THE MODERN FIGHT FOR MEDIA FREEDOM IN THE UNITED STATES

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I. INTRODUCTION

The First Amendment as a subject is challenging and provocative, and scholarly and popular understandings of it are changing.¹ New communication technologies are pushing lawyers, judges, and scholars to revisit, and sometimes rethink, old legal doctrines and concepts.² In the area of privacy, we have

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² See, e.g., Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Knight First Amend. Inst. at Colum. U. v. Trump, 928 F.3d 226 (2d Cir. 2019).
to think today about encryption and a website’s terms of service. In the area of copyright, we have to think about peer-to-peer file sharing and the licenses granted by iTunes. In the area

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of sexual expression, we have to think about sexting,\(^7\) revenge porn,\(^8\) and deep fakes.\(^9\)

This is the emerging state of play for First Amendment law in our modern media landscape, in which PBS has a Pinterest board,\(^10\) the Associated Press once built a partnership with other news organizations to collect royalties from aggregators,\(^11\) and the “people formerly known as the audience,” as New York University’s Jay Rosen once put it,\(^12\) regularly perform journalistic acts using their own smartphones.\(^13\) This is

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\(^12\) Jay Rosen, The People Formerly Known as the Audience, PRESS THINK (June 27, 2006), http://archive.pressthink.org/2006/06/27/ppl_frmr.html.

\(^13\) See, e.g., David Uberti, Philando Castile, Facebook Live, and a New Chapter for Citizen Journalism, COLUM. JOURNALISM REV. (July 7, 2016), https://www.cjr.org/analysis/philando_castile_minnesota_facebook_live.php; Mike Isaac & Sydney Ember, Live Footage of Shootings Forces Facebook to Confront New Role,
a media industry in which the gathering, production, and distribution of content is widely dispersed, and the ongoing challenge for First Amendment law is to keep up—to breathe life into the freedoms of speech and press, no matter the media of the day.

Public-opinion research shows that most Americans support the freedoms of speech and press, but nearly one-third think they go too far, and roughly a quarter of Americans think “the president should have the authority to close news outlets engaged in bad behavior,” including 43 percent of Republicans. Courts have confronted these idiosyncrasies daily, for decades, in cases involving people who say things that are different, offensive, or unwelcome. That is because the real power of the

First Amendment is not in the protection it gives to popular speech but rather to unpopular speech.\textsuperscript{18} Under the First Amendment, particularly its broad modern judicial interpretations, certain types of speech that are unlawful in other countries, even in other democracies, are protected in the United States.\textsuperscript{19}

That is why the late writer Anthony Lewis, who covered the U.S. Supreme Court for \textit{The New York Times} and founded the field of legal journalism,\textsuperscript{20} once said that Americans are more free to say what they think, and to think what they will, than any other people in the world.\textsuperscript{21} Whether or not that is true, Americans do have a large amount of expressive freedom, which is part of an evolving First Amendment story, one moved along by judicial and legislative trial and error.\textsuperscript{22} And that process is ongoing. Our current moment is critical for freedom of expression. The president has been denouncing the press in

\textsuperscript{18} Nina Totenberg, \textit{High Court Asked to Limit Military Funeral Protests}, NPR: MORNING EDITION (Oct. 6, 2010, 12:02 AM), https://www.npr.org/templates/story/story.php?storyId=130357711. According to ACLU Legal Director Steven Shapiro, “The First Amendment really was designed to protect a debate at the fringes. You don’t need the courts to protect speech that everybody agrees with, because that speech will be tolerated. You need a First Amendment to protect speech that people regard as intolerable or outrageous or offensive—because that is when the majority will wield its power to censor or suppress….” \textit{Id.}

\textsuperscript{19} \textsc{Anthony Lewis}, \textit{Freedom for the Thought That We Hate: A Biography of the First Amendment} ix-xv (2007).


\textsuperscript{21} \textit{See Lewis, supra} note 19, at ix.

