

THE MODERN FIGHT FOR MEDIA FREEDOM IN THE UNITED STATES

Jonathan Peters*

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

* Jonathan Peters is a media law professor at the University of Georgia, with appointments in the School of Law and the Grady College of Journalism and Mass Communication. He is the press freedom correspondent for the *Columbia Journalism Review*, and he has written about First Amendment issues for *Esquire*, *The Atlantic*, *Slate*, *Wired*, and CNN. He has also blogged about free speech for the *Harvard Law Review*, and his scholarship has appeared in the *Harvard Law and Policy Review* and the *Berkeley Technology Law Journal*, among others. He is coauthor of the textbook *The Law of Public Communication*, now in its 10th edition. Peters is grateful for the research assistance of UGA law students Charles Wells, William Gaskins, Victoria Carballo, and Mary Frances Dennis. He is also grateful that the UNC Center for Media Law and Policy hosted him for a talk in January 2019 that prompted him to think thematically about many of the issues discussed in this article and in his remarks at this symposium. Speaking of which: He thanks the staff of the *First Amendment Law Review* for planning such an engaging and thought-provoking event about the First Amendment's role in facilitating an informed society.

¹ See, e.g., Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment>; Kate Klonick, *Facebook v. Sullivan*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Oct. 1, 2018), <https://knightcolumbia.org/content/facebook-v-sullivan>; Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Nov. 2, 2017), <https://knightcolumbia.org/content/hostile-audience-revisited>; Jeremy Waldron, *A Raucous First Amendment, Wild, Boisterous, and Raucous Free Speech*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/a-raucous-first-amendment-1>; Tim Wu, *Beyond First Amendment Lochnerism: A Political Process Approach*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach>; Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>.

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 encryption³ and a website's terms of service.⁴ In the area of copyright, we have to think about peer-to-peer file sharing⁵ and the licenses granted by iTunes.⁶ In the area

³ See, e.g., Joshua Benton, *Here Are 12 Principles Journalists Should Follow to Make Sure They're Protecting their Sources*, NIEMANLAB (Jan. 16, 2019, 11:00 AM), <https://www.niemanlab.org/2019/01/here-are-12-principles-journalists-should-follow-to-make-sure-theyre-protecting-their-sources/>; Kate Krauss, *Time for Journalists to Encrypt Everything*, WIRED: OPINION (Mar. 10, 2017, 10:30 AM), <https://www.wired.com/2017/03/time-journalists-encrypt-everything/>; Spencer Woodman, *Five Digital Security Tools to Protect Your Work and Sources*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS: BLOG (Jan. 29, 2018), <https://www.icij.org/blog/2018/01/five-digital-security-tools-to-protect-your-work-and-sources/>.

⁴ See, e.g., Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to be Bound by its Terms*, PROPUBLICA (May 20, 2019), <https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click>; New York Times Editorial Board, *How Silicon Valley Puts the 'Con' in Consent*, N.Y. TIMES: OPINION (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/opinion/internet-facebook-google-consent.html>; Charlie Warzel & Ash Ngu, *Google's 4,000-Word Privacy Policy is a Secret History of the Internet*, N.Y. TIMES: THE PRIVACY PROJECT (July 10, 2019), <https://www.nytimes.com/interactive/2019/07/10/opinion/google-privacy-policy.html>.

⁵ See, e.g., Richard Conniff, *Steal This Book? There's a Price*, N.Y. TIMES: OPINION (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/opinion/book-piracy.html>; Guillermo Contreras, *Alleged 'Copyright Troll' Claims Unnamed San Antonians Are Stealing Porn Movies*, SAN ANTONIO EXPRESS-NEWS (July 18, 2019, 3:44 PM), <https://www.expressnews.com/news/local/article/Alleged-copyright-troll-claims-unnamed-San-14106219.php>; Ben Gilbert, *Facebook Now Blocks People from Sharing Links to Notorious Piracy Site The Pirate Bay*, BUS. INSIDER (Sept. 30, 2019, 10:20 AM), <https://www.businessinsider.com/facebook-blocks-users-from-linking-to-the-pirate-bay-2019-9>.

⁶ See, e.g., Harmeet Kaur, *Now That iTunes Is Going Away, Here's What Will Happen to Your Music and Movies*, CNN: BUSINESS (June 6, 2019, 2:24 PM), <https://www.cnn.com/2019/06/06/tech/apple-explains-itunes-changes-trnd/index.html>; David Lazarus, *Column: When You Buy Digital Content On Amazon Or iTunes, You Don't Exactly Own It*, L.A. TIMES (May 13, 2016, 3:00 AM), <https://www.latimes.com/business/lazarus/la-fi-lazarus-digital-content-20160513-snap-story.html>; Mike Masnick, *You Don't Own What You've Bought: Apple Disappears Purchased Movies*, TECHDIRT (Sept. 12, 2018, 10:37 AM), <https://www.techdirt.com/articles/20180912/09473640628/you-dont-own-what-youve-bought-apple-disappears-purchased-movies.shtml>.

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

⁷ See, e.g., John A. Humbach, “Sexting” and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010); Robert D. Richards & Clay Calvert, *Prosecuting Obscenity Cases: An Interview With Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56 (2010); Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1 (2009).

⁸ See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Alix Iris Cohen, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300 (2015); Deanna Paul, *Is Revenge Porn Protected by the Constitution? Some States Might Say Yes*, WASH. POST (May 19, 2019, 11:07 AM), <https://www.washingtonpost.com/nation/2019/05/19/is-revenge-porn-protected-by-constitution-some-states-might-say-yes/>.

