

## **“An End to ‘Fortress Journalism’?: Some Historical and Legal Precedents for Citizen Journalism and Crowdsourcing in the United States”**

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An example of the current state of affairs for newspaper journalism in the United States is in a photograph taken this past summer. In the immediate foreground is a vending machine or what Americans call a news box for the *Chicago Tribune*. As an aside, much of my research and my most recent book involves the news media in Chicago, America’s so-called Second City. You will excuse me for using Chicago as an example in some of the points I hope to make today, but similar assertions can be made about other large American cities including the big one on the Atlantic Ocean and that other big one on the Pacific. As I was saying, the *Chicago Tribune* was considered one of America’s top five newspapers for a better part of the latter twentieth century, even in spite of this famous issue which has been called the worst newspaper headline mistake ever made, identifying the wrong candidate as the winner in the 1948 presidential election. The real winner, Harry Truman, even took the time to pose with a copy of the *Tribune* in a popular photograph. In spite of that gaff, the *Tribune* improved in subsequent years, winning prizes and doing many excellent stories, until it was sold in 2006 to a real estate speculator with no previous newspaper experience named Sam Zell. What followed was predictable, readership and circulation declines, an exodus of editors, and several editorial staff cutbacks. The newspaper is in the process of remaking itself as this paper is being written.

Returning to the original photograph however, the slightly beat-up *Tribune* news box stands all by itself on Clark street, at a location about two miles north of the famous 1929 St. Valentine’s Day massacre for those who know a bit about Chicago’s history. However, if one

looks more closely in the background of the photograph to the right, one can see a banner for the *Chi-Town Daily News*, Chicago's first citizen journalism or CJ newspaper, which has its modest editorial offices at this location. The *Chi-Town Daily News* ([www.chitowndailynews.org](http://www.chitowndailynews.org)) was started in December 2006 with a paid staff of four, six volunteer beat reporters, and a total CJ staff of 65 plus several interns including one of my journalism students. The web site is updated throughout the day, and if needed, night. The editors claim at least one legitimate scoop over Chicago's two dailies and five television stations in the past two years, and their beat structure includes covering some city institutions even the newspapers don't cover such as the Chicago Housing Authority. The *Daily News* also has a flexible staffing structure that allows it to cover breaking stories with a minimum of editorial interference, at least in a story's initial stages. By comparison, the *Tribune's* staff stood around for an extended period of time on September 11, 2001, when the World Trade Centers were attacked in New York City, while the paper's editors met in a closed room and debated what to do. At least one former reporter told me that the paper missed sending Chicago reporters to New York to cover the story from a Chicago angle because of editorial indecision. That sort of "fortress journalism" or a uni-directional flow of information mentality, as Steven Smith of the *Spokane [Washington] Spokesman-Review* first called it, is antipathetic among CJs

The *Chi-Town Daily News* is surviving for now on grants with a minimum of advertising support. The editors hope to become self supporting at an unspecified date in the future, and would like to hire some additional professional reporters, but seem committed to the concept of citizen journalism, of having residents in Chicago's more than 50 neighborhoods cover and report events. Similar operations are in place or under discussion in other American cities, and the number of CJ Internet newspapers will increase in the United States over the next several

years. In discussing this concept with others however, the terms “new,” “pathbreaking,” “cutting edge,” and the like often come up. As a historian and legal scholar, CJ is anything but new or *avant garde*. Nor is the concept of crowdsourcing, which I will discuss. As part of a book on CJ journalism I’m writing, I want to be able to put these movements in appropriate legal and historical contexts, and that is the point of this presentation. As you will discover, CJ began in the earliest years of American newspaper journalism, as it probably did in other nation’s journalism as well.

### Franklin and Paine

In America’s case, citizen journalism began interestingly enough through the efforts of two Englishmen. Most Europeans will recognize the United States’ first international celebrity, Benjamin Franklin, but his older brother James is less known. The first issue of his first newspaper, the *New England Courant*, was published in Boston on August 7, 1721. The elder Franklin learned the printing trade as a young man but knew little about writing, as did most early American newspaper printers. Instead of allying himself with the colony’s religious authorities, he sided with a growing group of local businessmen and published this paper without official approval. He invited his business friends to write letters which he published verbatim in his newspaper. One particular unsigned article from a citizen journalist attacked a questionable public health practice of the day backed by the colonial religious leadership, the use of inoculations to vaccinate against small pox. Just like it is easy to overlook the fact that this newspaper is filled with volunteer contributions, historians have attacked James Franklin for obstructing “medical progress,” but the reality is that he was representing public, not official

governmental opinion.<sup>1</sup>

In this particular article, which is a little hard to read, the writer equates inoculations to “the practice of Greek old women,” and notices that the town’s Select Men or town council voted unanimously that the practice was “rash and dubious, being entirely new, not in the least vouched or recommended.” Medical progress was made in this case, as most residents eventually submitted to the vaccinations and a smallpox epidemic was eradicated, but Franklin had established a new precedent in the American colonies that newspapers devote at least some space to printing CJ efforts, letters and correspondent reports. James Franklin ran afoul of the law the following year for criticizing the local government for failing to protect the overseas trading of the town’s businessmen, and landed in jail. His younger brother Benjamin filled in for him, and that was his start as the leading colonial newspaper publisher and editor. Benjamin wrote a great number of anonymous CJ-type articles, including this 1722 piece in the *Courant* attributed to one “Silence Dogwood.”<sup>2</sup>

