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The Ideology of Press Freedom

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The Ideology of Press Freedom

Hannah Bloch-Wehba*

This Article offers a critical account of the law of press freedom. American law and political culture land the press as an institution that plays a vital role in democracy: guarding against corruption, facilitating self-governance, and advocating for free expression. These democratic functions provide justification for the law of press freedom, which defends the media's autonomy and shields the press from outside interference.

But the dominant accounts of the press's democratic role are only partly accurate. The law of press freedom is grounded in large part in journalism's professional commitments to objectivity, public service, and autonomy. These idealized characterizations, flawed from the start, drive a business model and a legal strategy that is increasingly at odds with democracy itself. In both its journalism and in its legal advocacy, the press often reifies existing social and racial hierarchies. An inconsistent defender of free expression, the press strategically sits out many First Amendment battles; in others, it pursues narrow, modest remedies unlikely to protect many outside of its ranks. While the press continues to burnish its image as a critical force for the preservation of democracy, its legal strategy has become increasingly detached from the public good.

Alongside a more clear-eyed assessment of the press's foundational commitments should come a broader rethinking of the press's freedom and legal strategy. Amid dire technological, economic, and political challenges, the reigning ideology of press freedom deserves press institutions as well as broader First Amendment values and democratic interests. This Article concludes by pointing a path toward alternative legal strategies for the press that would better respond to contemporary challenges to democracy.

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INTRODUCTION

America's free press is in jeopardy. In recent years, leak investigations and mass surveillance have compromised newsgathering.¹ The Trump administration accused journalists of being “fake news” and “enemies.”² Dozens of journalists were arrested and charged with violations of criminal laws while reporting on mass

1. Leonard Downie & Sara Rafsky, *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America*, COMM. TO PROTECT JOURNALISTS (Oct. 10, 2013), <http://bit.ly/1c3Cnfg> [<https://perma.cc/F887-VUDG>]; HUMAN RIGHTS WATCH, WITH LIBERTY TO MONITOR ALL: HOW LARGE-SCALE SURVEILLANCE IS HARMING JOURNALISM, LAW, AND AMERICAN DEMOCRACY (2014), <http://bit.ly/1uz3CL1> [<https://perma.cc/GJ6C-QYL6>]; PEW RESEARCH CENTER, INVESTIGATIVE JOURNALISTS AND DIGITAL SECURITY: PERCEPTIONS OF VULNERABILITY AND CHANGES IN BEHAVIOR (2015), <http://www.journalism.org/2015/02/05/investigative-journalists-and-digital-security/> [<https://perma.cc/EC9Y-8C32>]; PEN AMERICAN CENTER, CHILLING EFFECTS: NSA SURVEILLANCE DRIVES WRITERS TO SELF-CENSOR (2013), www.pen.org/chilling-effects [<https://perma.cc/LAS6-STCM>].

2. Joel Simon, *Assessing Trump's Press Freedom Record, One Year On*, COLUM. JOURNALISM REV. (Jan. 19, 2018), <https://www.cjr.org/analysis/trump-press-freedom.php> [<https://perma.cc/MD7C-UND4>]; RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419 (2020); RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017); John McCain, Opinion, *Mr. President, Stop Attacking the Press*, WASH. POST, (Jan. 16, 2018, 8:15 PM), https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87_story.html [<https://perma.cc/7CAU-MDYR>].

uprisings against police violence.³ At the same time, press institutions are facing an economic reckoning. Google and Facebook have devoured newspapers' advertising revenues.⁴ Local newspapers have shuttered in droves.⁵ Hedge funds are acquiring and gutting once-vibrant local and regional news sources.⁶ Trust in journalism is falling and characterized by a widening partisan gap.⁷

Legal scholars are sounding the alarm. Journalism, after all, is the lifeblood of a healthy democracy. A free press informs the public, fosters self-governance, and checks potential abuses of power.⁸ Operated mostly by profit-seeking corporations, the news industry's interests are nonetheless said to converge with those of the American public.⁹ News reporting plays a crucial role in "gathering and distributing the information that propels us forward in our collective search for truth."¹⁰

3. *Arrest/Criminal Charge*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/arrest-criminal-charge/> [<https://perma.cc/63Q7-8MQH>]; William Morris, 'This is My Job!': Register Reporter Andrea Sabouri Testifies in Her Own Defense in Her Second Day on Trial, DES MOINES REGISTER (Mar. 9, 2021), <https://www.desmoinesregister.com/story/news/crime-and-courts/2021/03/09/this-my-job-iowa-reporter-said-she-arrested-while-covering-floyd-protest/4638859001/> [<https://perma.cc/3468-8F4E>]; *Prosecutor's Office Must Correct Investigative Findings on Asbury Park Officers' Arrest of Journalist*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 13, 2020), <https://www.rcfp.org/asbury-park-press-arrest-investigation-statement/> [<https://perma.cc/G5XT-L5S2>].

4. NIKKI USHER, NEWS FOR THE RICH, WHITE, AND BLUE 137 (2021); Erin C. Carroll, *Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism*, 79 MD. L. REV. 529, 531 (2020) ("The press's economic model has been decimated.").

5. Megan Garber, *The Threat to American Democracy That Has Nothing to Do With Trump*, ATLANTIC (Jul. 11, 2020), <https://www.theatlantic.com/culture/archive/2020/07/ghosting-news-margaret-sullivans-alarm-bell/614011/> [<https://perma.cc/49FC-3MU5>]; RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011); Margaret Sullivan, *The Constitution Doesn't Work Without Local News*, ATLANTIC (Jul. 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/constitution-doesnt-work-without-local-news/614056/> [<https://perma.cc/49FC-3MU5>].

6. McKay Coppins, *A Secretive Hedge Fund Is Gutting Newsrooms*, ATLANTIC (Oct. 14, 2021), <https://www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171/> [<https://perma.cc/3HTG-5ZE8>]; Sydney Ember, *Colorado Group Pushes to Buy Embattled Denver Post From New York Hedge Fund*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/business/media/denver-post-alden-global-capital.html> [<https://perma.cc/88UZ-MQB3>].

7. Jeffrey Gottfried & Jacob Liedke, *Partisan Divides in Media Trust Widen, Driven by a Decline Among Republicans*, PEW RSCH. CTR. (Aug. 30, 2021), <https://www.pewresearch.org/fact-tank/2021/08/30/partisan-divides-in-media-trust-widen-driven-by-a-decline-among-republicans/> [<https://perma.cc/97JU-5VBE>]; GALLUP & KNIGHT FOUNDATION, AMERICAN VIEWS 2020: TRUST, MEDIA, AND DEMOCRACY (2020).

8. See, e.g., Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2437 (2014) [hereinafter West, *Press Exceptionalism*] (arguing that press speakers "fulfill unique roles in our democracy," and failure to recognize them as such entails significant risks); MIKE ANANNY, NETWORKED PRESS FREEDOM: CREATING INFRASTRUCTURES FOR A PUBLIC RIGHT TO HEAR 43 (2018) (describing the press's role as one of the "public institutions that assume structural responsibility for free speech"); RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 528 (2019) (describing "the press" as "critically important institutional speakers sharing a symbiotic relationship with individual, autonomous listeners").

9. See *infra* Section II.C.

10. RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*,

Journalism's professional commitments to autonomy, objectivity, and public service ensure that news institutions serve as "guardians of the First Amendment."¹¹ A diminished press might be less equipped to advance government accountability, protect transparency, and defend free expression.¹²

This dominant conception of the free press as a watchdog of democracy is not wrong, but it is incomplete. The leading scholarly accounts simultaneously overstate the significance of investigative, watchdog, and accountability journalism and underplay the press's failures to uphold its democratic function.¹³ The standard story romanticizes the press's democratic commitments while sidelining its antidemocratic tendencies.¹⁴

In many respects, the press's "freedom" has become unmoored from its vaunted roles as government watchdogs and First Amendment heroes.¹⁵ Press institutions invoke their freedoms to protect their economic interests and privileges.¹⁶ Sometimes those interests and privileges align with those of journalists and the public, but not always.¹⁷ Conflicts between journalists and management underscore the internal divisions and conflicts between the press's public interest orientation and the news industry's bottom line.¹⁸ If freedom of the press was once considered a sword against government tyranny, today it is increasingly a shield against corporate accountability.

This Article critically assesses the ideology that dominates press freedom law and scholarship.¹⁹ By using the term "ideology," I mean to suggest that press freedom is more than a straightforward set of legal protections. Our "image of a free press" is supported by a set of assumptions, stories, and narratives that justify the press's status in law and political culture.²⁰ The central narrative of the press's democratic function in turn provides the normative justification for the law of press

98 WASH. U. L. REV. 423 (2020).

11. *News Organizations' Ability to Champion First Amendment Rights is Slipping, Survey of Leading Editors Finds*, KNIGHT FOUNDATION (Apr. 21, 2016), <https://knightfoundation.org/press/releases/news-organizations-ability-champion-first-amendmen/> [https://perma.cc/8KLV-2E6W].

12. Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 200–01; RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 269 (2014) (press freedoms "rise and fall" alongside expressive rights more generally).

13. See *infra* Section II.A.1.

14. See *infra* Section II.A.

15. Knight Foundation, *supra* note 11.

16. See *infra* Part II.

17. See *infra* Section II.A.

18. See *infra* Section II.C.

19. See generally Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853 (1992) (exploring the idea of free speech as an ideology).

20. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 1 (1991); see also Jocelyn Simonson, *The Place of the People in Criminal Procedure*, 119 COLUM. L. REV. 249, 255–56 (2019) (describing an "ideology" as a set of "reigning assumptions structuring how we think" about criminal procedure); cf. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1284 (1984) (describing, in the context of bureaucracy, how a "story" or ideology can reassure critics and skeptics).

freedom.

The word “ideology” comes with some negative undertones: it suggests that its adherents are unthinking acolytes of a dominant philosophy.²¹ I use this term, with all its baggage, precisely because the core tenets of faith in press freedom are so widely accepted within legal scholarship and press institutions.

This Article’s primary contribution is its critical reevaluation of foundational assumptions about journalism’s social and political role. In theory, journalism’s professional and institutional norms—of objectivity, autonomy, and public service—set it apart from other speakers.²² Objectivity in particular serves as both a “moral ideal” for press institutions and a justification for the press’s central role in democratic discourse.²³ But the news industry selectively interprets and applies those normative commitments. Owners of news organizations reward stories that earn clicks and advertising dollars rather than resource-intensive investigations.²⁴ The much-ballyhooed local news often serves as a mere mouthpiece for local authorities.²⁵ The news outlets that we laud as objective sources of information amplify and normalize right-wing propaganda and reify racial hierarchy.²⁶ In legal scholarship, press freedom is often presented as a win-win proposition, an unfettered good for the news industry and the public. Drawing on scholarship in journalism, communications studies, and sociology, I show that press freedom can in fact come at a significant cost to others.

To date, legal scholarship and advocacy have remained largely unreceptive to these arguments.²⁷ Faith in the news industry’s democratic function forms the default starting point for scholars of press freedom, media law, and information law. This idealized vision of the free press explains why scholars of free expression and the First Amendment often view journalists as uniquely important speakers. And journalism’s integral relationship to democracy supplies the core justification for the press’s claim to privileges such as freedom from search warrants,²⁸ shield laws,²⁹ regulatory shield laws,³⁰ regulatory protections,³¹ and elevated First Amendment

21. Schauer, *supra* note 19, at 855.

22. *See infra* Section II.B.

23. Michael Schudson, *The Emergence of the Objectivity Norm in American Journalism*, in *SOCIAL NORMS* 165 (Michael Hechter & Karl-Dieter eds., 2001).

24. *See infra* Section II.A.1.

25. *See infra* Section II.A.2.

26. *See infra* Section II.A.3.

27. *But see* Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Clay Calvert, *The Law of Objectivity: Sacrificing Individual Expression for Journalism Norms*, 34 GONZ. L. REV. 19, 44 (1998) (critiquing a press freedom decision as a “triumph for corporate image and credibility”); Douglas M. McLeod, *News Coverage and Social Protest: How the Media’s Protest Paradigm Exacerbates Social Conflict*, 2007 J. DISP. RESOL. 185 (2007).

28. 42 U.S.C. § 2000aa.

29. *See, e.g.*, Christina Koningisor, *The De Facto Reporter’s Privilege*, 127 YALE L.J. 1176, 1198–99 (2018) (recounting efforts to enact a federal shield statute).

30. *Id.*

31. 28 C.F.R. § 50.10(a)(1) (2021) (“A free and independent press is vital to the functioning of

scrutiny.³² Media law scholars have also focused on substantive questions about *how* the law ought to protect the press—for example, by recognizing its unique status,³³ codifying unique protections,³⁴ or enacting novel forms of financial support.³⁵

The absence of a critical literature on press freedom is surprising. In sociology, journalism, and communication studies, the ideal of an objective press that operates in the public interest has earned significant scrutiny.³⁶ Meanwhile, a large body of scholarship in tort law, the First Amendment, and related areas has documented how free speech doctrine protects discrimination, hatred, and other loathsome expression at the expense of others' dignity.³⁷ Similarly, scholars in information law and communications law have offered critical reconsiderations of the political-economic implications of the right to know, open government, and transparency law.³⁸ Yet the foundational assumptions underpinning press freedom law have gone relatively unexamined. This Article fills that gap in the literature.

Second, I excavate ideology's influence on press freedom strategy. Journalism's commitments to public service, autonomy, and objectivity help to justify the existence and expansion of legal and regulatory protections for journalism and the media.³⁹ The objectivity norm has become particularly salient to press

our democracy.”).

32. See SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS* 79 (2016) (describing how the Associated Press argued for heightened First Amendment scrutiny of antitrust law in defending its monopoly).

33. Carroll, *supra* note 12; West, *Press Exceptionalism*, *supra* note 8; Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91 (2018).

34. Devlin Barrett, *Sen. Wyden Proposes New Shield Law to Protect Journalists' Phone, Email Records*, WASHINGTON POST (Jun. 28, 2021, 10:00 AM), https://www.washingtonpost.com/national-security/press-shield-law-ron-wyden/2021/06/28/ddc7acd0-d808-11eb-bb9e-70fda8c37057_story.html [https://perma.cc/S4F4-5JZ9].

35. MARTHA MINOW, *SAVING THE NEWS* 100 (2021).

36. See, e.g., Sue Robinson & Kathleen Bartzen Culver, *When White Reporters Cover Race: News Media, Objectivity, and Community (Dis)Trust*, 20 JOURNALISM 375 (2019); Matt Carlson, Sue Robinson, Seth C. Lewis & Daniel A. Berkowitz, *Journalism Studies and Its Core Commitments: The Making of a Communication Field*, 68 J. COMM'N 6 (2018); Sue Robinson, *Legitimation Strategies in Journalism*, 18 JOURNALISM STUD. 978 (2017).

37. See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story Legal Storytelling*, 87 MICH. L. REV. 2320 (1989); Charles R. III Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991). See also Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project* 127 YALE L.J.F. 685 (2018) (applying a critical approach to the First Amendment freedom of assembly).

38. See, e.g., David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016); Karen EC Levy & David Merritt Johns, *When Open Data is a Trojan Horse: The Weaponization of Transparency in Science and Governance*, 3 BIG DATA & SOC'Y Jan.–Jun. 2016; Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79 (2012).

39. Indeed, the ideology of press freedom is closely related to the ideology of journalism, and the “collection of values, strategies, and formal codes characterizing professional journalism” are

freedom litigation. News organizations have invoked objectivity both explicitly and implicitly to argue for additional protections and distinctive privileges as a matter of statute, regulation, and practice. On the ground, the objectivity norm encourages press institutions to engage in certain kinds of legal and political advocacy (e.g., for newsgathering, transparency, or free expression), while discouraging others (e.g., for civil rights).⁴⁰ The objectivity norm has made press institutions reluctant to engage in legal action that would make them part of the “story.”⁴¹ At other times, objectivity surfaces as an aspect of editorial discretion to insulate news organizations from civil liability and justify personnel decisions.⁴²

While legal scholars have largely taken the objectivity norm at face value, examining how it is deployed in practice raises unsettling questions about the normative foundations of press freedom law. Faith in journalism’s political and social role underpins press actors’ distinctive, preferential status under the law. But amid what we may consider the “worst of times” for press freedom and expressive rights, these special protections repeatedly fail to operate as intended or planned.⁴³ Instead, the commitment to objectivity has led the press to adopt a cramped view of its freedoms and made it reluctant to aggressively confront abuses of power. At the same time, press organizations excuse discrimination and racial hierarchy under the banner of objectivity as an unreviewable newsroom norm.⁴⁴

Finally, I tally the practical costs of press freedom’s ideological commitments. The press’s distinctive status preserves its privileges, but in so doing it legitimates broader inequities and silences dissenting voices. From a pragmatic perspective, the current press freedom strategy may not effectively preserve journalism’s institutional integrity. If the ideology of press freedom supported a legal strategy that was particularly successful, its costs might be worth the tradeoffs. Instead, however, it encourages the press to seek narrow tactical victories with questionable strategic value.

Before proceeding further, I offer a note on the scope and focus of my argument. This Article’s critical focus necessarily leaves many important doctrinal and policy questions unresolved. For instance, in press freedom law and scholarship, a recurring problem involves the attempt to define “the press” and thus

“shared most widely by its members.” Mark Deuze, *What is Journalism?: Professional Identity and Ideology of Journalists Reconsidered*, 6 JOURNALISM 442, 445 (2005).

40. See *infra* Part III.

41. See, e.g., *SPJ Cautions Journalists: Report the Story, Don’t Become Part of It*, SPJ NEWS (Jan. 22, 2010), <https://www.spj.org/news.asp?ref=948> [<https://perma.cc/WJ93-PS8B>]; Lewis Wallace, Opinion, *There are Times Journalists Should Become the Story*, COLUM. JOURNALISM REV. (May 23, 2017), <https://www.cjr.org/opinion/lewis-wallace-desmond-cole-journalism.php> [<https://perma.cc/7DFW-J99U>].

42. See *infra* Section IV.A.

43. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 451 (1985) (“The First Amendment . . . should be targeted for the worst of times.”).

44. See *infra* Section III.A.

draw administrable boundaries around its legal entitlements.⁴⁵ I do not directly address this definitional problem, with one exception: in Part II, I describe and critique how the concept of the press as an “institution” is likely to benefit formal press organizations above newcomers, freelancers, and other outsiders.⁴⁶ Similarly, scholars in media and information law disagree about whether “the press” is constitutionally entitled to particular protections.⁴⁷ In particular, an animated debate has explored whether the First Amendment’s Press Clause confers any special privileges on press actors.⁴⁸ Because my focus is on the law’s normative justifications, rather than doctrine itself, I do not address this debate directly.

Perhaps the most significant question of all is, if the prevailing myths of press freedom are not accurate, then what justifies the law of press freedom? Resolving this question is all the more urgent as long-standing assumptions about the form, structure, and substance of the journalism industry begin to erode. I leave this question, too, to be addressed in future work.

Finally, I am aware that criticizing the press has its risks. The basic ideas supporting the law of press freedom have proven remarkably sturdy. Perhaps that is because they contain much that is accurate. Particularly in an era of Trumpian hostility to journalism, the press’s role as a potential counterweight against corruption, fraud, and authoritarianism has never been more apparent.⁴⁹ Amid polarization, right-wing hostility, and even outright violence against press actors, criticism could be perceived as peevish, even potentially dangerous.⁵⁰ We need a free press more than ever; arguments that undercut its strength might be considered willfully contrarian.

The apparent dangers of criticism might explain why the legal-academic consensus on press freedom is so stable and resilient.⁵¹ But the perceived risks of critique do not fully explain its absence. It might be similarly risky to criticize free

45. Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1585–86 (2012).

46. See *infra* Section II.B.

47. West, *Favoring the Press*, *supra* note 8, at 101 (describing the “increasingly popular view of the Press Clause as a nondiscrimination provision”).

48. *Id.*; see also *infra* Section II.B (describing the state of the scholarly disagreement).

49. Ryan Bort & Asawin Suebsaeng, *Trump Keeps Musing About Journalists Being Raped in Prison—He’s Not Joking*, ROLLING STONE (Nov. 8, 2022), <https://www.rollingstone.com/politics/politics-news/trump-imagines-journalists-raped-prison-1234626493/> [https://perma.cc/2UV8-MRGF].