⁹ See, e.g., Jesselyn Cook, *Here’s What It’s Like To See Yourself In A Deepfake Porn Video*, HUFFINGTON POST (June 23, 2019, 7:00 AM), https://www.huffpost.com/entry/deepfake-porn-heres-what-its-like-to-see-yourself_n_5d0d0faee4b0a3941861fced; Tom Simonite, *Most Deepfakes Are Porn and They’re Multiplying Fast*, WIRED (Oct. 7, 2019, 10:00 AM), <https://www.wired.com/story/most-deepfakes-porn-multiplying-fast/>; James Vincent, *New AI Deepfake App Creates Nude Images of Women in Seconds*, THE VERGE (June 27, 2019, 6:23 AM), <https://www.theverge.com/2019/6/27/18760896/deepfake-nude-ai-app-women-deepnude-non-consensual-pornography>.

¹⁰ PBS, PINTEREST, <https://www.pinterest.com/pbsofficial/> (last visited Oct. 17, 2019).

¹¹ Rick Edmonds, *AP, 28 News Orgs Launch Newsright to Collect Licensing Fees from Aggregators*, POYNTER (Jan. 5, 2012), <https://www.poynter.org/reporting-editing/2012/ap-28-news-orgs-launch-newsright-to-collect-licensing-fees-from-aggregators/>.

¹² Jay Rosen, *The People Formerly Known as the Audience*, PRESS THINK (June 27, 2006), http://archive.pressthink.org/2006/06/27/pp1_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,¹⁴ 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,¹⁵ 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.¹⁶ Courts have confronted these idiosyncrasies daily, for decades, in cases involving people who say things that are different, offensive, or unwelcome.¹⁷ That is because the real power of the

N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/technology/facebook-dallas-live-video-breaking-news.html?_r=0;

Trevor Timm, *People Who Film Police Violence Are Citizen Journalists. We Stand With Them*, GUARDIAN (Aug. 10, 2016, 1:52 PM), <https://www.theguardian.com/commentisfree/2016/aug/10/filming-police-violence-citizen-journalists-first-amendment>.

¹⁴ Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (2009), https://archives.cjr.org/reconstruction/the_reconstruction_of_american.php.

¹⁵ *The 2019 State of the First Amendment*, FREEDOM FORUM INSTITUTE, 3-4 (2019), <https://www.freedomforuminstitute.org/wp-content/uploads/2019/06/SOFAreport2019.pdf>.

¹⁶ *American's Views on the Media*, IPSOS (Aug. 7, 2018), <https://www.ipsos.com/en-us/news-polls/americans-views-media-2018-08-07>.

¹⁷ See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012); *Snyder v. Phelps*, 562 U.S. 443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Miller v. California*, 413 U.S. 15 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Abrams v. United States*, 250 U.S. 616 (1919).

First Amendment is not in the protection it gives to popular speech but rather to unpopular speech.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.¹⁹

That is why the late writer Anthony Lewis, who covered the U.S. Supreme Court for *The New York Times* and founded the field of legal journalism,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.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.²² And that process is ongoing. Our current moment is critical for freedom of expression. The president has been denouncing the press in

¹⁸ Nina Totenberg, *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....” *Id.*

¹⁹ ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* ix-xv (2007).

²⁰ Richard Reuben, *The Art, Craft, and Future of Legal Journalism: A Tribute to Anthony Lewis*, 79 MO. L. REV. 849, 850 (2014).

²¹ See LEWIS, *supra* note 19, at ix.

²² *Id.* at x-xii.

rallies and speeches and on Twitter, and other elected officials have been parroting his rhetoric.²³ Reporters are being assaulted²⁴ and arrested²⁵ covering protests—and sued by the wealthy.²⁶ Meanwhile, Facebook and YouTube have adopted policies and practices making it more difficult to produce quality journalism,²⁷ and in general public opinion of the press is desperately low.²⁸ A recent survey revealed that many Americans are poorly informed about the First Amendment.²⁹ Over a third cannot name any rights that it guarantees.³⁰

²³ See, e.g., Jonathan Peters, *Trump Twitter Spreadsheet Tracks “a Perpetual Campaign against the Press”*, COLUM. JOURNALISM REV. (Dec. 21, 2017), https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php; Jonathan Peters, *Trump and Trickle-down Press Persecution*, COLUM. JOURNALISM REV. (Spring 2017), https://www.cjr.org/local_news/trump-and-trickle-down-press-persecution.php.

²⁴ See, e.g., Peter Sterne & Jonathan Peters, *‘Put the Camera Down’: Covering Protests Has Become the Riskiest Job in Journalism*, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/covering-protests-threats-press-freedom-tracker.php.

²⁵ See, e.g., Jonathan Peters, *When a Journalist Is Arrested Covering a Protest, What Should the News Outlet Do?*, COLUM. JOURNALISM REV. (Oct. 2, 2017), https://www.cjr.org/united_states_project/protest-arrests-journalism-st-louis.php.

²⁶ See, e.g., Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>; Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>; NOBODY SPEAK: TRIALS OF THE FREE PRESS (Netflix 2017), <https://www.netflix.com/title/80168227>.

²⁷ See, e.g., Mathew Ingram, *Youtube Takedowns Are Making It Hard to Document War Crimes*, COLUM. JOURNALISM REV. (Oct. 24, 2019), https://www.cjr.org/the_media_today/youtube-takedowns-war-crimes.php; Mathew Ingram, *The Facebook Armageddon: The social network’s increasing threat to journalism*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/facebook-media-buzzfeed.php.

²⁸ *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL’Y CTR. UNIV. PA. (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/>.

²⁹ *Id.*

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,³¹ 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,³² and that Democrats are 47 points more likely than Republicans to support the press's watchdog role.³³ 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.”³⁴

³¹Jonathan Peters, *Survey: Editors See Media Losing Ground as Legal Advocate for 1st Amendment*, COLUM. JOURNALISM REV. (Apr. 21, 2016), https://www.cjr.org/united_states_project/knight_survey_editors_first_amendment.php.