\textsuperscript{22} \textit{Id.} at x-xii.
rallies and speeches and on Twitter, and other elected officials have been parroting his rhetoric.\textsuperscript{23} Reporters are being assaulted\textsuperscript{24} and arrested\textsuperscript{25} covering protests—and sued by the wealthy.\textsuperscript{26} Meanwhile, Facebook and YouTube have adopted policies and practices making it more difficult to produce quality journalism,\textsuperscript{27} and in general public opinion of the press is desperately low.\textsuperscript{28} A recent survey revealed that many Americans are poorly informed about the First Amendment.\textsuperscript{29} Over a third cannot name any rights that it guarantees.\textsuperscript{30}


\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.
Other recent surveys have shown that a majority of daily newspaper editors feel that financial constraints are making it difficult for news organizations to go to court to protect First Amendment rights,\(^3\) that 84 percent of Americans say the press is critical to democracy but only 28 percent feel the press is actually performing its role well,\(^3\) and that Democrats are 47 points more likely than Republicans to support the press’s watchdog role.\(^3\) Individual journalists cannot do their jobs if the institution of the press is delegitimized or if the legal protections for that institution are not understood. That is a problem of massive proportions because “a free press, however imperfect, is the lifeblood of a healthy democracy, one in which journalists are both benefactors and beneficiaries of the First Amendment—protecting and relying on its freedoms to inform their communities and enable democratic participation.”\(^3\)

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To put all of these comments in concrete terms, this essay addresses four discrete issues in the modern fight for media freedom in the United States. The first is fake news. The second is press rights at protests. The third is freedom of information. And the fourth is how tech platforms have evolved into serious threats to journalism. These issues are explored below in both practical and theoretical terms.

II. FAKE NEWS

Fake news means everything and nothing. Dictionaries have added the term to their pages, and its usage, according to researchers, has grown more than 350 percent since 2016. President Donald Trump claimed recently to have invented the term, and there is no doubt that he has popularized it. Trump has tried time and again to engage in character assassination of the press as an institution, referring to any report that he simply does not like as fake news. In a television interview with CBS's

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37 Id.
38 Margaret Sullivan, Perspective-Opinion, The Term ‘Fake News’ Has Lost All Meaning. That’s Just how Trump Wants It., WASH. POST (Apr. 4, 2018, 6:00 AM), https://www.washingtonpost.com/lifestyle/style/the-term-fake-news-has-lost-all-
Lesley Stahl, before the cameras were turned on, Trump explained why he routinely attacks the press, saying: “You know why I do it? I do it to discredit you all and demean you all so that when you write negative stories about me, no one will believe you.”

The term fake news made its first known appearance in the American press in 1890, when *The Cincinnati Commercial Tribune* published a story under the headline “Secretary Brunnell declares fake news about his people is being telegraphed over the country.”

Long before that, the concept of fake news (actual fake news: stories that are demonstrably false) was with us even if the term was not. In 1782, to drum up support for American independence, Ben Franklin created a fake issue of a real Boston newspaper, and one fake story in it accused the British of hiring Native Americans to scalp colonial women, children, and soldiers. In 1835, the penny press surged in popularity, and it brought to news consumers the Great Moon Hoax, a widely

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shared fake story about an astronomer who reportedly observed
unicorns on the moon.\textsuperscript{42}

There was discussion at the First Constitutional
Convention of the press’s power and its record of publishing
falsehoods—and yet the founders later converged around the
speech and press freedoms found in the First Amendment.\textsuperscript{43} As
one commentator put it, they recognized that “truth cannot be
centrally planned” and that it is often impossible to distinguish
normatively good and bad exercises of press freedom, so the
system they designed put trust in public judgment.\textsuperscript{44} The problem
is that the framers never could have anticipated the effects of bots
and artificial intelligence on the marketplace, where ideas are
supposed to compete on their merits but increasingly are
weaponized by special interests who use new technologies to
flood the marketplace with certain ideas to make them seem
more salient and accepted than they actually are.\textsuperscript{45} That is a

\textsuperscript{42} Kevin Young, \textit{Moon Shot: Race, A Hoax, and the Birth of Fake News}, \textsc{The New
\textsuperscript{43} Jarrett Stepman, \textit{We Already Have a Solution to Fake News: It’s Called the First
Amendment}, \textsc{The Heritage Found.} (Oct. 9, 2017),
\textsuperscript{44} Id.
\textsuperscript{45} See, e.g., Merritt Baer, \textit{Do Russian-Backed Bots Qualify for Free Speech}, \textsc{Daily Beast}
perversion of the marketplace as it was conceived,\textsuperscript{46} and right now an urgent question is what to do about it.