Some 50 years latter, a second Englishman demonstrated the potential of citizen journalism in a different but equally incendiary manner. Thomas Paine was born in Thetford, England, in 1737, and moved to London as an adult, where he failed in several business undertakings before he met and became friendly with Benjamin Franklin in 1774. With letters of

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<sup>1</sup>*New England Courant*, August 7, 1721, p. 1; Esmond Wright, *Franklin of Philadelphia* (Cambridge, MA: Harvard University Press, 1986); Ronald W. Clark, *Benjamin Franklin* (New York: Random House, 1983); Catherine D. Bown, *The Most Dangerous Man in America: Scenes from the Life of Benjamin Franklin* (Boston: Little Brown, 1974); Robert V. Hudson, “The English Roots of Benjamin Franklin’s Journalism,” *Journalism History*, 3(Autumn 1976), 76; Carl Van Doren, *Benjamin Franklin* (New York: Viking Press, 1938); Jeremy Black, *The English Press in the Eighteenth Century* (Philadelphia: University of Pennsylvania Press, 1987); Elizabeth Eisenstein, *The Printing Press as an Agent of Change* (Cambridge: Cambridge University Press, 1980).

<sup>2</sup>*New England Courant*, 3 September 1722, p. 1.

recommendation signed by Franklin, Paine emigrated to Philadelphia in 1774 and found work as a magazinist, penning articles anonymously for *Pennsylvania Magazine*, one of several monthly periodicals produced in the Colonies. A little more than a year after his arrival, he wrote and had printed a pamphlet called *Common Sense*. Strictly speaking, it's not journalism, not even eighteenth-century journalism, but it was republished in newspapers throughout the colonies and became a lightning rod for debate over colonial grievances against the mother country. "I challenge the warmest advocate for reconciliation to show a single advantage that this continent can reap by being connected with Great Britain," he wrote, and then he provided evidence of what he considered wrongdoings. *Common Sense* was widely reprinted but Paine received little if any profit from it, an early example of crowdsourcing, the collaborative sharing process popular on the early twenty-first century Internet.<sup>3</sup>

In late 1776, he wrote a series of articles that were printed initially as handbills and then in what were called the *Crisis Papers*, some say at the direction of Gen. George Washington. In a blunt, staccato, almost journalistic flavor that reminds one of Winston Churchill's 1940 "We shall fight them on the beaches, we shall fight them on the landing grounds," speech, Paine wrote, "These are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of his country; but he that stands it NOW, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered; yet we have this

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<sup>3</sup> *Common Sense: Addressed to the Inhabitants of America* (Philadelphia: R. Bell, 1776); "Tom Paine's First Appearance in America," *Atlantic Monthly*, 4(November 1859), 565-575; Eric Foner, *Tom Paine and Revolutionary America* (New York: Oxford University Press, 1976); Richard F. Hixson, "Literature for Trying Times: Some Pamphlet Writers and the Revolution," *Journalism History*, 3(Spring 1976), 7; David A. Wilson, *Paine and Cobbett: The Transatlantic Connection* (Kingston: McGill-Queen's University Press, 1988); Craig Nelson, *Thomas Paine: Enlightenment, Revolution, and the Birth of Modern Nations* (New York: Viking, 2006); Axel Bruns, *Gatewatching: Collaborative Online News Production* (New York: P. Lang, 2005).

consolation with us, that the harder the conflict the more glorious the triumph.” Paine wrote 16 *Crisis* papers between 1776 and 1783 but he was employed primarily as a governmental worker, refusing to accept profits from his writings, so that qualifies him as a CJ. Paine continued to write radical literature, getting involved in the French revolution, writing the famous *Rights of Man* response to Edmund Burke, and he died virtually penniless in New York State in 1809. British political journalist William Cobbett had his bones exhumed and returned to England, but Cobbett’s plan never came to fruition and Paine’s bones were lost to posterity. James Franklin died albeit in a less ignominious form of obscurity as well.<sup>4</sup>

#### The “Grab and Go” Citizen Journalists

A new breed of CJs began appearing in the United States around the time of the early nineteenth century, known among American historians as “frontier journalists.” These men – there were no women – typically had a background in hand printing and type setting, the old practice of setting the individual lead-cast letters of words and sentences into metal lines and page forms, but few had any writing talent and/or editorial experience. As new settlements developed along the westward frontier across the North American continent, these men would hurry to each new settlement with a bare minimum of printing supplies and paper and establish what they hoped would be the next great newspaper. A good example of this practice was John Calhoun, the man who started the first newspaper in frontier Chicago called the *Chicago Democrat*. Calhoun, who was a domestic immigrant of English origins in contrast to foreign-born immigrants from countries such as Germany, Ireland, Sweden, and Norway also populating