³²Jessica Estepa, *Gallup/Knight Survey: Americans Believe Media Matters, But Don't Think It's Doing Its Job*, USA TODAY (Jan. 16, 2018, 12:01 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/01/16/gallup-knight-survey-americans-believe-media-matters-but-dont-think-its-doing-its-job/1033956001/>.

³³Michael Barthel & Amy Mitchell, *Americans' Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RES. CTR. (May 10, 2017), <https://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/>.

³⁴Jonathan Peters, Opinion, *The Newspaper Ad that Changed Everything*, CNN (Nov. 20, 2017, 7:52 AM), <https://www.cnn.com/2017/11/20/opinions/new-york-times-v-sullivan-impact-opinion-peters/index.html>.

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 2016.³⁵ President Donald Trump claimed recently to have invented the term,³⁶ and there is no doubt that he has popularized it.³⁷ 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.³⁸ In a television interview with CBS's

³⁵ Summer Meza, 'Fake News' Named Word of the Year, NEWSWEEK (Nov. 2, 2017, 12:33 PM), <https://www.newsweek.com/fake-news-word-year-collins-dictionary-699740>.

³⁶ Jane E. Kritley, *Getting to the Truth: Fake News, Libel Laws, and "Enemies of the American People,"* 43 HUMAN RTS. MAG. (Oct. 2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/getting-to-the-truth/.

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.”³⁹

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.”⁴⁰ 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.⁴¹ In 1835, the penny press surged in popularity, and it brought to news consumers the Great Moon Hoax, a widely

meaning-thats-just-how-trump-wants-it/2018/04/03/ce102ed4-375c-11e8-8fd2-49fe3c675a89_story.html.

³⁹ *Leslie Stahl: Trump Admitted mission to “Discredit” Press*, CBS NEWS (May 23, 2018, 5:39 AM), <https://www.cbsnews.com/news/lesley-stahl-donald-trump-said-attacking-press-to-discredit-negative-stories/>.

⁴⁰ *The Real Story of “Fake News”: The Term Seems to have Emerged Around the End of the 19th Century*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited Oct. 20, 2019).

⁴¹ Roberg G. Parkinson, *Fake news? That’s a very old story.*, WASH. POST (Nov. 25, 2016), https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-8616-52b15787add0_story.html.

shared fake story about an astronomer who reportedly observed unicorns on the moon.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.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.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.⁴⁵ That is a

⁴² Kevin Young, *Moon Shot: Race, A Hoax, and the Birth of Fake News*, THE NEW YORKER (Oct. 21, 2017), <https://www.newyorker.com/books/page-turner/moon-shot-race-a-hoax-and-the-birth-of-fake-news>.

⁴³ Jarrett Stepman, *We Already Have a Solution to Fake News: It's Called the First Amendment*, THE HERITAGE FOUND. (Oct. 9, 2017), <https://www.heritage.org/insider/fall-2017-insider/we-already-have-solution-fake-news-its-called-the-first-amendment>.

⁴⁴ *Id.*

⁴⁵ See, e.g., Merritt Baer, *Do Russian-Backed Bots Qualify for Free Speech*, DAILY BEAST (Oct. 27, 2017, 9:33 AM), <https://www.thedailybeast.com/do-russian-backed-bots-qualify-for-free-speech>; Laurent Sacharoff, *Do Bots Have First Amendment Rights?*, POLITICO (Nov. 27, 2018), <https://www.politico.com/magazine/story/2018/11/27/bots-first-amendment-rights-222689>; Jared Schroeder, *Are Bots Entitled to Free Speech*, COLUM. JOURNALISM REV. (May 24, 2018), <https://www.cjr.org/innovations/are-bots-entitled-to-free->

perversion of the marketplace as it was conceived,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.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

speech.php; Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018, 6:00 AM), <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/>.

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, *Institutions in the Marketplace of Ideas*, 57 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, *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, *ON LIBERTY* (1859), 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.”).

⁴⁷ Walter Dean, *The Elements of Journalism*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism/> (last visited Oct. 20, 2019).

how they do so. When reporting on a lie, for example, it is best to limit its description, because repeating misinformation can reinforce it.⁴⁸ That is especially true when the misinformation offers a simpler explanation than the truth.⁴⁹ Giving news consumers novel and credible information can be effective in debunking misinformation, too.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.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.⁵² Trump alone has posted more than

⁴⁸ Maia Szalavitz, *Why Misinformation Sticks and Corrections Can Backfire*, TIME (Sep. 20, 2012), <http://healthland.time.com/2012/09/20/why-misinformation-sticks-and-corrections-can-backfire/>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., Julia Arciga, *Trump Says 'Press' is 'Truly the Enemy of the People'*, DAILY BEAST (Apr. 5, 2019, 3:53 PM), <https://www.thedailybeast.com/trump-says-press-is-truly-the-enemy-of-the-people>; Christal Hayes, *'They Go out of their Way to Cover Me Inaccurately': Trump Hits Media on World Press Freedom Day*, USA TODAY (May 3, 2019, 5:43 PM), <https://www.usatoday.com/story/news/politics/2019/05/03/president-trump-hits-news-media-world-press-freedom-day/1091153001/>; Ezra Klein, *"Enemy of the People": How Trump Makes the Media into the Opposition*, VOX (Oct. 30, 2018, 1:50 PM), <https://www.vox.com/policy-and-politics/2018/10/30/18039990/trump-media-sanders-press-fake-news-enemy-people-bombing>; Rem Rieder, *The World is Watching Trump's Attacks on the Press*, CNN (Aug. 27, 2017, 12:07 PM), <https://www.cnn.com/2017/08/27/politics/donald-trump-media/index.html>; Jim

1,300 tweets critical of the press since declaring his candidacy in 2015.⁵³ Trump has threatened to open up libel laws, lacking the authority to do so.⁵⁴ He called BuzzFeed a “failing pile of garbage” in a news conference.⁵⁵ He has accused the press of inciting violence⁵⁶ and of fabricating sources⁵⁷—of airing fake news and of being fake news.⁵⁸ He has called journalists the

Rutenberg, Column, *Trump's Attacks on the News Media are Working*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/business/media/trumps-attacks-news-media.html>; Brian Stelter, *Why Trump's Constant Attacks on an Independent Press are So Dangerous*, CNN (Sep. 2, 2019, 5:20 PM), <https://www.cnn.com/2019/09/02/media/trump-press-attacks-media/index.html>.

