

Communitarian Grounds for Media Duties

Roy Peled

The news media are an essential part of any democratic community. A community in which members are expected to take part in deliberating on community affairs, and reaching decisions regarding the community's future, cannot thrive without reliable news media organizations.

A basic communitarian presumption is well expressed in article 29 of the 1948 Universal Declaration on Human Right: "Everyone has duties to the community in which alone the free and full development of his personality is possible". This should be seen as applying to the news media as well.

The news media is not unaware of its essential role in any given community. In fact, justifications for privileges demanded under the notion of "Freedom of the Press" are often justified on this ground. "In order for us to be able to provide to the community the services we are expected to provide", say news media representatives, "we must be given certain tools". Such tools may include access to information and public officials, source confidentiality, and freedom to publish information with no fear of censorship or penal action. Some of these tools are most famously secured by the first amendment, preventing Congress from making any law abridging freedom of the press. Others are provided by shield laws, now in place in 37 US states. ¹

¹ For instance in shield laws enacted in at least thirty-seven US states, protecting journalists from indictment in certain circumstances. See: Jason A. Martin, Mark R. Caramanica & Anthony L. Fargo,

"Freedom of the Press" stems from the public interest. Like any other right, freedom of the press too bestows duties on others to respect it. The immediate suspect for bearing such duty is the government, which must not interfere in press operations. I wish to argue that another bearer of the duty to respect freedom of the press is the press itself. It is the news media (which I refer to here interchangeably with the press) which must adhere to standards of freedom and which must not subject itself to limitations and influences that limit its freedom to serve a democratic community in which it operates with the information it needs in order to thrive.

The press is not essential only to the community as such. It is essential for an individual that takes seriously his own duties. In this regard I am referring to the duty of a community member to remain up to date on community affairs.² The community's proper functioning is dependent on the engagement of community members in community affairs. This is another reason why the news media is so essential for a democratic community. A non-democratic community can survive without a news media. Surely it can survive without free media. All that it needs is a government information agency to provide citizens with information deemed to be necessary for their daily functions. But in a democratic community, members must have access to vast and diverse information from various sources, in order to be actively involved in the community and the decision making processes within it, to have an opinion and to express it. The civic functioning of a community member,

Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online, 16 COMMUN. LAW POLICY 89–125, 104 (2011).

² AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 261 (1st ed. 1993).

which allows her to situate herself within the community, is dependent on the proper functioning of the media. A news media that does not provide community members with the information they need, or even worse, provides them with tainted information, with information not thoroughly fact-checked or with information contaminated with external influences serving commercial or other goals of a certain individual or corporation, inflicts harm on the same community from which it demands various privileges under "Freedom of the Press".

The communitarian role of the news media, is also grounds for its duties. The news media is a member of the community either as a "legal person" (a corporate entity) or by nature of the individual it is comprised of – journalists, editors and publishers, photographers, which are all community members. As a member of the community, the news media bears certain duties towards other members.

Certain rights are meaningless, if we do not recognize the responsibilities they require from others. For instance, rights of the child are meaningless if we do not discuss parental duties. The right to equal treatment is meaningless, if we do not realize that members of the community ought to treat each other equally (in relevant aspects), above and beyond legal requirements.³ In both cases the rights (of children or people suffering discrimination) cannot be realized unless we are willing to bestow duties upon other individuals.

Similarly, the public's right to know, the right of people for active participation in their community, is meaningless if we do not recognize the news media's moral

³ Dallin H. Oaks, *Rights and Responsibilities*, in *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE*, 39 (1995).

duties. Indeed, the news media cannot force anyone to consume the information it provides.⁴ In any democratic society some citizens will, unfortunately, choose to be passive. Yet, a democratic society must be structured in a way that encourages citizens to be active and provides them with the necessary tools for taking action. A fair, honest and functioning press is at the core of such a structure.

Communitarians believe that the right to freedom of expression entails a duty to consider the implications of one's expressions on other community members.⁵ Journalistic expressions have a particularly strong impact on community members, and on the community as a whole – the direction it takes, its strength, its solidarity, the interaction between different forces within it and the relationships between individuals and organizations. Hence, the news media should be seen as bearing heightened responsibility to the impact of its expressions on the community. Community members are entitled to demand such responsibility from the media, journalists, editors, photographers, publishers and other news media professionals who are all members of the community. Raphael Cohen-Almagor argues that as such, they are expected to support the democratic process which is the habitat in which they operate.⁶ The media's increased influence on the community accounts for its increased responsibilities.

