Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism

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working paper
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ERIN C. CARROLL *

INTRODUCTION

Even in a city of monuments, the Newseum is striking. Called a “cathedral” to the First Amendment and the free press, it sits along a stretch of Pennsylvania Avenue that connects the White House and the United States Capitol. On its façade is a 50-ton Tennessee marble plaque carved with all forty-five words of the First Amendment. Its 250,000 square feet contain some 6,214 journalistic artifacts, including paens to the press’s watchdog role, like the hotel door from the Watergate break-in.

Despite its grandeur, however, the Newseum is teetering on insolvency. Its executive director hastily stepped down in 2017. Its benefactor, the Freedom Forum, is reportedly looking to sell the nearly $700 million building.

The museum’s struggle is no surprise. As the Washington Post’s media columnist Margaret Sullivan wrote, “It doesn’t require a PhD in comparative literature to see the Newseum’s troubles as a metaphor for the besieged state of the American press.”

The comparison runs deeper, however. The Newseum’s failure is not only a metaphor for the collapse of an institution, but is also emblematic of a strained relationship between

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constitutional law and the press. The limits of the First Amendment—understood by generations of journalists as an amulet—are becoming more apparent. Despite the press’s heralded role as a bulwark of our democracy, it is unclear if our living Constitution can stretch far and fast enough to protect it.⁸

The very nature of the press has changed. The First Amendment was shaped for and by a conception of the press that is no longer descriptively accurate: the Fourth Estate. The Fourth Estate metaphor captures the understanding of the press as being both an institution and independent. Implicit in the metaphor is also that the press will serve as a check on government power and potential abuse by shining a light on its actions.⁹ The framers sought to create and protect this structural role for the press. And the text of the First Amendment itself reflects this aim. Its admonition that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” explicitly protects press autonomy.¹⁰ By enshrining press freedom in the Constitution, the framers were protecting editorial discretion against what they viewed as its greatest threat: government tyranny. They helped to create conditions under which watchdog reporting—by which the press investigates and checks government corruption and malfeasance—could thrive. But the press itself has changed, and the threats to its freedom and its ability to check government have shifted as well.

As technology has transformed any number of industries, it has permanently upended the press. The press’s economic model has been decimated. Two companies, Google and Facebook, now take most of the advertising revenue that fueled the press in the twentieth century.¹¹ From 2001 to 2016, more than half of the news industry jobs in the United States disappeared,¹² and the term “news deserts” has been coined to describe the many communities without local journalism.¹³ The strength of newspapers—the longtime core of the Fourth Estate and the primary source of reporting on civic and governmental affairs—has withered.¹⁴ News

¹⁰ See U.S. CONST. amend. I.
¹⁴ See MATTHEW NISBET ET AL., FUNDING THE NEWS: FOUNDATIONS AND NONPROFIT MEDIA (June 18, 2018), https://shorensteincenter.org/funding-the-news-foundations-and-nonprofit-media/ (“For decades, newspapers produced the journalism that did the most to inform public debate and to hold those in power accountable. Even as the media system rapidly evolved over the past 20 years, studies found that newspapers remained at the core of the
organizations have scaled back lobbying and are less likely to sue to protect their right to gather information, protect sources, and publish.15

The Fourth Estate has now been subsumed into a new entity: the Networked Press.16 The Networked Press is not an institution—an organization of individuals bound by common norms, goals, and purpose. Rather, it is a web of interconnected actors whose aims and values differ. It includes journalists who share a commitment to being a check on government, a check that enhances citizens’ ability to be self-governing. But it also includes technology platforms, software engineers, algorithms, news consumers, and others who do not share the press’s (or necessarily one another’s) values and commitments. All of these actors—human and non-human—now contribute to how news is made.17

Although they are interconnected, the actors in the Networked Press are not equally powerful, and the disparities significantly impact journalistic independence and editorial discretion. Whereas in the twentieth century, the Fourth Estate controlled the flow of information to the public, now, platforms like Facebook, Google, Apple, and Twitter are the information gatekeepers.18 They curate and prioritize a growing amount of the information, including news, that citizens consume.19 Their ever-shifting algorithms help determine if a story goes viral or unread. These algorithms—formulas for deciding what information reaches users—are opaque.20

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18 Throughout this Article, I use “platforms” to refer to companies like Google, Apple, and Facebook. By platform, I mean “[l]arge technology companies that have developed and maintain digital platforms that enable interaction between at least two different kinds of actors who in the process come to host public information, organize access to it, create new formats for it, and control data about it and who thereby influence incentive structures around investment in public communication (including news production).” See Rasmus Kleis Nielsen, The Power of Platforms, https://www.slideshare.net/RasmusKlesiNielsen/the-power-of-platforms-inaugural-lecture-by-rasmus-kleis-nielsen-u-of-oxford.
19 See Bell & Owen, supra note 16 (“Social media and search companies are not purely neutral platforms, but in fact edit, or ‘curate,’ the information they present.”).
Many have argued that they’ve become so complex that platform engineers themselves cannot fully understand how they work.\textsuperscript{21}

Relatively, consumers of news are exerting tremendous sway over what news is produced.\textsuperscript{22} More and more, automation and data are influencing or supplanting human news judgment. Large news organizations have teams of employees devoted to studying and reacting to “analytics” that show what news consumers are reading and watching, where, and for how long.\textsuperscript{23} Individual journalists, too, are often reliant on data that can give them the sense of being a contestant in a never-ending popularity contest.\textsuperscript{24}

As the institution of the Fourth Estate is crumbling, and platforms alter the exercise of editorial discretion, watchdog journalism is threatened. It is expensive and time-consuming to produce.\textsuperscript{25} It is also not as widely read as more cheaply produced breaking news.\textsuperscript{26} A Networked Press regime does not incentivize watchdog journalism. News under this new press model is increasingly dominated by what will garner engagement and social sharing—the palace intrigue and the hot take rather than the painstaking investigation of government malfeasance.

The First Amendment was crafted, in part, to shield the watchdog function from government interference, and it has. The press-as-Fourth Estate has fit relatively comfortably under the First Amendment’s protective umbrella. Key Supreme Court cases have blocked the government from interfering with the press and allowed the press to exercise editorial discretion and publish government secrets. So far, indications are that courts will protect journalists from hostile treatment by the anti-press White House.\textsuperscript{27}

Yet, the protections the framers put in place are not sufficiently protecting watchdog journalism in the Networked Press era. Journalism remains legally shielded from government interference but not from the encroachment of the private sphere. As technology platform companies grow ever more powerful, it is becoming clearer what a significant threat private companies can be to the press’s watchdog role. Various private interests—including advertisers and audience—have always tethered the “free” press, but the tether of platforms on the press is proving to be especially suffocating because of their immense scale and power.


\textsuperscript{24} See FRANKLIN FOER, WORLD WITHOUT MIND 144-45 (2017).


\textsuperscript{26} See PABLO J. BOCZKOWSKI & EUGENIA MITCHELEIN, THE NEWS GAP 2 (2013) (noting the popularity of news about weather, sports, crime, and entertainment).

Platforms are not singlehandedly responsible for the technological changes that have decimated the press’s economic model and so, its ability to robustly fund watchdog reporting.28 Many forces and entities have played a part, including the press itself. Platforms are doing little, however, to prevent the threat from continuing. They have repeatedly shunned the responsibilities to citizens and democracy long shouldered by investigative journalists.29 Rather, they are embracing and reifying features of technology that harm the environment for watchdog reporting. Their tether on the press is restricting the press’s ability to perform its constitutionally prescribed function.

No shortage of legal scholarship exists on the relationship between the press and the First Amendment.30 Likewise, how the First Amendment applies to new forms of speech online has proved fertile (and necessary) ground for legal scholars to till.31 Less scholarship, however, has focused on the intersection of the First Amendment, the press, and new technology.32 More examination is needed of how platforms, social media, and algorithms are impacting the press and the journalistic process. We need to think harder about when and how law should respond to these changes. This article is a contribution to that effort.

Part I examines the inextricability of the First Amendment and the Fourth Estate. It establishes that the vision the framers had of “the press” as conveyed by the First Amendment was likely multifaceted and difficult to categorize. Yet, evidence exists that it tracked the qualities inherent to the Fourth Estate metaphor. The framers viewed the press as having three qualities. First, it was an institution. Second, it was independent (meaning that it could freely exercise editorial discretion). Finally, it served as a structural check on the government. The Fourth Estate metaphor was cemented in a series of pro-press Supreme Court opinions in the mid-twentieth century. Not coincidentally, the press truly was a Fourth Estate at this time. In this way, the Court’s First Amendment jurisprudence and the Fourth Estate were mutually reinforcing.

Part II describes the rift that is developing between constitutional law and the modern-day practice of journalism. In the last twenty years, technology has radically transformed the media ecology. It has undermined the economic model for newspapers and consequently weakened the institutional Fourth Estate. In the last decade, the circle of actors playing press roles has expanded. Platforms have seized the role of gatekeeper from the press, but they have

29 See, e.g., Mike Isaac, Facebook, in Cross Hairs After Election, Is Said to Question Its Influence, N.Y. TIMES (Nov. 12, 2016), http://www.nytimes.com/2016/11/14/technology/facebook-is-said-to-question-its-influence-in-election.html (noting that Mark Zuckerberg called the possibility that Facebook had affected the 2016 presidential election a “pretty crazy idea”).
32 A notable exception to this is the Knight First Amendment Institute’s Emerging Threats series of which Tim Wu’s article Is the First Amendment Obsolete?, supra note 31, is a part. See Emerging Threats, KNIGHT FIRST AMENDMENT INSTITUTE, https://knightcolumbia.org/emergingthreats. The series was published during the writing of this article.
been reluctant to assume the responsibilities to citizens and democracy that the Fourth Estate has long shouldered. Journalists who aspire to the watchdog role traditionally protected by the First Amendment are increasingly tethered to platforms. Platform values, including speed and scale, are heavily influencing the editorial discretion that is the animating feature of press freedom. Today, we have a Networked Press.

Part III begins by confronting the limits of the First Amendment. The state action doctrine prevents the First Amendment from truly protecting editorial discretion and watchdog journalism in a Networked Press environment. That is, a rift exists between the press that we have and the press that our Constitution is capable of protecting. This rift should prompt us to examine whether our current legal framework fosters and protects the type of journalism that centuries of scholars, lawyers, and politicians have said is essential to democracy. We have long relied on the market to produce such journalism. Now, in an era of cheap information, the shortcomings of that approach are becoming clearer. This part then considers the path forward. It provides a range of extra-constitutional legal options aimed at fostering watchdog journalism in the age of the Networked Press. They include options that would both loosen the hold of platforms on journalists and empower journalists by making their investigative reporting easier.

By definition, the Fourth Estate is not loyal to the occupant of any government office, but it is devoted to upholding our form of government. Watchdog journalism is a check on corruption and protection against tyranny. In contrast, the more diffuse Networked Press, with its web of human and non-human actors, has no collective loyalty. By allowing the Networked Press’s most powerful actors, technology platforms, to impose their values on the press, we are at risk of outsourcing a key constitutional function to Silicon Valley. The First Amendment alone is unlikely to resolve this problem. To protect the watchdog role in a Networked Press era, we should look beyond it.

I. THE FIRST AMENDMENT, THE PRESS, & THE FOURTH ESTATE

Cognitive linguists believe that a function of metaphor is to make the abstract more concrete. Describing life as a “journey,” for example, gives some shape to an otherwise difficult-to-define concept. The “Fourth Estate” does the same for the press. The words themselves conjure up a literal place—a formidable manor building with grounds, separated from three other similar estates. This image 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.

The Fourth Estate metaphor has served admirably for more than two centuries. Both when the First Amendment was ratified and when the Supreme Court has interpreted the First Amendment in cases involving the press, the conception of a “free press” under American law has been one that aligns with the Fourth Estate metaphor and its inherent qualities. This section begins by describing how the framers themselves viewed the press as having the qualities of a Fourth Estate. As a result, the metaphor was, in a sense, baked into the First Amendment. It then

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34 See Bell & Owen, supra note 16 (quoting David Skok, a digital media executive who worked for the Boston Globe and Toronto Star as saying, “We are outsourcing our core competency to third parties. We simply don’t have a choice”).
36 See id.
describes the way in which, when the Supreme Court turned in earnest to interpreting the First Amendment in the second half of the twentieth century, it fleshed out the Fourth Estate metaphor. The Court’s effort was both descriptive and normative. It reflected a press that actually existed, a press that served as a check on government. Likewise, the Court enshrined its vision of the Fourth Estate into constitutional law.

A. THE FRAMERS & THE FOURTH ESTATE

Somewhat ironically for a metaphor about the origins of journalism, the “when,” “where,” and “who” regarding the first use of the term “Fourth Estate” cannot be confirmed. The most often-told version of the story is this: It was 1787 in London, and British parliamentarian Edmund Burke was speaking of the rights of reporters to listen in on the business of government when he said: “there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.” The three estates Burke referred to were the clergy, nobility, and the commoners. When the metaphor gained currency here, the estates were Americanized and became the executive, legislative, and judicial branches of government.

If we believe this origin story, the timing of Burke’s speech—two years before the drafting of the First Amendment—makes it possible that the framers were familiar with the metaphor. In his history of the First Amendment, Emergence of a Free Press, Leonard W. Levy argues that at the time of the framing, “[f]reedom of the press also meant that the press had achieved special status as an unofficial fourth branch of government, ‘the Fourth Estate.’” But regardless of whether the framers knew or used the metaphor, evidence exists that they understood the press as having the essential qualities of a Fourth Estate. The press was an institution. That institution was independent, and it served as a check on government.

Admittedly, asserting that the framers viewed the press as an institution is controversial. Scholars and Supreme Court justices have heatedly debated whether the Press Clause protects

38 See id; Potter Stewart, “Or of the Press,” 26 HAST. L.J. 631, 634 (1975). But see Julianne Schultz, Reviving the Fourth Estate 49 (1998) (“The Oxford English Dictionary notes for instance that when Thomas Carlyle attributed the term to Edmund Burke, he observed that Burke had used it as a derogatory reference to the self-importance of parliamentary reporters in 1787.”).
40 See Steward, supra note 38, at 634 (arguing that the Fourth Estate is designed to serve as a check “on the three official branches.”)
41 See Schwartz, supra note 9, at 132.
42 See Bernard Schwartz, Death TV? Is There A Press Right of Access to News That Allows Television of Executions?, 30 TULSA L.J. 305, 350 (1994) (arguing that “influenced by Burke or not, Americans did develop a concept of the press as a Fourth Estate institution by the time the Bill of Rights was ratified”) [hereinafter Death TV?]; LEONARD W. LEVY, EMERGENCE OF A FREE PRESS xii, 273 (1985) (noting that at about the time of the framing, a “free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable, and accountable”).
the press as an institution or merely a technology. In a 1974 speech, Justice Potter Stewart argued that the First Amendment’s Press Clause was a structural provision designed to protect the press as an institution. He wrote that the framers’ goal in including the Press Clause in the First Amendment was “to create a fourth institution outside the Government as an additional check on the three official branches.” He added, “The relevant metaphor, I think, is the metaphor of the Fourth Estate.” This view never commanded a majority of the Court, however. Instead, First Amendment doctrine has been that the Press Clause does not confer any special protections on the press.