⁵³ Peters, *supra* note 23.

⁵⁴ See, e.g., Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018),

<https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>;

John Wagner, *Trump Suggests Libel Laws Should be Changed After Uproar over Woodward Book*, WASH. POST (Sep. 5, 2018, 3:07 PM),

https://www.washingtonpost.com/politics/trump-suggests-libel-laws-should-be-changed-after-uproar-over-woodwards-book/2018/09/05/9c00f2be-b02b-11e8-9a6a-565d92a3585d_story.html.

⁵⁵ Louis Nelson, *Trump: Buzzfeed is a 'Failing Pile of Garbage'*, POLITICO (Jan. 11, 2017, 12:36 PM), <https://www.politico.com/story/2017/01/trump-presser-slams-buzzfeed-233483>.

⁵⁶ See, e.g., Laura Egan, *Trump: 'The Fake News is Creating Violence'*, NBC NEWS (Nov. 2, 2018, 3:47 PM), <https://www.nbcnews.com/politics/white-house/trump-fake-news-creating-violence-n930576>.

⁵⁷ See, e.g., Seung Min Kim, *Trump Falsely Accuses the New York Times of Making up a Source. It was an Official who Briefed Reporters*, WASH. POST (May 26, 2018, 7:29 AM), https://www.washingtonpost.com/politics/trump-falsely-accuses-the-new-york-times-of-making-up-a-source-it-was-an-official-who-briefed-reporters/2018/05/26/2d055a60-612c-11e8-8c93-8cf33c21da8d_story.html; Rebecca Morin, *Trump Accuses 'Fake News' Media of Making up Sources*, POLITICO (May 28, 2017, 8:59 AM), <https://www.politico.com/story/2017/05/28/trump-fake-news-media-238894>.

⁵⁸ See, e.g., *Trump to CNN Reporter: You are Fake News*, CNBC NEWS (Jan. 11, 2017), <https://www.cnn.com/video/2017/01/11/trump-to-cnn-reporter-you-are-fake-news.html>; Tamara Keith, *President Trump's Description of What's 'Fake' is Expanding*, NPR, (Sep. 2, 2018, 7:02 AM), <https://www.npr.org/2018/09/02/643761979/president-trumps-description-of-whats-fake-is-expanding>; Brett Samuels, *Trump Accuses 'Fake News Media' of Trying to Hurt the Economy*, THE HILL (Aug. 15, 2019, 1:22 PM), <https://thehill.com/homenews/administration/457575-trump-accuses-fake-news-media-of-trying-to-hurt-the-economy>.

“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

⁵⁹ See, e.g., *Trump: ‘Fake News Media’ is ‘the Real Enemy of the People’*, DAILY BEAST (Jul. 19, 2018, 10:44 AM), <https://www.thedailybeast.com/trump-fake-news-media-is-the-real-enemy-of-the-people>.

⁶⁰ See *CPJ Chairman says Trump is Threat to Press Freedom*, COMM. TO PROTECT JOURNALISM (Oct. 13, 2016, 12:30 PM), <https://cpj.org/2016/10/cpj-chairman-says-trump-is-threat-to-press-freedom.php>; Tess Bonn, *Press Freedom Defense Fund Leader Says Trump Poses Unprecedented Threat to Journalists*, THE HILL (Nov. 19, 2018), <https://thehill.com/hilltv/rising/417440-press-freedom-defense-fund-leader-says-trump-poses-unprecedented-threat-to>.

⁶¹ See, e.g., Ronnell Anderson Jones & 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>; Ronnell Anderson Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. ONLINE 47 (2017); Isaac Chotiner, *Would President Trump Kill Freedom of the Press?*, SLATE (Mar. 14, 2016, 3:47 PM), <https://slate.com/news-and-politics/2016/03/donald-trump-vs-the-media-how-he-could-curtail-freedom-of-the-press-as-president.html>; Jonathan Peters, *What Trump Could (and Couldn’t) Do to Restrict Press Freedom if Elected*, COLUM. JOURNALISM REV. (Oct. 27, 2016), https://www.cjr.org/united_states_project/donald_trump_lawsuits_press_freedom.php.

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.⁶³ If an official, for example, is known to make demonstrably false claims, he or she should not be an invited guest on news programs.⁶⁴ If the White House revokes a reporter's press pass without due process, the reporter should sue, as CNN did.⁶⁵ 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,⁶⁶ 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.").

⁶³ Jay Rosen, *It's Time for the Press to Suspend Normal Relations with the Trump Presidency*, PRESSTHINK (June 25, 2018, 2:18 PM)

<http://pressthink.org/2018/06/its-time-for-the-press-to-suspend-normal-relations-with-the-trump-presidency/>.

⁶⁴ *Id.*

⁶⁵ See, e.g., Brian Stetler, *CNN sues President Trump and top White House aides for barring Jim Acosta*, CNN BUSINESS (Nov. 13, 2018, 5:47 PM),

<https://www.cnn.com/2018/11/13/media/cnn-sues-trump/index.html>; Jennifer Rubin, *Five Takeaways from Friday's CNN-White House Ruling*, WASH. POST (Nov. 19, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/11/16/five-takeaways-from-fridays-cnn-white-house-ruling/>; Scott Nover, *Trump Restores Acosta's Pass But Issues 'Rules' for Reporters*, ATLANTIC (Nov. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/11/trump-reverses-courts-and-restores-jim-acostas-pass/576244/>.