For one, news consumers, social media companies, and news organizations need to take steps to be market correctors. Consumers should support good journalism and those producing it, social media companies should reduce the financial incentives for people to produce fake news, and news organizations should be faithful to their principles and should call out fake news and its sources. Journalism’s first obligation is to truth, and its highest loyalty is to the public.\textsuperscript{47} And because journalists are both beneficiaries and benefactors of the marketplace, they have a responsibility to protect it from bad actors, while being careful

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\item \textsuperscript{46} See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he theory of our Constitution” is that “the ultimate good desired is better reached by free trade in ideas,” and “the best test of truth is the power of the thought to get itself accepted in the competition of the market…..”); Joseph Blocher, \textit{Institutions in the Marketplace of Ideas}, 57 \textit{Duke L.J.} 821, 823–24 (2008) (stating that the metaphor of a “market” in ideas “conceptualized the purpose of free speech so powerfully that” the Abrams dissent “revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech.”); John Milton, \textit{Areopagitica} 58 (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644) (“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”); John Stuart Mill, \textit{On Liberty} (1859), \textit{reprinted in 18 Collected Works of John Stuart Mill} 213, 229 (John M. Robson ed. 1977) (“[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”).
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how they do so. When reporting on a lie, for example, it is best to limit its description, because repeating misinformation can reinforce it.\textsuperscript{48} That is especially true when the misinformation offers a simpler explanation than the truth.\textsuperscript{49} Giving news consumers novel and credible information can be effective in debunking misinformation, too.\textsuperscript{50} The new information allows people to update their understanding of an event, enabling them to some degree to justify to themselves why they fell for the falsehood in the first place.\textsuperscript{51} Those are just two easy things that journalists and news organizations could do to address the scourge of fake news.

More broadly, thinking of the phrase fake news the way Trump does (to mean any story he simply dislikes), this is all part of the administration’s illiberal and rhetorical campaign against the press as an institution.\textsuperscript{52} Trump alone has posted more than

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\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.


“enemy of the people.” 59 Compared to other presidents, Trump is an unprecedented threat to press freedom. 60 Specifically, I do not worry as much about the administration’s impact on the actual freedoms of speech and press as much as I do its impact on the norms surrounding them. 61 They are under significant duress from the loud, nonstop drumbeat to erode not only public trust in the institutional press but also in the principle that facts matter and are knowable, which is at the foundation of our First Amendment tradition’s marketplace of ideas and of our democratic republic itself. 62

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62 See Bernard Avishai, Democracy and Facts in the Age of Trump, THE NEW YORKER (Dec. 29, 2017), https://www.newyorker.com/news/daily-comment/democracy-and-facts-in-the-age-of-trump (“The implicit social contract that underpins democracy didn’t come about spontaneously. It grew steadily ... as a counterpart to the advances made by the scientists and the entrepreneurs of the Enlightenment, which, in turn, coaxed citizens to reject both the dogma of priests and the authority of princes. ... [People] didn’t always agree—the principle of tolerance was a tribute to inevitable differences in perspective—but that didn’t discredit the ideal of democracy’s reliance on facts. Indeed, self-government was only possible because citizens could argue themselves into founding the institutions that facilitated the
With that in mind, protecting the marketplace and the public interest demands the ordinary doing of good journalism and sometimes the extraordinary suspension of normal relations with the White House. If an official, for example, is known to make demonstrably false claims, he or she should not be an invited guest on news programs. If the White House revokes a reporter’s press pass without due process, the reporter should sue, as CNN did. That is what our current moment demands. It may not be “an occasion for dancing in the streets,” as Professor Meiklejohn famously said after New York Times Co. v. Sullivan came down, but it is an opportunity for the press, through the ordinary and extraordinary, to serve the public interest and, in doing so, to protect its legitimacy.

changes that the facts warranted. ... Principles of action derived from facts were, in short, what the commonwealth had, well, in common. This process couldn’t have worked if facts were treated as things that people just cherry-picked to justify their prejudices.”); William Davies, The Age of Post-Truth Politics, N.Y. TIMES (Aug. 24, 2016), https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html (“Facts hold a sacred place in Western liberal democracies.”).


