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## Beyond Democracy: How a Free Press Supports the Rule of Law

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# BEYOND DEMOCRACY: HOW A FREE PRESS SUPPORTS THE RULE OF LAW

ERIN C. CARROLL \*

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## INTRODUCTION

There has been widespread agreement for centuries that the free press plays a crucial role in supporting democracy because it provides citizens with the information that they need to self-govern.<sup>1</sup> But regrettably little effort has been spent examining whether there are other reasons self-government requires a free press and so, why we must protect it. This Article attempts to broaden the aperture. At a moment when the free press is underfunded, untrusted, and disappearing, this Article argues that the press is not only foundational to democracy, but it is also essential to an ideal that has generally been considered to be separate: the rule of law.

Democracy is a system of government by and for the people. In contrast, the rule of law is, at its core, the idea that no one is above the law—even the rulers. Rule of law requires that

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\* Professor of Law, Georgetown University Law Center. Sincere thanks to Georgetown University President Emeritus Jack DeGioia with whom discussions about historian Lorraine Daston's work on rules planted a seed for this article; to Dean Bill Treanor and Georgetown Law for the support to engage in this work; to Tom Rosenstiel for his clear-headed thinking about the press; to Ronnell Andersen Jones and the participants in her Colloquium at the University of Utah S.J. Quinney School of Law for their insightful questions and comments; and to Samantha Rubinstein for superb research assistance. [MORE TO COME]

<sup>1</sup> See, e.g., A.G. Sulzberger, *How the Quiet War Against Press Freedom Could Come to America*, WASH. POST (Sept. 5, 2004), <https://www.washingtonpost.com/opinions/2024/09/05/sulzberger-free-press-new-york-times/> (describing the “foundational importance of press freedom to democracy”).

law is public, intelligible, consistent, and fairly applied. It often exists in concert with democracy, but the two are not the same.<sup>2</sup> A free press is essential to both—but not always in the same ways.<sup>3</sup>

Shining a spotlight on the connection between a free press and the rule of law has numerous benefits. As attention has focused on democratic backsliding, comparatively overlooked (until very recently) is the simultaneous erosion of the rule of law.<sup>4</sup> To the extent that the press can be friction against the devolution of democracy *and* the rule of law, it should. Some legal and political theorists would argue that democracy is impossible without the rule of law.<sup>5</sup> At the very least, in this age of rupture, the rule of law can be a suture.<sup>6</sup> The fight to protect it might also be capable of summoning the political will that seems to be flagging for the protection of democracy. As former British judge Tom Bingham has written, the rule of law is “the nearest we are likely to approach to a universal secular religion.”<sup>7</sup> Given its importance and unifying potential, thinking about how to thicken the press’s viscosity so that it might more effectively gum up the rule of law’s slippage (as well as democracy’s) is crucial.<sup>8</sup>

The role of the free press in supporting the rule of law also matters because the press is undergoing upheaval and transformation.<sup>9</sup> It is not clear what the press will look like in five, ten, or more years.<sup>10</sup> But given rapid shifts in technology, politics, and economics, it is bound to look different—perhaps dramatically so. We could barrel towards this future, mouths agape and hands waiving, or we could consider what values a free press serves and use them as a foundation for reshaping the press. A press aimed at enriching shareholders will look different than a press aimed at upholding the rule of law.<sup>11</sup> If we want the latter, we can do more to imagine it, create it, and protect it.

Doing this requires understanding how the press supports the rule of law. In declaring that the press supports democracy, the Supreme Court and legal scholars have focused on a

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<sup>2</sup> JEREMY WALDRON, *THOUGHTFULNESS AND THE RULE OF LAW* 2-3, 9, 148, 212-13 (2023).

<sup>3</sup> Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 20 (2003) (“Although there are surely significant tensions between the rule of law and democratic self-determination, it is clear that each is an indispensable element of our constitutional tradition. The ideals are in fact deeply interdependent.”).

<sup>4</sup> *Secretary-General’s New Vision for the Rule of Law*, UNITED NATIONS (July 31, 2023), <https://www.ohchr.org/en/documents/tools-and-resources/secretary-generals-new-vision-rule-law> (“We are experiencing a global decline in respect for the rule of law.”).

<sup>5</sup> See Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, UNITED NATIONS (Dec. 2012), <https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices> (“If considered not solely as an instrument of the government but as a rule to which the entire society, including the government, is bound, the rule of law is fundamental in advancing democracy.”).

<sup>6</sup> See Dan Balz, Scott Clement, & Emily Guskin, *Many of Trump’s Early Actions Are Unpopular, Post-Ipsos Poll Finds*, WASH. POST (Feb. 20, 2025) (indicating that 84% of adults, including 92% of Democrats and 79% of Republicans, believe that the Trump administration should follow federal court rulings). <https://www.washingtonpost.com/politics/2025/02/20/trump-poll-unpopular-post-ipsos/>.

<sup>7</sup> TOM BINGHAM, *THE RULE OF LAW* 174 (2011).

<sup>8</sup> STEPHEN D. REESE, *THE CRISIS OF THE INSTITUTIONAL PRESS* 58 (describing how institutions like the press can provide “an important brake on destructive social actions”).

<sup>9</sup> See Silvio Waisbord, *The “Future of Journalism” is Uncertain and Plural (but Beware of Predictions)*, in *THE PALGRAVE HANDBOOK OF GLOBAL DIGITAL JOURNALISM* 104 (Bruce Mutsaers & Kristin Skare Orgeret eds. 2024) (“The convergence of multiple revolutions has thrown journalism in disarray and crisis.”).

<sup>10</sup> See *id.* at 104, 107 (noting that it is unclear what the term “journalists” “will mean in the near or distant future” and that predicting the next ten years “would be quite bold—and exercise in fantasy thinking”).

<sup>11</sup> See PIERRE BOURDIEU, *ON TELEVISION* 17 (1996).

handful of press functions, or what I call “press benefits.”<sup>12</sup> This short list typically includes watchdog, educator, and facilitator of the public square.<sup>13</sup> To support the rule of law, the press provides these same benefits, but does so in ways that sometimes operate very differently.

For example, as a watchdog, the press helps to ensure that the justice system is open and fair. Yet, at the same time, the legitimacy of our judicial system—whose actors do not often speak directly to the public—depends on press affirmation and explanation in ways that the other two branches do not. This Article makes the claim—anathema in journalism circles—that we consider whether limits should ever be placed on the watchdog role or whether the watchdog role ever needs balancing out.

With respect to the press’s educator role, it is typically seen as a top-down function; the press takes information from elites and shares it with the masses. But this is an outdated and incomplete understanding, as examining the press’s relationship to the rule of law reveals. When it comes to the rule of law, the press is more of a boulevard than a one-way alley. Beyond sharing information with its audience, it likewise shares information about the public (its norms, opinions, standards, and narratives) that feed into the rule of law. This information is so vital that the rule of law could not thrive without it.

The press’s role facilitating public fora is also foundational to the rule of law. Core to the rule of law is community conversation about values and norms. The press can provide the space, the guardrails, and the enticement for these conversations. This is especially urgent as the political sphere is aiming to rapidly impose new norms and values, putting pressure on the rule of law.

In addition to performing these traditional press functions in support of the rule of law, the press plays other roles that bolster the rule of law. These include being a curator and an empathy-builder. The latter is especially important in the current moment when so many Americans are such strangers to one another—unable to understand one another’s opinions, desires, and choices. By playing this role the press can not only strengthen rule of law and democracy, but its own institutional revival.

Unfortunately, despite the importance of the empathy-builder and curator roles, the courts have barely recognized them, much less flagged them as key reasons why a self-governing society needs a free press. This lack of recognition has a cutting irony given that these press roles support the very value that the judiciary holds dearest.

Acknowledging how the press supports the rule of law might force courts and legal scholars to revisit the short list of press benefits that the Supreme Court set out in a few dozen cases a half century ago and has rarely re-visited since. This could spark us to complicate our understandings of democracy, rule of law, and the press in beneficial ways. The hope is that this Article steers us in a helpful direction.

To start, Part I elaborates on the why: why should we care about the connection between the press and the rule of law? As described, the rule of law is in jeopardy and the press is an institution that can fortify it. Moreover, as the press is being reimagined and remade, better understanding its functions can help orient that fortification. This could impact everything from

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<sup>12</sup> See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (“The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”); see also Ronnell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 256-59 (2014) (devoting sections to characterizations of the press as educator, dialogue builder, and watchdog).

<sup>13</sup> 435 U.S. at 781 (1978); see also Andersen Jones, *supra* note 12, at 256-59.

advocates' constitutional legal strategy to how journalists understand their own role and the import of their day-to-day work.

Part II shifts to examine the what: what is the rule of law and what is the free press? Both concepts are highly contested and bookshelves worth of scholarship exist defining and redefining each. The rule of law exists on a sliding scale; it is not an all of nothing proposition.<sup>14</sup> The press is also not truly a singular entity—a fourth estate—but an amalgamation of entities, people, and practices.<sup>15</sup> Given the complexities, spending some space to define these terms is vital.

In Part III, the Article works through the how. It examines three press functions—watchdog, educator, and facilitator of public for a—that the Supreme Court has said are key to the press's support of democracy. It describes the way in which these same press functions support the rule of law. In some instances, there are strong parallels between the particular press function's service of democracy and rule of law. But in other instances, there are differences. Regardless, they are not relationships that have been previously examined by legal scholars. The Article also indicates that press benefits exist—curator and social empathy-builder—that courts have paid little to no attention to, but are integral to the press's support of rule of law.

Finally, in Part IV, the Article surveys where we are and scouts out next steps. It considers how law might be used to encourage and protect press benefits that in turn support the rule of law. It proposes new priorities for journalists and newsrooms as they continue their work, especially as political leaders undermine the rule of law. It also suggests areas for legal scholars to further theorize the press's value to both democracy and the rule of law.

## I. WHY TO CARE

Much has been written trying to capture the overwhelm of our historical moment. “[O]mnicrisis devours us,” writes cultural critic Anna Kornbluh.<sup>16</sup> The “omni” nature of our combined political, environmental, epistemic (and other) crises creates, unsurprisingly, its own problems. Among these are anxiety, exhaustion, and apathy. And for those who want to hack away at the crises, it is hard to know which snake in a Medusa's head of possibilities to try to take on first.<sup>17</sup>

This Part makes the case that recognizing the connection between the press and the rule of law can both prod us out of any overwhelm and direct us toward action. In other words, even knee-deep in omnicrisis, the free press is worth our energy. This is for at least three reasons. First, as democracy is eroding, so is rule of law. It is necessary work to halt both backslides and, hopefully, begin to reverse them. The press can help. Understanding how the press is tightly interconnected not only to democracy but to the rule of law can provide insights into how it can serve as a multipurpose dam. I truly believe that improving our information systems—a feat that is in our power—could improve so much more. Second, with trust in the press (at least the

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<sup>14</sup> See Martin Krygier, *Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?*, 50 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 64, 69, 99, n.1 (2011).

<sup>15</sup> See Waisbord, *supra* note 9, at 104-08 (indicating that “there is no single journalism” and that “journalism refers to a variety of practices, institutions, and conditions, shaped by variables that cannot be neatly summarized”); MIKE ANANNY, NETWORKED PRESS FREEDOM: CREATING INFRASTRUCTURES FOR A PUBLIC RIGHT TO HEAR 18 (2018) (“The press is less a single, discernible thing than an outgrowth of forces governing a field of expression, circulation, and interpretation.”).

<sup>16</sup> ANNA KORNBLOH, IMMEDIACY OR, THE STYLE OF TOO LATE CAPITALISM 17 (2023).

<sup>17</sup> *Id.* at 14-15 (“[W]e are fastened to appalling circumstances from which we cannot take distance, neither contemplative nor agential, every single thing a catastrophe riveting our attention”).

national press) at abysmal levels, investigating the way that the institution props up an uber-value like rule of law might help the wary American public understand the necessity of supporting the press. Finally, as with so many institutions, the press is at an inflection point. Economic, political, and epistemic crises all indicate that the functioning and composition of the press need rethinking. Considering how the press is integral to the rule of law should inform that thinking.

#### A. RULE OF LAW EROSION

In an early draft of this article, written before the November 2024 presidential election, this section was devoted to both establishing that democracy had eroded and also convincing the reader that even if it might not have seemed like rule of law was under threat, it was. That convincing no longer seems necessary. Rule of law is clearly being challenged. It is happening blatantly and daily. Accordingly, I will keep this section short.