⁶⁶ Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Alexander Meiklejohn).

III. PRESS RIGHTS AT PROTESTS

The next step 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..

⁶⁸ U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/arrest-criminal-charge/> (last visited Oct. 22, 2019).

⁶⁹ See, e.g., Jim Salter, *Lawsuits Filed Over St. Louis Police ‘Kettling’ Practice*, AP NEWS (Sept. 18, 2018), <https://apnews.com/117d6c28721d466baa3c5fc3d636650a>; Stephanie Sugars, *Journalist Covering Protests in US Risk Getting Caught Up in Police Kettling Tactic*, COMM. TO PROTECT JOURNALISTS: BLOG (Mar. 15, 2018, 3:15 PM), <https://cpj.org/blog/2018/03/journalists-covering-protests-in-us-risk-getting-c.php>.

⁷⁰ U.S. PRESS FREEDOM TRACKER, *supra* note 68..

⁷¹ *Id.*

⁷² See, e.g., Jonathan Peters, *Why the Charges against Wesley Lowery and Ryan Reilly in Ferguson Are Absurd*, COLUM. JOURNALISM REV. (Aug. 13, 2015), https://www.cjr.org/united_states_project/wesley_lowery_ryan_reilly_ferguson.php; Jonathan Peters, *More Than 20 Months After Ferguson, Ryan Reilly and Wesley Lowery are Still Facing Charges in St. Louis County*, COLUM. JOURNALISM REV. (Apr. 19, 2016), https://www.cjr.org/united_states_project/ryan_reilly_wesley_lowery_ferguson_charges.php; Niraj Chokshi, *Ferguson-related Charges Dropped against Washington Post and Huffington Post Reporters*, WASH. POST (May 19, 2016, 4:00 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/>.

a government function.”⁷³ But even if charges are not filed or get dropped, an arrest is still a big deal. The same goes for a detainment. They both send a chilling message: “Gather the news at your peril.”⁷⁴ This is especially true for freelance and independent journalists who generally lack institutional and legal resources.⁷⁵

There were also dozens of physical assaults on journalists at protests in 2017 and 2018.⁷⁶ The majority were committed not by the police but by protestors⁷⁷ who disliked or distrusted the press, or simply did not want the press recording videos and photos wherever they were.⁷⁸ Many of the protestors were

⁷³ See, e.g., U.S. PRESS FREEDOM TRACKER, *Reporter Jack Smith IV Charged With Obstruction at Standing Rock* (May 23, 2017), <https://pressfreedomtracker.us/all-incidents/reporter-jack-smith-iv-charged-obstruction-standing-rock/>; Kelsey Sutton, *Criminal Charges Against ‘Mic’ Reporter Dismissed*, MIC (Dec. 7, 2017), <https://www.mic.com/articles/186661/criminal-charges-against-mic-reporter-dismissed>.

⁷⁴ Jonathan Peters, *Journalists in Ferguson: Know Your Rights*, COLUM. JOURNALISM REV. (Aug. 21, 2014), https://archives.cjr.org/united_states_project/press_rights_in_ferguson.php.

⁷⁵ David Uberti, *New Survey Reveals Everything You Think About Freelancing Is True*, COLUM. JOURNALISM REV. (Feb. 17, 2015), https://archives.cjr.org/behind_the_news/new_survey_reveals_everything.php.

⁷⁶ U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/physical-attack/> (last visited Oct. 22, 2019).

⁷⁷ *Id.*

⁷⁸ See, e.g., U.S. PRESS FREEDOM TRACKER, *Portland Mercury Reporter Kelly Kenoyer Shoved While Filming Patriot Prayer Rally* (July 11, 2018), <https://pressfreedomtracker.us/all-incidents/portland-mercury-reporter-kelly-kenoyer-shoved-while-filming-patriot-prayer-rally/>; U.S. PRESS FREEDOM TRACKER, *Oregonian Reporter Eder Campuzano Injured While Documenting Protest* (Aug. 13, 2018), <https://pressfreedomtracker.us/all-incidents/oregonian-reporter-eder-campuzano-injured-while-documenting-protest/>; U.S. PRESS FREEDOM TRACKER, *Protesters Smack Away NBC News Reporter Cal Perry’s Camera in Charlottesville* (Aug. 15, 2018), <https://pressfreedomtracker.us/all-incidents/protesters-smack-away-nbc-news-reporter-cal-perrys-camera-charlottesville/>; U.S. PRESS FREEDOM TRACKER, *CBS Producer Shoved by Police While Covering Protest in Washington, D.C.* (Aug. 14, 2018), <https://pressfreedomtracker.us/all-incidents/cbs-producer-shoved-police-while->

political extremists.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,⁸⁰ or the time an Alaska state senator slapped a reporter in the state capitol.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.⁸² Behind these data points are a number of chilling stories. First, *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/>.

⁷⁹ See *supra* note 80.

⁸⁰ Emily Cochrane, ‘*That’s My Kind of Guy, Trump Says of Republican Lawmaker Who Body-Slammed a Reporter*,’ *N.Y. TIMES* (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/trump-greg-gianforte-montana.html>.

⁸¹ Reid Wilson, *Alaska State Senator Slaps Reporter Over Story*, *THE HILL* (May 5, 2017), <https://thehill.com/homenews/state-watch/332071-alaska-state-senator-slaps-reporter-over-story>.

