



2024

Anti-Press Bias: A Response to Andersen Jones and West's Presuming Trustworthiness


Erin C. Carroll

Georgetown University Law Center, ecc66@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/2594>
<https://ssrn.com/abstract=4812206>

75 Fla. L. Rev. F. 63 (2024)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Law and Politics Commons](#), and the [Supreme Court of the United States Commons](#)

ANTI-PRESS BIAS:
A RESPONSE TO ANDERSEN JONES AND WEST’S PRESUMING
TRUSTWORTHINESS

*Erin C. Carroll**

Professors RonNell Andersen Jones and Sonja R. West’s *Presuming Trustworthiness*¹ is a deeply depressing read. That is what makes it so good. The article is a clear-eyed, data-driven approach to assessing just how endangered the legal status of the free press is. Given the universality of the agreement that a free press is central to democracy,² Andersen Jones and West’s message is vital. *Presuming Trustworthiness* should raise alarms.

In response, I hope this essay can serve as a bullhorn. I want to amplify what Andersen Jones and West’s research and data bear out. Not only has the Supreme Court ceased presuming the press’s trustworthiness, but certain Justices’ rhetoric intimates that any presumption has swung in the opposite direction. These Justices’ words suggest an anti-press bias.

This anti-press bias has serious consequences. Beyond the disadvantage it would pose to future press litigants, anti-press bias is already eroding legal protections for the institutional press and hobbling democracy. The United States is ill-equipped to bear such harms. At the hands of the Supreme Court, they are self-inflicted and unnecessary wounds.

Presuming Trustworthiness is the third in a groundbreaking series of articles written by Andersen Jones and West that began with *The U.S.*

* Professor of Law, Legal Practice, Georgetown University Law Center. Thank you to the *Florida Law Review Forum* for the invitation to respond to *Presuming Trustworthiness* and to Christina Koningisor for her feedback.

1. RonNell Andersen Jones & Sonja R. West, *Presuming Trustworthiness*, 75 FLA. L. REV. 799 (2023) [hereinafter Andersen Jones & West, *Presuming Trustworthiness*].

2. See, e.g., Thomas Jefferson, *Letter to Edward Carrington*, in THE FIRST AMENDMENT: FREEDOM OF THE PRESS 73, 74 (Garrett Epps ed., 2008) (arguing that free press is essential to democracy); MICHAEL SCHUDSON, WHY DEMOCRACIES NEED AN UNLOVABLE PRESS 10 (2008) (same); Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, 120 POL. SCI. Q. 187, 188–89 (2005) (same); C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 317–18, n.1 (1998) (noting it is “relatively easy” to agree that “democracy requires a free press” and citing Supreme Court opinions, James Madison, and other thinkers who have agreed); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (noting that a free press is essential to democracy in his evocative concurrence); THE COMM’N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 6 (1947) (noting that “[f]reedom of the press is essential to political liberty”).

Supreme Court's Characterizations of the Press: An Empirical Study.³ As part of this project, the authors gathered, labeled, and analyzed every press reference in a U.S. Supreme Court opinion since 1784.⁴ This includes nearly 9,000 judicial references to the press and its function.⁵

Discouragingly, but not surprisingly, the data from the last seventy-five years show a legal free fall for the press from a pedestal of trust during its “Glory Days”⁶ in the mid-twentieth century, to a present-day pit.⁷ The message from Andersen Jones and West’s series is clear: The Supreme Court, once a champion of the press, is no longer. Moreover, press advocates (and believers in democracy generally) should not expect the Court to aid the press in weathering current crises.⁸

Though this message is not a shock to either press law scholars or journalists, Andersen Jones and West have done a public service by gathering and analyzing the data that allows them to deliver the dark news with precision and force. This precision and force is especially needed because legal scholars and journalists alike have long (and longingly) looked to the Supreme Court, hoping that it and the First Amendment would be vital to any effort to protect and revitalize the institution.