Nearly four decades later, in Citizens United v. Federal Election Commission this debate between press-as-technology versus press-as-institution again surfaced. Justice Scalia wrote in a concurrence that it was “passing strange” to think of the press as an entity worthy of protection under the First Amendment. In a separate opinion, Justice Stevens countered that the Press Clause suggests that the press “might be able to claim special First Amendment status.” The case set off a new round of scholarly sparring over the Press Clause’s meaning.

Emerging from the debate is a convincing argument that the framers saw the press as both technology and institution. First Amendment scholar Sonja R. West has argued that a consensus probably did not exist among the framers on the precise meaning of the press and that they likely understood the press to have “multiple ‘original’ meanings.” She has written that the press “was a technology that, in their experience, was inextricably linked with a group of specialists who were discharging a particular set of functions by informing the citizenry about matters of public concern and checking government abuses.” West examined the “lived experience” of the framing generation and demonstrates that in both “practice and in reputation, the printing press overlapped meaningfully with the growing concept of the ‘press’ as a community of newspapers and the men who made them.” Thus, evidence exists that the framers understood the press, at least in part, to be a group of specialized actors with a common goal and the Press Clause as a structural provision to protect the institution of the press.

43 See, e.g., West, supra note 30, at 49; Volokh, supra note 30, at 461-63; Citizens United v. Federal Election Commission, 558 U.S. 310, 390 n.6, 431 n. 57 (2010).
44 See Stewart, supra note 38, at 634.
45 Id.
46 Id.
47 See Schwartz, Death TV?, supra note 42, at 353 (“There is no doubt that the Supreme Court jurisprudence … has rejected the Fourth Estate concept of the press with additional institutional rights and has instead accepted the Warren notion of the press vested only with the same rights as members of the public.”).
49 Id. at 390 n. 6. (Scalia, J., concurring), 431 n. 57 (Stevens, J. concurring in part and dissenting in part).
50 See id. at 390 n. 6 (“It is passing strange to interpret the phrase ‘the freedom of speech, or of the press’ to mean, not everyone’s right to speak or publish, but rather everyone’s right to speak or the institutional press’s right to publish. No one thought that is what it meant.”) There is no majority opinion in the case.
51 Id. at 431 n. 57.
52 See, e.g., Volokh, supra note 30, at 461-63; West, supra note 30, at 49.
53 West, supra note 30, at 55, 61.
54 Id. at 105.
55 Id. at 82. This view is shared by Randall P. Bezanson who wrote, “The press is an institutional speaker. This conception of the press was understood in a rough and structural way at the time the First Amendment was ratified, for the press was even then seen as playing a systematic role in democratic society.” See Randall P. Bezanson, The Developing Law of Editorial Judgment, 78 Neb. L. Rev. 754, 757 (1999).
56 See West, supra note 30, at 89.
To be fair, scholars and the Court do not utilize an agreed upon definition of institution. In fact, rarely in case law or scholarship on the Press Clause is there close examination of the term. Eugene Volokh, in his work on the Press Clause, wrote “press as institution” could be substituted with press as “industry,” “trade,” or “occupation.”\(^{57}\) West used “community,” “specialized craft” and an “institutionalized, professionalized endeavor.”\(^{58}\) Although diffuse, these labels are consistent with the broad conception of institution I adopt—an organization of individuals bound by common norms, goals, and purpose.\(^59\) Under this definition, the framers viewed the press as an institution.

As a key feature of its institutional nature, the framers also sought to ensure the press’s independence. The very words of the First Amendment announce the importance the framers placed on press autonomy from government.\(^60\) At the heart of this freedom is the press’s ability to exercise editorial discretion.\(^61\) Printers were exercising this discretion at the time of the First Amendment’s ratification. As First Amendment scholar Randall P. Bezanson wrote, printers in 18th and 19th century England were “selecting material to be published for [a] rapidly increasing audience” and in doing so were exercising “independence from government.”\(^62\) When the technology of printing and mass production was brought to America during the same era, “the idea of ‘news’ and editorial judgment was refined and extended, but not fundamentally altered.”\(^63\)

As an independent institution, the framers envisioned a key role of the press as being a check on government. About this, there is little question. “Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate,” wrote First Amendment scholar Vincent Blasi.\(^64\) The framers understood well the threat posed by government tyranny and the importance of having means to oppose it. The trial and acquittal of printer John Peter Zenger in 1735 for seditious libel was still in relatively recent memory.\(^65\) More proximate to the framing era, in 1774 the Continental Congress had made clear the importance of the checking function. In outlining the fundamental rights colonists sought, it emphasized that by a free press “oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.”\(^66\) And shortly after the First Amendment was ratified, its drafter, James Madison, argued that while press freedom in England may have been limited due to the belief

\(^{57}\) See Volokh, supra note 30, at 461 n.2.

\(^{58}\) See West, supra note 30, at 82, 95.

\(^{59}\) My definition is drawn from First Amendment scholar Paul Horwitz who describes an institution as an organization of individuals “bound together by [a] common purpose.” Paul Horwitz, First Amendment Institutions 11 (2012). This organization is one of shared “formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics.” Id. (citing Douglass C. North, Economic Performance Through Time, 84 AM. ECON. REV. 359, 360 (1994)).

\(^{60}\) See U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech, or of the press”).


\(^{62}\) Id. at 183.

\(^{63}\) Id.

\(^{64}\) See Vincent Blasi, The Checking Value in First Amendment Theory, 2 AM. B. FOUND. RES. J. 521, 527 (1977); West, supra note 30, at 70 (“The framing generation’s appreciation for the structural function of the press is not controversial.”).

\(^{65}\) See Blasi, supra note 64, at 534-35.

\(^{66}\) Id. at 535.
that legislators there sufficiently checked the executive, in the United States the situation was different. More freedom was required here because officials were not “infallible” or “omnipotent.”

Thus, even at the time of the framing, the components of a Fourth Estate were in place. A collective of printers exercising editorial discretion was serving as a check on the nation’s fledgling government. The Fourth Estate was taking shape, and the First Amendment promised to protect it from government interference.

B. THE SUPREME COURT & THE FOURTH ESTATE

The Supreme Court cemented the conception of the press as a Fourth Estate in a series of decisions from the mid-twentieth century. Although in its first 130-or-so years, the First Amendment lay dormant, the Supreme Court began deciding First Amendment cases in earnest at the close of World War I. And in the next four decades, the Court decided a series of cases that constitute a chunk of any media law casebook. In its opinions, the Court recognized the inherent qualities of a Fourth Estate. It viewed the press as an institution. It also confirmed that this institution was endowed with independence in the form of editorial discretion. Moreover, it indicated that a key press function is government watchdog.

“[T]he institutional press,” wrote Justice Brennan in *Richmond Newspapers, Inc. v. Virginia*, “serves as the ‘agent’ of interested citizens.” This 1980 concurrence capped off an era in which numerous opinions describe the press as an institution. For example, *First Nat. Bank of Boston v. Bellotti* describes the press as an “institution” with a “constitutionally recognized role of … informing and educating the public, offering criticism, and providing a forum for discussion and debate.” Likewise, in *Mills v. Alabama*, the Court refers to the press as “one of the very agencies” that the framers “thoughtfully and deliberately selected to improve our society and keep it free.”

In conceiving of the press as an institution, these decisions celebrated the press’s independence. They described the editorial discretion that the press exercised as almost

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67 Id. at 535-36.
68 Id. at 536; James Madison, Report on the Virginia Resolutions, in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 570 (Jonathan Elliot ed., 2d ed. 1937).
69 The Supreme Court said of its own First Amendment jurisprudence that “no important case involving free speech was decided” until the close of World War I. See Dennis v. United States, 341 U.S. 494, 503 (1951); Anderson, *supra* note 30, at 447-48 n. 94; Wu, *supra* note 31 (“The First Amendment was a dead letter for much of American history.”).
70 See Anderson, *supra* note 30, at 448.
71 448 U.S. 555 (1980).
72 Id. at 586, n. 2 (Brennan, J., concurring).
74 Id. at 781.
75 384 U.S. at 214, 219 (266). In referring to the institutional press, the justices were not always doing it in favorable terms. In his dissent in *New York Times Co. v. United States*, faulting the government for publishing secret documents, Justice Burger wrote: “To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents.” *New York Times Co. v. United States*, 403 U.S. 713, 751 (1971) (Burger, J. dissenting). Moreover, as with Press Clause scholars, it is not always clear what definition of “institution” the justices are using. Yet, their usage seems consistent with my broad definition.
For example, in *Miami Herald Publishing v. Tornillo*, a case about a political candidate’s right to reply to a negative newspaper editorial, the Court concluded that the government had no business interfering with the editorial process. “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment,” the Court wrote. “It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantee of a free press as they have evolved to this time.” Similarly, in *Columbia Broadcast System, Inc. v. Democratic National Committee*, the Court insisted on the right of journalists to exercise discretion in determining what qualified as news. The Court rejected the lower court’s view that “every potential speaker is ‘the best judge’ of what the listening public ought to hear.” It reasoned that “[a]ll journalistic tradition and experience is to the contrary.”

One might argue that even though the Supreme Court has, at times, recognized the institutional nature of the press, it has flatly rejected any protection of the institution itself. After all, the Court has refused to interpret the Press Clause as providing any unique protections to the press as an institution and has said that under the Speech Clause, members of the press have no greater protections than any other speaker. And yet, undermining its own statements, the Court’s jurisprudence is built on acceptance of the institutional nature of the press. Take *Tornillo* and the *Columbia Broadcasting System* cases. In both, the Court defers not to individual journalists but to “editorial control and judgment” and to “journalistic tradition.” In doing so the Court reveals its comfort in deferring to an institution that is, like the Court itself, bound by norms and rules.

Finally, in addition to recognizing the institutional and independent nature of the press, the Court repeatedly discussed the press’s roles and duties. Chief among these was serving as a watchdog. Take, for example, *New York Times Co. v. United States*, a case about one of the press’s most legendary acts of checking the government—its publishing of secret documents about the Vietnam War. In its opinion, the Court wrote that by the First Amendment, “[t]he sacrosanct. For example, in *Miami Herald Publishing v. Tornillo*, a case about a political candidate’s right to reply to a negative newspaper editorial, the Court concluded that the government had no business interfering with the editorial process. “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment,” the Court wrote. “It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantee of a free press as they have evolved to this time.” Similarly, in *Columbia Broadcast System, Inc. v. Democratic National Committee*, the Court insisted on the right of journalists to exercise discretion in determining what qualified as news. The Court rejected the lower court’s view that “every potential speaker is ‘the best judge’ of what the listening public ought to hear.” It reasoned that “[a]ll journalistic tradition and experience is to the contrary.”

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77 Id. at 258.
78 Id.
79 Id.
81 See id. at 124-25.
82 Id. at 124.
83 Id.
84 See Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (“Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’”)
85 See 418 U.S. at 258; 412 U.S. at 124.
86 And notably, even in one of the very cases in which the Court indicated the press cannot lay claim to any special protections, the Court’s opinion effectively gave the press just that. In *Houchins v. KQED*, the Court wrote that the news media did not have any “special privilege of access to information.” 438 U.S. 1, 10 (1978) (emphasis in original). Yet, in a concurring opinion, Justice Stewart wrote that although the Constitution does not do more than “assure the public and the press equal access” to information, that “equal access” included accounting for the “practical distinction between the press and the general public” and the press’s mission to inform. *Id.* at 16-17. Thus, Stewart’s opinion, which was effectively the controlling one in the 4-to-3 decision agreed with a district court finding that the press was entitled to access to a jail “on a more flexible and frequent basis” than members of the public. *Id.* at 18.
87 See 403 U.S. at 717.
press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in the government.”

The Court went so far as to say that a free press not only could be a watchdog but had an affirmative obligation to do so.

It wrote that “paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”

Other cases from the same era likewise lionize the press’s role as a “handmaiden of effective judicial administration” through “guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”

More broadly, the Court indicated that the press acted as “a powerful and constructive force, contributing to remedial action in the conduct of public business” and that “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.”

Thus, even though the Court has largely ignored the Press Clause and stated that the rights of journalists are no greater than other speakers, it has meanwhile repeatedly recognized and relied upon the institutional nature of the press. It characterized that institution as independent, cohesive, and signaled that it is worthy of significant deference. In doing so, although the Supreme Court has not used the words “Fourth Estate,” it breathed life into the metaphor.

C. THE FOURTH ESTATE IN ACTION

The timing of the Supreme Court’s opinions lauding the press is no coincidence. The 1960s and 70s were the press’s period of “high modernism.” In writing about an institutional press wielding its editorial discretion to serve as a watchdog over government, the Court was being descriptive and not merely normative. It was depicting a press that in many ways already existed.

A far cry from the colonial-era newspapers that journalist and historian Jill Lepore called a “ragged fleet of dung barges,” by the World War II era, the press had actually developed into a robust institution. That is, the press was exhibiting shared norms and goals that had been in development for several decades. For one, it had professional associations, awards, and training opportunities. The Society of Professional Journalists was founded in 1909, and the American Society of Newspaper Editors (now the American Society of News Editors) followed thirteen

88 Id.
89 See id.
90 Id.
93 See 384 U.S. at 219.
95 See HORWITZ, supra note 59, at 16 (“Law regulates our culture, but it is also determined by our culture.”).
96 See Jill Lepore, The Day the Newspaper Died, NEW YORKER (Jan. 26, 2009), https://www.newyorker.com/magazine/2009/01/26/back-issues; see West, supra note 30, at 88 (quoting the Lepore article).
years later. Although Columbia University had in 1892 turned down an offer by Joseph Pulitzer to establish a school of journalism, by 1912, university leadership changed its mind. That year, journalism classes began for seventy-nine undergraduate and graduate students. In 1917, the University bestowed the first round of Pulitzer prizes, which Joseph Pulitzer said in his will, were to elevate a “noble profession.”

Along with graduate programs, professional organizations, and prizes, came increased attention to institutional standards and norms. News became less commentary and more “scientized” and “fact-centered.” Objectivity became “a kind of industrial discipline.” News was grounded in “a faith in ‘facts,’ a distrust of ‘values,’ and a commitment to their segregation.” In 1923, at its opening convention, the American Society of Newspaper Editors adopted the “Canons of Journalism,” which included impartiality, truthfulness, and accuracy. Likely in service of objectivity, it was by this time that interviewing became a routine aspect of journalism whereas it had rarely been used fifty years earlier.

