

Countering the Mosaic of Threats to Press Functions

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The idealized press, which generated effusive praise from the Supreme Court during the golden age of media law in the late twentieth century, was a mature, economically robust, and politically powerful industry. As an industry, the press in that era fulfilled a number of key functions, such as setting the agenda of public issues, swaying the conduct of political campaigns and elections, informing the public of current events, and curating a common understanding of newsworthy developments. The news media had a comfortable relationship of give-and-take with the government but also acted as the Fourth Estate by uncovering, publishing, and amplifying information about government malfeasance¹ and political disinformation.² Against this backdrop, courts praised newspapers for their multiple functions as public proxies, audience educators, and watchdogs tasked with keeping government abuse in check. In turn, surveys indicated that the public had faith in the press.³

But over the last several decades, a confluence of economic, technological, and sociopolitical change has upended both the news industry and the public's view of it. While it is unrealistic to hope for a return to the old days of the press, the

¹ In the most high-profile example, The Washington Post's reporting on the Watergate break-in helped end Richard Nixon's presidency. For the reporters' account, see CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974). Under threat of impeachment and with his claim of executive privilege rejected by the Supreme Court, President Nixon resigned from office on August 9, 1974. See *United States v. Nixon*, 418 U.S. 683 (1974).

² In publishing excerpts from the "Pentagon Papers," The New York Times and Washington Post were combating government lies about the conduct and progress of the Vietnam war (as well as testing the boundaries of prior restraint doctrine under the First Amendment). See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

³ See, e.g., Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (July 5, 2022), <https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx>. Public approval varied over the years. See Erin C. Carroll, *Beyond the Watchdog: Using Law to Build Trust in the Press*, 3 J. FREE SPEECH L. 57, 60 (2023) and sources cited therein.

functions the press has historically played remain essential to democracy. Indeed, one can imagine the press playing an even more robust role today in combating disinformation disseminated by a variety of sources. Yet the news industry today is no longer economically powerful: Newspapers are in peril, television and cable viewership are in decline, news deserts dot the landscape, and jaw-dropping numbers of journalistic staff cuts have drained expertise from newsrooms.⁴ Social media have cannibalized content and replaced a scarcity of frequencies with a scarcity of attention, the news industry has far less political power, cell phones have allowed everyone to claim citizen journalist status, both the right and the left have complaints about the asserted bias of press organs, and a common understanding of public issues is a pipe dream in a highly polarized political landscape.

Under these circumstances, the fate of the press's functions is an existential question both for the news media as we know it and for contemporary American democracy. Managing the complexity of this kind of information environment⁵ calls for independent and principled engagement with issues of public concern by those who hew to journalistic values, such as truth, verification, completeness, investigation, and context. It also calls for appropriate legal protections.

In this chapter, I seek to explore the evolving mosaic of threats facing the American press and consider what, if any, legal rights the wielders of the press function need in response. I begin by identifying a set of key threats facing the press – economic, legal, technological, and audience-based developments. I then propose some initial responses to these threats along five dimensions – funding conditions, a mixed legal strategy, artificial intelligence (AI) policy, industry restructuring, and trust enhancement. I also call for a commitment to press self-examination from the vantage point of fundamental journalistic values in a democracy.

7.1 EVOLVING THREATS TO PRESS FUNCTIONS

Challenges to press functions today can be grouped into four categories – institutional/journalistic, legal, technological, and audience-based. In combination, they

⁴ Pew Research Center, *State of the Media*, <https://www.pewresearch.org/topic/news-habits-media/news-media-trends/state-of-the-news-media-project/>; Michael Lipka & Elisa Shearer, *Audiences Are Declining for Traditional News Media in the U.S. – With Some Exceptions*, PEW RSCH. CTR. (Nov. 28, 2023), <https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions/>.

⁵ For example, the tech platforms from which many Americans now get their news do not – and do not seek to – perform the press's traditional functions. Falsity and conspiracy theories travel virally online. At the same time, the business models and technological limitations of these information intermediaries inhibit effective content moderation and increase the circulation of polluted information.

undermine journalistic norms and routines, erode the perceived legitimacy of the press, and hamper its democracy-promoting work.

7.1.1 *Economic Instability and Its Institutional/Journalistic Consequences*

The combination of declining advertising revenue and increased profit-maximizing public company ownership has led to a financial crisis for the news sector. Many Americans now rely on social media for their news, rather than on local or national news outlets.⁶ The social media sector has not shouldered the cost of lost traffic to news sites or adequately compensated the press for the use of its content. The economic decline of the news industry has led to compromised journalistic norms, a disaster for journalistic personnel, and, with few exceptions, a practical abandonment of the press's watchdog role.⁷

Traditional editorial judgments have been unduly compromised by the desire to retain audiences, including via story selection designed to produce clicks.⁸ Pressures on journalists have increased their reliance on social media to generate stories. Insufficiently mindful of the questionable information environment, reporters have participated in normalizing bias and information skews bred online by reporting on, and thereby amplifying, unreliable material originating online. Established news outlets have served as megaphones for conspiracy theories. The rise in the use of native advertising in the news section has joined newsworthiness decisions driven by audience analytics to blur the traditionally sacrosanct line between advertising and the news.⁹ The failure of press institutions to resist commercial pressures as they chase partisan audiences has also resulted in bleed-through between opinion and news programming – as evidenced by Fox News' role in amplifying the “stolen” election trope regarding the 2020 presidential election. More generally, claims of political and ideological partisanship by media outlets have been made by both

⁶ See, e.g., Jacob Liedke & Jeffrey Gottfried, *U.S. Adults Under 30 Now Trust Information from Social Media Almost as Much as from National News Outlets*, PEW RSCH. CTR. (Oct. 27, 2022), <https://www.pewresearch.org/short-reads/2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-almost-as-much-as-from-national-news-outlets/>. Recently, only 2 percent of the people offered free newspaper subscriptions to their local newspapers in Philadelphia in an academic experiment accepted the offer. Kevin Lind, *They Gave Local News Away for Free. Virtually Nobody Wanted It*, COLUM. JOURNALISM REV. (Feb. 8, 2024), https://www.cjr.org/business_of_news/they-gave-local-news-away-for-free-virtually-nobody-wanted-it.php.

⁷ For example, investigative journalism is a victim of lack of funding and reduced reporter resources and expertise. At a minimum, expense limits the number of investigative pieces published and decisions about choice of investigative targets.

⁸ The strategy of using technology to increase revenue in the digital space through subscriptions and paywalls appears to have worked well only for a few of the powerhouse national outlets (such as *The New York Times*).

⁹ See, e.g., Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647 (2015); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006).

conservatives and progressives for some time. An NPR editor's claim of liberal bias in NPR programming has brought the matter to the forefront of public discussion again recently.¹⁰

Financial problems have also led to the closure of many local and regional news outlets. News deserts and the failure to cover local news, politics, and the state house have had significant negative effects – both on underserved local communities and on efforts to check local and regional corruption.¹¹ The financial strictures have also led publishers to outsource reporting functions to nonemployee journalists, with all the instability for the workers and additional oversight responsibilities that hiring freelancers entails. And with fewer professionally trained news staff, the risk that shoddy reporting practices will affect the quality of the final product rises. Meanwhile, news organizations have been forced increasingly to rely on packaged news and information provided by public relations companies and entities whose partisanship is disguised (sometimes referred to as “pink slime” journalism¹²), which further undermines the independence of the press function.¹³

7.1.2 *The Chilling Effects of Increasing Legal Ambivalence and Uncertainty*

The evolving legal hurdles for the press are both substantive and procedural, including questions about the judicial recognition of constitutional privileges for the press. For example, media law scholars have highlighted the risk to press function from recent attacks on the press-protective *The New York Times Co.*

¹⁰ See, e.g., Benjamin Mullin & Katie Robertson, *NPR in Turmoil After It Is Accused of Liberal Bias*, N.Y. TIMES (Apr. 11, 2024), <https://www.nytimes.com/2024/04/11/business/media/npr-criticism-liberal-bias.html>; Benjamin Mullin, *NPR Suspends Editor Whose Essay Criticized the Broadcaster*, N.Y. TIMES (Apr. 11, 2024), <https://www.nytimes.com/2024/04/16/business/media/npr-suspends-business-editor.html>; Oliver Darcy, *NPR Faces Right-Wing Revolt and Calls for Defunding After Editor Claims Left-Wing Bias*, CNN (Apr. 11, 2024), <https://www.cnn.com/2024/04/11/media/npr-uri-berliner-left-bias-right-wing-media/index.html>.