In the introduction to *Presuming Trustworthiness*, the authors assert, “Justices’ positive assumptions about press-speaker trustworthiness—and the benefit of the doubt that accompanied them—have vanished.”⁹ After letting that blow land, they reveal something more ominous: that the presumption of trustworthiness has been turned on its head. They write that the Court “once routinely went out of its way to emphasize that its starting point was to believe that the press speaker was well-motivated, credible, and public-serving” but that now the Court “instead offer[s] characterizations that ascribe opposite traits.”¹⁰ Moreover, “the Justices’ asides about press speakers now assume the worst.”¹¹

This “assum[ption of] the worst”¹² could also, perhaps more

3. RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375 (2022) [hereinafter Andersen Jones & West, *Characterizations of the Press*]. The second article in the series is RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press*, 79 WASH. & LEE L. REV. 1377 (2022).

4. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 801.

5. *Id.*

6. Andersen Jones & West, *Characterizations of the Press*, *supra* note 3, at 383–84.

7. *See* Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 802.

8. *See* Andersen Jones & West, *Characterizations of the Press*, *supra* note 3, at 380 (“All told, our data suggest that any hopes that the judiciary can be trusted to be a savior of press freedom in America might be misplaced. Indeed, our empirical analysis of the Court’s characterizations of the press over time suggests just the opposite.”).

9. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 800.

10. *Id.* at 802.

11. *Id.* at 810.

12. *Id.*

pointedly, be labeled an anti-press bias. To assume the worst—“taking for granted” that something is bad¹³—is synonymous with bias. Bias is the “[t]endency to favour or dislike a person or thing, especially as a result of a preconceived opinion; partiality, prejudice.”¹⁴ The connotation of bias is that this tendency is also unfair. The tendency for certain Justices to critique the press in sweeping terms is just that.

Applying the bias label here is meant to be provocative. I use it because it is of tremendous concern that the press's standing has slipped to the point that some Justices might not even perceive the press neutrally. The label also demonstrates the nature and degree of harm the Supreme Court is inflicting on the American press. This harm results most obviously from certain Justices' anti-press rhetoric, but it is also the product of other Justices' failure to counter this rhetoric. Judicial silence undermines the press as well.

In *Presuming Trustworthiness*, Andersen Jones and West offer significant evidence to back their claim that the Justices “now assume the worst.”¹⁵ One key example is Justice Neil Gorsuch's dissent from the denial of certiorari in *Berisha v. Lawson*,¹⁶ a case he hoped would be a vehicle for revisiting *New York Times Co. v. Sullivan*.¹⁷ Press advocates generally view *Sullivan* as a talismanic case.¹⁸ It sets a high bar for defamation plaintiffs to meet, thereby giving the press and other speakers “breathing space” for their speech about public figures.¹⁹ In *Berisha*, as Andersen Jones and West describe, “Justice Gorsuch argued that, at least in the defamation context, the old breathing-space rule ‘has evolved into an ironclad subsidy for the publication of falsehoods’ and a dynamic in which ‘ignorance is bliss.’”²⁰ He added “that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy” for the press.²¹ Justice Gorsuch contrasted today's weakened

13. *Assume*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/assume_v?tab=meaning_and_use [https://perma.cc/G7FG-WP3Q].

14. *Bias*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/bias_n?tab=meaning_and_use#21580744 [https://perma.cc/WQQ2-YBWT].

15. Andersen Jones & West, *Presuming Trustworthiness*, supra note 1, at 809–10.

16. 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting).

17. 376 U.S. 254, 283 (1964) (holding that public officials could only recover for defamation by showing an injurious falsehood was published with “actual malice”).

18. See, e.g., *The Uninhibited Press, 50 Years Later*, N.Y. TIMES (Mar. 8, 2014), <https://www.nytimes.com/2014/03/09/opinion/sunday/the-uninhibited-press-50-years-later.html> [https://perma.cc/X36R-C24E] (characterizing *Sullivan* as the “clearest and most forceful defense of press freedom in American history.”).

19. See *id.*; 376 U.S. at 271–72.

20. Andersen Jones & West, *Presuming Trustworthiness*, supra note 1, at 813 (quoting *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting)).