50. Alex Mann & Lilly Price, *Capital Gazette Gunman Sentenced to Five Life Terms Without Parole for Killing Five in Newsroom Shooting*, CAPITAL GAZETTE (Sep. 28, 2021), <https://www.capitalgazette.com/news/ac-cn-capital-gazette-shooting-sentence-tuesday-20210928-dqpmoiu6hjgylontchcvnnkv3u-story.html> [https://perma.cc/AJH3-GMEE]; Michael Tanenbaum, *Alleged Fishtown Vigilante Charged in Assault on Journalist*, PHILLY VOICE (June 26, 2020), <https://www.phillyvoice.com/fishtown-assault-vigilante-why-reporter-protests-philly-police-26th-district/> [https://perma.cc/6W2Z-WBM2]; Jake Thomas, *Reporter Surrounded, Heckled for ‘Fake News’ as Trucker Convoy Nears D.C.*, NEWSWEEK (Mar. 4, 2022), <https://www.newsweek.com/reporter-surrounded-heckled-fake-news-trucker-convoy-nears-dc-1685177> [https://perma.cc/RE69-PRMF].

51. One major exception is Barron, *supra* note 27.

expression more broadly, which (like press freedom) is highly valued, instrumentally important, and politically salient. And yet there is an extensive literature critiquing how free speech doctrine and practice favor the white, the wealthy, and the powerful.⁵² In journalism and communication studies, accounts of journalism's "democratic" role and its production of "objective" news are more nuanced and skeptical than legal-academic accounts.⁵³ A more clear-eyed assessment of press freedom's failings is likewise urgently needed in legal scholarship. I begin to offer that assessment here.

I. THE LAW OF PRESS FREEDOM

Scholars, advocates, and legal actors widely assume, sometimes without explanation, that the press plays a crucial role in U.S. democracy. To fulfill this role, however, the press requires legal protections: a law of press freedom.⁵⁴ This body of law is made up of an overlapping and intersecting set of constitutional, statutory, and regulatory protections for journalism and newsgathering.

A. *Regulating the Press*

The law of "press freedom" is concerned primarily with state regulation that infringes the central value of institutional autonomy.⁵⁵ At its core, the law of press freedom ensures that journalists can work free of state interference. So, for example, the First Amendment forbids states from "forc[ing] a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."⁵⁶ By the same token, the First Amendment prohibits states from enjoining the publication of news.⁵⁷ The principle of institutional autonomy thus affords press

52. See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story Legal Storytelling*, 87 MICH. L. REV. 2320 (1989); Charles R. III Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991). See also Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J.F. 685 (2018) (applying a critical approach to the First Amendment freedom of assembly); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018).

53. See Anthony Smith, *Is Objectivity Obsolete?*, 19 COLUM. JOURNALISM REV. 61 (1980); Matt Carlson, *News Algorithms, Photojournalism and the Assumption of Mechanical Objectivity in Journalism*, DIGITAL JOURNALISM 1 (2019); Jay Rosen, *The View from Nowhere*, PRESS'THINK (Sept. 18, 2003), <http://archive.pressthink.org/2003/09/18/jennings.html> [https://perma.cc/FX5K-C8ET]; Robinson & Culver, *supra* note 36; Carlson et al., *supra* note 36; Robinson, *supra* note 36; Deuze, *supra* note 39; Schudson, *supra* note 23.

54. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430–31 (2002).

55. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1974); Carroll, *supra* note 4, at 534; LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 1 (1991).

56. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 261 (1974); see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) ("journalistic independence"); Herbert v. Lando, 441 U.S. 153, 168 (1979) ("[N]either a State nor the Federal Government may dictate what must or must not be printed.").

57. N.Y. Times Co. v. United States, 403 U.S. 713, 715 (1971). While these protections are

institutions a large measure of editorial discretion.⁵⁸

In light of the paramount importance of watchdog and accountability journalism, it is hardly surprising that the law of press freedom is primarily oriented toward preserving the press's institutional autonomy.⁵⁹ And this vision of institutional autonomy is capacious. The principle of institutional autonomy protects the press not only from public regulation, but also from private censorship and retaliation through the courts: plaintiffs cannot use the law of defamation, for example, to silence truthful reporting or criticism.⁶⁰ Nor is institutional autonomy limited to press actors. As Erica Goldberg and others have demonstrated, First Amendment jurisprudence has constitutionalized large bodies of "private" law—tort, contract, and property.⁶¹

To be sure, the First Amendment is at the core of much press freedom litigation and rhetoric. But as a straightforward doctrinal matter, the press enjoys no true constitutional protection.⁶² Because the press has no "special" rights or privileges beyond those of the First Amendment more generally, "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."⁶³ Journalists are "treated by the law as being no different than the subjects they are covering or, perhaps, mere curious bystanders."⁶⁴

Press institutions have argued, albeit with uneven success, that autonomy interests require heightened scrutiny of a variety of generally applicable legal doctrines when applied to press activities. For instance, press institutions have advocated for First Amendment rules that protect defendants from liability for defamation⁶⁵ and shield journalists from being compelled to give testimony

critical, they are not unique to the press. The First Amendment protects against compelled speech, prior restraints, and content-based restrictions regardless of speaker identity.

58. Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 571 (1978).

59. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("No intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request."); Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 399 (2009) (writing that the press is "protected against government incursions on their newsgathering").

60. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

61. Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 699 (2016); Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109 (2013).

62. Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013).

63. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

64. West, *Press Exceptionalism*, *supra* note 8, at 2436.

65. *N.Y. Times v. Sullivan*, 376 U.S. at 256–64.

regarding the identity of confidential sources.⁶⁶ Press institutions have also argued for exemptions from antitrust and labor laws.⁶⁷

Beyond the First Amendment, institutional autonomy is also protected through statutes, norms, and regulations, many of which are explicitly intended to protect only the press. At the federal level, for instance, statutes and regulations protect journalists from intrusive searches, seizures, and subpoenas.⁶⁸ At the state level, shield laws function in a similar way, protecting journalists from being compelled to testify regarding information obtained from confidential sources.⁶⁹

If autonomy means anything, it means that journalistic institutions cannot be compelled or coerced to adopt a certain perspective or method. Indeed, the principle of autonomy is one of the core professional concepts of journalism.⁷⁰ Other “ideal-typical traits” of professional journalism include the commitment to journalism as a public service and to the norm of objectivity, which counsels that journalists must be “impartial, neutral, objective, fair and (thus) credible.”⁷¹

At first blush, the notion of institutional autonomy seems difficult to square with the press’s commitments to public service and objectivity. The widely valued commitment to objective, impartial, “traditional” journalism cannot be enforced through law.⁷² Nevertheless, press institutions generally adhere to a set of professional norms and values that shape their coverage, their reporting methods, and their legal activities.⁷³ As Justice Stewart argued in 1974, the press can choose—and, in many respects, has chosen—to “serve as a neutral market place for debate.”⁷⁴ But the principle of institutional autonomy prevents the government from compelling the press to act as such.⁷⁵

66. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

67. *Associated Press v. Nat’l Lab. Rels. Bd.*, 301 U.S. 103, 130 (1937) (holding that the National Labor Relations Act does not violate the First Amendment); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (holding that the Sherman Act does not violate the First Amendment); *McDermott v. Ampersand Publ’g, LLC*, 593 F.3d 950, 959 (9th Cir. 2010) (“[The] First Amendment erects a barrier against government interference with a newspaper’s exercise of editorial control over its content.”).

68. *See* 42 U.S.C. § 2000aa (1980) (barring federal law enforcement, under most circumstances, from searching journalists’ work product and documentary materials); 28 C.F.R. § 50.10 (requiring that the Department of Justice notify and attempt to negotiate with a journalist before obtaining a subpoena or court order for communications records).

69. *See, e.g.*, Ronnell Andersen Jones, *Rethinking Reporter’s Privilege*, 111 MICH. L. REV. 1221 (2012); Koningsor, *supra* note 30.

70. Deuze, *supra* note 39, at 447.

71. *Id.*

72. Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 365 (2011) (“[D]istinguishing between Assange and other journalists is not feasible without effectively excluding core pillars of the emerging networked public sphere and the networked fourth estate.”).

73. *See, e.g.*, RON SMITH, *ETHICS IN JOURNALISM* 42 (2008); BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 1–12 (3d ed. 2013).

74. Stewart, *supra* note 55, at 635.

75. *Id.*

News institutions reconcile their arguments for autonomy with their commitments to objectivity by suggesting that the former fosters the latter. Press institutions routinely argue, for example, that “ethical journalism [is] the natural product of robust press freedoms.”⁷⁶ At the same time, journalism institutions also argue that it is imperative to protect the institutional autonomy of even unethical, erroneous, or ill-intended journalists in order to ensure the security of the ethical and well-meaning majority.⁷⁷

Even though it is not required, the objectivity norm shapes press coverage, informs press advocacy, and underpins the law of press freedom. Indeed, the ideal of journalism as an objective source underpinning democratic governance is a critical basis for the press’s legal protections.⁷⁸ According to RonNell Andersen Jones, the Supreme Court views the media as a “valuable educator” and a “helpful teacher with a gift for both determining what the people need to know and conveying it to them in a useful fashion.”⁷⁹ Consider, for example, the rationale for affording protections for newsgathering and access to government proceedings. In *Richmond Newspapers v. Virginia*, the Supreme Court upheld a First Amendment right of access to criminal proceedings, reasoning that openness provides “an opportunity both for understanding the system in general and its workings in a particular case.”⁸⁰ The Court noted that the press had a particular role to play in fostering this understanding, observing: “While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry” to facilitate accurate reporting of the proceedings.⁸¹

Other protections ensure that journalists have access to the places and records required for their reporting. For example, numerous cities have adopted policies to provide press credentials to journalists, often providing them with increased access to crime scenes or other sites of newsworthy events.⁸² States have enacted shield

76. Brett G. Johnson, Ryan Thomas & Jeremiah Fuzy, *Beyond Journalism About Journalism: Amicus Briefs as Metajournalistic Discourse*, 15 JOURNALISM PRAC. 937, 946 (2020).

77. *Id.* (“[T]he highest echelon of reporting can only be realized in a milieu of expansive press freedom that tolerates inevitable errors.”).

78. *See generally* C. EDWIN BAKER, MEDIA, MARKETS & DEMOCRACY, 154–64 (2001) (examining the conceptions of democracy underpinning journalism’s foundational professional ideals).

79. Jones, *What the Supreme Court Thinks*, *supra* note 12, at 256 (describing the “link between this educator role and the media’s role as a ‘surrogate’” or public proxy).

80. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

81. *Id.* at 573; *see also id.* at 587 (Brennan, J., concurring) (noting that “the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government”).

82. *See, e.g.*, CHICAGO POLICE DEPARTMENT GENERAL ORDER G09-02-01 NEWS MEDIA CREDENTIALS (2014), https://home.chicagopolice.org/wp-content/uploads/2020/02/G09-01-06_Use-of-Focial-Media_DRAFT_05FEB20.pdf [<https://perma.cc/3PBU-R4PH>]; *L.A. News Media Identification Card Guidelines: Media/Press Pass Policy*, LAPDonline (last visited Nov. 3, 2023), www.lapdonline.org/inside_the_lapd/content_basic_view/2026 [<https://perma.cc/2VRN-W3FL>].

laws to prevent interference with the newsgathering process.⁸³

The idea that openness gives rise to understanding and trust in government proceedings implicitly adopts an unspoken definition of the press as employing objective journalistic practices to inform public debate. Similarly, the Court's opinion in *New York Times v. Sullivan* emphasized the press's function in facilitating discussion and criticism of elected officials.⁸⁴ As Jones has argued, this conception of the press held true even for a "less-than-responsible press."⁸⁵

B. Reorienting the Law of Press Freedom

Structurally, the law of press freedom is largely binary: press freedom ensures the press's institutional autonomy from the state. Like other civil liberties concerns, the press's "freedom" is a freedom from regulation and intervention.⁸⁶ This "negative framing" of the press's rights is widely accepted within legal scholarship, although some voices are beginning to suggest that it is incomplete.⁸⁷ Following this framing, the lion's share of press freedom scholarship focuses on judicial decision-making and legislative action. Almost none of the literature focuses on how, when, and whether press institutions choose to pursue legal claims (or not).

In truth, however, press freedom is not binary: it is, as communications scholar Mike Ananny describes it, relational.⁸⁸ By "relational," I mean that the press achieves its freedom "in relation to others."⁸⁹ This concept of relational press freedom is relatively new to legal scholarship. Like the press itself, press freedom relies on a "set of institutional relationships" that define, limit, and characterize press autonomy.⁹⁰ If press freedom is relational, then "the press" is free in relation not only to the state, but also in relation to its subscribers, its laborers, its platforms, its advertisers, and its financial backers.⁹¹

By taking this approach, I am consciously reorienting inquiry away from questions about state regulation of the media and instead focusing on how press

83. Koningisor, *supra* note 30.

84. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

85. Jones, *What the Supreme Court Thinks*, *supra* note 12, at 260.

86. Owen M. Fiss, *Why the State*, 100 HARV. L. REV. 781, 785 (1987) (describing the view of the First Amendment as "a limit on state action").

87. MINOW, *supra* note 35 at 100 (arguing that government action to support the press is consistent with the First Amendment); *see also* C. EDWIN BAKER, ADVERTISING, AND A DEMOCRATIC PRESS 3 (1994) ("Government might be seen as the sole, relevant threat to freedom, and freedom of the press might mean at bottom a laissez-faire marketplace for the mass media industry. . . . [T]his view of freedom is wrong.").

88. ANANNY, *supra* note 8, at 61 (arguing that the press's freedom and autonomy confer "a relational power to configure separations and dependencies in pursuit of public goods").

89. John Law & Annemarie Mol, *Notes on Materiality and Sociality*, 43 SOCIO. REV. 274 (1995).

90. ANANNY, *supra* note 8, at 61.

91. Carroll, *supra* note 4; C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 250 (1989) ("From the perspective of some conceptions of freedom, these economic forces and industrial structures threaten press freedom to an equal or greater extent than government does.").

institutions exercise and wield arguments about their freedom.⁹² My point is that press institutions deploy their own institutional values to shape, channel, and influence the law of press freedom in sometimes unexpected ways.⁹³

Seeing the press's freedom in relation to that of others opens up new domains for critical analysis. Freedom from regulation is crucial to the protection of the press's autonomy and its ability to fulfill its watchdog role. But the scholarly focus on institutional autonomy and freedom from regulation threatens to miss broader pathologies in how the press wields its freedom and the relational implications of its exercise of legal rights. Press freedom is advanced and made at the ground level when press organizations choose whether and how to advocate for their interests. It is these ground level, strategic decisions that most clearly illustrate the press's legal priorities and agenda.

II. THE IDEOLOGY OF PRESS FREEDOM

Theoretical accounts of the press's democratic function justify the press's institutional autonomy and explain journalism's privileged position. They hold that the press is uniquely situated to hold the powerful to account and thus to advance important public interests—whether through legal advocacy or through journalism itself. As this Part shows, these accounts center on three basic elements of the press's function: that the press as a collective institution serves an essential democratic role, that it facilitates government accountability, and that it advances expressive rights for all speakers.

A. Democratic Governance

Democratic governance theories see “the press” (however defined) as playing a crucial role in our system of government.⁹⁴ Rather than focusing on *who* the press is, however, democratic governance theories focus on the *impact* of press coverage.

The democratic governance-focused theories of press freedom view the press as more than just a “collection” of journalists who are each contributing to the marketplace of ideas as individual speakers.⁹⁵ Rather, as RonNell Andersen Jones

92. Cf. ANANNY, *supra* note 8 (investigating how press institutions use legal, normative, and other tools that set them apart from other communications institutions).

93. Howard Erlanger, Bryant Garth, Jane Larson & Elizabeth Mertz, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 357 (2005) (describing how “new governance” “reinvent[s] governance from the ‘bottom up’ by rejecting ancient administrative strategies of command and control and replacing them with a continuous dynamic process governed by the relevant stakeholders”); Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673, 674 (2010) (describing the turn away from “an image of law that is state-centered, unified, and hierarchical” toward one that is “decentered, fragmented, and heterarchical”).

94. Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1102 (2016) (“[T]here can be no serious doubt that the institutional function of freedom of the press has always been understood to be to preserve democracy and check government tyranny.”).

95. RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U.

has written, the press performs “critically important speech activities” that are “organizational and surrogate in nature.”⁹⁶ One classic perspective views the media as advancing democratic values in some instrumental way by conveying information to an audience (the “public”), which then decides what to do with that information.⁹⁷ This theory is related to broader conceptions of free expression that center “democratic deliberation” as a core speech value.⁹⁸ The classic perspective thus views the press, collectively, as an essential mechanism for informing the public and shaping public opinion.⁹⁹

The conception of the press as a truth-teller serving the public interest, rather than an arm of the public itself, rests on a core belief that reporting and journalism provide uniquely credible and trustworthy accounts of public issues and serve as a “vital source of public information.”¹⁰⁰ In turn, the press’s credibility is said to depend on its objectivity.¹⁰¹ But news was never required to be a “neutral conduit of information between the people and their elected leaders.”¹⁰² Journalists are not simply outlets for official reports; instead, as Sonja West has described the press’s role, it “filter[s], analyz[es], and translat[es] information for its audience.”¹⁰³

Closely related is the idea that the press plays a unique role in advancing government accountability and limiting abuses of power.¹⁰⁴ As Vince Blasi has put it, the press can “check[] the abuse of power by public officials.”¹⁰⁵ In this respect, journalism may function as a form of countervailing power that influences government (mis)conduct. Journalism organizations have recognized this “special obligation to serve as watchdogs over public affairs and government.”¹⁰⁶ For its part, the Supreme Court has recognized the accountability function of the press as a “powerful antidote to any abuses of power by governmental officials.”¹⁰⁷

COLO. L. REV. 499, 528 (2019).

96. *Id.* at 528–29.

97. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”).

98. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 29 (2004).

99. Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 750 (2014) [hereinafter West, *Stealth*]; *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (arguing that the average person “relies necessarily upon the press to bring to him in convenient form the facts” of government functions).

100. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

101. MATTHEW PRESSMAN, *ON PRESS: THE LIBERAL VALUES THAT SHAPED THE NEWS* 60 (2018).

102. Stewart, *supra* note 55, at 634.

103. West, *Stealth*, *supra* note 99, at 751.

104. For the most compelling articulation of this idea, see generally Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOC. INQUIRY 521 (1977).

105. *Id.* at 528; see also Jones, *What the Supreme Court Thinks*, *supra* note 12, at 259 (describing journalism’s watchdog function).

106. SOCIETY OF PROFESSIONAL JOURNALISTS, ETHICS CODE, <https://www.spj.org/ethicscode.asp> [<https://perma.cc/A754-GH2V>].

107. *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966) (describing the press as “a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were

But whether the news industry meaningfully fulfills this function has long been a topic of sharp debate.¹⁰⁸ Even if we credit press institutions with a basic capacity to support democratic governance through informing the citizenry, press freedom scholars too readily romanticize the press's accountability-forcing role and the bygone days of dogged investigative reporting.¹⁰⁹

1. *The Myth of Investigative Journalism*

The press's watchdog and accountability functions underpin its democratic promise. These functions have a vaunted social and political history. During what Martha Minow calls the "golden age of journalism," the press was crucial to reporting on the Vietnam War, the civil rights movement, and Watergate.¹¹⁰ More recently, investigative journalists have exposed key stories about the opioid epidemic, unsafe working conditions, lobbying and corruption, and secret surveillance by the U.S. government.¹¹¹ Concerns about the evisceration of local news have likewise centered on the importance of investigative journalism and its role in democratic decision-making.¹¹²

selected to serve"); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (articulating the "responsibility of the press to report the operations of government").

108. WALTER LIPPMANN, *LIBERTY AND THE NEWS* 12 (1920) ("So long as there is interposed between the ordinary citizen and the facts a news organization determining by entirely private and unexamined standards, no matter how lofty, what he shall know, and hence what he shall believe, no one will be able to say that the substance of democratic government is secure.").

109. W. JOSEPH CAMPBELL, *GETTING IT WRONG* 4, 10 (2016) (describing how "media-driven myths" "tend to distort understanding of the role and function of journalism in American society, conferring on the news media far more power and influence than they necessarily wield"); *see infra* Section II.A.1 (discussing the fall of investigative reporting).

110. MINOW, *supra* note 35, at 4 (defining the "golden age" as the period between 1960 and 1980); *see also* Paul Steiger, *A Closer Look: Three Golden Ages of Journalism?*, PROPUBLICA, <https://www.propublica.org/article/a-closer-look-three-golden-ages-of-journalism> [<https://perma.cc/TAW5-QHBL>] (arguing that the "golden era in American journalism" spanned the mid 1950s-mid 1970s).