¹¹ See, e.g., Richard L. Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 200, 209 (2017).

¹² On “pink slime” journalism, see, e.g., Priyanjana Bengani et al., “Pink Slime”: *Partisan Journalism and the Future of Local News*, TOW CTR. FOR DIGITAL JOURN., https://towcenter.columbia.edu/sites/default/files/content/%E2%80%99CPink%20Slime%E2%80%99D_%20Partisan%20journalism%20and%20the%20future%20of%20local%20news.pdf (describing it as a subset of partisan news – mimicking the appearance of local news but “whose primary original contribution is partisan content or reputation laundering that lacks transparency around intent, authorship, ownership, and funding.”)

¹³ Much “news” is produced today by entities with propagandistic goals distinct from journalistic values. See, e.g., *id.* Think tanks funded by ideological groups, new outfits such as Project Veritas that seek the mantle of the press when convenient but that practice “gotcha” journalism and editorial manipulation in order to achieve particular political purposes, untrained individuals who take to YouTube channels to disseminate their conspiracy-inflected take on current events are all dangerous to the goal of a free press working to shore up democracy in the public interest.

v. *Sullivan* doctrine.¹⁴ On the Supreme Court itself, Justices Gorsuch and Thomas have called for reconsideration of the doctrine.¹⁵

In lower courts, some judges appear less disposed than previously to dismiss actual malice-grounded defamation cases despite the heightened pleading requirements of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.¹⁶ In turn, juries have granted multi-million-dollar damage awards, which include massive punitive components.¹⁷ Settlements are also more likely in such circumstances, at least in part because of concerns about revelations in discovery.¹⁸ The possibility of fee-shifting can also be expected to have a chilling effect.¹⁹ Moreover, procedural hurdles under state law, such as supersedeas bonds, have also made it difficult for news organizations to attempt to challenge extensive damages assessed against them.²⁰

¹⁴ See, e.g., Lili Levi, *Disinformation and the Defamation Renaissance: A Misleading Promise of "Truth,"* 57 RICHMOND L. REV. 1235 (2023). Although the Court has not yet granted *certiorari* in numerous cases that have purported to raise the question (and has recently cited *Sullivan's* actual malice standard in a non-defamation, true threats context in *Counterman v. Colorado*, 143 S.Ct. 2106 (2024)), political plaintiffs – such as Sarah Palin – continue to advance claims seeking to undermine the line of cases establishing the boundaries of the actual malice doctrine. See, e.g., Josh Gerstein, *Appeals Court Mulls Reviving Sarah Palin's Suit Against New York Times – Again*, POLITICO (Nov. 6, 2023), <https://www.politico.com/news/2023/11/06/sarah-palin-libel-lawsuit-appeal-00125595>; *Blankenship v. NBCUniversal*, 60 F.4th 744 (4th Cir. 2023), 144 S.Ct. 5 (2023); *Coral Ridge Ministries Media Inc. v. Southern Poverty Law Center*, 6 F.4th 1247, 1251–53 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 2453 (2022). The Court could grant *cert* in the “right” case or a majority could revise the press-protective doctrines adopted in what are typically styled *Sullivan's* “progeny.”

¹⁵ See, e.g., *McKee v. Cosby*, 139 S.Ct. 675 (Thomas, J. concurring in the denial of *certiorari*); *Berisha v. Lawson*, 141 S.Ct. 2424 (Gorsuch, J. & Thomas, J. dissent from denial of *certiorari*).

¹⁶ See, e.g., Levi, *supra* note 14, at n. 176 and accompanying text.

¹⁷ See, e.g., *id.*; Jeremy W. Peters & Katie Robertson, *Fox Will Pay \$787.5 Million to Settle Defamation Suit*, N.Y. TIMES (Apr. 18, 2023), <https://www.nytimes.com/2023/04/18/business/media/fox-dominion-defamation-settle.html>. See also Gabriel Tynes, *Oklahoma Jury Reaches \$25 Million Verdict Against Newspaper in Defamation Case*, CNS (Feb. 5, 2024), <https://www.courthousenews.com/oklahoma-jury-reaches-25-million-verdict-against-newspaper-in-defamation-case/> (reporting on jury award of \$5 million in compensatory and \$20 million in punitive damages on an Oklahoma newspaper for misidentifying an announcer who uttered racist comments into a hot mike during coverage of a high school athletic event.)

¹⁸ See, e.g., Quinta Jurecic, *Dominion v. Fox Is Just the Beginning*, LAWFARE (Apr. 19, 2023), <https://www.lawfaremedia.org/article/dominion-v-fox-is-just-the-beginning> (“the pretrial discovery process allowed Dominion to make public an extraordinary amount of damaging information about Fox’s operations and the mechanics of the Big Lie of 2020 election fraud.”)

¹⁹ Recently, for example, a federal judge ordered a plaintiff in a defamation suit to pay the defendants’ legal fees when his case was dismissed. See Jack Baer, *Patrick Reed Ordered to Pay Legal Fees for Defendants in Dismissed \$1 Billion Lawsuit*, YAHOO SPORTS (Jan. 7, 2024), <https://sports.yahoo.com/patrick-reed-ordered-to-pay-legal-fees-for-defendants-in-dismissed-1-billion-lawsuit-054407072.html>. Although this was press-protective in this case, in which a golfer had sued eighteen news organizations for defamation, the possibility of fee shifting could well threaten press defendants in an atmosphere of growing judicial ambivalence about the press.

²⁰ See, e.g., Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AMER. U. L. REV. 761, 772–73, 815–13 (2017).

State legislatures have entered the arena as well. Although some have enacted laws to protect the press – such as New York’s amendment to its anti-SLAPP law to adopt actual malice as a state requirement²¹ – others, such as Florida, have been considering legislation under which publishing a story only supported by an anonymous source would be considered reckless disregard of falsity, regardless of context.²²

There also appears to be a new willingness to prosecute, enforce, or litigate claims against the press over its coverage. The recent rise of a powerful plaintiff’s defamation bar has already had a notable impact.²³ Many of the pro-press rulings by courts – including the Supreme Court – between the 1960s and the 1980s were litigated by a sophisticated media defense bar on behalf of well-heeled newspapers. Now the press and the media defense bar are hard-pressed to afford rights-expanding litigation. By contrast, Peter Thiel’s funding of Hulk Hogan’s privacy lawsuit against Gawker led to a \$140 million mega-verdict that resulted in the magazine’s bankruptcy.²⁴ The *Gawker* case also indicates the use of doctrines other than defamation law to impose liability on the press for publication.²⁵

²¹ N.Y. Civ. Rights Law § 79-a(1)(a)(1)–(2) (2020).

²² See, e.g., Emily Hockett & Joe Wolf, *For Second Straight Year, Florida Lawmakers Consider Bills Targeting Defamation Law*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Feb. 28, 2024), <https://www.rcfp.org/fla-defamation-analysis-2024/>.

²³ See Levi, *supra* note 14, at 1279–84.

