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The Press's Responsibilities as a First Amendment Institution

Author : Helen Norton

Date : October 3, 2022

Erin C. Carroll, *News as Surveillance*, [59 Washburn L.J. 431](#) (2020).

At a time when it's all too easy to dump on the press, it may be surprising to find press law scholar Erin Carroll, a former journalist herself, adding to the criticism. Yet in *News as Surveillance*, a symposium essay, she illuminates "how much data news organizations collect on us as we read the news online and how they allow third parties to collect that personal data as well."

21st-century technologies now empower platforms to collect and aggregate information about us, and then to use this information to influence our choices to their own advantage, and in ways that we would resist [if we were aware](#) of their efforts. More specifically, platforms' surveillance of our reading habits and preferences enables them to design and deploy interfaces that change our decisions about when to buy, click on, read, or forward specific content. Informed by data surveillance and fine-tuned through [A-B testing](#), these interfaces can [double, triple, even quadruple](#) our willingness to accept online offers and requests.

It turns out that the press is part of this problem. Carroll explains the substantial extent to which news organizations collect—and allow others to collect—data about their online readers. Indeed, "[n]ews websites are among the internet's worst offenders when it comes to tracking their visitors. News sites contain more cookies and other like devices aimed at vacuuming up user data than do gaming, shopping, sports, or pornography sites." And here too, the information collected and aggregated by this surveillance enables those sites to manipulate their readers, as some news organizations have studied "how a particular piece of news might make a reader feel" and how to target advertising to that reader accordingly.

Maybe we shouldn't be surprised. [The press now confronts existential threats](#). It faces an environment where an ever-growing number of speakers compete for our increasingly scarce attention through [a variety of features](#) that manipulate us into staying online longer, thus spending more money and shedding more data. Who can blame the press for vying for our eyeballs, our time, our data, and our dollars with the same techniques that rivalrous speakers and platforms are using to bury it?

Carroll can. She describes news organizations' surveillance of their readers as inflicting injuries to our democracy different in degree and in kind from the considerable harms posed by surveillance capitalism more generally (see, for example, [here](#), [here](#), and [here](#)). For instance, armed with the extensive information about our reading habits and preferences served up by surveillance, news organizations can feed us more of what we're already reading to keep us online as long as possible. In this way, Carroll explains, news surveillance narrows the "menu of news from which we can choose," limiting our efforts to explore and discover, and reducing our exposure to "surprise and serendipity." This harmful feedback loop also exacerbates "the very real danger of journalists using likeability and shares as a measure of a story's importance."

Carroll also worries that we will be less likely to read the news when news organizations monitor our reading history—and that this, in turn, means that "we will likely know less about our neighbors, our communities, and the world around us. When we act in personal and political capacities it may be from a place of ignorance. Likewise, we may avoid action altogether." For a brick-and-mortar parallel, think of a public library that tracks what we read and then uses that information to shape our choices about what to read (and what to buy). This is not what we want from libraries—nor from newspapers.

Carroll expects more from the press precisely because it is “a named beneficiary of the First Amendment” that serves the constitutionally valuable functions of watchdog, educator, curator, and more. Although the definition of the “press” for First Amendment purposes is contested, here I adopt (and I think Carroll would too) Sonja West’s [functional understanding of the press](#) that attends to its actual ability and commitment to gather news and disseminate it to the public in ways that serve as “a check on the government and powerful people.” Although today almost any of us can be a publisher, West points out that relatively few of us have the training, capacity, or dedication to be newsgatherers.

When the press (as defined above) monitors our reading history and then uses that information to manipulate our choices, it violates the intellectual privacy that is key to our constitutionally protected freedoms of thought and expression. Carroll sees this as an ethical breach, “a special brand of betrayal” by an institution “dependent on its readers’ trust, one that checks abuses of power.” And this betrayal harms not only us, but also the press itself: “it is not a winning long-term business model for the press.” (Carroll is not alone among the press’s defenders in asserting that the press’s status as a First Amendment institution carries with it First Amendment responsibilities as well as First Amendment rights. Peter Coe, for instance, suggests that a [news organization’s constitutional protections should depend on](#) its demonstrated commitment to ethical behavior when gathering and publishing the news.)

But by no means has Carroll given up on the institution she loves. [Like others](#), she calls for new business models and policy measures to relieve some of the economic pressure on the press, thus reducing its financial incentives to surveil its readers. Emphasizing transparency as among the press’s greatest virtues, she also urges the press to reveal its own surveillance practices. Along these lines, she applauds the New York Times for [reporting on](#), and publishing [op-eds condemning](#), its and other news organizations’ surveillance of their readers.

[And in other work](#), Carroll suggests that our democracy would be healthier if at times the rest of us behaved more like journalists. She describes journalism as “a method and a practice—an evolving system for gathering, curating, and conveying information. Among its aims are accuracy and truth, the checking of power, and the creation of spaces for criticism and compromise,” through tools that include “verification using multiple sources, interviewing those with first-hand knowledge, and correcting errors.” In proposing that thinking and acting like journalists can help us build constructive habits of mind, her work parallels the connections drawn by [Vince Blasi](#) between free speech and the development of positive character traits like “inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil.”

In *News as Surveillance*, Carroll exposes some unflattering truths about the institution she so values, even as she shares her continuing hopes for it (and for the rest of us). In so doing, she poses ambitious, maybe existential, questions for the press. What does the press’s behavior tell us about what *it* values? And what does that, in turn, tell us about whether and when *we* should value the press?

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