may be additional ways journalists can qualify for press status. My definition focuses on separating balance trap journalism from journalism worthy of press status, but there may be other work journalism does that has nothing to do with the presence or absence of the balance trap and merits Press Clause protections and status for other reasons.

¹⁹¹ See Greenwald, *supra* note 50 (“[R]eporting facts that conflict with public claims . . . is one of the defining functions of journalism, at least in theory.”).

¹⁹² Note that this definition builds on the one offered by Sonja West—that press status should be available to journalists who “gather[] and convey[] information to the public about newsworthy matters.” West, *supra* note 37, at 1069. My definition is different than West’s in that it expressly rejects balance trap style journalism that would qualify for press status under West’s definition.

¹⁹³ *Infra* Part IV (providing these specific examples).

specifics of implementing this new definition of the press—how this definition can be used to create a journalistic norm that advances First Amendment values.

*4. Implementing the New Definition of the Press: Journalists Take the Lead in Building a Better Press Corps*¹⁹⁴

Having concluded that only journalists whose work advances First Amendment values of truth and democratic competence deserve press status, the next question is: how do we implement this new definition of the press? How, in practice, will bona fide members of the press be separated from journalists not deserving of Press Clause protections? Other scholars look primarily to the courts to implement their proposed definitions of “the press” and give the Press Clause meaning.¹⁹⁵ In my model, the courts play an important, but supporting role in giving meaning to the Press Clause. Journalists themselves will take the lead in building a new definition of the press.¹⁹⁶ This will vindicate the goal of self-governance identified by Paul Horwitz¹⁹⁷ and will obviate, in at least some cases, the need for

¹⁹⁴ Economics professor Brad DeLong frequently asks, “Why oh why can’t we have a better press corps?” See, e.g., *One-Hundred-Thirty-Seven Pinocchios for Glenn Kessler of the Washington Post as He Tells Untruths About Mitt Romney*, BRAD DELONG (July 13, 2012, 7:03 AM), <http://delong.typepad.com/sdj/2012/07/one-hundred-thirty-seven-pinocchios-for-glenn-kessler-of-the-washington-post-as-he-tells-untruths-about-mitt-romney.html>. This Article in general, and especially this section, attempts to answer his question.

¹⁹⁵ See West, *supra* note 37, at 1048–49 (“[I]n order for the Press Clause to have the independent weight it merits, the courts must give the term ‘press’ a meaningfully narrow definition.” (emphasis added)); *id.* at 1069–70 (discussing ways in which courts can apply West’s proposed definition of the press); see also Horwitz, *supra* note 44, at 56–62 (discussing ways in which courts can use institutional approach to First Amendment as a basis for defining the Press Clause—though Horwitz would have courts defer to some decisions made by First Amendment institutions).

¹⁹⁶ It could be argued that Paul Horwitz takes a similar approach when he urges courts to defer to those First Amendment institutions that merit Press Clause protections. Horwitz, *supra* note 44, at 56–62. However, Horwitz’s approach still assigns the courts a more central role than I would, as he concludes that it is up to the courts to differentiate between those who are and are not worthy of Press Clause protections. *Id.* at 61–62. In my approach, journalists themselves initially and explicitly identify bona fide members of the press and the courts play only a supporting role in determining whether or not to defer to these determinations.

¹⁹⁷ *Id.* at 56–57.

courts to make initial case-by-case determinations as to who qualifies for press corps status.¹⁹⁸

a. The Role of Journalists

Ideally, I would suggest an approach that allows an initial group of journalists who have demonstrated their understanding and rejection of the balance trap model to identify other bona fide members of the press on a case-by-case basis. In practice, it is difficult to see how this could be done, given that there were close to 60,000 reporters, correspondents, and broadcast news analysts working in the United States as of 2010.¹⁹⁹ Recognizing that the extremely labor-intensive project of evaluating the body of work of tens of thousands of journalists is simply not feasible, I would propose this alternative: journalists who recognize the balance trap problem could use awards, prestige, peer praise, and criticism to develop a new journalistic norm²⁰⁰ that favors accurate coverage over the balance trap or stenographic models.²⁰¹

David Anderson observes that journalism “is largely a self-rewarding and self-perpetuating profession.”²⁰² Most journalists do not earn a great deal of money;²⁰³ as a consequence, “journalism is staffed largely by people who have rejected economic reward as their

¹⁹⁸ Cf. West, *supra* note 37, at 1029 (“To many jurists and scholars, the thought of identifying who constitutes the press reeks of government favoritism toward a privileged few and discrimination against other, less favored speakers.”).

¹⁹⁹ Bureau of Labor Statistics, *Occupational Outlook Handbook: Summary of Reporters, Correspondents, and Broadcast News Analysis*, U.S. DEP’T LAB. (Mar. 29, 2012), <http://www.bls.gov/ooh/Media-and-Communication/Reporters-correspondents-and-broadcast-news-analysts.htm>. It is not clear whether the BLS number—58,500—includes journalists who publish their work only online, so this number could well be higher. See *Occupational Outlook Handbook: Work Environment of Reporters, Correspondents, and Broadcast News Analysis*, U.S. DEP’T LAB. (Mar. 29, 2012), <http://www.bls.gov/ooh/Media-and-Communication/Reporters-correspondents-and-broadcast-news-analysts.htm#tab-3> [hereinafter Bureau of Labor Statistics].

²⁰⁰ In some cases, it would also be important to have legislators defer to the decisions made by journalists that I discuss here since “[t]he press pass, the press gallery, the press room, the press office . . . the press bus or plane, and the press pool are usually created by some form of law—statute, regulation, rule, or policy.” See Anderson, *supra* note 37, at 430.

²⁰¹ Of course, some journalists already reject the balance trap and stenographic models, but, as discussed *infra* Part IV, these models are powerful norms for many journalists today, and they need to be challenged and discredited if journalists are to vindicate First Amendment values of truth and democratic competence.

²⁰² Anderson, *supra* note 37, at 475.

²⁰³ *Id.*; see also Bureau of Labor Statistics, *supra* note 199 (listing median pay for journalists as \$36,000 per year as of 2010).

principal motivation. The rewards they seek come from their peers and their superiors, not the audience or the market.”²⁰⁴ Anderson’s observations suggest that peer responses can have a powerful effect in changing journalistic norms: journalists ought to praise work that advances First Amendment values and criticize work that follows balance trap or stenographic norms. Some critics already do this—for instance, Rem Rieder, Jay Rosen, Marty Kaplan, James Fallows, and Glenn Greenwald.²⁰⁵ More should follow their lead, and those who recognize the problems of the balance trap ought to coordinate their efforts and develop a strategic plan to improve journalistic norms. They might, for instance, create awards²⁰⁶ for journalists whose work advances First Amendment values as well as anti-awards or “awards of shame” designed to expose journalists who follow the balance trap model.²⁰⁷

There are, of course, a number of existing prestigious honors that journalists already seek—Pulitzer Prizes, Emmy Awards, Nieman Fellowships, Society of Professional Journalists Awards, and White House Correspondents’ Association Awards.²⁰⁸ The criteria for making these awards could be specifically crafted to reward journalists whose work advances First Amendment values and to rule out journalists whose work follows balance trap or stenographic norms.

²⁰⁴ Anderson, *supra* note 37, at 475.

²⁰⁵ See, e.g., James Fallows, *False Equivalence Watch: NYT Ed Page Dept.*, THE ATLANTIC (June 2, 2012, 1:53 PM), <http://www.theatlantic.com/politics/archive/2012/06/false-equivalence-watch-nyt-ed-page-dept/258003/>; Greenwald, *supra* note 50; Marty Kaplan on *Big Money’s Effect on Big Media*, BILLMOYERS.COM (Apr. 27, 2012), <http://billmoyers.com/segment/marty-kaplan-on-big-moneys-effect-on-big-media/>; Rieder, *supra* note 3; Rieder, *supra* note 2; Jay Rosen, *NPR Tries to Get its Pressthink Right*, PRESSTHINK (Feb. 26, 2012, 5:15 PM), <http://pressthink.org/2012/02/npr-tries-to-get-its-pressthink-right/>. The organization Fairness and Accuracy in Reporting (FAIR), which describes itself as a “national media watchdog group,” *What’s FAIR*, FAIR, <http://www.fair.org/index.php?page=100> (last visited Nov. 15, 2012), also criticizes the balance trap problem, see Peter Hart, *WaPo and Keystone False Balance*, FAIR (Jan. 3, 2012), <http://www.fair.org/blog/2012/01/03/wapo-and-keystone-false-balance/>.

²⁰⁶ At least one of these critics, Marty Kaplan, is already associated with an organization that gives awards to journalists. Kaplan is director of the Norman Lear Center at USC’s Annenberg School for Communication and Journalism. *Call for Entries: 2012 Walter Cronkite Awards*, WALTER CRONKITE AWARD, <http://www.cronkiteaward.org/the-2013-awards.html> (last visited Oct. 26, 2012). This could be a starting point, although these awards seem to be limited to television journalists.

²⁰⁷ See Anderson, *supra* note 37, at 476 (“[J]ust as surely as it recognizes its heroes, journalism punishes those who violate its norms.”).

²⁰⁸ See *id.* at 475.

Journalists also derive status from special access to the powerful—for example, through membership in the White House and congressional press corps. The Standing Committee of Correspondents issues congressional press passes, which are also required for journalists who seek White House accreditation.²⁰⁹ These press credentials are awarded to “full-time, paid correspondent[s] who require[] on-site access to congressional members and staff . . . [and are] employed by a news organization.”²¹⁰ Under the existing guidelines, a journalist whose work faithfully follows balance trap norms would still be perfectly able to receive access to cover Congress and the White House as long as he or she met the Committee’s other requirements.

These guidelines ought to be changed: only journalists whose work advances First Amendment values should qualify for this special access and status. This would not require any government action or interference: the Standing Committee of Correspondents is composed of journalists selected by members of the congressional press corps.²¹¹ I would propose a similar method for selecting journalists who participate in “press pool” coverage of Presidents and presidential candidates,²¹² for providing presidential debate credentials to journalists and for choosing moderators for presidential and other political debates.²¹³ Finally, it could be worthwhile to

²⁰⁹ *Rules Governing the Press Gallery*, U.S. SENATE, <http://www.senate.gov/galleries/daily/rules2.htm> (last visited Oct. 26, 2012); see also Joshua E. Keating, *Can the White House Revoke a Reporter's Credentials?*, FOREIGN POL’Y (June 7, 2010), http://www.foreignpolicy.com/articles/2010/06/07/can_the_white_house_revoke_a_reporter_s_credentials.

²¹⁰ *Rules Governing the Press Gallery*, *supra* note 209.

²¹¹ *Standing Committee of Correspondents*, U.S. SENATE, <http://www.senate.gov/galleries/daily/standing2.htm> (last visited Oct. 26, 2012). Of course, a kind of “chicken and egg” problem presents itself: if one needs a committee to select bona fide members of the press corps, but that committee must be selected by the press corps itself, which comes first? I would suggest that journalists with objectively recognizable bona fides on the question of balance trap coverage—people like Rieder, Kaplan, Greenwald, Fallows and Rosen—select an initial Committee to accredit members of the congressional press corps. Once an initial press corps has been established, that press corps could elect future members of the Committee.