²⁴ See Levi, *supra* note 20. (To be sure, the sensationalist Gawker may not have been the best example of responsible journalism on which to base an argument for increased press rights, but the publication *did* sometimes engage in “real” journalism, and many important constitutional rights have been litigated on behalf of problematic defendants.) Analogously, the open offer of litigation funding by Elon Musk to employees “unfairly treated” by their employers due to their posts on X (formerly Twitter) is another example of increased incentives for the plaintiff’s bar to engage in censorious suits even if the outcome is not a sure bet for the plaintiff. See, e.g., Michael Sin & Vlad Savov, *Musk Promises to Fund Legal Fights of Discriminated X Users*, BLOOMBERG (Aug. 6, 2023), <https://www.bloomberg.com/news/articles/2023-08-06/musk-says-discriminated-x-users-will-get-help-with-legal-bills>. Litigation funding by third parties does not seem to be limited to conservative funders. See Jose Pagliery, *E. Jean Carroll Moves to Keep Who’s Bankrolling Her Trump Rape Lawsuit a Secret*, DAILY BEAST (Apr. 21, 2023), https://news.yahoo.com/e-jean-carroll-moves-keep-190419292.html?guccounter=1&guce_referrer=aHRocHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAABbOzZoquBF7d1yN36b5So7wotmw09x6TfA7VUZLQJPbiFPsFq3b-9CiUORnh2_3S0G-r3_N5J0vdq8CNe1bOfuuKvtTGHYr oJGIXcSCzjJdtvLL0JmKga04fHKYpI06xD3RfIIIbU3ltPv9TzndX5RYU5gPSmcFpu0UDJhMN.

²⁵ For example, business torts such as interference with contractual relations appear increasingly to be drafted into service against press coverage. Privacy law presents a particularly attractive avenue as well. Clever plaintiff’s lawyers are also bringing suits under corporate law against news organizations. In a recent action against Fox Corp., for example, the plaintiffs have argued in the Chancery Court of Delaware that the board of Fox News’s parent company breached its fiduciary duties of oversight under Delaware corporate law by allowing Fox News to propagate false programming that put the company at risk of catastrophic legal liability for defamation. *Schwartz v. Murdoch & Fox Corp.*, <https://www.dandoddiary.com/wp-content/uploads/sites/893/2023/04/Fox-Derivative-Lawsuit-Complaint.pdf>.

The plaintiff’s defamation bar has also used the demand letter requesting pre-publication review – with extensive document retention demands – as a tool to attempt to deter

In addition to publication, there are also evolving hurdles to the press's news-gathering functions.²⁶ For example, on the criminal side, there has been an increase since the Obama administration in the number of instances in which the government has threatened reporters with liability under the Espionage Act for refusing to reveal their sources. Concerns with freedom of the press and worries about the criminalization of the normal practices of national security reporters led many to object to the Department of Justice's (DOJ) request for Julian Assange's extradition to the United States to face trial on Espionage Act charges.²⁷ The Computer Fraud and Abuse Act (CFAA) has recently been used to justify the indictment of journalist Tim Burke.²⁸ The government's ability to get access to a reporter's notes and information via subpoenas to third-party platforms (such as email or social media services) has been a practical problem. Outside the criminal context, access to information has also been cut significantly – and certainly since the COVID-19 pandemic.²⁹ In addition, newsgathering is indirectly impeded by the popularity of nondisclosure agreements (NDAs) signed by sources.³⁰

To be sure, the press can still count on significant legal protection – particularly for publication – under current constitutional, statutory, and common law. But the trends described here suggest an increasingly skeptical attitude by courts, legislatures, and government actors toward the press in the legal sphere. This mixed legal picture presents its own complex type of threats to the press, including the particular incentive effects of uncertainty and the need for a variety of responsive legal and policy strategies.

publication. See Lachlan Cartwright, *New York Times, NBC, and '60 Minutes' Bigwigs Hired These Media Assassins to Fight #MeToo Stories*, DAILY BEAST (Jul. 20, 2018), <https://www.thedailybeast.com/60-minutes-boss-hired-law-firm-over-metoo-story>.

²⁶ For a superb account of shifts in the “First Amendment equilibrium” between the press and the executive, see generally Christina Koningisor & Lyrrisa Lidsky, *First Amendment Disequilibrium*, 110 VA. L. REV. 1 (2024) (discussing, *inter alia*, the law governing access to national security materials, confidential source protection, and informational access rights).

²⁷ See, e.g., Mathew Ingram, *Can Julian Assange Appeal His Extradition to the US? A British Court Will Decide*, COLUM. JOURNALISM REV. (Feb. 22, 2024), https://www.cjr.org/the_media_today/assange_appeal_extradition_wikileaks_press_freedom.php. Assange agreed to a plea deal in June 2024; the impact of this plea deal on the work of national security journalism is not yet clear.

²⁸ See, e.g., Sarah Jeong, *When Does a Journalist Become a Hacker?*, THE VERGE (Feb. 23, 2024), <https://www.theverge.com/2024/2/23/24081656/tim-burke-journalism-hacking-cfaa>.

²⁹ See, e.g., GAO, *Freedom of Information Act: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs* (Jan. 26, 2022), <https://www.gao.gov/products/gao-22-105040>.

³⁰ Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Feb. 14, 2018), https://www.cjr.org/special_report/nda-agreement.php; Gabriel Arana, *Journalists Aren't as Tied by NDAs as They Think*, COLUM. JOURNALISM REV. (Dec. 11, 2017), <https://www.cjr.org/watchdog/journalists-nda-nondisclosure-harassment-metoo-newsrooms.php>.

7.1.3 *The Dual Effects of Technological Change, Including Generative AI*

Many functional problems for the press – from newsgathering to story generation and topic selection – are bound up with technology.³¹ For example, due to the availability of spyware like Pegasus, surveillance cameras in the streets and on commercial buildings, Ring cameras on people's houses, and the ubiquitous cell phone camera, Bob Woodward and Carl Bernstein's meeting with Deep Throat could never remain secret today. Technological advances have also brought danger to the journalistic enterprise and to press workers, including through online harassment, particularly of reporters of color, women reporters, and non-Christian reporters.³²

The evolving technological challenges for the press function are likely to metastasize in the age of generative AI. Many newsrooms are already using generative AI to accomplish a variety of tasks.³³ The current rhetoric about generative AI is largely binary and hyperbolic. On the one end of spectrum, optimistic media observers identify potentially powerful benefits that generative AI could bring to journalism, particularly in saving time and effort in routinizing a variety of tasks and helping small newsrooms.³⁴ Other observers, however, have a more dystopian vision of generative AI's effects on journalism – including concerns about the possibility of training bias and the unequal distribution of access to the tools of generative AI around the world.³⁵

One major concern is the prospect of the “daily me” on steroids.³⁶ The CEO of OpenAI opined to Axios that large language models would provide hyper-personalized

³¹ This is not only with respect to the technological tools reporters can use for their newsgathering functions, but also with respect to the challenges posed for their work by the imperatives of developing technology. With respect to newsgathering as such, for example, journalists are now faced with increasing technological surveillance by government and private users and challenges to source anonymity and access to their preparatory materials. Just as the availability of technology to allow the mining of large datasets of information can enable the discovery of sophisticated stories about systemic problems, technological advances and the structure of technological tools can affect the types of stories that the press covers and news organizations' values.

³² See Lili Levi, *Racialized, Judaized, Feminized: Identity-Based Attacks on the Press*, 20 FIRST AM. L. REV. 35 (2022) and sources cited therein. Such harassment occurs constantly online for at least some journalists, and sometimes even crosses over IRL. *Id.* It stands to reason that campaigns of harassment have chilling impacts, especially over time.

³³ Publishers argue that relying on generative AI for routine journalistic tasks will leave room for professional journalists to engage in deeper and better work in the public interest. While this is theoretically possible, the reality of the cost-cutting at news organizations in the recent past casts some doubt on whether news organizations – particularly corporate-owned businesses – will consistently be willing to expend money saved by AI on reporters and expensive deep-dive journalism. For a critique of the trend toward “digital piecemeal,” see Bengani et al., *supra* note 12 (citing Nicole Cohen). These are issues that deserve to be taken up at a minimum in contract negotiations and union talks.

³⁴ See, e.g., Charlie Beckett & Mira Yaseen, *Generating Change: A Global Survey of What News Organisations Are Doing with AI*, JOURNALISMAI (2023).

³⁵ See *id.* (describing some journalist responses).

³⁶ Cass R. Sunstein, REPUBLIC.COM 2.0 (2007) (elaborating on the “daily me,” a notion introduced by Nicholas Negroponte).

content.³⁷ If the American public continues to be politically polarized, then won't this degree of hyper-personalization lead to an even more fractured polity? In a related vein, some worry that the efficiency-based logic of AI tools could potentially transform the nature of news in ways inconsistent with traditional journalism.³⁸ The answer may depend on AI design³⁹ and the sophistication of news organizations' generative AI use policies and negotiation tactics in their dealings with AI companies.