The press’s increasing focus on objectivity was, in part, a means of asserting its freedom from the primary forces that might tether it: government and advertisers. The press was responding to feeling as if it had been an uncritical conduit for propaganda during World War I. It was also attempting to distinguish journalism from the burgeoning fields of public relations and advertising. Thus, the press’s increasing cohesiveness as an institution coincided with its increasing independence from other major forces that had traditionally impeded its freedom and independent exercise of editorial discretion.

As the institutional press developed, it played its constitutionally prescribed watchdog role in ways that have become fodder for Hollywood blockbusters. In 1971, the New York Times and other newspapers published the “Pentagon Papers,” secret government documents about the country’s involvement in the Vietnam War. The next year, the Washington Post

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102 See Ananny, supra note 16, at 68 (quoting Daniel C. Hallin).
104 See SCHUDSON, supra note 16, at 68 (quoting Michael Schudson, Discovering the News: A Social History of American Newspapers 6 (1978)).
107 See Ananny, supra note 16, at 75 (“Journalists’ uncritical echoing of state propaganda during World War I convinced them that they needed a professionalism premised on separating facts and values.”). As media sociologist Michael Schudson wrote, “For journalism, habitual deference to government officials, especially in foreign policy, came to be seen not as professionalism but as occupationally induced laziness, naïveté, or even worse.” SCHUDSON, THE SOCIOLOGY OF NEWS, supra note 103, at 80. Journalists began emphasizing their role as “activist, reformer, and exposé.” See Kovach & Rosenstiel, supra note 33, at 169.
108 See Ananny, supra note 16, at 71 (“Journalists worried that their inchoate autonomy—grounded in objectivity—would be eclipsed by these new ‘parajournalists’ who, to the uninitiated public . . . were indistinguishable from journalists.”); SCHUDSON, THE SOCIOLOGY OF NEWS, supra note 103, at 76.
109 See, e.g., All the President’s Men (Warner Bros. 1976); The Post (Amblin Entm’t. et al. 2017).
110 See SCHUDSON, THE SOCIOLOGY OF NEWS, supra note 103, at 81; Kovach and Rosenstiel, supra note 33, at 177.
would play a key role in revealing the details of the Watergate scandal that brought down a president and numerous other officials.111 Around this time as well, CBS launched 60 Minutes, an investigative news show so successful that it is still produced today.112

The press’s watchdog role during this time period also extended beyond what it published. The press served as an “instigator and enforcer” in legislatures and courts.113 Cases like New York Times Co. v. United States (allowing for newspapers to publish the Pentagon Papers), Richmond Newspapers, Inc. v. Virginia (granting access to courtrooms during criminal trials) and Nebraska Press Association v. Stuart (invalidating a bar on the press publishing accounts of confessions or admissions in a criminal trial) all involved the press flexing its muscle in the name of greater First Amendment freedoms.114 “Without newspapers and newspaper organizations at the helm—instigating, enforcing, coordinating, and financing legal change, much, if not most, of the nation’s important open-government law from the last generation simply would not have come to pass,” media law scholar RonNell Andersen Jones wrote.115 This includes the Freedom of Information Act, which was drafted by a former journalist and passed because of the work of a wide range of journalism organizations.116

To be fair, this golden age of journalism was not without tarnish. The press could be biased. It could still be a mouthpiece for government and private interests despite its efforts to be independent. It could be apathetic and even hostile to women and people of color both in its ranks and in its audience. Even so, if we look at the attributes that made the press a Fourth Estate—institutional cohesion, the ability to exercise independence through editorial discretion, and service as a watchdog—the press was at a relative apex. It was profiting handsomely. It controlled its distribution networks. And, although composed of many news organizations, those organizations that made up the Fourth Estate only had to worry about competing with one other. News executives likely would not have imagined a day in which they would be beholden to a handful of platforms just one of which, Alphabet, Inc., the parent company of Google, has annual revenue four times that of the entire newspaper industry.117

111 See SCHUDSON, THE SOCIOLOGY OF NEWS, supra note 103, 82.
112 See KOVACH AND ROSENSTIEL, supra note 33, at 170.
113 See Jones, supra note 15, at 559.
114 See 403 U.S. at 714; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980); 427 U.S. at 570. 584.
115 Jones, supra note 15, at 570.
116 To be sure, the press plays numerous societal roles that may not all be encompassed under the umbrella of watchdogging. For example, Michael Schudson described the six functions of journalism in democratic societies as: information, investigation, analysis, social empathy, public forum, and mobilization. SCHUDSON, WHY DEMOCRACIES NEED AN UNLOVABLE PRESS, supra note 94, at 12. Acting as a watchdog may overlap with one or more of these roles at any given time, but it does not necessarily do so.
II. THE NETWORKED PRESS: DEFINING FEATURES & THE CHALLENGE TO WATCHDOG REPORTING

In May of 2018, Showtime premiered a docu-series by Oscar-nominated filmmaker Liz Garbus entitled The Fourth Estate.118 A teaser for the series says it “intimately chronicles the tenacious men and women in the trenches who are fighting for the freedom of the press and America’s right to know.”119 But despite its title and this description, the series is not primarily about “the press” writ large. Rather, its focus is a single newspaper: the New York Times. It follows Times journalists as they negotiated covering the first year of the Trump Administration.

The title of the series is evidence that the Fourth Estate metaphor still has cultural heft. And yet, its subject demonstrates how narrow the scope of the metaphor has become. The Fourth Estate has not disappeared, but its membership has shrunken dramatically, and it has been subsumed into a vast media ecosystem—one that includes players far more powerful than the Times. Although they deny being media companies, platforms like Google, Facebook, and Twitter are exercising traditional press functions, including editorial discretion.120 And what media scholar Jay Rosen called “the people formerly known as the audience” are also playing journalistic functions by creating, curating, and sharing news, not simply consuming it.121 That these entities might not consider themselves members of the press—or may even actively distance themselves from the label—does not negate their role.

Platforms are goliaths in the news ecosystem because they are often where we go to find news. And they are a particular threat to news because platforms are also where we go to find so many other types of information. News is just one type of content that platforms monetize. Platforms are not so much concerned with news as they are with whether news is content that captures attention.

Each week, 600 million people see a news story on Facebook.122 Between July 2017 and July 2018, about forty-nine percent of referral traffic to publisher sites came from Google and thirty-one percent was from Facebook.123 Consumers also find news on other platforms including

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119 Evans, supra note 118.


121 See Jay Rosen, The People Formerly Known as the Audience, HUFFPOST: THE BLOG (June 30, 2006), https://www.huffingtonpost.com/jay-rosen/the-people-formerly-known_1_b_24113.html; KOVACH AND ROSENSTIEL, supra note 33, at 25 (“As we search through Google for information, graze across a seemingly infinite array of outlets, share stories or links with friends, like things on Facebook pages, we become our own editors, researchers, and even news gatherers.”).


There is a clear correlation between the folding of entire newspapers and the loss of revenue from advertising. In other words, a significant percentage of news sites’ readership is coming to them through a search engine or social media. “[N]ews spaces are no longer owned by newsmakers,” said Emily Bell, the director of the Tow Center for Digital Journalism at Columbia University. Rather, platforms are now playing a gatekeeping function once exercised by the press.

This gatekeeping role has earned platforms vast wealth. Google and Facebook control about seventy-three percent of digital advertising revenue in the United States. While newspapers have hung on to some of this revenue, most escapes their white-knuckle grasp. In the last decade, advertiser spending on newspapers plunged by almost seventy-five percent. Desperate to recoup some of that loss, many publications have agreed to share their journalism with certain platforms and, in return, receive some portion of advertising revenue. These arrangements have tended to disadvantage news organizations. A 2017 report by the World Association of Newspapers and News Publishers concluded that “revenue shared by the leading platforms is too low to fully fund editorial operations,” even for the largest news organizations.

Although signs are emerging that some news organizations are having success bringing viewers to their home pages and garnering subscriptions, these successes are still limited. Meanwhile, the effects of the erosion on the press’s business model have been serious and widespread. Some are tangible: the shuttering of news bureaus, the laying off of journalists, and the folding of entire newspapers. The problem is particularly acute in smaller markets.

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124 See Brown, Local Audiences Consuming News on Social Platforms Are Hungry For Transparency, supra note 17.
126 Tiku, supra note 11.
127 FOER, supra note 24, at 211.
128 One example is the May 2015 announcement by Facebook that it had entered into agreements with nine publishers to provide it content for its Instant Articles product. See Martin Moore, Tech Giants and Civic Power, CENTRE FOR THE STUDY OF MEDIA, COMMUNICATION, AND POWER 31 (April 2016), https://www.kcl.ac.uk/sspp/policy-institute/cmcp/tech-giants-and-civic-power.pdf. In describing this development, media scholar Martin Moore says that the publishers entered into these agreements “willingly.” See id. Yet, this is not an entirely fair characterization. Having had their revenue streams gutted, publishers were left with few viable choices.
130 See Joshua Benton, So Some People Will Pay for a Subscription to a News Site. How About Two? Three?, NIEMANLAB (Nov. 13, 2018), http://www.niemanlab.org/2018/11/so-some-people-will-pay-for-a-subscription-to-a-news-site-how-about-two-three/?utm_source=Daily+Lab+email+list&utm_campaign=4f7c334df5-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-4f7c334fd5-396214909 (indicating that subscriptions are “at the center of media company plans for 2019 and beyond” but that the “data thus far isn’t super encouraging”).
131 See Daniel Funke, What’s Behind the Recent Media Bloodbath? The Dominance of Google and Facebook, POYNTER (June 14, 2017), https://www.poynter.org/news/whats-behind-recent-media-bloodbath-dominance-google-and-facebook-(quoting Jason Kint, CEO of an advertising trade organization saying, “There is a clear correlation between layoffs and buyouts with the growth in market share for the duopoly—Google and Facebook”). In fact, New York Times CEO Mark Thompson forecasted benefits for his company in the next five years because so many other news entities are going out of business. See Ken Doctor, Newsonomics: The New York Times’ Mark Thompson on Regulating Facebook, Global Ambition, and When to Stop the Presses (Forever), NIEMANLAB (Nov. 13, 2017),
The New Networked Press. Part A

A. COMPETING NORMS & THE DECLINE OF AN INSTITUTIONAL PRESS

In the spring of 2016, Benjamin Fearnow was working as a contract employee for Facebook. Relatedly, journalists are now more concentrated in a handful of coastal cities. Whereas in 2004, one in eight news jobs was based in Washington, New York, or Los Angeles, today it is one in five. See Helain Olen, The Crisis in Journalism That’s Helping Trump, WASH. POST (April 9, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/04/09/the-crisis-in-journalism-thats-helping-trump/?utm_term=d3de140bb388.

By “rot,” I mean to invoke Jack Balkin’s concept of “constitutional rot.” See Jack M. Balkin, Constitutional Crisis and Constitutional Rot, 77 Md. L. Rev. 147, 147 (2017). Balkin differentiates between the acute process of “constitutional crisis” and the “degradation of constitutional norms that may operate over long periods of time” that he calls “constitutional rot.” See id. at 147, 150-51. This slow, institutional degradation is similar to what is occurring to the press.

permit him to list the position on his LinkedIn profile.137 His task, along with about two dozen others, was to work in tandem with Facebook’s algorithms to decide which posts would be featured on Facebook’s Trending News, a changing list of the most popular stories on the platform.138 If, for some reason, the algorithm didn’t surface news that human editors like Fearnow thought was important, the humans could “inject” it.139 Facebook hoped that the humans would be so helpful in training the algorithms that they would make themselves unnecessary.140

The plan was short-circuited, however, when the Trending News team of editors became news themselves. A series of stories broken in May 2016 by technology publication Gizmodo revealed the existence of the human editors at Facebook and, beyond that, aired claims that certain Facebook editors were suppressing conservative views.141

News about the human editors spread quickly. A public relations crisis ensued, and the backlash led Facebook CEO Mark Zuckerberg to meet with conservative leaders. Zuckerberg posted on Facebook about the meeting and included a photo with the words: “A Platform for All Ideas.”142 Several months later, Facebook fired the Trending News team.143

Reflecting on the experience, Fearnow (who had actually been fired in April for leaking information to the Gizmodo reporter) expressed surprise at the outcry over supposedly “liberal journalists” dictating stories, given that the engineers training Facebook’s algorithm were truly the ones with the power.144 “The culture at Facebook is, the engineers there are like editors,” he said.145 “They’re like God, because no one really knows what . . . they do.”146

The incident highlights the difficulty of labeling today’s press an institution. Rather, platforms, software designers, engineers, algorithms, consumers of news, journalists, and others,

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137 See Benjamin Fearnow, LINKEDIN, https://www.linkedin.com/in/benjamin-fearnow-3a096831/; Nathan Bomey, How Facebook Fired Workers Who Blocked “Fake News”—“After the Fact” Book Excerpt, USA TODAY (May 6, 2018), https://www.usatoday.com/story/money/2018/05/06/after-fact-erosion-truth-donald-trump-book/541341002/ (noting contractors had been “sworn to secrecy over the existence of their jobs”); Isaac, Facebook “Trending” List Skewed by Individual Judgment, Not Institutional Bias, supra note 136 (noting that “managers were ambivalent about allowing staff members to identify themselves as curators or editors on their LinkedIn profiles . . . given concerns that outsiders would notice the element of human judgment and ask questions about it”); Thompson & Vogelstein, supra note 136.

138 See Thompson & Vogelstein, supra note 136.

139 See id.

140 See id.; Sam Thielman, Facebook Fires Trending Team, And Algorithm Without Humans Goes Crazy, THE GUARDIAN (Aug. 29, 2016), https://www.theguardian.com/technology/2016/aug/29/facebook-fires-trending-topics-team-algorithm (noting that “the trending module was meant to have ‘learned’ from the human editors’ curation decisions and was always meant to eventually reach full automation”).


143 See Bomey, supra note 137.

144 See id.

145 Id.

146 Id.
all play press functions. The Fourth Estate still exists, but it could be described as a node in the Networked Press—a web in which the biggest nodes are platforms.

The Networked Press is not an institution. The norms of platforms diverge too significantly from those of the Fourth Estate. Below is a taxonomy that details platform norms and explains how they differ from those of the press.

1. COMMODIFICATION V. DUTY

“If I ever say the word ‘user’ again, immediately charge me $140,” Jack Dorsey, Twitter’s CEO, wrote in 2013. “No one wants to be thought of as a ‘user’ (or ‘consumer’ for that matter). I certainly don’t,” Dorsey said, calling the word “derogatory.” Dorsey then made a plea: “To everyone in the technology industry: I encourage you to reconsider the word ‘user’ and what you call the people who love what you’ve created.” It is not clear if Dorsey ever needed to pay out. (I have found no evidence of him saying “user” publicly in the years since). Regardless, Dorsey definitively failed at convincing Silicon Valley to give up the term.