III. PRESS RIGHTS AT PROTESTS

The next stop in the modern fight for media freedom in the United States is a protest, which happens to be the most dangerous place to be a journalist in America.67 In 2017, police arrested at least 33 journalists, the majority of them at protests,68 where police occasionally used a controversial “kettling” technique to take people en masse.69 In 2018, police arrested at least 10 journalists, again the majority at protests;70 and reflecting broader trends in the industry, most of them were freelancers.71 Notably, journalists arrested at protests are often not charged or see any charges dropped before trial,72 and what they typically stand accused of are vague, flexible offenses like “obstruction of

67 Sterne & Peters, supra note 24..
70 U.S. PRESS FREEDOM TRACKER, supra note 68..
71 Id.
a government function.” But even if charges are not filed or get dropped, an arrest is still a big deal. The same goes for a detention. They both send a chilling message: “Gather the news at your peril.” This is especially true for freelance and independent journalists who generally lack institutional and legal resources.

There were also dozens of physical assaults on journalists at protests in 2017 and 2018. The majority were committed not by the police but by protestors who disliked or distrusted the press, or simply did not want the press recording videos and photos wherever they were. Many of the protestors were

77 Id.
political extremists.\textsuperscript{79} (To be clear, these numbers do not include assaults that occurred away from protests—for example, the time that Montana congressional candidate Greg Gianforte, now Rep. Greg Gianforte, “body slammed” a reporter who tried to interview him,\textsuperscript{80} or the time an Alaska state senator slapped a reporter in the state capitol.\textsuperscript{81})

There were also a dozen incidents in 2017 and 2018 in which the police seized (and, in some cases, searched) a journalist’s equipment, including cellphones and cameras.\textsuperscript{82} Behind these data points are a number of chilling stories. First, \textit{St. Louis Post-Dispatch} reporter Mike Faulk was “knocked down, pinned to the ground, pepper-sprayed, arrested, held in jail for 13 hours, and charged with a misdemeanor—all at the hands of St. Louis police” because he dared to document the protests following the acquittal of Jason Stockley, the white police officer covering-protest-washington-dc/; U.S. Press Freedom Tracker, Independent Journalist Files Assault Charges Following May Day Protests (May 30, 2019), https://pressfreedomtracker.us/all-incidents/independent-journalist-files-assault-charges-following-may-day-protests/.

\textsuperscript{79} See supra note 80.


\textsuperscript{82} U.S. Press Freedom Tracker, https://pressfreedomtracker.us/equipment-search-seizure-or-damage/ (last visited May 12, 2020).
who fatally shot Anthony Lamar Smith, a black man, in 2011.83 “Although Faulk was wearing press credentials and told the arresting officers he was a reporter, he was zip-tied and taken in, along with some 100 protesters rounded up for failing to disperse.”84 Second, in Charlottesville in 2018, Taylor Lorenz, a reporter for The Hill, was “recording the aftermath of a deadly car attack when a shirtless man approached and told her to stop.”85 She identified herself as a reporter, and “[h]e walked behind her and [then] punched her in the head.”86 Finally, the most serious injury to a reporter at a protest, so far, occurred at Standing Rock:

Independent journalist Jon Ziegler, who streams most of his coverage via YouTube, was recording an aggressive police action against protesters when non-lethal rounds hit his leg and hand. Ziegler was likely known to police because he had been covering Standing Rock for some time. In fact, an officer called out his name before he was shot. A rubber bullet shattered a bone in his finger, requiring emergency reconstructive surgery, a follow-up surgery, and months of physical therapy.87

Notably, Rep. Eric Swalwell (D-CA) introduced in 2018 a bill—the Journalist Protection Act—to make it a federal crime

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84 Id.
85 Sterne & Peters, supra note 24.
86 Id.
87 Id.
to assault a journalist. Although it did not pass, it would have amended the chapter of the federal code that includes penalties for assaults against government officials, including judges, prosecutors, and members of Congress. The bill had symbolic and practical value, but my overall opinion of it was mixed. Its protections were mostly redundant, and the bill missed an opportunity to put forward a much-needed federal shield law to protect journalists from the compelled disclosure of their sources and unpublished materials.

