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Obstruction of Journalism

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INTRODUCTION

Identifying oneself as press—with a badge on a lanyard, label on a helmet, or sign on a car—used to be a near-grant of immunity. It meant safer passage through all manner of dangerous terrain. But today, being recognizable as a journalist may be more likely to make one a target.

Physical attacks against journalists in the United States increased nearly 1,400 percent in 2020.¹ Journalists were assaulted by police as they covered Black Lives Matter protests and by a

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pro-Trump mob as they reported on Congress’s certification of the presidential election. In public spaces, performing their democratic role, journalists were dragged, beaten, and bloodied. A photojournalist was permanently blinded in one eye.

This physical violence is only the most visible danger journalists face. The rate of online violence against journalists is soaring, and it is even more pervasive than physical violence. It is aimed at women, and women of color, in particular. In a 2020 United Nations study of violence against journalists, nearly three quarters of the respondents identifying as women said they had experienced online abuse, harassment, threats, and attacks. This included graphic and epithet-filled threats of rape, murder, or harm to family members. The report emphasized that online attacks can lead to offline ones.

The impact of this violence on individual journalists is severe, sometimes even debilitating and career-ending. But the impact extends beyond the individual journalists targeted. Because this violence is aimed almost entirely at women, people of color, non-Christians, and non-straight journalists, it threatens to have a very particular impact on news, and so, the broader information ecology. Journalists within these targeted groups are often the journalists who report on topics that challenge social hierarchies and inequities. Their work

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4 Burns, supra note 3.


6 Id. at 1-2, 5.

7 See Joseph A. Wulfsohn, New York Times Reporter Taylor Lorenz Mocked For Claim [sic] “Online Harassment” Has “Destroyed My Life,” FOXNEWS (March 9, 2021), https://www.foxnews.com/media/new-york-times-taylor-lorenz-harassment-claim (quoting Lorenz as saying “It’s not an exaggeration to say that the harassment and smear campaign I’ve had to endure over the past year has destroyed my life. No one should have to go through this . . . The scope of the attacks has been unimaginable. There’s no escape. It has taken everything from me.”); Mari Matsuda, Public Response to Racist Speech, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 24 (1993) (“Victims of vicious hate propaganda experience physiological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. Patricia Williams has called the blow of racist messages ‘spirit murder’ in recognition of the psychic destruction victims experience.”).
regularly gives voice to others from marginalized populations. Thus, this violence disproportionately silences voices already relegated to the margins. Rather than letting our national conversation branch and proliferate, the violence attempts to shear it to a white, male, Christian, and straight trunk.\(^8\)

At its core, democracy requires that we create the means by which new voices and stories can be heard so that the same stock stories—and the hierarchies they support—do not become entrenched. Journalists exist, in part, to tell us these new stories about ourselves and our communities—stories that bring us into conversation with one another and thereby help us to successfully self-govern. In this way, the violence is an assault on the freedom of the press, freedom of expression, and democracy itself. And it is continuing with impunity.

To address the systemic harm caused by violence against journalists, this article proposes a federal “obstruction of journalism” statute modeled on the federal obstruction of justice ones. The obstruction of justice statutes are aimed at preserving the effective functioning of our justice system by criminalizing threats against that system. Likewise, the obstruction of journalism statute proposed here would criminalize physical violence and particularly severe threats against reporters with the aim of protecting journalism, another system integral to the functioning of democracy.\(^9\) Adopting an obstruction of journalism statute would signal that the integrity of our system for newsgathering and publication is a national priority on par with the integrity of our justice system.

This article proceeds in three parts. Part I describes the rapid increase in violence against journalists. This includes physical violence, but more often online violence. Perpetrators select victims based on their identities, and, as noted, the victims are primarily women. They are disproportionately women of color. This violence has historical roots. Today’s violence is the latest in a series of surges that occur when its perpetrators perceive minority voices might eclipse their own. Yet today’s violence is also different—more pervasive and perhaps more intractable. Technology has made it easy to commit and so, the potential for its frequency and reach seems unbounded.

Part II details how violence obstructs journalism. Obstruction operates on at least three levels: the story, the beat, and the pipeline. At the story level, threats and abuse prevent journalists from covering particular events or incidents. At the beat level, perpetual abuse around broad topics like politics, economics, and immigration dissuades reporters from aggressively covering these beats or even covering them at all.\(^10\) At the pipeline level, violence is leading reporters to leave or consider leaving the profession entirely. All of these forms of obstruction culminate to produce a harm greater than the sum of its parts. This harm is an erosion of freedom of the press and expression that threatens democratic governance.


\(^9\) The article uses the term “obstruction of journalism” as both a descriptor of the harm being wrought on the press as well as the title of a federal statute that this article proposes to address the harm.

\(^10\) See Posetti et al., *supra* note 5, at 1 (quoting the United Nations Secretary General as writing, “Women who cover topics such as politics, law, economics, sport, women’s rights, gender and feminism are particularly likely to become targets of online violence”); Silvio Waisbord, *Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism*, DIGITAL JOURNALISM, 8:8, 1030-1046, 1033-34 (Sept. 24, 2020) (“[R]eporters who have produced critical stories about national politics, the presidency, immigration, right-wing extremism, guns, race, human rights, sexual abuses, and intelligence services have been common targets of vicious rhetoric and intimidation.”).
Part III proposes a federal obstruction of journalism statute as a means of addressing the systemic harm this violence causes. Obstruction of justice is aimed at protecting a democracy-enhancing institution—the judiciary—and its processes from violence and harm. Protecting the press and our news environment is similarly vital. Moreover, even while punishing words, an obstruction of journalism statute would promote First Amendment values under the Speech and Press Clauses. It would be speech-enhancing by promoting a diversity of voices and richer dialogue. It would also reflect a richer and more generative view of the Press Clause than our current laissez-faire one. Moreover, obstruction of journalism would be rhetorically important; it would signal a seriousness about the press’s value to public dialogue and our fragile democracy.

I. SURGING VIOLENCE AGAINST JOURNALISTS

“[J]ournalism has become one of the most dangerous professions in the world,” announced a 2020 report from the Council of Europe.11 This has, of course, long been true in war-torn nations and under certain autocratic regimes. But historically, safety was not something that most American journalists worried about on domestic soil. The United States was viewed as a relative haven for journalists—a model for freedom of the press.

Recently, this has changed. During 2020, physical violence against American journalists grew at an explosive rate. Advice to journalists from industry organizations included, “[T]hink carefully about whether you display credentials openly.”12 It continued that a press pass on a lanyard “can be used to strangle you in a scrum.”13

The physical violence is just the most visible form of hostility against journalists. Various forms of online abuse—including threats, impersonation, and stalking—are also surging. This violence is overwhelmingly targeted at non-male, non-white, non-straight, and non-Christian journalists. Women journalists identify being online as the biggest hazard in their professional lives.14

This violence is not a new phenomenon, but, rather, it is part of a history of violence against journalists in the United States. This history demonstrates that the violence is rooted in fear of women journalists and journalists from marginalized groups using their voice, occupying the public square, and setting the agenda. Most recently, the violence has been stoked by former-President Donald J. Trump’s and right-wing extremism and accelerated by the affordances of online social media platforms—anonymity, accessibility, speed, and scale.

A. FORMS OF VIOLENCE

11 See Peter Noorlander, Background paper on the implementation of CM/rec(2016)4 on the safety of journalists and other media actors, for the Conference of Ministers responsible for Media and Information Society (Nicosia, Cyprus, May 2020), COUNCIL OF EUROPE 5 (2020).
13 Id.
In 2020, the staff of the U.S. Press Freedom Tracker literally could not keep up with the reports of violence it was receiving. The nonprofit group, which collects and attempts to verify reports of violence against the press, wrote in a caveat to its annual report that: “[a]s a small team, we’re overwhelmed by the sheer amount of press freedom violations reported to us this year, and are still working through hundreds more reports across nearly a dozen categories.”

According to its data, 593 physical assaults against journalists occurred in 2020. In each of the three years prior (the only other three years comprehensively tracked), that number never climbed above 50. A spokesperson for Reporters Without Borders called the frequency and intensity of attacks on journalists in the United States “shocking” and added that the country was “no longer a champion of press freedom, either at home or abroad.”

Some of this violence was highly visible—photographed, livestreamed, or broadcast by journalists themselves. Photojournalist Linda Tirado shared a photo of herself with her left eyelid dark purple and swollen shut after police shot her with a foam bullet and permanently blinded that eye. Los Angeles Times journalist Molly Hennessy-Fiske Tweeted an image of her legs bruised and bleeding after police shot her with rubber bullets. Louisville, Kentucky reporter Kaitlin Rust could be heard yelling, “I’m getting shot!” in the midst of a live television segment.

This physical violence often occurred when police arrested journalists. During the protests in the wake of the police murder of George Floyd and in support of the Black Lives Matter movement, journalists were arrested in record numbers—nearly a 1,600 percent increase from 2019. More than a third of the arrests were accompanied by assaults.

This violence has continued since the summer of 2020, and occurs not only at large protests. Josie Huang, a reporter for Los Angeles’s NPR affiliate, was thrown to the ground, bruised, and cut for filming outside a hospital where sheriff’s deputies were treated after being

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16 See Interview with Kirstin McCudden, supra note 1.
20 @mollyhf, TWITTER (June 5, 2020, 4:50 PM), https://twitter.com/mollyhf/status/1269008792194297866.
23 U.S. Press Freedom in Crisis: Journalists Under Arrest in 2020, supra note 15. Note that this calculation is based on the number of arrests accompanied by assault known as of December 14, 2020, the date of this publication. The percentage may have shifted as more arrests (with or without accompanying assaults) have been confirmed.
shot in an ambush.\textsuperscript{24} The Los Angeles Sheriff’s Department lied in saying that Huang did not identify herself as press and had to recant after video evidence surfaced.\textsuperscript{25}

And police are not the only perpetrators. In 2017, Republican then-Congressman and now-Governor Greg Gianforte of Montana was convicted of assault after Gianforte attacked a reporter.\textsuperscript{26} In 2019, a BBC cameraman was knocked over at an El Paso rally for President Trump.\textsuperscript{27} The assailant was wearing a MAGA cap and shouting “Fuck the media” as he was restrained.\textsuperscript{28} As he was removed from the rally, some in the crowd shouted, “Let him go.”\textsuperscript{29}

Supporters of the former president also violently attacked journalists in the weeks before the inauguration. During the January 6, 2021 insurrection, the words “Murder the Media” were carved into a door in the Capitol.\textsuperscript{30} John Minchillo, an Associated Press photojournalist was dragged through a crowd, thrown over a wall and threatened with death.\textsuperscript{31} Erin Schaff, a photojournalist with the New York Times, described men becoming angry after reading her press pass, throwing her to the Capitol floor, and, as she screamed for help, “[p]eople just watched. At this point, I thought I could be killed and no one would stop them.”\textsuperscript{32}

Journalists for the Los Angeles Times, Washington Post, and other news organizations wore bulletproof vests when they covered the inauguration.\textsuperscript{33} The Committee to Protect Journalists issued a lengthy list of suggestions to reporters. These included wearing body armor, using equipment that doesn’t require cables (which could be used against reporters in an attack), avoiding black clothing (which is associated with “antifa” groups), and tying long hair up “to prevent individuals from pulling you from behind.”\textsuperscript{34}

As disturbing and widespread as this physical violence is, it is not the most pervasive type of violence journalists face. Far more common is the online violence that journalists


\textsuperscript{25} Id.