His request was unlikely to be heeded. The term is hard to shake because its negative connotations are apt. “User” accurately captures the prototypical busy person reliant on the platform while not fully appreciating what he is giving away. Platforms commodify users. For platforms, “users” are not really “customers” (a word Dorsey prefers). Rather, as the using public has begun to better understand, they are the commodity.

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147 See Mike Ananny, The Partnership Press: Lessons for Platform-Publisher Collaborations as Facebook and News Outlets Team to Fight Information, TOW CTR. FOR DIGITAL JOURNALISM (April 4, 2018), https://www.cjr.org/tow_center_reports/partnership-press-facebook-news-outlets-team-fight-misinformation.php/#citations (“There is increasing recognition that the conditions under which journalists work, news is produced, and information circulates are defined not only by journalists, their sources, markets, and the state, but also by technologists, software designers, databases, and algorithms that influence how news is made and made meaningful, through both human judgment and computational processes.”).

148 See KOVACH AND ROSENSTIEL, supra note 33, at XIII (“Much of the revenue surrounding journalism now flows to companies such as Google that are engaged in its distribution but not its creation and, thus, its values.”).

149 I chose to focus on the values of platforms both because of their outsized impact in the Networked Press, and because there are certain values platforms espouse that could be isolated and described. I do not attempt to do the same for the audience as the group is too diverse with too many motivations and values. I also do not attempt to define the values of algorithms because their values are those that software engineers build into them. As Google’s vice-president of news Richard Gingras quipped in a 2018 interview, “As I often say, technology has value but it doesn’t have values. It’s what we do with it.”

150 See id.

151 Id.

152 Id.

153 It also captures the addictive nature of the technology given that “user” is also a word used to describe someone addicted to drugs. Dorsey, too, recognized this connotation. See id.

154 See id.

155 Don Norman, the director of The Design Lab at the University of California, San Diego, argues that “user” is “a way to degrade the people for whom we design, a way of labeling them as objects.” See Don Norman, Words Matter. Talk About People: Not Customers, Not Consumers, Not Users, JND.ORG, https://www.jnd.org/dr.mss/words_matter_talk_ab.html; About Don Norman, JND.ORG, https://www.jnd.org/about.html.
Although users do not hand over cash, platforms are not providing a free service. Users pay with their personal information. Platforms harvest vast amounts of data from users that platforms then monetize. The volume of this data and the breadth of those it has been shared with is only beginning to get attention. The commodification of users is the platform business model.

In contrast, a text widely read by journalism students counsels that journalism’s “first loyalty is to citizens.” This sentiment is echoed by working journalists. For example, the editorial board of the Bangor (Maine) Daily News wrote, “News organizations don’t serve governments. They serve you, the public. They are the only way you know when your government isn’t working as it should. They are the only independent way to know what elected officials are doing.” Journalism—especially watchdog journalism—is a public service. Providing information to citizen-readers that will allow them to be self-governing is the ultimate goal. True, like the “user” of a platform, the reader or viewer is commodified by the press via advertising and subscriptions. In contrast to platforms, however, the press reciprocates the reader or viewer’s investment with its own loyalty to that reader or viewer as a citizen.

It is a loyalty sufficiently strong that it has been likened to a legal duty. “Every CEO understands they have a fiduciary duty to their shareholders,” a former chairman of the International Herald Tribune, Peter C. Goldmark, Jr., said. “In terms of journalism, I put more faith in corporate leadership that understands that they have an equally solemn fiduciary responsibility arising from their ownership of a news organization—that they hold a public trust.” In fact, the Supreme Court suggested such a duty exists when in Nebraska Press Association v. Stuart it wrote, “The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly.”

And so, while the press, like platforms, makes money from those who read and watch its products, there is an important difference. The press views itself as having an obligation to the

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156 See Kovach and Rosenstiel, supra note 33, at 9, 72; Ananny, Networked Press Freedom, supra note 16, at 186 (noting that “the very best and most self-reflective journalists do not shy away from seeing their work as part of democratic culture” and that, in contrast, “[a]s technology companies and social media platforms try to decide what exactly they are and who their constituents are, they often only awkwardly and shallowly invoke democracy and self-governance, preferring instead the safer terrain of users, customers, communities, personalization, and optimization”).


158 See Albuquerque Journal Editorial Board, Editorial: A Check on Power, Albuquerque Journal, Aug. 15, 2018, https://www.abqjournal.com/1209434/editorial-a-check-on-power.html (“The news media’s job is to hold a mirror up to the world, to tell the truth and to put events into context, so that ‘we, the people’ can make wise and informed decisions. The job of the media is to help the people hold their government accountable.”).

159 See Kovach and Rosenstiel, supra note 33, at 88. Even the Supreme Court indicated that the press has such a duty to the public. See 427 U.S. at 559-60 (“The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty.”).

160 427 U.S. at 560. In this case in which the Court had to balance fair trial rights against the rights of the press to publish, the Court went on to say that this was “a duty widely acknowledged by not always observed by editors and publishers.” See id.
It sees itself as having a fundamental role in our democracy. In fact, journalists are strikingly uniform in their understanding of their “public information mission.” A study by psychologists at Stanford, Harvard, and University of Chicago found that journalists in large numbers subscribed to the belief that “[t]he primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.”

2. PERSONALIZATION V. COMMUNITY

Every day, viewers around the world log a cumulative one billion hours watching YouTube. About seventy percent of that time, viewers are not watching content that they sought out, but rather, content that YouTube’s algorithm selected for them. YouTube’s goal is to make its website “sticky”—meaning, to keep users on it. To do that, not only does the site recommend personalized content, but it automatically plays those recommended videos from a bottomless queue. The phenomenon has a name: the YouTube rabbit hole.

YouTube’s attention-capture efforts are not unique. In order to stay sticky, platforms highly personalize the user experience. Two people may conduct an identical Google search and receive different results. Facebook prioritizes items in one person’s News Feed differently than another. Apple News advertises to users it is “More Personalized” with “Top Stories picked for you and recommendations from Siri.” In the summer of 2018, Twitter announced that it would start sending users personalized news updates based on their interests and add more personalized news to its “Happening Now” feature.

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162 See KOVACH AND ROSENSTIEL, supra note 33, at 20-21.
163 See id. at 17, 21. To be clear, this information-providing function is broader than the press’s watchdog role.
165 Id.
166 See id.
171 Screenshot from Apple News app on file with the author.
Personalization is a key facet of the platform business model. Per the platforms, personalization promotes engagement (i.e., more user time spent on the platform). Engagement allows platforms to show the user more advertising, thereby increasing profit. Engagement also allows the platforms more opportunities to collect user data. More data, in turn, allows for more targeted advertising, again increasing profits.

In contrast, the press has not catered to an audience of one. Doing so would have been financially disastrous in the pre-internet days, but it also runs contrary to a journalistic value, which is to “try to serve the interest of the widest community possible.” In one example, several years ago, The Poynter Institute, a journalism nonprofit, collected responses to this question: why does local journalism matter? The resulting article excerpting responses had the word “community” in it forty-one times. One local newspaper editor said that newspapers “frame the conversation in a community. Usually, that’s as simple as shifting the conversation to be centered on others instead of on ourselves.”

In fact, sociologists argue that news itself creates communities and that this process is crucial for democracy. As media scholar Michael Schudson wrote in his 2003 book, The Sociology of News: “That you and I read the same front page or see the same television news as do the president of the United States and the chairperson of IBM is empowering; the impression it promotes of equality and commonality, illusion though it is, sustains a hope of democratic life.”

Creating communities means not feeding readers and viewers personalized nuggets of information based on what each reader or viewer already knows and likes. As one former Yahoo news executive wrote, “To lovingly ‘curate’ . . . a version of current events to mirror readers’ hobbies, taste preferences, and browsing histories is to downgrade journalism into the stuff of

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173 See Adam Mosseri, Building a Better News Feed For You, FACEBOOK (June 29, 2016), https://newsroom.fb.com/news/2016/06/building-a-better-news-feed-for-you/ (stating that Facebook aims “to show people the stories that are most relevant to them”).

174 See Emily Bell, Facebook Creates Orwellian Headache as News is Labelled Politics, THE GUARDIAN (June 24, 2018), https://www.theguardian.com/media/media-blog/2018/jun/24/facebook-journalism-publishers (noting that targeted advertising represents 98 percent of Facebook’s revenue). To be fair, not all platforms are created equal. For example, Apple touts that it does not monetize customer data. See Leonid Bershidyk, Why Microsoft and Apple Don’t Need to Sell Your Data, NEW YORK POST, April 3, 2018, https://nypost.com/2018/04/03/why-microsoft-and-apple-dont-need-to-sell-your-data/. And yet, Apple collects vast amounts of information from users and is able to leverage it to sell users more of its own products.

175 Once Considered a Boon to Democracy, Social Media Have Started to Look Like Its Nemesis, THE ECONOMIST, (Nov. 4, 2017), https://www.economist.com/briefing/2017/11/04/once-considered-a-boon-to-democracy-social-media-have-started-to-look-like-its-nemesis (“The more people use their addictive-by-design social media, the more attention social-media companies can sell to advertisers—and the more data about the users’ behaviour they can collect for themselves.”) [hereinafter Once Considered a Boon]; Zeynep Tufekci, Facebook’s Surveillance Machine, N.Y. TIMES (March 19, 2018), https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html (“Facebook makes money, in other words, by profiling us and then selling our attention to advertisers, political actors and others. These are Facebook’s true customers, whom it works hard to please.”).

176 See KOVACH AND ROSENSTIEL, supra note 33, at 40.


178 See id.

179 Id.

Pinterest posting—strangely pleasing in many cases, like a warm bath for an infant, but serving no larger civic good.\(^{181}\)

3. AGNOSTICISM V. COMMITMENT

On a 2016 trip that included a private audience with the pope, Mark Zuckerberg told a group of Italian students that Facebook is “a tech company, not a media company . . . we build the tools, we do not produce any content.”\(^{182}\) This agnosticism regarding content has long been a legal and marketing strategy for platforms.

Distancing themselves from the media label allows platforms to absolve themselves of significant responsibility. Under Section 230 of the Communications Decency Act, platforms are not liable for content on their sites because the sites are merely pass-throughs or intermediaries.\(^{183}\) Platforms have been careful to advertise that they are conduits and not creators. Preservation of this image seems to have motivated Facebook’s termination of its “Trending Topics” contractors. Facebook merely helps you find “the things that you care about,” the company has said.\(^{184}\) It is just a tool; it is not “the things” themselves.

Content is not unimportant to platforms. But it is a means rather than an end, a commodity to be curated and leveraged to another purpose. Training the eyes and minds of users on their sites is the goal.\(^{185}\) With this in mind, Facebook, in particular, goes out of its way to avoid content that might bristle users. Among those things is news. In 2018, Facebook announced that its News Feed would prioritize posts from users’ family and friends over those from “businesses, brands, and media.”\(^{186}\) According to Facebook, “passively reading articles or watching videos” from these entities may not be as good for our “well-being” as posts from families and friends.\(^{187}\) Announcing the decision, Mark Zuckerberg wrote that news is “crowding out the personal moments that lead us to connect more with each other.”\(^{188}\)

With a more cynical take, communications and technology scholar Kate Crawford paraphrased the attitude of Silicon Valley engineers and technologists she interviewed about news values saying: “If somebody just wants to read news stories about marmots or the Kardashians, that’s completely fine.”\(^{189}\) Again conveying an agnosticism to the relative importance or worth of content, a senior news app designer told her he did not consider


\(^{183}\) See 47 U.S.C. § 230 (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).


\(^{185}\) Once Considered a Boon, supra note 175 (“It is the overall paying of attention, not the specific information, that matters.”)

\(^{186}\) See Mark Zuckerberg, *Facebook* (Jan. 11, 2018), https://www.facebook.com/zuck/posts/10104413015393571. In fact, although Facebook is notoriously secretive about the algorithm that governs News Feed, it has been clear that it prioritizes “friends and family posts” (seemingly regardless of subject or content) over posts that “inform,” which explicitly include news. See Mosseri, supra note 173.

\(^{187}\) See Zuckerberg, supra note 186.

\(^{188}\) See id.

journalistic values as he worked.  In fact, the designer said, “I think there are no ideals being pursued.”

Crawford’s interviews were conducted in 2014. Now, with the benefit of hindsight, it is easy to see how such attitudes foretold the ways in which disinformation could erupt and mutate as the platforms grew, and opportunists devised ways to manipulate them and their users. Today, marmots and Kardashians are far from being the most dangerous subject matter on platforms. Disinformation and its amplification on platforms is a direct outgrowth of content agnosticism.

For its part, the press has historically not been content-agnostic. Explainers, tic-tocks, profiles, brights, briefs, and breakers—these are just some of the types of stories journalists produce. These stories are not merely “content.” And watchdog journalism—a specialized, time-consuming, and expensive brand of journalism—is a calling for some journalists. Watchdog journalism is intended to expose corruption and to prompt a corrective response. Investigative journalists measure their success by the probes they have sparked, officials who have been ousted, or legislation that has been passed as a result of their work. Watchdog journalism often needles, incenses, and offends. It does so by design. It is not there for the well-being of any one user. Rather, its intent is the well-being of the citizenry and our democratic form of government.

4. SPEED V. DELIBERATION & PROCESS

Platforms are infatuated with speed and optimized for immediacy. “Mobile speed is good for everyone, everywhere,” announced a 2016 Google report. When conducting a Google search, users are told not only how many results the platform has identified, but also the speed at which it identified them down to the hundredth of a second. Twitter posts indicate how long they have been lingering on the platform—almost as if anything more than twenty-four hours old has spoiled. Snaps—posts on the platform Snapchat—last for hours (not days) before vanishing into the ether.

With the constant stream of loud, bright, and glittery things on the internet, users are hard-pressed to spend too much time on any one. The fear of missing out looms large. Facebook’s News Feed or Twitter’s TweetDeck (which allows users to see multiple, customizable Twitter feeds on a single screen) lets users scroll images, text, and video rapidly. A common sequence emerges: scan, dive shallowly into content, scan, reload, repeat. The feed is bottomless, and every refresh promises something new.

It is true that speed is important in journalism; journalists often have to work quickly. The Pulitzers have an entire category devoted to “Breaking News.” Watchdog journalism, however, tends to plod. As Bill Kovach and Tom Rosenstiel wrote in The Elements of Journalism: “More often than not, revelation comes not from a single document suddenly found, but from

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191 Id.; see Nicas, supra note 164 (quoting a Northeastern University computer-science professor as saying, “The editorial policy of these new platforms is to essentially not have one;” and “That sounded great when it was all about free speech and ‘in the marketplace of ideas, only the best ones win.’ But we’re seeing again and again that that’s not what happens. What’s happening instead is the systems are being gamed and people are being gamed”).
193 See When Does Snapchat Delete Snaps and Chats?, SNAPCHAT SUPPORT, https://support.snapchat.com/en-US/a/when-are-snaps-chats-deleted. Unopened content on Snapchat may last up to thirty days. See id.
discoveries slowly earned—winning the trust of sources, noticing a fragment of information, recognizing its possibilities, triangulating that with fragments from other information, fitting the pieces together, and establishing proof to a level that will satisfy lawyers.”