⁴ In the words of Frederick Schauer: "Yet one can question whether it is the function of the press to *force* interest on the public. A choice of *Kojak* over political discussion may indicate general satisfaction with government, or it may indicate a conscious preference to leave political discussion to others". FREDERICK F SCHAUER, *FREE SPEECH : A PHILOSOPHICAL ENQUIRY* 108 (1982).

⁵ Jeffrey Abramson & Elizabeth Bussiere, *Free Speech and Free Press: A Communitarian Perspective*, 4 *RESPONSIVE COMMUNITY* 22, 32 (1994).

⁶ RAPHAEL COHEN-ALMAGOR, *SPEECH, MEDIA, AND ETHICS : THE LIMITS OF FREE EXPRESSION : CRITICAL STUDIES ON FREEDOM OF EXPRESSION, FREEDOM OF THE PRESS, AND THE PUBLIC'S RIGHT TO KNOW* 92 (2001).

Media plays a unique role not only in informing the community, but also in maintaining its sense of community. Robert Dahl for instance, lays the existence of an active and engaged community not only on awareness to events within the community, but also on a sense of mutual empathic identification among community members.⁷ Dahl believes two forces are charged with the responsibility to create such empathy – schools and mass media (mostly television). Amitai Etzioni sees in the media two important roles in a national community, in addition to providing information and serving as a government watchdog. First – providing space for civic discourse; second – enabling the community to reach common decision on its future direction.⁸

We have seen that the media have strong influence on any community, and this much seems to come without saying. But the connections between news media and community go beyond the former's influence on the latter. More than any other commercial entity, the news media lives and grows in the heart of the community, and its relations with it are much more complex than those of a buyer and a supplier. The community entrusts the media with its informational resources, either information coming out of the government, or from the citizens. It does so with hope to stimulate public discourse, necessary for its proper democratic functioning. The media interviews citizens, documents their activities, amplifies their voices, and of

⁷ Robert A. Dahl, *Participation and the Problem of Civic Understanding*, in *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* 261–270, 270.

⁸ AMITAI ETZIONI, *MY BROTHER'S KEEPER: A MEMOIR AND A MESSAGE* 298 (2003). The intention here is not to democratic decision making but to gradual developments in which a common understanding of the preferred path for the community is reached. Etzioni brings examples of change in the public opinion such as racial separation in the South, the war in Vietnam and US involvement in the fighting in Yugoslavia.

course influences them and sells this influence potential to advertisers. It needs citizens not merely as customers or employees, but as raw material. This complex web of intertwined interests of media and community serves to further justify community requirements from the press.

The objection to imposing any duties on the press normally comes from people speaking for "corporate rights". They fear breach of the news organizations' freedom of speech and mostly their right to do with their property as they wish. The whole notion of corporate rights is debatable.⁹ However even if one accepts this idea, it does not imply that one cannot view news organizations as subject to certain communal duties. Current legal scholars view the right to property as a more complex set of entailments and duties than that of the old Blackstonian description of property as the owner's "sole and despotic dominion". Property rights require society to respect one's attachment to her property. This requirement from society allows society itself to have a stand in defining the substance of the right, as one which must take into consideration owners' rights as well as those of other interested parties. Scholars supporting this line of thought see property as a right that defines relationships between individuals in society, and can also serve to promote social values.¹⁰ It should also be remembered that corporations themselves are a creation of the law, and as such can be limited by the law. The protection

⁹ For critical discussion of the alleged right to corporate free speech see: Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO LAW REV 2853 (2008); D. S. Allen, *The First Amendment and the doctrine of corporate personhood: Collapsing the press-corporation distinction*, 2 JOURNALISM 255–278 (2001).