\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Fu, \textit{supra} note 2.


\textsuperscript{34} \textit{CPJ Safety Advisory: Covering the build-up to the U.S. presidential inauguration}, COMM. TO PROTECT JOURNALISTS (Jan. 14, 2021), https://cpj.org/2021/01/cpj-safety-advisory-covering-the-build-up-to-the-u-s-presidential-inauguration/.
confront. It includes cyberbullying,35 doxing,36 online impersonation,37 swatting38 and related digital privacy and security threats,39 and disinformation campaigns. It also includes abusive, harassing, and threatening language. Rape and even death threats are lobbed at journalists with regularity.40 A 2018 study, found that one in ten journalists surveyed had been threatened with death in the past year as a result of the work that they do.41

As with physical violence, the prevalence of online abuse appears to be skyrocketing.42 In a 2020 study of women journalists and media workers worldwide, seventy-three percent said that they had experienced online abuse, harassment, threats, and attacks.43 This is in marked contrast to a similar study from 2014 in which only about twenty-three percent of respondents reported experiencing online “intimidation, threats or abuse” related to their work.44 As with online violence as well as gendered and racialized violence more generally, the actual incidence of

35 See PEN America, Defining “Online Abuse”: A Glossary of Terms, ONLINE HARASSMENT FIELD MANUAL, https://onlineharassmentfieldmanual.pen.org/defining-online-harassment-a-glossary-of-terms/ (defining cyberbullying as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices”).
37 See PEN America, supra note 35 (defining online impersonation as creating a fake social media account to “post offensive or inflammatory statements to defame, discredit, or instigate further abuse”).
38 See id. (defining swatting as making a “hoax call to law enforcement detailing a completely false targeting event taking place at a target’s home or business, with the intention of sending a fully armed police unit (SWAT team) to the target’s address”); Matt Stieb, White Nationalist Arrested for Swatting Journalists and a Historically Black Church, INTELLIGENCER (Feb. 26, 2020), https://nymag.com/intelligencer/2020/02/neo-nazi-arrested-for-swatting-a-historically-black-church.html.
41 Id. at 22, 25.
42 See Posetti et al. supra note 5, at 5 (finding that online attacks in their various forms “appear to be increasing dramatically and uncontrollably”). Other studies confirm the surge in abuse and document the severity of it. For example, a 2018 report by the International Women’s Media Foundation and Troll-Busters (a service for women journalists targeted by online harassment) found that sixty-three percent of respondents had been threatened or harassed online, and ninety percent said they believed online threats or harassment against journalists had increased in the last five years. FERRIER, supra note 40, at 22, 25
43 See Posetti et al. supra note 5, at 2. And in a similar, but smaller study conducted in 2018 by researchers at the University of Texas, noted that “[a]llmost all of the journalists we interviewed reported experiencing some form of harassment online that focused on their person, gender, or sexuality.” Gina Masullo Chen et al., Women Journalists and Online Harassment, CTR. FOR MEDIA ENGAGEMENT 2 (Apr. 11, 2018), https://mediaengagement.org/wp-content/uploads/2018/04/Report-Women-Journalists-and-Online-Harassment.pdf.
44 See Posetti et al., supra note 5, at 5.
abuse is likely far more prevalent than reported. And although the available studies do not break out statistics on violence against transgender journalists, given that transgender people are disproportionately targeted with online abuse online, chances are high that transgender journalists are likewise disproportionately targeted.

These online attacks are aimed to intimidate. Perpetrators hope to make journalists’ work so frightening, concern for their and their families’ safety so strong, that work becomes impossible. They want to create a state of high-alert about privacy and safety that is so exhausting, it is untenable. They often want to shame, humiliate, and professionally discredit journalists. They want to see journalists’ careers toppled—for journalists to log-off and withdraw. They want to silence journalists. In one candid description of this strategy, the New York Times quoted an email between a venture capitalist and a “neoreactionary” leader with a large online following.

One told the other, “If things get hot, it might be interesting to sic the Dark Enlightenment audience on a single vulnerable hostile reporter to dox them and turn them inside out.”

As this quote hints, online violence can presage offline violence. According to Julie Posetti, the Global Director of Research at the International Center for Journalists, “The digital psychological, and physical safety threats confronting women in journalism are overlapping, converging and inseparable.” For example, online attacks can reveal identifying and personal information that increases the risk of physical attacks. The Committee to Protect Journalists found in 2017 that in at least forty percent of cases in which journalists were murdered, they had received threats before they were killed. As just one example, online violence has been linked

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45 See Waisbord, supra note 10, at 1030 (noting that the number of attacks are underreported); Ferrier, supra note 40, at 41 (noting that fear of retaliation and fear of losing work led to under-reporting); Michelle Ferrier & Nisha Garud Patkar, TrollBusters: Fighting Online Harassment of Women Journalists, in MEDIATING MISOGyny 321 (Jacqueline Ryan Vickery & Tracy Everback eds., 2018).

46 See AMNESTY INTERNATIONAL, TROLL PATROL FINDINGS: USING CROWDSOURCING, DATA SCIENCE & MACHINE LEARNING TO MEASURE VIOLENCE AND ABUSE AGAINST WOMEN ON TWITTER (2018), https://decoders.amnesty.org/projects/troll-patrol/findings#abusive_tweet (noting in a study about violence against journalists that the focus was not on transgender people, that regardless Amnesty’s “previous research shows that women of colour, religious or ethnic minority women, lesbian, bisexual, transgender or intersex (LBTI) women, and other women with different identities will often experience abuse that targets them in unique or compounded way[s]”).

47 See Ferrier, supra note 40, at 11-12, 24 (“These attacks seek to discredit women journalists and media workers, damage their reputations, and ultimately silence them. Perpetrators of these physical and online threats operate for the most part with impunity, leaving individual journalists to navigate how best to respond.”); Waisbord, supra note 10, at 1036.

48 See Ferrier & Patkar, supra note 45, at 320-21 (quoting DART CENTER FOR JOURNALISM AND TRAUMA, TRAUMA & JOURNALISM: A GUIDE FOR JOURNALISTS, EDITORS & MANAGERS (Mark Brayne ed. 2014)).

49 Posetti, Online Violence: The New Frontline for Women Journalists, supra note 39 (“The perpetrators range from individual misogynists and networked mobs seeking to shut women up.”).


51 Id.

52 Posetti, Online Violence: The New Frontline for Women Journalists, supra note 39.

53 Id.

to the murder of Maltese journalist Daphne Caruana Galizia, who was relentlessly harassed both online and off before being murdered with a car bomb.\textsuperscript{55}

B. TARGETS OF VIOLENCE

Violence against journalists is, primarily, gender-based violence. Posetti describes women journalists as sitting “at the epicentre of risk.”\textsuperscript{56} Although journalists who are men are also victims of online abuse, the abuse directed at women tends to be more severe.\textsuperscript{57}

Nearly every major study of online violence against journalists focuses on women. This is evident from a sampling of titles alone: *Online Violence Against Women Journalists—A Global Snapshot of Incidence and Impacts*,\textsuperscript{58} *Attacks and Harassment: The Impact on Female Journalists and Their Reporting*,\textsuperscript{59} *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse Against Women on Twitter*,\textsuperscript{60} and *Women Journalists and Online Harassment*.\textsuperscript{61} In fact, in a study by Amnesty International of tweets that contained the journalists’ usernames (i.e. “mentions”), more than seven percent of the tweets were “problematic” or “abusive.”\textsuperscript{62} As one respondent to a study by the Committee to Protect Journalists said, “Women whose work is published online face costs, in the form of threats and harassment, for almost every single piece they publish.”\textsuperscript{63}

Abuse and threats are compounded significantly for women who appear—based on online profiles and photographs—non-white, non-Christian, or non-straight.\textsuperscript{64} In the Amnesty study, researchers found that women of color (Black, Asian, Latina, and “mixed-race” women) were thirty-four percent more likely to be targeted in abusive and problematic tweets than white women.\textsuperscript{65} Black women were eighty-four percent more likely than white women to be targeted.\textsuperscript{66}

As American journalist Imani Gandy told Amnesty, “I get harassment as a woman and I get extra

\begin{itemize}
    \item Posetti et al., supra note 5, at 1 (citing the United Nations Secretary General).
    \item Id.
    \item FERRIER, supra note 40.
    \item AMNESTY INTERNATIONAL, supra note 46.
    \item Masullo Chen et al., supra note 43, at 1.
    \item AMNESTY INTERNATIONAL, supra note 46.
    \item Waisbord, supra note 10, at 1033; Silvio Waisbord, *Trolling Journalists and the Risks of Digital Publicity*, JOURNALISM PRACTICE 11 (Sept. 29, 2020) (“Reporters who appear stereotypically non-white, female, Arab, Muslim, Jewish or non-straight, based on their bylines and photographs showing skin color and clothing, are targets.”); Ferrier & Patkar, supra note 45, at 322 (citing Becky Gardiner et al., *The dark side of guardian comments*, THE GUARDIAN (Apr. 12, 2016), https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments).
    \item AMNESTY INTERNATIONAL, supra note 46.
    \item Id.
harassment because of race and being a black woman . . . Whatever identity they can pick they will pick it and use it against you.”

The threats and abuse are regularly misogynistic and sexualized. In the 2020 United Nations study, nearly twenty percent of women who had received threats said that they were threatened with sexual violence. Almost all of the women journalists who responded to a University of Texas study reported online harassment focused on their person, gender or sexuality. One editor stated, “It was not criticism of my work; it was actually the destruction of my person.”

This is not to say that men are immune. Michael Edison Hayden, a senior investigative reporter at the Southern Poverty Law Center says, “I’ve been deluged with violent threats. There were people threatening to kill my father on specific dates and times. It felt like I had a kind of rain cloud following me around all the time. This stuff is not a game. This isn’t something people should do without some level of self-protection.”

Hayden’s experience also points to another reason that journalists are targeted—the subject matter on which they are reporting. Hayden investigates and writes about hate groups and extremists—topics that, unsurprisingly, trigger online trolling and violence. Scholars have also noted that reporting on topics such as politics, race, gender, human rights, disinformation, immigration, national security, and guns attract more vitriol.