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<sup>4</sup>*Crisis* ; Karen K. List, “William Cobbett in Philadelphia, 1794-1799,” *Journalism History*, 5(Autumn 1978), 80.

the city, learned typesetting and printing as a youth in New York state but otherwise receiving limited formal education. He operated a newspaper in Watertown for less than a year before he heard about the earliest Chicago from a friend and headed west in 1833. He found a vacant office in a three-story hardware and stove business building and printed the first edition of the *Chicago Democrat* on 26 November 1833. The event was such an important milestone in the early settlement's history that spectators literally cheered as they watched Calhoun peel the first printed copy off of his printing press, vying for ownership of the "first" first issue. Calhoun was a printer, not a journalist however, and there was little local content in the initial issues other than non-by-lined editorials often written by CJ residents other than the printer. For example, the first issue of the *Chicago Democrat* observed that "more than 800 souls – including the half-breeds – may now be found within the limits that a few months since included less than one-tenth of the number. Situated as Chicago is at the mouth of a fine river, on the shore of the noble lake into which the river empties itself; in a country possessing a soil of extraordinary fertility, with a climate whose clear and salubrious atmosphere is almost unsurpassed, it is a matter of wonder that it should be so eagerly sought by enterprising emigrants," language clearly beyond Calhoun's limited education and talents. Such anonymous CJs extolled the virtues of their new communities to perspective settlers and investors alike.<sup>5</sup>

Subsequent *Democrat* issues were filled with reprinted articles from Eastern American

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<sup>5</sup>Calhoun to wife, 17 October 1833, as quoted in *Chicago Tribune*, 26 November 1883, p. 6; *Tribune*, 22 February 1859, p. 1; *Chicago Democrat*, 26 November 1833, p. 2, 9 May 1834, p. 2; *Chicago Democrat* as quoted in *New Hampshire Patriot*, 24 August 1835, p. 1; Alfred T. Andreas, *History of Chicago: From the Earliest Period to the Present Time*, vol. 1 (Chicago: A. T. Andreas, 1884-1886), 360-371; George S. Hage, *Newspapers on the Minnesota Frontier, 1849-1860* (St. Paul: Minnesota Historical Society, 1967); Michael C. Emery, *The Press and America: An Interpretive History of the Mass Media* (Englewood Cliffs, N.J.: Prentice Hall, 1992); Robert F. Karolevitz, *With a Shirt Tail Full of Type: The Story of Newspapering in South Dakota* (Bismark, S.D.: South Dakota Press Association, 1982).

newspapers called exchanges, an early form of a wire service, reprinted laws and other legal documents, literature and poetry, and correspondent essays and letters to the editor. The latter contributions were frequently written by CJs. “It may be of service to the cause of truth and freedom, to insert in your valuable and independent paper, a copy of the enclosed letter,” a CJ writer maintained to a Birmingham, New York editor in 1792. “We find poets very hard hearted, and if we affront them by not immediately inserting their production, we are sure of a severe scolding,” a Baltimore, Maryland, editor confessed in 1821. “Essayists are also obdurate dogs to deal with; if disappointed on the ensuring day of publication, there is no escaping their remonstrance.” Rather than circulation, the *Chicago Democrat* supported itself through job printing, everything from business cards and forms to lottery tickets. Much has been made of the partisan political content of early nineteenth-century American newspapers, but if you look at the early issues of most frontier papers before a competing second newspaper was started in a particular community, you will see that most stressed a political neutrality or impartiality in their editorials and letters, exhibiting a CJ-type public utility or crowdsourcing mentality. When Chicago got a second newspaper, the *American*, in 1836, the *American* quickly became an advocate for the Whig party. Within two months, John Calhoun had sold his *Democrat* and retired from the printing business altogether. The *Democrat* was remade into a partisan paper supporting its namesake party with a new, better educated, and more literate editor.<sup>6</sup>

Beyond frontier newspapers, CJs were involved in other forms of early journalism. For instance, America’s labor movement was aided in the nineteenth century by pro-labor newspapers staffed and produced by CJs. The *Journeyman Mechanic’s Advocate* was founded in

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<sup>6</sup>[Birmingham, New York] *General Advertiser*, 2 February 1792, p. 3; Baltimore [Maryland] *Patriot*, 30 May 1821, p. 2.



1827 in Philadelphia and was joined by the *Mechanic's Free Press* the following year along with the *Working Man's Advocate*, founded by English printer George H. Evans in 1829.