²¹² See, e.g., Michael Calderone, *News Orgs Balk at Romney Campaign Deciding Press Pool Membership*, HUFFINGTON POST (May 2, 2012, 9:18 PM), http://www.huffingtonpost.com/2012/05/02/romney-campaign-media-press-pool_n_1472610.html; David Taintor, *White House Correspondents' Association Takes No Action Against Daily Caller for Reporter's Outburst*, TPM (July 10, 2012, 3:30 PM), <http://tpmdc.talkingpointsmemo.com/2012/07/whca-daily-caller-munro.php>.

²¹³ The Commission on Presidential Debates provides debate credentials to journalists and chooses moderators for presidential debates. There is no indication that the

consider creating a title assigned to bona fide members of the press. Using a title would confer status and would also allow the public to readily identify bona fide members of the press.

Since, as Anderson notes, “[t]angible rewards in journalism come principally through advancement within the profession,”²¹⁴ it is possible that these proposed actions and changes could help discredit the balance trap norm by rewarding journalists whose work advances First Amendment values, or by incentivizing news outlets to improve their standards.²¹⁵ In fact, there is at least circumstantial evidence that peer criticism can have an effect. In a September 2011 post on his PressThink blog, Jay Rosen criticized NPR’s “he said, she said” approach to reporting for creating a false sense of balance.²¹⁶ NPR ultimately created a new ethics handbook that, in Rosen’s view, seemed to “speak directly to [his past criticisms] . . . [of] NPR.”²¹⁷ The new handbook included these declarations: “Our goal is not to please those whom we report on or to produce stories that create the appearance of balance, but to seek the truth,” and stated further:

[O]ur primary consideration when presenting the news is that we are fair to the truth. If our sources try to mislead us or put a false spin on the information they give us, we tell our audience. If the balance of evidence in a matter of controversy weighs heavily on one side, we acknowledge it in our reports.²¹⁸

Commission rules out balance-trap journalists in providing credentials or choosing moderators for debates. See *2012 Presidential Debate Credential Request Form*, TAMPA BAY TIMES, <http://www.tampabay.com/debate2012/> (last visited Nov. 16, 2012) (requesting information that is believed to be similar to what is requested on COMMISSION ON PRESIDENTIAL DEBATES, <https://2012presidentialdebates.iworldreg.com> (last visited Nov. 21, 2012); see also Rose Guastella, *Who Chooses the Moderator at the Presidential Debates?*, EHOW.COM, http://www.ehow.com/facts_6901884_chooses-moderator-presidential-debates_.html (last visited Oct. 27, 2012) (“Qualified moderators are chosen by a panel. CPD executive director Janet H. Brown explains. According to Brown, viewers prefer moderators with live television experience, as well as being knowledgeable about current issues.”).

²¹⁴ Anderson, *supra* note 37, at 475.

²¹⁵ If these ideas do not produce change, then other approaches should be tried. I do not consider this to be an exhaustive accounting of all the ways in which journalists themselves might help create a better press corps. My suggestions are intended to provide a starting point for further discussion. It would be essential to solicit additional ideas from journalists like Rieder, Rosen, Kaplan, Fallows, and Greenwald. As I suggest, these journalists and others like them who recognize and understand the balance trap problem ought to coordinate their efforts and discuss possible solutions to the problem.

²¹⁶ Rosen, *supra* note 4 (defining and explaining “he said, she said” journalism).

²¹⁷ Rosen, *supra* note 205.

²¹⁸ *NPR Ethics Handbook*, NPR, <http://ethics.npr.org/> (last visited Oct. 27, 2012).

It is important to note two caveats: (1) it is not clear that Rosen's criticisms of NPR directly or solely led to these changes;²¹⁹ and (2) the fact that NPR created a new ethics handbook claiming, in Rosen's words, to reject "the worst excesses of 'he said, she said' journalism"²²⁰ does not necessarily mean that NPR's journalists are faithful to the new handbook's vision. One would have to confirm that work done by specific journalists at NPR now rejects the balance trap approach in order to conclude that the changes have had an actual effect.

b. The Role of the Judiciary

Judges and courts would also play an important role by applying my proposed definition of "the press." When possible, judges should defer to initial determinations made by journalists themselves. For instance, if awards and press credentials are assigned only to those journalists whose work advances First Amendment values and not to journalists whose work depends on the balance trap or stenographic approach, then judges should endorse the results of these processes.²²¹ In those circumstances, the judicial role should be limited to confirming whether the decision was based on an appropriate definition of the press—in other words, that the awards or press credentials were given to journalists because of a conclusion by their peers that their work advances First Amendment values of truth and democratic competence and rejects the balance trap and stenographic norms. When journalists who have not been recognized as bona fide members of the press by their peers (because they have

²¹⁹ NPR may have been responding to other or additional criticism—although, either way, this would support the hypothesis that peer criticism has the ability to change journalistic norms. See Mallery Jean Tenore, *NPR Introduces New Ethics Handbook, Appoints Standards and Practices Editor*, POYNTER (Feb. 24, 2012, 12:39 PM), <http://www.poynter.org/latest-news/top-stories/164223/npr-introduces-new-ethics-handbook-appoints-standards-and-practices-editor/> ("NPR began working on the 72-page handbook shortly after Ellen Weiss, vice president of news, fired news analyst Juan Williams for remarks he made about Muslims on 'The O'Reilly Factor.' The October 2010 dismissal led NPR's Board of Directors to conduct a formal review of what happened. A couple [of] months after the incident, which generated widespread criticism, Weiss resigned. 'Obviously, we were informed by what happened,' Margaret Low Smith, NPR's vice president of news, said by phone. 'I think the question that emerged was: You have these guiding principles, now how do you enforce them and what do you do when things go awry? Putting a process in place makes for better decision-making.'").

²²⁰ Rosen, *supra* note 205.

²²¹ If journalists continue to follow norms that undermine First Amendment values—e.g., balance trap style reporting—then courts should not defer to judgments that such work is worthy of press status.

not received awards or accreditation) appear before the courts, courts should apply my proposed definition of the press in the first instance. Journalists whose work advances First Amendment values of truth and democratic competence would receive Press Clause protections. Journalists whose work reflects balance trap or stenographic approaches would not.²²²

Press membership provides specific benefits, tangible and intangible, legal and otherwise—that is to say, benefits not dependent on constitutional or statutory protections. The most important benefits may not depend on specific legal protections. Journalists who receive the approval of their peers, as evidenced by awards and accreditation, will enjoy the prestige associated with their status as well as access to important news-making events²²³ and the prospect of career advancement. However, for some journalists, an important benefit of press status will be the attendant legal protections that courts can enforce.²²⁴ Journalists whose press membership is confirmed by courts would be in a position to receive specific legal protections and benefits, including: (1) protection from prosecution if they refuse to testify about confidential sources, (2) protection from prosecution for methods necessary to conduct undercover reporting, and (3) access to government information.²²⁵ Journalists who continue to follow the balance trap or stenographic approach will be denied prestige, status, legal protections, and the respect of their peers.

²²² Some might question whether judges are capable of identifying bona fide members of the press by applying this test. As Scott Moss has noted in a different context, “[c]ontrary to the premise that judges cannot handle cases in fields in which they lack expertise, judges always adjudicate cases in fields alien to them, including ‘accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry.’” Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1666–67 (2007).

²²³ Journalists with congressional or White House press passes gain prestige and access, as do journalists who are accredited to cover presidential debates or are selected to moderate political debates.

²²⁴ As noted, legislators will also play a role.

²²⁵ See West, *supra* note 37, at 1043–46 (listing “rights and protections” associated with a “dynamic Press Clause”).

IV

HOW CAN WE KNOW WHICH JOURNALISTS QUALIFY AS BONA FIDE MEMBERS OF THE PRESS? SPECIFIC CASE STUDIES.

We now have a definition of the press that we can use to determine which individual journalists deserve the protections and prestige associated with membership in the press corps: we will ask whether they do work that advances democratic competence by helping to build an “educated and informed public opinion.”²²⁶ This is an approach that embraces “the idea that reporters should be in the business of testing claims for accuracy and finding out the truth, rather than allowing politicians to make outrageous statements as long as they are ‘balanced’ by quotes from their political opponents.”²²⁷ The next step is to apply this model to specific work journalists are doing in order to provide specific examples of the kind of work that vindicates First Amendment values and the kind that does not.

A. How the Balance Trap Norm Makes It Poor Form to Call Out a Dictator for Lying

Paul Horwitz has suggested that “the established news media” are worthy of press protections because they “typically operate subject to a set of ethical and professional norms.”²²⁸ The unanswered question, however, is whether these norms produce journalism that is worthy of Press Clause protections and status. The balance trap is a norm respected by many journalists, but those who operate subject to this norm do not merit press status. Journalists who strictly adhere to the ideal of balance are incapable of providing accurate information to the public, as their approach prevents them from calling out lies—even the lies of a dictator on his way out of power.

On February 9, 2011, as Egyptian dictator Hosni Mubarak clung to power in the face of growing protest, Anderson Cooper told CNN viewers that he would devote “the entire hour to debunking the lies the Egyptian regime continues to try to spread about what is really happening there.”²²⁹ Point by point, Cooper proceeded to expose the

²²⁶ See POST, *supra* note 8, at 35.

²²⁷ Ryan Lizza, *Why Didn't Reporters Call Romney a Liar?*, THE NEW YORKER (Nov. 22, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/11/why-didnt-reporters-call-romney-a-liar.html>.

²²⁸ Horwitz, *supra* note 44, at 59.

²²⁹ Anderson Cooper 360 Degrees, *Transcript of Protests Grow in Egypt*, CNN (Feb. 9, 2011), <http://transcripts.cnn.com/TRANSCRIPTS/1102/09/acd.01.html>.

government’s deceptions. Although the Mubarak regime blamed protesters for creating crisis, Cooper observed that it was the government, not protesters, that had “shut[] the banks, shut[] the trains, tr[ie]d to shut the Internet.”²³⁰ While Egypt’s foreign minister claimed a state of emergency could not be lifted because of the protesters, Cooper reminded viewers that Mubarak had kept a state of emergency in place since he came to power thirty years earlier, long before the protests began.²³¹ The Egyptian government claimed eleven people had died, but reports from Human Rights Watch based on “canvassing hospitals” put the death toll at closer to 300.²³²

Mubarak blamed protesters for provoking confrontation by “throw[ing] fire on oil,” and other government officials said foreigners were behind the protests, or claimed that protesters were being paid to wage phony resistance against the regime.²³³ Cooper noted that the government was responding to the protests with violence and that the protesters were Egyptians who were genuinely angry at living under authoritarian rule and wanted Mubarak to surrender power.²³⁴ Cooper, who covered the revolution from Egypt, described having witnessed “peaceful protesters attacked by uniformed police and then by mobs” and concluded that “having seen the truth, it is our obligation, I believe, to continue to bear witness to it. For the people in this square, every day now is life and death.”²³⁵

The next day, February 10, 2011, Cooper again told CNN viewers that Mubarak was lying by claiming that foreign interference was behind the protests.²³⁶ Cooper called this a last-ditch effort by Mubarak to appeal to Egyptian nationalism, redirecting public anger toward other countries and away from his government.²³⁷ Cooper described these as the “lies of a regime [that] is trying to stay in power.”²³⁸ He emphasized again that, while Mubarak blamed the

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Colby Hall, *Anderson Cooper Slams Mubarak Speech: “Same Lies We’ve Heard for Two Weeks,”* MEDIAITE (Feb. 11, 2011, 9:32 AM), <http://www.mediaite.com/tv/anderson-cooper-slams-mubarak-speech-same-lies-weve-heard-for-two-weeks/> (including video and partial transcript of Cooper remarks).