C. CAUSES OF VIOLENCE

Violence against journalists is a means of controlling the boundaries of legitimate public discourse. It is a power grab—a fight to maintain the centrality of whiteness and masculinity in the sphere of public discourse and to relegate all other identities and their stories to the margins. This has been true throughout American history, and the latest chapter of this history has happened in lockstep with the rise of Trump and authoritarianism. Violence has been worsened significantly in the modern era by social media platforms. Platforms—and the speed, scale, and anonymity that are baked into them—have been effective conduits for this terror. More traditional forms of online communication, like email, have also been used to unleash a “tsunami of hateful attacks.”

68 Posetti et al., supra note 5, at 6.
69 Masullo Chen et al., supra note 43, at 2.
70 Id.
Historically, violence against the press has been the product of racism and fears over loss of power. The first “martyr” to American press freedom was Elijah Lovejoy, the editor of the Observer, an abolitionist newspaper in Alton, Illinois, who was murdered in 1836. Lovejoy had originally been editing a religious weekly, but then wrote about a local lynching and protested the failure to convict the perpetrators. Over time, he began to devote the paper more and more to abolitionist content. Consequently, the paper’s printing press was attacked and destroyed four times (once when it was thrown into a river) by those attempting to silence Lovejoy. When a fifth press arrived, Lovejoy was killed, with a rifle in his hand, defending it.

About a year after Lovejoy’s murder, a 28-year-old Abraham Lincoln seemed to invoke Lovejoy when he gave a speech in Springfield, Illinois (about 85 miles from Alton), decrying the “mobocratic spirit” that was pervading the land. The future president issued this warning: “Whenever the vicious portion of the population shall be permitted to gather in bands of hundreds and thousands, and burn churches, ravage and rob provision-stores, throw printing presses into rivers, shoot editors, and hang and burn obnoxious persons at pleasure, and with impunity; depend on it, this Government cannot last.”

The speech was prescient, and it reveals that violence against the press is a facet of broader societal power struggles over entrenched hierarchies and inequities, including racism and sexism. As John Nerone, a historian of violence against the press, has written, “[m]edia are networks of relationships that can be constructed, reconstructed, and deconstructed in various ways with varying implications for where power is located and how it is exercised. Violent activity is often involved in that definition.”

Periods of sustained violence against the press are not random, but rather, are a reaction to the ascendency of minority voices. Nerone points, in particular, to the Revolutionary period (when “newspapers were called on to serve as advocates of a movement”) and the antebellum period (“when reform editors set out to accomplish the nation’s moral reconstruction”). Violence has been common “when minorities claimed the press as a voice of their own.” It is used as a method of intimidation and exclusion. And it has occurred “wherever the press is seen to be an agent of real or potential political transformation.”

Take for example the now-iconic reporting of Black journalist Ida B. Wells. In 1892, after publishing in the newspaper she owned, The Memphis Free Speech, an editorial denouncing

75 Id.
76 See id.
77 Id.
78 Id.
79 Id. at 108; Lyceum Address, Abraham Lincoln Online: Speeches & Writings, http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm.
80 Lyceum Address, supra note 79.
81 Nerone, supra note 74, at 17.
82 Id. at 15.
83 Id.
84 Id.
86 Id. at 5276.
lynching, Wells received countless death threats.\textsuperscript{88} A white mob then destroyed the newspaper’s offices and Wells (who was in New York at the time) left Memphis permanently.\textsuperscript{89}

Viewed in this context, today’s violence against the press seems almost predictable. Although there was scattered physical violence against the press throughout the Trump presidency, the sustained wave of physical violence occurred at Black Lives Matter protests in the wake of the murder of George Floyd—a moment in which protesters sought to focus attention on the scourge of police violence against the Black community.

Voices that were previously marginalized have risen up in other spaces too, including newsrooms. There, calls have grown louder for a racial reckoning over both the way the news is covered and who covers it. In a June 2020 essay, Pulitzer-prize winning journalist Wesley Lowery decried the failure of newsrooms “to employ, retain and listen to black people” and how the “views and inclinations of whiteness are accepted as the objective neutral.”\textsuperscript{90} Lowery called on journalists to shelve this warped understanding of objectivity and to adopt a “method of moral clarity.”\textsuperscript{91} History indicates that movements like these—movements that demand a shift in the current hierarchy—will be met with a backlash. And that backlash will often be violent.

Relatedly, surging anti-press rhetoric and the rise of right-wing movements are kindling for this violence.\textsuperscript{92} Anti-press rallying cries have long been central to right-wing movements.\textsuperscript{93} “Fake news” is the modern-day equivalent of the German “Lügenpresse” used by the Nazis and more recently by German anti-immigrant activists.\textsuperscript{94} And Trump’s Twitter account served as a megaphone for this rhetoric before being permanently suspended in the final weeks of his presidency. During his time in office, Trump posted approximately 1,800 negative tweets about the media.\textsuperscript{95} This included a 28-second video in which he is depicted wrestling and punching a

\footnotesize{\textsuperscript{88} See Anne Helen Petersen, \textit{The Cost of Reporting While Female}, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/reporting-female-harassment-journalism.php; NERONE, \textit{VIOLENCE AGAINST THE PRESS}, supra note 74, at 144 (noting that it is unclear whether the editorial was actually written by Wells or her business partner).

\textsuperscript{89} Petersen, supra note 88; NERONE, \textit{VIOLENCE AGAINST THE PRESS}, supra note 74, at 144.


\textsuperscript{91} Id.


\textsuperscript{93} Waisbord, \textit{Trolling Journalists and the Risks of Digital Publicity}, supra note 64, at 12 (“[T]rolling cannot be understood outside the context of right-wing aggressive, offensive rhetoric against ‘the media’ in contemporary politics. It has been central to the rhetoric of President Donald Trump and other right-wing populist leaders who regularly criticize ‘the press’ with epithets that echo far-right language, legitimize dehumanizing views of journalists, and cue in violent behaviors.”)(Citations omitted.)


\textsuperscript{95} Trump’s Negative Tweets About the Press (Living Doc), https://docs.google.com/spreadsheets/d/1uNA6nscgRhhQ0b6USsMNzhYLMfuDRSMhbGZNZ00WkK/edit#gid=0; The Last Trump Tweet Against the Media, U.S. PRESS FREEDOM TRACKER (Jan. 11, 2021) (embedding a link to the Google doc entitled Trump’s Negative Tweets About the Press (Living Doc)), https://pressfreedomtracker.us/blog/last-trump-tweet-against-media/.
figure whose head was replaced by a CNN logo. Trump targeted specific organizations and even reporters calling them “nasty,” “disgusting,” “dumb,” “fake,” “dishonest” and more. “Trump makes a very calculated decision about who he is going to pick on,” said Lucy Daglish, former executive director of the Reporters Committee for Freedom of the Press and now dean of the journalism school at the University of Maryland. “He’s encouraging the public—actually calling on them—to harm journalists.” Trump also, at times, singled out Black women journalists for particular abuse. During a few days in November 2018 he attacked three Black women journalists telling one she asked “a lot of stupid questions”; calling another a “loser” and demanding she sit down at a news conference; and telling a third that she had asked him a “racist question.”

Trump’s attacks became a playbook for other authoritarian leaders. In a 2019 face-to-face meeting, Trump said to Russian president Vladimir Putin, “Fake news is a great term, isn’t it? You don’t have this problem in Russia, but we do.” Putin responded in English, “We also have. It’s the same.” Trump’s rhetoric has given foreign leaders more cover for anti-press actions, including violence. For example, it was during the Trump presidency that Saudi crown prince Mohammed bin Salman ordered the murder and dismemberment of Washington Post columnist Jamal Khashoggi. Likewise, in the Philippines, President Rodrigo Duterte’s government has unleashed a torrent of online harassment as well as “cyber libel” criminal charges against journalist Maria Ressa, co-recipient of the 2021 Nobel Peace Prize. Ressa co-founded the Rappler, a Philippine news site that is one of few news organizations in the country that covers Duterte and his policies critically. As The Washington Post editorial board wrote, “daily, Ms. Ressa is told she should be killed or ‘publicly raped to death.’” But even though violence against the press can be historically situated and is, perhaps, even predictable in this moment, the scale of it is new. This is due to technology and widespread

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97 Id.
98 Id.
99 Id.
101 Downie, supra note 96.
102 Id.
103 Id.
access to it. A cell phone or a keyboard is the only weapon needed to attack a journalist.\(^{107}\) It is no surprise that rates of cybercrime, including cyber-harassment, have grown exponentially.\(^{108}\) One media reporter described the recent surge in online vitriol by writing, “The entire internet, from Facebook and Google on down, is groaning under the weight of hateful posts.”\(^{109}\)

Journalsists are also very easy to “find” online. Being in public—whether that public is congregating in a literal public square or a virtual one—is fundamental to the profession.\(^{110}\) This renders journalists “known citizens.”\(^{111}\) Journalists’ whereabouts, thoughts, and work can be easily surveilled by anyone signing onto social media.\(^{112}\) Personal branding on social media is an increasingly vital part of a journalist’s job. Being verified with a blue check on Twitter is almost a qualification. As one anonymous Washington Post reporter said in an internal report on the Post’s social media policies, “If I’m deathly afraid of driving, I can opt not to drive. I can take the bus. I feel like I don’t have the option to opt out of tweeting.”\(^{113}\) Journalists use social media to cultivate sources and story leads, gather news, distribute and promote news, and interact with their audience.\(^{114}\) They are often pushed to do this by the news organizations that employ them.\(^{115}\) News organizations tend to frame journalists’ engagement with their audience as an act of virtue and journalistic responsibility and ignore that not all of their audience members are the

\(^{107}\) See Mary Anne Franks, *Beyond ‘Free Speech for the White Man’: feminism and the First Amendment*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* 374-75 (Robin West & Cynthia Grant Bowman eds. 2019) (“Throughout history and continuing to the present day, men have responded with fear and rage when women speak, work, dress, travel or make decisions in ways they find unacceptable … This reality has been exacerbated rather than ameliorated by the Internet.”); Waisbord, *Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism*, supra note 10, at 1032 (describing how harassment of the press has become easier with digital tools).

\(^{108}\) See Masullo Chen et al., *supra* note 43, at 1 (noting of harassment of journalists that “[t]his harassment—vitriolic sexist attacks or inappropriately sexual bars—mirrors the experiences of many women in general online”).


\(^{110}\) Waisbord, *Trolling Journalists and the Risks of Digital Publicity*, supra note 64, at 8 (noting that “journalists are more prone to be targets of vicious attacks simply because they are prominent and easy to identify and contact . . . Just as they can display their work and ideas publicly, journalists are also more likely to be scrutinized”); FERRIER, *supra* note 40, at 11.