Take, for example, the investigative stories that helped galvanize the #MeToo Movement and won Pulitzers for the New York Times and won Pulitzers for the New York Times reporters and the New Yorker reporter who wrote them. New York Times reporters Jodi Kantor and Meaghan Twohey worked on the first article chronicling allegations of sexual misconduct by film mogul Harvey Weinstein for four months. Ronan Farrow of the New Yorker worked on his initial article about Weinstein for more than a year.

All of this sunken time also makes watchdog journalism the most expensive type of journalism to produce. A 2009 study by a Stanford economist showed that funding investigative reporters is significantly more expensive than beat reporters. As just one example, a “conservative[] estimate” of the cost spent by ProPublica, a nonprofit investigative journalism site, on a series of stories about the dangers of acetaminophen was $750,000. The stories took two years to produce.

The siren song of the audience seeking the live tweet or the hot take is constant. Carving out time and space for watchdog journalism is a challenge. “The daily churn of doing news keeps you from getting to more meaningful, deeper truths, and you just are reactive,” according to Jim Nelson, the editor of GQ.

Readers and viewers want news not only right after it happened, but while it is happening. News organizations have taken to making educated guesses about what news might happen and writing the story in advance so that it can be rolled out within minutes if the event comes to pass. The frenzy takes its toll. “I’m so tired,” New York Times White House

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194 Kovach and Rosenstiel, supra note 33, at 191.
197 Stanford economist James T. Hamilton, in a 2009 paper on subsidizing the news business, suggested that funding a beat reporter for a year in North Carolina would cost $61,500, while funding an investigative reporting unit (including an editor, three reporters, research, travel and legal expenses) that might produce two or three investigative series per year, would cost $500,000. See Hamilton, Subsidizing the Watchdog, supra note 25, at 3–4; James T. Hamilton, Democracy’s Detectives: The Economics of Investigative Journalism (2016) ("Investigative reporting involves original work, about substantive issues, that someone wants to keep secret. It is costly, underprovided in the marketplace, and often opposed.").
199 Id.
200 #268: Jim Nelson, LONGFORM PODCAST at 8:00 (Nov. 1, 2017), https://longform.org/search?utf8=%E2%9C%93&q=jim+nelson&.
201 See Charles Bethea, News Outlets Are PreWriting Stories About Officials Getting Fired to Keep Up With the Trump Era, NEW YORKER (Aug. 1, 2018), https://www.newyorker.com/news/news-desk/news-outlets-are-prewriting-stories-about-officials-getting-fired-to-keep-up-with-the-trump-era. This phenomenon is not new (it has long been done with obituaries), but the pressure to post news quickly may be prompting it to occur even more often. See id.
correspondent Maggie Haberman said in the documentary *The Fourth Estate.*

“But also, like, I really don’t know how to stop at this point, either.”

5. SCALE V. TARGETED IMPACT

In Silicon Valley speak, “scale” is the obsession with making things ever bigger. For platforms, the goal is to have more and more users, which means curating more and more information and enabling more and more sharing. A handful of platforms have become enormously successful at this. Facebook has 2.2 billion monthly active users. It owns Instagram, which has 800 million active monthly users. Google does not release data on how many searches it processes, but some have guessed it is on the order of billions daily. And Google owns YouTube, which has one billion users.

Given the breadth and openness of the internet, the rapid sharing of content among users is perhaps a foregone conclusion. See, for example, the ice bucket challenge, exploding watermelons, and eating Tide pods. Platforms incentivize virality by baking its promise into the infrastructure. Take Twitter. The Twitter hashtag is a sorting mechanism that allows the platform and users to amass all tweets on a particular topic (e.g., #Resist, #MAGA). Although Twitter is mum on how its algorithms determine which topics are trending, the number of tweets

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204 For example, LinkedIn founder Reid Hoffman has a podcast called Masters of Scale about “how great entrepreneurs take their companies from zero to a gazillion in ingenious fashion.” See *About Masters of Scale,* Masters of Scale with Reid Hoffman, https://mastersofscale.com/#/about-us.

205 This is consistent with Crawford and Ananny’s interviews, in which they heard from engineers and designers that “By far and away, the biggest value was ‘We just want users … We just want to be the most popular app in the space.’” See Columbia Journalism School, *Journalism + Silicon Valley Conference—Full Day—Tow Center Nov. 12, 2015,* http://www.youtube.com/watch?v=0Qftw6VkJKQ (starting at 54:10).


210 Virality, *English Oxford Living Dictionary,* https://en.oxforddictionaries.com/definition/virality (“The tendency of an image, video, or piece of information to be circulated rapidly and widely from one Internet user to another; the quality or fact of being viral.”)


on a certain topic is a criterion. Users can find trending topics—personalized to that user, of course—with a single tap.213

Scale (like personalization) functions exponentially. That is, it is self-reinforcing. The platforms already have so many users and are such an essential way of organizing and transmitting information that those seeking influence, from celebrities to politicians to advocates, use the platforms as a tool. In doing so, they generate more activity on platforms and bring in even more users.214

Although it may be too sweeping to say investigative reporting is not scalable, it is difficult to scale. Although in the Pentagon Papers Case, the Supreme Court wrote that a role of the press was to “bare the secrets of government,” watchdog reporting is not always that sexy. Perhaps consequently, it is not always all that read, at least relatively.215

Investigative journalism is the vegetable course of the news diet—vital for good health but not necessarily what people dig into first. This is borne out by research. According to one study of 40,000 stories posted on news sites in North and South America and Western Europe, the stories that the audience pays most attention to are about sports, crime, entertainment and weather.216 They may be great journalism, but they are not, generally speaking, stories about government and its inner workings. For example, a study by the Columbia Journalism Review of the most read stories for leading news organizations (including NPR, CNN, ABC News, and the Los Angeles Times) found that despite the belief that Donald Trump was dominating the news cycle, in reality, stories about hurricanes or mass shootings were even more widely read.217 This is also confirmed more anecdotally by a look at the New York Times most read stories of 2017. Even in a year when politics and uncovering sexual harassment and assault dominated the news, three of the top five were about crime, sports, or weather.218

Today, some journalists see diverging from the prevailing narrative—or that which might scale or go viral—as a risk.219 “We are telling stories that other outlets aren’t telling, which is

214 See Josef Adalian, Inside the Binge Factory, N.Y. MAGAZINE (June 11, 2018), http://www.vulture.com/2018/06/how-netflix-swallowed-tv-industry.html (describing a “simple logic” behind Facebook and Amazon’s success that “[g]rowth begets more grown begets more growth”).
215 Likewise, to the extent that the watchdog reporting is local news reporting, it is especially difficult to scale. See Harry Siegel, Why We Need Local Journalism: Look Around at How Vulnerable We Are Right Now, N.Y. DAILY NEWS, July 22, 2018, http://www.nydailynews.com/opinion/ny-oped-why-we-need-local-journalism-20180720-story.html (“The thing I love about local news is that it doesn’t scale. It happens one court hearing or campaign or crime at a time so that you can fairly try and connect political decisions to individual people, the life of the city to that of its inhabitants.”).
216 See BOCKOWSKI & MITCHELSTEIN, supra note 26, at 2.
219 See Phillips, supra note 22, at 24 (noting that this tendency ends up creating “an audience feedback loop where reporters are only talking to like-minded people, who want to keep reading the same kinds of things. And so their newsroom keeps churning out the same kinds of stories, all to ensure that the hits keep coming”). “[S]ocial media amplify the financial incentive to join the herd,” FOER explained. Foer, supra note 24, at 148. For news, “[t]he results are highly derivative.” Id. This derivative nature of news is also described by Caitlin Petre when she wrote “[T]he leaderboards ranking stories and staffers don’t just harness employees’ competitive tendencies; they shape the very nature of competition in the media field, namely by turning it further inward.” See Caitlin Petre, The Traffic Factories: Metrics at Chartbeat, Gawker Media, and The New York Times, TOW CTR. FOR DIGITAL JOURNALISM (May 7, 2015).
almost to our detriment in the world of viral news,” Delaney Simmons, Director of Digital Content and Social for New York public radio station WNYC, said. See Bell & Owen, supra note 16.

B. THE CHANGING NATURE OF EDITORIAL DISCRETION & THE MUZZLING OF THE WATCHDOG

For decades, decisions about what to publish have been made around a big table in a newsroom. Journalists have discussed, debated, and employed their collective judgment to determine what is newsworthy. As the word “newsworthy” itself indicates, this judgment has involved not simply what is new or enticing but what is important and legitimate. Journalists have not viewed their role as merely to entertain or capture attention (although they have recognized and capitalized on this as a means to profit), but to provide a public service. They have attempted to discern, however inelegantly or incorrectly, not simply whether something qualifies as news but whether that news is worthy of being passed along to citizens.

One type of news that has perennially qualified is investigative or watchdog reporting. Platforms have significantly altered both the ability of the press to discern newsworthiness and the process for doing so. They have been able to do this in large part because of their size and dominance. As just detailed, their values and norms are different from those of the traditional press. And because of the outsized power of platforms within this network, these values (those of the platforms and those of the press) are not competing. Rather, platform values dominate. To succeed within this network, the press is being pressured to adopt them. Thus, the norms and goals of the Networked Press as a whole now tend to disincentivize and devalue watchdog reporting on government. As a result, the press’s ability to perform a core structural role—to be a check on government—is not obliterated, but it is compromised.

While the previous section detailed the ways in which the values of platforms and the press differ, this section describes the mechanics of how platform values are imposed upon and even adopted by the press. It details two categories of mechanisms by platforms have impacted editorial discretion. The first are top-down mechanisms. These are ways in which platforms directly impose their power onto traditional news organizations. Among these is the most complete way in which platforms can impose power—to put news organizations out of business. Another is that within the new news ecosystem, platforms are increasingly playing the role of editor, deciding which stories get prime billing and which are easily missed.

https://www.cjr.org/tow_center_reports/the_traffic_factories_metrics_at_chartbeat_gawker_media_and_the_new_york_times.php.

See Bell & Owen, supra note 16.


According to journalism scholars, news is that which “is judged to be newsworthy by journalists, who exercise their news sense within the constraints of the news organizations in which they operate.” See Deirdre O’Neill and Tony Harcup, News Values and Selectivity, in THE HANDBOOK OF JOURNALISM STUDIES 161 (Karin Wahl-Jorgensen and Thomas Hanitzsch eds. 2009).

The legal definition of newsworthiness (an affirmative defense to privacy torts in many jurisdictions) captures this. In order to be newsworthy, information must generally not simply be of interest but be of “legitimate public interest.” See RESTATEMENT (SECOND) OF TORTS § 652D, cmt. h (AM. LAW INST. 1977).
category is for a bottom-up or indirect mechanism. This is the way in which journalists are incentivized to kowtow to platforms. They are increasingly deciding what news to cover and how to do it with the perceived preferences of platform algorithms in mind.  

1. TOP-DOWN INFLUENCES ON EDITORIAL DISCRETION

For John F. Kennedy, the relatively new technology of television was a means of speaking directly to citizens, unfiltered by the media. During his presidency, Kennedy held a televised press conference almost every other week. But even though Kennedy was enamored of this means of mass communication, he still viewed the press as essential. “[T]here is a terrific disadvantage not having the abrasive quality of the press applied to you daily, to an administration,” he said in a 1962 interview with NBC. “[E]ven though we never like it, and even though we disapprove, there still isn’t any doubt that we couldn’t do the job at all in a free society without a very, very active press.” The press, Kennedy said, was “a check really on what is going on in the administration.”

In its period of “high modernism,” the press applied its “abrasive quality” to government regularly. And while the current administration is still subject to this rough treatment, many state and local governments across the country are faced with less of a scrub than they once were—or perhaps they are altogether unmonitored by the press. Tethered by platforms and audience, the press is both less able and less incentivized to act in its watchdog capacity. Platforms are behind both of these changes.

The number of full-time newspaper reporters in statehouses dropped thirty-five percent between 2003 and 2014. Most obviously, with fewer reporters and fewer newspapers, the press is simply unable to provide the checking function it once did. In an article entitled “The Capitol Press Corpse,” the “dean” of the Austin, Texas press corps, Paul Burka, said, “It’s the boots-on-the-ground principle. The more troops you have, and the more visible they are, the more the bad guys fear you and the less likely they are to do mischief.” Likewise, a reporter at Eugene, Oregon’s Register Guard said, “We’re treading water.”

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225 See John F. Kennedy and the Press, John F. Kennedy Presidential Library and Museum, https://www.jfklibrary.org/JFK/JFK-in-History/John-F-Kennedy-and-the-Press.aspx (quoting Kennedy’s press secretary Pierre Salinger as saying, “The fact of the matter is that the time when President Kennedy started televised press conferences there were only three or four newspapers in the entire United States that carried a full transcript of a presidential press conference. Therefore, what people read was a distillation … We thought they should have the opportunity to see it in full”).
226 See id.
227 Id.
228 Id.
229 Id.
Salem has dropped from thirty-seven to thirteen since 2005. And it is not only reporters who are lamenting the losses in statehouses nationally. “The public is not being kept aware of important policy decision that are being made that will affect their daily lives,” said Gene Rose, a former communications director for the National Conference of State Legislatures.

Measuring how much news we are missing—and what the impact of that news would be—is next to impossible. But it is likely quite a bit. This was the warning in a tweet by New York Daily News editor Josh Greenman in July of 2018 when its parent company, Tronc, fired half of its reporters. Greenman wrote: “The Daily News led the charge to get 9/11 first responders health benefits. Exposed widespread abuse of eviction rules punishing poor people. Revealed deception and dysfunction in public housing that put kids in danger of lead poisoning. Showed the world the Eric Garner video.”

Platforms, of course, also have tremendous impact on the newsrooms still operating. Their algorithms are a top-down mediation tool. When a user opens her News Feed, behind the scenes, Facebook’s algorithm has examined all of the content recently posted by that user’s friends, by members of groups that user belongs to, or on pages that the user has liked. The algorithm has assigned a score to each of these posts. It then prioritizes those items with the highest score, buoying them to the top of the feed.

Thus, a formula rather than a journalist decides which news the reader has the opportunity to read and, by its placement in the news feed, how likely it is that the user will actually read it. “While publishers can freely post to Facebook, it is the algorithm that determines what reaches readers,” said Emily Bell and Taylor Owen in their report, The Platform Press: How Silicon Valley Reengineered Journalism. Platforms do not share information about how their algorithms function—except in the broadest of sketches—meaning that the platforms’ editorial process is a black box. Yet, we know that platform norms and goals, in many instances, differ vastly from those of journalists.