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

⁸³ Jonathan Peters, *When a Journalist is Arrested Covering a Protest, What Should the News Outlet Do?*, COLUM. JOURNALISM REV. (Oct. 2, 2017), https://www.cjr.org/united_states_project/protest-arrests-journalism-st-louis.php.

⁸⁴ *Id.*

⁸⁵ Sterne & Peters, *supra* note 24..

⁸⁶ *Id.*

⁸⁷ *Id.*

to assault a journalist.⁸⁸ 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.⁸⁹ The bill had symbolic and practical value, but my overall opinion of it was mixed.⁹⁰ Its protections were mostly redundant, and the bill missed an opportunity to put forward a much-needed⁹¹ federal shield law to protect journalists from the compelled disclosure of their sources and unpublished materials.⁹²

The bill was symbolically important because it underscored that a free press is democratically essential,⁹³ and it

⁸⁸ Press Release, Eric Swalwell, Representative, *Swalwell Introduces the Journalist Protection Act* (Feb. 5, 2018), <https://swalwell.house.gov/media-center/press-releases/swalwell-introduces-journalist-protection-act>.

⁸⁹ 18 U.S.C. §§ 111-119 (2012 & Supp. 2017); Journalist Protection Act, H.R. 4935, 115th Cong. § 2 (2018).

⁹⁰ Jonathan Peters, *The Time is Right for the Journalist Protection Act. But We Need a Federal Shield Law*, COLUM. JOURNALISM REV. (Feb. 9, 2018), https://www.cjr.org/united_states_project/journalist-protection-act.php.

⁹¹ H.R. 4935, *supra* note 89; *see, e.g.*, Gabe Rottman, *The Trump Administration's Pursuit of Ali Watkins Proves We Need Federal Shield Law Now*, DAILY BEAST (June 9, 2018, 10:04 PM), <https://www.thedailybeast.com/the-trump-administrations-pursuit-of-ali-watkins-proves-we-need-federal-shield-law-now>; Clarence Page, *Trump's War Against Leakers Show Why We Need a 'Shield Law'*, CHI. TRIB. (June 12, 2018), <https://www.chicagotribune.com/columns/clarence-page/ct-perspec-page-trump-sessions-espionage-act-cpj-0613-20180612-story.html>; Danielle McLean, *SPJ Calls on Congress to Pass Strong Federal Shield Law*, QUILL MAG. (Mar. 12, 2019), <https://www.quillmag.com/2019/03/12/spj-calls-on-congress-to-pass-strong-federal-shield-law/>; Paul Fletcher, *Sessions' Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017), <https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#607db9ec4912>.

⁹² *See generally* Jonathan Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php.

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.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.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.⁹⁶ That capital would have been better spent on a federal shield bill, an area where the law does not already provide meaningful protection.⁹⁷ There is no federal shield law, and the First Amendment offers highly inconsistent protections against compelled disclosure (none at all, in some places).⁹⁸

⁹⁴ Peters, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ Press Release, Eric Swalwell, *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-slammng 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.”).

⁹⁷ Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php.

⁹⁸ *Id.*

This is a major problem calling out for legislative action. Despite the adoption of guidelines designed to make it difficult to subpoena journalists,⁹⁹ the U.S. Department of Justice has served subpoenas on plenty of them and has spent years trying to force some journalists to comply.¹⁰⁰ Federal investigators have also secretly seized phone records of journalists and editors.¹⁰¹ Moreover, as attorney general, Jeff Sessions bragged about the DOJ's many ongoing leak investigations,¹⁰² 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

⁹⁹ 28 C.F.R. § 50.10 (2019).

¹⁰⁰ See, e.g., Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html>; Sarah Ellison, *What was New York Times Reporter James Risen's seven-year legal battle really for?*, VANITY FAIR (Mar. 17, 2015), <https://www.vanityfair.com/news/2015/03/james-risen-anonymous-source-government-battle>; James Risen, *The Biggest Secret: My Life as a New York Times Reporter in the Shadow of the War on Terror*, INTERCEPT (Jan. 03, 2018), <https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/>.

¹⁰¹ Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), <https://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html>.

¹⁰² Callum Borchers, *Jeff Sessions Might Subpoena Journalists to Reveal Leakers. Mike Pence Once Fought Against That*, WASH. POST (Aug. 04, 2017, 1:58 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/08/04/jeff-sessions-might-subpoena-journalists-to-reveal-leakers-mike-pence-once-fought-against-that/>; Josh Gerstein & Madeline Conway, *Session: DOJ Reviewing Policies on Media Subpoenas*, POLITICO (Aug. 04, 2017, 11:42 AM), <https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329>.

for protecting their sources.¹⁰³ 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;¹⁰⁴ William Bennett Turner, who argued three cases at the Supreme Court, including two under the First Amendment (*Procurier v. Martinez* and *Houchins v. KQED*);¹⁰⁵ David Goldberger, who won four First Amendment cases at the Supreme Court, including *National Socialist Party of America v.*

¹⁰³ Peter Sterne, *Session 'Not Sure' Whether He Would Prosecute Journalists*, POLITICO (Jan. 10, 2017, 4:49 PM), <https://www.politico.com/blogs/on-media/2017/01/sessions-not-sure-whether-he-would-prosecute-journalists-233431>; Erik Wemple, *William Barr On Jailing Journalists: 'I Know There Are Guidelines in Place'*, WASH. POST (Jan. 15, 2019, 2:34 PM), <https://www.washingtonpost.com/opinions/2019/01/15/william-barr-jailing-journalists-i-know-there-are-guidelines-place/>.

¹⁰⁴ Jonathan Peters, *Rod Smolla: Most Off-Campus Internet Speech will be Ruled Beyond the Reach of Public Schools*, HARV. L. & POL'Y REV. (Dec. 05, 2012), <https://harvardlpr.com/2012/12/05/rod-smolla-most-off-campus-internet-speech-will-be-ruled-beyond-the-reach-of-public-schools/> (hereinafter "Smolla Interview").