111. Eric Eyre, *780M Pills, 1,728 Deaths*, CHARLESTON GAZETTE-MAIL (Dec. 18, 2016), https://www.wvgazettemail.com/news/legal_affairs/drug-firms-poured-780m-painkillers-into-wv-amid-rise-of-overdoses/article_99026dad-8ed5-5075-90fa-adb906a36214.html [<https://perma.cc/9UDT-3VFS>]; Corey G. Johnson, Rebecca Woolington & Eli Murray, *Poisoned Part 1: The Factory*, TAMPA BAY TIMES (Mar. 24, 2021), <https://projects.tampabay.com/projects/2021/investigations/lead-factory/gopher-workers/> [<https://perma.cc/RC65-SDTG>]; Susan Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff*, WASH. POST (Dec. 29, 2005), <https://www.washingtonpost.com/archive/politics/2005/12/29/the-fast-rise-and-steep-fall-of-jack-abramoff/56987391-1b47-414d-866e-531bc2b0a603/> [<https://perma.cc/XJ2S-G2ZA>]; Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 29, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<https://perma.cc/T8LP-TSVY>]; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (Jun. 7, 2013, 10:51 AM), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html [<https://perma.cc/2L8D-H4ZY>].

112. MARGARET SULLIVAN, *GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY* (2021); MINOW, *supra* note 35, at 25 ("When newspapers close, local

It is easy to focus on these successes and applaud the press for its democratic achievements. With that said, this rosy view of watchdog journalism was never fully accurate. Many newspapers supported the internment of Japanese-Americans during the Second World War.¹¹³ As Gene Roberts and Hank Klibanoff document, many local Southern papers in the civil rights era were pro-segregation to their core and embraced local officials' efforts to clamp down on critical coverage by "Yankee" institutions.¹¹⁴ And, with limited exceptions, United States newspapers scarcely covered the nation's role in the "dirty wars" and the government's support of genocidal dictatorship in South and Central America during the 1970s and 1980s.¹¹⁵

Today, watchdog journalism is under threat amidst the collapse of the news industry. Investigative journalism comprises only a small and shrinking portion of the overall news ecosystem. As Erin Carroll has pointed out, expensive watchdog reporting is "often the first thing newsrooms slash" when faced with budget pressures.¹¹⁶ In economic terms, "changes in the costs of delivery have reduced the ability of news outlets to cover the fixed costs of creating accountability work."¹¹⁷

Shifting newsroom norms also call into question the heroic ideal of the intrepid reporter exposing local corruption, malfeasance, and misconduct. Digital journalism's use of metrics and analytics—what Caitlin Petre calls "the traffic game"—has profound consequences for journalists and journalism, discouraging investigative work and encouraging in its place journalism that drives advertising revenue.¹¹⁸ In her ethnographic study of Gawker Media, Petre finds that the time journalists spent pursuing traffic, pageviews, and engagement cost them the time

government becomes more expensive to taxpayers, no doubt reflecting the absence of monitoring of government salaries, debt, and other expenses.").

113. Lloyd E. Chiasson, *The Japanese-American Encampment: An Editorial Analysis of 27 West Coast Newspapers*, 12 NEWSPAPER RES. J. 92 (1991); Ronald Bishop, *To Protect and Serve: The "Guard Dog" Function of Journalism in Coverage of the Japanese-American Internment*, 2 JOURNALISM & COMMUN MONOGRAPHS 64 (2000); Brian Thornton, *Heroic Editors in Short Supply During Japanese Internment*, 23 NEWSPAPER RES. J. 99 (2002); Lynn Thiesmeyer, *The Discourse of Official Violence: Anti-Japanese North American Discourse and the American Internment Camps*, 6 DISCOURSE & SOC'Y 319 (1995).

114. GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION*, 232–35 (2008) (describing how Birmingham newspapers "seemed less interested in competing for news than topping each other in defending Birmingham and 'the Southern way of life'").

115. Kevin Young, *Washing U.S. Hands of the Dirty Wars: News Coverage Erases Washington's Role in State Terror*, 46 NACLA REP. ON THE AMS. 58 (Jan. 2013); CounterSpin, *On Guatemala, The Press Has Blood on Its Hands*, FAIR (May 1, 1999), <https://fair.org/extra/on-guatemala-the-press-has-blood-on-its-hands/> [https://perma.cc/3NB7-598T].

116. Carroll, *supra* note 4, at 584.

117. JAMES HAMILTON, *DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 17 (2016).

118. CAITLIN PETRE, *ALL THE NEWS THAT'S FIT TO CLICK* 60–61 (2021) (describing how "the traffic game has reshaped the operating logic of journalism in the digital age").

necessary to pursue stories with “greater civic value.”¹¹⁹ More generally, the reality of digital advertising has made “traffic-driven editorial work” a necessity for news institutions to survive.¹²⁰ As the discussion below illustrates, news institutions have rethought some of the foundational journalistic ideals in light of these new financial imperatives.¹²¹

2. *The Myth of Local News*

We likewise lionize the democratic significance of local news at our peril.¹²² Legal scholars decry the emergence of “news deserts”—locations without “reliable news and information to make wise decisions” about issues of public importance.¹²³ Many scholars suggest that local news is important because it saves taxpayer dollars.¹²⁴ Others are concerned that misinformation and disinformation are rushing in to fill the void left behind by shuttered newspapers and authoritative news sources.¹²⁵

But local news also has an unacknowledged dark side: the media has “systematically marginalized communities and participated in retaining a problematic status quo” at the local level.¹²⁶ Perhaps most damning, when it comes to journalism on crime, protest, and race, the press routinely fails to fulfill its self-proclaimed role as a neutral, objective, and detached observer of events—or as a watchdog holding power to account. Instead, the local press tends to reinforce power disparities by distorting news coverage, repeating official points of view, and catering to primarily white audiences.

Crime coverage exemplifies these deficiencies. Local television coverage of crime often portrays racialized representations of crime and criminality, perpetuates negative racial stereotypes, and shapes public opinion in favor of more aggressive law enforcement strategies.¹²⁷ Multiple studies have shown that local television

119. *Id.* at 61.

120. *Id.* at 126; *see also* USHER, *supra* note 4 at 133 (“Digital advertising is a vibrant industry, just not for news publishers.”).

121. BAKER, *supra* note 78, at 196 (“Market forces could conceivably cripple the press’s performance of the checking function. Competitive, profit-oriented pressures could lead media entities to abandon expensive, investigative journalism and replace it with cheaper, routine beat reporting, or even cheaper ‘press-release’ or wire service journalism.”).

122. USHER, *supra* note 4, at 19 (“This romanticizing of the local newspaper is deeply problematic and somewhat ahistorical.”).

123. PENNY MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? (2020), <https://www.usnewsdeserts.com/reports/news-deserts-and-ghost-newspapers-will-local-news-survive/> [<https://perma.cc/9PGX-Y4VN>]; *see also* MINOW, *supra* note 35, at 25 (identifying “cascading” effects of local news deserts on democratic governance).

124. Carroll, *supra* note 4, at 585; MINOW, *supra* note 35, at 25; Erick Franklund, *Democracy Dies in Silicon Valley: Platform Antitrust and the Journalism Industry*, 95 S. CAL. L. REV. 161, 185 (2021).

125. Franklund, *supra* note 124, at 186.

126. USHER, *supra* note 4, at 238.

127. Franklin D. Gilliam, Nicholas A. Valentino & Matthew N. Beckmann, *Where You Live and What You Watch: The Impact of Racial Proximity and Local Television News on Attitudes about Race and*

news tends to disproportionately cover crime stories with Black and Latino perpetrators.¹²⁸

Local newspapers exhibit some of the same tendencies.¹²⁹ Scholars of journalism and communications have explored how news organizations “frame” stories in ways that “call attention to some aspects of reality while obscuring other elements.”¹³⁰ Crime reporting “typically reinforces stereotypes of blacks and other nonwhites, particularly Latinos, and contributes to more-generalized racial antagonism.”¹³¹ To this day, what Allissa Richardson calls “the myth of inherent black criminality” continues to recirculate within news coverage.¹³²

Despite the ideal of the press as a vehicle for promoting accountability, journalism scholars have also demonstrated that, in covering crime, newsrooms tend to fall into a series of traps: “overreliance on public officials, overuse of standardized story scripts and familiar stereotypes, and ‘pack journalism’—the tendency of reporters from nominally competitive news organizations to converge on the same framings.”¹³³ As Danielle K. Brown has written, breaking-news reporters typically rely on official sources, giving police “an opportunity to shape the initial version of the event” being reported, often before a victim can share their own version.¹³⁴

This tendency can easily lead the press astray. In the aftermath of the Atlanta spa shootings in 2021, for example, the mainstream press parroted the account of the shootings given by the sheriff’s office, which “uncritically echoed the suspect’s claims that he suffered from sexual addiction, and which minimized the role of racial

Crime, 55 POL. RES. Q. 755 (2002); Franklin D. Gilliam & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AMER. J. POL. SCI. 560 (2000); Travis L. Dixon, *Good Guys Are Still Always in White? Positive Change and Continued Misrepresentation of Race and Crime on Local Television News*, 44 COMM. RES. 775 (2017); Travis L. Dixon, *Crime News and Racialized Beliefs: Understanding the Relationship Between Local News Viewing and Perceptions of African Ams. and Crime*, 58 J. COMM. 106 (2008); Eileen E. S. Bjornstrom, Robert L. Kaufman, Ruth D. Peterson & Michael D. Slater, *Race and Ethnic Representations of Lawbreakers and Victims in Crime News: A National Study of Television Coverage*, 57 SOC. PROBS. 269 (2010).

128. Bjornstrom, *supra* note 127, at 3–4 (summarizing the literature).

129. Valerie J. Callanan, *Media Consumption, Perceptions of Crime Risk and Fear of Crime: Examining Race/Ethnic Differences*, 55 SOCIO. PERSP. 93 (2012); Richard J. Lundman, *The Newsworthiness and Selection Bias in News About Murder: Comparative and Relative Effects of Novelty and Race and Gender Typifications on Newspaper Coverage of Homicide*, 18 SOCIO. F. 357 (2003).

130. Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 55 (1993).

131. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 94 (2008).

132. ALLISSA V. RICHARDSON, BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, AND THE NEW PROTEST #JOURNALISM 60 (2020).

133. Entman & Gross, *supra* note 131, at 95.

134. Danielle Kilgo, *Being Skeptical of Sources is a Journalist’s Job—But It Doesn’t Always Happen When Those Sources Are the Police*, NIEMANLAB (Apr. 19, 2021, 8:30 AM), <https://www.niemanlab.org/2021/04/being-skeptical-of-sources-is-a-journalists-job-but-it-doesnt-always-happen-when-those-sources-are-the-police/> [https://perma.cc/9XZW-Z8CL].

animus in his motivation for the killing spree.”¹³⁵ By the time the media corrected course, a series of stories had already given airtime to the killer’s own explanation (sex addiction), repeating longstanding stereotypes that linked Asian spas to “illicit sex work,” and “input[ed] criminality” to the victims.¹³⁶

These traps often surface when press organizations cover police killings and the protests that occur afterwards. Coverage of police killings tends to rely heavily on official sources who have a clear incentive to mislead, obfuscate, or outright lie about the circumstances of a death. Consider the official account of the murder of Laquan McDonald by a white police officer in Chicago, which claimed that the teenager had lunged at police with a knife.¹³⁷ Early reporting on the killing repeated the official version of the story along with “one-sided” headlines that referred to McDonald only as a nameless, dangerous “boy” or “teen.”¹³⁸ After a whistleblower came forward, a legal battle for footage from a police dashboard camera ensued, which prompted news organizations to revisit their initial coverage and reframe the story as one about government accountability.¹³⁹ That footage ultimately showed officer Jason Van Dyke opening fire on the back of an unarmed McDonald as he walked away.¹⁴⁰

News coverage of protests similarly tends to rely on official sources, “delegitimize” and “demonize” protest groups, and frame stories about demonstrations as ones about crime.¹⁴¹ Despite a perception that the movement for

135. Shinhee Kang, *Covering the Atlanta Massacre from Inside the Korean Community*, COLUM. JOURNALISM REV. (Mar. 23, 2021), https://www.cjr.org/local_news/atlanta-shooting-local-korean-news.php [https://perma.cc/5BHS-DULB].

136. *Id.*

137. Alexandria Neason, “Officials Say...”, COLUM. JOURNALISM REV. (2019), https://www.cjr.org/special_report/officials-say-chicago-police-joshua-beal.php [https://perma.cc/7JSK-QT4U]; Hannah Bloch-Wehba, *Visible Policing: Tech., Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 969–970 (2021).

138. Drew Shenkman & Kelli Slade, *Police Reports Shouldn’t Set the News Agenda: A Guide to Avoiding Systemic Racism in Reporting*, AMER. BAR ASS’N (Jan. 22, 2021), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/police-reports-shouldnt-set-news-agenda-guide-avoiding-systemic-racism-reporting/ [https://perma.cc/XGR6-RYNF]; Quinn Ford, *Cops: Boy, 17, Fatally Shot by Officer After Refusing to Drop Knife*, CHI. TRIB. (Oct. 21, 2014, 4:13 PM), <https://www.chicagotribune.com/news/breaking/chi-chicago-shootings-violence-20141021-story.html> [https://perma.cc/8UCQ-FQ4D]; RICHARDSON, *supra* note 132, at 61 (citing Robert Entman’s argument that “namelessness dehumanized black suspects and reinforced the idea that bad individual black behavior represented a larger pattern of communal deviance”).

139. Curtis Black, *How Chicago Tried to Cover up a Police Execution*, CHI. REP. (Nov. 24, 2015), <https://www.chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/> [https://perma.cc/LX9S-NF9K]; Mary Mitchell, *Questions Surround a Chicago Police Fatal Shooting of a Teen*, CHI. SUN-TIMES (Jun. 24 2016, 9:37 AM), <https://chicago.suntimes.com/2016/6/24/18448853/questions-surround-a-chicago-police-fatal-shooting-of-a-teen> [https://perma.cc/8ATR-K6CJ].

140. Donald F. Tibbs & Tryon P. Woods, *Requiem for Laquan McDonald: Policing as Punishment and Abolishing Reasonable Suspicion*, 89 TEMP. L. REV. 763, 774–75 (2017).

141. Douglas M. McLeod, *News Coverage and Social Protest: How the Media’s Protect Paradigm Exacerbates Social Conflict*, 2007 J. DISP. RESOL. 185, 186–87 (2007).

police accountability is gaining traction, “mainstream outlets have consistently marginalized protests” against police violence.¹⁴² For example, news reporting on Black Lives Matter (BLM) protests following the death of Michael Brown in Ferguson, Missouri tended to “characterize the protests as disruptive, dangerous, and a disservice to the normal order of the cities in which they occurred.”¹⁴³ This kind of coverage is also racialized: protests against anti-Black racism are more frequently reported within a “riot” framing than protests regarding other topics.¹⁴⁴ Moreover, news coverage of protests against anti-Black racism tends to rely more heavily on official accounts than coverage of other kinds of protests, allowing police a greater voice in the coverage and preventing protestors from “speak[ing] for themselves and . . . contribut[ing] to a more objective narrative.”¹⁴⁵ As Joy Leopold and Myrtle Bell have argued, “When journalists allow those in power to define protests in and on their terms, the protestors are characterized by their deviance from societal norms rather than by their struggle for representation, equality, or change.”¹⁴⁶

3. *The Myth of Objectivity*

The voluminous scholarship discussing racism in news coverage illustrates just how far news coverage is from achieving its ideal of objective journalism. Much of journalism’s appeal as a mechanism for promoting accountability, discouraging corruption, and informing the public is tethered to the objectivity norm. But the objectivity norm itself is contested, elusive, and potentially unattainable.¹⁴⁷ Despite the many grounds on which scholars of communications and journalism have critiqued the commitment to objectivity, little of this criticism has made its way into legal scholarship.

Like other decisions about how to cover the news, the ideal of objectivity is closely linked to a newsroom’s financial viability rather than a democratic mission to inform the public as a whole. The principle of objectivity has long been

142. Danielle K. Kilgo & Rachel R. Mourão, *Protest Coverage Matters: How Media Framing and Visual Communication Affects Support for Black Civil Rights Protests*, 24 MASS COMM. & SOC’Y 576, 591 (2021).

143. Joy Leopold & Myrtle P. Bell, *News Media and the Racialization of Protest: An Analysis of Black Lives Matter Articles*, 36 EQUAL., DIVERSITY, & INCLUSION: AN INT’L J. 720, 727 (2017).

144. Danielle K. Kilgo & Summer Harlow, *Protests, Media Coverage, and a Hierarchy of Social Struggle*, 24 INT’L J. PRESS/POL. 508, 521 (2019); see also RICHARDSON, *supra* note 132, at 68 (drawing a distinction between news coverage of the Women’s March in 2017 and coverage of the Black Lives Matter movement).

145. Kilgo & Harlow, *supra* note 144, at 522.

146. Leopold & Bell, *supra* note 143, at 722.

147. See, e.g., Anthony Smith, *Is Objectivity Obsolete?*, 19 COLUM. JOURNALISM REV. 61; James W. Carey, *Technology and Ideology: The Case of the Telegraph*, 8 PROSPECTS 303 (1983); Satu Repo, *Journalistic Objectivity, the Discourse on Democracy, and the Birth of the Popular Press* (1986) (Ph.D dissertation, University of Toronto) (ProQuest); Schudson, *supra* note 23; Matt Carlson, *News Algorithms, Photojournalism and the Assumption of Mechanical Objectivity in Journalism*, 7 DIGITAL JOURNALISM 1 (2019); Rosen, *supra* note 53.

connected to the financial imperative to “appeal to the broadest possible audience in response to newly achievable circulation scales made possible by improved printing technologies.”¹⁴⁸

Objectivity comes at a potential cost to democracy. Some scholars have suggested that the commitment to journalistic objectivity can lead press institutions to serve as a mouthpiece for antidemocratic forces.¹⁴⁹ Ron Smith describes how newspaper reporters during the McCarthy era routinely repeated, rather than debunked, McCarthy’s own false claims in an effort to maintain a respectable impartiality—echoing contemporary debates about whether and how news organizations ought to cover President Donald J. Trump’s self-aggrandizement, falsehoods, and Tweets.¹⁵⁰ As the McCarthy era demonstrated, mechanical balance can produce “lazy journalism,” leading reporters to “make all commentators seem equally credible.”¹⁵¹

In the so-called post-truth era, commitments to objectivity and impartiality easily slide into counterproductive both-sidesism.¹⁵² Contemporary media observers have noted that right-wing propagandists have taken advantage of “the preference for objectivity in political coverage” to ensure that their propaganda reaches a mainstream audience.¹⁵³ But legal scholarship has, in the main, failed to reckon with the implications of this era for the press itself, or to acknowledge the possibility that the commitment to objectivity itself could bear some

148. Carlson, *supra* note 147, at 4; *see also* Schudson, *supra* note 23, at 170 (describing how commercial competition among nineteenth-century newspapers had fostered an appreciation of accuracy in news).

149. RON SMITH, ETHICS IN JOURNALISM 44 (2008); *see also* Kyle Pope, *It’s time to Rethink How We Cover Trump*, COLUM. JOURNALISM REV. (Jan. 22, 2018), <https://www.cjr.org/politics/trump-coverage-inauguration-press-media.php> [<https://perma.cc/6X6M-HQA2>]; Jon Allsop, *After 10,000 ‘False or Misleading Claims,’ Are We Any Better at Calling Out Trump’s Lies?*, COLUM. JOURNALISM REV. (Apr. 30, 2019), https://www.cjr.org/the_media_today/trump_fact-check-washington_post.php [<https://perma.cc/KRR5-Y2K6>].

150. SMITH, *supra* note 149, at 44.

151. *Id.* at 45, 46.

152. *Looking at ‘Bothsidesing,’* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/bothsidesing-bothsidesism-new-words-were-watching> [<https://perma.cc/G5F4-7LL8>] (last visited Oct. 22, 2023).