¹⁰ For an overview of this approach and its criticism, see: HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 38 (2011).

offered to owner's through the institution of limited liability, justifies such measured limitation geared at preventing harm to the community.¹¹

Even devoted supporters of the rights of corporations such as news organizations, do often recognize the social responsibilities of these corporations. The approach combining the pursuit of profit with responsibility towards the various communities in which the corporations operates was developed in the 1980s and is known as the "stakeholder theory". A "stakeholder" in a corporation is any person or group which can affect or are affected by the achievement of the organization's goals.¹² In its earlier days the theory focused on respecting interests of the community and expectations of stakeholders as a management strategy which indirectly benefits the corporation's revenues. But later development in the theory included normative arguments as to the corporations moral duties towards stakeholder.¹³ Communitarians further developed this argument to present stakeholders such as employees, credit providers, customers and the community at large as investors in the corporation and thus at equal status with its shareholders.¹⁴

So what would the duties I am suggesting here should be imposed on the news media, look like? And no less important – how do I suggest to impose them?

¹¹ This view was best expressed as early as 1901 by Theodore Roosevelt in his State of the Union speech: "Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with these institutions," Theodore Roosevelt: First Annual Message, December 3, 1901, available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=29542> .

¹² R. Edward Freeman, **Strategic management: A stakeholder approach**, p. 46 (1984).

¹³ Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MANAGE. REV. 65–91 (1995)..

¹⁴ Amitay Etzioni, *A Communitarian Note on Stakeholder Theory*, 8(4) BUS. ETHICS Q. 679, 682 (1998).

To find out what duties need to be fulfilled for the press to serve the needs of the community in a fair and professional manner, we need not invent the wheel all over again. These requirements have been laid out by the press itself in numerous press ethics' codes.¹⁵ Two overarching core expectations from the press are shared by the vast majority of these codes: 1. True factual reporting (which appears in one version or another in all codes reviewed); 2. Acting in the best interest of the public at large and not that of private interests.¹⁶ Many other ethical expectations appear in many different codes, among them a ban on any conflicts of interests, separation between editorial content and advertising, offering individuals and organizations attacked by or through the press a right of reply, protection to the privacy of people balanced with the public interest in information, refraining from irrelevant labeling and mentioning of minority groups, and more. All in all, these codes of ethics, adopted in most countries by professional organizations, and in the US by individual news organizations, seem to offer decent basis for the operation of a fair and trustworthy news media.

The problem arises when they are not adhered to. Proof the very low level of adherence to these codes of ethics by a great many news organizations is beyond the scope of this modest note. For the sake of this discussion, it is a premise that

¹⁵ For purposes of this note and a wider research I am conducting, I reviewed 27 press codes of ethics from the 15 original members of the European Union, New Zealand, Australia, Canada, Israel and the United States. An additional and important source I rely on is a comprehensive review of 242 such codes from around the globe: Itzhak Himelboim & Yehiel Limor, *Media perception of freedom of the press: A comparative international analysis of 242 codes of ethics*, 9 JOURNALISM 235–265, 236 (2008).

¹⁶ The Washington Post code of ethics is very clear on this point: "The newspaper's duty is to its readers and to the public at large, and not to the private interests of the owner. In the pursuit of truth, the newspaper shall be prepared to make sacrifices of its material fortunes, if such course be necessary, for the public good", Washington Post Standards and Ethics, <http://asne.org/content.asp?pl=236&sl=19&contentid=335>

widespread breach of these standards exists, and that this widespread unethical press behavior has a heavy toll on the communities in which the press operates. Were this not the case, there would be no need for discussion of the community's right to present demands to the news media. If one believes this indeed is not the case, than she should oppose measures in line of those proposed in the paragraph to follow. But if one shares what I believe to be a notion common to many in many democracies, one must ask himself whether it is time for communities to stop treating this reality as a force majeure.

So how would press ethics, as described in press codes, be enforced? Clearly state intervention in the content of the news media is unacceptable if it is the needs of a *democratic* community that we look to serve. The state, as embodied in government officials that would implement such enforcement is in no better position than the press people themselves or the commercial entities that influence them, to assure the community will enjoy the service of a press truly free from external pressures subjecting public interest to other interests. On the other hand, self-regulation, as practiced in some news organizations by internal ombudsmen, and in some countries by voluntary press councils managed by the press itself, has largely failed to produce the kind of journalism our communities are entitled to. For one thing, not very many news organizations decide to employ an ombudsman. if they do, these are often the first to be axed under financial pressure, and where they are not, there is the question of effectiveness. The US cadre of ombudsmen, which was as low as 40 around the turn of the century, shrunk to half that number

following the 2008 recession.¹⁷ The failure of voluntary press councils has been the focus of inquiry committees in New Zealand,¹⁸ Australia¹⁹ and most notably the United Kingdom.²⁰