Abolitionism, the social and religious movement against African American enslavement, would not have been possible without CJs. In 1831, reformer William Lloyd Garrison, who had some training as a printer, published *The Liberator* in Baltimore, equating abolitionism to the war for independence from England. "I am determined, at every hazard, to lift up to the standard of emancipation in the eyes of the nation, within sight of Bunker Hill, and in the birthplace of liberty," he wrote. "That standard is now unfurled, and long may it float, unhurt by the spoliations of time or the missiles of a desperate foe; yea, till every chain be broken, and every bondman set free!" Garrison's *Liberator* became the most professional of the abolitionist newspapers, but printed countless volunteer contributions and inspired a host of volunteer counterparts. Former slave Frederick Douglass printed a paper named after himself which routinely featured reports from white and black abolitionists throughout the North. "I write you this letter not because I am a letter writer – by no means, sir, as your readers will learn by reading further," an African American correspondent in Chicago wrote to Douglass in 1853, and numerous such reports appeared in each weekly issue. White abolitionists frequently filled the pages of their newspapers with political discussions (African Americans could not vote), but CJs even served as reporters, such as an 1846 account in the Chicago-based *Western Citizen* which chronicled the capture of four escaped slaves walking on a downtown street in broad daylight. As legal proceedings were hastily convened, the men were hustled out of a side door "and a strong guard of determined blacks formed around each and escorted them to a place of safety," a CJ reported. "A stone-hearted old democrat [sic] mocked and taunted" the rescuers until "a young Irishman standing near . . . cried out, 'Hold your tongue, you old villain!'" Such accounts belied

the volunteer character of the abolitionism movement. Beyond labor and abolitionist newspapers, CJs were involved in newspapers written for the suffragist or women's rights movement, utopians and other dissident religious groups, agrarian and populist political movements, and even more radical political movements such as socialism, communism, and anarchism.<sup>7</sup>

### The Era of the Professional Reporter

Labor specialization, first described by Scotsman Adam Smith in 1776, started coming to the larger American newspapers during the 1850s along with the industrial revolution and new methods of mass newspaper production. Before that time, the only newspaper "reporters" paid salaries were men who took verbatim notes of speeches, court hearings, public meetings, and similar events, performing what would eventually be called shorthand or stenography. Beginning around 1860, paid full-time staff members began reporting events in the place of CJs, on the battlefields of the American Civil War for instance. The sometimes lengthy, effusive, and occasionally self-serving narrative accounts written by CJs disappeared from newspapers, replaced by the more efficient and skilled inverted pyramid stories prepared by professional reporters. At first, editors, the former *primo uomos* of American newspapering, resisted giving

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<sup>7</sup>*Frederick Douglass' Paper*, 18 November 1853; *Gem of the Prairie*, 27 January 1849; *Western Citizen*, 13 July 1844; Otto L. Schmidt, "The Underground Railroad of Illinois," unpublished manuscript, Schmidt papers, CHS; James H. Collins to George W. Clark, 7 November 1846, as quoted in Larry Gara, "The Underground Railroad in Illinois," *Journal of the Illinois State Historical Society*, 56(Fall 1963): 508-528; *Belleville Advocate*, 17 July 1851, p. 2; George H. Woodruff to Zebina Eastman, 17 June 1874, Eastman Papers, CHS; *Western Citizen* as quoted in *Emancipator*, 6 April 1843, p. 190; *St. Louis New Era* as quoted in *Barre [Massachusetts] Patriot*, 29 August 1845, p. 3; *Western Citizen*, 27 October, p. 2, 3 November 1846, p. 2; *Emancipator*, 11 November 1846, p. 114; Bob Ostertag, *People's Movements, People's Presses: The Journalism of Social Justice Movements* (Boston, MA: Beacon Press, 2007); Lauren Kessler, *The Dissident Press: Alternative Journalism in American History* (Beverly Hills, Calif.: Sage Press, 1984).

bylines to their reporters, but by the 1880s even the most egocentric editor had to recognize that readers bought more newspapers to read articles written by bylined names they recognized.

Letters to the editors that previously manifested a two-way, participatory form communication were no longer published verbatim but were edited for style and content. Readers were encouraged to make their point and wait, hopefully, to see if their letter was published much less commented upon by the professional editorial page staff. The ultimate qualifying association for late nineteenth-century professional reporters were press clubs, organizations of and for reporters and no one else. They were formed in cities such as London, New York, and in Chicago in 1881. They existed for one purpose primarily, to celebrate the new rising stars of the American press. To this goal they provided male bonding and comradery, food, drinking, eating, and sleeping facilities in often opulent club rooms and buildings. As sort of an ultimate homage to the reporting profession, the Chicago press club even purchased its own section in a prominent cemetery and furnished it with a lofty monument to the reporting profession so that its reporter members could spend eternity with their own kind if they so chose. A few wealthy men were able to continue the CJ tradition through their own financial support, primarily in non-fiction magazines and books. For instance, one-time newspaper editor and politician Henry George wrote and published his 1879 *Progress and Poverty*, a book which highlighted the growing disparity between property owners and what he called wage slaves in the United States. Henry Demarest Lloyd was a *Chicago Tribune* editorial writer during the 1870s who was influenced by the British Christian Socialism movement. He quit the newspaper in 1885, wrote several articles for the *Atlantic Monthly* magazine and provided an expose of John D. Rockefeller's monopolistic Standard Oil Company in his 1894 book *Wealth Against Commonwealth*, considered one of the first pieces of investigative reporting in American history, that appeared several years before the