153. Greg Sargent, *Opinion, The 2016 Nightmare Is Already Repeating Itself*, WASH. POST (May 14, 2020, 10:26 AM), <https://www.washingtonpost.com/opinions/2020/05/14/2016-nightmare-is-already-repeating-itself/> [<https://perma.cc/9YMF-LSL8>]; *see also* Sean Illing, “Flood the Zone with Shit”: How Misinformation Overwhelmed Our Democracy, VOX (Jan. 16, 2020, 9:27 AM), <https://www.vox.com/policy-and-politics/2020/1/16/20991816/impeachment-trial-trump-bannon-misinformation> [<https://perma.cc/Z86T-CUNF>]; Sean Illing, *How Trump Should Change the Way Journalists Understand “Objectivity,”* VOX (Aug. 4, 2020, 8:50 AM), <https://www.vox.com/policy-and-politics/2020/8/4/21306919/donald-trump-media-ethics-tom-rosenstiel> [<https://perma.cc/YXK3-UUP7>]; Chris Quinn, *Ignoring False Statements and Stunts by Politicians Is Working Well So Far: Letter from the Editor*, CLEVELAND.COM (July 10, 2021), <https://www.cleveland.com/news/2021/07/ignoring-false-statements-and-stunts-by-politicians-is-working-well-so-far-letter-from-the-editor.html> [<https://perma.cc/M2UB-CP2D>].

responsibility.¹⁵⁴

The veneer of objectivity can also cloak injustice and inequity. Consider, for example, the common practice in the 1940s, 1950s, and 1960s of reporting the names of men arrested in raids on gay bars.¹⁵⁵ More recently, newspapers have begun to rethink the common practice of publishing online carousels of mugshot photographs, a “staple” of online journalism that yielded ad revenues for news sites but disproportionately affected people of color.¹⁵⁶ In litigation in the Sixth Circuit, the *Detroit Free Press*—backed by multiple coalitions of press institutions as amici curiae—fought for the right to obtain mugshots under the federal Freedom of Information Act, arguing that the photos were an objective “part of the public record” with no significant privacy implications for the individuals pictured.¹⁵⁷ In both instances, one might fairly call these kinds of publication decisions consistent with the objectivity norm, but they also reify existing social prejudices and disparities.¹⁵⁸

Claims to objectivity can also reinforce existing hierarchies both in reporting and within journalistic institutions. The relationship between journalistic “objectivity” and the preference for “mainstream” (white, straight, cis, and male) perspectives is not new. As Matthew Pressman recounts, many Black journalists in the late 1960s and early 1970s “felt that objectivity was often synonymous with coverage that represented the mainstream white perspective.”¹⁵⁹ *New York Times* editors distrusted the work of Grace Lichtenstein, a “devoted feminist” and avowed objective journalist, repeatedly accusing her of “advocacy” and denying her request to cover the 1977 National Women’s Conference because, they asserted, she could not cover the event in a sufficiently objective way.¹⁶⁰ As one scholar has put it, “professional ideologies” “may reinforce such white practices and ideologies”

154. One notable exception is Ronnell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, *supra* note 2. But Jones and Grow Sun focus on the implications of the “post-truth” era for audiences rather than for press institutions. See also Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535, 537 (2020) (“[T]here is no generally accepted arbiter whom a broad spectrum of the public will rely upon to resolve public factual disputes.”)

155. Chris Johnson, *Before Stonewall, Newspapers Complicit with Police in Gay Bar Raids*, WASHINGTON BLADE: LGBTQ NEWS, POLITICS, LGBTQ RIGHTS, GAY NEWS (Jun. 25, 2019), <https://www.washingtonblade.com/2019/06/25/before-stonewall-newspapers-complicit-with-police-in-gay-bar-raids/> [https://perma.cc/APK7-RS5W].

156. Keri Blakinger, *Newsrooms Rethink a Crime Reporting Staple: The Mugshot*, MARSHALL PROJECT (Feb. 11, 2020), <https://www.themarshallproject.org/2020/02/11/newsrooms-rethink-a-crime-reporting-staple-the-mugshot> [https://perma.cc/Y8AG-XR7X].

157. *Detroit Free Press Inc. v. United States Dep’t of Just.*, 829 F.3d 478, 483 (6th Cir. 2016).

158. *Id.* at 482 (“Indeed, viewers so uniformly associate booking photos with guilt and criminality that we strongly disfavor showing such photos to criminal juries.”); see also Sarah Esther Lageson, *Online Criminal Records Trap Americans in a Purgatory of Digital Punishment*, SLATE (June 24, 2020), <https://slate.com/technology/2020/06/criminal-justice-records-online-digital-punishment.html> [https://perma.cc/YS7T-MFKZ].

159. Pressman, *supra* note 101, at 84.

160. *Id.* at 93.

within hiring, promotion, and assignments in the newsroom.¹⁶¹

B. *The Institutional Press*

A pervasive—although by no means unanimous—consensus views the press as an *institution* that is vital to democracy.¹⁶² More than simply a news organization, an individual journalist, or a reporting method, the idea of the press as an “institution” foregrounds its significance within our system of government as an independent democratic force.¹⁶³ As scholar David Anderson put it, the concept of “the press” implies “something to which the collective singular can be properly applied—an institution, or at least a shared mission or common undertaking.”¹⁶⁴ This notion of the “institutional” press, as distinct from the press as an “activity” or a “technology,” has been the subject of lengthy scholarly debate.¹⁶⁵ Nonetheless,

161. TEUN A. VAN DIJK, *ELITE DISCOURSE AND RACISM* 247 (1993) (“Along all social and cognitive dimensions of news gathering, news writing, and management, and in the newsroom, we find the fundamental prevalence of white perspective and dominance.”); *see also* Joshua Benton, *Freedom’s Just Another Word for “Not Sure What to Do,”* NIEMAN LAB (Aug. 2, 2021), <https://www.niemanlab.org/2021/08/freedoms-just-another-word-for-not-sure-what-to-do/> [<https://perma.cc/9QD4-PWC3>] (analyzing NPR’s revised ethics policy, which attempts to give journalists more freedom to advocate for the “freedom and dignity of human beings”); *cf.* LEWIS WALLACE, *THE VIEW FROM SOMEWHERE: UNDOING THE MYTH OF JOURNALISTIC OBJECTIVITY* 34 (“An editor who is white may not see a Black man’s death at the hands of police as anything more than a one-off, a story that might be interesting if it happened near your house but isn’t newsworthy until its impact is proven.”).

162. *See, e.g.*, *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (describing the press’s “essential role in our democracy”); Carroll, *supra* note 4, at 536 (describing how the term “Fourth Estate” “captures qualities that have been definitional for the American press; it is an independent institution that serves as an overseer of and check on the other estates”); Jones & Sun, *Enemy Construction*, *supra* note 2, at 1305 (describing the press as “one of the nation’s core democratic institutions”); *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (“Beyond question, the role of the media is important; acting as the ‘eyes and ears’ of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business . . . [but] the media are not a substitute for or an adjunct of government.”); JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* 253 (1980) (describing how the St. Louis Post-Dispatch commented, after *Mills v. Alabama* was decided, that “no other institution . . . is now so well equipped to alert the public to public issues or to inspire public discussion of them”); ANANNY, *supra* note 8, at 28 (“The press (however it might be constitutionally defined at any moment in history) is thus an institutional exemplar in a system of free speech designed for public needs.”); *see also* 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, 461–62 (2012) (distinguishing between the “press-as-industry” or institution, and the press “as a technology”).

163. *See* ANANNY, *supra* note 8, at 59–60 (“[P]ress oversight is always intertwined with visions of democracy.”).

164. Anderson, *supra* note 54, at 442.

165. For examples of the scholarly disagreement, *see id.*; McConnell, *supra* note 62; C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007); Volokh, *supra* note 162; West, *Press Exceptionalism*, *supra* note 8; RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499 (2019); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 810 (1995) (“[T]he First Amendment provides specific protection for institutional speech by the press.”).

many press freedom advocates have taken it as an article of faith. In the wake of the January 6, 2021, attack on the U.S. Capitol, for example, the Reporters Committee for Freedom of the Press decried attacks “targeting reporters” as “the direct result of years of this language stoking fear and hate for one of our most vital institutions.”¹⁶⁶

The view of the press as a collective institution naturally opens up debates about how to distinguish “the press” from other kinds of speakers.¹⁶⁷ Some have argued for a functional approach that defines whether a speaker belongs to the “press” based on their social role. Sonja West, for example, has argued that “press speakers are those who fulfill the unique constitutional functions of the press . . . gathering newsworthy information, disseminating it to the public, and serving as a check on the government and powerful people.”¹⁶⁸ In contrast to what West describes as “occasional public commentators,” “the press” has deeper knowledge, makes “editorial decisions” about newsworthiness, and plays more of a “gatekeeper” role.¹⁶⁹

Perhaps not surprisingly, this view of the “institutional” press prioritizes the interests of formal press institutions. As legal academics like to point out, “the press” is the only private business mentioned by name in the Constitution.¹⁷⁰ In a foundational 1974 speech, Justice Potter Stewart pointed to the “daily newspapers and other established news media” as the constitutional guarantors of press freedom.¹⁷¹ As Anderson recognized over two decades ago, although many First Amendment rights “ostensibly” apply to all, it is in reality those “in the publishing business” who stand to benefit the most.¹⁷²

Certainly, it is formal press institutions that can most easily point to their legacies and histories to demonstrate that they are within established “journalistic” borders. Communications theorists call this practice of demarcating the professional identity of journalists “boundary work” or “boundary maintenance.”¹⁷³ Journalists and press organizations draw metaphorical “boundaries” between “real”

166. *Reporters Committee: Attack on U.S. Capitol ‘A Grave Threat to Our Democracy,’* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Jan. 7, 2021), <https://www.rcfp.org/rcfp-us-capitol-attack-statement/> [<https://perma.cc/FYR4-W78R>]. Still, as RonNell Andersen Jones and others have noted, the courts have largely not treated the press as exceptional. Jones, *What the Supreme Court Thinks*, *supra* note 12, at 261.

167. Others have focused on the “press” as a technology or mode of expression rather than a collective institution. *See, e.g.*, Volokh, *supra* note 162, at 463 (arguing that the original meaning of the Press Clause was to protect the press as a technology).

168. West, *Press Exceptionalism*, *supra* note 8, at 2443–44.

169. *Id.* at 2444.

170. MINOW, *supra* note 35, at 1.

171. Stewart, *supra* note 55, at 634.

172. Anderson, *supra* note 54, at 431–32.

173. *See, e.g.*, Scott A. Eldridge II, *Boundary Maintenance and Interloper Media Reaction*, 15 JOURNALISM STUD. 1 (2014); Mark Coddington, *Defending a Paradigm by Patrolling a Boundary: Two Global Newspapers’ Approach to WikiLeaks*, 89 JOURNALISM & MASS COMM’N Q. 377 (Sep. 2012).

journalism and its imitators.¹⁷⁴ As Tim Vos and Joseph Moore have explained, “When outsiders attempt to encroach on professional journalists’ exclusive domain, journalists discursively reinforce the boundaries, guarding their professional territory by rearticulating the characteristics that distinguish journalists from non-journalists.”¹⁷⁵

Yet as economic shifts have eroded newspapers’ bottom lines and threatened their ability to stay afloat, the appeal of the “institutional” press as a “Fourth Estate” or “Fourth Branch” seems increasingly elusive.¹⁷⁶ Technological changes have also made it even more difficult to define the “institutional press” with real precision. As the Internet made it possible for any “stereotypical ‘blogger’ sitting in his pajamas at his personal computer posting on the World Wide Web” to publish,¹⁷⁷ many scholars gave up on the idea of being able to define “the press” as a category with any true cohesion.¹⁷⁸

Although the boundaries around the press have faded, press freedom scholarship and advocacy continue to see the interests of the news industry as congruent with, or perhaps even coextensive with, interests in journalism, newsgathering, and an informed democratic public. As a practical matter, formal press institutions have always been able to plausibly claim membership in the “institutional” press, while individuals more akin to the blogger or the “lonely pamphleteer” must fight for inclusion.¹⁷⁹ The idea that “real” journalism serves a different (and more important) function than non-journalism is also reflected, at times, in journalists’ own conceptions of the “indispensable” social and political function that they perform.¹⁸⁰

Yet actors outside of the news industry increasingly cover important public interest stories, in part because the press has proven so willing to accept police

174. See generally C. Anderson & M. Schudson, *Objectivity, Professionalism, and Truth Seeking*, in THE HANDBOOK OF JOURNALISM STUDIES 1, 136 (K. Wahl-Jorgensen & T. Hanitzsch eds., 2019) (describing “journalism’s troubled professional project, the relationship between the objectivity norm and that project, and the manner in which journalists attempt to forge a journalistic jurisdiction out of the link between their everyday work and their heavily qualified claim to possess a form of professionalized knowledge”); Jane B. Singer, *Out of Bounds: Professional Norms as Boundary Makers*, in BOUNDARIES OF JOURNALISM: PROFESSIONALISM, PRACTICES, AND PARTICIPATION 22–24 (Matt Carlson & Seth C. Lewis eds., 2015) (describing how professional norms enable “real” journalists to distinguish themselves from outsiders).

175. Tim P. Vos & Joseph Moore, *Building the Journalistic Paradigm: Beyond Paradigm Repair*, JOURNALISM 3, 19 (2018).

176. Carroll, *supra* note 4, at 536 (describing how the term “Fourth Estate” situates the press alongside the government); see also DOUGLASS CATER, THE FOURTH BRANCH OF GOVERNMENT (1959) (describing the press as a “Fourth Branch” of government).

177. In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005), superseded, 438 F.3d 1141 (D.C. Cir. 2006).

178. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1053 (2011).

179. *Id.*

180. Matt Carlson, *Metajournalistic Discourse and the Meanings of Journalism: Definitional Control, Boundary Work, and Legitimation*, 26 COMM. THEORY 349 (2015).

narratives. In the context of police violence and repression, cell-phone videos and bystander footage play a significant role in tilting the balance of power between law enforcement and those who are policed.¹⁸¹ Allissa Richardson’s incisive study *Bearing Witness While Black* identifies several reasons why Black activists engage in “journalistic labor” to correct the missteps of the institutional press in covering police killings of Black people: to “revise news narratives” and to “see the movement (and victims of fatal police shootings) redeemed in mainstream media.”¹⁸²

Despite the obvious and growing significance of citizen journalists, press institutions continue to view them as having a lesser sort of status. In 2021, Darnella Frazier—who has struggled with the trauma of having witnessed and recorded Derek Chauvin’s murder of George Floyd—was awarded an honorary Pulitzer Prize for her recording of the killing, “highlighting the crucial role of citizens in *journalists’* quest for truth and justice.”¹⁸³ Even in honoring Frazier, the Pulitzer subordinated the role of her witnessing to that of the journalists professionally engaged in a “quest for truth and justice,” as if “citizens” were merely sources or adjuncts on this quest.

C. Private Enterprise, Public Service

Finally, there is a widespread perception, both popular and scholarly, that the press advances expressive rights that redound to the public’s benefit. As RonNell Andersen Jones has described, press freedoms “rise and fall” alongside expressive rights more generally.¹⁸⁴ The concept of the press as an institution uniquely equipped to advance expressive rights is a pragmatic one. The argument is not that “press freedom” inevitably lends itself to the expansion of expressive rights more generally.¹⁸⁵ Rather, as Jones has argued, “newspapers and traditional media companies have played a critical role as legal instigators and enforcers,” litigating significant cases about constitutional doctrine and open records.¹⁸⁶

On this view, the kinds of fundamental expressive freedoms for which press institutions often fight tend to trickle down for the public benefit as well.¹⁸⁷

181. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016).

182. RICHARDSON, *supra* note 132, at 54.

183. Darnella Frazier, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/darnella-frazier> [<https://perma.cc/WM8Q-GYFQ>]; Versha Sharma, *Darnella Frazier, Teen Who Filmed George Floyd’s Murder, Speaks Out About Her Trauma*, TEEN VOGUE (May 26, 2021), <https://www.teenvogue.com/story/teen-recorded-george-floyd-murder-statement> [<https://perma.cc/3G5Q-C8D3>] (calling the event a “traumatic life-changing experience”).

184. Jones, *supra* note 12, at 269.

185. See McConnell, *supra* note 62, at 445–46 (“We cannot overrule *Citizens United* by constitutional amendment without either endangering the right of the press to editorialize or drawing a line for the first time between a privileged class of recognized journalists who enjoy the freedom to publish, and the rest of us who do not.”).

186. Jones, *supra* note 5, at 559.

187. *Id.* at 571 (“A sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively

Commitments to the foundational values of journalism have led news organizations to pursue certain kinds of legal action to advance constitutional and statutory protections for free expression, access to information, and open government.¹⁸⁸ Press institutions have long played a vital role in challenging prior restraints on First Amendment grounds.¹⁸⁹ Press institutions have also successfully fought to expand and enforce the constitutional right of access to government proceedings and records.¹⁹⁰ Similarly, media organizations have engaged in affirmative litigation to broadly enforce state and federal open records laws.¹⁹¹

Because of the outsized role that news organizations have played in shaping the law of free expression, the news industry's legal interests are also often seen as identical to—or at least aligned with—the public interest. As Jones argues, media litigation has indisputably “served newspapers’ overarching business model but also unquestionably resulted in greater public good.”¹⁹² Jones points to successful legal battles against censorship, restraint, and opacity as evidence that press freedom benefits the public as a whole.¹⁹³ In Jones’s view, successful newspaper litigation is a win-win-win: a win for the business, a win for the journalistic function, and a win for the public.¹⁹⁴

Legal scholars also see the press as a particularly clear advocate for and beneficiary of “public” rights.¹⁹⁵ For example, in a series of cases in the 1970s and 1980s, local newspapers challenged routine closures of criminal proceedings.¹⁹⁶

fought for fundamental democratic principles that had public benefits beyond the scope of the individual litigants’ successes.”).

188. West, *supra* note 8, at 2444–45 (arguing that the press “expends significant resources defending itself against legal attacks as well as advocating for legal changes that foster information flow”); Jones, *supra* note 5, at 570–71 (describing the press’s role in advancing constitutional rights, open-meetings acts, open-records laws, and federal open government legislation).

189. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (successfully challenging an injunction against the *Saturday Press* on First Amendment grounds); *N.Y. Times v. United States*, 403 U.S. 713 (1971) (successfully challenging government effort to prevent publication of the Pentagon Papers); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (successfully challenging a gag order on First Amendment grounds).

190. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty.*, 464 U.S. 501 (1984); *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty.*, 478 U.S. 1, 2 (1986).

191. See, e.g., *U.S. Dep’t of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *McBurney v. Young*, 569 U.S. 221 (2013); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019); *Capital Newspapers v. City of Albany*, 15 N.Y.3d 759, 906 N.Y.S.2d 808 (2010).

192. Jones, *supra* note 5, at 617.

193. See *id.* at 570.

194. See *id.* at 617.

195. Cristina Carmody Tilley, *I Am a Camera: Scrutinizing the Assumption That Cameras in the Courtroom Furnish Public Value by Operating as a Proxy for the Public*, 16 U. PA. J. CONST. L. 697, 714 (2014).

196. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (criminal trials); *Globe Newspaper Co. v. Super. Ct., Cnty. of Norfolk*, 457 U.S. 596, 606 (1982) (sex offender trials involving juvenile victims); *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside Cnty.*, 464 U.S. 501 (1984) (*voir dire*); *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside Cnty.*, 478 U.S. 1 (1986)

They argued that the First Amendment and common law provided a “public right of access” to criminal trials and, later, to pretrial proceedings.¹⁹⁷ In so doing, these cases advanced a right that would trickle down to all members of the public—including, but not limited to, the press.

Like the “institutional press” and “democratic governance” theories, the trickle-down theory of press freedom sees the interests of the press and public as aligned, if not identical. As Cristina Tilley has argued, the Supreme Court has typically assumed that the press simply enjoys the public right of access to court proceedings “as an agent of the public.”¹⁹⁸ Put another way, the press acts as a “proxy for the public, on the theory that individual members of the press act no differently than individual members of the public would in the same setting.”¹⁹⁹ Conversely, the press is also not constitutionally entitled to any rights that are not afforded to the public.²⁰⁰

The sense of convergence between the press and the public interest is widely shared within journalism. As Erin Carroll points out, journalism is considered by many within its ranks to be a form of “public service.”²⁰¹ As Carroll notes, the sense of public obligation felt by many in the journalistic profession is akin to a “fiduciary duty.”²⁰² Journalism’s “public-service ideal” may be aspirational, but journalists and news institutions frequently resort to it to legitimate their reporting.²⁰³

In law, this notion of the press as a “surrogate” for the public is a legal fiction that itself rests on the press’s institutional and democratic role.²⁰⁴ As the Court reasoned in *Richmond Newspapers*, the press enjoys the same rights as the public, but more practical accommodations: “special seating and priority of entry” facilitate the press’s objective reporting on the happenings in the courtroom.²⁰⁵ The press’s advancement of public rights, then, rests at least in part on the expectation that it relates the news in a public-regarding way, although it is not required to do so.²⁰⁶

But press and public interests might diverge as readily as they converge. Even when there are strong arguments for the right of access, the public interest may be more complicated than it seems at first blush. Consider *Globe Newspaper Co. v. Superior Court*.²⁰⁷ Albert Aladjem stood accused of raping three children under

(preliminary hearing).