The bill was symbolically important because it underscored that a free press is democratically essential, and it

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93 Press Release, Eric Swalwell, supra note 88 (“It represents a clear statement that assaults against people engaged in reporting is unacceptable, and helps ensure law enforcement is able to punish those who interfere with newsgathering.”).
had practical value because it would have created dual jurisdiction, allowing the federal government to prosecute if a state refused to do so (e.g., for political reasons), or if a state prosecution failed to obtain a conviction.\textsuperscript{94} But state prosecutors have not demonstrated a broad reluctance to file charges in cases involving journalist victims, and there has not been a critical mass of failed prosecutions.\textsuperscript{95} As a result, the bill was functionally redundant and even an unwise expenditure of political capital. The bill was leveraging the press’s social influence of the moment, springing from the popular reactions to anti-press rhetoric and behavior making news around the country.\textsuperscript{96} That capital would have been better spent on a federal shield bill, an area where the law does not already provide meaningful protection.\textsuperscript{97} There is no federal shield law, and the First Amendment offers highly inconsistent protections against compelled disclosure (none at all, in some places).\textsuperscript{98}

\textsuperscript{94} Peters, \textit{supra} note 92.

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} Press Release, Eric Swalwell, \textit{supra} note 88 (“During his campaign and since taking office, President Trump has created a climate of extreme hostility to the press by describing mainstream media outlets as ‘a stain on America,’ ‘trying to take away our history and our heritage,’ and ‘the enemy of the American People.’ He tweeted a GIF video of himself body-slamming a person with the CNN logo superimposed on that person’s face, and retweeted a cartoon of a ‘Trump Train’ running over a person with a CNN logo as its head.”).


\textsuperscript{98} \textit{Id.}
This is a major problem calling out for legislative action. Despite the adoption of guidelines designed to make it difficult to subpoena journalists, the U.S. Department of Justice has served subpoenas on plenty of them and has spent years trying to force some journalists to comply. Federal investigators have also secretly seized phone records of journalists and editors. Moreover, as attorney general, Jeff Sessions bragged about the DOJ’s many ongoing leak investigations, and at their respective Senate confirmation hearings both Sessions and William Barr, currently the attorney general, equivocated when asked if they would guarantee that journalists would not be jailed.

for protecting their sources. To the extent the press has any, its political capital should be spent here.

IV. Freedom of Information

Next up in the modern fight for media freedom in the United States is government secrecy. A few years ago, I conducted an interview series about First Amendment issues for the Harvard Law & Policy Review, talking with lawyers, scholars, and others who have made a mark on free expression, people like Rod Smolla, who won the landmark case Virginia v. Black at the Supreme Court; William Bennett Turner, who argued three cases at the Supreme Court, including two under the First Amendment (Procunier v. Martinez and Houchins v. KQED); David Goldberger, who won four First Amendment cases at the Supreme Court, including National Socialist Party of America v.

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Village of Skokie and McIntyre v. Ohio Elections Commission; Martin Garbus, the former ACLU legal director whose clients in private practice included Nelson Mandela and Daniel Ellsberg, and Lee Bollinger, the president of Columbia University and a prolific First Amendment scholar. Among other questions, I asked all of the respondents to identify the most serious threat at the time to free expression. What they said was fascinating, in part, because their answers varied so widely. One said there was “no great threat” because “First Amendment doctrine is very stable.” Another said it was “ignorance” and “the indifference to how and why we protect civil liberties.” And yet another said it was the Citizens United case, because it perverted the marketplace of ideas.

I had not thought about that series for years, but not long ago, as I took stock of the cases I had covered for the Columbia
Journalism Review as its press freedom correspondent, my mind wandered to a variation of the question I had asked in that series: *What is the most serious threat today to a free press in the United States?* It is not a simple question because the answer depends on how you define “most serious” and “threat” and “free press.” Trump would be a good choice. So would press rights at protests, or fake news and social media. But for me what has occupied most of my writing time in the last three years have been government attempts to shield information and events from public view.112 It is, put differently, the fight for freedom of information.113

Take these examples. A township sued a citizen who requested public records to obtain relief from its duty to respond—and even asked for attorney’s fees.114 State lawmakers tried hard to kill a program designed to help citizens resolve public-records disputes without litigating.115 Other lawmakers used Sunshine Week to propose bills to make it more difficult for

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citizens to obtain law-enforcement records.\textsuperscript{116} A police chief prohibited a citizen from taking photos of public records as he reviewed them.\textsuperscript{117} States went to great lengths to keep secret their capital-punishment protocols.\textsuperscript{118} A city sued one of its citizens for copyright infringement after he posted to YouTube several edited clips of city council meetings that the city made available as public records.\textsuperscript{119} The list goes on.