early 20<sup>th</sup> century muckraking movement in America.<sup>8</sup>

The most spectacular example of what can be called CJ produced during the era of the professional reporter was Jacob Riis' 1890 book, *How The Other Half Lives*. Riis was a Danish emigrant to the United States who arrived impoverished in 1871 and was forced to live in poorhouses until he found work as a police reporter for various New York city newspapers during the 1870s and 1880s. That newspaper work would discount him as a CJ except that Riis taught himself photography, especially the use of flash powder to take photographs at night, then a cutting-edge technology, outside of his regular job. He roamed the streets of New York's slums at night during the 1880s, taking spectacular flash pictures of the city's under class which newspapers could not print because they would not purchase the necessary reproduction technology. Riis had to publish his photographs in magazines and eventually in his own book above and beyond his regular newspaper job. His photographs showed middle and upper-class Americans for the first time what immigrant life was really like in America's largest city. In turn, his CJ photography convinced New York City Police Commissioner Theodore Roosevelt to close the poor houses and helped initiate a social welfare movement in the United States represented by people such as Chicagoan Jane Addams. When Roosevelt became president a decade later, he called Riis "the best American I ever knew" even though Riis was a sexist and racist against Eastern European immigrants. These photographs are examples of an early example of how mainstream American newspapers refused to embrace a new technology until they were literally

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<sup>8</sup>Burton Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: W. W. Norton, 1978); Richard Junger, *The Journalist as Reformer: Henry Demarest Lloyd and Wealth Against Commonwealth* (Westport, Conn.: Greenwood Press, 1996); John Thomas, *Alternative America: Henry George, Edward Bellamy, Henry Demarest Lloyd and the Adversary Tradition* (New York: Belknap Press, 1983).

forced to. Sound familiar?<sup>9</sup>

### The Era of the Publisher

Even with the rise of professional reporters during the latter nineteenth century, a form of what is called “crowdsourcing” today was still commonplace in American newspapers.

Crowdsourcing is a word supposedly coined by an American Internet-magazine writer in 2006 that means some form of community participation to perform a particular task, such as developing a new, shared form of technology or new piece of software such as Mozilla. The Amish religious sect in America have been building barns as a community project since the eighteenth century. The first volume of the what became the Oxford English Dictionary was published in 1884 using some of the millions of words submitted on individual slips of paper by volunteers, and television programs have been using telephone and text message voting for years. Nineteenth-century newspapers reprinted wholesale not only articles from other papers but entire copyrighted works of non-American authors without payment. It is said that Charles Dickens suffered financially because he could not make money from his writings in America, but in retaliation, Mark Twain was reprinted widely throughout Europe without payment of royalties. There are many amusing stories of how nineteenth-century American newspapers embarrassed competitors who stole articles through the judicious use of made-up stories. That all came to an end in the United States in 1894. Harriet Monroe was a Chicago-born newspaper literary critic who was paid to write an epic poem to celebrate the ceremonial opening of the World Columbian

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<sup>9</sup>Jacob A. Riis, *How the Other Half Lives* (New York: Dover Press, 1971, 1890); James B. Lane, *Jacob A. Riis and the American City* (Port Washington, N.Y.: Kennikat Press, 1974); Bonnie Yochelson, *Rediscovering Jacob Riis: Exposure Journalism and Photography in Turn-of-the-Century New York* (New York: New Press, 2007).

Exposition in Chicago in 1892. Publisher Joseph Pulitzer's *New York World* obtained an advance copy of the poem and printed it in its entirety the day before Monroe was to read it at the fair without her permission. Monroe had taken the unusual step at the time of copyrighting her poem, so angered, she sued Pulitzer for copyright infringement and the U. S. Supreme Court upheld a lower court verdict in her favor for \$5,000 in 1896.<sup>10</sup>

The United States has a long history of advocating free speech, but a poor record of supporting a free press. In the wake of the Monroe decision, newspapers began copyrighting not only their entire papers but individual articles that they feared other papers might be tempted to steal. A good example is this *Chicago Tribune* story about a major victory in the 1898 Spanish-American War, which was transmitted by telegraph after the Saturday morning New York newspapers had printed their last editions. You can't miss the copyright notice at the beginning of the article, for the *New York World* because it had a shared news bureau with the *Tribune*. However, it was the latter which was given the credit for breaking the story because it protected its copyright instead of sharing the story with other newspapers. The conflict between the newspaper business and intellectual property rights came to a head in America during the First World War. When British and French authorities barred another legendary newspaper publisher, William Randolph Hearst, and his International News Service (INS) from using their telegraph lines to transmit war reports to Hearst's U. S. newspapers. To compensate, INS paraphrased Associated Press reports published in eastern American papers and printed them in Hearst's western papers. The AP sued and the U. S. Supreme Court ruled in favor of the AP after the war had ended that while the AP could not prevent what it called the *publici juris* from copying and

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<sup>10</sup>“Who's Ready to Crowdfund?” *Advertising Age*, 23 October 2006, p. 35; Burrow-Giles *Lithographic v. Srony*, 111 U. S. 53 (1884); *Press Publishing Co. V. Monroe*, 164 U. S. 105 (1896);

repeating the “history of the day” it could protect its intellectual property from competitors as long as the news was of commercial value. The Seventh Circuit Court of Appeals made a similar ruling in 1921 involving an article rewritten by the *Chicago Herald* that had first appeared in the *New York Tribune*, protecting what it called the “distinct literary favor and individuality of expression peculiar to authorship,” Only in a dissenting opinion in *Associated Press* did one of the Supreme Court’s brighter lights, Associate Justice Louis Brandeis, argue a concept similar to 21<sup>st</sup> century crowdsourcing. “The fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property,” Brandeis wrote. “The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – became, after voluntary communication to others, free as the air to common use.”<sup>11</sup>