\(^{112}\) See *id*.


\(^{114}\) FERRIER, *supra* note 40, at 11.

\(^{115}\) @benyt, TWITTER (June 8, 2020, 12:59 PM), https://twitter.com/benyt/status/1270037852110422016; Ginsberg & Montgomery, *supra* note 113 (noting that the Post’s existing social media policy dates to an era “when reporters were urged to build a brand online: Be on Twitter. Manage your Facebook page and post often”); Sarah Eberspacher, ‘Delete Your Account’ or Deal With It? How News Organizations are Failing to Support Female Reporters Against Online Harassment, 21 GEORGETOWN J. OF GENDER & THE LAW 143, 149-50 (2019).
civically-minded citizens envisioned by legal and journalism scholarship.\textsuperscript{116} Journalists, if they want to keep their jobs, cannot simply log off.

Meanwhile, social media platforms have done little to protect the journalists who produce the news that draws so many to their sites and reaps them hefty profits. After twelve people were murdered at the offices of the French satirical newspaper 	extit{Charlie Hebdo} in 2015, Mark Zuckerberg wrote in a Facebook post: “I’m committed to building a service where you can speak freely without fear of violence.”\textsuperscript{117} Yet, years later, neither Facebook nor Twitter have policies specific to trolling of journalists. Both platforms have mechanisms for blocking other users. Users can also be reported. But these “fledgling” efforts do little to help journalists.\textsuperscript{118} Punishment or de-platforming of even serial abusers of the platforms is rare.\textsuperscript{119} If users feel they are in danger, both Twitter and Facebook recommend contacting law enforcement. Women journalists rate Facebook the least safe of the platforms that they use to do their work.\textsuperscript{120} Meanwhile, Amnesty International has criticized Twitter for its failure to protect users of its site—especially journalists and politicians—saying that it has failed in its responsibility to protect women’s rights.\textsuperscript{121} According to the human-rights organization, Twitter’s inadequate responses lead women “to self-censor what they post and limit their interactions.”\textsuperscript{122}

Finally, and beyond inaction by social media platforms, violence has also persisted because of the American legal system’s failure to curb it. It is largely being committed without consequence.\textsuperscript{123} Federal and state law enforcement has been critiqued for having “little capacity or drive” to prosecute online threats generally.\textsuperscript{124} For example, Virginia Heffernan, a columnist for the 	extit{Los Angeles Times}, who has been the target of an online hate campaign, tweeted that while local police have secured her house against physical threats, “They don’t have the resources or inclination to track coordination w/Reddit, Parler, Gateway Pundit, Ben Shapiro, etc.

\begin{thebibliography}{9}
\bibitem{Quandt} See Thorsten Quandt, 	extit{Dark Participation}, 6:4 MEDIA AND COMM’N 37 (Nov. 8, 2018) (describing the early idealism about the internet’s promise for citizen participation in journalism and the rise in “dark participation,” which is “the evil flip side of citizen engagement”).
\bibitem{Posetti2} Posetti, et al., 	extit{The Chilling: Global trends in online violence against Journalists}, supra note 118, at 36.
\bibitem{Waisbord} Id.
\end{thebibliography}
And so, at this point, the violence continues almost unabated. Without action, indicators suggest that it will continue to surge.

II. HOW JOURNALISM IS OBSTRUCTED

Violence against journalists harms individual journalists physically and mentally. As described in the Introduction, American journalists have been bloodied and maimed covering protests. They have even been murdered on their workplace. 

In 2018, five employees of the Capital Gazette in Annapolis, Maryland were shot and killed in their newsroom. Their murderer was a man who was angry that a columnist at the newspaper had written about his online harassment of a former high school classmate.

Journalist victims of online abuse describe depression, fatigue, headaches, and anxiety. These effects can be debilitating. One reporter described the aftermath of having to listen to abusive comments saying: “I had to spend most of the day in bed after listening to a five-minute conversation about how unpleasant but necessary a task raping me would be.”

These individualized harms—including death—literally could not be more severe. But the aperture of our perspective on this violence needs to be widened in order to understand its collective impact. These acts are assaults on freedom of the press and freedom of expression. By precluding and changing the stories journalists share, this violence alters our national conversations.

Obstruction of journalism operates at three levels. The first is the story level. At this level, violence prevents journalists from covering certain events or occurrences. The second is the beat level. Here, it prevents journalists from reporting on certain topics altogether. Third, is the pipeline level. At this level, violence prompts journalists to leave the profession completely or, perhaps not enter it. All of these harms then contribute to a collective harm—one that is greater than the sum of its parts. It is the systemic suppression of particular voices, stories, and ideas in our information environment, undermining freedom of the press and freedom of expression.

A. THE STORY LEVEL

A 2018 column by Theresa Vargas in the Washington Post began this way: “Before last week, I had an idea for a column that I thought could speak to gender, power dynamics, and...
motherhood.” She continued, “It could be funny, illuminating and maybe even cause some small measure of change. It could be—and this is why you will not read it anytime soon—risky.”

The headline on the piece was: “The column I won’t write because of a troll with a gun.”

Vargas was giving voice to a decision that journalists are making quietly, and more routinely: not to publish a story because of fear of violence. In a 2018 study of violence against journalists by the International Women’s Media Foundation and Troll-Busters (a service for journalists who are victims of online attacks), of those respondents who said they’d been threatened or harassed online, about forty percent said that “they avoided reporting on certain stories as a result of that harassment.” This practice is so common that it has been given a name: strategic avoidance.

This phenomenon has not yet been widely studied, and it is hard to know what the impact of journalists avoiding any one given story might be. If another journalist picks up the story and reports on the event or occurrence, then perhaps the impact is small. Yet, given that many journalists have broad control about what they select to cover within their designated beat, it is possible these stories simply don’t get told.

Even when certain stories are told, journalists’ fear of violent reprisals may shape their reporting and writing process. A Latina newspaper journalist told researchers at the University of Texas that she was “extra-vigilant about showing multiple sides of a story to prevent complaints that may escalate into abuse.” And a television journalist told the same researchers that she “tries to avoid details in her stories that she knows will upset people.” She said: “Yes, it affects the way I do my stories … I am more careful.”

Showing “both sides” and being “more careful” may initially seem like simply good journalistic practice, but they can be understood differently. In recent decades, “both sides” journalism has been roundly criticized as biased in its own right because certain topics do not lend themselves to this treatment—such as the scientific validity of climate change or white supremacy. As Norm Ornstein, a resident scholar at the conservative American Enterprise Institute, wrote in 2014 in The Atlantic, “insisting on equivalence as the mantra of mainstream journalism, leaves the average voter at sea, unable to identify and vote against those perpetrating the problem.” Rather than simplistically parroting each side of an issue as a means of getting at an ever-elusive truth, journalism experts have called for transparency of methods and a “discipline of verification.”

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132 Id.
133 Id.
135 FERRIER, supra note 40, at 7.
136 Silvio Waisbord: “Mob Censorship: Online Harassment of Journalists & the Risks of Digital Publicity,” supra note 72, at 32 min.
137 Masullo Chen et al., supra note 43, at 4.
139 See @TomRosenstiel, TWITTER (June 24, 2020), https://twitter.com/tomrosenstiel/status/1275773988053102592?lang=en.
Plus, returning to the television reporter’s statement, it is also unclear what was meant by “more careful.” Of course, more accurate is desirable; accuracy is the end goal of the “discipline of verification.” But when the statement is paired with her comment that she avoids upsetting her audience, “more careful” can easily be understood as self-censorship rooted in fear.

B. The Beat Level

Obstruction of journalism does not operate with equal force across all subject matters. Coverage of certain issues seems to be chilled more deeply than others. This is obstruction at the beat level. Beats are the topics a given reporter covers day in and day out and about which the reporter develops sources and expertise.

Those beats that inspire the most violence and abuse include what University of Texas researchers refer to as “divisive topics” including “immigration, race, feminism, or politics.” Writing about disinformation also tends to lead to higher levels of abuse. Of course, virtually no news is untouched by these topics, but their prominence in a story seems to provoke violence. Coverage of other topics that led to particularly virulent attacks against journalists included stereotypically male domains like automobiles and video gaming.

Harm at the beat level is of a different magnitude than at the story level. It may mean that journalists are not developing sources and specialized knowledge in these areas. This prevents them from as readily doing high-quality reporting on them. It may also mean that certain beats receive little or no attention. As a report from the Dart Center for Journalism and Trauma concluded, violence can “lead to the abandonment of important lines of journalistic inquiry.”

It may not be particularly significant if women give up covering a beat like automobiles—given that automobiles are not critical to democracy and our ability to self-govern. Yet, it is certainly significant if women cannot write about vital issues like race, immigration, or politics without being attacked. It is also significant if these issues are simply covered less or less vigorously due to threats.

This avoidance is real. For example, journalist Lauren Kirchner described being threatened by acolytes of Fox host Tucker Carlson after Carlson aired a segment about Kirchner’s reporting for news nonprofit ProPublica on hate groups. Kirchner said that the “rape

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141 Masullo Chen et al., supra note 43, at 2.
142 See Posetti et al., supra note 5, at 8 (noting that of the story topics that led to higher level of online abuse, sixteen percent of respondents said those stories were about disinformation).
144 Masullo Chen et al., supra note 43, at 2.
145 Ferrier & Patkar, supra note 45, at 320 (quoting DART CENTER FOR JOURNALISM AND TRAUMA, TRAUMA & JOURNALISM: A GUIDE FOR JOURNALISTS, EDITORS & MANAGERS (Mark Brayne ed. 2014)).
146 See Posetti et al., The Chilling: Global trends in online violence against Journalists, supra note 118, at 27 (quoting NBC disinformation journalist Brandy Zadrozny saying “I’m not in a war zone. I’m behind a computer. But the effect of online harassment and bad faith journalism from disinformation agents . . . is meant to silence us, meant to stop our reporting, meant to scare us. I think it does all those things . . . And it takes a real toll on you.”).
& death threats continued for weeks.”

(Other women journalists have also been threatened and harassed by Carlson watchers—encouraged by Carlson, who has repeatedly berated women journalists during his program.)

The violence had a chilling effect, and Kirchner believes that effect was intentional.

She said, “I confess that it made me want to avoid reporting on that topic again. And that’s exactly why they do it.”

C. THE PIPELINE LEVEL

Beyond stamping out stories or disrupting certain beats, another harmful effect of violence against journalists is starting to be borne out by the data. Violence is driving women away from the profession. For example, the 2020 United Nations study found that four percent of women journalists who had experienced online abuse responded by quitting their jobs and two percent had quit the profession for good. The report cautioned that although “these numbers might appear small, this is a significant indicator of the perniciousness of the problem.”