¹⁰⁵ Jonathan Peters, *Q&A with Bill Turner*, HARV. L. & POL'Y REV. (Aug. 08, 2013), <https://harvardlpr.com/2013/08/08/q-a-with-bill-turner/> (hereinafter "Turner Interview").

Village of Skokie and *McIntyre v. Ohio Elections Commission*,¹⁰⁶ Martin Garbus, the former ACLU legal director whose clients in private practice included Nelson Mandela and Daniel Ellsberg,¹⁰⁷ and Lee Bollinger, the president of Columbia University and a prolific First Amendment scholar.¹⁰⁸ 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.”¹⁰⁹ Another said it was “ignorance” and “the indifference to how and why we protect civil liberties.”¹¹⁰ And yet another said it was the *Citizens United* case, because it perverted the marketplace of ideas.¹¹¹

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*

¹⁰⁶ Jonathan Peters, *Ten Questions on Free Speech with David Goldberger, The First Amendment Lawyer who Won Skokie, McIntyre And Other SCOTUS Cases*, HARV. L. & POL'Y REV. (July 07, 2012), <https://harvardlpr.com/2012/07/20/ten-questions-on-free-speech-with-david-goldberger-the-first-amendment-lawyer-who-won-skokie-mcintyre-and-other-scotus-cases/>.

¹⁰⁷ Jonathan Peters, *Martin Garbus: Citizens United Is the Most Serious Threat Today to Free Speech, and “There Are Two First Amendments”*, HARV. L. & POL'Y REV. (Nov. 05, 2012), <https://harvardlpr.com/2012/11/05/martin-garbus-citizens-united-is-the-most-serious-threat-today-to-free-speech-and-there-are-two-first-amendments/> (hereinafter “Garbus Interview”).

¹⁰⁸ Jonathan Peters, *Lee Bollinger: “We Can Expect Censorship Anywhere to be Censorship Everywhere”*, HARV. L. & POL'Y REV. (Mar. 15, 2012), <https://harvardlpr.com/2012/03/15/lee-bollinger-we-can-expect-censorship-anywhere-to-be-censorship-everywhere/>.

¹⁰⁹ Peters, *Smolla Interview*, *supra* note 104.

¹¹⁰ Peters, *Turner Interview*, *supra* note 105.

¹¹¹ Peters, *Garbus Interview*, *supra* note 107.

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

¹¹² *Archive of Columns by Jonathan Peters*, COLUM. JOURNALISM REV., <https://www.cjr.org/author/jonathan-w-peters> (last visited Oct. 17, 2019).

¹¹³ See generally, *The Basics: Using Freedom of Information Law*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/news-media-and-law-spring-2014/basics-using-freedom-inform/>.

¹¹⁴ Jonathan Peters, *When Governments Sue Public-Records Requesters*, COLUM. JOURNALISM REV. (June 30, 2015), https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php

¹¹⁵ Jonathan Peters, *Why Ohio’s New ‘Sunshine Audits’ Could Be Important*, COLUM. JOURNALISM REV. (Apr. 23, 2015), https://www.cjr.org/united_states_project/ohio_sunshine_audits.php.

citizens to obtain law-enforcement records.¹¹⁶ A police chief prohibited a citizen from taking photos of public records as he reviewed them.¹¹⁷ States went to great lengths to keep secret their capital-punishment protocols.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.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.¹²⁰ A

¹¹⁶ Jonathan Peters, *It's Sunshine Week –but Some States Have a Funny Way of Celebrating*, COLUM. JOURNALISM REV. (Mar. 19, 2015), https://www.cjr.org/united_states_project/sunshine_week_mugshots_recording_cops.php.

¹¹⁷ Jonathan Peters, *Nice Try, Government Officials, but This Time the Law Is on the Citizen's Side*, COLUM. JOURNALISM REV. (Aug. 27, 2015), https://www.cjr.org/united_states_project/government_officials_can_get_creative.php.

¹¹⁸ Jonathan Peters, *Why Larry Flynt's Latest Court Victory is Good for the Media*, COLUM. JOURNALISM REV. (Apr. 09, 2015), https://www.cjr.org/united_states_project/larry_flynt_missouri_death_penalty.php.

¹¹⁹ Peters, *supra* note 117.

¹²⁰ See, e.g., Jon Allsop, *Another Brutal week for American Journalism*, COLUM. JOURNALISM REV. (July, 02, 2019), https://www.cjr.org/the_media_today/media_layoffs_the_vindicator.php; Nathan Bomey, *Newspapers, Digital News Operations Hit with Layoffs as Disruption*, USA TODAY (Aug. 01, 2019, 9:30 AM), <https://www.usatoday.com/story/money/2019/08/01/newspaper-layoffs-digital-journalism-job-cuts-pew-research-center/1877757001/>; Elizabeth Grieco, Nami Sumida, & Sophia Fedeli, *About a Third of Large U.S. Newspapers have Suffered Layoffs Since 2017*, PEW RES. CTR. (July 23, 2018), <https://www.pewresearch.org/fact-tank/2018/07/23/about-a-third-of-large-u-s-newspapers-have-suffered-layoffs-since-2017/>; Kristen Hare, *Report: The Number of*

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.¹²¹ They were right.¹²²

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.¹²³ Established news

Multiple Layoffs at Newspapers Nearly Doubled From 2017 To 2018, POYNTER (Aug. 01, 2019), <https://www.poynter.org/reporting-editing/2019/report-the-number-of-multiple-layoffs-at-newspapers-nearly-doubled-from-2017-to-2018/>; Gerry Smith, *Journalism Job Cuts Haven't Been this Bad Since the Recession*, BLOOMBERG (July, 01, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-07-01/journalism-layoffs-are-at-the-highest-level-since-last-recession>.