Another concern for news purveyors is the likelihood of increased claims of copyright infringement, defamation, invasion of privacy, breach of rights of publicity, and other such allegations.⁴⁰ Much attention must be paid to the mix of AI production and human review in order to reduce potential liability.⁴¹

Finally, the increased use of AI in newsrooms carries obvious concerns about the impact on public trust in journalism – which, as I describe below, is reportedly at a troubling low already.

7.1.4 *The Politicization of the Press and Loss of Faith*

An undergirding problematic development is the politicization of the press and the public's loss of faith in the media. Both anecdotal evidence and public surveys have shown a marked decline in institutional trust, including of the press, in the past decade in the United States.⁴² President Donald Trump's unending attacks on the

³⁷ See, e.g., Jim Love, Sam Altman: The Future of AI Could Be “Troubling,” AXIOS (Jan. 17, 2024), <https://www.itworldcanada.com/post/sam-altman-the-future-of-ai-could-be-troubling>.

³⁸ Felix M. Simon, *Artificial Intelligence in the News: How AI Retools, Rationalizes, and Reshapes Journalism and the Public Arena*, TOW CTR. FOR DIGITAL JOURN., Dec. 2023, at 3–5, <https://academiccommons.columbia.edu/doi/10.7916/nem5-3vo6>.

³⁹ In Finland, for example, the personal “news assistant” Voitto offers subscribers article summaries relating to subjects of their interest but also ensures that a variety of viewpoints are reflected. See Barbara Gruber, *Facts, Fakes and Figures: How AI is Influencing Journalism*, KULTURTECHNIKEN 4.0, GOETHE-INSTITUT, <https://www.goethe.de/prj/k40/en/lan/aij.html>. Particularly if hyper-personalization could lead to financial security for those engaging in the press's functions, perhaps attention to design could reduce concerns about echo chamber effects. To be sure, however, the failure of personalized news app Artifact, brainchild of Instagram's co-founders, demonstrates that these types of tools have not yet achieved financial sustainability. So the hype of personalization has not yet borne fruit in practice, though it will likely do so in the future.

⁴⁰ Outside the press context, training-focused copyright litigation is currently ongoing. For recent discussions of AI liability, see, e.g., Peter Henderson et al., *Where's the Liability in Harmful AI Speech?*, 3 J. FREE SPEECH L. 589 (2023); Eugene Volokh, *Large Libel Models? Liability for AI Output*, 3 J. FREE SPEECH L. 489 (2023). In addition, query how courts will apply the *Sullivan* doctrine to articles based on false information produced by generative AI. At least one defamation claim is currently being litigated against OpenAI. See Ashley Belanger, *OpenAI Faces Defamation Suit After ChatGPT Completely Fabricated Another Lawsuit*, ARS TECHNICA (June 9, 2023), <https://arstechnica.com/tech-policy/2023/06/openai-sued-for-defamation-after-chatgpt-fabricated-yet-another-lawsuit/>.

⁴¹ There have been many reports of “hallucinations” by generative AI tools. The likelihood of error and bias in the work of generative AI services is exacerbated by the fact that over time, the training data for the large language models will include AI LLMs themselves, including their hallucinations.

⁴² See Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232 (2018).

mainstream press as purveyors of “fake news” and “enemies of the American people” doubtless served as a factor in reinforcing that sense of public distrust.⁴³ One of the most harmful effects of such delegitimizing tactics is the politicization of the press, which results in generalized and partisan doubt about everything produced by a particular outlet, rather than simply skepticism about any specific news story.⁴⁴ If the audience does not believe what the press reports, what is gained even with journalistic or legal reform?⁴⁵ As noted above, these effects seem likely to become even more dismal if, as is likely, the use of generative AI optimizes the dissemination of false information via increasingly convincing deepfakes.

7.2 THE MULTIPLICITY OF RESPONSES NEEDED

These various challenges to the functions of the press cannot be solved by interventions in any one area alone. The particular sorts of threats identified should influence the particular responses, and this should be an iterative and evolutionary process.

⁴³ The news media in general no longer constitute the kind of powerful industry of the past, and former President Trump’s attacks on the media prove that politicians feel far less at risk if they criticize the press.

⁴⁴ Whether audiences don’t believe anything because they don’t know what to believe, or are particularly credulous when they hear political conspiracy theories, or simply respond according to their subconscious biases and heuristics (e.g., confirmation bias), or deploy different degrees of skepticism depending on the party affiliation of the speaker, the widespread distrust of the American people in the press – or at least in the press whose politics do not align with theirs – is a major stumbling block in ensuring the effectiveness of the press in its various functions.

⁴⁵ The audience’s lack of faith in the press is paralleled by rising objections within the journalism profession itself to the twentieth-century consensus on objectivity and neutrality as journalistic aspirations. See, e.g., Levi, *supra* note 32; Levi, *supra* note 42. While many journalists and news organizations still articulate norms of neutrality and impartiality, some reporters have been challenging the false equivalencies of “he said-she said” reporting and calling for press outlets to take substantive positions on controverted social issues and events. Journalists who see reporting primarily as a tool to advance social justice and those who suggest that a commitment to anti-racism may require distancing from journalistic objectivity have been leading the charge to expand journalistic norms. See sources cited in Levi, *supra* note 32. Some news organizations, such as The Intercept, are explicit in their commitments to partisan journalism and replace what they consider false objectivity with ideological transparency. At the same time, this challenge to traditional journalistic norms of neutrality has led to conflict within major mainstream news organizations. See, e.g., Alexandra Bruell, *New York Times Bosses Seek to Quash Rebellion in the Newsroom*, WALL ST. J. (Apr. 12, 2024) <https://www.wsj.com/business/media/new-york-times-reporters-rebellion-a6951d91>. See also A. G. Sulzberger, *Journalism’s Essential Value*, COLUM. JOURNALISM REV. (May 15, 2023), https://www.cjr.org/special_report/ag-sulzberger-new-york-times-journalisms-essential-value-objectivity-independence.php (arguing for continuing benefits of journalistic independence and distinguishing between independent and advocacy journalism.)

In a parallel institutional move, the press ecosystem now reflects more explicit ideological divergence on political issues than heretofore, even among mainstream news outlets, and greater political polarization and openness to disinformation. See YOCHAI BENKLER ET AL., *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* (2018).

7.2.1 Funding to Reverse Consequences of Economic Decline

Everyone agrees that the question of funding is existential for today's hollowed-out press, although there is variation in the recommendations for achieving stable funding.⁴⁶ While enhanced funding for journalism is critical, I argue that evaluating funding recommendations should require testing vis-à-vis public trust and comparative evaluations of viability.

Attention to funding does not mean that we should blindly shore up the existing institutional press simply because it has traditionally performed press functions. The history of the American press reveals a variety of different funding strands – an approach that could, in principle, provide helpful checks and balances. We should not discount the commercial press as some have suggested. There is much to be gained for public discourse from the systematic exploration of events and institutions by well-trained reporters hewing to shared professional standards – and such journalists inhabit commercial as well as nonprofit spaces. While many have expressed concern about philanthropic funding of the press by billionaires, a more granular look at alternative philanthropic scenarios raises different issues (and perhaps less

⁴⁶ It is beyond the scope of this chapter to address the details of the numerous proposals for financial sustainability being explored by scholars and media activists. See Damian Radcliffe & Nick Mathews, *Building a Stronger Local Media Ecosystem: The Role of Media Policy*, COLUM. JOURNALISM REV (April 20, 2023), https://www.cjr.org/tow_center_reports/building-a-stronger-local-media-ecosystem-the-role-of-media-policy.php (providing an overview of some proposals); Koningisor & Lidsky, *supra* note 26, at 67–69; Cameron Joseph, *Can Legislation Save Journalism in California?*, COLUM. JOURNALISM REV. (Feb. 16, 2024), https://www.cjr.org/the_media_today/california_news_bill_buffy_wicks.php. Some focus on ways for news organizations to obtain payments from social media platforms and generative AI companies for the use of their content (some through antitrust law and others through new regulatory models). Others explore philanthropic and not-for-profit approaches. See, e.g., Cameron Joseph, *This Nonprofit Has Newsrooms in All 50 State Capitals. Is It the Future of State Journalism?*, COLUM. JOURNALISM REV. (April 5, 2024), https://www.cjr.org/the_media_today/states-newsroom-local-politics-policy-model.php. Still other suggestions look to direct or soft government subsidies and taxation options. Some suggest expansion of the collaborative project Report for America. <https://www.reportforamerica.org/>. There are many possibilities and little clear consensus. See, e.g., Jeff Jarvis, *The California Journalism Preservation Act Would Do More Harm Than Good. Here's How the State Might Better Help News*, NIEMANLAB (Apr. 10, 2024), <https://www.niemanlab.org/2024/04/the-california-journalism-preservation-act-would-do-more-harm-than-good-heres-how-the-state-might-better-help-news/> and sources cited therein.