First, with respect to democracy: Americans have increasingly understood over the last decade the degree to which democracy is slipping away. Ours is part of a worldwide democratic recession.<sup>18</sup> But the speed of it has surprised even many experts. To alert the public, numerous bestselling books with distressing titles like *On Tyranny*,<sup>19</sup> *Twilight of Democracy*,<sup>20</sup> and *How Democracies Die*,<sup>21</sup> have been written. United Nations' alarms have been sounded.<sup>22</sup> News organizations have created “democracy beats” to document the issue.<sup>23</sup> All of this focus on democracy, however, did not prevent the election of an American president who seems intent on autocracy.

In contrast, less attention had been paid to the erosion of the rule of law, which has been happening in fits and starts over at least the past several years. This changed dramatically on January 20, 2025. In the opening weeks of the second Trump presidency, the administration made its disdain for the rule of law blatant. The President pardoned all of the January 6 rioters, including the most violent among them.<sup>24</sup> It dismissed government watchdogs.<sup>25</sup> The vice president suggested that court orders need not be obeyed.<sup>26</sup> And President Trump anointed himself a “king” in a post on his social media platform, *Truth Social*.<sup>27</sup>

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<sup>18</sup> See Larry Diamond, *Democratic Regression in Comparative Perspective: Scope, Methods, and Causes*, 28 DEMOCRATIZATION 22, 25 (2021).

<sup>19</sup> TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* (2017).

<sup>20</sup> ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* (2021).

<sup>21</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2019).

<sup>22</sup> *UN Chief Raises Alarm Over ‘Backsliding’ of Democracy Worldwide*, UNITED NATIONS NEWS (Sept. 15, 2022), <https://news.un.org/en/story/2022/09/1126671>.

<sup>23</sup> See Celeste Katz Marston, *American Democracy Is Under Threat—and Newsrooms Are Mobilizing to Cover It*, NIEMAN REPORTS (June 13, 2022), <https://niemanreports.org/covering-elections-democracy-beat/>.

<sup>24</sup> See Tom Dreisbach, *Justice Department Broadens Jan. 6 Pardons to Cover Gun, Drug-Related Charges*, NPR (Feb. 20, 2025), <https://www.npr.org/2025/02/20/nx-s1-5304454/jan-6-pardons-drugs-firearms>.

<sup>25</sup> Zeke Miller, Eric Tucker, & Will Weissert, *Trump Uses Mass Firing to Remove Independent Inspectors General at a Series of Agencies*, AP (Jan. 25, 2025), <https://apnews.com/article/trump-inspectors-general-fired-congress-unlawful-4e8bc57e132c3f9a7flc2a3754359993>.

<sup>26</sup> See Charlie Savage & Minh Kim, *Vance Says ‘Judges Aren’t Allowed to Control’ Trump’s ‘Legitimate Power,’* N.Y. TIMES (Feb. 9, 2025) (quoting Vice President JD Vance’s social media statement that “judges aren’t allowed to control the executive’s legitimate power”), <https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html>.

<sup>27</sup> Benjamin Oreskes, *‘Long Live the King’: Trump Likens Himself to Royalty on Truth Social*, N.Y. TIMES (Feb. 19, 2025), <https://www.nytimes.com/2025/02/19/us/politics/trump-king-image.html>.

An obvious question presents itself: Will Americans let rule of law continue to erode in the way democracy has been eroding over several decades? I hold out hope that even some of those citizens who have lost faith in democracy do not want to lose the rule of law. Although studies show that American's belief in our democracy has waned, there is no indication that the same is true for the rule of law.<sup>28</sup> Constitutional law scholar Robert Post and political scientist Neil Siegel have written that, "All would no doubt agree that the rule of law is of enormous social value."<sup>29</sup>

Rule of law is a value so esteemed that academics and theorists lament that it is hard to define. Too often it is simply meant to signal all that is politically and legally good. One philosopher dubbed it an "international hurrah term."<sup>30</sup> We might even say that it is what rhetorician Richard M. Weaver calls a "god term"—a phrase that is viewed so positively that it can overpower other ideas or language.<sup>31</sup>

If it truly is such a concept, this is important to recognize in our fractured political environment. During his presidency, George W. Bush said, "Americans will always stand firm for the non-negotiable demands of human dignity: the rule of law."<sup>32</sup> Whether this remains true is a question with an answer that might be shifting in real time. But, encouragingly, a 2024 study by the World Justice Project found that 96% of both Democrats and Republicans indicated that they believe the rule of law is essential or important to the future of the country.<sup>33</sup>

It also remains true that at a practical level we need to preserve rule of law if we have any hope of clinging to democracy. As Robert Post and Reva Siegel have written, "The value of [democratic] self-determination requires the rule of law so that popular will does not slide into fascism and so that politics remain true to the values that animate democracy itself."<sup>34</sup> As noted, this slide is already well underway.

If we do care about rule of law, understanding that there is a relationship between the rule of law and the press matters. We also need to understand the contours of that relationship. This is because, as I argue in Part II, the existence of the relationship and the very tightness of it means that the press can serve as friction against the devolution of rule of law. The press can help prevent a transition from rule of law to rule by law.<sup>35</sup> That is, it can help ensure that law is "preeminent and can serve as a check against the abuse of power" and prevent it from being a government tool of oppression.<sup>36</sup>

## B. FREE PRESS EROSION

Investigating the relationship between the press and the rule of law is also critical because it can give Americans new reasons to support the press. The story of the press's demise has been

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<sup>28</sup> See Jeffrey M. Jones, *Record Low in U.S. Satisfied With Way Democracy Is Working*, GALLUP (Jan. 5, 2024), <https://news.gallup.com/poll/548120/record-low-satisfied-democracy-working.aspx>; *U.S. Rule of Law Trends & the 2024 Election*, WORLD JUSTICE PROJECT 9 (2024).

<sup>29</sup> Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1477 (2007).

<sup>30</sup> Krygier, *supra* note 14, at 64.

<sup>31</sup> RICHARD M. WEAVER, *THE ETHICS OF RHETORIC* 212 (1953).

<sup>32</sup> BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 1-2 (2004).

<sup>33</sup> *U.S. Rule of Law Trends & the 2024 Election*, *supra* note 28, at 9.

<sup>34</sup> Post & Siegel, *Protecting the Constitution from the People*, *supra* note 3, at 20.

<sup>35</sup> TAMANAHA, *supra* note 32, at 3.

<sup>36</sup> *Id.*

well publicized by those in its ranks who remain standing. The number of newspapers across the United States has been decimated. In the past two decades, more than 3,200 daily, weekly, and semi-weekly newspapers have closed, with only about 5,600 remaining.<sup>37</sup> Thousands of journalists have lost their jobs even in the last year.<sup>38</sup> Major news organizations have been purchased by billionaires whose commitment to the free press is questionable at best.<sup>39</sup>

Meanwhile, press advocates have been growing hoarse shouting about the importance of a free press to democracy. We have leaned on the First Amendment; it protects freedom of the press explicitly, and the press is the only business mentioned in the Constitution.<sup>40</sup> We have pointed to the Framers who valued and understood the importance of the free press; a favorite citation is to Thomas Jefferson's statement that, "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."<sup>41</sup>

Press advocates have emphasized time and again that democracy is dependent on a free press. We have done this in articles.<sup>42</sup> In interviews.<sup>43</sup> In op-eds.<sup>44</sup> In legal briefs.<sup>45</sup> At conferences.<sup>46</sup> We can prove it with studies showing the civic engagement increases with the prevalence of news organizations.<sup>47</sup>

But these arguments—though they should matter—haven't seemed to, at least, not enough. They are not stopping the institution's freefall in terms of finances, size, and public trust. They are also not stopping verbal and physical attacks on the press. They did not prevent a

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<sup>37</sup> Brian Stelter, *Hundreds of Washington Post Staffers Send Letter to Jeff Bezos Sounding Alarm Over Paper's Direction*, CNN (Jan. 15, 2025), <https://www.cnn.com/2025/01/15/media/washington-post-jeff-bezos-letter/index.html>; David Bauder, *Local News Sources Are Still Drying Up, But There's Growth In Digital Sites In Metro Areas*, AP (Oct. 23, 2024), <https://apnews.com/article/newspapers-closing-jobs-lost-digital-fa82ebfdefdde058a1cbfaa1a59fb69>.

<sup>38</sup> *Id.*

<sup>39</sup> See Benjamin Mullin & Katie Robertson, *Billionaires Wanted to Save the News Industry. They're Losing a Fortune*, N.Y. TIMES (Jan. 18, 2024), <https://www.nytimes.com/2024/01/18/business/media/billionaires-news-media-owners.html>.

<sup>40</sup> See U.S. CONST. amend. I.

<sup>41</sup> *Letter from Thomas Jefferson to Edward Carrington* (Jan. 16, 1787), in THE FIRST AMENDMENT: FREEDOM OF THE PRESS 73, 74 (Garrett Epps ed., 2008). And more recently, many other examples exist. See, e.g., Lord Neuburger et al., *The Need for Independent Judges and a Free Press in a Democracy*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/dohadeclaration/en/news/2021/05/the-need-for-independent-judges-and-a-free-press-in-a-democracy.html> ("The loss of a free, independent media is essentially the loss of democracy.").

<sup>42</sup> See generally, *The Future of Press Freedom: Scholars Series*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV., <https://knightcolumbia.org/blog/channel/the-future-of-press-freedom-scholars-series> (compiling a series of articles by experts on freedom of the press "to illuminate how we might better define and protect the core democracy-enhancing press functions").

<sup>43</sup> See, e.g., *The Just Security Podcast, How Should the Press Cover Democracy*, JUST SECURITY (Jan. 29, 2023), <https://www.justsecurity.org/84934/the-just-security-podcast-how-should-the-press-cover-democracy/>.

<sup>44</sup> See, e.g., Sulzberger, *supra* note 1.

<sup>45</sup> See, e.g., Brief for Amici Curiae of Nat'l Press Photographers and 25 Media and Free Speech Orgs. in Support of Petitioner, Ass'n at 3, *Lozman v. City of Riviera Beach, Fla.*, 583 U.S. 1110 (2018) (No. 17-21) 2017 WL 6804624.

<sup>46</sup> See, e.g., *The Future of Press Freedom: Democracy, Law, and the News in Changing Times*, KNIGHT FIRST AMENDMENT INST., YOUTUBE, <https://www.youtube.com/live/sY81jLSDkxA>.

<sup>47</sup> See Chloe Reichel, *Civic Engagement Declines When Local Newspapers Shut Down*, THE JOURNALIST'S RESOURCE (June 22, 2018), <https://journalistsresource.org/politics-and-government/local-newspapers-civic-engagement/>.



January 6 rioter from writing “Murder the Media” on a door at the U.S. Capitol.<sup>48</sup> Assaults against journalists are on the rise.<sup>49</sup> And name-calling and threats by right-wing politicians against the press are commonplace.<sup>50</sup> The headwinds against any effort to protect the free press feel nearly paralyzing. It is unclear how to get the public to care enough to fund the press, help chart its future, or just speak positively about it.

One response, one of the few remaining responses perhaps, is to return to first principles. This means asking why it is that we need a free press. What is the free press for, and what does it do? Perhaps, to be cynical, in this era characterized by fear and self-centeredness, citizens need to understand what the press does for *us*.<sup>51</sup> Perhaps this is the motivation that we need.

That is why this Article homes in on the rule of law. I am banking on Americans valuing the rule of law more right now than they value democracy. And perhaps linking the press to rule of law—which can be authentically and convincingly done—might help persuade those who need persuading of the value of a necessary institution that is in decline and perhaps even dying. There is a long game too, however. It is that our legal understanding of the press and its value—politically, epistemically, culturally, and morally—needs to evolve, change, and expand. That is the only way to preserve a free press in perpetuity and with it, perhaps, the viability of liberal democracy in the twenty-first century.

### C. REIMAGINING THE PRESS

Even if the press can be revived and nourished, its path forward is uncertain.<sup>52</sup> Thoroughly battered by the various crises it has faced for several decades, the press has no choice but to, in large part, reimagine itself. Technology, economics, and politics all require significant institutional changes to the press if it is to thrive.

Journalism and communications scholars are deeply invested in thinking about this change, but they have widely divergent visions.<sup>53</sup> In their 2022 book, *The Journalism Manifesto*, communications scholars Barbie Zelizer, C.W. Anderson, and Pablo J. Boczkowski debate whether there should be “reform or revolution.”<sup>54</sup> In contrast, journalism scholar Stephen D. Reese’s vision of the “hybrid institution” of the press takes a more restrained approach. It calls for the institution maintain a certain level of stability, but that in some part it would constantly be evolving and emerging.<sup>55</sup> Whatever the vision, pinning down specifics is hard and maybe even

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<sup>48</sup> See Angela Fu, *Reporters Covering the Capitol Attack Were Used to Harassment and Heckling. But Wednesday Was Different*, POYNTER (Jan. 13, 2021), <https://www.poynter.org/reporting-editing/2021/reporters-covering-the-capitol-attack-were-used-to-harassment-and-heckling-but-wednesday-was-different/>.