²³⁷ *Id.*

²³⁸ *Id.*

protesters for creating a crisis, it was the government that had “shut[] down the banks, shut[] down the internet service, shut[] down the trains.”²³⁹ Cooper noted that for thirty years Mubarak had offered a false choice to Egyptians: either his rule would continue or there would be chaos.²⁴⁰ In that context, government actions to shut down basic services were clearly an effort to create a sense of crisis that would lead Egyptians to accept Mubarak’s rule as the only alternative to anarchy.²⁴¹

Although Cooper had identified and explained demonstrably false statements made by Mubarak and his regime, while also providing context to CNN viewers to help them understand the strategy behind these deceptions, journalists criticized Cooper for what they saw as his subjective reporting. James Rainey chided Cooper for “channeling comic (and now U.S. Sen[ator]) Al Franken’s 2003 book, ‘Lies and the Lying Liars Who Tell Them.’”²⁴² For Rainey, the problem was not that Cooper was wrong to identify Mubarak and his subordinates as liars—it was that Cooper “heaped the pejorative on Egypt’s leaders 14 times in a single [show].”²⁴³ Rainey’s objections were more stylistic than substantive—he conceded that “it’s hard to find fault with what Cooper had to say, though it did begin to sound a little one-note after about the sixth or seventh ‘liar, liar.’”²⁴⁴

The thrust of Rainey’s criticism was that Cooper was wrong to stray from what Rainey defined as “mainstream American news” norms.²⁴⁵ By using such direct language to call out the Mubarak regime’s lies, Cooper risked sounding more like an “opinion-mak[er]” than a reporter.²⁴⁶ Rainey speculated that this might be part of a conscious decision Cooper had made “in recent months” to move away from “traditional he-said/she-said reporting” and “adopt the more commentary-heavy approach of [CNN’s] higher-rated

²³⁹ *Anderson Cooper on Mubarak Speech* (CNN television broadcast Feb. 10, 2011), available at <http://www.mediaite.com/tv/anderson-cooper-slams-mubarak-speech-same-lies-weve-heard-for-two-weeks/>.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² James Rainey, *Egypt: CNN’s Anderson Cooper on Lies and the Lying Liars Who Tell Them*, L.A. TIMES (Feb. 12, 2011, 8:11 AM), http://latimesblogs.latimes.com/the_big_picture/2011/02/cnns-anderson-cooper-lying-liars-and-the-lying-egyptians-who-tell-them.html.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

competitors, Fox and MSNBC.”²⁴⁷ Oddly, and perhaps as his own nod to the balance trap style, Rainey ended his piece by quoting a journalism professor, Marc Cooper, who rejected Rainey’s criticisms. Professor Cooper said he had “no problem with [Anderson Cooper’s] point-of-view reporting because it was fully substantiated and accurate . . . I applaud its honesty, even if motivated by commercial concerns.”²⁴⁸ Professor Cooper’s only concern was that Anderson Cooper should also apply the same approach to American leaders, considering “[h]ow refreshing it would be to see that same piercing candor directed at American politicians when they overtly lie.”²⁴⁹

Like Rainey, other critics objected to Anderson Cooper’s coverage on stylistic grounds, while simultaneously agreeing that Cooper was correct to describe the Mubarak regime’s statements as lies.²⁵⁰ But strikingly, none of Cooper’s critics questioned the accuracy of his commentary in any way—each agreed that Mubarak was, in fact, lying.²⁵¹

These criticisms show how the current balance trap and stenography models operate as journalistic norms that disrupt the flow of accurate information to the public. The critics’ attempt to mark Cooper’s coverage as out of bounds had to do with his departure from balance trap/stenography norms. In their view, by forthrightly describing lies as lies, Cooper was “taking sides” and departing from objectivity. By policing Cooper’s coverage in this way, these critics were reinforcing the balance trap and stenography norms—especially for journalists who are less well-established than Cooper. Rather than facing criticism from their peers, journalists might conclude that it would be safer to follow the “traditional he-said/she-said reporting” model Rainey alluded to,²⁵² or, alternatively, simply to stenographically report Mubarak’s claims without comment.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* Note that Marc Cooper is not related to Anderson Cooper.

²⁵⁰ *Fox News’ Liz Trotta Slams Anderson Cooper’s Egypt Coverage*, HUFFINGTON POST (Feb. 14, 2011), http://www.huffingtonpost.com/2011/02/14/fox-news-liz-trotta-anderson-cooper_n_822745.html; *Transcript of CNN Reliable Sources*, CNN (Feb. 13, 2011), <http://transcripts.cnn.com/TRANSCRIPTS/1102/13/rs.01.html>. *But see* Rieder, *supra* note 2.

²⁵¹ *See, e.g.,* Pitts, *supra* note 56 (noting that “[critics a]ll . . . concede Cooper was accurate: The regime did lie. Yet they question whether it was journalistically ethical [for Cooper] to say it”).

²⁵² Rainey, *supra* note 242.

Some commentators, to their credit, challenged these criticisms of Cooper's work. Rem Rieder praised Cooper for rejecting the balance trap approach.²⁵³ Rieder approvingly quoted Larry Platt, editor of the *Philadelphia Daily News*, who instructed his staff to do the following:

[R]eport the hell out of our city, in keeping with the highest standards of accuracy and fairness, but you should also not be afraid to have a point of view about what you report Our pages should never be home to "he said/she said" neutrality. Instead, you will be explicit adjudicators of factual disputes, and you'll be free to draw conclusions from your reporting.²⁵⁴

Rieder suggested that Cooper's work rightly followed Platt's model rather than the balance trap, and Rieder rejected critics who accused Cooper of "taking sides."²⁵⁵ For Rieder, Cooper was right to abandon a norm that required journalists to create "a false equivalency" by "treat[ing] everything equally."²⁵⁶ Rather than settling for an "on the one hand, on the other hand" approach, Cooper, to his credit, exposed "demonstrably false" statements and fairly "drew conclusions from his reporting."²⁵⁷ Ultimately, "[a]ll Cooper did was tell the truth."²⁵⁸ Rieder considered Cooper's work an encouraging sign, with a "potential payoff [that] is huge, for the news organization, the reader—and democracy."²⁵⁹

Glenn Greenwald charged that Cooper's critics "have this exactly backwards" when they accuse Cooper of "depart[ing] from good journalistic objectivity."²⁶⁰ Greenwald argued that "[i]dentifying lies told by powerful political leaders—and describing them as such—is what good journalists do, *by definition*."²⁶¹ In Greenwald's view, Cooper was being objective when he described "factually false statements as false . . . [T]he only 'side' [he was] taking [was] with facts, with the truth."²⁶² The real failure occurs when journalists "treat lies told by powerful political officials as though they're viable,

²⁵³ Rieder, *supra* note 2.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Glenn Greenwald, *Journalists Angry Over the Commission of Journalism*, SALON (Feb. 14, 2011, 3:15 AM), http://www.salon.com/2011/02/14/journalism_10/singleton/.

²⁶¹ *Id.*

²⁶² *Id.*

reasonable interpretations of subjective questions.”²⁶³ For Greenwald, the debate over Cooper’s coverage exposed an important failure of American journalism. The balance trap and stenography norms tell journalists it is “not [their] role” to “point[] out the lies of powerful political leaders.”²⁶⁴ Cooper’s coverage properly rejected this norm.²⁶⁵

Greenwald rightly observes that the debate over Cooper’s decision to describe Mubarak’s lies as lies exposes a division between journalism that is and is not worthy of protection.²⁶⁶ If we want journalists who provide Americans with the accurate information that will “[e]quip[] people to understand and evaluate concepts in public discourse,”²⁶⁷ then we must aim to establish Cooper’s approach as the norm while rejecting the existing norm, the false equivalence or balance trap model. Journalists who qualify as bona fide members of the press must demonstrate that they understand why this is an important distinction, why Cooper is right and his critics are wrong, and they must demonstrate their ability to apply this critical approach in all of their coverage—not just when it comes to the lies of foreign dictators. This goal can be advanced by adopting the definition of the press that I have suggested. Cooper’s work would be embraced as a model, while his critics’ work would not merit press status.

Unfortunately, journalists often limit this approach to coverage of foreign dictators and fail to expose deceptions by American leaders. Journalists often follow the “officials say”²⁶⁸ model in reporting on claims by the Obama administration, especially in the context of national security. For instance, the Obama administration decided to “count[] all military-age males in a [drone] strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent.”²⁶⁹ Although some former intelligence officials charged that this policy relies on “guilt by association” and produces “‘deceptive’ estimates of civilian casualties,”²⁷⁰ American news

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Blocher, *supra* note 34, at 435.

²⁶⁸ *See supra* Part II.

²⁶⁹ Jo Becker & Scott Shane, *Secret “Kill List” Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=3&_r=1.

²⁷⁰ *Id.*

outlets uncritically report Obama administration claims that strikes killed a specific number of “militants,” without explaining that the official definition of “militant” could include civilian noncombatants.²⁷¹ This work is not deserving of press status, although under the existing institutional and functional models, it would qualify.²⁷²

The controversy over Anderson Cooper’s decision to describe frankly the Mubarak regime’s lies as lies provides specific evidence of a problem in American journalism, and suggests a way to solve it. Cooper’s approach vindicates First Amendment values by providing the public with accurate information and provides a model that ought to be used in reporting on false statements made by foreign and American officials alike. Cooper’s critics demonstrate the persistence of journalistic norms standing in the way of journalism that vindicates First Amendment values. The existing models for defining the press offer no way to distinguish between these different approaches and would end up classifying all of them as worthy of Press Clause protection. In contrast, my proposed definition of the press would classify Cooper’s work as worthy of Press Clause protections, but not his critics’ work. Journalists who persist in enforcing the balance trap or stenography norms would not merit press membership.