197. See, e.g., *Richmond Newspapers*, 448 U.S. at 585 (Brennan, J., concurring).

198. Tilley, *supra* note 195, at 714.

199. *Id.* at 711.

200. *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974).

201. Carroll, *supra* note 4, at 555 (describing the press’s “loyalty” to its readers, its viewers, and the public).

202. *Id.*

203. Deuze, *supra* note 39, at 447–48.

204. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

205. *Id.*

206. Stewart, *supra* note 55, at 634.

207. 457 U.S. 596 (1982).

seventeen, and the *Boston Globe* wanted to cover the trial.²⁰⁸ But a Massachusetts law required closure of the courtroom during a trial for sexual offenses involving children under seventeen.²⁰⁹ The logic of the closure law was that closing the courtroom would protect child victims of sexual offenses and encourage them to “come forward and provide accurate testimony.”²¹⁰ The prosecutors consulted with the victims, who did not object to the courtroom being open.²¹¹ The court closed the courtroom anyway, and the *Globe* challenged the constitutionality of the law.²¹²

The Supreme Court struck the statute down, holding that trial courts must determine “on a case-by-case basis whether the State’s legitimate concern for the well-being of the minor victim necessitates closure.”²¹³ Today, the case stands for the straightforward proposition that the First Amendment does not allow the state to err on the side of protecting the minor victims from the burden of testifying in public; instead, it requires the state to err on the side of publicity.

Globe Newspaper is a widely heralded opinion, but I can’t be the first person to feel a little queasy about its dismissive treatment of the interests of child victims of sex crimes.²¹⁴ The majority gave the state’s interests the back of the hand, describing the interest in shielding the victims from public scrutiny as “speculative” at best.²¹⁵ On the surface, the case-by-case analysis rule seems to adequately balance the welfare of minor victims against the press’s interest in observing their testimony. But, though it is hard to argue with the presumption of openness, it is also hard to accept that the “public interest” is, by definition, better advanced by a for-profit news organization than by a state seeking to shield the child victims of sex crimes from the obligation to testify in public.²¹⁶

Indeed, the press’s advocacy for transparency of the criminal law enforcement system frequently collides with that of criminal defendants and with a public

208. *Globe Newspaper Co. v. Super. Ct., Cnty. Of Norfolk*, 379 Mass. 846, 848, 401 N.E.2d 360, 363 (1980). Aladjem was ultimately acquitted. *Id.* at 849.

209. Massachusetts’s highest court construed the law as requiring closure only during the testimony of a minor victim. *Id.* at 861, *vacated sub nom.* *Globe Newspaper Co. v. Super. Ct., Cnty. of Norfolk*, 449 U.S. 894 (1980).

210. *Globe Newspaper Co.*, 457 U.S. at 609.

211. *See id.* at 599.

212. *See id.* at 600.

213. *Id.* at 609.

214. *Id.* at 609–10.

215. *Id.* at 610. In dissent, Justice Burger took the majority to task for what he called its “cavalier disregard of the reality of human experience.” *Id.* at 617. He added, “It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced.” *Id.* at 617.

216. A handful of student notes and articles have noted the downsides of the opinion in *Globe Newspaper*. *See, e.g.,* Susan Puder, *Protecting the Rape Victim Through Mandatory Closure Statutes: Is It Constitutional?*, 32 N.Y. L. SCH. L. REV. 111, 135 (1987); Arthur S. Frumkin, Note, *The First Amendment and Mandatory Courtroom Closure in Globe Newspaper Co. v. Superior Court: The Press’ Right, the Child Rape Victim’s Plight*, 11 HASTINGS CONST. L.Q. 637 (1984); Kathe Aschenbrenner Pate, Comment, *Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule*, 1993 U. CHI. LEGAL F. 347 (1993).

increasingly interested in reform. For instance, in advocacy and litigation, press coalitions insist that public criminal records are essential mechanisms of holding the government to account.²¹⁷ Media institutions have likewise opposed efforts to limit the availability of criminal histories, arguing that to do so would “hamper the ability of journalists and other members of the public to investigate and critique the workings of the criminal justice system.”²¹⁸ But access to criminal records comes at a particularly high price for those arrested and charged.²¹⁹ Criminally involved individuals are also disproportionately Black, while the media itself remains disproportionately white.²²⁰ Meanwhile, as Jocelyn Simonson notes, the institutional press pays little attention to the run-of-the-mill criminal cases that concern local communities.²²¹ If the press and public’s interests are said to align, then there remains a question about *which* public the press serves.

Consider, too, the institutional press’s positions on campaign finance regulation. In 2010, the U.S. Supreme Court struck down a portion of the federal Bipartisan Campaign Reform Act of 2002 (BCRA) that prevented corporations and unions from using “treasury funds” to pay for electioneering communications.²²² BCRA contained an exemption for news.²²³ But press institutions were concerned that the exemption was not sufficiently broad.²²⁴ In an amicus brief filed in support of *Citizens United*, the Reporters Committee for Freedom of the Press (RCFP) raised concern that federal campaign finance rules would impede a free press by

217. See, e.g., *Detroit Free Press Inc. v. U.S. Dep’t of Just.*, 829 F.3d 478, 492 (6th Cir. 2016).

218. Letter from Lucy Dalglish, Reporters Comm. for Freedom of the Press, to Laurel Bellows, American Bar Association Commission (Jan. 9, 2007) (available at https://www.rcfp.org/wp-content/uploads/imported/20120307_164410_aba.pdf [<https://perma.cc/C3EX-PFCG>]) (discussing the recommendation of the Commission on Effective Criminal Sanctions); see also Letter from Michael Grygiel, New York State Bar Ass’n Comm. On Media Law, to Vincent Doyle, III, New York State Bar Ass’n (Feb. 24, 2012) (available at https://www.rcfp.org/wp-content/uploads/imported/20120308_160556_bar_letter.pdf [<https://perma.cc/GJ9N-KR2Z>]).

219. SARAH ESTHER LAGESON, *DIGITAL PUNISHMENT* 9 (2020) (“Mass punishment is structured by race and class at its roots, and thus it should come as no surprise that its offshoot, digital punishment, is similarly structured.”).

220. USHER, *supra* note 4, at 55 (describing the “embarrassing whiteness of legacy news outlets”); Hanaa’ Tameez, *American Journalism’s “Racial Reckoning” Still Has Lots of Reckoning to Do*, NIEMAN LAB (Mar. 8, 2022), <https://www.niemanlab.org/2022/03/american-journalisms-racial-reckoning-still-has-lots-of-reckoning-to-do/> [<https://perma.cc/YFQ8-ZQQG>]; Sarah Scire, *“Crushing Resistance”: Yet Again, Newsrooms Aren’t Showing up to the Industry’s Largest Diversity Survey*, NIEMAN LAB (Apr. 12, 2022), <https://www.niemanlab.org/2022/04/crushing-resistance-yet-again-newsrooms-arent-showing-up-to-the-industrys-largest-diversity-survey/> [<https://perma.cc/38Y8-YD7N>].

221. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2174, 2185 (2014).

222. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

223. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 89 (2002).

224. Brief Amicus Curiae of Reporters Comm. For Freedom of the Press in Support of Appellant at 11, *Citizens United v. Fed. Election Comm’n*, 557 U.S. 932 (2009) (No. 08-205).

chilling the speech of independent journalists and documentarians.²²⁵ Then the Supreme Court ordered the case reargued.²²⁶ On reargument, RCFP again filed a brief in support of Citizens United, arguing that BCRA could be saved only if the “news media” were permitted to engage in what would otherwise be considered electioneering communications.²²⁷

The *Citizens United* opinion instantly became “one of the most reviled decisions” in memory.²²⁸ While it would be unfair to blame the institutional press for the decision, it remains worth considering whether striking down BCRA was an unambiguous win for journalism or the public. Indeed, press institutions technically lost in *Citizens United*: the Supreme Court rejected RCFP’s argument, reasoning that the news media exemption itself was “a further, separate reason” for striking down BCRA’s electioneering provision in toto.²²⁹ Under the reasoning in *Citizens United*, “identity-based distinctions” were anathema to the First Amendment. Press institutions’ claim to special status were roundly rejected.

Press institutions have gone on to resist other forms of campaign finance regulation. In 2019, the *Washington Post* won a significant victory when the Fourth Circuit struck down, on constitutional grounds, a Maryland law requiring online platforms to collect and disclose certain information about political advertisements.²³⁰ A coalition of press institutions supported the *Post*, arguing that Maryland’s disclosure law violated the First Amendment because it compelled online platforms to “speak” when they would prefer to remain silent.²³¹

The campaign finance cases highlight the risks of assuming—even as a purely rhetorical matter—that the press inevitably and inexorably advances public interests and public rights. In fact, the *Washington Post* case illustrates how press anti-censorship advocacy clearly serves the bottom line of press institutions. The core of the *Washington Post*’s argument was that it should not be required to bear the financial or technological burden of the disclosures required by the Maryland statute.²³² In this respect, the expressive rights of the news organization match up, not coincidentally, with their economic interests. This merger of economic and

225. *Id.* at 11.

226. *Citizens United v. Fed. Election Comm’n*, 557 U.S. 932 (2009).

227. Supplemental Brief Amicus Curiae of The Reporters Comm. For Freedom of the Press Support of Appellant, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205). Other news institutions also supported Citizens United. Brief of Amici Curiae Broadcasters in Support of Appellant, *Citizens United v. Fed. Election Comm’n*, 557 U.S. 932 (2009) (No. 19-1132).

228. McConnell, *supra* note 62, at 414.

229. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 352 (2010).

230. *Wash. Post v. McManus*, 944 F.3d 506 (4th Cir. 2019).

231. Brief of Amici Curiae News Media Alliance and 16 Media Organizations in Support of Plaintiffs-Appellees at 15, *Wash. Post v. McManus*, 944 F.3d 506 (4th Cir. 2019) (No. 19-1132); Brief of Amici Curiae National Association of Broadcasters and NCTA – the Internet & Television Association in Support of Appellees at 5, *Wash. Post v. McManus*, 944 F.3d 506 (4th Cir. 2019) (No. 19-1132).

232. *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 278 (D. Md. 2019).

expressive interests is not new: as Sam Lebovic details, the news industry has long used First Amendment argumentation to challenge economic regulation.²³³

My point here is not that *Citizens United* by definition runs counter to the public interest, or that press organizations advanced arguments that they did not believe genuinely advanced the public welfare. Nor is the point that the *Washington Post* was wrong to challenge Maryland's disclosure law, or that the press coalition was wrong to support the *Post*. I simply mean to show that the assumption that press institutions' interests coincide with those of the public is a dramatic oversimplification. Surely there are strong interests on the other side of the ledger, even if they are not sufficiently compelling to satisfy First Amendment scrutiny.

1. Corporate Structure and Commercial Interests

Conflating the press's interests with the public's interests also risks oversimplifying complex dynamics within news organizations. To start, news organizations themselves recognize that there are tensions between a firm's business interests and its interests in reporting. These tensions underlie one of the core values of professional journalism, which holds that the journalistic function is completely separate from a news organization's commercial function.²³⁴ Reflecting this norm, news organizations employ a "distinctly bifurcated structure" that separates the newsroom from the business side.²³⁵ As Mark Coddington has written, the so-called wall between the "news" and "business" sides of press organizations has allowed journalists to "set their public service and commercial goals in opposition to each other."²³⁶

Other aspects of media companies' commercial structure also cast doubt on the assumption that press institutions—unlike other corporations—first and foremost advance the public interest.²³⁷ Many of the United States' major newspapers are owned by publicly traded firms that owe fiduciary duties to their shareholders.²³⁸ Although these press institutions may play a vaunted democratic role, by law they must also maximize the value of the corporation.²³⁹ Like

233. Sam Lebovic, *The Conservative Press and the Interwar Origins of First Amendment Lochnerism*, 39 L. HIST. REV. 539 (2021).

234. Mark Coddington, *The Wall Becomes a Curtain*, in BOUNDARIES OF JOURNALISM 67 (Matt Carlson & Seth C. Lewis eds., 2015).

235. *Id.* at 71.

236. *Id.* at 73.

237. See, e.g., Erin C. Carroll, *Promoting Journalism as Method*, 12 DREXEL L. REV. 691, 699 (2020) (distinguishing between the press, which "has traditionally viewed itself as promoting democratic self-governance through the production of a public good," with online platforms, which seek to "amass capital"). As Carroll acknowledges in other work, the business models of platforms and the press increasingly converge. Erin C. Carroll, *News as Surveillance*, 59 WASHBURN L.J. 431 (2020).

238. News Corp., Annual Report (Form 10-K) (Aug. 12, 2022); N.Y. Times, Annual Report (Form 10-K); Gannett Co., Inc., Annual Report (Form 10-K) (Feb. 23, 2023) (stating that Gannett owns 230 daily print media outlets and 249 weekly print media outlets).

239. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the*

technology companies, some newspapers are owned through dual-class ownership structures that confer extraordinary decision-making power on one class of shareholders and very little on the other.²⁴⁰ Other press institutions are owned by individual mega-billionaires,²⁴¹ hedge funds,²⁴² or wealthy families.²⁴³

To be sure, these press institutions often find that their business interests align with their journalistic functions. But what happens when they do not? Consider, for example, what happens when vulture hedge funds systematically strip newsrooms of personnel and resources.²⁴⁴ As “distressed debt” investors strategically target the news industry, press organizations’ “business interests” increasingly diverge from those of their newsroom.²⁴⁵ Even legacy media organizations can compromise their integrity in the name of their business interests. In 2020, the *Sacramento Bee*, a McClatchy-owned newspaper, proposed including numerical metrics as a significant part of reporters’ annual performance reviews.²⁴⁶ The newsroom union revolted,

Power and Accountability Structure Established by the Delaware General Corporation Law, 50 WAKE FOREST L. REV. 761, 767 (2015) (“It is not only hollow but also injurious to social welfare to declare that directors can and should do the right thing by promoting interests other than stockholder interests.”).

240. James Fallows, “Two-Class” Corporate Ownership Structure: Not Just for Media Dinosaurs Any More!, ATLANTIC (July 31, 2007), <https://www.theatlantic.com/technology/archive/2007/07/quot-two-class-quot-corporate-ownership-structure-not-just-for-media-dinosaurs-any-more/7682/> [https://perma.cc/6YX4-SHPD].

241. Beth Healy, *John Henry’s Purchase of The Boston Globe Completed*, BOSTON GLOBE (Oct. 24, 2013, 11:33 PM), <https://www.bostonglobe.com/business/2013/10/24/john-henry-purchase-boston-globe-completed-after-worcester-judge-lifts-injunction/mfk18W0Ficsvg4gI814y11/story.html> [https://perma.cc/FN9Y-47ZY]; Paul Farhi, *Washington Post to Be Sold to Jeff Bezos, the Founder of Amazon*, WASH. POST (Aug. 5, 2013, 8:12 PM), https://www.washingtonpost.com/national/washington-post-to-be-sold-to-jeff-bezos/2013/08/05/ca537c9e-fe0c-11e2-9711-3708310f6f4d_story.html [https://perma.cc/V8R4-PNTY]; Meg James, *Patrick Soon-Shiong Affirms Commitment to the Los Angeles Times*, L.A. TIMES (Feb. 19, 2021, 4:37 PM), <https://www.latimes.com/entertainment-arts/business/story/2021-02-19/patrick-soon-shiong-affirms-commitment-to-the-los-angeles-times> [https://perma.cc/2HZA-REC8].

242. Sydney Ember, *Denver Post Rebels Against Its Hedge-Fund Ownership*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/business/media/denver-post-opinion-owner.html> [https://perma.cc/P52E-XQQD]; Marc Tracy, *McClatchy, Family-Run News Chain, Goes to Hedge Fund in Bankruptcy Sale*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/business/media/mcclatchy-newspapers-bankruptcy-chatham.html> [https://perma.cc/SF2E-A6SE]; Coppins, *supra* note 6; Sara Fischer & Andrew Keatts, *Patrick Soon-Shiong Sells San Diego Union-Tribune to MediaNews Group*, AXIOS (Jul. 10, 2023), <https://www.axios.com/2023/07/10/san-diego-union-tribune-sold> [https://perma.cc/C334-DYTQ].

243. David Brewster, *Frank Blethen’s Battle to Save The Seattle Times (and Local Journalism)*, POST ALLEY (Feb. 13, 2020), <https://www.postalley.org/2020/02/13/frank-blethens-battle-to-save-the-seattle-times-and-local-journalism/> [https://perma.cc/5MT8-DBBS].

244. Coppins, *supra* note 6.

245. Michelle M. Harner, *Activist Distressed Debtholders: The New Barbarians at the Gate?*, 89 WASH. U. L. REV. 155, 189 (2011); PETRE, *supra* note 118 at 188–89 (describing the clash between Gawker’s newsroom and its owners when the company was purchased by a private equity firm that promptly announced that it expected the editors to quadruple pageviews).

246. Kristen Hare, *The Sacramento Bee Wants to Tie Metrics to Pay. Its Guild is Not Having It.*, POYNTER (Oct. 26, 2020), <https://www.poynter.org/locally/2020/the-sacramento-bee-wants-to-tie>

mounting a social media campaign #NoPayForClicks that foregrounded, among other things, the tensions between metrics-oriented compensation and coverage of important civic issues.²⁴⁷

Press institutions' willingness to serve as watchdogs, or to advance crucial legal claims about free expression, is indisputably shaped by their business interests as well as their solvency.²⁴⁸ In other words, the legal status quo for media firms does not support the assumption that press institutions primarily serve the public interest. The growing popularity of nonprofit journalism might alleviate potential frictions between the profit motive and the journalistic function, but it is not a cure. As Nikki Usher has written, concerns remain about whether nonprofits can achieve sufficient "reach" and "volume" to fill the gap left by vanishing for-profit news outlets.²⁴⁹ While nonprofit status might alleviate some pressures on the "business side," it also invites new pressures from philanthropic funders and investors.²⁵⁰

Today, the idealized vision of the press's democratic role appears more aspirational than achievable. Any half-conscious observer of the media ecosystem knows that we are awash in misinformation, disinformation, manipulation, and other garbage from outlets many would agree are part of the "institutional press."²⁵¹ Amid momentous technological and economic shifts, the press has struggled to perform the kinds of accountability and watchdog functions that press freedom theorists so prize.²⁵² The foundational assumptions that the press informs the public, serves as a check on official power, and operates in a way that the general public cannot are currently under strain.

III. PRESS FREEDOM IN PRACTICE

In order to understand how press freedom works, we also need to examine how the press exercises its freedom: how, when, and whether it chooses to advance

metrics-to-pay-its-guild-is-not-having-it/ [https://perma.cc/6HVF-AVV3].

247. *Id.*; see also Victor Pickard, *Management by Metrics Is Upending Newsrooms and Killing Journalism*, JACOBIN (Oct. 23, 2021) <https://jacobinmag.com/2021/10/journalism-metrics-news-management-profit-clicks-gawker-analytics/> [https://perma.cc/ZV2P-EV79] ("The unholy union between capitalism and journalism is finally fraying beneath the weight of its many contradictions.").

248. Jones, *supra* note 5, at 622–23 ("On the whole, it appears that new entities, which are creatively filling the newsgathering and information-dissemination functions once served by newspapers, simply do not anticipate financing the legal instigation and enforcement functions.").

249. USHER, *supra* note 4, at 198.

250. USHER, *supra* note 4, at 199.

251. See, e.g., David Folkenflik, *You Literally Can't Believe the Facts Tucker Carlson Tells You. So Say Fox's Lawyers*, NPR (Sept. 29, 2020, 4:34 PM), <https://www.npr.org/2020/09/29/917747123/you-literally-cant-believe-the-facts-tucker-carlson-tells-you-so-say-fox-s-lawyer> [https://perma.cc/88RH-3WEC].

252. See Carroll, *supra* note 4, at 560 (tying watchdog journalism to "the well-being of the citizenry and our democratic form of government").

legal claims and how those arguments function in the context of the broader “free press.” Despite the claims that press freedom enables and facilitates journalism’s democracy-enhancing role, the picture on the ground can look different. At times, the press engages in forms of advocacy that not only do not advance democracy but actively undermine it.