<sup>49</sup> See Julie Posetti & Waqas Ejaz, *New Survey Finds an Alarming Tolerance for Attacks on the Press in the US—Particularly Among White, Republican Men*, THE POYNTER CONVERSATION (Nov. 4, 2024), <https://theconversation.com/new-survey-finds-an-alarming-tolerance-for-attacks-on-the-press-in-the-us-particularly-among-white-republican-men-242719>.

<sup>50</sup> See, e.g., Liam Reilly, *Trump Has Long Threatened the Media. Press Freedom Groups Fear He Might Make Good on It*, CNN (Nov. 7, 2024), <https://www.cnn.com/2024/11/07/media/trump-news-media-press-freedom-threats/index.html>.

<sup>51</sup> See, e.g., Glenn Ligon, *Untitled (America/Me)*, BILLBOARDS: HIGH LINE (Sept. – Dec. 2024) (describing and picturing an art installation featuring the word “AMERICA” with each letter other than the “M” and “E” crossed out), <https://www.thehighline.org/art/projects/glenn-ligon/>.

<sup>52</sup> See Waisbord, *supra* note 9, at 103.

<sup>53</sup> *Predictions for Journalism, 2025*, NIEMANLAB, <https://www.niemanlab.org/collection/predictions-2025/>.

<sup>54</sup> BARBIE ZELIZER, C.W. ANDERSON, & PABLO J. BOCZKOWSKI, *THE JOURNALISM MANIFESTO* 92 (2022).

<sup>55</sup> REESE, *supra* note 8, at 17-19.

foolish. According to sociologist Silvio Waisbord, trying to predict what the future of journalism will look like is likely “a quixotic endeavor given that virtually everything about news, the industry, and the profession is in flux.”<sup>56</sup>

Regardless of the way in which the press evolves, lawyers should not stand on the sidelines. Change can be driven in legal spheres by broadening and complicating our understanding of the press’s role. Currently, legal thinking about the purposes of the press and the functions it plays in service of those purposes is narrow and brittle. This is in part because it too often relies primarily on what the Supreme Court has said about the press. But the Court has discussed the press in a relatively small number of opinions and the vast majority of those were penned fifty years ago or more.<sup>57</sup> When legal scholars discuss the purposes of the press or press functions, inevitably that limited body of case law is at the foundation of the discussion.

The resulting danger is that our conception of the press is myopic and backward-looking in a way that is, to use Robert Cover’s terminology, “jurispathic.”<sup>58</sup> That is, as constitutional law scholar Jamal Greene says with respect to originalism’s jurispathic quality: “It leaves no space for other interpretive methodologies, and it produces narratives about the past that make other narratives irrelevant.”<sup>59</sup> The story we have about the press feels mythic and frozen in amber. It is choking off the ability to create new possibilities for the press, democracy, and the rule of law.

Lawyers are not the only ones who feel bound. Some communications scholars have lamented even their discipline’s limited conception of both journalism and its role in self-government. Barbie Zelizer has eloquently written about this with respect to journalism and its relationship to democracy specifically. She says that “[t]he regard for journalism and democracy as necessary props for each other derives from the earliest normative theories of journalism” and that this linkage, especially among American scholars, “has favored narrow definitions of each side of the relationship.”<sup>60</sup> She adds that “regard for journalism in the West has been narrowly refracted through a vested interest in the political world, with journalism thought to possess the most value when it is used to enhance democracy.”<sup>61</sup>

This Article is an effort to expand our thinking about the press and journalism and what they could be. Zelizer argues for centering imagination in thinking about journalism’s future and to reject arguments that “journalism is currently at its point of exhaustion.”<sup>62</sup> “[T]he fields of possibility” for envisioning journalism’s future, she writes, “have been smaller than they need to be.”<sup>63</sup> Here, I’m hoping to metaphorically open up the curtains and scan the horizon.

Broadening our conception of the press’s purpose and benefits would not only serve the lofty echelons of legal and communications scholarship. It should impact journalism on the ground. Journalism in service of democracy looks different than journalism in service of other

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<sup>56</sup> See Waisbord, *supra* note 9, at 103.

<sup>57</sup> Erin C. Carroll, *Promoting Journalism as Method*, 12 DREXEL L. REV. 691, 708 (2000) (“To the extent that the Court lauded the press in its opinions, it did so in an era in which the press was thriving: the 1960s and 70s...In its opinions, the Court recognized this heyday and froze it in jurisprudential amber.”).

<sup>58</sup> Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

<sup>59</sup> See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 6–8 (2009); Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 46 (2024) (making the connection between Cover and Greene).

<sup>60</sup> BARBIE ZELIZER, *WHAT JOURNALISM COULD BE* 1, 63–64 (2017).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.*

values and certainly different than journalism in service of capitalism. Likewise, journalism in service of the rule of law, as I will argue below, might look different still.

## II. WHAT IS AT ISSUE

Whether the press supports the rule of law depends on how we define each of these key concepts. Both the “free press” and “rule of law” are highly-contested terms.<sup>64</sup> Scholars have blackened reams of paper thinking through their meaning.<sup>65</sup> Because scholarship rarely, if ever, invokes both the free press and the rule of law together, I am going to assume that even those familiar with one are not intimately familiar with the other, and so it seems worth some exploration of each.

For purposes of this Article, which is aimed at expanding our thinking about the free press and its role, I try to adopt broad definitions. At the same time, both concepts are so vast that I cannot do justice to a rich version of either in this Article. So, in this Part, I set out the expansive definitions. Then the body of the Article attempts to stay as true to them as space allows and tries to be honest when it is falling short.

### A. DEFINING THE RULE OF LAW

The concept of the rule of law has likely existed since Aristotle.<sup>66</sup> And the actual term “rule of law” has been used for almost 150 years.<sup>67</sup> But its meaning is still unsettled. Much of the literature on the rule of law begins, as jurisprudence scholar Brian Z. Tamanaha’s *On the Rule of Law* does, indicating that it is “an exceedingly elusive notion” invoked by leaders and citizens alike who rarely “articulate precisely what it means.”<sup>68</sup> Likewise, legal philosopher Jeremy Waldron calls it “chameleon-like”<sup>69</sup> and “an essentially contested concept.”<sup>70</sup> Yet, as Waldron also indicates, the contestation “does not mean that [the rule of law] is hopelessly confused.”<sup>71</sup>

First, what the rule of law is not. Although it is a close cousin of democracy, they are not the same.<sup>72</sup> According to Waldron, the rule of law “is but one star in a constellation of political ideals: others include democracy, human rights, social justice and economic freedom.”<sup>73</sup> Many believe that rule of law is a precondition for democracy.<sup>74</sup> It is the soil in which democracy can root. And even though rule of law and democracy generally work in concert, there are situations

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<sup>64</sup> See, e.g., Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA L. REV. 1, 6 (2004) (“The Rule of Law is a multi-faceted ideal”); Ronnell Andersen Jones, *Rethinking Reporter’s Privilege*, 111 MICH. L. REV. 1221, 1241 (2013) (noting that “scholars have spilt gallons of ink setting forth proposed definitional approaches”).

<sup>65</sup> See Waldron, *The Concept and the Rule of Law*, *supra* note 64, at 6; Andersen Jones, *Rethinking Reporter’s Privilege*, *supra* note 64, at 1241.

<sup>66</sup> BINGHAM, *supra* note 7, at 3.

<sup>67</sup> *Id.*

<sup>68</sup> TAMANAHA, *supra* note 32, at 3.

<sup>69</sup> Robert A. Stein, *What Exactly is the Rule of Law?*, 57 HOUSTON L. REV. 185, 186 (2019).

<sup>70</sup> WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 2.

<sup>71</sup> *Id.*

<sup>72</sup> See Joseph Raz, *The Rule of Law and its Virtue*, in RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211 (2009) (indicating that the rule of law “is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man”).

<sup>73</sup> WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 2-3.

<sup>74</sup> *Id.* at 212-213.

in which they might conflict.<sup>75</sup> For example, judicial review of legislation is a situation in which rule of law can butt up against democracy given that the courts are serving as a check against the will of the people as expressed through statute.<sup>76</sup>

As for what the rule of law is, at its most basic, the rule of law requires that the sovereign is subject to law in the same way as any other citizens.<sup>77</sup> This is a definition advanced by A.V. Dicey, the British law professor credited with coining the expression “rule of law” in 1885.<sup>78</sup> Dicey wrote that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”<sup>79</sup> Or, in an earlier American formulation, penned by Thomas Paine in *Common Sense*, “in America, the law is king.”<sup>80</sup>

Building on this foundational idea, conceptions of the rule of law range from “thin” (or formalist) definitions to “thick” (or substantive) ones.<sup>81</sup> The thinnest of definitions, rejected as unworkable by all but perhaps autocrats and dictators, focus solely on procedures for applying rules.<sup>82</sup> If such a definition were employed it would look nothing like what even the loosest of normative understandings of the rule of law. Philosopher Joseph Raz made this point when he wrote that a “legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law.”<sup>83</sup>

Truly useful and desirable definitions of the rule of law are thicker and include not only procedural requirements but some substantive requirements as well. Lists of these requirements abound, but they typically include some or all of the following:

- with limited exceptions, law should apply equally to all<sup>84</sup>
- law is public, transparent, accessible, clear, and not contradictory<sup>85</sup>
- law is predictable and consistent<sup>86</sup>
- law is such that citizens have the ability to comply with it<sup>87</sup>
- questions of legal right and liability should be resolved by application of the law and not the exercise of arbitrary discretion<sup>88</sup>

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<sup>75</sup> *Id.* at 2-3.

<sup>76</sup> *Id.* at 9, 148, 212-13.

<sup>77</sup> A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193 (1885).

<sup>78</sup> BINGHAM, *supra* note 7, at 3.

<sup>79</sup> DICEY, *supra* note 77, at 193.

<sup>80</sup> THOMAS PAINE, THE WRITINGS OF THOMAS PAINE (Moncure Daniel Conway ed., 1894), <https://oll.libertyfund.org/pages/1776-paine-common-sense-pamphlet>.

<sup>81</sup> Krygier, *supra* note 14, at 81.

<sup>82</sup> See Tommasoli, *supra* note 5 (“[I]n general terms, a focus on ‘thin’ definitions places emphasis on the procedures through which rules are formulated and applied, whereas ‘thick’ definitions aim to protect rights and frame it within the broader human development discourse.”).

<sup>83</sup> Raz, *supra* note 72, at 211.

<sup>84</sup> BINGHAM, *supra* note 7, at 55.

<sup>85</sup> *Id.* at 37.

<sup>86</sup> *Id.* at 37.

<sup>87</sup> LON L. FULLER, THE MORALITY OF LAW 39 (1969); WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 223 (“Fuller does not use the phrase ‘the rule of law’ in regard to the principles he sets out ... [b]ut they have been adopted by the jurisprudence community as a fair statement of central elements of the rule-of-law ideal.”).

<sup>88</sup> BINGHAM, *supra* note 7, at 48, 54.

Even thicker definitions tend to incorporate heftier substantive goals.<sup>89</sup> At the broadest level, legal philosophers have conceived of this as a rule of law that promotes safety, liberty, and human dignity.<sup>90</sup> For example, philosopher Judith Shklar argued that any version of the rule of law worthy of discussion, should be one aimed at preventing “the fear of violence, the insecurity of arbitrary government and the discriminations of injustice.”<sup>91</sup> Likewise, legal philosopher Martin Krygier writes that any true rule of law system must have as “[i]ts ultimate goals” the “reduction of domination, fear, indignity or confusion.”<sup>92</sup>

More concretely, but perhaps not wholly capturing the aims of Shklar or Krygier, many have called for a rule of law that advances human rights, economic development, and compliance with international law.<sup>93</sup> Even more specifically, the Secretary General of the United Nations has recently indicated that the rule of law must be strengthened in a way that “enhances equal access to justice for all, places gender equality at the centre, protects our planet, invests in future generations, properly manages data and digital technology, [and] improves resilience and turns the tide of the spread of mis- and disinformation.”<sup>94</sup> Some non-governmental organizations and interest groups are similarly specific in their understandings of the rule of law. For example, the World Justice Project calls for open government and accessible dispute resolution as part of the rule of law.<sup>95</sup> And the International Bar Association includes “a strong and independent legal profession” and “strict protection of confidential communications between lawyer and client” as inherent to the rule of law.<sup>96</sup>

Despite its difference from democracy, rule of law and democracy do have commonalities. For example, on the ground, neither exists in a perfect or static form. “The rule of law is not something you have or don’t have. It comes in degrees, more or less, and not only on one scale,” Krygier writes.<sup>97</sup> He adds that it is “a relative and variable achievement.”<sup>98</sup> That means, that as it can slip away, it can also be built back up.