Platforms are also exercising editorial discretion by dictating what form news takes. For example, in the last several years, Facebook has pushed news organizations to produce news in a video format. In 2016, to promote its Facebook Live feature, Facebook paid out millions to news organizations including CNN, the New York Times, Vox, and Mashable, to create video. Again in 2018, to promote another new video product, Facebook Watch, the platform solicited news video “tailored to succeed in a social environment.”

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233 Id.
234 America’s Shifting Statehouse Press, supra note 230 at 7.
236 Id.
237 See Will Oremus, Who Controls Your Facebook Feed, SLATE (Jan. 3, 2016), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html (describing algorithms as “a set of concrete instructions by which a given problem may be solved”).
238 See id.
239 See id.
240 Bell & Owen, supra note 16.
241 See generally PASQUALE, supra note 20 (describing the black-box nature of algorithms).
242 See Bell & Owen, supra note 16 (noting that platforms dictate “what format and type of journalism flourishes”).
243 See Mathew Ingram, Facebook is Paying Millions to News Outlets and Celebrities to Create Live Video, FORTUNE (June 21, 2016), http://fortune.com/2016/06/21/facebook-paying-live-video/.
And even without Facebook’s explicit push, many news organizations began emphasizes video believing that algorithms preferred it. The movement among publishers was so big that it was labeled the “pivot to video.” As it turns out, the pivot has been a disappointment. Viewers have not been as keen as Facebook predicted to watch their news online. As a result, video has not proved lucrative for many news organizations.

But even if the effort had succeeded, that would not necessarily put news organizations at ease—at least not for any length of time. Platforms can change priorities without warning. Often news organizations only become aware of such a change when traffic to their sites inexplicably spikes or plummets. They then scramble to assess the benefits or losses. The uncertainty is exacerbated because many large news organizations post to an array of platforms. For example, during a single week in 2017, CNN used eleven different platforms to distribute its journalism. Journalists are left in a constant state of uncertainty about how a key part of their distribution network will function. “Every publisher knows that, at best, they are sharecroppers on Facebook’s massive industrial farm,” according to Wired editor-in-chief Nicholas Thompson and Fred Vogelstein. “And journalists know that the man who owns the farm has the leverage.”

None of this is to say that the news industry is blameless for its own plight. The press has now struggled for decades to come up with a viable business model for journalism online. These efforts have been slow, and often clumsy and misguided. Very few legacy news organizations have figured out to profit online—the New York Times and the Washington Post are among the few. (The latter had the benefit of being purchased by a billionaire tech executive.) Yet, at times, it also feels as if the platforms are holding the press’s collective head underwater. Platforms have profited handsomely while paying little to nothing for content generated by journalists. Their executives have spoken in platitudes about bringing the world together while ignoring the damage wrought by their innovation.

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246 See Moore, The Secret Cost of Pivoting to Video, supra note 245.
248 See Bell & Owen, supra note 16.
250 Thompson & Vogelstein, supra note 136.
2. BOTTOM-UP INFLUENCES ON EDITORIAL DISCRETION

In terms of indirect influences, platforms shape everything from newsroom organizational charts to journalists’ word choices. The New York Times, for example, employs social media editors to eye which Facebook or Twitter posts are being shared so that they can recycle the language that they use. They also have “growth editors” across various news desks who “spray[] social platforms with Times links.” The Wall Street Journal has a position entitled, “Executive Emerging Media Editor, Audience Development.” News organizations also have employees who serve as diplomats of a sort to the platforms. For example, some British publications have created the position of Chief Customer Officer (or “CCO”), whose role often includes negotiating with Google and Facebook. These newsroom employees can sway coverage. If one of them does not think a story would perform on platforms, it might not be assigned at all.

Perhaps even more impactful on editorial discretion than these employees are the “analytics” that allows journalists to see for themselves where, when, and how their readers are consuming news. Using products like Chartbeat, CrowdTangle, and, somewhat forebodingly, NewsWhip, among others, many journalists can see from their own desks just how stories are succeeding (or not) on platforms. Some newsrooms project analytics onto large TV screens for all reporters to see.

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252 Bell & Owen, supra note 16 (“News organization structures, workflows, and resource allocation are increasingly dictated by platforms.”)


254 Bell & Owen, supra note 16.

255 See id.


257 Bell & Owen, supra note 16 ("One publisher said that if their audience team doesn’t think a story will perform, it may not be assigned.").

258 See Petre, supra note 219 (“One way to win the fierce competition for dwindling ad dollars was to enlarge a publication’s audience, and metrics developed a reputation as a crucial tool for doing just that.”). Although former New York Times editor Bill Keller discouraged reliance on analytics, today the paper is building its own tools like “Stela” to measure page views and engagement on social media. See Shan Wang, The New York Times Is Trying to Narrow the Distance Between Reporters and Analytics Data, NIEMANLAB (July 25, 2016, 12:44 PM), http://www.niemanlab.org/2016/07/the-new-york-times-is-trying-to-narrow-the-distance-between-reporters-and-analytics-data/.

259 See Foer, supra note 24, at 144-47.

260 See Petre, supra note 219 (indicating that the Washington Post has screens in the newsroom that project analytics).
Although little research exists measuring the impact of analytics on newsrooms, what there is confirms that journalists, unsurprisingly, use data to try to maximize their audience. A study by journalism scholars at University of Texas, University of Minnesota, and New York University found that journalists are engaged in “an often subtle but sometimes deliberate pursuit of topics and terminology most likely to attract traffic via search algorithms and viral social channels.” What has resulted, they said, is “a culture of the click.”

To be sure, it would be inaccurate and simplistic to say that reacting to the audience is bad. In fact, considering the audience is vital. Good journalism is responsive to audience needs and desires. Given that journalists are not representative of Americans generally (they are more educated, more urban, and less diverse), it is dangerous for journalists to assume that what they think the public needs to know is definitively what the public needs to know. Considering audience input—along with editorial values like objectivity, accuracy, and proportionality—is crucial.

But the pressure on journalists to amass audiences and the tools that they have to measure their success are unprecedented. Even journalists at established institutions are not immune. Franklin Foer wrote that during a time when he served as the editor of The New Republic, Chartbeat was his “master.” He said he would peak at the site and its dashboard interface while he was brushing his teeth, editing stories, and even standing at the urinal. Other journalists have called analytics “sanity ruining” and like “crack cocaine.” Asked whether Chartbeat is addictive because it “speaks to an editorial mindset,” one journalist replied: “I wish I could say yes, but no … you are constantly worrying about whether you’re getting enough traffic or not. So your eyes are glued to Chartbeat because your life depends on it.” Some news

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261 See Petre, supra note 219 (“Audience metrics have become ubiquitous in news organizations, but there has been little empirical research on how the data is produced or how it affects newsroom culture and journalists’ daily work.”).

262 See Lee, supra note 224, at 510. “The more editors know about their audience metrics, the more they become ‘sensitive to the implications of what their audience [is] reading and why,’ altogether showing that ‘the process of ‘deciding what’s news’ is increasingly influenced by quantitative measurement techniques.’” Id. at 512.

263 Id. at 510.


265 A good example of this might be the #MeToo movement. This started with the now famous New York Times story about Harvey Weinstein. See Jodi Kantor and Megan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html. It opened the floodgates to first-person accounts with the hashtag #MeToo on Twitter as well other posts and op-eds. See, e.g., Salma Hayek, Harvey Weinstein Is My Monster Too, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html?_r=0. All the while, the media continued to cover the story. There was also criticism, however, that the media focused on white entertainers and journalists who were the victims of sexual harassment and assault and ignored other populations. See O’Donovan & Kramer, supra note 264. This criticism was not wholly accurate. See Benjamin Mueller, For Hotel Workers, Weinstein Allegations Put a Spotlight on Harassment, N.Y. TIMES (Dec. 17, 2017), https://www.nytimes.com/2017/12/17/us/harvey-weinstein-hotel-sexual-harassment.html; Susan Chira and Catrin Einhorn, How Tough Is It to Change a Culture of Harassment? Ask Women at Ford, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region&region=top-news&WT.nav=top-news&_r=0.

266 See FOER, supra note 24, at 144.

267 See id.

268 See Petre, supra note 219.

269 Id.
organizations including Forbes and The Oregonian have, in fact, linked reporters’ pay to audience engagement metrics.\textsuperscript{270} One reporter at the Des Moines Register said of watching the traffic to his web posts, “It absolutely changes what I write.”\textsuperscript{271}

A movement is afoot among news organizations to thoughtfully incorporate analytics.\textsuperscript{272} Such an approach stems from a recognition that reader input is vital to both mission and economics but also should not supplant editorial judgment. In order to use analytics to do better journalism and help in rejiggering the press’s economic model, news organizations are beginning to recognize that relying on a single data point—the page view—cannot be the sum total of their focus. As an internal New York Times report on the company’s future stated, “The newsroom needs a clearer understanding that page views, while a meaningful yardstick, do not equal success … The most successful and valuable stories are often not those that receive the largest number of pageviews, despite widespread newsroom assumptions.”\textsuperscript{273}

A difficulty with implementing any nuanced analytics strategy, however, is that page views are the dominant metric for platforms. If platforms remain primarily concerned with how many hits any piece of content is getting, news organizations that rely on platforms as a distribution network will not be able to escape this metric.\textsuperscript{274}

And so, prominent journalists remain concerned about the pull of platforms. They are speaking out with increasing urgency that algorithms are an existential threat to editorial discretion—the lynchpin of a free press. As Pulitzer Prize-winning technology reporter Julia Angwin said at a 2018 conference on the power of platforms over the press: “Essentially

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\textsuperscript{271} JEFFREY C. ALEXANDER ET AL., THE CRISIS OF JOURNALISM RECONSIDERED: DEMOCRATIC CULTURE, PROFESSIONAL CODES, DIGITAL FUTURE 184 (2016) (concluding that analytics “don’t help enrich coverage” and that instead, “the data may in fact guide journalists to make decisions purely based on real-time, immediate audience reaction. This can result in stories that have no lasting value to readers, and instead take on click-bait headlines”).


\textsuperscript{274} Beyond the scope of this article but noteworthy is that evidence is growing that journalists’ news judgment is being impacted not only by analytics, but simply by their use of Twitter. A recent study published in Journalism, found that inexperienced journalists who used Twitter regularly did not distinguish between the newsworthiness of headlines from the Associated Press and anonymous, context-free tweets. See Shannon C. McGregor and Logan Molyneux, Twitter’s Influence on News Judgment: An Experiment Among Journalists, JOURNALISM (Oct. 5, 2018), https://journals.sagepub.com/doi/abs/10.1177/1464884918802975?journalCode=jous; Denise-Marie Odway, Polarizing the Network: the Most Interesting New Digital and Social Media Research, NIEMANLAB, Nov. 20, 2018, http://www.niemanlab.org/2018/11/polarizing-the-network-the-most-interesting-new-digital-and-social-media-research/?utm_source=Daily+Lab+email+list&utm_campaign=4867bf1efb-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-4867bf1efb-396214909.
journalism has become a game of how to game the algorithm as opposed to what is the news.”

That is, platforms and their algorithms are not just conduits. They are becoming the ultimate arbiter of newsworthiness.

III. LOOKING BEYOND THE FIRST AMENDMENT TO PROTECT WATCHDOG JOURNALISM

For decades, the First Amendment has offered real and significant protection to the Fourth Estate. It has prevented prior restraints. It has given the press “breathing room” by barring the government from meddling with decisions about newsworthiness. It has also shielded it from liability when it makes mistakes in reporting on public figures and topics of legitimate public interest.

The First Amendment, too, offers protection to the Fourth Estate that extends beyond doctrine. It has sweeping cultural significance. The luster of the First Amendment and the promise of its protections likely emboldens the press in its everyday work. In an era when the press is under sustained attack from the Trump Administration, defenders of the press have regularly invoked the First Amendment and the principle of a free press. The First Amendment is essential.

Neither First Amendment doctrine nor cultural coattails, however, can incentivize and shield the press’s watchdog role in a Networked Press environment in the same way that they did when the press was simply a Fourth Estate. The First Amendment’s protection is bounded in two important ways—one structural and one interpretive. Structurally, the state action doctrine prevents the First Amendment from being used as a sword against platforms. Platforms may be

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275 Open Markets Institute, Panel 1 Discussion from the Open Markets Institute Conference, Breaking the News: Free Speech & Democracy in the Age of Platform Monopoly, YOUTUBE (June 14, 2018), https://www.youtube.com/watch?v=40HXpiOlzDk&ti=3080s (hereinafter Breaking the News).
276 See Geoffrey R. Stone, Reflections on Whether the First Amendment is Obsolete, https://knightcolumbia.org/content/reflections-whether-first-amendment-obsolete (“[T]he First Amendment, as interpreted and applied by the Supreme Court, has been extraordinarily successful at constraining the primary evil at which the First Amendment was directed—government censorship of unwelcome ideas and criticism.”).
280 Many state torts for invasion of privacy have exemptions for newsworthiness. These exemptions are designed to ensure the torts do not run afoul of the First Amendment. See, e.g., Fla. Stat. § 540.08 (2015) (including exemption for matters of “legitimate public interest”).
281 See Lee C. Bollinger, Can the First Amendment Save Us?, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/can-the-first-amendment-save-us.php (“Though the First Amendment applies only to state action, it has become a touchstone for broader society, influencing norms far beyond its legal reach.”).
282 See Nabiha Syed, Real Talk About Fake News: Towards a Better Theory for Platform Governance, 127 YALE L.J. FORUM 337, 338 (2017), https://www.yalelawjournal.org/forum/real-talk-about-fake-news (“As colloquially invoked, the ‘First Amendment’ channels a set of commonly held values that are foundational to our social practices around free speech.”).
283 See Turner Broad Sys. v. FCC, 512 U.S. 622, 685 (1994) (O’Connor, J., concurring in part and dissenting in part) (noting that “the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression”).
284 See generally Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001) (discussing the state action requirement for a First Amendment claim and indicating that state action only exists where there “is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”).
sovereign-like (scholars have referred to them as “Facebookistan” and “Googledom”\footnote{See Anupam Chander, \textit{Facebookistan}, 90 N.C. L. REV. 1807 (2012); REBECCA MACKINNON, \textsc{CONSENT OF THE NETWORKED} 149 (2012) (referring to “Facebookistan” and “Googledom”).} and collectively as the “New Governors”\footnote{See Klonick, supra note 31, at 1603.}, but when courts have been confronted with the question of whether or not technology companies are state actors, they have found that they are not.\footnote{See Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 445 (E.D. Pa. 1996); Wu, supra note 31 (arguing that finding platforms to state actors would have negative consequences because it would prevent them from combatting “trolling, flooding, abuse, and myriad other unpleasantries” online).} It is unlikely that courts will change tack on this any time soon.\footnote{See Klonick, supra note 31, at 1638 (arguing that it “is both unlikely and normatively undesirable” that courts would find platforms to be state actors for purposes of imposing First Amendment obligations on them).}