This Part explains how journalism’s foundational ideals encourage, discourage, and shape the press’s legal advocacy. Journalism’s ideals of autonomy, public service, and objectivity have contributed to the legal, social, and ideological dividing line that separates “the press” from everybody else. Yet objectivity’s significance to the law of press freedom, in particular, is underexplored.²⁵³ As the examples below illustrate, commitment to the objectivity norm can justify legal action (as when news organizations demote or terminate workers whose extracurricular actions raise the appearance of bias) or inaction (as when news organizations refuse to engage in litigation that would jeopardize their impartiality). Objectivity also shapes press freedom advocacy, guiding press organizations to seek narrow remedies and protections from broadly applicable laws. In short, objectivity contributes to a narrow legal strategy based on protecting institutional autonomy, expanding newsgathering and access rights, and securing special legal protections for journalists and reporters.

A. Objectivity as Defense

Conflicts between news institutions and their workers offer a useful entry point to understanding how journalistic values relate to the press’s legal strategy, advocacy choices, and, ultimately, its protections. Disputes about objectivity often arise over internal policies and memoranda governing employee speech and newsroom ethics. News organizations sometimes discipline or terminate journalists whose extracurricular activities or social media usage violate these guidelines.²⁵⁴

From the perspective of press institutions, determinations about objectivity and newsroom ethics are aspects of editorial discretion that are immune from scrutiny under the First Amendment.²⁵⁵ As part of their editorial function, press firms can craft their own editorial standards and apply them as they see fit.²⁵⁶

253. See Calvert, *supra* note 27.

254. See, e.g., Fred Young & Nerissa Young, *Ethics Case Studies: Reigning on the Parade*, SOCIETY OF PROFESSIONAL JOURNALISTS, <https://www.spj.org/ecs16.asp> [<https://perma.cc/EL6C-V2C9>] (last visited Oct. 22, 2023) (describing how a longtime columnist filed three lawsuits against his employer after it disciplined him for participating as a grand marshal alongside his husband in a gay pride parade); Calvert, *supra* note 27, at 30–33 (describing how, in one case, a news organization successfully argued that its termination of a journalist who participated in political activity in violation of its ethics policy was protected by the First Amendment); Rachel Abrams, *Washington Post Suspends a Reporter After Her Tweets on Kobe Bryant*, N.Y. TIMES (July 22, 2021), <https://www.nytimes.com/2020/01/27/business/media/kobe-bryant-washington-post-felicia-sonmez.html> [<https://perma.cc/553S-T83X>].

255. Calvert, *supra* note 27.

256. Newspaper Guild of Greater Pa., Local 10 v. Nat’l Lab. Rels. Bd., 636 F.2d 550, 561 (D.C.

Accordingly, press institutions are free to enact, for example, social media policies that govern how employees express themselves online.²⁵⁷

Under the banner of objectivity, news organizations often forbid newsroom staff to engage in political activism or activity such as attending marches and rallies, or even displaying bumper stickers.²⁵⁸ For example, the Minneapolis *Star Tribune*'s conduct and ethics policies instruct newsroom journalists to "avoid behavior or actions that could be a real or perceived conflict between their personal interests and their jobs as objective or impartial journalists."²⁵⁹ The policy elaborates that journalists should "avoid participating in public displays that reveal partisan sentiments, such as protests, social action and politics."²⁶⁰ The Society of Professional Journalists' (SPJ) code of ethics likewise instructs journalists to "avoid conflicts of interest, real or perceived."²⁶¹ SPJ's Ethics Committee stresses that journalists' "political activity" can compromise their ethical integrity.²⁶²

Newsroom rules and practices reflect (but rarely acknowledge) the tension between the field's dueling commitments to objectivity on the one hand and to accountability and watchdog journalism on the other. Indeed, journalism is devoted to "shining a light on injustices in society," although this apparent exception to the objectivity norm is rarely explained.²⁶³ So while newsroom policy discourages

Cir. 1980) ("A news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity.").

257. See, e.g., *Ethical Journalism: Participation in Public Life*, N.Y. TIMES, <https://www.nytimes.com/editorial-standards/ethical-journalism.html> [<https://perma.cc/B7ZR-BK7U>] ("Staff members may not march or rally in support of public causes or movements . . ."); Shani O. Hilton, *The BuzzFeed News Standards and Ethics Guide*, BUZZFEED (Sept. 12, 2019, 3:58 PM), <https://www.buzzfeednews.com/article/shani/the-buzzfeed-editorial-standards-and-ethics-guide#.iq46LYaEGP> [<https://perma.cc/L7HA-W9ZP>] ("We firmly believe that for a number of issues, including civil rights, women's rights, anti-racism, and LGBT equality, there are not two sides. But when it comes to activism, BuzzFeed editorial must follow the lead of our editors and reporters who come out of a tradition of rigorous, neutral journalism that puts facts and news first.").

258. *Ethical Journalism: Participation in Public Life*, N.Y. TIMES, <https://www.nytimes.com/editorial-standards/ethical-journalism.html#> [<https://perma.cc/7LAR-M84K>] (last visited Nov. 4, 2023) ("[Journalists] may not wear campaign buttons or themselves display any other insignia of partisan politics. They should recognize that a bumper sticker on the family car or a campaign sign on the lawn may be misread as theirs, no matter who in their household actually placed the sticker or the sign.").

259. *Star Tribune Policies and Standards*, STAR TRIBUNE (Mar. 3, 2020), <https://www.startribune.com/star-tribune-policies-and-standards/482850961/> [<https://perma.cc/YMC2-87QE>].

260. *Id.*

261. *SPJ Code of Ethics*, SOC'Y OF PRO. JOURNALISTS (Sept. 6, 2014), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/A2RZ-XQDL>].

262. *SPJ Ethics Committee Position Papers: Political Involvement*, SOC'Y OF PRO. JOURNALISTS, <https://www.spj.org/ethics-papers-politics.asp> [<https://perma.cc/C4YR-YEJC>] (last visited Oct. 22, 2023).

263. Michael Blanding, *Where Does Journalism End and Activism Begin?*, NIEMAN REPORTS (Aug. 21, 2018), <https://niemanreports.org/articles/where-does-journalism-end-and-activism-begin/>

partisanship and political activity, *Star Tribune* policy affirmatively *encourages* staff “to actively advocate for open public records and government processes, First Amendment issues and press freedom.”²⁶⁴ SPJ tells journalists to “be vigilant and courageous about holding those with power accountable,” as if doing so is not “political.”²⁶⁵

The 2020 uprisings have produced what Wesley Lowery has called a renewed “reckoning” with the concept of objectivity that has, at times, pitted reporters against the media institutions they work for.²⁶⁶ Amid nationwide upheaval, newsroom policies designed to promote the ideal of objectivity come across as naïve endorsements of “apolitical” behavior that simply reaffirms dominant perspectives. Reflecting these tensions, in 2021, NPR revised its ethics policy, which had long barred journalists from participating in public protests or marches.²⁶⁷ The new policy permits editorial employees to “express support for democratic, civic values that are core to NPR’s work,” including “the freedom and dignity of human beings.”²⁶⁸ NPR also explicitly acknowledges that, while journalists should generally not support any political causes, it may make exceptions for causes that are at the core of the organization’s “journalistic mission.”²⁶⁹

The commitment to objectivity, it seems, falls away when the news industry advocates for its own interests. The press has lobbied hard for increased government transparency, access to public information, and press freedom.²⁷⁰ None of these interests are politically neutral.²⁷¹ Press institutions are willing to advocate for special credentialing practices to enable access to briefings, hearings, courtrooms, and other rarefied spaces; reduced or eliminated fees for open records

[<https://perma.cc/T8ZG-XNL3>].

264. *Star Tribune Policies and Standards*, STAR TRIBUNE (Mar. 3, 2020), <https://www.startribune.com/star-tribune-policies-and-standards/482850961/> [<https://perma.cc/YMC2-87QE>].

265. *SPJ Ethics Committee Position Papers: Political Involvement*, SOC’Y OF PRO. JOURNALISTS, <https://www.spj.org/ethics-papers-politics.asp> [<https://perma.cc/C4YR-YEJC>] (last visited Oct. 22, 2023).

266. Wesley Lowery, *A Reckoning Over Objectivity, Led by Black Journalists*, N.Y. TIMES (Jun. 23, 2020), <https://www.nytimes.com/2020/06/23/opinion/objectivity-black-journalists-coronavirus.html> [<https://perma.cc/3S9T-BT7Y>].

267. Kelly McBride, *New NPR Ethics Policy: It’s OK for Journalists to Demonstrate (Sometimes)*, NPR (July 29, 2021), <https://www.npr.org/sections/publiceditor/2021/07/29/1021802098/new-npr-ethics-policy-its-ok-for-journalists-to-demonstrate-sometimes> [<https://perma.cc/9LKJ-7B9U>].

268. *NPR Ethics Handbook: Impartiality*, NPR (Jul 7, 2021), <https://www.npr.org/templates/story/story.php?storyId=688413430> [<https://perma.cc/X8FC-HF2M>].

269. *Id.*

270. For example, the media lobbied hard for the enactment of the federal Freedom of Information Act. *See, e.g.*, Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 463–64 (2012) (describing the role of the American Society of Newspaper Editors in pressuring Congress to enact FOIA); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1371 (2016) (same).

271. *See generally* David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100 (2018) (surveying the political valences of open government and transparency law).

requests; and exceptions to citywide curfews.²⁷² All of these advocacy efforts are understood to be essential to the democratic function of the press, facilitating journalists' ability to gather, report, and disseminate the news. To press institutions, there is no tension between the commitment to objectivity and the embrace of advocacy in favor of free expression, government transparency, or accountability.

At times, the objectivity paradigm can appear to be an excuse for otherwise unjustifiable personnel decisions. In 2006, the Allentown *Morning Call* disciplined its columnist Frank Whelan for serving as the grand marshal of a gay pride parade.²⁷³ The *Call* claimed that Whelan's actions violated the paper's ethics policy.²⁷⁴ The newspaper reportedly settled out of court after Whelan filed three lawsuits, all of which alleged that the paper's application of its ethics policy was a fig leaf for discrimination.²⁷⁵

Perhaps ironically, press institutions' power to enforce and define journalistic values might come at a significant cost for journalists. For workers, the objectivity norm can be a potent cover for institutional discrimination and retaliation. For news institutions, the power to define journalistic objectivity, regardless of racial impact, was at the very core of its First Amendment freedoms. In Pittsburgh, the management of the *Post-Gazette* removed two Black reporters from covering Black Lives Matter protests and deleted protest coverage from the newspaper's website after calling the reporters' objectivity into question.²⁷⁶ The newsroom union supported the reporters and argued that management's response to the controversy jeopardized the paper's commitment to "truth and transparency."²⁷⁷ When one of the reporters, Alexis Johnson, filed a lawsuit alleging racial discrimination, the *Post-*

272. *At Least 125 Press Freedom Violations Reported Over 3 Days of U.S. Protests*, COMM. TO PROTECT JOURNALISTS (June 1, 2020), <https://cpj.org/2020/06/at-least-125-press-freedom-violations-reported-over-3-days-of-us-protests/> [<https://perma.cc/N92T-B2VL>]; Michael M. Grynbaum, *CNN Sues Trump Administration for Barring Jim Acosta From White House*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/business/media/cnn-jim-acosta-trump-lawsuit.html> [<https://perma.cc/YF8Z-A82R>]; Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 208 (2016) (discussing Congress's addition of fee waivers for disclosure of information in the public interest under the Freedom of Information Act).

273. Scott Kraus, *Columnist: Call Suspended Me for Riding in Gay Pride Parade*, MORNING CALL (Oct. 5, 2021, 10:50 AM) <https://www.mcall.com/news/mc-xpm-2006-06-24-3662328-story.html> [<https://perma.cc/S7M6-YC8H>].

274. *Id.*

275. SOC'Y OF PRO. JOURNALISTS, ETHICS CASE STUDIES (2014), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/HU9Z-6XNF>].

276. Becky Metrick, *Black Journalists Sidelined, Stories Deleted from Pittsburgh Post-Gazette's Protest Coverage: Report*, PENNLIVE (June 7, 2020), <https://www.pennlive.com/news/2020/06/black-journalists-sidelined-stories-deleted-from-pittsburgh-post-gazettes-protest-coverage-report.html> [<https://perma.cc/PR98-FLRJ>].

277. Becky Metrick, *Statement on the Alexis Johnson Situation at the Pittsburgh Post-Gazette*, NEWSPAPER GUILD OF PITTSBURGH (June 7, 2020, 9:29 PM), <https://pghguild.com/2020/06/06/statement-on-the-alexis-johnson-situation-at-the-pittsburgh-post-gazette/> [<https://perma.cc/H5N7-EDGR>].

Gazette moved to dismiss, contending that its removal of Johnson was nothing more than “editorial judgment” protected fully by the First Amendment.²⁷⁸

The invocation of press freedom to shield press institutions from accountability for employment discrimination hardly seems like the kind of democracy-promoting activity that earns the press its keep in our democratic system. In July 2021, Felicia Sonmez, a *Washington Post* reporter and sexual assault survivor, filed suit against her employer.²⁷⁹ Sonmez was barred from covering the confirmation hearings of Supreme Court Justice Brett Kavanaugh after she made a public statement about her assailant’s resignation from the *L.A. Times*.²⁸⁰ After Sonmez tweeted about allegations that Kobe Bryant had sexually assaulted a teenager in 2003, the *Washington Post* suspended her for violating the firm’s editorial policies. Sonmez contended that the *Post* had a “male-dominated culture” that perceived female editors and reporters as overly “emotional.”²⁸¹ In response to Sonmez’s discrimination suit, the newspaper argued that its decisions were wholly protected by the First Amendment, invoking its status as a “First Amendment institution” analogous to a church or religious school.²⁸²

The freedom to define and apply objectivity norms comes at the expense of individual journalists who are not free to do and say as they please. Of course, there is an argument that this ultimately serves democracy, but it is hardly self-evident.²⁸³ Protecting the prerogative of news firms to enforce their editorial standards helps to ensure that the press is independent and shielded from government meddling and influence. These kinds of disputes between journalists and their employers illustrate the perils of assuming that the freedom of press institutions inevitably converge with the freedom of journalists or with the public interest. Indeed, as the Whelan, Johnson, and Sonmez cases illustrate, this freedom for press firms comes at a significant cost for employees. News firms’ invocation of objectivity to justify personnel decisions thus raises troubling questions about journalism’s role in a democracy.

278. Mem. P. & A. Supp. Def.’s Mot. Dismiss 15, *Johnson v. PG Publ’g Co.*, No. 2:20-cv-00885-NR (W.D. Pa. filed Oct. 16, 2020), ECF No. 21; *see* Oral Arg. Tr., *Johnson v. PG Publishing Co.*, 2:20-cv-00885-NR (W.D. Pa. filed Feb. 19, 2021), ECF No. 31 at 4–5 (contending that “the Post-Gazette had a social media policy that applied journalistic standards to avoid the perception that the newspaper mix is [sic] commentary with news coverage”).

279. Complaint, *Sonmez v. WP Co.*, Case No. 2021 CA 002497 B (D.C. Superior Court filed July 21, 2021).

280. Complaint ¶ 2, *Sonmez v. WP Co.*, Case No. 2021 CA 002497 B (D.C. Superior Court filed July 21, 2021).

281. Complaint ¶ 53, *Sonmez v. WP Co.*, Case No. 2021 CA 002497 B (D.C. Superior Court filed July 21, 2021).

282. Mem. Supp. Defs.’ Opposed Consolidated Mot. Dismiss 27, *Sonmez v. WP Co.*, Case No. 2021 CA 002497 B (D.C. Superior Court filed Sept. 24, 2021).

283. *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 167 (2021) (“[T]he vast majority of American workplaces function not as democracies, but as dictatorships.”).

B. Objectivity as Deterrent

It is by now well-trodden ground that press institutions advance core journalistic values through litigation. Less recognized, however, is the role of those values in shaping institutional decisions about litigation. In the early morning on May 29, 2020, CNN correspondent Omar Jimenez was arrested while reporting live in Minneapolis.²⁸⁴ Media institutions were predictably outraged by Jimenez’s on-air arrest but could not plausibly claim to be surprised.²⁸⁵ The First Amendment provides that Congress “shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”²⁸⁶ Today, public protests can be regulated through permit requirements and other time, place, and manner restrictions.²⁸⁷ It is also generally accepted that protests can be regulated through criminal law enforcement. Demonstrators are regularly charged with loitering, trespass, disorderly conduct, and other vague criminal prohibitions.²⁸⁸

For the most part, from a constitutional perspective, journalists covering demonstrations are no differently situated than the demonstrators.²⁸⁹ “Journalists can be arrested if police have probable cause to believe a journalist broke the law while reporting—for example, by trespassing or disobeying a police order to disperse.”²⁹⁰ When police use violent crowd control tactics or “less-lethal munitions,” journalists have no particular constitutional right to gentler handling.²⁹¹

284. CNN, *Police Arrest CNN Correspondent Omar Jimenez and Crew On Live Television*, YOUTUBE (May 29, 2020), <https://www.youtube.com/watch?v=ftLzQefpBvM> [<https://perma.cc/BMH7-AK79>].

285. Brian Steinberg, *Journalists Express Shock, Outrage At CNN Reporter’s Arrest*, VARIETY (May 29, 2020), <https://variety.com/2020/tv/news/cnn-omar-jimenez-reaction-tv-news-journalists-1234619857/> [<https://perma.cc/34T4-5QQS>]; Doreen St Félix, *In Minneapolis, the Shocking Arrest of the Journalist Omar Jimenez Live on CNN*, THE NEW YORKER (May 29, 2020), <https://www.newyorker.com/culture/on-television/in-minneapolis-the-shocking-arrest-of-the-journalist-omar-jimenez-live-on-cnn> [<https://perma.cc/9X72-F4HR>].

286. U.S. CONST. amend. I.

287. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 545 (2009); see also Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 587 (2006) (arguing that “speech and spatiality are critically related”).

288. Tabatha Abu El-Haj, *What Does the Constitutional Right of Assembly Protect? What Counts as “Peaceable”? And Who Should Decide?*, JUST SECURITY (June 9, 2020), <https://www.justsecurity.org/70653/what-does-the-constitutional-right-of-assembly-protect-what-counts-as-peaceable-and-who-should-decide/> [<https://perma.cc/4SLD-L7Y9>]; see also *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (affirming convictions of HBCU students charged with trespass after demonstrating at a county jail against their classmates’ arrest for participating in a civil rights demonstration).

289. See *infra* Section II.A.

290. *Police, Protesters, and The Press*, REPS. COMM. FOR FREEDOM OF THE PRESS (June 2020), <https://www.rcfp.org/wp-content/uploads/2020/06/Police-Protesters-Press-2020.pdf> [<https://perma.cc/394B-5ZA3>].

291. Jacob Vaughn, *Dallas Police Have Injured Protesters With “Less-Lethal” Ammo. This Texas Bill Would Ban Its Use*, DALLAS OBSERVER (Dec. 14, 2022), <https://www.dallasobserver.com/news/dallas-police-have-injured-protesters-with-less-lethal-ammo-this-texas-bill-would-ban-its-use-15476783>

From a doctrinal perspective, then, the arrest of Omar Jimenez looks unremarkable. Minneapolis and Minnesota police arrested hundreds of demonstrators during the days after George Floyd's murder.²⁹² Across the nation, tens of thousands of demonstrators were arrested, teargassed, and beaten while protesting.²⁹³ The federal government deployed law enforcement officers to Cleveland, Detroit, Milwaukee, Portland, Chicago, and Albuquerque to quell demonstrations there.²⁹⁴ Like many of those demonstrators, Jimenez was arrested because he had ostensibly failed to comply with a police order to disperse from the area.²⁹⁵

But from another perspective, Jimenez's arrest was an indicator of a grave assault on press freedom. In 2019, there were nine incidents in which journalists were arrested in the United States while doing their jobs. In 2020, there were 146 incidents of journalists being arrested.²⁹⁶ Like Jimenez, most reporters were arrested amid the uprisings against police violence and repression prompted by Minneapolis police officer Derek Chauvin's killing of George Floyd in summer 2020.²⁹⁷ In law enforcement's violent crackdown on those uprisings, journalists appear to have been beaten, detained, and injured in unprecedented numbers.²⁹⁸

[<https://perma.cc/L3VG-DEVT>]; Amy Larson, *Oakland Settlement Restricts 'Less Lethal' Munitions at Protests*, KRON4 (Sep. 2, 2022, 8:03 PM), <https://www.kron4.com/news/bay-area/oakland-settlement-restricts-less-lethal-munitions-at-protests/> [<https://perma.cc/8K4Z-SUWL>].

292. Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, *Swept Up by Police*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/> [<https://perma.cc/LDJ8-EDSZ>]. Michael Sainato, *"They Set Us Up": US Police Arrested Over 10,000 Protesters, Many Non-Violent*, GUARDIAN (June 8, 2020), <https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest-non-violent-protesters> [<https://perma.cc/DJA2-TSTW>].

294. OFFICE OF PUB. AFF., OPERATION LEGEND EXPANDED TO CLEVELAND, DETROIT, AND MILWAUKEE (2020), <https://www.justice.gov/opa/pr/operation-legend-expanded-cleveland-detroit-and-milwaukee> [<https://perma.cc/BE6P-26YF>]; Sergio Olmos & Mike Baker, *Feds Vowed to Quell Unrest in Portland. Local Leaders Are Telling Them to Leave*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/portland-protests.html> [<https://perma.cc/LGT2-V5VY>].

295. Jason Hanna & Amir Vera, *CNN Crew Released from Police Custody After They Were Arrested Live On Air in Minneapolis*, CNN (May 29, 2020), <https://www.cnn.com/2020/05/29/us/minneapolis-cnn-crew-arrested/index.html> (last visited Nov. 27, 2023).

296. *Incidents Database: Arrests/Criminal Charges*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/arrest-criminal-charge/> [<https://perma.cc/4PKC-LFAS>] (last visited Oct. 22, 2023).

297. I use the term "uprising" to reflect the intentionality of political resistance to the status quo, rather than the term "riot," which brings with it pejorative connotations. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 406 n.1 (2018); RICHARDSON, *supra* note 132 at 68 (citing scholar Jennifer Heusel, who "has argued that using inflammatory language to report on black protests is a tool that elite media use to delegitimize black political demands").

298. U.S. PRESS FREEDOM TRACKER, *supra* note 296 (demonstrating that dozens of journalists were physically beaten, injured, or had their cameras or notes confiscated by law enforcement); see also David Chang, *'Vigilante' Accused of Attacking Journalist During Protest in Fishtown*, NBC10 PHILADELPHIA (June 25, 2020, 5:57 PM), <https://www.nbcphiladelphia.com/news/local/vigilante-accused-of-attacking-off-duty-journalist-during-protest-in-fishtown/2447046/> [<https://perma.cc/T62M-59FV>] (showing that journalists were also attacked and beaten by vigilantes

One might expect that this unmitigated “crisis” for press freedom would prompt legal action by press institutions that have anointed themselves as the defenders of democracy.²⁹⁹ Surprisingly, however, the press did not take a leading role in legal actions to defend First Amendment rights in the wake of the uprisings.³⁰⁰ While protestors, movement activists, and nongovernmental organizations across the country challenged law enforcement’s crackdown as a violation of First and Fourth Amendment rights, mainstream press institutions, in contrast, remained largely silent. With only a handful of exceptions, media organizations mostly shied away from any legal action to prevent mistreatment by law enforcement.

If it is true that law enforcement’s arrests and brutality against reporters heralded an unprecedented crackdown on press freedom, then what accounts for the relative silence of press institutions? The commitment to journalistic objectivity discouraged mainstream news organizations from becoming involved in litigation against law enforcement. In *Goyette v. City of Minneapolis*, a class action complaint filed against city and state law enforcement officers, two freelance reporters and the Communications Workers of America laid out a series of arrests of reporters, in disregard for their status as members of the news media.³⁰¹ Other journalists were pepper sprayed, tear-gassed, and shot at with “less-lethal” munitions.³⁰² Even though news media were explicitly exempt from the city’s and state’s respective curfew orders, some reporters were nonetheless arrested and charged with curfew violations and others were told their press credentials were “bullshit.”³⁰³

Despite the clear implications for press freedom, no news media organization joined the Minneapolis litigation. Jon Schleuss, the president of the NewsGuild—the affiliate union of the CWA that represents journalists, photojournalists, and other media workers—explained that the reason for the labor organization’s involvement in the case was precisely because journalists and press organizations were reluctant to participate themselves, fearing it would jeopardize their impartiality.³⁰⁴ As Schleuss attested, the fact that news organizations and journalists “report on the Minneapolis Police and Minnesota State Patrol as part of their journalism” made suing those organizations ethically questionable.³⁰⁵

In theory, objectivity means that press institutions are above the fray, “outside

and counter-protesters).

299. U.S. PRESS FREEDOM Tracker, *supra* note 296.

300. See *infra* Part II.

301. First Am. Complaint ¶¶ 29-36, *Goyette v. City of Minneapolis*, Case No. 0:20-cv-01302-WMW-DTS, ECF No. 1 (D. Minn. filed June 8, 2020).

302. *Id.* ¶¶ 37–66.

303. *Id.* ¶¶ 24–25, 31, 33.

304. Schleuss Decl., Ex. 4 to Am. Complaint ¶ 4, *Goyette v. City of Minneapolis*, Case No. 0:20-cv-01302-WMW-DTS, ECF No. 31-34 (D. Minn. filed June 8, 2020).

305. *Id.*

the arena.”³⁰⁶ Yet objectivity does not mean journalists and press institutions take no positions. Instead, the commitment to objectivity has led press institutions to be selective about the positions they take. Inevitably, however, press institutions are making choices when they decide whether or not to litigate or to advocate. The real choice they are making is whether to confront authority or to preserve the status quo.

C. Objectivity as Legal Narrative

Objectivity can also inform legal strategy by shaping the kinds of claims and narratives that press institutions advance about press freedom. Indeed, press institutions consistently advance their interests in judicial, legislative, and policy settings. For example, pursuing expanded expressive freedoms, government transparency, or newsgathering rights is understood to be compatible with the commitment to objectivity, even though doing so requires press institutions to take a position.

Consider another example of litigation regarding the 2020 uprisings. In Portland, local media organization Index Newspapers and a group of journalists and legal observers brought a class action against the city, law enforcement officers, and federal law enforcement agencies.³⁰⁷ The plaintiffs alleged that, despite being “neutrals” in the conflict between protestors and police, they had been beaten, shot by less lethal munitions, and intimidated by law enforcement.³⁰⁸ The plaintiffs received temporary restraining orders enjoining local and federal law enforcement agencies from arresting, threatening, or using physical force against identifiable journalists and legal observers.³⁰⁹ The problem was that some non-journalists had worn clothing marked “press,” making it difficult for law enforcement to discern who was a “real” journalist and who was pretending to be one in order to avoid getting arrested or beaten.³¹⁰ Ultimately, the court granted a preliminary injunction ordering the federal defendants not to arrest, threaten to arrest, or use physical force

306. Rosen, *supra* note 53.

307. First Am. Complaint, *Index Newspapers v. City of Portland*, Case No. 3:20-cv-1035-SI (filed July 10, 2020).

308. *Id.* ¶ 1.

309. *Woodstock v. City of Portland*, No. 3:20-CV-1035-SI, 2020 WL 3621179, at *4 (D. Or. July 2, 2020); *Index Newspapers v. City of Portland*, 474 F. Supp. 3d 1113, 1126-27 (D. Or. 2020).

310. *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1138 (D. Or. 2020). Soon afterward, the district court considered whether to amend its TRO to limit the definition of “journalist” to “professional or authorized journalist[s]” accredited by the ACLU of Oregon. Mins. & Scheduling Order, *Index Newspapers v. City of Portland*, Case No. 3:20-cv-1035-SI, ECF 108 (D. Or. July 31, 2020). The plaintiffs opposed the proposal, and the Reporters Committee filed an amicus brief on behalf of sixteen news organizations urging the court not to adopt it. Pls.’ Mem. Supp. Extending TRO with Limited Modifications, *Index Newspapers v. City of Portland*, Case No. 3:20-cv-1035-SI, ECF 112 (D. Or. filed Aug. 4, 2020); Brief of Amici Curiae Reporters Committee for Freedom of the Press and 16 News Media Organizations, *Index Newspapers v. City of Portland*, Case No. 3:20-cv-1035-SI, ECF 121-1 (D. Or. filed Aug. 5, 2020).

against anyone “whom they know or reasonably should know is a Journalist or Legal Observer.”³¹¹

Goyette and *Index Newspapers* both tell us something important about how journalistic objectivity informs legal strategy. In *Goyette*, the commitment to objectivity discouraged press organizations from joining the litigation at all because to do so would be to insert themselves into the story.³¹² In *Index Newspapers*, however, the press institutions took legal action, but in a selective, modest way.

Indeed, the press’s minimalist strategy in *Index Newspapers* is surprising in light of what appeared to be a wholesale crackdown on First Amendment rights. The extraordinary federal reaction to the Portland protests saw law enforcement brutalizing and arresting protesters in the hundreds, sometimes even sweeping them into unmarked vans.³¹³ The Department of Homeland Security accessed protestors’ communications data and compiled “intelligence dossiers” on journalists.³¹⁴ In the face of such extensive suppression of First Amendment activity, the remedy that the press ultimately sought and obtained—freedom from arrest for identifiable journalists—seems self-interested in the extreme.

Both cases reflect a recurring theme in press freedom litigation: the special status of the press, and its commitment to objectivity, sets it apart from other First Amendment actors. As a result, when generally applicable laws and practices disadvantage the press, it is somehow “worse” than when police repress other First Amendment rights.

Objectivity becomes legally salient when press actors point to it to justify differential treatment. It is not surprising that objectivity is used in this way. Scholars of journalism studies have shown that journalists rely on objectivity as a way of defining the field, retaining “journalistic authority,” and justifying their social role.³¹⁵ And legal advocacy is another setting in which journalists and news

311. *Index Newspapers LLC*, 480 F. Supp. 3d at 1155. The court’s order anticipated that the federal defendants would be able to identify journalists if they met one or more of the following criteria: “visual identification as a member of the press, such as by carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, or wearing a professional or authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press.” *Id.* at 1156.

312. Schleuss Decl., *supra* note 304.

313. Sergio Olmos, Mike Baker & Zolan Kanno-Youngs, *Federal Agents Unleash Militarized Crackdown on Portland*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/portland-protests.html> [https://perma.cc/LGT2-V5VY].

314. Shane Harris, *DHS Compiled ‘Intelligence Reports’ on Journalists Who Published Leaked Documents*, WASH. POST (July 30, 2020, 10:57 PM), https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html [https://perma.cc/B5MU-T29X]; Abigail Hauslohner, Eugene Scott & Alex Horton, *DHS Analyzed Protester Communications Despite Comments to the Contrary*, WASH. POST (July 31, 2020, 9:03 PM), <https://www.washingtonpost.com/nation/2020/07/31/protests-live-updates/> [https://perma.cc/K8WM-ZBF9].

315. See, e.g., Gino Canella, *Journalistic Power: Constructing The “Truth” and The Economics of Objectivity*, 17 JOURNALISM PRAC. 209, 211 (2021) (“Self-exclusive, facts-first journalism is a common

organizations can “engage in a discourse on the boundaries of the field.”³¹⁶ In short, since objectivity helps to define what is unique and special about the press, it also helps to identify those features for courts. This explains why in *Index Newspapers*, the rare case in which press organizations did directly challenge the law enforcement crackdown, they did so in a way that emphasized their neutrality and distanced themselves from other First Amendment actors.

News organizations’ commitments to objectivity help to explain their role as professional “public servants,” documenting and communicating “the truth” to the public.³¹⁷ This role is distinct from that of a protestor or demonstrator, and that distinct role justifies (at least in theory) the kinds of exceptional treatment that press institutions seek.

In numerous advocacy settings, press institutions sought preferential treatment for “working” journalists, whose professional calling distinguished them from other First Amendment actors.³¹⁸ Indeed, while the press focused on the treatment of working journalists, they studiously avoided taking a position on the treatment of demonstrators, legal observers, and others exercising their First Amendment rights. The Reporters Committee began tracking incidents in which journalists were arrested or assaulted by law enforcement after identifying themselves as members of the press.³¹⁹ In late May 2020, the Society of Professional Journalists wrote an open letter asking that both law enforcement and demonstrators “please let us do our jobs in covering the protests surrounding George Floyd’s death in Minneapolis.”³²⁰ News organizations repeated the call for law enforcement not to arrest or brutalize reporters for “just doing their jobs,” suggesting that working journalists were entitled to be treated less roughly than ordinary protestors.³²¹

marketing strategy for news organizations.”).

316. Brett G. Johnson, Ryan J. Thomas & Jeremiah P. Fuzy, *Beyond Journalism About Journalism: Amicus Briefs as Metajournalistic Discourse*, 15 JOURNALISM PRAC. 937, 941 (2020).

317. Maribel Perez Wadsworth, Nicole Carroll & Amalie Nash, *Our Journalists Are Being Attacked While Doing Their Jobs. This is Unacceptable.*, USA TODAY (May 31, 2020, 8:20 PM), <https://www.usatoday.com/story/opinion/2020/05/31/george-floyd-protests-stop-attacking-journalists-we-have-job-do/5300346002/> [https://perma.cc/44QK-JMAL].

318. *At Least 125 Press Freedom Violations Reported over 3 Days of U.S. Protests*, COMM. TO PROTECT JOURNALISTS (June 1, 2020, 7:02 PM), <https://cpj.org/2020/06/at-least-125-press-freedom-violations-reported-over-3-days-of-us-protests/> [https://perma.cc/MZC5-H2FZ] (calling on officials to “explicitly exempt the news media from curfew regulations so that journalists are able to report freely.”).

319. Sasha Peters & Linda Moon, *Curfew Orders Without Media Exemptions May Be Unconstitutional Under First Amendment*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (June 12, 2020), <https://www.rcfp.org/curfew-order-special-analysis/> [https://perma.cc/4ZAD-6B46].

320. *An Open Letter to Police Officers and Protesters*, SOC’Y OF PRO. JOURNALISTS (May 30, 2020), <https://www.spj.org/pdf/open-letter-2020-05-30.pdf> [https://perma.cc/2VH2-93Y4].

321. Lindsey Ellefson, *Washington Post Journalist Arrested at Capitol Amid Ongoing Unrest*, THE WRAP, (Jan. 6, 2021 7:40 PM), <https://www.thewrap.com/washington-post-journalists-arrested-capitol/> [https://perma.cc/MC78-EEKE] (“Our journalists were just doing their jobs and should never have been arrested in the first place.”); Perez Wadsworth et al., *supra* note 317; see also *Letter to*

Objectivity has similarly influenced press institutions' responses to law enforcement surveillance. In the spring of 2021, a series of news stories revealed that federal law enforcement had secretly obtained the communications records of journalists at CNN, the *Washington Post*, and the *New York Times* in the course of several leak investigations.³²² The revelations generated an enormous backlash. Critics objected to the Department's apparent evasion of a set of unenforceable internal guidelines (the "Guidelines") that govern its attempts to get information or communications from or about the news media.³²³ A core principle of the Guidelines is the presumption that, in all but the most exceptional cases, the Department will pursue negotiations and notice before obtaining information from or records of members of the news media.³²⁴ The Guidelines reverse the general presumption that no notice is necessary before a subpoena is issued, imposing a higher standard for investigations that involve journalists than for those that do not.

The presumption of the Guidelines is that there is something particularly dangerous about compelling the disclosure of journalists' records or communications. Writing in the *Columbia Journalism Review*, Bruce Brown, the executive director of the Reporters Committee for Freedom of the Press, decried the failure to follow the Guidelines in the *Washington Post* case.³²⁵ Given the

Commissioner Paul Schnell and Karl Procaccini, REPORTERS COMM. FOR FREEDOM OF THE PRESS (June 2, 2020), https://www.rcfp.org/wp-content/uploads/2020/06/6-2-20_Letter_to_MN_Officials.pdf [https://perma.cc/7JCQ-SWNH]; *Letter to Mayor Bill de Blasio and Commissioner Dermot Shea*, REPS. COMM. FOR FREEDOM OF THE PRESS (June 6, 2020), <https://www.rcfp.org/wp-content/uploads/2020/06/RCFP-NY-Letter-Latest-as-of-9-18-20.pdf> [https://perma.cc/7NML-R5FM]; *Letter to Mayor Michael Hancock, Chief Paul Pazen & Murphy F. Robinson*, REPS. COMM. FOR FREEDOM OF THE PRESS (June 16, 2020), <https://www.rcfp.org/wp-content/uploads/2020/06/6-16-20-Final-Press-Letter-on-Denver-Police-Assaults.pdf> [https://perma.cc/GX8B-RWAY].

322. Devlin Barrett, *Trump Justice Department Secretly Obtained Post Reporters' Phone Records*, WASH. POST (May 7, 2021, 10:00 PM), https://www.washingtonpost.com/national-security/trump-justice-dept-seized-post-reporters-phone-records/2021/05/07/933cdfc6-af5b-11eb-b476-c3b287e52a01_story.html [https://perma.cc/ZB7Y-722Z]; Jeremy Herb & Jessica Schneider, *Trump Administration Secretly Obtained CNN Reporter's Phone and Email Records*, CNN (May 20, 2021), <https://www.cnn.com/2021/05/20/politics/trump-secretly-obtained-cnn-reporter-records/index.html> [https://www.washingtonpost.com/national-security/trump-cnn-email-phone-records/2021/05/20/457daa70-b9bc-11eb-96b9-e949d5397de9_story.html]; Matt Zapotosky, *Trump Justice Dept. Secretly Obtained CNN Correspondent's Phone, Email Records*, WASH. POST (May 20, 2021, 8:50 PM), https://www.washingtonpost.com/national-security/trump-cnn-email-phone-records/2021/05/20/457daa70-b9bc-11eb-96b9-e949d5397de9_story.html [https://perma.cc/XA3C-ST69]; Charlie Savage & Katie Benner, *Trump Administration Secretly Seized Phone Records of Times Reporters*, N.Y. TIMES (June 3, 2021), <https://www.nytimes.com/2021/06/02/us/trump-administration-phone-records-times-reporters.html> [https://perma.cc/9VSC-YVJX].

323. 28 C.F.R. § 50.10 (the "Guidelines").

324. 28 C.F.R. §§ 50.10(a)(3)–(4).

325. Bruce D. Brown, *Why Did The Trump DOJ Secretly Seize Phone Records From Post Journalists?*, COLUM. JOURNALISM REV. (May 12, 2021), <https://www.cjr.org/opinion/trump-doj-washington-post-phone-records.php> [https://perma.cc/GD2L-M7GN] ("The guidelines are arguably the most important protection for newsgathering and press freedom at the federal level, particularly given the lack of a nationwide shield law that limits when reporters can be forced to disclose their sources.").

revelatory nature of communications records, the government's efforts to secretly obtain them could be particularly damaging to reporters' relationships with their sources, Brown argued.³²⁶

The response to the surveillance revelations exemplifies the legal strategy that objectivity has fostered. Press institutions did not push back on the government's broader power to secretly obtain the most sensitive communications records of the average citizen. Taking a position on the government's surveillance power in general could be seen to undermine journalistic objectivity by inserting press institutions into a broader debate that does not implicate them exclusively. Instead, press institutions sought and received special treatment that would effectively afford journalists an exemption from the typical criminal investigative procedures.

Strikingly, the government appeared to agree with press advocates. President Biden called the practice of secretly obtaining journalists' records "simply, simply wrong."³²⁷ The Biden Administration announced that the Department would change its leak investigation policy to end compulsory demands altogether.³²⁸ In the weeks following the revelations, Attorney General Merrick Garland held a closed-door meeting with news organization executives and press freedom advocates to discuss the issue.³²⁹ Garland announced that he would strengthen the Department's internal policy, but that he would also go further, supporting legislation that would make these protections durable and enforceable.³³⁰ In late June 2021, Senator Ron Wyden introduced the "Protect Reporters from Excessive State Suppression Act" (PRESS Act), legislation that would prevent federal government entities from compelling journalists or third-party service providers to provide testimony or documents unless a court determines that the testimony or documents are necessary to prevent a very serious threat.³³¹

IV. CONCLUSION: THE COSTS OF PRESS FREEDOM

The press has a cultural, legal, and political reputation for avidly defending

326. *Id.*

327. Charlie Savage, *White House Seems to Affirm Biden's Vow to Bar Seizures of Reporters' Phone Data*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/us/politics/biden-reporter-data-seizures.html> [https://perma.cc/P799-PCJA].

328. Charlie Savage & Katie Benner, *White House Disavows Knowledge of Gag Order on Times Leaders in Leak Inquiry*, N.Y. TIMES (June 5, 2021), <https://www.nytimes.com/2021/06/05/us/politics/biden-gag-order-new-york-times-leak.html> [https://perma.cc/P64B-GWUE].

329. Josh Gerstein, *Garland Meets News Executives Over Leak Probe Tactics*, POLITICO (June 14, 2021, 7:05 PM), <https://www.politico.com/news/2021/06/14/garland-news-executives-probe-494489> [https://perma.cc/4KJ4-7EZC].