Financial problems have been an important driver fueling at least some criticisms of the American press – for sensationalism, carelessness, and engagement-focused bias – and must therefore be a prime focus in stabilizing press functions going forward. And no single funding avenue will be able to replace the rich profits of newspapers in the mid to late twentieth century. The problem may be enhanced when generative AI tools summarize the content of many news stories in response to user prompts. The financial threats can be intensified if such generative AI summaries remove or minimize story branding and provenance and obviate the need to link to publishers' sites – factors that could help support the press economically in performing its democratic functions. See Simon, *supra* note 38, at 35.

ideological ones).⁴⁷ And while public funding is attractive in principle and likely necessary, a pragmatic approach must focus on the specific design of the initiatives, including its realism and legal viability. This is particularly true when the explicit political partisanship of today seems to lead people to accept politically motivated censorship so long as it is consistent with their political views. Media scholarship should further engage in close comparative evaluation of funding proposals – particularly from the pragmatic point of view of practicability today.⁴⁸

Furthermore, it is important to recognize that journalism funding questions and issues of public trust should be deeply tied. Unlike the media landscape of the late twentieth century, even a well-funded news ecosystem today will consist of a diversity of outlets, voices, and ideological vantage points – some explicitly partisan and some not. We cannot assume that declining public trust in the press will be reversed simply by better and more stable funding of the entire sector. The public's trust in the bona fides and accuracy of the press will require more – including, perhaps, more transparency about funding and point of view.⁴⁹ Perhaps more and better watchdog journalism or even different forms of journalism, such as community journalism, could improve the public perception of the press's work.⁵⁰ Considering the issue of public trust in evaluating press funding can optimize the inquiry for public interest reporting.

7.2.2 Countering Legal Ambivalence

Almost 60 percent of American journalists, regardless of the political leanings of their outlet's audiences, report being very or extremely concerned about possible

⁴⁷ See, e.g., David Folkenflik, *Philanthropies Pledge \$500 Million to Address 'Crisis in Local News'*, NPR (Sept. 7, 2023), <https://www.npr.org/2023/09/07/1198029284/macarthur-knight-journalism-news-press-forward>; Jennifer Preston et al., *Journalism and Philanthropy: Growth, Diversity, and Potential Conflicts of Interest*, MEDIA IMPACT FUNDERS (Oct. 2023), <https://mediainpactfunders.org/wp-content/uploads/2023/08/MIF-report-updated-.pdf>.

⁴⁸ One pragmatic warning: economic sustainability recommendations should be realistic when proposed, albeit with full recognition that what is realistic can change. Right now, for example, Congress is unlikely to increase its spending on public media although critics who point to the United States's abysmal comparative position on such funding are surely right as a matter of principle. Radcliffe & Mathews, *supra* note 46 (discussing stalled Congressional initiatives to bolster local journalism); Naomi Forman-Katz & Sarah Naseer, *Most U.S. Journalists Are Concerned About Press Freedoms*, PEW RSCH. CTR. (May 2, 2023), <https://www.pewresearch.org/short-reads/2023/05/02/most-u-s-journalists-are-concerned-about-press-freedoms/>. The slow-and-steady approach, focusing on achievable goals, is not definitionally inconsistent with commitments to broader and more radical change over time.

⁴⁹ It is at least possible that increased transparency about the funding, training, precommitments, political viewpoints, and ideological inclinations of the providers of news could help consumers assess the reliability of the information they receive.

⁵⁰ See, e.g., Carroll, *supra* note 3. While Professor Carroll suggests that watchdog journalism, with its adversarial character, may not be the right model to respond to public distrust today, I do not see public distrust as a singular phenomenon. Exposure to reliable examples of a diversity of types of journalism – including the watchdog reporting for which I believe there is an increasing need in both the government and private corporate contexts – can mitigate the distrust of a variety of publics with different reasons for lack of institutional faith.

restrictions on press freedoms.⁵¹ Regarding the legal challenges facing the press function, press advocates call for new affirmative rights to assist journalists in doing their work as watchdogs. For the past decade, they have been unsuccessful in persuading Congress to pass federal newsgathering protections in the form of a federal shield law. In 2024, however, the House passed, and there was bipartisan support in the Senate for, the PRESS Act – a very broad set of protections against journalists having to identify their sources and governments having easy access to journalistic records from third-party providers.⁵² Such support seemed to indicate a governmental recognition of the benefits of broad newsgathering access for those who engage in the press function.

Even a broadly protective shield law does not eliminate the need for additional assistance for newsgathering efforts, however.⁵³ More work needs to be done to obtain legal support to boost the now-fragile press's watchdog functions – including, for example, to combat state law anti-press initiatives; to seek clarifications of the Espionage Act and other press-affecting statutes such as the CFAA; and to enhance waning documentary access under FOIA and state sunshine rules.

Still, the attempt to enact new press protections should not distract from the need to conduct a defensive campaign addressing the erosion of existing rights and agreed-upon practices regarding publication. For example, close attention must be paid to resisting the call to reverse *Sullivan*; addressing changes to existing appeal bond statutes and other procedural hurdles for press defendants; reinforcing state-level protections; and arguing against the strategic and chilling deployment of non-media legal doctrines against the press.

One of the difficulties for this reclamation project is the recent reframing of defamation law as a weapon to combat disinformation.⁵⁴ Press advocates, however,

⁵¹ Forman-Katz & Naseer, *supra* note 48.

⁵² See Protect Reporters from Exploitative State Spying Act, H.R. 4250, 118th Cong. (2d Sess. 2024); Protect Reporters from Exploitative State Spying Act, S. 2074, 118th Cong. (1st Sess. 2023), <https://www.congress.gov/bill/118th-congress/house-bill/4250>. See also Clayton Weimers & Seth Stern, Opinion, *Why Political Rivals Can and Should Come Together for Press Freedom*, THE HILL (Feb. 1, 2024), <https://thehill.com/opinion/congress-blog/4442351-why-political-rivals-can-and-should-come-together-for-press-freedom/>. Because of President Trump's well-known attacks on the mainstream press, it would have been useful if the Act had been passed before the start of the second Trump Administration. But the bipartisan measure – which had been brought to the Senate floor in mid-December 2024 for passage by unanimous consent – did not advance at that time due to objection by Senator Tom Cotton.

⁵³ Some examples worth considering include improved informational access rights, state and federal sunshine act reforms, press-protective amendments to the Espionage Act and statutes like the CFAA, protections for reporters covering protests etc. See also Koningisior & Lidsky, *supra* note 26, at 60–67 (evaluating judicial and legislative fixes).

⁵⁴ Both the plaintiff's defamation bar and scholars such as David Logan have made this argument, which seems to have influenced the views at least of Justice Gorsuch. See *Berisha v. Lawson*, 594 U.S. ____ (2021) (Gorsuch, J. dissenting from denial of *certiorari*) (citing to David Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L. J. 759, 794 (2020)).

will need to remind the courts (including the Supreme Court) that individual defamation suits are not particularly effective tools to suppress political disinformation in most cases⁵⁵ and that most journalism today is not in fact “fake news” or disinformation as charged. Likewise, they should warn the courts against generalizing on the basis of the most high-profile examples of journalistic failure. It will be necessary to attack developing anti-press presumptions by demonstrating the value of free-press-first principles to tackling democratic challenges today.