The ultimate goal is to encourage journalism that provides the public with accurate information and to discourage, or at least refuse to privilege, journalism that stands in the way of vindicating First Amendment values of truth and democratic competence. The next section identifies additional specific examples to show why the

²⁷¹ Glenn Greenwald, *Deliberate Media Propaganda*, SALON (June 2, 2012, 2:36 AM), http://www.salon.com/2012/06/02/deliberate_media_propaganda/. Not all American news outlets follow this stenographic or “officials say” report; as noted, the *New York Times* explained the Obama administration’s definition of combatants. See Becker & Shane, *supra* note 269. In addition, while “the mainstream US media is consistently failing to report when civilians are credibly reported killed,” international media do so (i.e., journalists outside the United States report on civilian casualties caused by U.S. drone strikes). Greenwald, *supra* (emphasis omitted) (quoting Chris Woods, senior reporter with Bureau of Investigative Journalism).

²⁷² It is worth reminding that journalists who accurately explain the Obama administration’s definition of “militants” are not choosing sides or exhibiting anti-Obama bias. They are simply providing accurate information to the public that allows Americans to make sense of government claims about the results of drone strikes and who is killed by them. The public can then decide what to do based on this information—perhaps it will be outraged by the administration’s deception, perhaps it will conclude that the deception is justified.

balance trap norm is a persistent problem and why journalism of this type does not merit Press Clause protections or prestige.

B. Reporting on Reaction to a Lie Rather than the Lie Itself: A Mitt Romney Ad

In November 2011, Republican presidential candidate Mitt Romney ran his first television commercial, a spot that criticized President Obama’s stewardship of the economy.²⁷³ The ad began with footage of candidate Obama in 2008 promising to fix the broken economy. Text appearing on the screen, superimposed over the Obama footage, accused President Obama of failing to deliver on his promises and ultimately presiding over “the greatest jobs crisis since the Great Depression,” “record home foreclosures,” and “record national debt.”²⁷⁴ Then, a clip showed Obama saying “if we keep talking about the economy, we’re going to lose.”²⁷⁵

Someone watching the ad would reasonably conclude that President Obama made the quoted statement—that “if we keep talking about the economy, we’re going to lose”—after he took office. Obama’s statement played about twenty seconds into the ad, after the audience had seen footage of candidate Obama making campaign promises and graphics claiming he failed to deliver on them. The ad also created the clear impression, regardless of *when* he made this statement, that Obama was talking about himself—that the “we” who would lose by talking about the economy meant his administration.

In fact, candidate Obama made the quoted statement in 2008, and he was referring not to himself, but to his opponent at the time, Senator John McCain.²⁷⁶ The full Obama statement was “*Senator McCain’s* campaign actually said, and I quote, ‘if we keep talking about the economy, we’re going to lose.’”²⁷⁷ The Romney ad

²⁷³ Lizza, *supra* note 227 (including a clip of Romney ad).

²⁷⁴ Advertisement: Believe in America (Romney for President, Inc. 2011), available at <http://www.newyorker.com/online/blogs/newsdesk/2011/11/why-didnt-reporters-call-romney-a-liar.html>.

²⁷⁵ *Id.*

²⁷⁶ *Mitt Romney Ad Charges Obama Said, “If We Keep Talking About the Economy, We’re Going to Lose,”* POLITIFACT.COM (last visited Oct. 31, 2012), <http://www.politifact.com/truth-o-meter/statements/2011/nov/22/mitt-romney/mitt-romney-says-obama-said-if-we-keep-talking-abo/>.

²⁷⁷ Barack Obama, *Transcripts of Remarks in Londonderry, New Hampshire*, AM. PRESIDENCY PROJECT (Oct. 15, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=84555#ixzz1eOfc71EN> (emphasis added).

provided none of this context and gave no indication that Obama was quoting someone else.

The Romney ad was obviously misleading. It created the false impression that President Obama, having run on promises to fix the broken U.S. economy, conceded, after failing to keep his promise, that he would lose his re-election campaign unless he could distract attention from the economy. While some journalists correctly described the Romney ad as misleading, others took a “he said/she said” approach to reporting on the ad.

Michael Shear of the *New York Times* wrote an article on November 22, 2011, with the headline *Democrats Cry Foul Over New Romney Ad*.²⁷⁸ The headline itself suggested that there was a debatable controversy here—that Democrats, not surprisingly, were unhappy with the ad, but it was not objectively deceptive. The body of Shear’s article underlined this point, reporting in its lead paragraph that “*Democrats reacted ferociously on Tuesday to Mitt Romney’s first campaign commercial, which they said distorted comments by Barack Obama to make it look as if he was running away from his record on the economy.*”²⁷⁹ Although Shear acknowledged that the Romney ad had “[l]eft out . . . the context for Mr. Obama’s comment,” Shear avoided passing judgment on the ad’s ultimate legitimacy, instead focusing on what he described as a “back and forth” between Democratic and Republican officials, with Democrats describing Romney as “deceitful” and “dishonest” and Republicans calling the Democrats’ response “hysterical” and accusing the Obama campaign of “routinely lying about Mr. Obama’s record.”²⁸⁰

Shear summarized his conclusions without commenting on the ad’s accuracy: the ad had “generat[ed] controversy” and indicated that “Mr. Romney’s campaign [was] looking beyond the primary toward a fight against Mr. Obama.”²⁸¹ He concluded his article by quoting the subject line of an email the Romney campaign sent to reporters: “Game On.”²⁸² The implication was that the presidential race was beginning in earnest, both sides would be hurling accusations back

²⁷⁸ Michael D. Shear, *Democrats Cry Foul Over Romney Ad*, N.Y. TIMES (Nov. 22, 2011), http://www.nytimes.com/2011/11/23/us/politics/romney-ad-slams-obama-on-economy.html?_r=1.

²⁷⁹ *Id.* (emphasis added).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

and forth, and this was simply an example of the political hardball that characterizes presidential election campaigns.

Shear was not the only journalist to focus more on reaction to the ad than the deceptiveness of the ad itself. Online coverage by POLITICO chose this headline: *Jujitsu: Using Obama’s Words Against Him*.²⁸³ Though it noted that the clip did not include the context showing Obama was in fact quoting McCain, POLITICO’s post described the misleading Obama statement as “[t]he buzziest part of the ad.”²⁸⁴ In the same vein as the *New York Times* article, the POLITICO piece described a back and forth between an Obama spokesperson who called the ad “deceitful and dishonest” and a Romney spokesperson who warned that “President Obama will have to confront the promises made by candidate Obama.”²⁸⁵ POLITICO concluded that “[t]he Romney campaign is delighted to fight with Democrats over whether the ad should have included the McCain context.”²⁸⁶

A number of other journalists followed the balance trap approach taken by the *New York Times* and POLITICO, reporting about the ad as a subject of back and forth controversy in a way that obscured the ad’s deceptiveness.²⁸⁷ A CNN online post headlined *Democrats Say*

²⁸³ James Hohmann, *How Romney Will Bracket Obama in New Hampshire*, post in *Morning Score*, POLITICO FORUM (Nov. 22, 2011, 7:08 AM), <http://dyn.politico.com/members/forums/thread.cfm?catid=21&subcatid=69&threadid=6182418>; see also Alexander Burns, *White House: Mitt Romney Ad Shows ‘Blatant Dishonesty,’* POLITICO (Nov. 22, 2011, 1:07 PM), <http://www.politico.com/news/stories/1111/68938.html>; Catalina Camia, *Democrats Say Romney TV Ad Is Misleading*, USA TODAY (Nov. 22, 2011, 10:24 AM), <http://content.usatoday.com/communities/onpolitics/post/2011/11/romney-tv-ad-barack-obama-new-hampshire-1?loc=interstitialskip#.T-M2opH2QdR>; Maggie Haberman, *Who Wins this Round?*, POLITICO (Nov. 22, 2011, 3:48 PM), <http://www.politico.com/news/stories/1111/68946.html>; Ashley Parker, *Romney’s First Television Ad Attacks Obama on Economy*, N.Y. TIMES (Nov. 21, 2011, 9:57 PM), <http://thecaucus.blogs.nytimes.com/2011/11/21/romney-previews-his-first-television-ad/>; Jonathon M. Seidl, *Selective Editing? New Romney Ad Bashing Obama Called ‘Deceitful,’* BLAZE (Nov. 22, 2011, 7:49 AM), <http://www.theblaze.com/stories/selective-editing-new-romney-ad-bashing-obama-called-deceitful/>; Paul Steinhauer, *Democrats Say New Romney Ad Distorts Obama’s Words*, CNN (Nov. 22, 2011, 7:34 AM), <http://politicalticker.blogs.cnn.com/2011/11/22/democrats-say-new-romney-ad-distorts-obamas-words/>; Jon Ward, *Obama Campaign Blasts Romney’s First TV Ad as ‘Deceitful,’* HUFFINGTON POST (Nov. 21, 2011, 10:49 PM), http://www.huffingtonpost.com/2011/11/21/obama-campaign-romney-tv-ad_n_1106832.html.

²⁸⁴ Hohmann, *supra* note 283.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See, e.g., Burns, *supra* note 283 (“The Romney campaign recognized—and acknowledged upfront—that their commercial selectively clipped the president’s words for

New Romney Ad Distorts Obama's Words reported that, on the one hand, the Obama campaign said the ad took comments out of context, while, on the other hand, the Romney campaign claimed it "used the line intentionally."²⁸⁸ *USA Today* posted an online piece, *Democrats Say Romney TV Ad Is Misleading*, that took the same he said/she said approach.²⁸⁹ The article dutifully repeated the Obama campaign's criticism of the ad and the Romney campaign's defense, but it refused to adjudicate the controversy, concluding that "[w]hat's clear is this ad and accompanying activities today in New Hampshire signal a new phase in Romney's White House bid, in which the former Massachusetts governor attacks Obama even harder than he's been doing all year."²⁹⁰ The implication was that it's not clear which campaign is right about the ad. The *Blaze* ran a post headlined *Selective Editing? New Romney Ad Bashing Obama Called "Deceitful."*²⁹¹ The *Blaze* piece described the Romney campaign's defense of the ad, that it was merely turning Obama's tactics against him, as "a fair point," and the post's final sentence asks readers: "[w]hat do you think?"²⁹² A poll at the bottom allowed readers to vote on whether the ad was misleading or not, and results showed approximately 60% of readers believed the Romney campaign's explanation for the ad "ma[de] sense."²⁹³

dramatic effect. The result is that we're sort of seeing a microcosm of what a general election fight between Romney and Obama might look like, with Romney leveling explosive attacks on Obama's economic record, and the president working to disqualify Romney as a liar."); Parker, *supra* note 283 ("As soon as the ad was broadcast . . . the Romney campaign sent out an e-mail defending its use of Mr. Obama's quote. . . . 'Three years ago, candidate Barack Obama mocked his opponent's campaign for saying 'if we keep talking about the economy, we're going to lose,'" said Gail Gitcho, Mr. Romney's communications director, in an e-mail statement. 'Now, President Obama's campaign is desperate not to talk about the economy. Their strategy is to wage a personal campaign—or "kill Romney." It is a campaign of distraction.' Ms. Gitcho added that 'the tables have turned,' and implied that the line Mr. Obama once used against Mr. McCain could now be leveled against Mr. Obama himself." (emphasis added)); Ward, *supra* note 284.