In addition, neither democracy nor rule of law exist solely in one institution or space. Democracy is practiced perhaps most visibly in legislatures and polling booths but it surely is a value realized in other institutions and in the polity generally. Likewise, the judiciary is the branch most associated with the rule of law. But legal philosophers like Waldron have noted that rule of law also operates in other spaces. He writes in *Thoughtfulness and the Rule of Law* that the entire book “can be seen as a way of standing up for the respectability of ruling through legislation.”<sup>99</sup> He adds that rule of law, too, is central to “public administration.” In this Article, I focus on the judiciary as the key implementer of rule of law, but more could be written about the rule of law in other spaces.

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<sup>89</sup> See Tommasoli, *supra* note 5.

<sup>90</sup> See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3, 4 (2011) (describing how formal aspects of the rule of law ultimately help protect liberty and human dignity).

<sup>91</sup> Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 16 (A. Hutchinson and P. Monahan eds., 1987).

<sup>92</sup> Krygier, *supra* note 14, at 84.

<sup>93</sup> See, e.g., BINGHAM, *supra* note 7, at 110.

<sup>94</sup> See, e.g., António Guterres, *New Vision of the Secretary-General for the Rule of Law*, UNITED NATIONS 2 (July 3, 2023), <https://www.ohchr.org/en/documents/tools-and-resources/secretary-generals-new-vision-rule-law>.

<sup>95</sup> Stein, *supra* note 69, at 191-92.

<sup>96</sup> *Id.* 192.

<sup>97</sup> Krygier, *supra* note 14, at 99, n1.

<sup>98</sup> *Id.* at 69.

<sup>99</sup> WALDRON, *THOUGHTFULNESS AND THE RULE OF LAW*, *supra* note 2, at 10.

## B. DEFINING THE PRESS

Among legal scholars who study the press, defining the press is a \$100 million question. That is because, to the extent the press receives legal benefits—constitutionally, statutorily, or otherwise—it needs to be identifiable. Over time, as scholars, judges, and legislators have grappled with this problem, two schools of thought have emerged.<sup>100</sup>

One is the “formal” approach.<sup>101</sup> This approach views the press as an institution that employs journalists who produce journalism. As legal scholar Paul Horwitz wrote in *First Amendment Institutions*, the press is “identifiable and long established; it is a major part of the infrastructure of public discourse; it follows its own norms, practices, and self-regulatory standards; and it is fully (if imperfectly) capable of acting autonomously.”<sup>102</sup> Courts, too, especially in decades past, have relied on formal definitions, finding it perhaps easiest to define the press by seeing the word “*Broadcasting*” or “*Bulletin*” or “*Daily*” in a party’s name. The ease of this approach in the second half of the twentieth century was accurately captured by First Amendment lawyer Floyd Abrams when he wrote that “In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one.”<sup>103</sup>

But the usefulness of the formal test has waned in recent decades as newspapers shutter, social media platforms have become major conduits of news, and journalists have decamped to create newsletters and Substacks.<sup>104</sup> As the press becomes more diffuse, the institutional test is harder to apply.<sup>105</sup> In its place, legal scholars and legislators generally rely on a functional test. That is, the press is identifiable by what it does.

For example, press law scholar Sonja R. West has proposed a four-part functional test: “(1) recognition by others as the press; (2) holding oneself out as the press; (3) training, education, or experience in journalism; and (4) regularity of publication and established audience.”<sup>106</sup> Similar, but not identical, is the definition included in a reporter’s privilege bill called the PRESS Act, which press advocates desperately tried (and failed) to get through the Senate prior to President Trump beginning his second term.<sup>107</sup> It defined a journalist as “a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, investigates, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”<sup>108</sup>

I am persuaded by the idea of a functional definition generally. But the definition needs to be richer. The press is not simply about who its members are or the fact that it publishes. It is about *how* its work is done. It is the process. The press, and those journalists comprising it, gather and disseminate newsworthy information according to certain communal processes and

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<sup>100</sup> See Floyd Abrams, Sandra Baron, Lee Levine, Jacob M. Schriener-Briggs, & Isaac Barnes May, *The Press Clause: The Forgotten First Amendment*, 5 J. OF FREE SPEECH L. 561, 646-47 (2024) (describing the formal/institutional approach on the one hand and the functional approach on the other).

<sup>101</sup> See *id.*

<sup>102</sup> PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 146 (2013).

<sup>103</sup> Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580 (1979).

<sup>104</sup> See Chris Cillizza, *Who Is a ‘Journalist’?: Joe, Mika, and Our Changing Media World*, SO WHAT, SUBSTACK (Nov. 26, 2024) (arguing—on Substack—that the “the term ‘journalist’ is outdated” and suggesting ‘next-gen journalists’ as a substitute).

<sup>105</sup> See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2437-38 (2014).

<sup>106</sup> *Id.* at 2456.

<sup>107</sup> S. 2074, 118th Cong. (2023).

<sup>108</sup> *Id.*

norms. For example, the press exercises editorial independence. It acts according to publicly-available ethical standards, including correcting errors. It works to verify facts and not to publish in the absence of verification. It is committed to accuracy. It attempts to contextualize stories. It has a professed commitment to providing news in service of the public good.

These processes and commitments separate the press from the “media.”<sup>109</sup> The media, by my definition, could be any entity disseminating any information—even misinformation, disinformation, or rumor. It could include outlets driven solely by partisan political agendas. For purposes of this Article, it is important to distinguish the press from the media generally because certain members of the media may be regularly undermining the rule of law rather than promoting it.

Finally, although the description of the press in this Article is rooted in reality, I am also setting out a normative vision for the press and journalism. I am writing about what the press is capable of and not always what the press is and does today. It is an aspirational vision, but I truly believe it is an achievable one.

### III. HOW A FREE PRESS SUPPORTS THE RULE OF LAW

Although a handful of books,<sup>110</sup> articles,<sup>111</sup> white papers,<sup>112</sup> and websites<sup>113</sup> note the connection between the press and the rule of law, the way that the press can contribute to rule of law in the United States has not been investigated or described in any depth.<sup>114</sup> But the connection is ripe for examination. Rule of law scholars have long emphasized how deeply contextual the rule of law is. This is explained by legal philosopher Krygier:

[W]ith regard to the rule of law it pays to be a contextual universalist: universalist about the value of it; deeply contextual about how to get there. What is precious

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<sup>109</sup> See Sonja R. West, *The ‘Press,’ Then & Now*, 77 OHIO ST. L.J. 49, 90 (2016) (distinguishing between “mass communication technology” and “journalism”).

<sup>110</sup> See, e.g., BINGHAM, *supra* note 7, at 78 (discussing the importance of freedom of expression generally to the rule of law and noting that in a modern democracy, the “media, of course, have a crucial role to play” in informing and empowering citizens”).

<sup>111</sup> See Daniel Barnhizer & Adam Candeub, *Elite Theory, Media Regulation, and “Fake News”* in DISINFORMATION AND DIGITAL MEDIA AS A CHALLENGE FOR DEMOCRACY (Georgios Terzis et al. eds., 2021); Daniel A. Hanley, *America’s Fourth Estate: History and Law*, OPEN MARKETS INST. 4 (Nov. 2023) (arguing that antimonopoly can “help foster a news industry that is deconcentrated, capable of providing diverse opinion, able to hold the government and other powerful actors accountable to the rule of law, and maintains as wide a distribution system as possible so that the public can access information”); William E. Walters, *Freedom of the Press and the Rule of Law: Challenged Values in a Changing Marketplace*, 38 COLORADO LAWYER 5 (Mar. 2009).

<sup>112</sup> See, e.g., Guterres, *supra* note 94, at 2 (“We must support a free and independent media and its essential role in strengthening the rule of law.”).

<sup>113</sup> On of the most detailed descriptions of the link between the press and the rule of law is in a Q&A on the site of JURISTnews, which bills itself as “Law students reporting the rule of law in crisis.” See *Rule of Law Materials*, JURISTNEWS: LAW STUDENTS REPORTING THE RULE OF LAW IN CRISIS, <https://www.jurist.org/rule-of-law-materials/#section10>.

<sup>114</sup> Typical is an article by two Turkish-based academics who conclude that a stronger media leads to a more informed citizenry, which in turn leads to better economic development and human rights, which are substantive components of the rule of law. See Osama Shaikh & Zeeshan Malik, *Rule of Law: A Literature Review on Theoretical Concepts, Challenges from Mass Media to Innovation*, 1 JUS CORPUS L.J. 31, 37-39 (Aug. 2020), <https://www.juscorpus.com/journal/issue-2/>. This may well be right. But the 11-page essay does not provide space to truly unpack the linkages. See *id.*

about the rule of law, and a reason to start there, is not this or that bit of legal stuff but an outcome, a state of affairs, in which the law counts in certain ways. What conspires to generate such a state of affairs is complex and often mysterious, and will vary from place to place and time to time. In particular it will vary considerably between circumstances where the rule of law has yet to be *established* and those where the ambitious is that it be improved. What doesn't vary is that it will depend on many things *outside* what we commonly regard as legal institutions.<sup>115</sup>

One of those “things *outside*” is the press.<sup>116</sup> The press helps bring the rule of law to life. The way it does so, in one sense, is very basic. Both democracy and the rule of law are, at their roots, communication problems.<sup>117</sup> That is, both democracy and rule of law intimately depend on the creation, expression, sharing, and evolution of ideas. This is facilitated by any number of sources, conduits, and networks, but the press is one of them. Most Americans have very little personal experience with how law is formulated or meted out other than through jury service or, if they are unfortunate, criminal prosecution. It is via the press that the public understands the what, why, and how with regard to the work of our legislature and judiciary. And the public's belief in the integrity, legitimacy, and authority of these systems depends, in great part, on the press.

This Part aims to go beyond that basic connection, however. It demonstrates particular ways in which the press supports and influences the rule of law. It organizes this investigation around functions that the Supreme Court has said the press plays in service of its constitutional role in our democracy. Although there is some variation in this list from opinion to opinion, it often includes being a watchdog, educating the public by gathering and disseminating newsworthy information, and facilitating public fora for the discussion of ideas.<sup>118</sup>

This Part takes these three key press roles and does two things. It first describes how the press performs each role both in service of democracy and also in support of the rule of law. For the watchdog and educator roles, it then explains how conceiving of the function as one in service of the rule of law raises considerations not previously addressed in legal scholarship.

Finally, refusing to be bound by the Supreme Court's vision of the press, this Part then moves on to examine two press functions that have not been recognized by the Court but should be because of the way in which they support the rule of law (not to mention democracy). That is the press's role as a curator and empathy builder. The premise is that by naming and defining these functions, we can motivate support for the press and, in turn, curb the erosion of both the press and the rule of law.<sup>119</sup>

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<sup>115</sup> Krygier, *supra* note 14, at 99 (emphasis in original); WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 168 (noting that law itself “comes to life in institutions”).

<sup>116</sup> See Krygier, *supra* note 14, at 99.

<sup>117</sup> See ANANNY, *supra* note 15, at 18 (describing “[d]emocratic autonomy” as a “communication problem that sits at an intersection of the individual and the collective, the private and the social”).

<sup>118</sup> See Abrams, Baron, Levine, Schriner-Briggs, & Barnes May, *supra* note 100, at 615-16, 620-21; First Nat'l Bank of Boston, 435 U.S. at 781 (“The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”).

<sup>119</sup> Although this analysis is focused on the United States, these key press functions are consistent in other parts of the world. Studies of the press on other continents routinely start from the premise that these press functions are fundamental ones. See, e.g., Monika Hanych et al., *The Influence of Public Opinion and media on Judicial Decision-Making: Elite Judges' Perceptions and Strategies*, INT'L J. FOR CT. ADMIN. 6 (2023) (noting in a study of the Czech



## A. THE WATCHDOG

There is widespread agreement among press advocates that the watchdog is the press's most essential and historically grounded democratic role.<sup>120</sup> This watchdog role incorporates at least two, interrelated functions.<sup>121</sup> The first is that the press acts as a monitor or a sentinel; its very presence can prevent wrongdoing. The second is that it investigates government wrongdoing and exposes it. That exposure is a first step in resolving the problem and empowering citizens to use their leverage, whether it be by voting or otherwise, to help with that resolution. Press supporters have described the watchdog role as an unbridled good. The light could never be too bright, the watchdog's bite never too deep.