21. *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting) (emphasis in original).

and wayward press with that of the 1960s when “many major media outlets employed fact-checkers and editors . . . and one could argue that most strived to report true stories.”²² The suggestion was that most of today’s press does no such thing.²³

Justice Gorsuch is correct that the press has undergone upheaval in the past several decades. This has resulted in fewer journalists overall²⁴ and an increased need for journalists to report news that gets clicks (so as to stay in business).²⁵ It is also true that certain media actors behave badly. (See, for example, Fox News’s brazen violations of journalistic ethics revealed in Dominion Voting System’s defamation lawsuit against it.)²⁶ Yet, despite bad actors and behaviors, Justice Gorsuch’s suggestion that most journalists feel incentivized to go about their work without checking facts or that they no longer strive to report true stories is false.²⁷ Contrast, for example, Justice Gorsuch’s suggestion about today’s press with the findings of Michael Schudson, who is perhaps the nation’s preeminent sociologist of the media. Schudson has written that although the “practice of journalism has altered significantly” over time, that American journalists’ “attachment to a particular vision of journalism—fact-centered, aggressive, energetic, and non-partisan—remains powerful, practically sacred.”²⁸

It is also hard to square Justice Gorsuch’s comments with any clear-eyed examination of American journalists’ day-to-day work. This was especially true during the COVID-19 pandemic (when federal and local

22. *Id.* at 2428.

23. See Lyriisa Lidsky, *Untangling Defamation Law: Guideposts for Reform*, 88 MO. L. REV. 663, 673–74 (2023) (noting that in his *Berisha* dissent “Gorsuch implies that at the time *Sullivan* was decided, the press tried to get the facts right, but now things are different”).

24. See Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/short-reads/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/> [<https://perma.cc/WQK3-LQGL>].

25. See BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* xxii (4th ed. 2021).

26. See SPJ News, *SPJ on Fox News Lawsuit Allegations: ‘No Responsible Journalist Can Accept or Excuse This Behavior’*, SOC’Y OF PRO. JOURNALISTS (Mar. 29, 2023, 9:50 AM), <https://www.spj.org/news.asp?ref=2928> [<https://perma.cc/7X9C-36HF>]; Caitlin Dickson, *‘An Egregious Violation of Journalism Ethics’: Experts Slam Fox News’ Conduct in Dominion Case*, YAHOO! NEWS (Mar. 7, 2023), <https://news.yahoo.com/an-egregious-violation-of-journalism-ethics-experts-slam-fox-news-conduct-in-dominion-case-184832045.html> [<https://perma.cc/4PEJ-KRDY>].

27. Just one measure of this is the fact that mainstream newsrooms, on the whole, publish their ethical standards and policies. See, e.g., *Policies and Standards*, WASH. POST (June 30, 2022, 2:17 PM), <https://www.washingtonpost.com/policies-and-standards/> [<https://perma.cc/3L9D-M5LZ>] (dictating journalistic standards); *USA TODAY NETWORK Principles of Ethical Conduct For Newsrooms*, USA TODAY (Dec. 4, 2023), <https://cm.usatoday.com/ethical-conduct/> [<https://perma.cc/S5ET-BRPW>] (same).

28. SCHUDSON, *supra* note 2, at 35.

governments deemed journalists essential,²⁹ “life-sustaining,”³⁰ and “critical infrastructure”³¹ or on January 6 (when numerous journalists risked their lives covering events at the U.S. Capitol).³² Even while writing this piece, I regularly encountered evidence of journalists’ ethical commitments. This included journalists who were so concerned about getting it right that they described the “terror, sheer terror” that they “would get something wrong” or “make some kind of misstep” in their reporting.³³ And journalists in harm’s way, like one in Gaza, who ended a photo essay wanting to reassure her audience of its accuracy: “This is all I can tell you. This is what I have seen with my own eyes.”³⁴

But regardless of this reality, other Justices, too, have not just used a paintbrush but a roller to color the press deceitful and predatory. For example, as Andersen Jones and West document, in dissenting to a denial of certiorari in a defamation case against the Southern Poverty Law Center, Justice Clarence Thomas took the opportunity to write that “media organizations” are among a group of speakers who “cast false aspersions on public figures with near impunity” and “perpetrate lies.”³⁵ Likewise, Andersen Jones and West point out that Justice Samuel Alito has characterized the press as “‘irresistibly drawn to the sight of persons who are visibly in grief’ and eager to give ‘air time’ to scandal and heartbreak.”³⁶ And in a case about whether pretrial publicity prejudiced

29. *UPDATED: News Publishers Deemed “Essential Businesses During Pandemic,”* NEWS/MEDIA ALLIANCE (Apr. 7, 2020), <https://www.newsmediaalliance.org/important-news-publishers-essential-during-pandemic/> [<https://perma.cc/J79E-YFER>].