²⁸⁸ Steinhauer, *supra* note 283. By reporting that the Romney campaign said it had used Obama's words "intentionally," the CNN piece gave the impression that there was some legitimate reason to present Obama's truncated statement out of context. In addition, by reporting the Romney campaign's defense of the ad without comment, the CNN piece helped distract readers from the central point: that the ad had deceptively presented only part of Obama's comment, out of context, in order to make it seem that Obama was talking about his own campaign's need to avoid talking about the economy.

²⁸⁹ Camia, *supra* note 283.

²⁹⁰ *Id.*

²⁹¹ Seidl, *supra* note 283.

²⁹² *Id.*

²⁹³ *Id.*

Most of the pieces that took a balance trap approach to covering the ad used strikingly similar headlines that framed coverage in he said/she said terms suggesting criticism of the ad’s accuracy was itself partisan: “Democrats Cry Foul . . .” and “Democrats Say . . .”²⁹⁴ Although journalists noted that Obama’s statement had been taken out of context, by focusing attention on each campaign’s position regarding the ad and refusing to reach any ultimate conclusion as to who was right, the stories suggested that there was a genuine debate here, each side had a point, and readers would ultimately have to make their own subjective determination about the ad’s accuracy.²⁹⁵

None of this reporting should qualify as bona fide press coverage. This is not work that advances democratic competence by helping to build an “educated and informed public opinion.”²⁹⁶ Instead, these pieces mislead readers by creating the false impression that the Romney campaign ad included a claim that was a matter of genuine debate. This coverage conveyed the message that perhaps President Obama could be seen as afraid to talk about the economy, perhaps not, but there was nothing objectively dishonest about the ad. Such coverage buried the central point: the Romney ad conveyed the false message that President Obama had conceded he could not win re-election if he talked about the economy.

Most if not all of the reporters who wrote the pieces discussed above would qualify as members of the press under either Schauer and Horwitz’s institutional approach or West’s functional definition. Under the institutional approach, journalists writing for established outlets like the *New York Times*, *USA Today*, and CNN would qualify by virtue of their institutional affiliations. Journalists associated with POLITICO would likely also be protected under the institutional

²⁹⁴ Arianna Huffington complained that, as a result of this coverage, “[i]nstead of a national conversation about what sort of person would approve such an ad, what we mostly got was just another ‘he said/she said’ episode. The Obama camp attacked the ad, and the Romney camp responded.” Arianna Huffington, *Mitt Romney Brazenly Lies and the Media Lets Him Slide*, HUFFINGTON POST (Nov. 28, 2011, 4:47 PM), http://www.huffingtonpost.com/arianna-huffington/mitt-romney-ad_b_1117288.html.

²⁹⁵ As noted, the post at Blaze.com did this most explicitly by ending its story by posing the question to readers, “What do you think?,” and including a poll that asked readers to weigh in on the question, “Is the Romney ad misleading?” Seidl, *supra* note 283.

²⁹⁶ See POST, *supra* note 8, at 35.

model.²⁹⁷ Under West’s functional definition, all of these journalists (including those reporting only online) would qualify as members of the press since they were “gather[ing] and convey[ing] information to the public about newsworthy matters.”²⁹⁸ This would lead to an absurd result: journalism that frustrates First Amendment values would receive Press Clause protections and prestige.

Under my definition of the press, none of these journalists would qualify as members of the press since their work failed to advance First Amendment values of truth and democratic competence. While the pieces described above would not qualify as bona fide press work,²⁹⁹ other journalists demonstrated how to cover the Romney ad in a way that informed the public and advanced First Amendment values. These pieces explained why the ad was indisputably misleading and also explained why journalists who took a “balanced” approach to covering the ad were failing to advance First Amendment values. By extending press corps membership only to this second group of journalists, whose work is discussed in the paragraphs that follow, we can reward journalism that vindicates First Amendment values and make clear that journalism falling short of these standards is not worthy of press status.

Ryan Lizza of the *New Yorker* asked, *Why Didn’t Reporters Call Romney a Liar?*³⁰⁰ Lizza expressly rejected balance trap coverage, endorsing “the idea that reporters should be in the business of testing claims for accuracy and finding out the truth, rather than allowing politicians to make outrageous statements as long as they are ‘balanced’ by quotes from their political opponents.”³⁰¹ In this case, the Romney campaign had “put out something that is demonstrably false.”³⁰² Lizza criticized journalists who “reported [on the ad] as a clever tactic by the Romney camp to spark a debate about the ad’s accuracy that will serve to highlight its overall message that Obama

²⁹⁷ Horwitz notes that blogs may qualify for Press Clause protection—moreover, Politico has a print component and its website might not be categorized as a “blog” but simply Politico’s online feature.

²⁹⁸ West, *supra* note 37, at 1069–70.

²⁹⁹ As noted, this is not to say these stories should be suppressed or prohibited in any way—simply that the journalists writing these stories should not qualify as bona fide members of the press based on this work.

³⁰⁰ Lizza, *supra* note 227.

³⁰¹ *Id.*

³⁰² *Id.*

has been a failure.”³⁰³ By focusing on campaign spin that presented dueling arguments from the Romney and Obama camps, balance trap journalists distracted attention from the central point: that the Romney campaign had “falsely attributed” a statement to Obama.³⁰⁴

Similarly, Alex Pareene wrote at Salon.com that journalists’ “[p]hony objectivity” had “muddle[d] another easy call.”³⁰⁵ The ad was “objectively[] dishonest,” but for some journalists “[t]he news, apparently, [was] that Democrats have asserted that the ad contains a distortion. Are they correct? Who knows!”³⁰⁶ Instead of clearly informing readers of the ad’s dishonesty, balance trap journalists presented coverage centered on “he said-she said quotes from ‘both sides,’” providing readers with “contradictory information” and leaving it to the readers to sort out the truth.³⁰⁷

When journalists adopt a “balanced” approach to reporting on factually incorrect or unsupported statements, they create an incentive for politicians and other public figures to make any statement they like, even if it has absolutely zero factual support. The Romney ad discussed here is just one example.³⁰⁸ More recently, Senate majority

³⁰³ *Id.* Lizza specifically singled out the James Hohmann post at POLITICO.com, discussed *supra* at p. 581 as an example of this flawed approach.

³⁰⁴ *Id.* (emphasis omitted).

³⁰⁵ Alex Pareene, *Objective Press Unable to Label Dishonest Romney Ad Dishonest*, SALON (Nov. 22, 2011, 12:30 PM), http://www.salon.com/2011/11/22/objective_press_unable_to_label_dishonest_romney_ad_dishonest/singleton/.

³⁰⁶ *Id.*

³⁰⁷ *Id.*; see also Huffington, *supra* note 29; Rieder, *supra* note 3.

³⁰⁸ Another Romney campaign video suggests that Obama told business owners “you didn’t build that”—in other words, that business owners had not built their own businesses. The Romney video, like the ad discussed in this section, depends on taking another Obama statement out of context. See Steve Benen, *When Wrenching Quotes from Context is the Game Plan*, MADDOW BLOG (July 19, 2012, 11:07 AM), http://maddow.blog.msnbc.com/_news/2012/07/19/12833771-when-wrenching-quotes-from-context-is-the-game-plan?lite; see also David Taintor, *How the ‘You Didn’t Build That’ Canard Went from Right-Wing Blogs to Mitt Romney’s Mouth*, TPM (July 18, 2012, 11:59 AM), <http://2012.talkingpointsmemo.com/2012/07/obama-romney-fox-news.php>. Another Romney ad deceptively suggested that Obama’s decision to bailout the auto industry led to Chrysler’s decision to ship U.S. jobs overseas, charging that “Obama took GM and Chrysler into bankruptcy and sold Chrysler to Italians who are going to build Jeeps in China. Mitt Romney will fight for every American job.” Thomas B. Edsall, *What We Already Know*, N.Y. TIMES (Nov. 4, 2012, 11:50 PM), <http://campaignstops.blogs.nytimes.com/2012/11/04/what-we-already-know/>. In fact, Chrysler was not moving any Jeep production from the U.S. to China. Jeremy W. Peters & Jim Rutenberg, *Jeep Production Isn’t Moving to China, Chrysler Chief Says*, N.Y. TIMES (Oct. 30, 2012, 12:45 PM), <http://thecaucus.blogs.nytimes.com/2012/10/30/chrysler-ceo-jeep-production-isnt-moving-to-china/>. Many journalists correctly pointed out that the Romney ad was

leader Harry Reid (D-Nev.) claimed that an unnamed person told him that Romney did not pay any taxes for ten years.³⁰⁹ Reid will not name his source so it is currently impossible to determine whether this claim is credible.³¹⁰ Journalists predictably went into balance trap mode in reporting on Reid's unsupported assertions. Rachel Weiner of the *Washington Post* reported Reid's claim, as well as the Romney campaign's outraged response, and noted that "Reid has a history of saying controversial things," but added the following:

[T]his accusation is not an off-hand remark or an accident, or Reid wouldn't be repeating it so often. He clearly sees an upside in making these claims—whether he has some proof, is trying to goad Romney into releasing the returns, or is just taking advantage of the fact that the Republican won't prove him wrong.³¹¹

Similarly, Steve Tetreault of the *Las Vegas Review-Journal* covered Reid's claim in he said, she said style, reporting Reid's charge, the Romney campaign's denial, and observing, without resolving the

misleading. See Paul Waldman, *Why the Romney Campaign Screwed Up*, AM. PROSPECT (Nov. 5, 2012), <http://prospect.org/article/why-romney-campaign-screwed> ("The Romney campaign thought they could play by the ordinary campaign rules, which say that if you say something true but intentionally misleading, you will usually be judged not guilty. Reporters will discuss the issue in the he said/she said format, with you saying you're telling the truth and your opponent saying you aren't, and you can declare victory. But that's not what happened. Instead, Romney got a wave of negative coverage over the issue, with journalist after journalist saying forthrightly in their stories that the Romney attack is misleading or deceptive."). However, some took a balance trap approach to reporting on the misleading claim about Chrysler. See Karen Tumulty, *Romney, Obama Refine Themes for Final Days*, WASH. POST (Nov. 3, 2012), <http://www.standard.net/stories/2012/11/03/romney-obama-refine-themes-final-days> ("[A] Romney television commercial . . . saying that General Motors and Chrysler are expanding in China, may leave some Ohioans with the impression that U.S. jobs, including at Toledo-based Jeep, are moving there. Democrats have attacked the ad as untrue, and independent analysts, including The Washington Post's Fact Checker, have criticized it as misleading. Chrysler announced a year ago it would add 1,100 jobs at its Toledo plant. . . . Despite the criticism the ad has received, which has included condemnation by auto company executives, Romney aides say it is accurate and provides important context on an issue Obama has run on for months.")

³⁰⁹ Sam Stein & Ryan Grim, *Harry Reid: Bain Investor Told Me that Mitt Romney "Didn't Pay Any Taxes for 10 Years,"* HUFFINGTON POST (July 31, 2012, 4:47 PM), http://www.huffingtonpost.com/2012/07/31/harry-reid-romney-taxes_n_1724027.html?utm_hp_ref=mostpopular.