In addition, from an interpretive standpoint, it is not clear that the Supreme Court embraces a theory of the First Amendment that would readily protect investigative journalists or watchdog journalism in a Networked Press era. It is true that black-letter doctrine holds that press speakers are no different than other speakers. That means that the First Amendment should protect individual journalists from government interference. But this is a narrow reading of the case law. As described in Part I, in the key cases in which the Supreme Court bestowed the benefits of the First Amendment on journalists, it did so while speaking glowingly and deferentially of the institution to which journalists belong—the press—and specifically, a Fourth Estate conception of the press. Without a recognizable and robust Fourth Estate, it is not clear that the Court would shield individual journalists in the same way it did in the cases from the press’s golden era of the 1960s and 70s. That the Court has not heard a case in more than a decade in which journalists sought to vindicate rights is, in and of itself, a cause for concern.\footnote{See RonNell Andersen Jones and Sonja R. West, Don’t Expect the First Amendment to Protect the Media, \textsc{N.Y. Times} (Jan. 25, 2017) (“The Supreme Court has not decided a major press case in more than a decade, in part because it has declined to do so, and in part because media companies, inferring the court’s relative lack of interest, have decided not to waste their resources pressing cases.”)}

And so, although the First Amendment is an indispensable tool in protecting the press, it is not enough. Before examining whether other sources of law should be used to reinvigorate the press’s watchdog role, it is worth briefly considering whether law is the proper tool. Some might argue that the essence of a free press demands just that: freedom. Perhaps the most famous First Amendment lawyer alive, Floyd Abrams, made a version of this argument in 1979 when he wrote that, “A press that continually applies to the courts for vindication of its right to gather information cannot credibly be the same press that tells the same courts that what the press prints and why it prints it are not matters that courts may even consider.”\footnote{See Floyd Abrams, \textit{The Press is Different: Reflections on Justice Stewart and the Autonomous Press}, 7 \textsc{Hofstra L. Rev.} 563, 591 (1979); Stephen I. Vladeck, \textit{Democratic Competence, Constitutional Disorder, and Freedom of the Press}, 87 \textsc{Wash. L. Rev.} 529, 548 (2012) (discussing Abrams’s view on freedom as a “variation” on Justice Potter Stewart’s who said that “autonomy cuts both ways”).} In other words, the press undermines itself when it champions its independence on the one hand and asks government to grant that same independence on the other.

One could also argue that legal action is unnecessary because other means exist for addressing the ways in which platforms are tethering the press. For example, the press could try to isolate itself. It could maintain or create its own distribution networks so that it is not so reliant on platforms. It could shift its funding structure so that far more of its income is coming from...
subscriptions and less from advertising. Public pressure could be brought to bear more heavily on platforms forcing them to acknowledge the ways in which they function as the twenty-first century press and to take on some of the associated responsibility.

In fact, all of these private solutions are happening in some form. And yet, the tethering continues and may be worsening. These platforms are simply so powerful and have so little competition that their incentives for any change that is not profitable are limited. Leaving this to the market or to public shaming have not proven, at least to date, to be solutions.

Time itself could also be an antidote. Wu has argued that “attention merchants”—a label he applies to the advertising industry, platforms, and others—have historically proved fleeting. Eventually, adherents of these merchants begin to feel manipulated and resentful, and the merchants lose their grip on power. Signs are emerging that this may be happening with platforms. Criticism of Facebook in particular has increased dramatically in the wake of the 2016 election and the revelation about the scope of Facebook’s sharing of users’ personal data. Harsh criticism is being doled out to Facebook and other platforms for their inability to control disinformation and their inconsistent decision making with respect to policing speech. The downfall of Facebook or any other platform, however, seems far from imminent. The companies have burrowed into users’ lives and routines in ways that are difficult to curb much less reverse. And even if these platforms were to fail in key ways, others—also driven by profit and scale and speed—would gladly take their place.

But biding time is not a satisfactory option when it comes to a free press. If the press is a “bulwark of democracy,” and if, as Blackstone said, “[t]he liberty of the press is indeed essential to the nature of a free state,” then it seems right that law should have some role in preserving and protecting it. And the Supreme Court has written that “[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”

Moreover, in an era when the press is under attack from within the government, we should be wary of relying too heavily on established norms and conventions—as opposed to law—for protection of the press.

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293 See Breaking the News at 50:40.


To be sure, any legal responses to platform pressure on the press must be carefully calibrated. Maintaining sufficient press autonomy needs to be a constant concern. With these concerns in mind, the remainder of this section provides a brief overview of a variety of legal options that could be considered to help foster the press’s watchdog role, none of them mutually exclusive, that fall into two general types. One type includes top-down options: law that tries to loosen the tether of platforms on journalists. The second type includes bottom-up options: law aimed at incentivizing watchdog reporting.

A. ALIGNING PLATFORM & JOURNALISTIC NORMS: LOOSENING PLATFORMS’ TETHER

The top-down suggestions all involve first gaining a better understanding of how platforms manipulate content and users. They then seek to incentivize platforms to adopt journalistic methods and processes. They focus on transparency, sharing of data, and hiring of journalists. Thus, in a sense, they aim to better align values and goals within the Networked Press—to instill in it some of the institutional nature of the Fourth Estate.

1. ALGORITHMIC TRANSPARENCY REGARDING NEWS CONTENT

No matter how vehemently they deny it, today platforms are playing press roles. Manipulating the algorithms that surface content is an editorial act. The choices behind the algorithms help to determine what the user consumes. Algorithms are intended to optimize the likelihood that certain content will be consumed. If we want platforms to prioritize democracy-enhancing content like investigative journalism, we need to understand platforms’ motivations as well as how those motivations are put into action through engineering choices. This article has attempted to illuminate and categorize those motivations. Others, notably law and technology scholar Kate Klonick, have described the way in which Facebook makes decisions about what speech is and is not allowed on its platform.\(^{298}\)

What is needed to supplement this important work is an understanding of how various platforms prioritize (or deprioritize) news in particular. Of critical importance is understanding whether and how content is tagged as newsworthy or of legitimate public concern not simply for purposes of deciding whether it should be censored or permitted. Rather, we need this information to understand what ends up at the top or the bottom of a news feed; what is displayed on a single occasion and what is recycled; what is sprayed to many users and what is limited to a few. In essence: what types of news are platforms privileging or marginalizing and how?\(^{299}\)

Indications are that the revelations might be concerning. In a recent article on how Facebook determines whether to censor posts, Klonick described how Facebook employees decide whether someone is a public figure: They search to see if that person’s name appears on Google News. We should not assume that the engineers manipulating platforms’ algorithms are

\(^{298}\) See generally Klonick, supra note 31 (describing a variety of rules and processes that platforms use to govern speech); Kate Klonick, Facebook v. Sullivan, KNIGHT FIRST AMENDMENT INSTITUTE, Oct. 18, https://knightcolumbia.org/content/facebook-v-sullivan.

\(^{299}\) This proposal is a more news-specific version of one made by Jameel Jaffer of the Knight First Amendment Institute. He called on platforms to be more transparent generally regarding “how they’re shaping the speech they’re not taking down.” See Jameel Jaffer, Digital Journalism and the New Public Square – Or’ Emet Lecture, Nov. 13, 2018, https://knightcolumbia.org/news/digital-journalism-and-new-public-square-or-emet-lecture.
any more sophisticated when it comes to imbuing their work with journalistic values or democratic ideals.

Many have called for algorithmic transparency and to impose that transparency by law, if necessary. New York Times CEO Mark Thompson said transparency would be best if it were voluntary, “but if even if it requires regulation or legislation, it must be done—and done promptly.”\(^{300}\) Polling suggests the idea has public support.\(^{301}\) A 2018 study by Gallup and the Knight Foundation found that 88 percent of those surveyed believed “internet companies” should “disclose the methods they use to determine what news items show in their news feeds.”\(^{302}\)

Knowing how algorithms manipulate news would allow press advocates to challenge those aspects of the algorithm that disadvantage watchdog reporting. It could also allow journalists to work more collaboratively with platforms to provide investigative reporting to the public in ways that are more likely to “scale” (either because of format, placement, or some other factor) and have wider impact.

Of course platforms are highly resistant to transparency and justify their secrecy by claiming their algorithms are proprietary. Yet, proprietary interest should give way to the public interest in understanding how platforms distribute democracy-enhancing investigative reporting. This is especially true given, as the Supreme Court recently said, social media websites are, for many, “the principle sources for knowing current events” and “speaking and listening in the modern public square.”\(^{303}\) Moreover, there is precedent, albeit in a different context, for piercing this shield to reveal information in the public interest. In November 2018, in response to a lawsuit by investigative journalists under the Freedom of Information Act, the Labor Department indicated it would share statistics about the diversity of workforces at numerous Silicon Valley companies.\(^{304}\) The Department had initially argued that these statistics were trade secrets.

2. REQUIRE PLATFORMS TO SHARE DATA WITH JOURNALISTS

Platforms amass vast troves of data. Information about users is the capital of platforms. As the Cambridge Analytica story revealed, Facebook has long profited by sharing user data with numerous partners. If platforms are willing to share data for profit, they should be required to share data for public benefit. This could be done by making certain data available to investigative journalists.

Platforms could do this both affirmatively and by request. Affirmatively, platforms could be required to develop public interest APIs, which are interfaces that would allow the public to


access information on the platforms while protecting anonymity, trade secrets, and intellectual property. Some have suggested a public interest API might help to combat misinformation, false advertising, and election manipulation. It has also been suggested that it could help the public monitor how platforms are censoring content. Such APIs could supply extremely useful data to journalists.

In addition, however, journalists should be able to readily obtain data from platforms without fear of legal action. As it stands, journalists extract some data from platforms through “scraping”—an increasingly popular and powerful automated process for extracting data from websites. For example, scraping resulted in an Atlanta Journal-Constitution story about sex abuse by doctors that was a finalist for the 2017 Pulitzer Prize for national reporting.

Yet, currently, scraping opens up journalists to various forms of civil and criminal liability. For example, the Computer Fraud and Abuse Act (“CFAA”) bars knowing access to a “protected computer without authorization” and thereby obtaining “anything of value.” No journalist has been prosecuted under the statute, but journalistic sources have. Some circuits read the statute broadly enough that violating platforms’ terms of service could trigger liability. Although ongoing legal challenges to the CFAA might lead to protection for scraping by journalists (and others), consideration should also be given to amending the CFAA to protect journalists from obtaining data in this way.

Law could also do more to require platforms to own up to the label of press. Platforms could be incentivized to hire far more journalists and could even be monitored by journalists all in the hope of starting to collapse the dichotomies that were described in Part II. Perhaps journalistic values could start to infiltrate platform ones.

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306 See id.
307 See id.
309 See id.
310 See id.
312 See Baranetsky, supra note 308 (describing the prosecution of security researcher Andrew Auernheimer for revealing an AT&T security hole and sharing that information with Gawker).
313 See id.
314 See id. (describing litigation in federal court in the District of Columbia challenging the CFAA on First Amendment grounds); Jaffer, supra note 299 (arguing that the Congress should amend the CFAA and that “[j]ournalists and researchers who are investigating questions that implicate the very core of the First Amendment’s concern shouldn’t have to operate under the threat of legal sanctions”).
316 Jaffer, supra note 299 (noting that a “handful of countries, including the United Kingdom, have already recognized exemptions of this kind”).
Facebook has employees who are censoring content by employing elaborate and shifting community standards. It could likewise hire journalists to help make sounder decisions when it comes to manipulating Facebook’s News Feed algorithm. There is some sign that even a small number of journalists could make a significant difference in effecting information on the platform and perhaps even platform culture. Jonathon Albright, the director of the Digital Forensics Initiative at Columbia’s Tow Center for Digital Journalism, found that even a handful of people can have a great impact on the quality of information flow. He suggested, for example, that if Google had had a “Platform Editor,” it might have seriously staunched the flow of disinformation in the wake of the Las Vegas shooting. Albright said, “I do know that one person could have stopped that. And I do know that a group of people working together – even if it involves deliberation, even if they don’t agree on one specific thing—can often solve problems that appear or are starting to surface because of automation.”

Law could incentivize such hiring through a Work Opportunity Tax Credit. This tax credit has been used to combat unemployment and incentivize companies to hire from groups that face barriers to employment such as veterans and previously incarcerated individuals. In the past decade journalists have lost jobs at alarming rates while platforms have profited from investigative reporting and other journalist-created news. Promoting the employment of journalists whose jobs are focused on core First Amendment speech could be a sound use of the credit.

4. COUNTERACTING THE PLATFORM MONOPOLY

Concern about concentrated power over the press has a long history. In 1947, the Commission of Freedom of the Press, also known as the Hutchins Commission, concluded that freedom of the press was in danger because very few had access to the press, and those few did not always wield their power ethically. In the 1990s, pointing to a steep rise in the number of cities with only a single newspaper, First Amendment scholar Lee C. Bollinger noted that “[m]any commentators commonly believe, in fact, that the problem is worse now than in 1947.”

Today, the concern is arguably even more pressing. As noted, the profits of Facebook or Google alone exceed that of the entire newspaper industry. Platforms are behemoths suctioning up advertising dollars that once funded journalism. Precedent exists for using antitrust law to ensure that news is not controlled by a select few. For example, in 1945, in Associated Press v. United States, the Supreme Court held that the Associated Press had violated the Sherman Antitrust Act.

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318 Id.


322 See America’s Free Press and Monopoly, supra note 249 (describing the problem of “the concentration of power over reporters and news publishers by giant ‘platform monopolists’”).

323 See supra note 117.

324 326 U.S. 1 (1945).
members from getting access to news created by members.\footnote{See id. at 21-23.} Invoking the First Amendment as a basis for its decision, the Court noted that the Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”\footnote{Id. at 20.} The Court added that “Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.”\footnote{Id.}

Today, even advocacy groups are not clear, however, about what steps should be taken to combat any monopoly power of platforms when it comes to their impact on the news business specifically.\footnote{See America’s Free Press and Monopoly, supra note 249 (“At Open Markets Institute, we believe the American people have both a right and a duty to use government to ensure the independence and financial viability of both national and locally based news organizations. Although it is by no means clear yet what specific regulatory actions and policy decisions Americans should take today, at OMI we believe that a close study of American history will help citizens identify a clear set of goals as to the type of journalism we want and need, and the principles by which to achieve those goals”).} And there is no sign that the antitrust division of the Department of Justice has any interest in breaking up platforms. In a June 2018 speech, Makan Delrahim, the assistant attorney general for antitrust, argued that it would be misguided for enforcers to “broaden the consumer welfare lens to think about effects on democracy or expression.”\footnote{See Stand by Me: The Consumer Welfare Standard and the First Amendment, Assistant Attorney General Makan Delrahim Delivers Remarks at the Open Market Institute Event: Antitrust and the News, UNITED STATES DEPARTMENT OF JUSTICE (June 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-open-markets-institute-event.} More thinking needs to be done about how best to create more robust competition in the Networked Press environment, and advocates may need to wait for a new administration to bring any ideas to fruition.