30. Exec. Order No. 2020-257 (2020), https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf [<https://perma.cc/59CR-LDYE>] (Ky. Governor Andy Beshear).

31. Christopher C. Krebs, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, U.S. DEPT. OF HOMELAND SEC. (Mar. 28, 2020), <https://www.newsmediaalliance.org/wp-content/uploads/2020/03/Version-2.0-CISA-Guidance-on-the-Essential-Critical-Infrastructure-Workforce.pdf> [<https://perma.cc/G736-C6VK>].

32. See Tiffany Hsu & Katie Robertson, *Covering Pro-Trump Mobs, the News Media Became a Target*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/business/media/media-murder-capitol-building.html> [<https://perma.cc/5UUE-6CAL>].

33. MARTIN BARON, *COLLISION OF POWER: TRUMP, BEZOS, AND THE WASHINGTON POST* 190 (2023).

34. Samar Abu Elouf, *In One Image: The Patient*, N.Y. TIMES (Nov. 23, 2023), <https://www.nytimes.com/2023/11/15/world/middleeast/gaza-war-nasser-hospital.html?searchResultPosition=1> [<https://perma.cc/8NWY-6G3G>].

35. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 810 (quoting *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2455 (2022) (Thomas, J., dissenting)).

36. *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 467–68 (2011) (Alito, J., dissenting)). In an earlier article, Andersen Jones detailed similar public statements by Justices Alito and Thomas.

a jury, Justice Sonya Sotomayor wrote of a “‘barrage of local media coverage’ that was ‘massive in volume and often caustic in tone;’ ‘relentless’ coverage that ‘scoff[ed]’ at criminal defendants and placed them ‘directly in [its] crosshairs;’ and the tendency of the press to sensationally ‘reinforce[.]’ prejudicial narratives.”³⁷

Evidence of the Justices’ dislike of the press has perhaps continued to mount even since Andersen Jones and West drafted *Presuming Trustworthiness*. As a sign of this, in the summer of 2023, as the news nonprofit *ProPublica* was about to publish a story about a luxury fishing trip that Justice Alito took with a billionaire whose hedge fund later had cases before the Court,³⁸ the Justice took the unusual step of slamming *ProPublica* in an opinion piece in the *Wall Street Journal*.³⁹ Although Justice Alito likely did not write the headline on the piece, it accurately characterizes the op-ed’s sentiment: *ProPublica Misleads Its Readers*.⁴⁰ *ProPublica* went on to publish its investigation, and there is no evidence that it has issued any corrections or retracted a word. (*ProPublica* and several other outlets have continued publishing a series of highly critical pieces about numerous Justices.)⁴¹

Again, to be sure, the press is imperfect. Some of the Justices’ criticisms resonate with journalists’ own critiques of their profession and institution.⁴² But, as Andersen Jones and West make clear, especially

RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 B.Y.U. L. REV. 1791, 1805 n.96 (2012). She wrote that soon after he joined the Court, “Justice Samuel Alito said in a speech that the ‘news media typically oversimplifies and sensationalizes.” *Id.* Additionally, “Justice Clarence Thomas has publicly referred to members of the media as ‘smart-aleck commentators,’ ‘snot-nosed brats,’ ‘talking heads who shout at each other,’ and ‘snotty-nosed smirks.”” *Id.* at 1806 n.96.

37. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 810–11 (quoting *Skilling v. United States*, 561 U.S. 358, 427, 429–32, 447, 451 (2010) (Sotomayor, J., concurring in part and dissenting in part)).

38. Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/KV2V-6RVT>].

39. See Samuel A. Alito, Jr., Opinion, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda> [<https://perma.cc/D8R8-GFGV>].

40. See *id.*

41. See, e.g., Alison Durkee, *Here Are All the Supreme Court Controversies That Led to Adopting an Ethics Code*, FORBES (Nov. 14, 2023, 9:28 AM), <https://www.forbes.com/sites/alisondurkee/2023/11/14/here-are-all-the-supreme-court-controversies-that-led-to-adopting-an-ethics-code/?sh=3a32f30264ca> [<https://perma.cc/C7R6-QZWH>] (linking to numerous news articles alleging ethical lapses by numerous justices).