That warning seemed prescient when, one year later, Reporters Without Borders released a study indicating that digital harassment caused about a quarter of respondents to leave professional networks, resign, not want to renew contracts, or abandon specialties.

If violence continues to climb, it is likely that flight from the profession will increase. In the Troll-Busters study, twenty-nine percent of respondents said threats and attacks made them think about getting out of the profession. And indicating a serious pipeline problem, early career journalists were nearly twice as likely to say this as journalists more than forty-years-old.

Newsrooms are likely contributing to this problem. They have done little to help journalists address the deluge of violence. As is true with violence against women generally, women journalists have long been counseled to accept the abuse and develop a thicker skin. Especially as online violence began spreading, newsrooms told women to “‘toughen up’ … because it was ‘only online’ and therefore not ‘real’ or ‘serious.’”

In a survey conducted by

147 @lkirchner, TWITTER (March 10, 2021, 11:25 AM), https://twitter.com/lkirchner/status/1369685947986612227.
149 @lkirchner, supra note 147.
150 Id.
151 Waisbord, Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism, supra note 10, at 1038 (noting that reporters are considering quitting journalism amidst increasing attacks).
152 Posetti et al., supra note 5, at 10; Ferrier & Patkar, supra note 45, at 321 (“Some give up journalism or leave their jobs entirely; others may either stop reporting from specific localities, or be forced to relocate.”).
154 Ferrier, supra note 40, at 7, 44.
155 Id. at 44.
156 Posetti, Online Violence: The New Frontline for Women Journalists, supra note 39; Ginsberg & Montgomery, supra note 113.
PEN America in 2018 of writers and journalists, “an appalling number of them expressed how alone, isolated, and helpless they felt during episodes of online harassment.”

The studies indicating that women are leaving or not entering the profession do not indicate whether those making these decisions are disproportionately women of color. But given the impact of this violence on journalists of color, it would not be surprising if there were a strong correlation. This is especially concerning given journalism’s chronic sexism and failure to achieve diversity. The author of a 2020 report commissioned by the Bill & Melinda Gates Foundation concluded that “[i]n the 21st century, news is produced mainly by men, featuring more men, and is consumed by more men.” This remains true two decades later. Women make up approximately forty-two percent of all newsroom workers. They are only thirty-four percent of newsroom supervisors.

The failure at creating racially and ethnically diverse staffs is likewise severe. In 1978, the American Society of News Editors set a goal that by the year 2000, newsroom diversity would match the diversity of the U.S. population. Even more than twenty years post-deadline, newsrooms have fallen spectacularly short. Today, racial and ethnic minorities make up approximately forty percent of the U.S. population. Yet, people of color are about twenty-two percent of the salaried workforce at news organizations. People of color make up fewer than twenty percent of newsroom managers at print and online publications. In one particularly shocking example, in 2020, only about thirteen percent of the Los Angeles Times newsroom was Latinx. Latinx residents are half that city’s population. Violence against journalists is becoming another obstacle to creating a press that looks like the communities it covers.


162 Id.


166 @BermudezWrites, supra note 165; Folkenflick, supra note 165.
D. Cumulative Obstruction

These various levels of harm snowball into a broader one—an undermining of freedom of the press and freedom of expression. By capitalizing on fear and trauma they distort the functioning of the press. And in so doing, they corrupt the operation of the public square so that conversation within it defaults to a white and male perspective and is aimed at preserving a power hierarchy that preserves the perch of white males at the top.

It is well established that journalism is a public good. In fact, journalism scholars have gone further and called news and information “merit goods”—meaning that their production should not be dependent on popular choice, but on social need. Journalists are public watchdogs, story tellers, and creators of community. They are also educators and proxies for citizens. The Supreme Court has called these roles a “[g]reat responsibility” and said that “[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.” In other words, the press is central to citizens’ ability to participate in democracy.

The importance of the press has been reaffirmed during the pandemic. In this period, numerous federal government and numerous states deemed journalists “essential” workers. An executive order signed by the governor of Kentucky somewhat-lyrically labeled the media “life-sustaining.” It has even become clear that accurate news about the virus is vital to public health. Epidemiologists have said that local news is a “bedrock” for their work and understanding of disease spread.

Violence against journalists shuts down these essential flows of information. Fear is a mighty censor. As a report from the Dart Center for Journalism and Trauma indicated, even if journalists are not physically in harm’s way, violent threats “operate by creating a stressful, disruptive, and at times invalidating environment in which journalists must be vigilant about self-presentation, privacy, danger, and security of self and loved ones.” The report continued, “This psychological pressure, which at its most severe may challenge a journalist’s capacity to work effectively and safely, undermines human rights of autonomy, free expression, dignity and

168 Victor Pickard, Democracy Without Journalism?: Confronting the Misinformation Society 64 (2019).
174 Ferrier & Patkar, supra note 45, at 320-21 (quoting DART CENTER FOR JOURNALISM AND TRAUMA, TRAUMA & JOURNALISM: A GUIDE FOR JOURNALISTS, EDITORS & MANAGERS (Mark Brayne ed. 2014)).
justice." And when nearly seventy percent of women journalists say that are concerned about their online safety at work (and more than half are concerned about physical safety), that chills the public square in very specific ways. The voices of women journalists are silenced. And, as noted, so are the voices of the women that they interview and write about.

In this way, it is perhaps instructive to understand the violence as akin to a prior restraint. Under a conventional understanding, prior restraints occur when the government precludes publication of certain information (i.e., the government trying to block publication by newspapers in the 1970s of the Pentagon Papers). The Supreme Court has gone as far as to say that preventing prior restraints is the First Amendment’s “main purpose,” especially when the restraints are aimed at news.

Violence against journalists has this same impact. It prevents publication. And it does even more. It may scare the journalist from ever seeking out the information in the first instance—even, as noted, perhaps forcing the journalist out of the profession. In this way, it is perhaps the ultimate prior restraint. It is a complete silencing. Of course, the First Amendment cannot remedy these prior restraints because they are committed by private parties and not the government. But, as will be discussed in the next section, that does not mean that no remedy should exist.

Finally, when freedom of the press is undermined, freedom of expression more broadly is not far behind. Violence against journalists is a precursor for state-sponsored repression and degradation of human rights. If our information systems are coal mines, journalists are the canaries. If journalism is being metaphorically asphyxiated, it is time to take heed.

III. ADDRESSING OBSTRUCTION OF JOURNALISM

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175 See FERRIER, supra note 40, at 25.
176 Id. at 6 (“This hostile environment is a direct attack on freedom of expression worldwide with the intent to silence women’s voices and the stories they tell.”); Ferrier & Patkar, supra note 45, at 319; ORG. FOR SEC. & COOP. IN EUROPE, NEW CHALLENGES TO FREEDOM OF EXPRESSION: COUNTERING ONLINE ABUSE OF FEMALE JOURNALISTS, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE 33 (2016) https://www.osce.org/files/documents/c/3/220411.pdf (“Digital threats to women journalists aim[] to do what misogyny has always done. They represent an attempt to prevent women from participating in public life.”).
177 Id. at 9 (noting that “women make up only 24 per cent of those heard about in the news, although they constitute half of the population”).
178 Id. at 9 (noting that “women make up only 24 per cent of those heard about in the news, although they constitute half of the population”).
180 See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557 (1976) (noting that the “main purpose” of the First Amendment is “to prevent all such previous restraints upon publications as had been practiced by other governments”)(quoting Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907)).
183 See id.; Waisbord, Mob Censorship: Online Harassment of U.S. Journalists in Times of Digital Hate and Populism, supra note 10, at 1031 (“Journalism has been historically the bellwether of speech conditions in the public sphere.”); Silvio Waisbord: “Mob Censorship: Online Harassment of Journalists & the Risks of Digital Publicity,” supra note 72, at 14 min.
With its skyrocketing rates of violence against journalists, the United States can no longer fairly view itself as exceptional in the protections that it affords the press. Americans cannot continue to smugly believe that the First Amendment’s negative-rights approach has provided the press all of the freedom and protection that it needs.

Instead, a rethinking of how to wield law as a tool to protect the press is urgent. A federal obstruction of journalism statute would begin to do this by recognizing violence against journalists as a threat to freedom of the press and expression. Obstruction of journalism would be modeled on federal obstruction of justice law, which criminalizes threats and force against a democracy-enhancing institution—the judiciary.

Although it would punish the use of words, obstruction of journalism would actually help to realize values that underlie the First Amendment. It would be speech enhancing, and it could help to prompt a turning point in our understanding of the First Amendment as a press-preservation mechanism. And beyond its substantive impact, obstruction of journalism would have important rhetorical significance during this historical moment in which the press is widely held in low esteem but its work remains essential.

A. BORROWING FROM OBSTRUCTION OF JUSTICE

Properly combatting violence against journalists means combatting it holistically—recognizing that it injures not just individuals but a system, an institution, and freedoms collectively held by American citizens. A time-tested model for this effort exists: obstruction of justice laws. These laws were designed to protect our justice system and the judiciary as an institution. Plus, they were specifically aimed at staving off the actual and threatened violence that could corrupt and damage it.

“Obstruction of justice” is a label assigned to a broad array of laws punishing a variety of conduct. It includes a suite of twenty-two different statutes within Title 18 of the federal code. Under the federal sentencing guidelines, it is also the basis for a sentencing enhancement. But despite varied wording and mechanisms, all of these variations on obstruction of justice have a single aim: the protection of the judicial process. In fact, the 1831 statute that evolved into the modern-day collection of obstruction of justice laws was explicitly directed at protecting the “due administration of justice.”

This aim is obvious from even a cursory scan of the relevant United States Code sections that criminalize obstruction of justice. Sections 1501 through 1520 outlaw things such as “assault on a process server,” “influencing or injuring officer or juror generally,” “obstruction of court orders,” and “retaliating against a witness, victim, or an informant.”

185 See id. at 659 n.6.
These laws criminalize obstruction—often obstruction that is waged through violence—against processes aimed at achieving justice. The best example of this perhaps is Section 1503, which is entitled “influencing or injuring officer or juror generally.” It is known as the “omnibus” or “catch-all” obstruction of justice of statute. And, it states that whomever “corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice shall be punished.” The punishment is significant—a maximum of ten years in prison. If the obstruction involves a killing or attempted killing, it can be twenty years of more. This language could be fairly easily morphed into a statute that protects journalism rather than justice. The details of how are set out in Part III.E.