Just as shining light in dark corners of government boosts democracy generally, it can also boost the rule of law. The workings of our legal system are less prone to corruption when monitored. Moreover, the press can expose shortcomings and malfeasance in how law is created and applied. Rooting out crooked lobbyists, slapdash legislation, compromised judges, and failures in our criminal justice system can all lead to improvements in the rule of law. Without the press, much of this type of rot would go unremarked and unfixed.

Yet, unlike how the press has viewed the watchdog role with respect to democracy, when it comes to the rule of law, if the press plays its rooting-out-wrongdoing part in a particularly vicious way, it might be destabilizing and dangerous. This is because even in its weakened state, the press holds sway over how the public views the judiciary, and much of the judiciary's power is based in public perceptions of its legitimacy. If the press were to only (or even primarily) attack the judiciary, it might damage the judiciary's credibility such that it could not effectively uphold the rule of law.

This Part explores how the watchdog role can enhance rule of law. It likewise looks at how, if not balanced by other types of reporting, there is a danger that watchdog journalism undermines the rule of law.

### 1. *How it Functions*

For journalists, the watchdog role is a holy grail. They call it their “‘iron core’ accountability function.”<sup>122</sup> Journalists see a need for “the hot light of publicity,” which aims to prevent the powerful from becoming “altogether ruthless.”<sup>123</sup> It is likely colorful statements like these that have led to, as sociologist Waisbord has written, the “[t]he lore of journalism as well

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Constitutional Court that the media “give citizens the necessary information for effective citizenship participation and provide a forum for debate on public issues” and that media “acts as one of the powerful external mechanisms for oversight of judicial accountability”).

<sup>120</sup> DAVID L. PROTESS ET AL., JOURNALISM OF OUTRAGE 29 (1991) (“[T]he press’s watchdog role in American democracy has deep historical roots.”).

<sup>121</sup> BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 198 (4th ed. 2021) (describing the watchdog as both a monitor and an investigator).

<sup>122</sup> REESE, *supra* note 8, at 4.

<sup>123</sup> Cole C. Campbell, *Journalism as a Democratic Art*, in THE IDEA OF PUBLIC JOURNALISM xxiii (Theodore L. Glasser ed., 1996).

as academic studies frequently remind[ing] us that holding government accountable is one of the most fundamental tasks of the press in a democratic order.”<sup>124</sup>

This lore is founded in fact. The framing generation understood and celebrated the watchdog role of the press. The Continental Congress, in its *Address to the Inhabitants of Quebec of 1774*, which outlines the fundamental rights demanded by colonists, focused on this role.<sup>125</sup> It stated that the importance of a free press was not just tied up in its “advancement of truth, science, morality, and arts in general,” but that due to the press’s actions, “oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.”<sup>126</sup>

None of this is surprising given the way that the watchdog role aligns with long-standing views of liberal democracy in which the people are sovereign, sunlight is a disinfectant, and the marketplace of ideas is the ultimate generator of truth.<sup>127</sup> Accordingly, in its role as watchdog, the press serves to monitor the powerful. It plays what constitutional law scholar Vincent Blasi has called its checking function.<sup>128</sup> This watchdog or checking role has been understood as one over both public and private interests, but because the press has been so tied to its democratic function, the check on public entities has always been the more lauded and discussed one.<sup>129</sup> It is also the basis for the most prominent metaphor for the press—the fourth estate.<sup>130</sup> As a fourth estate, the press operates as part of the system of checks and balances that includes the three constitutional branches of government.<sup>131</sup>

For the Supreme Court, too, the watchdog role has been the most heralded press function. The classic reference to this role is from *New York Times Co. v. United States*<sup>132</sup> (known as the Pentagon Papers Case) in which Justice Hugo Black wrote that “[t]he press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”<sup>133</sup> Justice Black’s concurrence went as far as to state that the press’s watchdog role was an affirmative obligation. He wrote that “paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”<sup>134</sup> These statements show a ballooning sense in the 1970s, unsurprisingly given

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<sup>124</sup> SILVIO WAISBORD, WATCHDOG JOURNALISM IN SOUTH AMERICA: NEWS, ACCOUNTABILITY, AND DEMOCRACY 209 (2000).

<sup>125</sup> BERNARD SCHWARTZ, CONSTITUTIONAL ISSUES: FREEDOM OF THE PRESS 131-33 (1992).

<sup>126</sup> *Id.* at 132.

<sup>127</sup> See Whitney Phillips, *Light Disinfects*, 4 GEO. L. TECH. REV. 379, 382 (2020) (describing the link between liberalism and the idea that “light disinfects”); Pippa Norris, *Watchdog Journalism*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 525-26 (Mark Bovens et al. eds., 2014) (“Classical liberalism, ever skeptical about the trustworthiness of government and powerful leaders, advocates that journalists should be watchdogs of the public interest.”).

<sup>128</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) (noting that “if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate”).

<sup>129</sup> See Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 754 (2014) (noting that the Supreme Court has recognized that the press checks private power and not just government power).

<sup>130</sup> See West, *The “Press,” Then & Now*, *supra* note 109, at 70.

<sup>131</sup> See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975).

<sup>132</sup> 403 U.S. 713 (1971).

<sup>133</sup> *Id.* at 717 (Black J., concurring).

<sup>134</sup> *Id.*

the press's work uncovering corruption during this time, of the importance of the press's watchdog role.<sup>135</sup>

Although legal scholars have not focused on it, this press watchdogging of government and private power not only supports democracy but it also supports the rule of law. It does so by advancing formal rule of law values. Most obviously, it aligns with the central value of the rule of law—that the most powerful among us are subject to the same laws as the least powerful. This is really the *raison d'être* of watchdog reporting—to knock down the powerful when they overstep. It “ensur[es] accountability of the governors to the governed.”<sup>136</sup> The press animates this value in a broad sense. It is not simply directed at the most powerful single actor in the American government, the president, but potentially at any actor with power.

Beyond this, it also advances other rule of law aims. These includes transparency—watchdog reporting is all about bringing otherwise buried and important information to light. As the Supreme Court wrote in *Grosjean v. American Press Co.*,<sup>137</sup> which found a tax on news publishers unconstitutional, “The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.”<sup>138</sup>

The watchdog function even serves to encourage consistency in the application of rule of law. To the extent that legal institutions know that the press is simply present—acting as a skeptical monitor and sentinel—this might keep behavior more in line with expected norms and rules. I know of no studies looking at this issue with respect to the press and the courts, but there are studies indicating that local governments perform better simply due to the existence of local press outlets.<sup>139</sup> With respect to the rule of law, the monitoring also lets citizens know that decisions are not being made in secretive star chambers but in public spaces, according to rules, and without fealty to arbitrary power.

## 2. *New Considerations Raised by the Rule of Law*

Yet, when it comes to advancing rule of law values—at least as far as those values are meted out by the judicial branch—the press's watchdog role may not always be able to operate in quite the same way that it does with respect to advancing democratic values.<sup>140</sup> With respect to

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<sup>135</sup> They also echo what Justice Black had also written five years earlier in *Mills v. Alabama*—a case about a state statute that criminalized publishing editorials on election day encouraging voting a certain way. There, he wrote, “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (indicating the press acts as “a powerful and constructive force, contributing to remedial action in the conduct of public business”).

<sup>136</sup> WAISBORD, WATCHDOG JOURNALISM IN SOUTH AMERICA: NEWS, ACCOUNTABILITY, AND DEMOCRACY, *supra* note 125, at 209.

<sup>137</sup> 297 U.S. 233 (1936).

<sup>138</sup> *Id.* at 250.

<sup>139</sup> See Kriston Capps, *The Hidden Costs of Losing Your City's Newspaper*, CITYLAB (May 30, 2018), <https://www.citylab.com/equity/2018/05/study-when-local-newspaper-close-city-bond-finances-suffer/561422/>.

<sup>140</sup> See Rachel Luberda, *The Fourth Branch of the Government: Evaluating the media's Role in Overseeing the Independent Judiciary*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 507 (2008) (“While legal scholars have often

the judiciary, the press cannot be all check. It needs also to provide some balance. That is, a risk exists in continually criticizing the judiciary without also supporting it.

This is because what the public thinks about the judiciary—the very legitimacy of the branch—weighs heavy in the hands of the press.<sup>141</sup> With respect to the U.S. Supreme Court, experts have pointed out that media coverage is “[t]he principal mechanism by which the public receives its exceptionally limited information about the U.S. Supreme Court”<sup>142</sup> and that the press is a “critical mediator” of the Court’s work.<sup>143</sup> It is, quite simply, “the gatekeeper of the Court’s public image.”<sup>144</sup>

Veteran journalists know this well. As Linda Greenhouse, a *New York Times* Supreme Court correspondent for four decades, wrote, “it is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society.”<sup>145</sup> Given this power, press coverage of the judiciary could necessarily have a significant effect on rule of law. A judiciary that is untrusted or delegitimated in the eyes of the public will have a far more difficult time upholding the rule of law. As Paul Mishkin wrote in 1954 of the Supreme Court, but is no less true today of the judiciary generally, public confidence in the Court is not just a matter of the Court’s legitimacy, it is also “the ultimate foundation of the Court’s authority.”<sup>146</sup>

The press’s power over the judiciary is unique. The press does not hold the same sway over the other branches. This is because when it comes to our information ecosystem and the marketplace of ideas, the judiciary does not and cannot function in the same way as the executive or legislative branches. Ethical rules muzzle judges in a variety of circumstances. The Code of Conduct for federal judges bars them from “public comment on the merits of a matter pending or impending in any court.”<sup>147</sup> The “impending” and “any” makes the reach of this prohibition especially broad. State court judges are subject to similar restraints via rules largely based on the American Bar Association Model Code of Judicial Conduct Rule 2.10(A).<sup>148</sup> It states that “A

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expounded on the need for a vital independent judiciary, there remains an underlying recognition that the free press serves a vital role in democratic society as a check upon the judicial branch.”).

<sup>141</sup> See RonNell Andersen Jones, *Media Politicization of the United States Supreme Court*, 4 OÑATI SOCIO-LEGAL SERIES 4, 616 (2014) (“Studies have linked media depictions of the Court to public opinion of the Court, both in specific, situational instances and more generally, in overarching perceptions of the institution.”) (Citations omitted).

<sup>142</sup> *Id.*

<sup>143</sup> Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. OF LEGAL STUD. 223, 229 (2016).

<sup>144</sup> See *id.* at 250 (“The media are said to acknowledge their role in helping the justices and the Court maintain institutional legitimacy in the eyes of the public.”); Tani, *supra* note 60, at 48 (calling the media “the gatekeeper of the Court’s public image”); Richard Davis, *Lifting the Shroud: News Media Portrayal of the U.S. Supreme Court*, 9 COMM’NS & L., 43, 58-59 (1987) (describing the power of press coverage over the Supreme Court).

<sup>145</sup> Linda Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, 105 YALE L. J. 1537, 1538 (1996); Linda Greenhouse, *Senior Research Scholar in Law*, YALE L. SCH., <https://law.yale.edu/linda-greenhouse> (noting Greenhouse’s tenure at the Court ran from 1978 to 2008).

<sup>146</sup> See Paul J. Mishkin, *Prophecy, Realism and the Supreme Court: The Development of Institutional Unity*, 40 AM. BAR ASS’N J. 680, 683 (August 1954).

<sup>147</sup> Canon 3 (A)(6), *Code of Conduct for U.S. Judges* (U.S. CTS. 2019), [https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges#:~:text=\(5\)%20A%20judge%20should%20dispose,the%20judge's%20direction%20and%20control](https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges#:~:text=(5)%20A%20judge%20should%20dispose,the%20judge's%20direction%20and%20control).

<sup>148</sup> Rule 2.10: *Judicial Statements on Pending and Impending Cases*, Model Code of Judicial Conduct (AM. BAR ASS’N 2020),

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_2/rule2\\_10judicialstatementsonpendingandimpendingcases/](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_10judicialstatementsonpendingandimpendingcases/).

judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”<sup>149</sup>

No such constraints apply to most members of the legislature or the executive branch. They are regular and generous patrons of the marketplace of ideas. In many instances, they can and do hold press conferences.<sup>150</sup> They tweet, post, comment, tag, and share on social media.<sup>151</sup> Politicians, especially, buy advertising time and spend enormous amounts of energy and money curating their images and messages.<sup>152</sup> Sometimes for an audience of millions.<sup>153</sup>

For its part, in its opinions, the Supreme Court has alluded to the complexity of the watchdog role when it comes to the rule of law—and it has subtly suggested that the press should be submissive. In the 1976 case *Nebraska Press Association v. Stuart*,<sup>154</sup> Justice William Brennan first acknowledged the importance of the press’s watchdog role writing that “free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.”<sup>155</sup> But then, suggesting that to robustly critique or “check” the courts could go too far, Brennan added that a “responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.”