³¹⁰ Reid argues that Romney could resolve the question by releasing tax returns, but that still would not tell us whether Reid had, in fact, spoken with anyone who claimed Romney did not pay taxes.

³¹¹ Rachel Weiner, *Harry Reid Doubles Down on Romney Taxes; Romney Campaign Responds*, WASH. POST (Aug. 2, 2012, 10:42 AM), http://www.washingtonpost.com/blogs/the-fix/post/harry-reid-doubles-down-on-romney-taxes/2012/08/02/gJQAOREnRX_blog.html.

dispute that “[i]f nothing else, Reid’s remarks could be entered onto a list of other head-turning comments he has made over the years.”³¹²

Like many of the journalists who took a balance trap approach to reporting on the Romney ad, Weiner and Tetreault refused to take sides in a matter crying out for a referee. Instead of emphasizing that Reid has pointed to no specific support for his claim, Weiner, Tetreault, and other journalists³¹³ adopted he said, she said coverage. Under my approach, Weiner and Tetreault would not receive the protections afforded to members of the press because they do not advance First Amendment values.³¹⁴

C. How the Balance Trap Norm Stands in the Way of Describing Reality When One Political Party Is Extreme

A journalist who describes the Romney ad as dishonest or Reid’s claim as completely unsubstantiated is not guilty of bias, as long as he or she takes the same approach to covering similar statements made by other public figures.³¹⁵ In fact, this is an important way to know whether a journalist deserves recognition as a bona fide member of the press. Journalists who expose lies made by one political party but

³¹² Steve Tetreault, *Reid Doubles Down on Romney Tax Charge*, LAS VEGAS REVIEW-JOURNAL (Aug. 1, 2012, 6:21 PM), <http://www.lvrj.com/news/reid-doubles-down-on-romney-tax-charge-164680576.html>.

³¹³ See, e.g., Aamer Madhani, *Harry Reid’s Accusation Fans Flames Over Romney’s Taxes*, USA TODAY (Aug. 5, 2012, 10:47 PM), <http://www.usatoday.com/news/politics/story/2012-08-05/reid-romney-tax-returns/56812154/1>; Daniel Strauss, *Reid Stands by Bain Capital Investor Story*, HILL (Aug. 2, 2012, 8:05 AM), <http://thehill.com/blogs/blog-briefing-room/news/241785-reid-stands-by-bain-capital-investor-story>.

³¹⁴ As with coverage of the Romney ad, some journalists refused to play along, making clear that Reid had offered no evidence to support his claim and that this was the central piece of the story. See Anderson Cooper 360 Degrees, *Transcript of Reid’s Tax Attack*, CNN (Aug. 2, 2012), <http://transcripts.cnn.com/TRANSCRIPTS/1208/02/acd.01.html>; Linda Feldmann, *Romney Tax Returns: Harry Reid May Be Bluffing, but He’s Winning*, CHRISTIAN SCI. MONITOR (Aug. 6, 2012), <http://www.csmonitor.com/USA/Politics/The-Vote/2012/0806/Romney-tax-returns-Harry-Reid-may-be-bluffing-but-he-s-winning>; *The Daily Show With Jon Stewart: You, Harry Reid, Are Terrible* (Comedy Central television broadcast Aug. 1, 2012), available at <http://www.thedailyshow.com/watch/wed-august-1-2012/you-harry-reid-are-terrible>. The fact that Jon Stewart, a comedian, was one of the few to explain why Reid’s claim cannot be taken seriously, may not be very comforting.

³¹⁵ See Rieder, *supra* note 3 (“[P]ointing out that the facts make clear that [a public figure is lying] . . . has often been seen as a violation of the sacred oath of objectivity. In fact, it’s not—as long as it’s completely fact-driven and has nothing to do with personal or institutional bias. If Barack Obama or Ron Paul or Dennis Kucinich released an ad as outrageous as Romney’s, he also would need to get the ‘Pants on Fire’ designation.”).

take a balance trap approach to lies made by the other major party do not merit press protections and prestige.³¹⁶

It is also a problem, of course, when journalists refuse to call out lies by any politician. The stenography and balance trap models make journalists reluctant, even uncomfortable, to call out deception by a specific leader or party, due to concerns that this will appear biased. The general result is that the public is less likely to get accurate information.

1. Of Gridlock and Hostage Taking

The balance trap style is particularly unsuited to dealing with the problem of extremism. What happens if one of the two major American political parties has simply come unmoored, “ideologically extreme[,] . . . scornful of compromise[,] unpersuaded by conventional understanding of facts, evidence, and science[,] and dismissive of the legitimacy of its political opposition”?³¹⁷ The balance trap model would insist on rigid equivalency and reject the possibility of accurately describing this reality. For those who prize balance over accuracy, neither of the two major parties can ever be described as extreme; the claims of each party must be taken seriously and presented as legitimate, regardless of whether this is, in fact, accurate.

In their recent book, *It's Even Worse Than It Looks: How the American Constitutional System Collided With the New Politics of Extremism*, Thomas E. Mann and Norman J. Ornstein described a Republican Party that has become dangerously extreme. They concluded that the party's extremism is a central cause of political dysfunction in the United States.³¹⁸ Their conclusions made a lot of

³¹⁶ This is not to say that journalists must ensure that they call out exactly as many lies on both sides—that would itself be an example of balance trap coverage. The point is to apply a uniform standard—if one party or one public figure lies more than another, coverage reflecting that reality is not biased.

³¹⁷ MANN & ORNSTEIN, *supra* note 2, at 103.

³¹⁸ *Id.* at 185 (“[T]he Republican Party has become the insurgent outlier in American politics and as such contributes disproportionately to its dysfunction.”); *see also* Thomas E. Mann & Norman J. Ornstein, *Let's Just Say It: The Republicans Are the Problem*, WASH. POST (Apr. 27, 2012), http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/g1QAxCVUIT_print.html (“We have been studying Washington politics and Congress for more than 40 years, and never have we seen them this dysfunctional. In our past writings, we have criticized both parties when we believed it was warranted. Today, however, we have no choice but to acknowledge that the core of the problem lies with the Republican Party. The GOP has become an insurgent outlier in American politics. . . . When one party moves this far from the mainstream, it

journalists (and academics)³¹⁹ uncomfortable.³²⁰ However, if the public is to have access to accurate information, then the reality Mann and Ornstein describe must be conveyed to the public. In fact, Mann and Ornstein blame “the failure of the media . . . to capture the real drivers of [political dysfunction]” as part of the problem.³²¹ They identify the balance trap as a prime culprit, observing that “[i]t is traditional that those in the American media intent on showing their lack of bias frequently report to their viewers and readers that both sides are equally guilty of partisan misbehavior.”³²² The problem, Mann and Ornstein pointed out, is that “reality is very different. The center of gravity within the Republican Party has shifted sharply to the right. Its legendary moderate legislators . . . are virtually extinct.”³²³

Mann and Ornstein described a dysfunctional American political system that has been run off the tracks by the Republican Party’s

makes it nearly impossible for the political system to deal constructively with the country’s challenges.”).

³¹⁹ See MANN & ORNSTEIN, *supra* note 2, at 103 (“[J]ournalists and scholars often brush aside or whitewash [the extremism of the Republican Party] in a quest for ‘balance’ . . .”). I felt these pressures myself as I wrote this Article, especially this section. See *id.* at 186 (“It is, of course, awkward and uncomfortable, even seemingly unprofessional, to attribute a disproportionate share of the blame for dysfunctional politics to one party or the other.”). My goal is not to launch a partisan attack. However, I recognize that the balance trap is not an acceptable way to deal with discomfort caused by describing facts that may paint one party in a bad light. As Mann and Ornstein describe in their book, journalists have failed to provide Americans with the facts necessary to make sense of the debt limit crisis and gridlock in Congress. These journalists should not be rewarded for sticking doggedly to a norm that distorts reality by creating false equivalency between truth and fiction. My goal is to create a definition of the press that rewards journalists who advance First Amendment values of truth and democratic competence. I would be falling into the balance trap myself if I shrank from the task of describing how and why journalists have often failed to get the story about the debt limit crisis and congressional gridlock right. My analysis says nothing about the underlying policy goals of either party and, on this point, journalists are right not to take sides. Reporters should not describe policy differences over government spending as inherently “right” or “wrong”—and they need not describe political tactics as either “right” or “wrong.” However, they ought to provide the public with the facts it needs to understand the debate.

³²⁰ In fact, many news outlets, including leading national newspapers, decided simply not to write news articles about Mann and Ornstein’s book, despite the fact that the two authors “are well-respected centrist congressional experts who are often cited by the media.” Rob Savillo, *Report: Who? Media Turns Its Back on Experts Who Blame GOP for Political Gridlock*, MEDIA MATTERS FOR AM. (May 18, 2012), <http://mediamatters.org/research/201205180007>.

³²¹ MANN & ORNSTEIN, *supra* note 2, at xiii.

³²² *Id.* at 51.

³²³ *Id.* at 51–52.

“politics of partisan confrontation, parliamentary-style maneuvering, and hostage taking [that] has been building since the late 1970s [and] has become far more the norm than the exception since Barack Obama’s election [in 2008].”³²⁴ The Democrats are not blameless, but the Republicans bear the brunt of responsibility for political dysfunction and gridlock—in fact, part of their strategy, as originally imagined by former Speaker of the House Newt Gingrich, has been to “undermine[] basic public trust in Congress and government, reducing the institution’s credibility over a long period.”³²⁵ The idea was that “[b]y sabotaging the reputation of an institution of government, the [Republican] party that is programmatically against government would come out the relative winner.”³²⁶

In recent years, especially since the 2008 election, this strategy culminated in what Mann and Ornstein called the politics of “hostage taking”—demands for painful concessions as the price of agreeing to measures both sides understand are necessary. Mann and Ornstein identified the debt limit crisis of 2011 as the tipping point that “underscores how out of whack American politics and policy making have become.”³²⁷ Republicans suggested they were willing to take down America’s credit rating and default on the federal government’s debt obligations unless their demands for “radical policy change” were met.³²⁸ When the crisis was (at least temporarily) resolved, Senate minority leader Mitch McConnell observed that “some of our members may have thought the default issue was a hostage you might take a chance at shooting. Most of us didn’t think that. What we did learn is this—it’s a hostage worth ransoming.”³²⁹

³²⁴ *Id.* at 81. By “hostage taking,” Mann and Ornstein refer to the tactic of holding up important legislation by making extreme demands based on the assumption that the opposing party will give in to these demands rather than allow a breakdown in negotiation to produce some extremely harmful result (e.g., default on U.S. debt). *Id.* at 3–30, 82–84.

³²⁵ *Id.* at 43.

³²⁶ *Id.* at 55 (quoting Mike Lofgren, *Goodbye to All That: Reflections of a GOP Operative Who Left the Cult*, TRUTHOUT (Sept. 3, 2011, 11:09 AM), http://truth-out.org/index.php?option=com_k2&view=item&id=3079:goodbye-to-all-that-reflections-of-a-gop-operative-who-left-the-cult).