Beyond borrowing language, an obstruction of journalism statute would signal a borrowing of purpose—the intent to protect a system and not simply those engaged in it. And the systems do have remarkable similarities. Both are ultimately aimed at preserving democratic functioning. The press’s longtime moniker—the Fourth Estate—is a nod to its importance on par with the three official branches of government, including the judiciary. Recently, we have seen in vivid terms how vital our news and information ecology are to our democracy. The January 6, 2021 insurrection at the United States Capital was fueled by the #StoptheSteal disinformation campaign. Disinformation thrives in journalism vacuums. In fact, among the work that disinformation researchers are doing to combat information pollution is developing tools to proactively locate information deficits on the internet—novel issues about which there are legitimate questions with few answers—and discern how to flood these gaps with signal (accurate and democracy-enhancing information) so that disinformation doesn’t predominate.

At a 2021 Congressional hearing on misinformation, Joan Donovan of Harvard’s Shorenstein Center on Media, Politics and Public Policy, told legislators that the “biggest problem facing our nation is misinformation-at-scale.” She added that “[t]he cost of doing nothing is democracy’s end.” Yet, despite calls from misinformation experts like Donovan, as well as countless others—including Democratic lawmakers—the Biden administration has yet to

193 Id.
194 Id.
199 Id.
advance any major initiatives to address disinformation.²⁰⁰ It has not even chosen to include disinformation in its list of “immediate priorities.”²²⁰¹ Given the havoc misinformation can wreak on public health,²⁰² national security,²⁰³ civil discourse,²⁰⁴ and beyond, this policy vacuum is frightening. Obstruction of journalism is obviously not a solution, but it would be a piece of a wider and even more systemic effort to rehabilitate our online spaces and simultaneously promote democracy, freedom of the press, and our collective freedom of expression.

The comparison made here between the judiciary and the press is likely to draw criticisms, but that criticism can be countered. Some might argue that journalism is a flawed system unworthy of protection. Yet, our justice system is similarly flawed. Various movements—from prison abolition to engaged journalism—seek to overhaul the judiciary and the press.²⁰⁵ Yet, as our judiciary remains the institution through which we try to achieve justice, so, too, the press is the institution that is our best hope of providing news—accurate and contextualized information about important events and topics in our communities.

B. EXISTING STATUTES & EFFORTS ARE INADEQUATE

Legal tools do exist to address some of the harms individual journalists face. Physical violence could be criminalized under an array of state assault and battery laws. Many states outlaw online threats and cyberstalking. Likewise, at the federal level, online threats are criminalized by 18 U.S.C. § 875.²⁰⁶ Cyberstalking is prohibited by 18 U.S.C. § 2261A, enacted in 1996 as part of the Violence Against Women Act.²⁰⁷ Although, as noted earlier, enforcement of the laws against online violence often lags, enforcement could certainly be stepped up with the help of funding and other incentives.²⁰⁸

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²⁰⁷ 18 U.S.C. § 2261A (2018);

²⁰⁸ See KEATS CITRON, supra note 123, at 124.

²⁰⁸ See KEATS CITRON, supra note 123, at 132 (describing enforcement failings).
Prosecuting these crimes would put an end to impunity. There is ample evidence that perpetrators could be located and arrested. Unlike in other nations, where politicians and police are often the assailants, there is no indication that online violence against American journalists is directly state sponsored. Rather, perpetrators in the United States appear primarily to be white men with far-right ideologies who could be apprehended. It is not uncommon for these actors to use accounts that would easily identify them to law enforcement. In fact, in one study of online “firestorms” (surges of online outrage), researchers found that non-anonymous individuals were even more aggressive than anonymous ones. If arrests led to convictions, this might also serve some deterrent effect beyond the individual defendant. The media could help amplify that effect through coverage of these cases.

Yet, although these prosecutions might result in convictions and curb some future violence, they would still be insufficient. They would not squarely address the cumulative harm of this violence—the harm inflicted on the freedom of the press and expression. That the victim in cases under state or federal assault or cyberstalking laws happened to be a journalist would not even be legally relevant to the prosecutions. Those statutes are aimed at remedying harms against private individuals, not at combatting systemic crimes against the free press and free expression.

A handful of legislators at the state and federal level have recognized the need for laws that protect journalists against violence, but their proposals have shortcomings. At the federal level, in 2019 and again in 2021, Democratic lawmakers introduced the Journalist Protection Act. It proposes amending a federal assault statute to provide a penalty for assault against journalists specifically. The proposed Act would punish causing bodily injury to a journalist, committed with knowledge or reason to know the victim is a journalist while the journalist was newsgathering or with the intent of intimidating or impeding newsgathering. The legislation had the support of the Society of Professional Journalists and assorted other media.

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211 Silvio Waisbord: “Mob Censorship: Online Harassment of Journalists & the Risks of Digital Publicity,” supra note 72, at 1 hr. 20 min.


215 Id.
organizations.\textsuperscript{216} Yet, in 2019 the bill lingered without action and expired.\textsuperscript{217} It is unclear how much momentum is behind the 2021 version.

Although the Journalist Protection Act would likely have provided journalists some protection against physical abuse, it did nothing to address the far more prevalent problem of online abuse. Given that online abuse has proved to be a precursor to physical violence, this shortcoming is significant.\textsuperscript{218}

Meanwhile, in Florida, a legislator has proposed adding “member of the press” to a list of protected categories under the state’s hate crimes law.\textsuperscript{219} In proposing the legislation in February 2021, State Senator Janet Cruz said, “It is a dark reality that members of the press in our country are facing a heightened risk of violent attacks as a result of irresponsible leadership throughout our country.”\textsuperscript{220} Focusing in on the democracy-promoting work of this press, Cruz added, “What sort of indictment is it on us if we fail to protect those that pursue no other goal but the interest of the public good?”\textsuperscript{221}

Florida’s Republican-controlled legislature is unlikely to respond warmly to Cruz’s bill. But even for press advocates, passage of the proposal might not be the best outcome. Florida’s hate crime law already protects race, color, ancestry, ethnicity, religion, sexual orientation, national origin, advanced age, and homeless status. Homeless status was added about a decade ago.\textsuperscript{222} Legislation is also pending (co-introduced by Cruz) that would add gender and gender identity to this list.\textsuperscript{223} It seems that as the list of protected categories grows, the law risks losing potency, and journalists may not gain much from being included. If one profession is added to the list of other traits—many of them immutable—it would seem an invitation to other professions. Solutions that recognize the importance of journalism without degrading the effectiveness of essential hate crimes laws are needed.

C. OBSTRUCTION OF JOURNALISM’S SUBSTANTIVE BENEFITS

Obstruction of journalism’s benefits would radiate far beyond the deterrence achieved by any single prosecution. Rather, the statute would help to enrich freedom of expression and could


\textsuperscript{217} See, e.g., Journalist Protection Act, H.R. 684, 116th Cong. (2019-20), https://www.congress.gov/bill/116th-congress/house-bill/1684 (navigate to “Actions” to see the bill was introduced in 2019 and no further action was taken).

\textsuperscript{218} See Witchel, supra note 54.

\textsuperscript{219} S.B. 1558 (Fla. 2021), https://www.flsenate.gov/Session/Bill/2021/1558/?Tab=BillText.


\textsuperscript{221} Id.


\textsuperscript{223} S.B. 194 (Fla. 2021), https://www.flsenate.gov/Session/Bill/2021/194/?Tab=BillText.
help kick start a more robust form of press freedom than has previously existed in the United States.

Obstruction of journalism can be viewed as part of a broader movement among First Amendment thinkers to consider how to best create the conditions under which people can speak and be heard as opposed to simply defending anyone’s right to speak at any cost. This movement is characterized as one aimed at protecting the values that underlie the First Amendment. This statute would advance those values in ways tied to both the Speech and Press Clauses. With respect to the Speech Clause, an obstruction of journalism law is aimed at bringing and keeping a broader array of voices at the fore and so, encouraging debate rather than allowing violence to stifle it. And under the Press Clause, obstruction of journalism is an outgrowth of a historically-grounded (but too-often ignored) thread of First Amendment theory under which the First Amendment requires support for the institutional press.

i. SPEECH CLAUSE BENEFITS

Constitutional law scholar Mary Anne Franks has written, “First Amendment advocacy has been particularly devoted to protecting the speech of white men that actively denigrates, vilifies, or dehumanizes other groups of people.” But this is shifting, and a consensus is growing that online violence can and must be countered in order to promote free speech. For example, Franks and privacy scholar Danielle Keats Citron have been at the forefront of successful legislative efforts to criminalize cyber-harassment and so-called “revenge porn.” Citron has argued that “online abuse can be proscribed without jeopardizing our commitment to free expression.” This is true, argues Citron, where speech makes “only the slightest contribution to public debate,” and any contribution is outweighed by the serious harm it causes.

The data bear this out. As Franks has stated: “[w]hile First Amendment fundamentalists claim that regulations of unprotected speech lead to widespread censorship, there are few facts to support this.” Franks cites a 2017 study finding that criminalizing online stalking and harassment “may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women.” According to the study, even the knowledge that there are laws in place prohibiting harassment, “may actually lead to more speech, expression, and sharing online among adult women online, not less.”

In this vein, obstruction of journalism could be criminalized without jeopardizing free expression. Rather, obstruction of journalism would be speech-enhancing. Threats against journalists make no contribution to what the Supreme Court in New York Times v. Sullivan described as our “profound national commitment to the principle that debate on public issues

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224 See MARTHA MINOW, SAVING THE NEWS 5-8, 103 (2021).
225 Franks, supra note 107, at 367.
226 See Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 WAKE FOREST L. REV. 345, 349 (2014).
227 KEATS CITRON, supra note 123, at 26-27.
228 Id.
229 Franks, supra note 107, at 382-83
230 Id. at 383.
231 Id.
should be uninhibited, robust, and wide-open.” The Court in that case warned that the debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Rape and death threats are not simply “caustic” or “unpleasantly sharp.” And they are certainly not an effort to engage in dialogue. They are the opposite. They are an attempt to instill fear and to silence. They aim to end any conversation, not to further it. And they attempt to end it in the bluntest of ways. Even if one believes wholeheartedly in the marketplace of ideas, this “speech” does not further the quest for truth through exchange.