In one sense, this “handmaiden” reference is merely an indication that the press is a partner to the judiciary in ensuring the fairness of the criminal justice system—a co-equal institution, just as the fourth estate metaphor itself suggests. But more skeptically, a fourth estate is not the same as a handmaiden. A “handmaiden,” is a “female personal attendant or servant.”<sup>156</sup> And so, with this metaphor (repeated in three other Supreme Court cases involving the press<sup>157</sup>), the Court may have wanted to defang the watchdog when it comes to its role over the judiciary specifically. This more skeptical reading is reinforced by the fact that the Court uses “handmaiden” in other cases from the same era to suggest not a partner, but a lackey or servant.<sup>158</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> See Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, *supra* note 145, at 1538.

<sup>151</sup> See Patrick Van Kessel et al., *Congress Soars to New Heights on Social Media*, PEW RSCH. CTR. (July 16, 2020) (describing social media use by members of Congress) <https://www.pewresearch.org/internet/2020/07/16/1-the-congressional-social-media-landscape/>.

<sup>152</sup> Linos & Twist, *supra* note 143, at 225 (“The Supreme Court depends more heavily on the media to convey and translate its messages than do other elite actors. Elites in the executive and legislative branches often speak directly to the public; they also buy advertisements and hold frequent press conferences to ensure that their messages are spread widely. In contrast, the nine justices communicate their views through lengthy and complex judicial opinions.”).

<sup>153</sup> See, e.g., Alexandria Ocasio-Cortez (@aoc.bsky.social), BLUESKY (showing 1.8 million followers as of February 2025), <https://bsky.app/profile/aoc.bsky.social>.

<sup>154</sup> 427 U.S. 539 (1976)

<sup>155</sup> *Id.*

<sup>156</sup> *Handmaiden*, OXFORD ENG. DICTIONARY.

<sup>157</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 413 (1979).

<sup>158</sup> See *Greer v. Spock*, 428 U.S. 828, 839 (1976) (noting that under a military policy that prevents “entanglement with partisan political campaigns” that the military “is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates”); *Brown v. Glines*, 444 U.S. 348, 372 (1980) (Brennan, J., dissenting) (quoting *Greer v. Spock*, 428 U.S. at 839); *Gelbard v. United States*, 408 U.S. 41, 69 (1972) (“Rather, if these witnesses’ allegations are correct, judges are being invited to become the handmaidens of intentional police

More recent comments by Supreme Court justices are not so subtle. Numerous justices have indicated an antipathy for the press’s watchdog role. For example, Justice Clarence Thomas has said that “media organizations” are among a group of speakers who “cast false aspersions on public figures with near impunity” and “perpetrate lies.”<sup>159</sup> And in response to one of a series of articles investigating gifts to the justices, Justice Samuel Alito slammed the news nonprofit that published it in an opinion piece he wrote in the *Wall Street Journal* entitled “*ProPublica Misleads Its Readers*.”<sup>160</sup> *ProPublica* has not retracted or corrected the piece and it, as well as other news outlets, have continued publishing a series of highly critical articles about numerous justices.<sup>161</sup>

To the extent the Court (past or present) was dismissing the press as a “handmaiden” or maligning it generally, these attitudes about the press’s role vis-à-vis the rule of law and its watchdog function specifically are a far cry from what Justice Felix Frankfurter wrote in 1949. He saw the vital link between the press and an independent judiciary—a key part of the rule of law—when he wrote, “one potent means for assuring judges their independence is a free press.”<sup>162</sup> In other words, he saw the institutions—at least in certain instances—as partners. And the press has been this partner—every time it respects the secrecy of grand juries, it refuses to name jurors, it helps catch criminals on the lam. This relationship is not always one of antagonism but of mutual respect and succor.

For the reasons Justice Frankfurter and others have long recognized, the press’s watchdog role in support of both democracy and the rule of law must continue. The press should not be a mere “handmaiden.” If it acts courageously, it should not be intimidated from writing about corruption and conflicts regarding judges or any aspect of the judiciary or rule of law. And yet, in many instances it is also a true partner and bearer of witness to the functioning of the judiciary system. Far more thinking needs to be done about whether there should ever be limits on the watchdog role or whether there are ways to complement watchdog coverage regarding the rule of law such that the legitimacy of the courts is not unintentionally undermined. These questions are taken up again in the Article’s final Part.

## B. THE EDUCATOR

Other than the watchdog function, the educator function is the press role the Supreme Court generally focuses on most.<sup>163</sup> Like its watchdog role, this press function has been framed as part of the press’s undergirding of democracy. As this Part describes, the press also plays this role in support of the rule of law. Through storytelling, the press educates the citizenry, making

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lawlessness by order these victims to elaborate on their telephonic communications of which the prosecutors would have no knowledge but for their unconstitutional surveillance”).

<sup>159</sup> Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2455 (2022) (Thomas, J., dissenting).

<sup>160</sup> See Samuel A. Alito, Jr., Opinion, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda> [<https://perma.cc/D8R8-GFGV>].

<sup>161</sup> See, e.g., Alison Durkee, *Here Are All the Supreme Court Controversies That Led to Adopting an Ethics Code*, FORBES (Nov. 14, 2023, 9:28 AM), <https://www.forbes.com/sites/alisondurkee/2023/11/14/here-are-all-the-supreme-court-controversies-that-led-to-adopting-an-ethics-code/?sh=3a32f30264ca> [<https://perma.cc/C7R6-QZWH>] (linking to numerous news articles alleging ethical lapses by numerous justices).

<sup>162</sup> Pennekamp v. Florida, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

<sup>163</sup> See First Nat’l Bank of Boston, 435 U.S. at 781 (“The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”).

law more public and more transparent. It may even make it more interesting, so that citizens feel invested in it. This educative storytelling function is described in more detail below.

Focusing in on the rule of law, this Part also turns the conventional understanding of how the educator function works on its head. When described with respect to democracy, the idea is that information flows from government officials and other elites through the press and down to the public, so that the public has the information it needs to vote. But, with respect to rule of law, the press educates bi-directionally. It educates the public about the rule of law, and it educates the judiciary (and animates law itself) by creating narratives about the citizenry that convey norms, standards, and values. That is, the press provides information that infuse the rule of law. This is not a hierarchical or vertical transfer of knowledge, but a horizontal one.

### *1. How It Functions*

Sociologist Michael Schudson calls education the press’s “most obvious” role in service of democracy.<sup>164</sup> The idea, according to Schudson, is that the press informs the public “of what its political representatives are doing, what dangers and opportunities for society loom on the horizon, and what fellow citizens are up to.”<sup>165</sup> All of this “enables the citizenry to participate in self-government.”<sup>166</sup>

This causal chain—that the press informs the public and the public can participate in democracy—has a long history and was even behind the formation of the U.S. Postal Service. When the system was established, shortly after the founding, the idea was that it would be a “tool for promoting the ideas of a republic in which the people were sovereign” and newspapers were “one of the principal means to strengthen the republican foundations of the young nation.”<sup>167</sup> Legislators viewed the circulation of newspapers as so vital, that newspapers received a dramatically discounted postage rate.<sup>168</sup> Newspapers were seen as the lifeblood of democracy. During the same era, newspapers were similarly seen as vital for circulating information about rule of law.<sup>169</sup> Two days after the U.S. Constitution was signed in 1787, it was published in a newspaper, the *Pennsylvania Packet and Daily Advertiser*.<sup>170</sup>

In the latter half of the twentieth century, the Supreme Court explicitly and repeatedly recognized the press’s educational role as part of the trinity of its key roles. In *First National Bank of Boston v. Bellotti*,<sup>171</sup> the Court wrote that press cases “emphasize the special and constitutional recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>172</sup> The Court has specifically indicated that the press provides an “informative function.”<sup>173</sup>

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<sup>164</sup> Michael Schudson, *News and Democratic Society: Past, Present, and Future*, 10 THE HEDGEHOG REV. 7, 9 (Summer 2008).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 677 (2007).

<sup>168</sup> *Id.*

<sup>169</sup> See *Brief for Amici Curiae of the Reporters Committee for Freedom of the Press and 25 Media Organizations* at 11, *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020) (No. 118-1150), 2019 WL 5305477.

<sup>170</sup> *Id.*

<sup>171</sup> 435 U.S. 765 (1978)

<sup>172</sup> *Id.* at 781.

<sup>173</sup> *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972).

Still other cases homed in on the educational role with respect to rule of law. For example, in *Estes v. Texas*,<sup>174</sup> the Court noted that television news is “capable of performing an educational function by acquainting the public with the judicial process in action.”<sup>175</sup> And in *Richmond Newspapers, Inc. v. Virginia*,<sup>176</sup> the Court indicated that as a proxy for the public, the press “affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice.”<sup>177</sup>

For its part, the press has implicitly recognized its educative role with respect to the rule of law by regularly installing reporters in courthouses, legislatures, and on criminal justice beats, for example. Stories from these beats not only cover substantive rule of law issues but contribute to the rule of law values of transparency. The necessity of this kind of publicity was insisted upon by Lon Fuller, an early thinker about the components of the rule of law, which he described in his classic book *The Morality of Law*.<sup>178</sup> Fuller argued that law need “adequate publication” both so that it can be critiqued but also because “if [laws] are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.” In other words, if the public does not know the law, it is not fair to charge them with failure to follow it. Similarly, and more recently, Jeremy Waldron has said that it is not enough to have norms “hidden away in the closets of bureaucracy.”<sup>179</sup> Rather, law “must be promulgated to the public” and “norms should be public knowledge in the sense of being available to anyone who is sufficiently interested.”<sup>180</sup>

In this way, the press can advance the rule of law in a manner that a simple public repository of law could not. Being an educator and teaching is not the same as simply handing over a textbook. It is making the information accessible, digestible, contextual, and ultimately interesting. The press becomes this teacher though employing narrative. As numerous communications scholars have recognized, storytelling is a major part of what the press does.

## 2. *New Considerations Raised by the Rule of Law*

In describing the press’s educator role, the conventional wisdom from scholars and the Court is that the press is educating the public.<sup>181</sup> If the information flow were diagrammed, it might look like the government being a brain and the press being a system of nerves that send messages out to the extremities.

Here, I want to suggest that in the rule of law context, the information flow also works in the opposite direction. That is the extremities (the public) aided by the nervous system (the press), sends signals back to the brain (the government). And I want to further argue that this information flow is critical to rule of law’s functioning.

This is because, as legal scholars have argued, rule of law is a dynamic concept that draws on the world around it. To use another somatic metaphor, the rule of law is not merely a

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<sup>174</sup> 381 U.S. 532 (1965).

<sup>175</sup> *Id.* at 589 (Harlan, J., concurring).

<sup>176</sup> 448 U.S. 555 (1980).

<sup>177</sup> *Id.* at 572.

<sup>178</sup> FULLER, *supra* note 87, at 51.

<sup>179</sup> WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 160.

<sup>180</sup> *Id.* at 49.

<sup>181</sup> See WALTER LIPPMANN, PUBLIC OPINION 8 (Courier Corp. 2012) (1922); Hanych et al., *supra* note 119, at 6 (describing the same process in Czechia writing “Citizens do not directly monitor such institutions themselves but allow the media to do this work instead.”).



skeleton, but a living organism, fed by air, water, and nutrients. Martin Krygier has made this point in writing that “[t]he rule of law grows, needs nurturing, and has to be in sync with local ecologies. It can’t just be screwed in, though it can be screwed up, and it depends as much on what’s going on around it, on the particular this in that ecological niche, as on its own characteristics.”<sup>182</sup> He adds that “the rule of law depends on a lot going right outside official practices and institutions, and a lot of what it depends upon is not what we conventionally take to be legal.”<sup>183</sup>

And it is not strictly rule of law scholars who have made this point. Robert Cover seized on a life-giving metaphor in his coining of the word “jurisgenesis,” which he described as “the creation of legal meaning.”<sup>184</sup> That creation, he argued is “collective or social” and “takes place always through an essentially cultural medium.”<sup>185</sup> Importantly, for Cover, that cultural medium is the communal practice of narrative-making.<sup>186</sup> In describing how narrative animates the way in which law mutates and evolves, he wrote, “To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but the ‘in,’ the ‘ought,’ and the ‘what might be.’ Narrative so integrates these domains.”<sup>187</sup>

The press is our nation’s key collective narrative-making institution.<sup>188</sup> Its most obvious and tangible product is story. Communications scholars have long studied the way in which the press is an engine of human narrative-making.<sup>189</sup> Drawing on cultural studies, numerous American journalism scholars have understood journalistic texts as collective “cultural artifacts” based in a “broader system of meaning, where the facts that undergird contemporary social relations are given legible form within a narrative structure.”<sup>190</sup>

News stories, scholars have said, can “express[] and reaffirm[] prevailing values, beliefs, and ideologies, particularly through the creation and retelling of cultural myths.”<sup>191</sup> And many emphasize that despite the way the press often fetishizes the individuality of journalists, that the production of news is a complex stew of cultural practices and factors.<sup>192</sup> In this way, news is a product of and reflects community beliefs and norms.