In the meantime, if antitrust law cannot be imposed on platforms, Congress should consider exempting news organizations from antitrust laws so that they might band together in an attempt to exert pressure on platforms. For example, the pending Journalism Competition and Preservation Act of 2018 would create a temporary safe harbor from antitrust laws for publishers to collectively negotiate with platforms regarding the terms on which their content may be used.\footnote{See Journalism Competition and Preservation Act of 2018, H.R. 5190, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/5190/text.; Tiku, supra note 11.} The bill is being pushed by the News Media Alliance, which represents almost 2,000 news organizations.\footnote{See Congressman David Cicilline to Introduce Anti-Trust Safe Harbor Bill for Newspaper Companies, NEWS MEDIA ALLIANCE (Feb. 25, 2018), https://www.newsmediaalliance.org/release-safe-harbor-bill/; About Us, NEWS MEDIA ALLIANCE, https://www.newsmediaalliance.org/about-us/.} As the CEO of that organization, David Chavern, said in an op-ed, “The least the government can do is get out of the way and let publishers protect themselves and their readers.”\footnote{David Chavern, Protect the News from Google and Facebook, WALL ST. J. (Feb. 25, 2018) https://www.wsj.com/articles/how-antitrust-undermines-press-freedom-1499638532.}

**B. BOLSTERING INVESTIGATIVE JOURNALISM**

With regard to bottom-up legal possibilities, they could take several forms, including more significant government funding of the press, better enforcement (and some expansion) of
laws around newsgathering, and expanding the Corporation for National and Community Service (which spearheads AmeriCorps) to include a journalism component.

1. ENHANCED PUBLIC FUNDING OF THE PRESS

Some journalists would dismiss public funding outright as anathema to their role as watchdog. Yet, more robust public funding of journalism needs to at least be on the menu of options. Watchdog reporting is the most expensive type of reporting, and part of the reason it flourished in the 1960s and 1970s was that news organizations at that time were better able to afford it. 333 As profits have been squeezed by platforms, investigative reporting is often the first thing newsrooms slash.334

Public funding of the press is not a new concept. The press has never been financially autonomous.335 The newspaper industry, in fact, is likely indebted to the American government for its very existence. The Postal Service Act of 1792 made mailing a newspaper cheaper than sending a letter (and free if it was being sent to another newspaper), and so newspapers could cheaply reach readers in far-flung locations.336 This gave the fledgling newspaper industry both a distribution network and a heap of content to choose from since newspapers freely borrowed content from one another.337 “As a historical matter,” Professor Anuj Desai wrote, “the American press most likely would have been significantly impoverished without the federal government’s role in promoting it.”338 The government has provided the press a host of other financial incentives in the centuries since.339

In addition, other democracies fund their press at much higher levels than in the United States. Whereas the United States spends $2.25 per capita to fund media systems, Canada spends $22, the United Kingdom spends $86, Germany spends $107, and Norway spends $135.340

333 See KOVACH AND ROSENSTIEL, supra note 33, at 191 (“[I]t is no accident that the rise of investigative modern reporting in the 1960s coincided with the growing financial strength of news organizations in print and television.”).
334 See SEYMOUR M. HERSH, REPORTER (asking in the Introduction: “Where are the tough stories today about America’s continuing Special Forces operations and the never-ending political divide in the Middle East, Central America, and Africa? Abuses surely continue—war is always hell—but today’s newspapers and networks simply cannot afford to keep correspondents in the field”).
335 See THOMAS E. COOK, GOVERNING WITH THE NEWS 38-60 (2005). The press, too, has always been dependent on and influenced by various market actors including advertisers, investors, shareholders, and news consumers. As Michael Schudson wrote, a news organization “is an endlessly volatile marriage between professional ideals and commercial ones.” SCHUDSON, WHY DEMOCRACIES NEED AN UNLOVABLE PRESS, supra note 94, at 94; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 78 (1975) (“Freedom of speech, with us, is a compromise, an accommodation. There is nothing else it could be.”).
337 See SCHUDSON, THE SOCIOLOGY OF NEWS, supra note 103, at 213.
339 See Erin C. Carroll, Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press, 2016 UTAH L. REV. 193, 216-17 (2016); C.W. Anderson et al., Post-Industrial Journalism: Adapting to the Present, TOW CTR. FOR DIGITAL JOURNALISM 4-5 (Dec. 3, 2014), https://academiccommons.columbia.edu/catalog/ac:7sqy94m8x (noting that “[g]ood journalism has always been subsidized; markets have never supplied as much news as democracy demands” and defining “subsidy” broadly to include more than “direct government funding”).
numerous Western European countries, public news organizations are well-funded and powerful enough that they are the top news sources for citizens.\textsuperscript{341} For example, the BBC is the main news source for forty-eight percent of adults in the United Kingdom.\textsuperscript{342}

In terms of convincing lawmakers to provide funding for journalism, recent research suggests watchdog reporting actually saves local communities money. A study by economists at Notre Dame and the University of Illinois at Chicago found that when a local newspaper shuts down and there is less scrutiny of local government, costs for municipal projects rise.\textsuperscript{343} “[I]f you look at the municipal bond market, you can actually see the financial consequences that have to be borne by local citizens as a result of newspaper closures,” a study co-author Chang Lee said.\textsuperscript{344} Thus, by funding watchdog journalism, communities may actually save money overall.

And some politicians have shown a willingness to begin to fund local journalism. In the summer of 2018, New Jersey legislators created a first-of-its-kind “Civic Information Consortium” and provided it with $5 million in seed money.\textsuperscript{345} The consortium will be affiliated with several New Jersey state universities and will, according to the law creating it, “provide grants that support news and information that benefit the State’s civic life and meet the evolving information needs of New Jersey’s underserved communities.”\textsuperscript{346} Free Press, the advocacy group that lobbied for the bill, hopes that more specifically the Consortium will train journalists; improve access to government data and other civic information, especially to low-income communities and communities of color; and “nurture better civic engagement and dialogue.”\textsuperscript{347} To help prevent the State from influencing grantees, funding decisions will be made by board members drawn not only from government, but the media and technology industries.\textsuperscript{348}

2. BETTER ENFORCEMENT AND EXPANSION OF LAWS AROUND NEWS GATHERING

A second way in which watchdog reporting could be bolstered is better enforcement and expansion of laws related to news gathering. One of the most significant of these laws is the federal Freedom of Information Act (“FOIA”) and its state counterparts.\textsuperscript{349} Getting information from government is, obviously, critical to watchdog reporting. Journalists have lamented for decades that obtaining government records through FOIA is numbingly slow and sometimes impossible. I have elsewhere argued in favor of overhauling the expedited processing provision

\begin{itemize}
\item See id.
\item Id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\end{itemize}
under FOIA to give preference to journalists.\(^\text{350}\) (Many states have expedited processing provisions as well).\(^\text{351}\) Providing public records to journalists faster could help minimize the amount of time that makes watchdog reporting particularly difficult given the speed of information flow today. More dramatically, several scholars have proposed reimagining FOIA to shift from its “request-and-respond paradigm” to an affirmative disclosure regime.\(^\text{352}\) This would also result in a faster provision of information to journalists. This is essential given the platform value of speed.

Other news gathering protections could be explored as well. For example, several scholars have proposed enhanced protections for whistleblowers.\(^\text{353}\) And news organizations have long been trying to pass a federal reporter’s shield law. Protection for sources is critical given the nature of the information being collected and reported on when the press is acting in its watchdog role. All of these suggestions would better enable journalists to produce substantive investigative reporting rather than “content” the primary purpose of which is to lure eyes to their publication.

As any enhancement of news-gathering laws is considered, it will be critical to bring journalists into the conversation. Lawmakers need to better understand the news gathering and editorial processes so that they can best protect them. As good as the press is at shining the light on everything around it, it has historically not been transparent about its own processes. Yet, this is shifting. Today, there is urgency for the press to explain how it goes about its work.\(^\text{354}\) In the wake of President Trump’s attacks on the press, concern over “fake news,” and public trust in the press plummeting, news organizations have realized that transparency needs to be part of their business plan.\(^\text{355}\) This resulted in things like the Showtime series *The Fourth Estate* and a *Washington Post* series of videos entitled, *How to be a Journalist.*\(^\text{356}\)

\(^{350}\) See Carroll, supra note 339 at 196.

\(^{351}\) See Utah Code Ann. § 63G-2-204(3)-(4) (West Supp. 2015).


\(^{353}\) See Pozen, supra note 352, at 1149.

\(^{354}\) See C.W. Anderson et al., supra note 339, at 4 (“Journalism performs multiple overlapping functions, and there never used to be much urgency in defining those functions. In the period in which public speech was scarce (which is to say, all of history until now), journalism was simply what journalists did, journalists were just people hired by publishers, and publishers were the relative handful of people who had access to the means of making speech public.”).


\(^{356}\) See Liz Garbus, *A View Inside the ‘Fourth Estate’ During Trump’s First Year*, N.Y. TIMES (April 26, 2018), https://www.nytimes.com/2018/04/26/insider/true-story-the-fourth-estate.html (speaking about how she got access to the newsroom, filmmaker Liz Garbus said, “It might be that the organization’s leaders understood that at a time when journalism was under attack from the highest powers in the land, it might not be a bad idea to show the public exactly what it is that real journalists actually do”); WashPost PR, *The Washington Post Launches “How to Be a Journalist” Video Series*, WASH. POST PR BLOG (Dec. 8, 2017), https://www.washingtonpost.com/pr/wp/2017/12/08/the-washington-post-launches-how-to-be-a-journalist-video-series/?utm_term=.03dcb149cc91. Washington Post editor Marty Baron also said that the paper is looking for ways to combat the mystery around who journalists are and what they do. See Lakshmanan, supra note 355.
Journalists could still do more. Legislators and courts need to understand how the investigative reporting and writing processes works and how newsworthiness decisions are made. Without a firm understanding of this process, it will be difficult to convince decision makers to protect it or to discern the best ways to do so.

3. EXPANDING THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

A third option for bolstering watchdog reporting would be to create a federally-funded program for journalism akin to AmeriCorps, to build out the existing AmeriCorps program to include journalism, or to create a similar privately-funded organization.357 This proposal is aimed specifically at bolstering the press’s focus on community and combatting the tendency of platforms and technology to cater to an audience of one, thereby producing isolation despite promises of connectivity. It is also aimed at the largest gap in watchdog reporting and reporting in general—reporting on local governments.

The AmeriCorps program began in the early 1990s and supports volunteers in local communities working on a range of issues including improvements in education, combatting poverty, and disaster preparedness.358 It is part of the Corporation for National and Community Service whose mission is promoting “civic engagement” and building “stronger, more efficient, and more sustainable community networks.”359 Watchdog journalism comfortably fits under this umbrella.

Members of this journalism service program could be placed in communities with one or more experienced journalists (depending on the size of the community) with the mission of reporting on local government. If publication is online, overhead costs could be kept fairly low. Private models for such programs exist.360 Yet, of course, this proposal is dependent not only on the funding of such a program, but the continued funding of the Corporation for National and Community Service. The President’s 2019 budget has proposed defunding the agency.361 Thus, any proposal of this sort faces roadblocks under the current administration.

Yet, this proposal, as well as the other “bottom up” options proposed here, could be undertaken at the state level. As noted, the New Jersey Civic Information Consortium is an example of a state government—seemingly pushed by grassroots organizing and local communities—taking steps to improve the local news ecology. This demonstrates more promise perhaps in looking to states than the federal government.

357 Inspiration for this idea came from journalists Deborah and James Fallows. See #295: Deborah and James Fallows, LONGFORM PODCAST at 59:30 (May 23, 2018), https://longform.org/posts/longform-podcast-295-deborah-and-james-fallows (describing a “Peace Corps-like” program to “train the next generation of journalists”).

358 See Who We Are, CORPORATION FOR NATIONAL & COMMUNITY SERVICE, https://www.nationalservice.gov/about/who-we-are.

359 See id. (noting this under “Guiding Principles”).


This overview of top-down and bottom-up possibilities is intentionally just an overview. The goal is to demonstrate that law beyond the First Amendment can and should be considered as a tool for protecting and fostering watchdog journalism. Neither journalists nor lawmakers should assume that the First Amendment is sufficient. A broad range of options exist for creating an environment that would foster watchdog reporting. These options are not mutually exclusive, nor do they all require sweeping government action. Some are as straightforward as enforcing existing legislation or passing pending legislation.

CONCLUSION

Journalists often speak of the First Amendment as if it has talismanic power. This reverence is not unfounded. After all, an entire museum in eyeshot of the United States Capitol, the Newseum, is devoted to the First Amendment and its protection of a free press. The First Amendment has capably protected the Fourth Estate—an institution that exercised editorial discretion independently to act as a check on government. In part because of that protection, the Fourth Estate flourished in the second half of the twentieth century and demonstrated the power of its watchdog role.

But the press ecology has changed dramatically and rapidly. The Fourth Estate has been eclipsed by the Networked Press in which not only journalists but platforms, algorithms, audience and others play significant roles in creating and distributing news. Until relatively recently, journalists served as information gatekeepers and were relatively free in their exercise of editorial discretion. Platforms now host public squares, set their boundaries, and police what happens in them.

If an institution is an organization based on shared norms and goals, the Networked Press does not qualify. Its members are too different. Some are not even human. While platforms are focused on commodification, personalization, agnosticism, speed, and scale; in contrast, watchdog journalists are engaged in a deliberate and often time-consuming process to unearth stories that can impact the community. This is true even when the stories may not be widely read. The power of the platforms is so immense—in part because of their hold on advertising dollars—that platform values are permeating the Networked Press and undermining the conditions needed for watchdog journalism to thrive. Editorial discretion is not being exercised in the same way, and watchdog journalism is withering.

Although the First Amendment largely protected the Fourth Estate, it does not protect the press from private power. Technology platforms have amassed that power in a way perhaps never seen before and they have wielded it—even if unintentionally—against the press. At its core, the role of the watchdog is to protect against tyranny. Today, that role is significantly compromised. To protect watchdog journalism some action is needed. Law should be part of that response.

Various possibilities exist, including algorithmic transparency, sharing of data, the hiring of journalists by platforms, press exemptions from antitrust law, subsidies, better enforcement of laws related to newsgathering, and a corps of volunteer journalists. Some of these are aimed at strengthening the press, others at weakening platforms. The goal is to reduce the power asymmetry between the players in the Networked Press, better align platform and press goals and norms, and create an environment in which watchdog journalism can flourish.