All this will involve litigation, as well as lobbying, activism, and scholarly work. One of the more hopeful developments in effective resistance to the “fake news” trope is the increase in the number of media law clinics in American law schools.⁵⁶ A revival of pro bono work by the First Amendment defense bar through outside funding would also further reinforce the project of protecting the existing protections for press functions in legal doctrine and policy.

Because today’s legal approach to press functions reflects both press protections and retrenching trends,⁵⁷ this chapter recommends a mixed legal strategy focusing on both new press-protective legislation to boost accountability journalism and a set of reframed arguments to support traditional protections under federal, state, and common law.⁵⁸ Although legal uncertainty may invite activism by the plaintiffs bar at the same moment that a fragile and risk-averse press has incentives to overinterpret doctrinal ambivalence as prohibition,⁵⁹ uncertainty also leaves room for revision, and the press’s modern legal status is not yet fixed. A two-pronged legal strategy arguing for new newsgathering protections while showing the benefits of existing press rights and their history might bear some fruit before rollbacks of press rights become set in stone.

7.2.3 *Technological Impacts and the Special Case of Generative AI*

Now is the moment for news organizations to address issues of design and boundaries for use of generative AI tools in newsrooms without succumbing to the

⁵⁵ See Levi, *supra* note 14; RonNell Andersen Jones, *Defamation, Disinformation, and the Press Function*, 3 J. FREE SPEECH L. 103 (2023) (accord).

⁵⁶ Karen Sloan, *Hear Ye, Hear Ye! First Amendment Clinics Trending at Law Schools*, LAW.COM (Sept. 24, 2019), <https://www.law.com/2019/09/24/hear-ye-hear-ye-first-amendment-clinics-trending-at-law-schools/>.

⁵⁷ See Koningsor & Lidsky, *supra* note 26, at 34–48 (demonstrating that there has been a reduction in press protections accompanied by an increase in government’s ability to keep secrets).

⁵⁸ A granular exploration of existing press protections under state and common law, for example, might provide supporting precedent. For example, freedom of the press is enshrined in the constitution of Florida. Constitution of the State of Florida, Art. 1, § 4. Cf. Genevieve Lakier, *The Non-First Amendment Law of Speech*, 134 HARV. L. REV. 2299 (2021) (exploring the history of free speech protections beyond the First Amendment). To be sure, such an exploration must look not only at the law on the books but in application as well. As mentioned above, recent legislative initiatives in Florida seem inconsistent with the constitutional commitment but have taken a lot of lobbying to head off and keep being reintroduced.

⁵⁹ Further complicating the matter is that some press organs, for a variety of reasons, may respond in a more risk-averse fashion than others to legal change.

binary – utopian and dystopian – hype about AI.⁶⁰ News organizations should adopt AI standards after a realistic and granular analysis of where the benefits of AI tools for press functions will outweigh the risks and costs.⁶¹ Who is invited to the table in standard-setting is critical as well.⁶²

Another fundamental issue concerns building journalistic values into AI tools to be used by the press. Observers suspect that it would not be cost-effective for most news media to build their own, journalism-focused generative AI tools.⁶³ As many have already done, press organizations could rely on off-the-rack products created by commercial AI companies.⁶⁴ Query then how to ensure the centrality of journalistic values.

Moreover, relying on tech company products exposes news organizations to the dangers of lock-in – such as changes in pricing, availability, design decisions, access, and utility.⁶⁵ Without specifically negotiated contract terms, these decisions would

⁶⁰ This standard-setting process has already begun. See, e.g., *Paris Charter on AI and Journalism*, Nov. 10, 2023 (convened by Reporters Without Borders), <https://rsf.org/sites/default/files/medias/file/2023/11/Paris%20Charter%20on%20AI%20and%20Journalism.pdf>; WAN-IFRA, *Charter for AI and Journalism*, <https://wan-ifra.org/2023/11/wan-ifra-steps-back-from-endorsing-new-charter-for-ai-and-journalism/#:~:text=AI%20systems%20used%20in%20journalism,ensure%20content%20origin%20and%20traceability>; ASSOCIATED PRESS, AP, *Other News Organizations Develop Standards for Use of Artificial Intelligence in Newsrooms*, ASSOCIATED PRESS (Aug. 16, 2023), <https://www.ap.org/media-center/ap-in-the-news/2023/ap-other-news-organizations-develop-standards-for-use-of-artificial-intelligence-in-newsrooms/>. See also Kim Bjorn Becker et al., *Policies in Parallel? A Comparative Study of Journalistic AI Policies in 52 Global News Organisations* (Sept. 6, 2023), <https://ora.ox.ac.uk/objects/uuid:b527b298-a12b-4f0d-bf77-543e3375cdf7/files/sp2676x005> (unpublished paper) (finding similarities but variations as well).

⁶¹ For example, AI can continue to be useful to news organizations on the business and distribution side, and there are certainly a range of newsroom tasks that gen AI tools will make speedier, more efficient, and – over time – increasingly accurate. However, many aspects of journalism cannot – and should not – be accomplished or made more efficient with AI tools. See, e.g., Simon, *supra* note 38, at 11–22. See generally NICHOLAS DIAKOPOULOS, *AUTOMATING THE NEWS: HOW ALGORITHMS ARE REWRITING THE MEDIA* (2019) (addressing AI in journalism and discussing the human influence in automation); David Caswell, *AI and Journalism: What's Next?*, REUTERS INST. (Sept. 19, 2023), <https://reutersinstitute.politics.ox.ac.uk/news/ai-and-journalism-whats-next> (describing variety of uses of AI in journalism).

⁶² Journalism societies should collaborate in presumptive standard-setting and journalists should be at the forefront of boundary-setting for particular publishers. The interests of news executives, publishers, and corporate management are not necessarily congruent with those of journalists and editors. While the economic realities central to news executives are certainly relevant to tech-related decisions, a focus on journalistic values in the AI context is important for the future of news.

⁶³ Simon, *supra* note 38, at 4, 22–31. It is the case, though, that Reuters has developed a significant number of AI tools in-house and the BBC has been reported to be considering creating its own in-house large language model trained on its archives. However, producing and keeping up at least some journalistic AI tools would be prohibitively expensive for smaller and resource-poorer press outfits.

⁶⁴ Even if customized to some degree, the genesis of these tools is not journalism and they are not developed and trained specifically for the press's functions and values.

⁶⁵ See Simon, *supra* note 38, at 4, 28–31 (elaborating on this point).

all be made by the technology companies and platforms.⁶⁶ Realistically, then, the decisions of tech companies will impact journalistic work both methodologically and substantively.

Another issue to be addressed in negotiations between news organizations that rely on commercial AI products and the AI companies should be the question of access to information regarding how their products and services work, including training data and error rates for generative AI applications.⁶⁷

Journalists who worry about the ways in which nontransparent editorial decisions by an oligopoly of powerful first movers in the generative AI space could constrain reportorial functions and editorial discretion might consider collaboration with universities and other nonprofit partners engaged in the development of alternatives to commercial AI company products.⁶⁸ Government funding and access to resources for such research and partnerships could help advance such collaborations.

⁶⁶ As of now, there are few such companies, most of which already have relationships with the major tech enterprises.