330. Josh Gerstein, *Garland Backs Legislation To End Subpoenas For Reporters' Records*, POLITICO (June 25, 2021, 12:45 PM), <https://www.politico.com/news/2021/06/25/garland-reporters-records-subpoenas-496291> [https://perma.cc/LR82-CM59].

331. PRESS Act, S. 2457, H.R. 4330, 117th Cong. §§ 3–4 (2021). The PRESS Act was reintroduced in the 118th Congress. S. 2074; H.R. 4250 (2023).

civil liberties.³³² But this reputation is only part of the story. The press strategically sits out many First Amendment battles; in others, it pursues narrow, modest claims unlikely to protect many outside of its formal ranks. At still other times, it uses its freedom aggressively—to defend workplace policies that reflect and amplify decades of racial and gender bias in media.

What are the costs of the press’s legal strategy, and of the ideology that underpins it? Ideology, like law, is not neutral. It “conceals the need to reorder American society to bring to life better versions of the ideal of human freedom.”³³³ Although the press’s freedom is usually seen as an unalloyed good for democracy and society, this assessment gives rise to a more cautious perspective. The costs of an *unfree* press are obvious: unaccountable governments, uninformed decision making, corruption, and abuse of power.³³⁴ But the press’s freedom also comes at some expense.

A. Legitimation Costs

First, press actors’ legal strategy might legitimate the suppression of others’ expressive rights. By “legitimation,” I mean that press institutions’ legal strategy might secure their own expressive interests—increased access to places where they gather the news, protections against police violence and surveillance, the ability to enforce editorial policy—at some cost to those of other actors.³³⁵

In some respects, these costs are obvious. Consider, again, press institutions’ invocation of their own expressive rights as a defense against claims of employment discrimination.³³⁶ Sometimes, press institutions invoke their First Amendment rights to explain why they enjoy editorial discretion to enforce institutional norms on working journalists, as in the *Sonmez* and *Johnson* cases.³³⁷ The interest in protecting the expression of the news organization thus legitimates the suppression of the journalist’s expression. In a conflict between management and workers’ interests, the institution’s editorial discretion is seen as the more significant interest.³³⁸

332. West, *Awakening*, *supra* note 178, at 1049.

333. Frug, *supra* note 20, at 1295.

334. FREEDOM HOUSE, MEDIA FREEDOM: A DOWNWARD SPIRAL (2019), <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral> [<https://web.archive.org/web/20231008091124/https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral>].

335. Cf. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1406 (2009) (“[A] concededly just legal change will sometimes legitimate a deeper or broader injustice with the legal institution so improved, thus further insulating the underlying or broader legal institution from critique.”).

336. See *supra* Section III.A.

337. See also *Nelson v. McClatchy Newspapers*, 131 Wash. 2d 523 (1997) (holding that a Washington statute that prohibited private employers from discriminating against workers on the basis of political activity could not constitutionally be applied to a newspaper).

338. As Sam Lebovic details, conflicts between press institutions’ management and their

How might other aspects of the press's legal strategy translate into costs for others? On one level, the press's strategy of seeking specific protections for journalists or "neutral" actors, or other special exemptions from legal burdens, might implicitly legitimate practices or burdens that are more broadly felt. *Index Newspapers*, which sought to prevent law enforcement from arresting and assaulting "neutrals" in Portland, illustrates this dynamic.³³⁹ While extracting a promise from law enforcement not to arrest identifiable press actors benefits press institutions, the press tried to avoid judgment regarding the treatment of protestors (the vast majority of the people arrested in Portland).³⁴⁰ Instead of aligning the press with other actors wrongfully arrested in violation of their First Amendment rights, press actors described themselves as agnostic intermediaries or "neutrals" (in the phrasing adopted in *Index Newspapers*), and argued that this status entitled them to *preferential* treatment over the hoi polloi.³⁴¹

When press institutions distance themselves from other First Amendment actors, they risk implicitly legitimating broader pathologies endemic to policing and law enforcement. Indeed, by distancing themselves from other speakers, the press is not just taking a "neutral" stance toward First Amendment freedoms—it is actively choosing not to advance them. Carving out special exemptions from law enforcement's general practices may allow the government to claim that First Amendment rights are sufficiently protected when, in fact, only identifiable "neutrals"—a tiny minority of First Amendment actors—are shielded from mistreatment.³⁴² This strategy raises serious questions about whether the press in fact acts as a "guardian of First Amendment rights" for all, or rather as a guardian of its own interests.³⁴³

Focusing on the treatment of "neutrals," however, might also effectively consolidate law enforcement power with respect to its ability to police protests and dissent more generally. The events of the last couple of years demonstrate the

workers are nothing new. Sam Lebovic, *The Conservative Press and The Interwar Origins of First Amendment Lochnerism*, 39 LAW & HIST. REV. 539, 547–48 (2021) (describing efforts by the news industry during the interwar period to use the First Amendment to invalidate labor laws).

339. *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120 (D. Or. 2020).

340. See Hannah Ray Lambert, *Policing Portland's Protests: 1,000 Arrests, Handful of Prosecutions*, KOIN (Nov. 1, 2020), <https://www.koin.com/news/protests/policing-portlands-protests-1000-arrests-handful-of-prosecutions/> [<https://web.archive.org/web/20230314231141/https://www.koin.com/news/protests/policing-portlands-protests-1000-arrests-handful-of-prosecutions/>] (noting that nearly 1,000 people were arrested between late May and early November 2020, but that only a handful were charged).

341. See *supra* Section I.A.

342. *Wise v. City of Portland*, 539 F. Supp. 3d 1132, 1142 (D. Or. 2021) (holding that protest medics lacked standing to pursue their First Amendment claim); *Wolfe v. City of Portland*, 566 F. Supp. 3d 1069, 1087 (D. Or. 2021) (holding that people with disabilities lacked standing to pursue their First Amendment claim); *Pettibone v. Biden*, No. 3:20-CV-1464-YY, 2021 WL 6112595, at *11 (D. Or. Dec. 27, 2021) (granting in part and denying in part government defendants' motion to dismiss protestors' complaint).

343. Knight Foundation, *supra* note 15.

fragility of existing protections for press freedom in the face of current law enforcement practice. The short-term successes of seeking special protections for the press thus mask the potential long-term costs of an approach that remains studiously impartial as to broader pathologies.

The surveillance revelations involve a similar dynamic. By framing the surveillance of journalists' communications records as affronts to press freedom, press institutions successfully used the revelations to advocate for better treatment.³⁴⁴ In doing so, however, this strategy effectively legitimated both the favorable position that the press receives and the government's broader power to investigate, surveil, and monitor the communications of everybody else. And when the press receives favored treatment, it is less likely to advocate for others who do not: these relatively powerful and well-resourced actors have satisfied their own interests, never mind the First Amendment rights of others.

Advocates and scholars ought to reconsider the assumption that press-specific protections will continue to protect journalists and media institutions against the most urgent threats to a free and independent press. Narrow, press-specific legal protections are of dubious value when contrasted with law enforcement's power. Routine criminal law enforcement practices—broad criminal laws, sweeping law enforcement discretion, and minimal protections against surveillance—pose evident threats to journalism and news gathering. Press-specific protections and rights may once have granted substantial protection to working journalists and ensured that newsgathering could continue unabated. Today, however, this strategy overlooks more significant threats to journalism and to First Amendment rights in a broader sense.

B. Toward Other Possible Press Freedoms

The existing vision of press freedom has been highly influential, but it is not the only possible path. The current political, economic, and technological challenges facing the press create an opportune moment for the press to shift course from a legal strategy engineered to preserve the veneer of objectivity toward a strategy that might be more aggressive at challenging government abuses and less defensive of the news industry's business interests.

This opportunity comes in the form of a crisis. The dominant explanation for the reluctance of media institutions to engage in litigation has been economic: as news organizations have folded and newsrooms have shrunk, the institutional press is less capable of advancing legal claims than it once was.³⁴⁵ Partly as a result, a

344. See *supra* Section III.C.

345. In *Defense of the First Amendment*, KNIGHT FOUNDATION (Apr. 21, 2016), <https://knightfoundation.org/reports/defense-first-amendment/> [<https://perma.cc/9H6H-RAKY>] (showing that 89% of editors who responded to a survey asserted that because of financial pressures, the “news industry is less able now than it was 10 years ago to pursue First Amendment-related litigation”); see also Jones, *supra* note 5 (analyzing the relationship between the collapse of newspapers

broader universe of actors—civil society organizations, movement groups, legal clinics, and others—are increasingly advancing claims that have traditionally been brought by news media institutions.³⁴⁶

The expansion of media litigation beyond mainstream press institutions offers an opening to break with the paradigmatic vision of press freedom. While some have raised concern that the shrinking of news media litigation comes at a cost to democracy, perhaps the media’s shifting business model creates new democratic prospects.³⁴⁷ New nonprofit news outlets such as *The Appeal* and *The Objective* have already embraced a different sort of ethos of public service and responsibility, oriented more toward solidarity with individuals and groups who have historically been sidelined by media institutions.³⁴⁸ Press institutions could conceivably embrace a broader concept of “press freedom” that places them in greater solidarity with journalists, with the public interest, and with democracy.

I have two potential changes in mind. The first would reimagine the legal priorities of press institutions in a much broader fashion, to enable the press to pursue a broader vision of its freedom. In a concrete sense, this could mean that news organizations might be more open to joining litigation against government agencies outside of the traditional media law priorities of transparency and First Amendment litigation.³⁴⁹ Reporters and media organizations have at times aligned themselves with broader coalitions of organizations and activists. For example, *The Nation*, a progressive weekly, has been a party to multiple civil suits challenging programmatic national security surveillance under the FISA Amendments Act.³⁵⁰ In Chicago, the progressive nonprofit news organization *In These Times* joined a putative class action alongside a group of organizations and activists engaged in protests after the murder of George Floyd.³⁵¹ The Chicago plaintiffs, aware of the

and media litigation).

346. See, e.g., Bloch-Wehba, *supra* note 137, at 969 (“Movements, individuals, and civil society organizations have turned to transparency law not because it is superior at accomplishing police accountability but because, given the constraints of politics and constitutional doctrine, it is the only viable option to get the foot in the courthouse door.”); see also *About FELN*, FREE EXPRESSION LEGAL NETWORK, <https://freexpression.law/about-feln/> [<https://perma.cc/9CLC-7AMY>] (last visited Oct. 23, 2023) (“The Free Expression Legal Network is a nationwide coalition of law school clinics, academics, and practitioners focused on promoting and protecting free speech, free press, and the free flow of information to an informed and engaged citizenry.”).

347. Jones, *supra* note 5, at 617 (noting the general convergence between newspaper litigation and the public good).

348. *THE APPEAL*, <http://theappeal.org> [<https://perma.cc/HNY4-UKN5>] (last visited Oct. 23, 2023); *THE OBJECTIVE*, <http://objectivejournalism.org> [<https://perma.cc/9J7R-SDJK>] (last visited Oct. 23, 2023).

349. See *These Are the Standards of Our Journalism*, NPR (Feb. 11, 2019), <https://www.npr.org/ethics> [<https://perma.cc/T97R-4MA3>].

350. *Clapper v. Amnesty Int’l U.S.*, 568 U.S. 398 (2013); *Wikimedia Found. v. Nat. Sec. Agency*, 14 F.4th 276 (4th Cir. 2021).

351. First Amended Complaint, *Black Lives Matter Chi. v. Wolf*, 1:20-cv-04319 (N.D. Ill. July 31, 2020), ECF No. 9.

Department of Homeland Security's intention to send personnel to Chicago "whether they like us there or not," sought an injunction preventing federal law enforcement from "interfering in or otherwise policing lawful and peaceful assemblies and protests" in the city.³⁵²

In order for press institutions to expand their conception of the kinds of interests implicated by "press freedom," they must take the difficult step of acknowledging that they are vulnerable. Press institutions have historically been reluctant to directly confront law enforcement power and its ramifications for expression, newsgathering, and dissent, fearing that to do so might compromise existing norms and relationships with powerful institutions. And yet these norms and relationships do not appear to protect journalists or the press from the most egregious abuses of government power. In fact, the press is no more protected from arrest, assault, or abuse than the public it informs, and no less endangered by the current system of criminal law enforcement.

A more aggressive confrontation with law enforcement might acknowledge that journalists and other First Amendment actors are similarly affected by policing. For example, this might mean that news organizations could be parties to legal challenges to law enforcement tactics such as kettling, in which police encircle demonstrators to prevent them from moving (and often beat and arrest them en masse).³⁵³ Kettling is a longstanding tactic that frequently leads to the arrest of journalists alongside legal observers, protestors, and others.³⁵⁴

In spite of the frequency with which journalists are arrested in kettles, though, news organizations have never challenged the practice. Instead, press institutions tend only to advance legal claims regarding the right to gather and disseminate the news. For example, prior to the Republican National Convention (RNC) held in New York in 2004, a coalition of protestors obtained an injunction to prevent the New York Police Department (NYPD) from "penning" protestors at the Convention, unduly curtailing their freedom of movement.³⁵⁵ The protestors' victory was fleeting, however. NYPD arrested over 1,800 protestors during the RNC.³⁵⁶ In the aftermath of the RNC, the vast majority of the charges against

352. *Id.* ¶ 136.

353. "Kettling" *Protesters in the Bronx: Systemic Police Brutality and Its Costs in the United States*, HUMAN RIGHTS WATCH (Sept. 30, 2020), <https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states> [<https://perma.cc/ES93-AW3J>] (documenting "at least 61 cases of protesters, legal observers, and bystanders who sustained injuries" when NYPD kettled protestors in the Bronx).

354. Stephanie Sugars, *Journalists Covering 'Protests in US Risk Getting Caught Up in Police Kettling Tactic'*, COMMITTEE TO PROTECT JOURNALISTS (Mar. 15, 2018, 3:18 PM), <https://cpj.org/2018/03/journalists-covering-protests-in-us-risk-getting-c/> [<https://perma.cc/MM9U-ZJ8L>].

355. Susan Rachel Nanes, *The Constitutional Infringement Zone: Protest Pens and Demonstration Zones at the 2004 National Political Conventions*, 66 LA. L. REV. 189, 202 (2005).

356. Jennifer Earl, *Information Access and Protest Policing Post-9/11: Studying the Policing of the 2004 Republican National Convention*, 53 AM. BEHAVIORAL SCIENTIST 44 (2009).

protestors were dropped.³⁵⁷ Civil litigation against NYPD, however, wore on for several years, much of it proceeding under seal.³⁵⁸ Two years after the convention, the *New York Times* intervened in the case, asserting a First Amendment right of access to the sealed discovery and briefing so that its journalists could report on the litigation.³⁵⁹

The example of the RNC litigation illustrates press institutions' commitments to a vision of press freedom with newsgathering, access, and transparency at its core. But when law enforcement engages in tactics that not only impede journalistic activities but also affect First Amendment rights writ large—here, kettling, penning and mass arrests—press silence speaks volumes. That journalists and protestors are equally vulnerable to police abuses might lead one to believe that the better strategy is to demand a broader change to police tactics. And yet, time and again, press organizations have focused on their own privileges at the expense of others' expressive interests.

The second change would recognize that press institutions' interests are distinct from those of the journalists who work for them and would consequently reimagine the relationship between press institutions and their workers. Today, press institutions treat their ethics policies and editorial standards as aspects of unfettered editorial discretion and impose them on their workers through fiat.³⁶⁰ One result is that the institutional rules that enforce journalistic norms are increasingly a reason for conflict between journalists and management and the basis for contestation over the meaning of those norms and the strength of journalism's commitments.³⁶¹ These tensions are once again on the rise, as press institutions remind their workers to “avoid tweeting anything that may give a perception of bias” about abortion in the wake of the decision in *Dobbs v. Jackson Women's Health Organization*.³⁶²

Some of these tensions might be alleviated if press institutions agreed to collectively bargain over their editorial standards or otherwise give journalists a greater voice in those standards. Newsroom unions, however, rarely gain direct

357. Jim Dwyer, *Videos Challenge Accounts of Convention Unrest*, N.Y. TIMES (Apr. 12, 2005), <https://www.nytimes.com/2005/04/12/nyregion/videos-challenge-accounts-of-convention-unrest.html> [https://perma.cc/G85P-B9VB].

358. Earl, *supra* note 356, at 48.

359. *Id.* at 52.

360. *Supra* Section III.A (discussing the clash between press institutions' imposition of editorial standards and journalists).

361. See, e.g., Jack Mirkinson, *The AP's Shameful Firing of Emily Wilder*, OBJECTIVE (May 24, 2021), <https://objectivejournalism.org/2021/05/the-aps-shameful-firing-of-emily-wilder/> [https://perma.cc/PF42-CJT3] (discussing the termination of a journalist for a history of pro-Palestinian activism).

362. Alex Sujong Laughlin, Opinion, *It's Possible to be a Journalist and a Human*, POYNTER (June 28, 2022), <https://www.poynter.org/business-work/2022/journalism-objectivity-roe-scotus-social-media/> [https://perma.cc/8EXD-964Y].

influence over institutional editorial practices.³⁶³ Instead, current battles focus on whether union contracts will include provisions stipulating that press institutions may not discipline or dismiss union members without “just cause.”³⁶⁴ Management has objected to the inclusion of “just cause” without an “editorial exception” that would permit adverse employment actions to be taken against workers who violate editorial standards.³⁶⁵ Unions oppose the editorial exception because it would offer a broad loophole for management to punish workers within editorial units, while management opposes “just cause” because they think it would make it too hard to enforce editorial standards.³⁶⁶

Battles over just cause complicate the traditional approach to press freedom. Amid rising interest in unionization in media and technology firms, the struggle to ensure that “just cause” is included in union contracts represents more than just a typical worker protection measure. Instead, it offers a rare opportunity for journalists and management to share responsibility and power for editorial standards. Otherwise, press institutions can easily deploy malleable editorial standards on issues like objectivity at the expense of their workers. Is this really the kind of archetypal liberty interest that the press’s freedom is meant to protect?

Our basic rights to be free from government oppression are bound up with freedom of the press. Yet the law of press freedom, and the ideology that underpins it, routinely draws distinctions between the press and “ordinary” people.³⁶⁷ This line between “citizens” and “journalists,” and between the “public” and the “press” that is meant to serve it, performs an important legal function: it allows the state to extend certain privileges to journalists, media institutions, and press organizations without having to extend them to everyone. In theory, at least, these capacious protections for press freedom are compatible with—even indispensable to—expressive liberties for all. The press’s freedoms, in short, permit it to advance the public interest.

But amid social, political, and economic upheaval, it is no longer clear that the

363. Tony Harcup, *Journalists and Ethics: The Quest for a Collective Voice*, 3 JOURNALISM STUD. 101, 108 (2002) (examining a handful of examples of British union advocacy around ethics issues).

364. Kerry Flynn, *New Yorker Union Wins Fight for Just Cause in Contract*, CNN (Oct. 5, 2020, 8:49 PM), <https://www.cnn.com/2020/10/05/media/new-yorker-union-just-cause-contract/index.html> [<https://perma.cc/C2TH-CJ47>].

365. Hannah Aizenman, Stefanie Frey & Mai Schotz, *We Finally Won Just Cause Protection at The New Yorker after AOC and Warren Refused to Cross Our Picket Line*, LABOR NOTES (Oct. 23, 2020), <https://labornotes.org/2020/10/we-finally-won-just-cause-protection-new-yorker-after-aoc-and-warren-refused-cross-our> [<https://perma.cc/TBW2-VACZ>].

366. *The Facts*, JUST CAUSE NO EXCEPTIONS, <https://www.justcausenoeexceptions.com/faq/> [<https://perma.cc/LSM4-GK7N>] (last visited Oct. 23, 2023); *Just Cause Open Letter*, BUZZFEED NEWS UNION, <https://www.buzzfeednewsunion.com/just-cause-open-letter> [<https://perma.cc/XN4Z-47W5>] (last visited Oct. 23, 2023).

367. See *supra* Section II.A.

dominant understandings of the press's legal freedoms protect it or the public. Rather than advancing free expression, journalism's foundational commitments appear to hamper the press in significant ways and hold it back from playing the legal role in which it has been cast. The legal privileges that journalists and reporters have long enjoyed offer flimsy protection against an increasingly hostile public and press institutions that seek to appeal to the broadest possible subscriber base. The frail business model of press institutions discourages the kind of legal advocacy that we have come to expect of them. This state of affairs should not only lead the press to rethink its legal strategy, but also to probe whether it is in fact fulfilling its role as a "guardian of the First Amendment" and its fundamental commitments to American democracy.