³²⁷ *Id.* at 3.

³²⁸ *Id.* at 4, 9.

³²⁹ *Id.* at 25 (emphasis omitted) (quoting David A. Fahrenthold, *In Debt Deal, the Triumph of the Old Washington*, WASH. POST (Aug. 8, 2011), http://www.washingtonpost.com/politics/in-debt-deal-the-triumph-of-the-old-washington/2011/08/02/gIQARSFfqi_story_1.html (last visited July 6, 2012)).

In a similar fashion, Senate Republicans have used the filibuster and holds³³⁰ to stall legislation and nominations.³³¹ In the past, filibusters were “a tool of last resort, used only in rare cases when a minority with a strong belief on an issue of major importance attempts to bring the process to a screeching halt to focus public attention on its grievances.”³³² In recent years, and “especially since Obama’s inauguration in 2009, the filibuster is more often a stealth weapon, which minority Republicans use not to highlight an important national issue but to delay and obstruct quietly on nearly all matters, including routine and widely supported ones.”³³³ Again, Democrats are not blameless—they have contributed to the problem by “mov[ing] preemptively to cut off delays by invoking cloture . . . prior to any negotiations with the minority over the terms of debate.”³³⁴ However, Mann and Ornstein described the Republicans’ “pervasive use of the filibuster” as unprecedented,³³⁵ and they observed that Republicans have mounted filibusters even against bills that enjoyed nearly unanimous support and ultimately were passed by margins of 90-5 or better.³³⁶ The objective is not to derail objectionable legislation but simply to cause “weeks of delay”—filibustering uncontroversial legislation can cause “[a] bill that should have zipped through in a day or two at most [to take] four weeks, including seven days of floor time, to be enacted.”³³⁷

In reporting on this political landscape, journalists need not, and should not, conclude that the Republican Party’s tactics are inherently repugnant or illegitimate. That is a decision for the public to make, and Americans might well conclude that these tactics are justified—for instance, if one believes that government is out of control and dangerous, then one might applaud the Republican Party’s tactics.³³⁸

³³⁰ A hold is “an individual senator’s notification to the leadership in writing that he or she will object to consideration of a bill or nomination.” *Id.* at 84–85.

³³¹ *Id.* at 84–91.

³³² *Id.* at 88.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 90–91.

³³⁷ *Id.* at 90.

³³⁸ See James Fallows, ‘False Equivalence’ Reaches Onion-esque Heights, but in a Real Paper, THE ATLANTIC (Oct. 15, 2011, 3:11 PM), <http://www.theatlantic.com/politics/archive/2011/10/false-equivalence-reaches-onion-esque-heights-but-in-a-real-paper/246754/>. Fallows, addressing the problem of journalists’ failure to provide context necessary to understand use of the filibuster, observed that

However, journalists do have a responsibility to provide the public with the information it needs to reach informed conclusions about political debate. In this context, that means explaining that Republicans have adopted a specific strategy that depends on gridlock and obstruction as a way to advance their goals.³³⁹ Instead, many journalists have used the balance trap method in reporting on the debt ceiling debate and congressional gridlock, creating the impression that both major parties share equal blame for political dysfunction.

During the summer of 2011, as the United States moved closer to defaulting on its debt obligations, journalists frequently reported on the debt ceiling debate in balance trap terms. A July 27, 2011 *USA Today* article described the debate as simply “Washington’s latest stalemate” and an example of what it generically described as “Washington’s political brinkmanship,” suggesting this was a standard conflict flowing from “partisan passions” on both sides.³⁴⁰ The *USA Today* article consisted mainly of quotes from person-on-the-street interviews conveying a sense that both parties were to blame for the standoff.³⁴¹ A retired economist in New Orleans was quoted as saying “I’m sick of it . . . They’re playing games . . . [T]hey can’t come to an agreement.”³⁴² A woman from Louisville was described as “expressing disappointment with all sides.”³⁴³ Although another woman asserted that Republicans had been “hijacked” by the Tea Party, the article balanced out this charge by noting the same woman was “disappointed with the congressional leadership of both parties.”³⁴⁴ There was no commentary offered on any of the quotes taken from the person on the street interviews—nothing to indicate

[y]ou can consider this strategy brilliant and nation-saving, if you are a Republican. You can consider it destructive and nation-wrecking, if you are a Democrat. You can view it as just what the Founders had in mind, as Justice Scalia asserted recently at an Atlantic forum. You can view it as another step down the road to collapse, since the Democrats would have no reason not to turn the same nihilist approach against the next Republican administration. . . . You can even argue that it’s stimulated or justified by various tactics that Democrats have used. But you shouldn’t pretend that it doesn’t exist.

Id.

³³⁹ See MANN & ORNSTEIN, *supra* note 2, at 194–95.

³⁴⁰ William M. Welch et al., *Debt-Limit Debate Wearing on Americans*, USA TODAY (July 27, 2011, 2:30 PM), http://www.usatoday.com/news/washington/2011-07-26-Americans-debt-limit-debate_n.htm.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

whether those who were interviewed were justified in finding both parties at fault. In the absence of any commentary, a reasonable reader would conclude that there is reason to believe both parties were to blame. This conclusion is supported by the article’s reporting, again without comment, that “[t]he president and the Republican speaker of the House, John Boehner of Ohio, both have appealed to the public and accused the other side of refusing to come to a deal.”³⁴⁵

The *USA Today* article contained none of the background necessary to understand the debate. The article did not state: (1) that raising the debt limit is not a rare event; (2) that, “[s]ince the debt limit simply accommodates debt that has already been incurred, raising it should, in theory, be perfunctory”; (3) that, as a rule, when “the government needed to raise the debt ceiling, the key actors in Washington, including presidents and congressional leaders, knew that almost nobody—until now—had any intention of precipitating a default”; and (4) that what was different in the summer of 2011 was that Republicans, especially those associated with the Tea Party, were threatening to “take the country down via default.”³⁴⁶ Without this background, readers of the *USA Today* article would reasonably conclude that each party had dug in its heels and shared responsibility for the standoff.

Like the *USA Today* reporters, other journalists and news outlets provided balance trap coverage reinforcing the false narrative that typical Washington partisanship was to blame for the fight over raising the debt limit. Charles Riley wrote an article for CNNMoney describing a “continuing impasse, with each party sketching out their own plans and showing little common ground.”³⁴⁷ The *Washington Post* described the crisis as “boil[ing] down to [a] tale of two men”—President Obama and Speaker of the House John Boehner—suggesting again that this was simply a partisan battle, or perhaps a clash of personalities.³⁴⁸ Reuters described the debate as “acrimonious political stalemate” reflecting “political gridlock” without attributing the causes of stalemate or gridlock to any one

³⁴⁵ *Id.*

³⁴⁶ MANN & ORNSTEIN, *supra* note 2, at 5–6, 26.

³⁴⁷ Charles Riley, *No Deal on Debt Ceiling*, CNNMONEY (July 24, 2011, 9:06 PM), http://money.cnn.com/2011/07/24/news/economy/debt_ceiling_no_deal/index.htm.

³⁴⁸ Zachary A. Goldfarb et al., *Debt Drama Boils Down to Tale of Two Men*, WASH. POST (July 27, 2011), http://www.washingtonpost.com/politics/debt-drama-boils-down-to-tale-of-two-men/2011/07/22/gIQAWQKYUI_story.html.

party.³⁴⁹ A *New York Times* front page headline read *Challenge to a Budget Deal: Selling it to Democrats*, suggesting that Democrats, not Republicans, stood in the way of resolution.³⁵⁰

Other journalists rejected the balance trap model. Even as the debt limit saga played out, Jonathan Chait complained about reporters who used generic terms to suggest both parties were to blame for the standoff—for instance, reporters who vaguely asserted that “politicians in Washington” failed to understand the risks associated with not raising the debt limit.³⁵¹ Chait observed, as Mann and Ornstein later did in their book, that the key to understanding what was happening depended on realizing that “[i]t was the Republican Party’s idea to turn the debt ceiling vote from a symbolic opportunity for the opposition party to posture against deficits into a high-stakes negotiation over budget policy.”³⁵² He observed that it was only “Republican . . . elected officials [who were] dismissing the dangers of failing to lift the debt ceiling.”³⁵³

Chait acknowledged that this seemed to be “a partisan account,” but added that “it’s completely true.”³⁵⁴ He argued that balance trap style reporting, suggesting both parties were equally to blame for the standoff, allowed “Republicans [to] play[] debt ceiling chicken” with impunity.³⁵⁵ Republicans astutely recognized “that the blame for a debt default will be aimed at the diffuse ‘politicians in Washington,’” and Chait hypothesized that Republicans might change their approach “[i]f faced with the threat of specific, partisan blame for such a fiasco.”³⁵⁶

³⁴⁹ Andy Sullivan & Caren Bohan, *Top Republicans Confident of Debt Deal with Obama*, REUTERS (July 30, 2011, 7:24 PM), <http://www.reuters.com/article/2011/07/30/us-usa-debt-idUSTRE7646S620110730>.

³⁵⁰ David Atkins, *The New York Times Reports. You Decide*, HULLABALOO (July 22, 2011), http://digbysblog.blogspot.com/2011/07/new-york-times-reports-you-decide_22.html. A different headline appears when the *Times* piece is accessed today, but the headline suggesting Democrats were to blame can be seen in a screenshot available at the Hullabaloo website. Compare Carl Hulse & Jackie Calmes, *Boehner and Obama Nearing Deal on Cuts and Taxes*, N.Y. TIMES (July 21, 2011), http://www.nytimes.com/2011/07/22/us/politics/22fiscal.html?_r=1&hp with Jonathan Chait, *The Debt Default Enablers*, NEW REPUBLIC (July 19, 2011, 11:23 AM), http://digbysblog.blogspot.com/2011/07/new-york-times-reports-you-decide_22.html.

³⁵¹ Chait, *supra* note 350.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

2. When Majority Support for Legislation Is a Failure: Reporting on Use of the Filibuster

Mann and Ornstein cited evidence that “senators have distorted a [filibuster] practice designed for rare use—to let a minority of any sort have its say in matters of great national significance—to serve other purposes [including] . . . rank obstruction . . . to make everything look contentious and messy so that voters will react against the majority.”³⁵⁷ The “sixty-vote hurdle” required to end debate and break filibusters has come to be seen as routine, even though “[t]he framers [of the Constitution] certainly didn’t intend that.”³⁵⁸ Senate practice has not historically required a 60-vote supermajority as a matter of course.³⁵⁹ Republican senators have used the filibuster more and more often, especially since 2009, even on noncontroversial legislative matters in the hopes that the resulting delay and gridlock will be blamed on the Democrats who control the majority in the Senate and occupy the executive branch.³⁶⁰

This strategy only works if journalists go along with it by declining to provide the context necessary for the public to understand what is going on. As it turns out, that’s exactly what they’ve done. Journalists routinely report on “a measure ‘fail[ing],’ even] when it gets more Yes than No votes,” because the sixty-vote threshold has been “routiniz[ed].”³⁶¹ For instance, the *Daily Beast* reported *Obama Loses Big on Jobs Bill*, even though a majority of senators voted for the American Jobs Act.³⁶² The *Daily Beast* described this majority vote

³⁵⁷ MANN & ORNSTEIN, *supra* note 2, at 89–90.