At this point, the power relationships and associated negotiation possibilities between the platforms and news organizations in the future are unclear, which will affect both the press and the public arena. See Simon, *supra* note 38, at 34 (“the public arena will also be reshaped in accordance with how the balance of control shakes out between platforms and publishers.”) Given that platforms have taken over much of news outlets’ access to audiences, the visibility of news content on platform and search companies and the extent to which they send traffic to publishers’ sites “will depend on strategic choices made by a set of powerful actors over whom the news industry has little control . . .” *Id.* at 35. Such choices could affect the news organizations’ bargaining power in their AI-related negotiations. Nevertheless, the platforms and AI companies are both under the regulatory microscope, both at home and in Europe. This too affects bargaining power. In addition, and if we are to take them at their word, at least some of the tech companies have made public commitments to journalism and the responsible use of AI. See, e.g., Noreen Gillespie, *Here’s How We’re Working with Journalists to Create the Newsrooms of the Future with AI*, MICROSOFT BLOG (Feb. 5, 2024), <https://blogs.microsoft.com/on-the-issues/2024/02/05/journalism-news-generative-ai-democracy-forward/#:~:text=Microsoft%20365,Here's%20how%20we're%20working%20with%20journalists%20to%20create%20the,of%20the%20future%20with%20AI&text=What%20will%20the%20newsroom%20of,organizations%20to%20adopt%20generative%20AI>. See also Francesco Marconi, *AI and Journalism Need Each Other*, WALL ST. J., Dec. 28, 2023.

⁶⁷ Principle 3 of the *Paris Charter on AI and Journalism* provides that AI systems used by media “undergo an independent, comprehensive, and thorough evaluation involving journalism support groups” and “demonstrate adherence to the core values of journalistic ethics.” I am not persuaded that this broad a requirement (and particularly one that does not identify the “journalism support groups” to be charged with this evaluation) is realistic.

⁶⁸ Although the initiative includes several commercial AI firm partners, help might also come in part from the National Science Foundation’s recent announcement of a national AI research resource pilot program in order to promote a “shared research infrastructure that will strengthen and democratize access to critical resources necessary to power responsible AI discovery and innovation.” NSF News, *Democratizing the Future of AI R&D: NSF to Launch National AI Research Resource Pilot*, U.S. NAT’L SCIENCE FOUND. (Jan. 24, 2024), <https://new.nsf.gov/news/democratizing-future-ai-rd-nsf-launch-national-ai>.

7.2.4 Rethinking Industry Structure and the Distribution of the Press's Multiple Functions

Under today's precarious circumstances, it is also worth considering the extent to which structural, organizational, and process-focused changes could advance press functions today. The current picture of the news industry should make us question whether traditional notions of outlet generalism, news organization competition, institutional-structure type, and homogeneity of journalistic standards continue to be either realistic or beneficial for the public.⁶⁹

For example, at a time of decreasing economic resources for journalism, it would be unreasonable to expect that each news outlet or self-defined TikTok journalist could serve all these functions particularly well.⁷⁰ Not every news organization can seek to undertake all the press functions that courts have heretofore celebrated. Nor, perhaps, should they. Perhaps press conditions now require us to explore questions about the order of primacy of possible functions and about which entities are best positioned to perform them. Perhaps audiences do not need blanket coverage of the same events by every outlet. Perhaps funding and attention should focus on areas in which news failures have already demonstrated public harm. Perhaps different outlets should offer the public different forms of journalism.⁷¹

Competition norms too are worth challenging, both as to reporting and as to developing journalism-native generative AI models. There have already been examples of important reporting via collaboration rather than the traditional attitude

⁶⁹ Admittedly, there are significant differences among the various persons and entities performing press functions – even within the professional press cohort. Moreover, some – and especially the reputable national outlets – have adapted to the new environment better than others financially and in continuing their investigative work.

⁷⁰ Moreover, if an increasing use of video and AI transcript access in public proceedings will make them available to anyone at no or low cost, then one might argue that the press's role as the public's proxy in attending such proceedings on behalf of the public has been adequately fulfilled. Reporters could then emphasize interviewing, investigating, explaining, contextualizing, and historicizing. If the availability of data and processing capacity enable broader and richer types of data journalism looking at systemic problems, then perhaps some who currently perform the full gamut of press functions could focus first on data journalism. One thing such an approach could require is granular attention to the particular socio-political, historical, economic, informational, and technological context and which news and information providers are best placed to address the most critical issues of the time. For example, if the apparent worldwide turn to populism and authoritarianism continues, then perhaps a principal role for the national press should be the watchdog function – the role that traditionally promotes accountability with respect to government power, but now also with respect to private and corporate power as well. Of course, on the legal front, such a role requires attention to specific protections for investigative reporting and newsgathering. But, in addition, this kind of work seems most clearly fit for professional, well-trained, well-sourced, and well-funded journalists and news organizations – although counterexamples can also easily be imagined.

⁷¹ See, e.g., Carroll, *supra* note 3 (arguing that community journalism might at this moment be more effective at boosting public trust in the media than the adversarial and hierarchical watchdog journalism of the Watergate decade).

of commercial press competition. A shift from a competitive to a collaborative mindset could well enable greater impact for the resulting journalistic output. Collaborations with journalism schools and student reporters could also help.

7.2.5 Enhancing Public Trust

Ultimately, the robustness of the press function depends on public trust – so ensuring its viability involves sustained inquiry into reversing public distrust of the press. This requires extensive empirical and interdisciplinary study – including by political scientists, social psychologists, media scholars, and cognitive scientists – of the bases for press distrust and of how people change their minds.⁷² While existing studies have already documented confirmation bias with respect to particular issues as to which there is no consensus, what about the possibility of enhancing trust in less controverted and politicized contexts? Trust does not have to be an all-or-nothing matter.

Moreover, since empirical research thus far indicates that distrust in the press has been asymmetrical between Democrats and Republicans, with conservatives having significantly more distrust in the mainstream press,⁷³ further granular exploration of the particular barriers to trust on the conservative side could be helpful in increasing the effectiveness of trust-promoting interventions. Additional work on the spread and debunking of conspiracy theories is also called for in the research mix.

Journalists and news organizations themselves are far from free of blame. Self-examination and diagnostic attention to their own practices and methods are necessary.⁷⁴ The press could study and advance effective types of fact-checking. Just as there was value – at least aspirationally – to the demarcation between “hard news” and “opinion” or “op-ed pages” in the traditional newspaper, the failures of

⁷² Lili Levi, “Media Literacy” *Beyond the National Security Frame*, 2020 UTAH L. REV. 941 (2020). See also Bengani et al., *supra* note 12, at 140–41 (on journalists’ failures to explain what happens in the newsroom adequately, especially in light of new technology and the opportunity for media literacy efforts now); Stephanie Craft et al., *News Media Literacy and Conspiracy Theory Endorsement*, 2:4 COMM’N & PUB. 388 (Dec. 2017), <https://doi.org/10.1177/2057047317725539> (finding that media literacy can decrease the endorsement of conspiracy theories).

⁷³ See, e.g., Jeffrey Gottfried & Jacob Liedke, *Partisan Divides in Media Trust Widen, Driven By a Decline Among Republicans*, PEW RSCH. CTR. (Aug. 30 2021), <https://www.pewresearch.org/short-reads/2021/08/30/partisan-divides-in-media-trust-widen-driven-by-a-decline-among-republicans/>.

⁷⁴ Professional journals such as the Columbia Journalism Review engage in such assessments of journalistic practices. See, e.g., Derek Kravitz, *Opinion, Failures Like Rolling Stone’s Do Not Happen in Every Newsroom*, COLUM. JOURNALISM REV. (Sept. 26, 2023), <https://www.cjr.org/opinion/wenner-uva-rolling-stone-scandal.php> (discussing failures in Rolling Stone’s “A Rape on Campus” reporting). Cf. Michael M. Grynbaum, *NBC News Faces Rebellion over Hiring of Former Republican Party Chair*, N.Y. TIMES (Mar. 25, 2024), <https://www.nytimes.com/2024/03/25/business/media/nbc-ronna-mcdaniel-rebellion.html> (describing “escalating revolt” among NBC anchors over the network’s hiring of former RNC chair as political analyst on grounds of her prior support of election denial claims).