It is vital, in fact, that obstruction of journalism not punish vociferous, caustic, and unpleasantly sharp attacks. Journalists who have been the victims of true threats have made this point. For example, Talia Lavin, a journalist who writes about white supremacy, has said that newsrooms have been “exclusive, patrician, nearly all white spaces forever,” and so, journalists “get critiques—even vociferous, collective critiques—on a disastrous headline, a racist or sexist column, on open or veiled bigotry from people whose job description is to present ‘objective’ reality.” These critiques should be welcome and are a “necessary corrective,” according to Levin. But threats of violence against a reporter are different. If, as described earlier, these threats are conceived of as a prior restraint, then using criminal law to tamp them out is even more justified. As Alexander Bickel argued in the Morality of Consent, “A criminal statute chills, prior restraint freezes.” That is, a prior restraint harms free speech interests even more profoundly than the imposition of criminal liability. Of prior restraints, Bickel wrote that they “fall on speech with a brutality and a finality all their own.” For this reason, if we are balancing harms, then criminalization of violent threats is justified. By punishing perpetrators of threats and violence against journalists, obstruction of journalism would enhance press freedom and freedom of expression. It would encourage women, people of color, and others with marginalized identities to engage in journalism, engage in journalism on divisive topics, and to share that journalism more widely. This would necessarily enhance dialogue in the public sphere. And given journalists’ high degree of visibility in this sphere, it would enhance dialogue in a particularly potent way.

ii. PRESS CLAUSE BENEFITS

As it would promote the values that underlie the Speech Clause, obstruction of journalism would promote Press Clause values as well. The First Amendment’s negative formulation of press rights—Congress shall “make no law” abridging the freedom of the press—has fueled a libertarian theory of the press that is more concerned with preventing government interference

233 Id.
234 Waisbord, Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism, supra note 10, at 1035-36 (“Mob censorship is packed with hostility, sentiments of social superiority, and contempt for specific groups of people. It is uninterested in engaging in productive dialogue. It is not based on commonly agreed speech norms. It is not intended to offer useful suggestions to improve press performance.”).
236 Id.
238 Id.
with the press than ensuring the press’s existence or that citizens have access to it.\textsuperscript{239} As Justice Douglas put it in his concurring opinion in \textit{CBS v. Democratic National Committee},\textsuperscript{240} the “laissez-faire regime” toward the media and the “old-fashioned First Amendment” requires that “Government shall keep its hands off the press.”\textsuperscript{241} This negative-rights formulation has assumed that the market—free of both excessive regulation or help—will function well enough to ensure news is created and distributed.

Yet, in the past two decades, this view has definitively been proven wrong. Since 2000, more than half of the news industry jobs in the United States have disappeared.\textsuperscript{242} In about the same time period, more than 2,000 American newspapers have shut down.\textsuperscript{243} The advertising funds that have fueled the American press for decades are now primarily going to Google and Facebook.\textsuperscript{244} Add to this the Covid-19 pandemic, and press-watchers have said local news is in the midst of an “extinction event.”\textsuperscript{245}

Given this, it is long past time to recognize the First Amendment as a mandate for press-protecting laws. In describing the need for such a mandate in the press context, Martha Minow has written: “because the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance.”\textsuperscript{246}

This positive-press rights approach would be a definitive shift from current practice, but it would not be revolutionary. A historical narrative that supports this approach can be traced even alongside the dominant libertarian narrative. Among its earliest plot points, is evidence that the founders viewed the press as an institution whose “need for special protections exceed individual speech freedoms.”\textsuperscript{247} Moreover, the government has long supported the existence and freedom of the press through non-constitutional law.\textsuperscript{248} Most notably, it heavily subsidized the

\textsuperscript{239} See Pickard, infra note 168, at 14 (“Liberalism also privileges individuals’ private property rights over collective needs of society. In media policy, this prioritization has historically led to a laissez-faire arrangement that treats media as private commodities whose value is dictated by the market. Such an approach does not privilege diverse voices, representations, and perspectives.”).

\textsuperscript{240} 412 U.S. 94 (1973).

\textsuperscript{241} Id. at 160-61 (Douglas, J., concurring).

\textsuperscript{242} See Sasha Lekach, Fewer than half of newspaper jobs from 15 Years ago still exist, MASHABLE (Apr. 4, 2017), https://mashable.com/2017/04/04/newspaper-publishers-jobs-decline-blsemb99KxXBTdXsqF.


\textsuperscript{244} See Angela Fu, Report: Google and Facebook are responsible for depressed advertising revenue, POYNTER (Jan. 12, 2021), https://www.poynter.org/business-work/2021/report-google-and-facebook-are-responsible-for-depressed-advertising-revenue/.


\textsuperscript{247} Pickard, supra note 168, at 15.

\textsuperscript{248} See Paul Starr, The Creation of the Media: Political Origins of Modern Communications 16 (2004) (“Precisely because of the interest in strengthening republican institutions, early American policy included strong positive commitments to information and communications, not merely the ‘negative liberty’ of individual rights to free expression.”); Sonja R. West, Awakening the Press Clause, 58 U.C.L.A. L. REV. 1025, 1062 (describing the non-constitutional benefits that the press has been
press though reduced postal rates beginning in the late eighteenth century. These reduced rates allowed the press to flourish in ways that otherwise would not have been possible. As First Amendment scholar Genevieve Lakier argues, the reduced rates “enable[d] rural newspapers to compete for readers against newspapers in the denser commercial centers” and so, “helped create the vibrant, diverse, and decentralized newspaper public sphere that Alexis de Tocqueville marveled at when he visited the United States in 1831.” That is, pro-press law has facilitated and prioritized a public square that contains a diversity of voices.

Perhaps the high-water mark for a positive press-rights theory was the 1945 case Associated Press v. United States, in which the Supreme Court indicated the existence of such a right. In that case, the Court held that the Associated Press’s membership requirements violated the Sherman Antitrust Act by preventing non-members from getting access to news created by members. In discussing the role of the First Amendment, Justice Black wrote, “It 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 government was without power to protect that freedom.” As Black’s opinion suggests, the First Amendment is premised on the idea that a functioning press exists.

Unfortunately, the Court has not developed Justice Black’s conception of a positive press right. In that void, the libertarian theory has instead flourished and unnecessarily constrained creative thinking and innovation regarding how law can help to protect and strengthen the press—especially the local press. This absence of legal tools is evident even in the discussion among journalists and their advocates about how to combat violence against journalists. Law rarely makes an appearance in these discussions. Many of the studies examining violence against journalists make no or only passing reference to the possibility of legal remedies—this, despite it being clear that at least some of this violence could be prosecuted under existing criminal law. Typical of the conversations about addressing violence against journalists was a recent conversation thread in a newsletter by Columbia University’s Tow Center for Digital Journalism. In it, experts shared their thoughts about keeping journalists safe online. Among their ideas: “burner” email, VPNs, minimizing the use of personal details online (especially anything about children), disconnecting when possible, and engaging in “self-care rituals.” None of the suggestions involved law enforcement or enforcement of legal rights of any kind. This silence is telling. It is as if journalists do not even perceive of the law as a resource at all.

Obstruction of journalism could be a part of a reinvigorated vision of the Press Clause—one that understands it not as a blanket prohibition against interfering with the press but rather, granted including press passes, press planes, protections from searches and seizures and subpoenas, and preferential tax policies); MINOW, SAVING THE NEWS, supra note 224, at 5-6.

249 PICKARD, supra note 168, at 16.


251 Lakier, supra note 250, at 2310.

252 326 U.S. 1 (1945).

253 See id. at 21-23.

254 Id. at 20.

255 See Sheridan, supra note 71.

256 Id.

257 See id.; Sinders & Shukla, supra note 119 (“The real systemic change needs to come from companies. To protect journalists, the policy and design of platforms need to change.”).

258 See Sheridan, supra note 71.
as a mandate for law to ensure the continued existence of a free and independent press. In this way, the First Amendment could be, in fact, generative. It could serve as additional justification for non-constitutional, press-protecting law such as obstruction of journalism.259

D. Obstruction of Journalism’s Rhetorical Benefits

Beyond the substantive benefits of drawing from obstruction of justice to craft an obstruction of journalism statute, there could be a rhetorical benefit as well. So much of the press’s ability to serve as democracy-enhancing is dependent on the public’s level of trust in it.260 Journalists can gather and publish news, but if it is not read and believed, it is of no value. And whether the press is trusted or not is impacted by public discourse about the press. Trump is a case in point. Trump’s barrage of anti-press tweets (averaging more than one a day from the moment in 2015 that he announced he was running for president until his Twitter account was suspended in January 2021)261 effectively fomented distrust in the press, especially among conservatives. From 2015 to 2020, the number of Republicans who said they trusted the media fell from an already-shaky thirty-two percent to an abysmal ten percent.262

Pushing these numbers up will likely take more time and effort than Trump spent sending them on a downward spiral. Positive rhetoric is key—and the language of “obstruction” is especially potent. It sends a strong signal about the press’s importance to democracy. It also seems more serious than “censorship” which, while accurate, has lost its muscle given the way in which right-wing politicians and pundits commonly use it to falsely claim that social media platforms silence them.263 More broadly, the phenomenon of “cancel culture” has almost fetishized free speech to such a degree that updated language and frames are especially helpful to describe what is happening to the press.264 And, as discussed earlier, what is happening to the press is occurring at such a scale and with such systemic impacts, that obstruction of journalism is a fitting descriptor.

To be sure, a chicken-and-egg problem exists here. Yes, an obstruction of journalism statute could help promote more positive rhetoric about the press. But passage of any press-protective legislation is likely difficult given prevailing anti-press environment. The low esteem

259 It’s important that we begin to view non-First Amendment law as essential to protecting speech. Lakier, supra note 250, at 2344-45 (“[I]f we want to understand how well the existing body of free speech law is achieving the goals we set for it, we cannot look only to the constitutional law cases.”).
260 Press scholars RonNell Andersen Jones and Sonja R. West have called “the good will of the public” one of the “pillars” of press freedom. RonNell Andersen Jones and Sonja R. West, Don’t Expect the First Amendment to Protect the Media, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html.
261 See The Last Trump Tweet Against the Media, supra note 95.
in which the press is held may prevent meaningful action to protect it.\textsuperscript{265} A pro-press coalition will be difficult to conjure. It is hard to know if an obstruction of journalism statute would have a viable shot at passage without a shift in rhetoric about the press.

One thing that could help would be positive-press rhetoric from other branches of the federal government as well as from local government leaders. The executive branch is in a position to lead the charge on this. An encouraging sign was White House Press Secretary Jen Psaki’s first press briefing after Biden was sworn in. In it she said, “I have deep respect for the role of a free and independent press.”\textsuperscript{266} She continued, “We have a common goal, which is sharing accurate information with the American people.”\textsuperscript{267} Yet, it is worrisome that a short time later, President Biden failed to take any significant steps to punish the Saudi regime or crown prince for the murder of \textit{Washington Post} journalist Jamal Khashoggi.\textsuperscript{268} Surely, the Biden administration will exceed the low bar set by his predecessor for treatment of the press, but by how much remains to be seen. And, to be fair, White House support for the press may not have the desired effect. In our polarized environment, such support may only lower support among conservatives who have increasingly viewed being anti-press as part of their in-group identity.\textsuperscript{269}

The judiciary is another source of potential pro-press rhetoric. In several highly-publicized cases during the Trump presidency, the courts defended press rights against challenges.\textsuperscript{270} Judges are in a particularly good position to take note of the importance of a free press to democracy and to convey that in appropriate decisions. Yet, the Supreme Court is unlikely to be a leader in this regard. A recent study of the Supreme Court by RonNell Andersen Jones and Sonja indicates that the institution’s characterizations of the press have been declining for years both in quantity and quality.\textsuperscript{271} Lately, the Supreme Court has barely spoken of the press at all. It is possible, but far from certain, that the lower courts will fill this vacuum.