From an era of reporters, the American press had moved to an era of publishers in the early 20<sup>th</sup> century, at least according to British historian James Bryce. When President Calvin Coolidge warned against what he considered to be excessive commercialization in the American press in 1925, the *Wall Street Journal* published an editorial that marks the ultimate low point in the history of CJ. “A newspaper is a private enterprise, owing nothing to the public, which grants it no franchise,” the *Journal* wrote. “It is emphatically the property of its owner, who is selling a manufactured product at his own risk.” Partially in response, professional reporters who been watching their role in journalism diminish began an idolization of so-called “common man” journalism, celebrating the same people their predecessors had pushed out of their newsrooms.

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<sup>11</sup>“Direct News from Dewey!,” *Chicago Tribune*, 7 May 1898, p. 1; *International News Service v. Associated Press*, 248 U. S. 215 (1918) at 250; *Chicago Record-Herald v. Tribune Assoc.*, 275 Fed. at 798 (1921); *Kelly v. Morris*, L. R. 1 Eq. 697, 701; *Tribune Co. of Chicago v. Associated Press*, 116 Fed. 126 (1900); *Associated Press v. U. S.*, 326 U. S. 1 (1945); *Confold Pacific v. Polaris*, 433 F. 3d 952 (2006).

“Hence the press becomes more and more an essential community necessity in the conduct of group affairs,” pioneer social scientists Robert S. and Helen Lynd observed in their 1927 path breaking sociological study of small town Indiana, *Middletown*. “I believe that the people’s will should be obeyed,” William Randolph Hearst bleated ten years later to anyone who was listening. “The more I read papers, the less I comprehend, the world and all its capers, and how it all will end,” composer Ira Gershwin penned to his brother George’s music in their 1938 popular hit song, “Love is Here to Stay.”<sup>12</sup>

Perhaps the most obvious example of the trend toward publishers and away from CJ was *Chicago Tribune* owner Robert R. McCormick, who in an overwhelmingly Democratic city considered Democratic President Franklin Roosevelt the equal of Mussolini, Stalin, and Hitler and depicted them collectively as the Four Horsemen of the Apocalypse. When *Time* magazine co-founder Henry Luce questioned University of Chicago President Robert Hutchins about his own obligations toward a free and open press during a 1942 meeting in Chicago, the so-called Hutchins commission was born. In response to findings such as that more than half of 1930s-era Washington, D. C. reporters had had stories cut or killed by publishers or publisher edicts, the commission found that more forms of mass communication in the twentieth century had resulted in fewer voices being heard in the news media. “Protection against government is now not enough to guarantee that a man who has something to say shall have a chance to say it,” the report observed. “The owners and managers of the press determine which persons, which facts,

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<sup>12</sup>“A Fictitious Public Interest,” *Wall Street Journal*, 20 January 1925, p. 1; “Coolidge Declares Press Must Foster America’s Idealism,” *New York Times*, 18 January 1925, p. 1; “President Praises U. S. Newspapers in Address to Editors,” *Washington Post*, 18 January 1925, p. 1; Manley O. Hudson, “International Protection of Property in News,” *The American Journal of International Law*, 22(April 1928), 385-389; Robert S. and Helen Merrell Lynd, *Middletown: A Study in American Culture* (New York: Harcourt, Brace and Co., 1929), 471; Piers Brendon, *The Life and Death of the Press Barons* (New York: Atheneum, 1983), 200.



which versions of the facts, and which ideas shall reach the public.”<sup>13</sup>

### The Underground Press and Its Influence

In reaching its conclusions the commission ignored radical CJ-type publications such as the communist *Daily Worker*, *Student Review*, *Champion of Youth*, and similar leftist counterparts, and their findings were challenged in the 1950s by edgy new publications such as *Village Voice*, which made use of volunteers in its earliest years. A broader underground or counterculture press flourished during the 1960s and 1970s in the United States as it did in the UK, Canada, Australia, and other English-language countries. Most underground publications were written and produced by former university newspaper reporters and editors or others with previous journalism experience (the FBI produced at least three such publication in the U. S. and several alternative news services with its agents). “The student journalists who write for the campus papers are working for grades, a degree, and perhaps a little pocket money,” underground historian Roger Lewis noted in his 1972 *Outlaws of America* study of the underground press. “The underground staffers are working solely because it pleases them.” For instance, an underground comic strip of the era showed a university professor criticizing an underground newspaper as “juvenile” while a colleague observed, “They don’t seem to worry about libel, copyrights or anything else – none of the things that reputable newspapers concern themselves about,” what today would represent crowdsourcing. Underground papers routinely shared content with another, through alternative press agencies, as long as the content was written in opposition