Should the law be brought into the picture? I believe a fair answer to this question was delivered by Israeli Supreme Court Justice Itzhak Zamir in a 1996 case. In that case, a police officer sewed a newspaper for libel where the newspaper failed to report that an investigation conducted against the officer, which was widely covered by the newspaper with blunt headlines, has ended with no criminal findings. The supreme court dismissed the case, and Justice Zamir concurring included the following paragraph in his decision:

"The law follows ethics with its eyes wide open. At times it seems that ethics are weak and cannot secure proper behavior, either because its demands are not clear enough or agreed upon, or because it has no effective enforcement mechanism, or for some other reason. In such a case, where an important public interest is at real danger, the law may cross the fence erected between it and ethics, and turn an

¹⁷ Rim Rieder, "Ombudsman Role Still has Place in a Newsroom", 2.21.2013 *available at*: <http://www.usatoday.com/story/money/columnist/rieder/2013/02/21/rem-rieder-ombudsmen/1934015/>

¹⁸ New Zealand Law Commission, "The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age".

¹⁹ Australian Government, Report of the Independent Inquiry into the Media and Media Regulation (by R. Finkelstein), 2.28.2012, *available at*: http://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf.

²⁰ The Leveson Inquiry: Culture, Practices and Ethics of the Press, *available at*: <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>.

ethical rule into a legal one, to give it the power required for proper order".

This is the path taken by the report of the United Kingdom's "Leveson Inquiry" into the Culture, Practices and Ethics of the press. The inquiry commission recommended replacing the voluntary Press Complaints Commission, run by the news organizations themselves, with a statutory commission holding statutory power. The commission suggested that "a genuinely independent and effective system of self-regulation"²¹ backed by "legislation to underpin the independent self-regulatory system and facilitate its recognition in legal processes".²² This solution seems to me to strike a reasonable balance between the need to keep the state out of media regulation, and to offer the community effective tools to keep the news media accountable to the community it presumes to serve. Such ideas go against deep roots in American thought of press freedom. As an open and sincere American friend, who is a distinguished media lawyer put it to me "when it comes to press regulation, law is a four letter word". However, this need not be the communitarian approach. Law is an expression of the communities will to apply its power to a subject of utmost importance to its existence as a democratic and deliberative community. Deliberation with the press and discourse on the limits of its freedom are preferable. But where they fail to produce adherence with minimal requirements, communitarians too have

²¹ Id., Article 53 to the executive summary.

²² Id., article 70.

agreed that as a last resort, the law may be used to impose responsibility duties on individuals towards the community.²³

In the context of US law, this approach leaves much to be explored. How would such legislation be enacted? Which news organizations would it cover? Who would it related to new digital media? What penalties could an independent non-governmental body impose? Who would appoint members to such parties? What point is there in state legislation in an environment where newspapers transcend state boundaries through the web. These and many more are valid questions. My modest goal with this note, however, is just to set off this discussion, by pointing to the right of the community to demand higher ethical standards from the press that serves it and that in return requires from the community privileges under the title of "freedom of the press".

The community is an essential part of almost every individual's life. It can exist only if individuals will exercise some responsibility towards their shared public sphere. Much of this public sphere is dominated by the news media. It is therefore the community's right to require the media, as part of

²³ In the words of Amitai Etzioni:

"... the law as a deterrent has its place in any moral order. Morality rests on intricate interactions among three factors: individual conscience, the moral voice of the community, and the state. Each one helps to sustain the others. Hence, while it is best to build up individual consciences and community voices, communities must on occasion fall back on the law. Without punishing those who do serious injury to our commonly held values-child abusers, toxic polluters, fathers who renege on child support, corporations who market unsafe drugs-no moral order can be sustained. We do not have to love the coercive' side of the law, but we cannot fail to recognize its place as a last resort."

the community, and individuals involved in the media, as members of that community, to act in a manner that fulfills its positive potential and reduce its negative influences. These are existential requirements for the community, as without them, and without effective means to secure they are met, "the wells of public discourse and public life are poisoned".²⁴

²⁴ Onora O'neill, *A Question of Trust – Lecture 5: A License to Deceive*, BBC4 Radio, available at: <http://www.bbc.co.uk/radio4/reith2002/lecture5.shtml>