It is nothing new, of course, for government agencies and officials to try to minimize their exposure and public scrutiny. But it is worrisome the resources and creativity that the government expends to parry the press and public. The shrinking budgets of newspapers, historically the most likely to litigate to compel the disclosure of records, only amplifies that worry.\textsuperscript{120} A


\textsuperscript{119} Peters, supra note 117.

Knight Foundation study released last year showed that roughly half of freedom-of-information experts believe access to information has gotten worse in the last four years, and nearly 90 percent said it would get worse under President Trump. They were right.

It is a cliché to say that the disruption of newspapers and other traditional publishers has also created opportunities for independent journalists and startups. But, equally importantly, that disruption has significant implications for the legal landscape in which journalism is produced. Established news

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122 Camille Fassett, The Freedom of Information Act Is Getting Worse Under the Trump Administration, FREEDOM OF THE PRESS FOUND. (Mar. 14, 2019), https://freedom.press/news/freedom-information-act-getting-worse-under-trump-administration/ (“Departments from the Justice Department to the EPA and the Interior have been hit by huge increases in FOIA lawsuits under the Trump administration.”). According to Alex Howard, an open government advocate, “Lawsuits are significant because that’s generally a tell that affirmative disclosure isn’t where it should be, and that FOIA officers aren’t releasing information upon request. It’s a capacity issue, a political will issue, a training issue, and a funding issue.” Id.

123 Jonathan Peters, The Biggest Threat to Press Rights May Be a Failure to Understand Them, COLUM. JOURNALISM REV. (Oct. 24, 2014), https://archives.cjr.org/united_states_project/jeff_hermes_qa_legal_needs_of.php. According to Jeff Hermes, deputy director of the Media Law Resource Center, “Most established media organizations have institutional knowledge that helps them judge when they’re on thin ice, allowing them to consult legal counsel only when it’s most needed. Startups typically don’t have the resources to keep a bunch of lawyers on retainer, and many of them don’t yet have the institutional knowledge that helps
organizations tend to have institutional knowledge that can guide their pursuit of public records and their presence at open meetings, and so on, while independent journalists and startups typically do not have the resources to have lawyers on retainer—and many do not yet have the institutional knowledge to guide them.\footnote{Id.}

\section*{V. Tech Platforms and Journalism}

In October 2019, Facebook founder and CEO Mark Zuckerberg delivered a speech at Georgetown University in which he defended the platform as a champion of free expression.\footnote{Id.} He said Facebook should not be an arbiter of speech.\footnote{Id.} He criticized countries like China that restrict digital technologies.\footnote{Id.} He said that using “your voice helps people come together,” citing sources as diverse as Frederick Douglass, the Vietnam War, Martin Luther King, Jr., the Black Lives Matter and #MeToo movements, and the landmark First Amendment case \textit{Schenk v. United States}.\footnote{Id.} He defended the


\footnote{Id.}

\footnote{Id.}

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\footnote{Id.}
platform’s policy decision not to fact-check political ads, saying, “I don’t think it’s right for a private company to censor politicians or the news in a democracy.” And while acknowledging Facebook’s power, Zuckerberg said the more important reality is that his company has “decentralized power by putting it directly into people’s hands,” which “at scale is a new kind of force in the world—a Fifth Estate.”

Reactions to the speech were generally negative. Kara Swisher, editor of Recode, called it “pretty thin intellectually.” Jillian York, international director of freedom of expression for the Electronic Frontier Foundation, a nonprofit organization dedicated to digital civil liberties, said Zuckerberg’s remarks offered little more than “contradictions, unsubstantiated postulations, and a Cliff Notes version of free speech history.” Writing in The New Yorker, Masha Gessen said Zuckerberg is “symptomatic of our collective refusal to think about speech and the media in complicated ways”, and Andrew Marantz’s

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129 Id.
130 Id.
column ran under the headline “Mark Zuckerberg Still Doesn’t Get It.”134 Marantz went on to say that Zuckerberg’s “thesis was that free speech is good,” while the largely unanswered “question is whether free speech is the only good worth pursuing.”135