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<sup>13</sup>James Bryce, *Modern Democracies*, vol. 1 (New York: Macmillan, 1921), 97-98; Brendon, *Press Barons*, 192; Robert D. Leigh, ed., *A Free and Responsible Press* (Chicago: University of Chicago Press, 1947), 14-16; Margaret A. Blanchard, “The Hutchins Commission, the Press, and the Responsibility Concept,” *Journalism Monographs*, 49(May 1977), 3-13.

to “the man.” Very labor intensive, some of the underground papers used the new technology of photocopy machines or other much older mimeograph machine, the larger ones took advantage of offset printing, another older technology that became less expensive during the 1950s and 1960s. One librarian complained in a Canadian underground publication in 1974, “the more one person does, the more s/he is asked to do. If one expresses a millimetre of interest in any subject, ten different groups ask for more. And usually always ‘for love’ or ‘for the profession.’ Let me label it the volunteerism syndrome.” The underground press disappeared in the early 1970s to be replaced by professionally-staffed “alternative newspapers,” which continued in the United States into the twenty-first century. Interestingly, the first usage of the term “citizen journalist” appeared in the *New York Times* at about this time, in 1976, although it did not enter into more common usage until the 1990s.<sup>14</sup>

At about the same time as the underground press, several American law cases served to redefine CJ. Beginning in the late 1960s, American prosecutors began subpoenaing evidence from professional reporters related to investigations ranging from alleged subversive activities to illegal drug manufacture. In the United States, most professional journalists consider it unethical to cooperate or advocate for either criminals or law enforcement, seeing their role as an intermediary between the two societal segments. In particular, Paul Branzburg, a reporter for the *Louisville [Kentucky] Courier Journal*, toured and reported about a clandestine hashish factory, and was ordered to name his anonymous sources by police in court. A fiercely-divided U. S. Supreme Court ruled that the First Amendment did not protect Branzburg and other professional

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<sup>14</sup>Roger Lewis, *Outlaws of America: The Underground Press and its Context: Notes on a Cultural Revolution* (Middlesex, England: Penguin Books, 1972), 58-59; Anne Woodsworth, “Volunteerism,” *Emergency Librarian* as reprinted in *Booklegger Magazine*, 1(1974), 47-48; *New York Times*, 8 September 1976, p. 3; Louis Menand, “The Trashing of Professionalism,” *New York Times*, 5 March 1995, p. SM41.

reporters from testifying in legal proceedings as required of regular citizens. One of the most controversial aspects of the decision was alluded to by Associate Justice Lewis F. Powell in notes opened to the public 35 years later and published in the *New York Times* in 2007. On what looks like a golf scorecard for another case, Justice Powell wrote, “Who are ‘newsmen – how to define,” an issue that becomes all the more complicated by the increasing recognition of CJs.<sup>15</sup>

Perhaps mindful of a popular mid-twentieth century saying by American journalist A. J. Liebling that “freedom of the press is limited to those who own one,” the U. S. Supreme Court has done much to limit CJ access to the mainstream press intensify the need for CJ outlets such as the Internet. For instance, the Court ruled in 1969 that American broadcasters had to provide equal air time to opposing sides on controversial issues of public importance, an attitude supportive of CJ, but in a 1973 case, the Court held that broadcasters did not have to air paid editorial or issue advertising if they didn’t want to accept it. More recently, the so-called Fairness Doctrine, which offered the promise of making radio and television more accessible to CJs was repealed in 1987, and rules requiring equal time for political endorsements and against personal attacks were repealed in 2000 . In 1974 the Court ruled that newspapers did not have to provide equal space in response to political or editorial endorsements. “Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate,” Chief Justice Warren Burger wrote cryptically in the unanimous decision which made property rights more than an accessible free press. Access cases have all but disappeared from the courts in recent years with open hostility being expressed against advocates by both political parties and with the

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<sup>15</sup>*Branzburg v. Hayes*, 408 U. S. 665; Adam Liptak, “A Justice’s Scribbles on Journalists’ Rights,” *New York Times*, p.7.

wider usage of the Internet in the United States beginning in the 1990s.<sup>16</sup>

It was a citizen employee of the U. S. Department of Defense who precipitated the most dramatic 20<sup>th</sup> century CJ case in American jurisprudence. Economist Dr. Daniel Ellsberg contributed to a study of the Vietnam War commissioned by the U. S. Department of Defense during the late 1960s. Convinced that the war could not be won, he also used the new technology of photocopying to reproduce 7,000 pages of top-secret documents in his possession. With the assistance of Anthony Russo, a fellow researcher with a background in aeronautical engineering, he gave the documents to a *New York Times* reporter. In turn, the *Times* published summaries and verbatim accounts of some of the documents in June 1971 until the U. S. government obtained an injunction against further publication. Although Ellsberg did not write the actual *Times*' articles, he was involved in their preparation, acting as a CJ. When the *Times* could no longer print what came to be called the Pentagon Papers, Ellsberg went to at least five other newspapers and helped them continue the series of articles. The newspapers won in the right to published Ellsberg's documents in an historic decision on 30 June 1971, although the bulk of the Pentagon Papers will remain under lock and key until 2050. Meanwhile, Ellsberg was tried on charges of espionage, but gross government misconduct in his case resulted in dismissal of the charges. Ellsberg became a full-time political activist, writing for publications such as *Harper's Magazine* and has participated in blogging in recent years. The Pentagon Papers became part of the downfall of the President Richard Nixon administration in 1973, and the case remains a landmark decision