³⁵⁸ *Id.* at 195.

³⁵⁹ *Id.* at 88.

³⁶⁰ *See id.* at 88–91.

³⁶¹ James Fallows, *A Modest Proposal: Call Obstruction What It Is*, THE ATLANTIC (Oct. 12, 2011, 7:43 AM), <http://www.theatlantic.com/politics/archive/2011/10/a-modest-proposal-call-obstruction-what-it-is/246528/>.

³⁶² Patricia Murphy, *Obama Loses Big on Jobs Bill*, DAILY BEAST (Oct. 11, 2011, 8:50 PM), <http://www.thedailybeast.com/articles/2011/10/11/obama-loses-major-battle-as-his-jobs-bill-splits-senate-democrats.html>. Murphy reported fifty-two votes in support of the measure, although it seems that there were only, at most, fifty-one votes in support of the measure (i.e., to end debate). *See U.S. Senate Roll Call Votes on American Jobs Act*, U.S. SENATE (Oct. 11, 2011), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00160 (showing fifty votes for cloture motion to end debate and move to a final vote on the bill and forty-nine votes against cloture, with Senate Majority Leader Harry Reid voting no for procedural reasons). However, either way, there was majority support for the bill. *See Robert Pear, President’s Job Measure Is Turned Back in Key Senate Test*, N.Y. TIMES (Oct. 11, 2011), <http://www.nytimes.com/2011/10/12/us/politics/obamas-jobs-bill-senate-vote.html?pagewanted=all>

in favor of the bill as a sound defeat of the legislation.³⁶³ A *Washington Post* article, headlined *Senate Has Become a Chamber of Failure*, described a 50-49 vote³⁶⁴ in favor of legislation as one example of this failure and described the sixty-vote threshold as simply the standard requirement “to do anything big” in the Senate.³⁶⁵ The *Post* article failed to explain that “requiring 60 votes for everything is new, and it is overwhelmingly a Republican tactic.”³⁶⁶ Instead, as James Fallows observed, the *Post* suggested that “partisanship and extremism ‘on both sides’ was bogging the Senate down.”³⁶⁷

This style of journalism produces head-scratching headlines like *Senate Defeats Democrats’ Measure to Kill Off “Big Oil” Tax Breaks, 51-47*³⁶⁸ and *Buffett Rule Fails in Senate, 51-45* (with the 51 votes favoring the legislation voted on in each case).³⁶⁹ A casual reader might think these were typos—how did votes with majority support lose? The text of these articles does not provide readers with the information needed to understand the context that will allow them to make sense of what happened, saying only that 60 votes were needed to advance the bill.

James Fallows criticizes this kind of coverage as helping to “routiniz[e] the once-rare requirement for a 60-vote Senate ‘supermajority’ into an obstacle for every nomination and every bill.”³⁷⁰ He suggests an alternative approach: if a bill enjoys majority support but is filibustered, headlines could report that the bill was “Blocked . . . in [a] Procedural Move.”³⁷¹

(reporting a 50-49 vote, with Majority Leader Reid casting a no vote for procedural reasons).

³⁶³ Murphy, *supra* note 362.

³⁶⁴ With the Majority Leader voting no for procedural reasons.

³⁶⁵ David A. Fahrenthold & Paul Kane, *Senate Has Become a Chamber of Failure*, WASH. POST (Oct. 12, 2011), http://www.washingtonpost.com/politics/the-senates-epic-fails/2011/10/11/gIQAl15cfL_story.html.

³⁶⁶ James Fallows, *Chronicles of False Equivalency, Chapter 2,817*, THE ATLANTIC (Oct. 13, 2011, 11:43 PM), <http://www.theatlantic.com/politics/archive/2011/10/chronicles-of-false-equivalence-chapter-2-817/246667/#> (emphasis omitted).

³⁶⁷ *Id.*

³⁶⁸ Ben Geman & Andrew Restuccia, *Senate Defeats Democrats’ Measure to Kill Off “Big Oil” Tax Breaks, 51-47*, HILL (Mar. 29, 2012, 11:59 AM), <http://thehill.com/blogs/e2-wire/e2-wire/219015-draft-draft-senate-again-blocks-dems-bid-to-nix-big-oil-tax-breaks/>.

³⁶⁹ Josh Barro, *Buffett Rule Fails in Senate, 51-45*, FORBES (Apr. 16, 2012, 7:04 PM) <http://www.forbes.com/sites/joshbarro/2012/04/16/buffett-rule-fails-in-senate-51-45/>.

³⁷⁰ Fallows, *supra* note 361; *see also* MANN & ORNSTEIN, *supra* note 2, at 195.

³⁷¹ Fallows, *supra* note 361.

This “would help offset the mounting mis-impression [sic] that the Constitution dictates a 60-vote margin for getting anything done.”³⁷² Fallows notes that some journalists do take this approach—for instance, the Cincinnati Enquirer ran a headline *Senate Republicans Vote to Kill Jobs Bill* for an Associated Press story reporting on the same vote that the *New York Times*, *Washington Post*, and *Daily Beast* described as failing to muster a required sixty votes.³⁷³ Mann and Ornstein similarly suggest that journalists ought to “[s]top lending legitimacy to Senate filibusters by treating a sixty-vote hurdle as routine.”³⁷⁴ In the same vein as Fallows, they suggest that when a filibuster is used to defeat a bill or derail a nomination, journalists should report that “the bill or person was blocked *despite* majority support, by the use of a filibuster.”³⁷⁵ This will inform the public that “[i]t was not Congress that blocked [the measure]—it was one political party via the filibuster.”³⁷⁶

Mann and Ornstein urge journalists to reject the balance trap by “[h]elp[ing their] readers, listeners, and viewers recognize and understand asymmetric polarization,”—i.e., that the Republican Party has shifted further to the right than the Democratic Party has moved to the left.³⁷⁷ They bluntly advise journalists that “[a] balanced treatment of an unbalanced phenomenon is a distortion of reality and a disservice to your consumers.”³⁷⁸ They are right, but it will take more than gentle “unsolicited advice” to journalists to effect change.

The solution to the problem that Mann and Ornstein identify when it comes to journalistic failure to explain the extremism of today’s Republican Party is found in the new definition of the press described in this paper. By conditioning press membership on a journalist’s ability to recognize and break free of the balance trap, we can move

³⁷² *Id.*

³⁷³ Associated Press, *Senate Republicans Vote to Kill Jobs Bill*, CINCINNATI.COM (Oct. 11, 2011, 7:17 PM), <http://news.cincinnati.com/article/20111011/NEWS02/111011048/Senate-Republicans-vote-kill-jobs-bill> (appearing in the *Cincinnati Enquirer*). The *New Haven Register* used a similar headline, *GOP Senators Defeat Obama’s \$447B Jobs Bill*, for the same Associated Press story. See The Associated Press, *GOP Senators Defeat Obama’s \$447B Jobs Bill*, NEW HAVEN REGISTER (Oct. 11, 2011), <http://www.nhregister.com/Articles/2011/10/11/news/doc4e94db793929f508348246.txt>.

³⁷⁴ MANN & ORNSTEIN, *supra* note 2, at 195.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 194.

³⁷⁸ *Id.*

toward a press corps that gives the public the information it needs to make sense of the political world it is charged with governing.

CONCLUSION

This Article is certainly not intended as the final word. Some open or unresolved questions remain.³⁷⁹ First, and most importantly, how can journalists who recognize the balance trap problem persuade their peers who do not recognize the problem that this is, in fact, a concern? I have suggested a number of ideas—for instance, conditioning eligibility for awards and press credentials on a journalist's demonstrated ability to reject the balance trap in his or her work. My hope is that peer criticism and praise can create a new journalistic norm built on my proposed definition of the press so that only those journalists whose work advances First Amendment values of truth and democratic competence receive the status and protections attached to press membership.

However, the crucial first step, of course, is getting a critical mass of journalists to endorse this new norm and reject the balance trap approach. Some journalists already recognize the problem and criticize their peers when they fall into the balance trap. However, the balance trap approach remains the prevailing norm. Changing that will take work, to say the least. As I suggest, that should begin with journalists and critics of journalism themselves—those, like Rem Rieder, Jay Rosen, Glenn Greenwald, Marty Kaplan, James Fallows, and others who understand the problem and have been writing about it. I hope that this Article will provide impetus for them to coordinate their efforts and develop a strategy for change, and I am indebted to their perceptive and essential work in describing and criticizing the balance trap problem. By providing a way to understand the balance trap problem as a failure of journalists to do work that merits Press Clause status and protections, I also hope that I have built on their work and found a new way to think about the problem and move toward a solution.

Assuming that some of the suggestions that I make can lead to the changes I propose, there will be some specific logistical problems. For instance, can journalists whose work sometimes, but not always, follows the balance trap or stenographic model merit press status? My own view is that they should not—that press membership should be

³⁷⁹ These are ones I have identified, or readers commenting on drafts of this Article have identified. I hope others will identify additional questions.

reserved for those who understand and consistently reject false equivalence in their work. That doesn't mean that “redemption” is impossible, but journalists must establish a consistent body of work that advances First Amendment values of truth and democratic competence before they earn press membership. Journalists and critics like Rieder, Rosen, Greenwald, Kaplan, Fallows, and others may have different views, and I do not presume to have the last word here, or on any of the matters I address.

Although judges and legislators play a supporting role in implementing my proposed definition of the press, their role is an important one. It will also be necessary to convince them that this new definition is the best way to give meaning to a central part of the First Amendment that, for more than 200 years, has remained essentially a constitutional nullity.

Ultimately, the goal of this Article is to give meaning to Oliver Wendell Holmes's assertion that “the real justification of a rule of law . . . is that it helps to bring about a social end which we desire.”³⁸⁰ Frederick Schauer, Paul Horwitz, and Sonja West have astutely recognized that it is important to give distinct meaning to the Press Clause. I would add that it is important not to lose sight of *why* this matters. It is only useful to give the Press Clause distinct meaning if it brings about a desirable social end, as Holmes suggests. Replacing balance trap journalism with journalism that gives Americans the accurate information they need to make informed decisions is a highly desirable social end.

If we develop a definition of the press that gives press membership to journalists whose work reflects the balance trap norm, then we have not achieved a desirable social end. Schauer's, Horwitz's, and West's definitions of the press all leave room in the press corps for balance trap journalists. My definition of the press does not. If we want to have a better press corps,³⁸¹ we must begin with a definition of the press that has the potential to solve the balance trap problem by recognizing only members of the press whose work truly advances First Amendment values.

³⁸⁰ Holmes, *supra* note 32, at 460.

³⁸¹ See DeLong, *supra* note 194.