Fox News teach us that today's news purveyors should work to distinguish opinion to the extent possible.⁷⁵ As for partisan complaints of press bias, failure to disclose the reporter's slant, the nature of the newsgathering and reporting process, and the information on which an article's conclusions rest could reasonably undermine audience trust and be addressed consistent with professional norms.⁷⁶ Journalists could build reputations vis-à-vis expertise, ideological vantage point, reliability, and type of journalistic focus. In light of the likelihood of increased disinformation via increasingly believable deepfakes, journalists should focus on combatting "manipulation of large-scale public opinion trends" by the spread of false information.⁷⁷

It would also be worthwhile for researchers and journalists to inquire further into what functions today's various audiences think are properly those of the press. Although this does not mean that the press should simply respond to what audiences assertedly want, or that there is no room today for traditional watchdog journalism, it does suggest the benefits to news professionals of better understanding the range of public expectations. A recent Pew Research Center report indicates that although many Americans rely on social media for news, there has been a material increase in the number of people who are concerned about inaccuracy.⁷⁸ So even if Americans

⁷⁵ To be sure, Fox is not the only outlet airing news-focused opinion shows. Such programming is doubtless far less expensive to produce than factual, investigative reporting. See Cameron Joseph, *The Ronma McDaniel Incident Reveals a Deeper Dilemma for Journalism*, COLUM. JOURNALISM REV. (Mar. 29, 2024), https://www.cjr.org/the_media_today/ronma-mcdaniel-nbc-trump-journalism-dilemma.php. Far less than fact-focused programming, opinion talk shows also raise the risk of partisan bias and/or difficulty controlling and containing guest responses.

⁷⁶ To be sure, some are transparency skeptics, arguing that transparency as to errors may increase public distrust. See, e.g., Dan Gillmor, *The Corrections Dilemma: Admitting Your Mistakes Increases Accuracy but Reduces Audience Trust*, A NEW STUDY FINDS, NIEMANLAB (Mar. 27, 2023), <https://www.niemanlab.org/2023/03/the-corrections-dilemma-admitting-your-mistakes-increases-accuracy-but-reduces-audience-trust-a-new-study-finds/>; Bengani et al., *supra* note 12, at 141–43. Even if that is true in the short term, query whether it holds for the long term. Moreover, error-correction is not the transparency issue discussed in text.

⁷⁷ See Steven Waldman, *Opinion, How AI Could Sap – or Save – Local News*, POYNTER (Jan. 25, 2024), <https://www.poynter.org/commentary/2024/how-ai-could-sap-or-save-local-news/> (citing article).

⁷⁸ Luxuan Wang & Naomi Forman-Katz, *Many Americans Find Value in Getting News on Social Media, but Concerns About Inaccuracy Have Risen*, PEW RSCH. CTR. (Feb. 7, 2024), <https://www.pewresearch.org/short-reads/2024/02/07/many-americans-find-value-in-getting-news-on-social-media-but-concerns-about-inaccuracy-have-risen/>. Admittedly, however, there has also been a documented decline in how closely Americans follow the news. Naomi Forman-Katz, *Americans Are Following the News Less Closely Than They Used To*, PEW RSCH. CTR. (Oct. 24, 2023), <https://www.pewresearch.org/short-reads/2023/10/24/americans-are-following-the-news-less-closely-than-they-used-to/>. Still, a recent study showing that Americans find fact-checking labels created by professional fact checkers to be more effective than labels by algorithms or crowd-sourcing, and similarly that news media-created labels are ranked as second-most effective, suggests that "people put more faith in institutions especially equipped with journalistic professionalism and expertise than algorithms or peer users in terms of verifying facts." Chenyan Jia & Taeyoung Lee, *Journalistic Interventions Matter: Understanding How Americans Perceive Fact-Checking Labels*, MIS/INFORMATION REV. (Apr. 11, 2024), <https://misinforeview.hks.harvard.edu/article/journalistic-interventions-matter-understanding-how->

report increased distrust in the press, many also express a desire for accurate news and information – which leaves room to shift at least some assumptions about the reliability of the press.⁷⁹

A well-thought-out and evidence-based approach to media literacy would also be beneficial. This could be particularly constructive when joined by community engagement on the press side when research reveals disconnects between press and public expectations.⁸⁰

Structural and policy changes responsive to shifts in press practices as discussed above could also address public concerns. For example, reports suggest that the crisis of trust in national journalism is not yet accompanied by an equivalent distrust of local news.⁸¹ Therefore, a focus on increasing the sustainability of local news might also help chip away at the media distrust problem.

Finally, we should not forget that distrust in the press is only one aspect of declining public faith in institutions generally. It is worth exploring whether press

[americans-perceive-fact-checking-labels/](#). The authors also found that “the positive relationships between news media trust and the efficacy of labels by both news media and fact checkers became stronger for those who were exposed to such labels more frequently. These findings suggest that raising the visibility of fact-checking labels can help increase their effectiveness, especially among those who trust news media.” *Id.* Given the asymmetry between the views of Republicans and Democrats on the effectiveness of fact-checking, the study also calls on “professional fact checkers . . . to be transparent and objective in their selection of claims to verify” in order to promote conservative users’ trust in fact-checking. *Id.*

⁷⁹ To the extent that the impression of unbridgeable polarization in America reflects partisan clashes among comparatively small but highly engaged publics, the quieter and more disengaged citizens may be interested in accurate and appropriately presented information and amenable to finding middle ground. Cf. David French, *America’s Most Overlooked Political Divide Is Also Its Most Revealing*, N.Y. TIMES (Mar. 22, 2024), <https://www.nytimes.com/2024/03/22/opinion/christian-nationalists-polling-divide.html>. Journalists may be well positioned to serve that need, which could in turn improve their public perception.

⁸⁰ For example, a recent Pew Research Center study reports that 76 percent of Americans “say journalists should always strive to give all sides equal coverage,” while 55 percent of journalists surveyed report that “every side does not always deserve equal coverage in the news.” Naomi Forman-Katz & Mark Jurkowitz, *U.S. Journalists Differ from the Public in Their Views of ‘Bothsidesism’ in Journalism*, PEW RSCH. CTR. (July 13, 2022), <https://www.pewresearch.org/short-reads/2022/07/13/u-s-journalists-differ-from-the-public-in-their-views-of-bothsidesism-in-journalism/>; Bengani et al., *supra* note 12, at 132 (“[b]othsideism remains a heated debate.”) Of course, this does not mean that journalists should simply make false claims of objectivity or disguise their partisan content with neutral editorial tones. The Pew report results could also mean that they have different understandings of “equal coverage” rather than a more fundamental divide. In any event, the different expectations could be bridged by more transparent disclosure of a reporter’s journalistic stance and a clear explanation of why she believes a “both sides” story does not tell enough of the truth, clear understandings on both sides of what equal coverage means, and whether different communities view the issue differently and as to what kinds of coverage questions.

⁸¹ See Bengani et al., *supra* note 12, at 151–54. Admittedly, as the Tow Center report points out, an increase in partisan “pink slime” reporting designed to achieve particular results (such as swinging tight elections) could undermine trust in local news more broadly. But for now, local news outlets fare better than the concentrated national press.

reporting on and explaining the work of other contested institutions – such as, for example, the administrative state – could indirectly serve to enhance the perceived legitimacy of both.⁸²

7.3 CONCLUSION

An effective press sector consisting of a variety of actors committed to journalistic values can support democracy. It can know, inform, and educate its many publics. It can discover what the powerful do not want discovered, act as a watchdog, dispel disinformation, and help sustain local and underrepresented communities. Shoring up these functions for the press is a worthwhile enterprise in the public interest. But today's economic, technological, legal, professional, and consumer contexts are a far cry from those of the press's golden age. Still, the press and its allies should continue to proselytize the value of journalism's ideal functions – while acknowledging the instances in which the modern press fails to meet the mark. They should pressure-test reform proposals for viability; develop responsible technology policies; revisit antiquated functions and industry expectations; and use the lessons of interdisciplinary research to explore effective ways to counter public distrust. They should also call for normalizing self-examination across the entire sector to enhance compliance with fundamental journalistic norms. Such targeted steps can help rehabilitate journalism's public role and allow society to reap the benefits of an independent press. We ought not surrender this promise.

⁸² See Gabriel Scheffler & Daniel E. Walters, *The Submerged Administrative State*, 3 WIS. L. REV. 789 (2024) (arguing that the public's faith in government is undermined *inter alia* because administrative agencies are constrained in their communications with the public and frequently engage in opaque actions).