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<sup>16</sup>*Red Lion v. FCC*, 395 U. S. 367 (1969); *Columbia Broadcasting v. Democratic National Committee*, 412 U. S. 94 (1973); *Meredith Corp. v. FCC*, 809 F. 2d 863 (D.C. Cir. 1989); *Syracuse Peace Council v. FCC*, 867 F. 2d 654 (D.C. cir. 1989); *Miami Herald v. Tornillo*, 418 U. S. At 241 (1974).

against the prior restraint of American journalists.<sup>17</sup>

### Recent Developments

If as author Richard Gant maintained in his 2007 book *We're All Journalists Now*, then recent court and legislative developments will have a significant impact on all Americans. For instance, U. S. Government nuclear scientist Wen Ho Lee received \$1.6 million from the U. S. government and five news media organizations in 2006 after the government leaked allegations to those organizations that Lee had given nuclear secrets to the Chinese. Lee spent 278 days in solitary confinement in 1999 and 2000 before he was released and received an apology from the government. Two American journalists faced imprisonment for refusing to reveal their sources they used in 2003 in an investigation which involved the identification of Valerie Plame as a Central Intelligence Agency operative, a violation of a 1947 U. S. law. Ultimately, a close associate of Vice President Richard Cheney, I. Lewis "Scooter" Libby, was tried, convicted, and had his sentence commuted by President George Bush as a result of the incident. Two *San Francisco Chronicle* reporters faced 18 months in prison for refusing to reveal their source for a series of stories in 2004 describing secret testimony on steroid use by professional athletes. The two were spared the sentence at the last minute because a former defense attorney admitted leaking the information. That same year, the Apple Company sued an anonymous blogger for publishing alleged corporate secrets in a case called *Apple Computer v. Doe*. The alleged perpetrator, Jason O'Grady, was promptly hired by tech new service CNET as a reward for his aggressiveness. In all of these cases, the precise definition of who constitutes a journalist or CJ

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<sup>17</sup>*New York Times Co. v. U. S.*, 403 U. S. 713 (1971); Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Viking Press, 2002); Ellsberg, *Papers on the War* (New York: Simon and Schuster, 1972).

has been a critical question. Currently, one piece of pending federal legislation defines a news person as anyone who gathers information of potential interest to the public, uses editorial skills to turn that raw material into a distinct work, and distributes that work to an audience, certainly a definition that would include a CJ. However, another pending bill protects only those who are engaged in reporting, editing, and publishing activities “for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain,” although the later is said to include bloggers. One wonders how many bloggers make a “substantial portion” of their livelihood from blogging. Regardless, if both of these proposals became law, the courts and ultimately the U. S. Supreme Court would have to decide which, if either, definition applies.<sup>18</sup>

And the issue of crowdsourcing has been confused in the United States by passage of 1998 Copyright Term Extension Act, or what some people have called the “Mickey Mouse Protection Act,” and the companion Digital Millennium Copyright Act. Simply stated, the copyright on the Walt Disney character Mickey Mouse had been set to expire in 2000. It has now been extended past the year 2030, but so have copyrights of other properties that many argue should be allowed to enter into the public domain in the United States as they have in some European and Asian countries. Critics call the law a form of corporate welfare, and it certainly flies against the principles of crowdsharing, especially in popular locations such as YouTube.<sup>19</sup>

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<sup>18</sup>Scott Gant, *We’re All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* (New York: Free Press, 2007); Dan Gilmor, *We the Media* (Sebastopol, CA: O’Reilly Media, 2004); Paul Farhi, “U. S. Media Settles With Wen Ho Lee,” *Washington Post*, 3 June 2006, p. a01; Bob Egelko, Prosecutor, *Chronicle* Reporter, linked by BALCO, meet at Bar panel,” *San Francisco Chronicle*, 13 August 2007, p. A4; Adam Liptak, “A Justice’s Scribbles on Journalists’ Rights,” *New York Times*, p.7; “Open Government Act of 2007,” S. 849; “Free Flow of Information Act of 2007,” H.R. 2102.

<sup>19</sup>17 U. S. C. §512; *Eldred v. Ashcroft*, 537 U. S. 186 (2003); *Tur v. YouTube/Google* (D.C., Central California, 2007)

In summary, it is not the intention of this paper to solve some of these issues, particularly who or what is a CJ. Instead, this paper is designed to encourage scholars from other countries to seek out the historical and legal precedents for CJ and the emerging new technology being discussed at this conference. If the United States is any example, it is likely that CJ has existed in some form in many countries, especially those that have a longer tradition of newspapering such as the U.K., the Netherlands, and Germany. It is important that these historical and legal precedents be recognized to help deal with some of the serious legal challenges that exist today.

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