¹²¹ David Cuillier, *Forecasting Freedom of Information: Why it Faces Problems – and How Experts Say They Could Be Solved*, KNIGHT FOUND. (Mar. 2017), <https://www.knightfoundation.org/reports/forecasting-freedom-of-information> (Full disclosure: I was one of the experts interviewed).

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.¹²⁴

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.¹²⁵ He said Facebook should not be an arbiter of speech.¹²⁶ He criticized countries like China that restrict digital technologies.¹²⁷ 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 *Schenk v. United States*.¹²⁸ He defended the

them make the thin-ice judgments. So it’s usually smart to think in advance about whom you’d call if an issue arose.” *Id.*

¹²⁴ *Id.*

¹²⁵ Mark Zuckerberg, *Standing for Voice and Free Expression*, FACEBOOK (Oct. 17, 2019), <https://www.facebook.com/notes/mark-zuckerberg/standing-for-voice-and-free-expression/10157267502546634/>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *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.”¹²⁹ 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.”¹³⁰

Reactions to the speech were generally negative. Kara Swisher, editor of *Recode*, called it “pretty thin intellectually.”¹³¹ 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.”¹³² 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”,¹³³ and Andrew Marantz’s

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Michel Martin, *Kara Swisher's Take On Mark Zuckerberg's 'Free Speech' Speech*, NPR, (Oct. 20, 2019), <https://www.npr.org/2019/10/20/771755317/kara-swisher-s-take-on-mark-zuckerberg-s-free-speech-speech>.

¹³² Jillian C. York, *Mark Zuckerberg's Promise to Respect Free Expression Is So Far Just Empty Words*, VICE (Oct. 17, 2019, 2:58 PM), https://www.vice.com/en_us/article/mbmk7b/mark-zuckerbergs-promise-to-respect-free-expression-is-so-far-just-empty-words.

¹³³ Masha Gessen, *Mark Zuckerberg Doesn't Know What the First Amendment Is For*, THE NEW YORKER (Oct. 22, 2019), <https://www.newyorker.com/news/our-columnists/mark-zuckerberg-doesnt-know-what-the-first-amendment-is-for>.

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

¹³⁴ Andrew Marantz, *Mark Zuckerberg Still Doesn’t Get It*, THE NEW YORKER (Oct. 19, 2019), <https://www.newyorker.com/news/daily-comment/mark-zuckerberg-still-doesnt-get-it>.

¹³⁵ *Id.*

¹³⁶ Mathew Ingram, *Facebook Says It Plans to Put \$300M into Journalism Projects*, COLUM. JOURNALISM REV. (Jan. 15, 2019), https://www.cjr.org/the_new_gatekeepers/facebook-journalism-funding.php.

¹³⁷ Craig Timberg, *Facebook to offer ‘News’ tab for users—and pay (some) publishers for their work*, WASH. POST (Oct. 23, 2019, 12:12 PM), <https://www.washingtonpost.com/technology/2019/10/23/facebook-offer-news-tab-users-pay-some-publishers-their-work/>.

¹³⁸ Max Willens, *Facebook tries again by hiring journalists to staff its news tab*, DIGIDAY (Aug. 20, 2019), <https://digiday.com/media/facebook-tries-hiring-journalists-staff-news-tab/>.

¹³⁹ Benjamin Mullin and Sahil Patel, *Facebook Offers News Outlets Millions of Dollars a Year to License Content*, WALL STREET J. (Aug. 8, 2019, 6:37 PM), <https://www.wsj.com/articles/facebook-offers-news-outlets-millions-of-dollars-a-year-to-license-content-11565294575>.

journalists in how to leverage social tools to in their reporting.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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

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>.

¹⁴² Mathew Ingram, *The Facebook Armageddon*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/facebook-media-buzzfeed.php.

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

¹⁴³ *Id.*

¹⁴⁴ Mathew Ingram, *Every 30 Seconds, A Female Journalist or Politician Is Harassed on Twitter*, COLUM. JOURNALISM REV. (Dec. 19, 2018),

https://www.cjr.org/the_media_today/female-journalists-harassed-twitter.php.

¹⁴⁵ Jeff Hemsley, *Social Media Giants Are Restricting Research Vital to Journalism*, COLUM. JOURNALISM REV. (July 11, 2019),

https://www.cjr.org/tow_center/facebook-twitter-api-restrictions.php.

¹⁴⁶ See Mathew Ingram, *YouTube Takedowns Are Making It Hard to Document War Crimes*, COLUM. JOURNALISM REV. (Oct. 24, 2019),

https://www.cjr.org/the_media_today/youtube-takedowns-war-crimes.php.

hoaxes and actual fake news rank high on the recommended list and have more success than quality journalism.¹⁴⁷

Behind these problems is the reality that social media platforms and news organizations have decidedly different missions and interests *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 p]latforms 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.¹⁴⁸

¹⁴⁷ Mathew Ingram, *YouTube's secret life as an engine for right-wing radicalization*, COLUM. JOURNALISM REV. (Sept. 19, 2018), https://www.cjr.org/the_media_today/youtube-conspiracy-radicalization.php; Mathew Ingram, *YouTube has done too little, too late to fight misinformation*, COLUM. JOURNALISM REV. (Apr. 4, 2019), https://www.cjr.org/the_media_today/youtube-misinformation.php.

¹⁴⁸ Nabihah Syed, *Real Talk About Fake News: Towards A Better Theory for Platform Governance*, 127 YALE L.J. FORUM 337, 357 (2017) (alteration added).

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.¹⁴⁹ 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.¹⁵⁰ The platforms are developing a de facto free-speech jurisprudence, against the background of their business interests and self-professed democratic values.¹⁵¹ 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.

¹⁴⁹ See Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989 (2017).

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.*