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<sup>182</sup> Krygier, *supra* note 14, at 86.

<sup>183</sup> *Id.*; Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 581 (2009) (quoting Jeremy Waldron to say that law is not “an autonomous grammar”).

<sup>184</sup> Cover, *Foreword: Nomos and Narrative*, *supra* note 58, at 11.

<sup>185</sup> *Id.* at 11.

<sup>186</sup> *Id.* at 7. (“The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be. If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust.”).

<sup>187</sup> *Id.* at 10.

<sup>188</sup> Keren Tenenboim-Weinblatt, *News as Narrative*, *ENCYCLOPEDIA OF JOURNALISM* 954 (2009) (“Storytelling is a central mode of human communication and journalists can be viewed as the primary narrators of public events in contemporary societies. News stories—the product of journalism—constitute a distinct, nonfictional narrative genre.”).

<sup>189</sup> Michael Buozis & Brian Creech, *Reading News as Narrative: A Genre Approach to Journalism Studies*, 19 JOURNALISM STUD. 1430, 1430 (2018) (“Since the mid-1970s, media and literary scholars have examined how news and other forms of journalism function as narrative.”).

<sup>190</sup> *Id.* at 1433.

<sup>191</sup> Tenenboim-Weinblatt, *supra* note 188, at 954; Buozis & Creech, *supra* note 191, at 1431.

<sup>192</sup> Buozis & Creech, *supra* note 189, at 1432-33.

And it is these norms and narratives that animate law in the broad ways that Cover describes. In fact, law requires them to operate. For example, although we have constitutions, statutes, regulations, and common law, they are often incomplete and they always need to be interpreted.<sup>193</sup> A bevy of legal standards, too, explicitly rely on an assessment of community norms and values. For example, determining what qualifies as obscene depends on assessing “contemporary community standards.”<sup>194</sup> Tort law often relies on the “reasonable man” standard under which negligence is “a departure from a standard of conduct demanded by the community.”<sup>195</sup> Privacy torts are dependent on an assessment of “community norms” to determine what amounts to a reasonable expectation of privacy.<sup>196</sup> In adjudicating void for vagueness challenges, courts will look at the “norms of the community.”<sup>197</sup> More broadly, the use of juries is a way to bring the “conscience of the community” in all of its complexity and diversity to interpretation and application of the law.<sup>198</sup>

The press, of course, doesn’t dictate what community norms are, but it is part of the culture that creates them and is a key source of the fodder that legal decision makers—judges, jurors, administrators—have to draw on in trying to determine what the norms are and weave them through law. It is also what helps to strike the delicate balance between keeping norms consistent enough to support rule of law’s need for predictability and elastic enough to support its requirement of equity.

In her book *Rules: A Short History of What We Live By*, historian Lorraine Daston has described in broad brush what is needed to create that state of consistency.<sup>199</sup> She writes, “An island of stability and predictability in a tumultuous world, no matter what the epoch or locale, is the arduous and always fragile achievement of political will, technological infrastructure, and internalized norms.”<sup>200</sup> The press is a key part of our modern technological infrastructure that can help to not only create but to cement internalized norms.

Meanwhile, as Jeremy Waldron has written, evolution is also key.<sup>201</sup> “[N]o conception of law or the rule of law that fails to leave room for changes and adjustments ... can possibly be tolerable.”<sup>202</sup> Waldron emphasizes that this requires “collective attention.”<sup>203</sup> The press can provide this collective attention and the narratives.<sup>204</sup> Again, narratives are a key part of the equation. As law and narrative scholar Anne Ralph has written, “With a richer catalog of law-stories, judges and juries will be able to attend to and understand different stories, rather than relying on the stories that they already possess based on individual life circumstances.”<sup>205</sup> Ralph argues that lawyers themselves can participate in a “systematic expansion to the kind of

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<sup>193</sup> See ROBERT KATZMANN, JUDGING STATUTES 7 (2014) (describing the history and importance of judicial interpretation of statutes).

<sup>194</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>195</sup> Rest. 2d Torts § 283 (1965).

<sup>196</sup> See, e.g., *Hill v. NCAA*, 7 Cal. 4th 1, 37 (1994).

<sup>197</sup> See, e.g., *L.B. v. State*, 700 So.2d 370, 372 (1997), *superseded by statute on other grounds as stated in State v. A.M.*, 765 So.2d 927 (Fla. 2d DCA 2000).

<sup>198</sup> See Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 18 (1998).

<sup>199</sup> LORRAINE DASTON, *RULES: A SHORT HISTORY OF WHAT WE LIVE BY* 5 (2022).

<sup>200</sup> *Id.*

<sup>201</sup> WALDRON, *THOUGHTFULNESS AND THE RULE OF LAW*, *supra* note 2, at 267.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Anne Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 591 (2018).

narratives available as ‘schema,’ ‘stock stories’ or ‘master narratives.’”<sup>206</sup> This is correct, but lawyers need information to draw from and that is where the press can assist.<sup>207</sup>

And a journalism worth having is one that is committed to this multiplicity of narratives. For example, journalism scholar James Ettema celebrated journalists’ use of narrative to open up worlds of possibility in broad areas of human existence.<sup>208</sup> He wrote that for journalism to resonate, it “requires not merely fidelity to familiar narratives but the re-imagining and renewal of those narratives in a way that might transform desire into thoughtful deliberation, sound judgment, and wise action.”<sup>209</sup>

In wrapping up this Part, I want to be clear that I am not arguing that judges or other legal decision makers are merely influenced by extra-legal public opinion. Numerous articles have been written based on the premise that such opinion would taint decision making because it is superfluous to law itself.<sup>210</sup> A summation of this approach can be found in a quote from a European judge in a study of public opinion on judicial decision making. He said, “No judge lives in isolation. Therefore, I am conscious of public opinion polls, various petitions, newspaper articles, discussions, proclamations of politicians and lawyers, and public assemblies.” But, he continued, judges “can win trust only by deciding according to law, without regard to public opinion.”<sup>211</sup> In contrast, what I’m arguing is that through narrative, the press animates and breathes life into the law. It educates not just the public, but those judges, jurors, administrators, and others in the systems that mete out the rule of law. This is not extra-legal but endemic to law itself.

### C. THE FACILITATOR OF THE PUBLIC SQUARE

A third role recognized by the Supreme Court as a key press function is the facilitator of the public square.<sup>212</sup> This role, too, has been viewed as fundamental to the press’s bolstering of democracy. The reasoning goes that the press is among the entities that creates a “public sphere” allowing for the sharing of information and the creation of public opinion.<sup>213</sup> As constitutional law scholar Mary Anne Franks has written, the public square “is presumed to be the quintessential site of democratic deliberation and civic participation—a physical ‘marketplace of ideas.’”<sup>214</sup>

In other words, as political and legal theorists have understood it, democracy needs a space—an agora, a marketplace, a public square, a sidewalk.<sup>215</sup> It also needs a community—a polis, a congregation. Then, within that space, and among that community, there needs to be

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<sup>206</sup> *Id.* at 625

<sup>207</sup> *See id.*

<sup>208</sup> James Ettema, *Crafting Cultural Resonance*, in *CULTURAL MEANINGS OF NEWS: A TEXT READER* 282 (Daniel A. Berkowitz ed. 2011).

<sup>209</sup> *Id.*

<sup>210</sup> *See, e.g.*, Hanych et al., *supra* note 119, at 2.

<sup>211</sup> *Id.* (noting that this quote from a former Slovak Constitutional Court president “represents the position of many judges across the globe”).

<sup>212</sup> *See* First Nat’l Bank of Boston, 435 U.S. at 781.

<sup>213</sup> Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 *YALE L.J. FORUM* 427, 446 (2021); Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 *Utah L. Rev.* 193, 199 (2016).

<sup>214</sup> Franks, *supra* note 213, at 427.

<sup>215</sup> *See id.*; *see also* David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 *YALE L.J.* 857, 894 (1986) (describing the marketplace ideas metaphor and its link to the agora and other public fora).

communication. The Supreme Court and others have rightly recognized that the press can be a facilitator of that conversation.<sup>216</sup> As playwright Arthur Miller wrote in the 1950s, a good newspaper is like “a nation talking to itself.”<sup>217</sup>

Like democracy, the rule of law also needs a space, a community, and a conversation. Rule of law theorists are clear about this. Krygier has argued that rule of law is dependent on it in writing that “[w]hether or not the rule of law has claim in a society is a matter found in the extent and quality of its reach and effects there: in interactions between citizens and the state, of course, but, of equal if not more importance, between citizens themselves.”<sup>218</sup> Those interactions and the “structured mode of deliberation” that is fundamental to rule of law can happen, according to Waldron in a variety of places including “in social movements, on the streets, and in the media.”<sup>219</sup> And, emphasizing the dialectic inherent to rule of law, civil rights scholar Lani Guinier advocated that we should want lawmaking and legal practices “that inform and are informed by the wisdom of the people.”<sup>220</sup>

How the press facilitates the rule of law with respect to its public fora function, is an issue lurking on the periphery but not squarely addressed in legal scholarship. Waldron noted it, as indicated in the quote above about the deliberation for rule of law happening “in the media.”<sup>221</sup> Guinier got closer in her work on “demosprudence,” her portmanteau for “democracy-enhancing jurisprudence,” which is “not concerned primarily with the logical reasoning or legal principles that animate and justify a judicial opinion” but rather is “focused on enhancing the democratic potential” of legal actors.<sup>222</sup>

In *Demosprudence Through Dissent*, Guinier described the way that judicial dissents can prompt democratic deliberation, and in doing so, she referenced the role of the press. Not only is it a key conduit and framer of the public’s understanding of dissents and one of the “informal venues” in which “legal meanings circulate, compete, and ultimately surface,” it is one of the key sources for Guinier’s own understanding.<sup>223</sup> For example, she noted how newspaper editorials about a Justice John Paul Stevens opinion challenging the death penalty “helped translate” the opinion, which she dubbed “highly demosprudential” into a “clarion call.”<sup>224</sup> And throughout the article, she relies on press coverage to describe the way that information about courts and opinions make their way to the public. In fact, in a description of the importance of the delivery of oral dissents in the Supreme Court, she relies on reporting from the *Washington Post*’s Robert Barnes that describes the scene in the courtroom and demeanor of the judges, key facets of the demosprudential process that Guinier advocates.<sup>225</sup> The underlying message, evident in her prose

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<sup>216</sup> See Stephen D. Reese, *Theories of Journalism*, OXFORD RSCH. ENCYCLOPEDIAS: COMM’N (Aug. 31, 2016), <https://doi.org/10.1093/acrefore/9780190228613.013.83> (“Journalism seeks to observe and communicate what it learns of social importance, something called news, and in doing so is always in the process of creating a public by bringing it into synchronized conversation with itself.”).

<sup>217</sup> Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER, Mar. 31, 2008, reprinted in WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT 7 (Robert W. McChesney & Victor Pickard eds., 2011).

<sup>218</sup> Krygier, *supra* note 14, at 89.

<sup>219</sup> WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 31-32.

<sup>220</sup> Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

<sup>221</sup> See WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 31-32.

<sup>222</sup> Guinier, *supra* note 220, at 15-16.

<sup>223</sup> See *id.* at 59.

<sup>224</sup> *Id.* at 67-68.

<sup>225</sup> *Id.* at 71-72.

and her citations, is that the press is a central part of the information structure that feeds the rule of law.

Unlike with the watchdog role where the press's function differed as between supporting democracy and the rule of law, here, it seems to overlap. That is, the press's facilitator role is the same in its support of democracy and rule of law. Specifically, as noted above with respect to democracy, it creates space, it brings communities together within it, and then it sparks exchange.

With respect to creating space, it does this in long-standing ways. Newspapers have editorial pages and many online publications create digital space for the opinions of members of the public.<sup>226</sup> Many publications also include letters to the editor.<sup>227</sup> Substantively, articles themselves may also create space for voices by including diverse viewpoints on a given issue.