Although beyond the scope of this article, or any one article, the press will also need to re-envision itself and how it might better serve its core mission. That mission, according to a foundational text on journalism principles is “tell[ing] the truth so that people will have the information that they need to be sovereign.”\textsuperscript{272} This re-envisioning is happening, as it needs to, in

\textsuperscript{265} See Joe Heim, \textit{Massive investment in social studies and civics education proposed to address eroding trust in democratic institutions}, \textit{WASH. POST} (March 1, 2021), https://www.washingtonpost.com/education/civics-social-studies-education-plan/2021/03/01/e245e34a-747f-11eb-9537-496158cc5fd9_story.html (“Dangerously low proportions of the public understand and trust our institutions.”).


\textsuperscript{267} \textit{Id.}

\textsuperscript{268} Missy Ryan & Loveday Morris, \textit{Media advocacy groups accuse Saudi crown prince, aides of crimes against humanity in Khashoggi death}, \textit{WASH. POST} (March 2, 2021), https://www.washingtonpost.com/national-security/khashoggi-killing-saudi-rsf-complaint/2021/03/01/2688ab7c-7af5-11eb-b0fc-83144c02d676_story.html (noting that the Biden administration imposed visa restrictions on some but failed to impose punishment on the crown prince).

\textsuperscript{269} See Conroy, supra note 262.


\textsuperscript{272} KOVACH & ROSENSTIEL, \textit{supra} note 140, at 9, 98.
a variety of different places and ways. It is happening in places like Oakland, California, where a nonprofit newsroom called The Oaklandside was recently born from community listening sessions. In those sessions, journalists heard that residents wanted a more accurate narrative about the city’s underserved communities and wanted coverage of systems—including systemic racism—rather than just symptoms. It is happening in Boston where the Boston Globe and Boston University’s Center for Antiracist Research are launching The Emancipator, a modern-day analogue to the abolitionist newspapers of the nineteenth century as a means of thinking about systemic racism and ways to combat it.

Through all of these efforts, hopefully, journalists and their advocates can begin to better convince the American public of the necessity of journalism to our democracy and to freedom of expression more broadly. And hopefully, in the short term, legislators are convinced enough of this that they will act to curb violence against journalists. Perhaps then, the benefits of an obstruction of journalism statute—both rhetorical and substantive—would redound.

E. CRAFTING AN OBSTRUCTION OF JOURNALISM STATUTE

Although passage of an obstruction of journalism statute would inevitably be politically complex, the drafting of the actual language need not be. The omnibus obstruction of justice statute provides a template that has already been used in at least two other contexts. One obstruction statute outlaws interference with the work of government officials carrying out Internal Revenue Service mandates. Another criminalizes interference with the Social Security benefits program. The language of the omnibus provision could as easily be co-opted to protect journalists and freedom of the press.

In pertinent part, the omnibus provision states:

274 Id.
276 See 26 U.S.C. § 7212 (“Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined . . . or imprisoned”).
277 See 42 U.S.C. § 1320a-8b (“Whoever corruptly or by force or threats of force (including any threatening letter or communication) attempts to intimidate or impede any officer, employee, or contractor of the Social Security Administration (including any State employee of a disability determination service or any other individual designated by the Commissioner of Social Security) acting in an official capacity to carry out a duty under this chapter, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or attempts to obstruct or impede, the due administration of this chapter, shall be fined not more than $5,000, imprisoned not more than 3 years, or both”).
[W]homewer “corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished.”278

This provision could be adapted to state:

Whomever corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede journalists engaged in newsgathering or news publication shall be punished.

This proposed language preserves the mens rea (“corruptly”) and a key facet of the actus reus (“by threats or force”) of the original statute. The object of protection would shift from the administration of justice to the process of newsgathering and publication, in other words, journalism.

In order to keep the statute sufficiently narrow, other alterations are necessary. For example, the “influences” and “endeavors to influence” language in the original obstruction of justice statute would likely render an obstruction of journalism statute overly broad and would need to be stricken. Entire industries aim to influence the news. Much of public relations work would be criminalized. Without this language, the statute would be limited to threats or force, which is precisely the type of conduct being aimed at journalists. Neither true threats nor physical violence are protected by the First Amendment. In fact, threats against journalists seem to fit precisely within the parameters of what the Supreme Court has established as a true threat. In Virginia v. Black,279 in which the Court held a Virginia anti-cross burning law was constitutional, the Court wrote of true threats that the speaker need not intend to carry out the threat.280 Rather, the prohibition on true threats was necessary to “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders.”281

Plus, it might be wise to build in a “nexus” requirement that the courts, in the obstruction of justice context, have adopted as a way to limit the statute’s scope. That requirement is that the act of obstruction must relate in “time, causation, or logic with the judicial proceeding.”282 Courts have specified that this means “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.”283 This could be added to obstruction of journalism through a requirement that the threat or force have the natural and probable effect of interfering with the newsgathering or publication process. This would leave out more generalized threats and violence, but those could still be prosecuted under the assault, threat, and cyberstalking laws discussed earlier. Thus, this more robust version of the statute would read:

Whomever corruptly or by threats or force, or by any threatening letter or communication, obstructs, or impedes, or endeavors to obstruct, or impede

279 538 U.S. 343.
280 Id. at 359-60.
283 Id. The Supreme Court has also said more generally in the obstruction of justice context that, as with all federal criminal statutes, it will exercise “restraint in assessing [its] reach.” Id. at 600.
journalists engaged in newsgathering or news publication shall be punished. The endeavor must have the natural and probable effect of interfering with newsgathering or news publication.

In drafting or interpreting the statute, the legislature or courts would also need to answer the perennially-thorny question of who qualifies as a journalist. Although there has been some skepticism about whether this can be done effectively in the constitutional context (i.e., for purposes of any special First Amendment protections for journalists), statutes and regulations in different contexts have successfully defined the press. And so, reshaping the language of obstruction of justice to criminalize violence against journalism is possible.

Although journalists tend to want to operate within a big tent and keep the definition of journalist broad, a narrower definition would be better in this context for two reasons. First, because it is a criminal statute, limiting it makes sense so that a narrower range of conduct would be criminalized. Additionally, within this context it is essential to delineate between the media broadly and journalists who are engaged in reporting and publishing in the public interest. This is because pundits, influencers, and other talking heads within the media sometimes facilitate this violence against journalists. As noted earlier, Fox’s Tucker Carlson, has been a repeat harasser of women journalists.

One source of language might be the Free Flow of Information Act—proposed federal reporters’ shield legislation that never passed. That bill defined “covered persons” (i.e., journalists) as:

a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the

285 See e.g., COLO. REV. STAT. ANN. § 13-90-119 (defining “Newsperson” for purposes of reporter shield law as “any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media”); 42 C.F.R. § 2.104(f)(3) (defining “member of the news media” as “a person whose primary professional activity or occupation is information dissemination, although it need not be the requester’s sole occupation” for purposes of expedited processing of a records requests to the Environmental Protection Agency).
287 See Posetti, et al., The Chilling: Global trends in online violence against Journalists, supra note 118, at 14, 30-31 (“Partisan news outlets, media operating at the fringes of the political spectrum, and misogynistic journalists are instrumentalised to amplify and fuel attacks.”).  
288 See Gabbatt, supra note 148.
publication for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. 290

Particularly helpful about this definition are its temporal and financial components. The journalist cannot be a mere “occasional public commentator.” 291 That and the requirement that they depend on this work for their livelihood helps guarantee professionalism. It would exclude “citizen journalists,” which, again, seems reasonable given the severity of the punishment. To narrow this definition further and perhaps better carve out so-called influencers, it may be that the definition should require that any remuneration is provided by a recognized news organization.

As a final caveat to this obstruction of journalism proposal, it is important not to overstate the impact that an obstruction of journalism statute could have standing alone. As journalists have already expressed concern that law enforcement is unwilling or unable to prosecute the violence under existing law, incentives for prosecution under obstruction of journalism would be necessary. Here, it would be instructive for Americans to set aside any feelings of exceptionalism and look to other governments and non-governmental organizations who have thought about these issues harder and longer. For example, in March 2021, the United Kingdom released a “National Action Plan for the Safety of Journalists.” 292 Among other things, the plan calls for every police force in the United Kingdom to have access to a “designated journalist safety liaison officer” and a “robust prosecutorial approach” of crimes against journalists. It also commits to publishing an “Online Media Literacy Strategy” that promotes better public understanding of journalism’s role. 293 At the inter-governmental scale, the Council of Europe has issued an extensive set of recommendations aimed at countering what it described as an “alarming” wave of off and online abuse against journalists. 294 Among its recommendations are removing limitations periods for prosecution of crimes against freedom of expression and better statistics about complaints, investigations, prosecutions and convictions. 295

CONCLUSION

Violence against journalists cannot be allowed to continue with impunity. The United States is at an inflection point. It is not hyperbole to say that the local press—the most trusted form of news and one that has the potential to bind communities together—is perilously close to extinction. It has been bled by hedge funds, outmaneuvered by technology platforms, and kicked to the curb by many readers and viewers whose attention has flitted (or been dragged) elsewhere.

291 See West, Press Exceptionalism, supra note 284, at 2437 (coining the phrase “occasional public commentators”).
293 Id.
295 Id. at 44 at 50, 56-57.
Law has too often sat on a metaphorical folding-chair on the sidewalk and watched. This should change. The United States needs to hold fast to its core principles of freedom of the press and expression. Recognizing obstruction of journalism would be a start.

Afghan journalist Farida Nekzad recently told Reporters Without Borders that “[e]liminating women journalists is tantamount to imposing silence on all women.” 296 She added, “A news organisation without women is a guarantee that many subjects will never be covered.” 297 This is no less true in the United States than it is in Afghanistan. And it is not simply true with respect to gender, but it is true with respect to race, religion, and other aspects of journalists’ identities.

Curbing the harm to freedom of the press and expression that results from violence against journalists requires a multi-faceted approach. It needs to include more research and education. (We need to better understand the nature of the violence, its perpetrators, and their motives.) It needs to include far greater efforts by newsrooms and especially social media platforms. (Platforms need to proactively find ways to eliminate vitriol from their sites and journalists need to know where to turn when they are victimized.) But it also needs to include law. An obstruction of journalism statute would recognize the tremendous importance of our news system to democracy and the serious harm to it that can come from violence against journalists. Such a statute would serve as a deterrent as well as a concrete sign of a renewed and earnest American commitment to a free press.

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296 Sexism’s Toll on Journalism, Reporters Without Borders, supra note 153, at 26.
297 Id.