Facebook’s and Zuckerberg’s roughhewn approach to free expression is of a piece with its approach to journalism. The platform announced that it would drive $300 million over three years into various journalism projects, including several nonprofits that focus on local reporting.136 Facebook is also developing a news tab for publishers137 that will be overseen by a team of journalists138 and will offer news organizations up to $3 million to license their editorial content.139 Plus, the Facebook Journalism Project offers live and online courses to train

135 Id.
journalists in how to leverage social tools to in their reporting. But these efforts, however laudable, do not change the fact that news is not a core focus for the company and that its firm grip on ad dollars and eyeballs is an existential threat to journalism’s sustainability. In 2018, Facebook and Google together commanded nearly 60 percent of the U.S. internet advertising market, up 3 percent from the year before. Along the way, Facebook has been moving the algorithmic goalposts of the News Feed, at times making it more difficult for news content to be shared widely. As my Columbia Journalism Review colleague Mathew Ingram put it recently:

Facebook’s relationship with the media has been a classic Faustian bargain: News outlets want to reach [its billions of users], so they put as much of their content as they can on the network. Some … are favored by the company’s all-powerful (and completely mysterious) algorithm, giving them access to a wider audience to pitch for subscriptions or the pennies … of ad revenue they receive from the platform. But while many media outlets continue to pander to Facebook, even some of the digital-media entities that have catered to the company seem to be struggling. …

…Facebook’s dominance of social distribution, and the power it gives the company to command

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140 Welcome to the Facebook Journalism Project, FACEBOOK JOURNALISM PROJECT, https://facebookjournalismproject.com/about/.
141 Sheila Dang, Google, Facebook have tight grip on growing U.S. online ad market: report, REUTERS (June 5, 2019), https://www.reuters.com/article/us-alphabet-facebook-advertising/google-facebook-have-tight-grip-on-growing-u-s-online-ad-market-report-idUSKCN1T61IV.
attention, represents a direct threat to media companies. It’s about control. As digital advertising continues to decline as a source of revenue thanks to Google and Facebook, many media companies are having to rely increasingly on subscriptions. But the readers they want … are all on Facebook consuming content for free.143

To be clear, Facebook is not the only social media platform that has an uneasy relationship with journalism. Every 30 seconds, a female reporter or politician is harassed or abused on Twitter.144 That platform has also made it harder for academic researchers to tap into its application programming interfaces (“API”) and its data, with the effect of limiting how well the researchers can act as sources for journalists on urgent issues of public concern, such as election security.145 YouTube is complicating efforts to document and report on war crimes, by removing videos of human rights violations if they contain graphic depictions of violence.146 The website’s recommendation algorithm has been notorious, too, as an engine of misinformation and far-right radicalization, a place where

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143 Id.
hoaxes and actual fake news rank high on the recommended list and have more success than quality journalism.\textsuperscript{147}

Behind these problems is the reality that social media platforms and news organizations have decidedly different missions and interests \textit{and} that the platforms generally have not thought systematically or coherently about their relation to free expression and journalism in the digital public sphere. In other words, they have failed to develop a clear theory of platform governance vis-à-vis free expression and journalism. And one is needed now more than ever:

For one, a functioning theory can bridge the widening gap of expectations between what a platform permits and what the public [and press] expects. Practically, an overarching theory can also help navigate evolving social norms, [because platforms make policy decisions based on contemporary norms. . . ] Finally, and crucially, we need a theory to help direct and hold accountable the automated systems that increasingly govern speech online. These systems will embed cultural norms into their design, and enforce them through implicit filters we cannot see.\textsuperscript{148}


A cohesive theory would take into consideration the central feature of social media platforms: they are powerful private actors in the networked public square and generally unconstrained by the First Amendment’s limits. They dominate in ad dollars and eyeballs, and they conduct private speech regulation by creating and enforcing policies regarding user content, ultimately deciding what content may be posted, when to remove content, and how to display and prioritize content using algorithms. The platforms are developing a de facto free-speech jurisprudence, against the background of their business interests and self-professed democratic values. They have a shared responsibility to help protect—through their policies and practices, guided by a coherent theory of platform governance—our fast-changing marketplace of ideas, in which journalism remains a democratically important institution.

150 Jonathan Peters, All the News That’s Fit to Leak, in TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD 117, 117–29 (Charles N. Davis & David Cuillier eds., 2014).
151 Id.