42. See, e.g., Wesley Lowery, *A Test of the News: Objectivity, Democracy, and the American Mosaic*, COLUM. JOURNALISM REV. (Apr. 25, 2023), <https://www.cjr.org/analysis/a->

concerning is that the Justices' rhetoric about the press in recent years has been exclusively negative. Not a single Justice has commented positively about the press's trustworthiness since 2009.⁴³

This is an about-face from decades past. As Andersen Jones and West describe, historically, press trustworthiness was what they dub a "mixed-tone frame."⁴⁴ That is, the Justices spoke positively and negatively about the trustworthiness of the press.⁴⁵ This tendency to admonish and protect the press was sometimes compressed into a single sentence. Take this concurrence from Justice William O. Douglas in *New York Times Company v. United States*,⁴⁶ the case in which the Court opened the door to newspapers publishing the Pentagon Papers: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."⁴⁷

The absence of the Justices' press positivity cannot be blamed on a lack of opportunity. As Andersen Jones and West carefully detail, the Court has recently decided many First Amendment cases, expanding free speech rights for numerous other speakers, including violent, bigoted, lying, and potentially fraudulent ones.⁴⁸ Each of these instances could have been an occasion to mention the press's contribution to freedom of expression and democracy—or to say anything positive at all. That press entities were not parties to these cases was not an obstacle. As Andersen Jones and West have written in earlier work, "Justices often reveal their views on the value of the press in cases that do not directly involve the news media or expressive freedoms."⁴⁹ Given this, the silence of other Justices is not necessarily neutral. It takes on a malign cast.⁵⁰

That there has not even been a whisper of praise for the press is also concerning because of what Andersen Jones and West label the "Breathing Space Principle."⁵¹ Under this principle, the Court has long drawn "a protective bubble" around the entire press—including members

test-of-the-news-wesley-lowery-objectivity.php [https://perma.cc/Y3VR-E5PK] (critiquing journalism's business model and various journalistic practices noting, for example, that "[a] twenty-four-hour news cycle that attempts to merge information with entertainment often fails to provide either").

43. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 813.

44. *Id.* at 812.

45. *Id.*

46. 403 U.S. 713, 720 (1971) (Douglas, J., concurring).

47. *Id.* at 723.

48. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 830.

49. Andersen Jones & West, *Characterizations of the Press*, *supra* note 3, at 385.

50. Andersen Jones and West have noted that the precarious structure that supports the press's "constitutional status . . . will only remain strong if the principles behind the Justices' characterizations are repeated, amplified, and reaffirmed by their successors on the bench." *Id.* at 383.

51. Andersen Jones & West, *Presuming Trustworthiness*, *supra* note 1, at 805.

who might be deemed untrustworthy or believed to have acted in untrustworthy ways—because protecting the group is necessary to preserve the press’s democratic function.⁵² As evidenced by the Breathing Space Principle, the Court once understood that the press perennially has rogue elements but is still worth supporting and even praising. In contrast, as Andersen Jones and West write, today, “not a single Justice on the Court still advances the concept of press-speaker breathing space.”⁵³ In fact, judging from the anti-press comments of certain Justices, an inverse of the Breathing Space Principle has taken root. That is, to mix metaphors, under the Breathing Space Principle, a few bad apples were no reason to toss the bushel. Today, the Justices seem to think that the bad apples have multiplied to such a degree that the entire bushel is contaminated. To the extent the Justices speak about the press, they seem to view it as wormy at its core.

This anti-press bias from Justices with lifetime appointments and incredible power over the contours of American free expression has serious consequences. First, it suggests that a press litigant might not get a fair shake at the Court. Andersen Jones and West hint at this in the final sentence of the first article in this series, where they write: “When members of the press turn to the Court in their legal battles, they will no longer find an institution that consistently values their role in our democracy, but rather one that views their place with skepticism or ignores it altogether.”⁵⁴ Notably, the Court has not issued any major opinion elaborating on press freedom in nearly twenty years.⁵⁵ One has to wonder if part of the reason is that Justices’ anti-press rhetoric has had a chilling effect on would-be press litigants.

Second, and more significantly, because the degree of freedom the press enjoys has long been linked to positive Supreme Court rhetoric, anti-press bias also wages systemic harm. As Andersen Jones and West have written, “virtually all” of the legal protections granted to the press are those granted to each and every one of us as speakers.⁵⁶ To the extent the press is special, it is not due to substantive law but “press-praising dicta.”⁵⁷ Through dicta, past Justices have “crafted a vital support structure that bolsters the press’s constitutional status.”⁵⁸ But for that structure to remain intact, Justices’ positive characterizations need to be

52. *Id.*

53. *Id.* at 808.

54. Andersen Jones & West, *Characterizations of the Press*, *supra* note 3, at 429.

55. See RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. ONLINE 47, 58 (2017).

56. Andersen Jones & West, *Characterizations of the Press*, *supra* note 3, at 377.

57. *Id.*

58. *Id.* at 383.

“repeated, amplified, and reaffirmed.”⁵⁹ Today, negative press rhetoric is disassembling the buttresses that reinforce the press. It is even possible that anti-press rhetoric negatively impacts public perceptions of the press. As press law scholar and former president of Columbia University Lee C. Bollinger has written, the Court has “a dual capacity to decide the scope of the constitutional freedom available to the press and to characterize and shape society’s attitudes toward it as a social institution.”⁶⁰ The Court’s characterization of the press has normative power; it can impact public understanding of what the press is and can be.⁶¹

Finally, given the tie between the press and our form of government, the Justices’ anti-press bias undermines democracy. This harm is galling given that the Justices undoubtedly understand the danger of overheated attacks on democratic institutions. Several Justices have indicated recently that it is heretical, even dangerous, to criticize the Court. Justice Roberts has said, “Simply because people disagree with opinions is not a basis for questioning the legitimacy of the court.”⁶² Similarly, Justice Alito told the *Wall Street Journal*, “[S]aying or implying that the court is becoming an illegitimate institution or questioning our integrity crosses an important line.”⁶³ And Justice Thomas, speaking about the leak of the *Dobbs v. Jackson Women’s Health Organization*⁶⁴ opinion, said, “I wonder how long we’re going to have these institutions at the rate we’re undermining them. And then I wonder[,] when they’re gone or destabilized, what we’re going to have as a country.”⁶⁵

The irony is rich. It was not so long ago that the Justices understood that the fortunes of the press and the Court were hitched. In 1949, Justice Felix Frankfurter described the linkage when he wrote, “The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent

59. *Id.*; David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) (“[T]he press, insofar as that means something more than a machine for printing, is largely a creation of law.”).

60. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 53 (1991).

61. *See id.* at 41 (“It is widely recognized that the Supreme Court possesses enormous power to affect society.”).

62. Jamelle Bouie, Opinion, *The Supreme Court Seems Awfully Nervous About Its Own Legitimacy*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/opinion/roberts-alito-kagan-barrett-thomas.html> [<https://perma.cc/Q8A5-GL5X>].

63. Jess Bravin, *Kagan v. Roberts: Justices Spar Over Supreme Court’s Legitimacy*, WALL ST. J. (Sept. 28, 2022, 6:46 PM), <https://www.wsj.com/articles/kagan-v-roberts-justices-spar-over-supreme-courts-legitimacy-11664394642> [<https://perma.cc/S67V-VEWL>].

64. 597 U.S. 215 (2022).

65. Robert Barnes, *Clarence Thomas Says Supreme Court Leak Has Eroded Trust in Institution*, WASH. POST (May 14, 2022, 7:50 AM), <https://www.washingtonpost.com/politics/2022/05/14/clarence-thomas-supreme-court-leak-roe-trust/> [<https://perma.cc/M39C-RMRF>].

means for assuring judges their independence is a free press.”⁶⁶

Yes, the press has changed in the ensuing decades. So has the Court. But to ensure a functional democracy, the need for the Court to treat the press with fairness and trust—as Andersen Jones and West so beautifully detail—has never waned. One hopes that the Justices will recognize this and speak accordingly.

66. *Pennekamp v. Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).