More recently, both evolving journalistic practices and the need for revenue have also sparked new "space"-creating efforts on the part of news organizations. These changes sparked in part from scholarly efforts like a movement in the late twentieth century toward "public journalism." As one of its founders, James Carey described, the press serves as an instrument that helps the public "form and find its identity" and that it "must find ways in which the public can address one another."<sup>228</sup> We see this taking shape today with news organizations creating public events—such as *The Atlantic* Festival and the *New Yorker* Festival—presumably both as a needed revenue generator and a kind of large-scale public salon. (Highlighting the community-building function, perhaps, *The Atlantic* advertised that its Festival would allow participants to "meet great minds that don't think alike.")<sup>229</sup> Smaller publications have done this as well.<sup>230</sup>

A journalism movement of even more recent vintage, community-centered journalism, advocates for journalists to create a time and place to talk to the public about the news-making process and even bring them into it from brainstorming story ideas to gathering information for them. Sometimes this means piggybacking on civic organizations that already exist.<sup>231</sup> For example, in one project called *Curious City*, run by Chicago radio station WBEZ, journalists worked with libraries, bars, and community groups to gather questions that journalists could then answer with their reporting.<sup>232</sup>

These strands of journalism have also made it into the mainstream of scholarship and practice. In the latest edition of the classic journalism text, *The Elements of Journalism*, the authors added a *Citizens' Bill of Rights and Responsibilities* that proclaims that the public "should expect our news providers to create several channels through which the public can have constructive civic conversation, both among citizens themselves and with journalists."<sup>233</sup> More specifically, it explains, "it should also include spaces in person and online where people can talk to each other, informed by journalism, to discuss priorities and values, understand commonalities

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<sup>226</sup> See, e.g., *News. Opinion.*, THE WALL ST. J., <https://newsliteracy.wsj.com/news-opinion/> (describing the difference between the news and opinion sides of the operation).

<sup>227</sup> See, e.g., *Letters to the Editor*, SEATTLE TIMES, <https://newsliteracy.wsj.com/news-opinion/>.

<sup>228</sup> Theodore L. Glasser, *The Idea of Public Journalism*, in THE IDEA OF PUBLIC JOURNALISM 13 (Theodore L. Glasser ed. 1996) (quoting James W. Carey, *Community, Public, and Journalism*, in MIXED NEWS: THE PUBLIC/CIVIC/COMMUNITARIAN JOURNALISM DEBATE 12-13 (Jay Black ed. 1997)).

<sup>229</sup> See *The Atlantic Festival*, THE ATLANTIC, <https://www.theatlantic.com/live/atlantic-festival-2024/>.

<sup>230</sup> See Josh Stearns, *Events Guide—Journalism Live: How News Events Foster Engagement and Expand Revenue*, DEMOCRACY FUND: LOCAL NEWS LAB (March 1, 2023), <https://localnewslab.org/guide/events/>.

<sup>231</sup> ANDREA WENZEL, COMMUNITY-CENTERED JOURNALISM: ENGAGING PEOPLE, EXPLORING SOLUTIONS, AND BUILDING TRUST 47, 63-64 (2020).

<sup>232</sup> *Id.*

<sup>233</sup> KOVACH & ROSENSTIEL, *supra* note 121, at 341.

across differences, and otherwise engage with people different from ourselves for the sake of the public good.”<sup>234</sup>

This type of conversation is a key facet of twenty-first century journalism, according to Tom Rosenstiel and Bill Kovach, the authors of the *Citizens Bill of Rights and Responsibilities*. The journalism that we need now draws on the “community intelligence” not only of a broad range of citizens but technological networks and journalistic skills and practices. In this way, Kovach and Rosenstiel argue that journalism becomes “a kind of organized community intelligence” that “fulfills the promise of creating community.”<sup>235</sup> If nothing else, this community and “institutionally organized forum” exist to “resist the dark side of the internet and provide a centripetal force against the scattered and increasingly polarized factions in society, pulling apart from economic dislocation, tribalism, and fear.”<sup>236</sup>

Rule of law scholars describe that ideal as developing and subsisting in an uncannily similar way. Jeremy Waldron writes about the importance of human dignity as an outcome of rule of law and describes the thoughtfulness and standards that get us there as requiring an “active intelligence” among community members.<sup>237</sup> He likewise conceives of “ordinary citizens” as “active centers of intelligence.”<sup>238</sup> Of course, myriad sources feed into that active intelligence—religious institutions, civic organizations, the arts—and the press.

#### D. UNRECOGNIZED PRESS BENEFITS

As described, the courts, and the Supreme Court especially, have recognized certain press roles—namely the watchdog, educator, and facilitator of the public square. And as also described, these press roles support not only democracy but the rule of law. But as much as the Supreme Court’s “Glory Days” opinions of the press laud the institution, overall, the Court has been stingy when it comes to recognizing the benefits of a free press.<sup>239</sup> In the twenty-first century, in fact, the Court has become anti-press.<sup>240</sup> As press law scholars Ronnell Andersen Jones and Sonja R. West write, while the Supreme Court “once routinely went out of its way to emphasize that its starting point was to believe that the press speaker was well-motivated, credible, and public-serving,” it now “instead offer[s] characterizations that ascribe opposite traits.”<sup>241</sup> In fact, “the Justices’ asides about press speakers now assume the worst.”<sup>242</sup> I have argued elsewhere that to the extent the Court is silent about press benefits this undermines the press as well.<sup>243</sup>

This matters because historically the Supreme Court gives shape to the public conception of the press and the press’s conception of itself. First Amendment scholar Lee C. Bollinger has

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<sup>234</sup> *Id.* at 341.

<sup>235</sup> *Id.* at 25.

<sup>236</sup> REESE, THE CRISIS OF THE INSTITUTIONAL PRESS, *supra* note 8, at 1.

<sup>237</sup> WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 86.

<sup>238</sup> Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 90, at 22.

<sup>239</sup> See Ronnell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, *supra* note 13, at 255-56 (referring to the “Glory Days”).

<sup>240</sup> See Erin C. Carroll, *Anti-Press Bias: A Response to Andersen Jones and West’s Presuming Trustworthiness*, 75 FLA. L. REV. F. 63, 64-65 (2024).

<sup>241</sup> Ronnell Andersen Jones & Sonja R. West, *Presuming Trustworthiness*, 75 FLA. L. REV. 799, 802 (2023).

<sup>242</sup> *Id.* at 810.

<sup>243</sup> See Carroll, *Anti-Press Bias: A Response to Andersen Jones and West’s Presuming Trustworthiness*, *supra* note 240, at 65.

written that the Supreme Court is the press’s “primary arbiter and definer.”<sup>244</sup> And West has defined the press by saying “[t]he bottom line is that press speakers are those who fulfill the unique constitutional functions of the press, functions the Supreme Court has identified.”<sup>245</sup> The Court could find opportunities to opine on the importance of a free press and to expand it and the public’s understanding of the benefits of the press. Other unrecognized benefits exist that support both democracy and the rule of law. Here, I want to propose two: curator and empathy-builder.

To have a functioning self-government, we need institutions that can sift good information from bad—or what has been called “signal” from “noise.” To the extent that democracy and rule of law are both “information problems,” the curation function improves the viability of both. With respect to rule of law, if citizens do not have access to accurate information and cannot tell what is true, then the formal aspects of rule of law—consistency, predictability, transparency—simply cannot exist.

For decades now, U.S. domestic policy has virtually ignored that we need information-curating institutions. Congress has repeatedly failed to do anything of significance to turn the volume up on signal. It might have done this by providing basic assistance to the press. Instead, it has refused to provide needed financial support and failed (despite bipartisan support) to pass the most basic of protections for reporters to protect their sources.<sup>246</sup> Numerous presidents of both administrations have likewise failed to prioritize information policy, instead allowing technology platforms to crush the economic model for local news, to deprioritize news on their platforms,<sup>247</sup> and then to give small handouts to news organizations to make it seem as if they were, at heart, supporters of the press. Both Congress and the executive branch have let information access under the Freedom of Information Act fall apart such that the statute rarely works as it should.<sup>248</sup> The Supreme Court as well has been silent on the press at best and villainized it at worst.<sup>249</sup>

If there has been any frenzy in information policy, it has focused on the scourge of misinformation and how to minimize it.<sup>250</sup> This is a worthy goal. But any successful effort to clear away the brush in our information landscape needs to also consider what seeds are being planted in the razed earth. Without intentional sowing, weeds will take over.

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<sup>244</sup> LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 133 (1991).

<sup>245</sup> West, *Press Exceptionalism*, *supra* note 105, at 2443.

<sup>246</sup> See Claire Foran & Brian Stelter, *Senate GOP Blocks Bill to Protect Journalists After Trump Opposes It*, CNN (Dec. 10, 2024), <https://www.cnn.com/2024/12/10/politics/senate-gop-blocks-press-protections-bill/index.html>.

<sup>247</sup> @anneapplebaum.bsky.social, BLUESKY (Nov. 27, 2024, 1:22 AM), <https://bsky.app/profile/anneapplebaum.bsky.social/post/3lbvzvkd1pk2y> (“People are often surprised when I tell them this: both Twitter and Facebook/insta/threads are now specifically engineered to downgrade, hide, suppress real journalism.”).

<sup>248</sup> See Anne Weismann, *The FOIA is Broken, But Is It Beyond Repair?*, CITIZENS FOR RESPONS. AND ETHICS IN WASHINGTON (June 30, 2020) <https://www.citizensforethics.org/reports-investigations/crew-investigations/the-foia-is-broken-but-is-it-beyond-repair/> (“The current situation deviates radically from the letter of the law, and from Congress’ vision of the FOIA.”); *FOIA Backlogs Hinder Government Transparency and Accountability*, U.S. GOV’T ACCOUNTABILITY OFFICE (Mar. 14, 2014), <https://www.gao.gov/blog/foia-backlogs-hinder-government-transparency-and-accountability#:~:text=More%20complex%20FOIA%20requests%20have,processed%20within%2020%20days%20decreased.>

<sup>249</sup> See Carroll, *Anti-Press Bias: A Response to Andersen Jones and West’s Presuming Trustworthiness*, *supra* note 240, at 65.

<sup>250</sup> See, e.g., Miles Park & Shannon Bond, *5 Takeaways from Big Tech’s Misinformation Hearing*, NPR (March 25, 2021), <https://www.npr.org/2021/03/25/981203566/5-takeaways-from-big-techs-misinformation-hearing>.

Lost has been the realization that the press—the local press especially—can create signal and curate information. That means the work of sifting through the noise that no one individual has the time to do. It also means serving almost as a spatial and temporal buffer—a mediator—a way to reduce the pressure of the fire hose of information. We need to thicken what is thin, slow down what is fast, complicate what is artificially simplified.<sup>251</sup>

We need a robust institution to do this skilled work. Journalism scholars Kovach and Rosenstiel have described this new and complex curation role writing that “[w]here journalism’s role once was to simply provide information as a tool of self-governance, it now becomes a role of providing citizens with the tools they need to extract knowledge for themselves from the undifferentiated flood of rumor, propaganda, gossip, fact, assertion, and allegation that the communications system now produces.”<sup>252</sup> Journalists now, are sieves. They continue, “Thus, the journalist must not only make sense of the world but also help people make sense of the flood of information about it.”<sup>253</sup>

To date, the judiciary has not fully recognized the importance of this role or the press’s ability to play it. In *Glory Days* cases like *Miami Herald Pub. Co. v. Tornillo*,<sup>254</sup> the Court indicated the importance of editorial discretion—the idea that a newspaper’s editors and journalists have the sole discretion to decide what appears on that newspaper’s pages.<sup>255</sup> In invalidating a Florida “right of reply” statute that required a news outlet to print a political candidate’s response to criticisms or attacks also printed in that same newspaper, the Court wrote that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”<sup>256</sup>

This certainly recognizes the press’s right to make decisions about what it publishes. But it does not acknowledge the public benefit that the press provides when it makes those decisions in such a way that promotes the circulation of accurate information and squelches the opposite. In fact, the majority in *Tornillo* intentionally avoided this conclusion in writing that “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”<sup>257</sup>

Perhaps it cannot be legislated, but it can be encouraged. Recognizing the press’s curatorial role specifically would simultaneously affirm those outlets that are truly playing this role and it could nudge those that are not. Supreme Court opinions can both reify and inspire the press’s sense of its own identity. The press will forever be an imperfect institution, and although we want it to stay free by self-regulating, the Court can and should provide a normative vision.

A second role the Court could recognize is empathy builder. It is well established that empathy is foundational to democracy. Philosopher Jason Stanley has written that “Democratic citizenship requires a degree of empathy, insight, and kindness that demands a great deal of all of us.”<sup>258</sup> And although the Supreme Court has not recognized this press role, journalism scholars

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<sup>251</sup> See KORNBLUH, *supra* note 16, at 22 (describing the role of teachers saying “our classrooms can be clinics of mediacy where we thicken the symbolic, estrange language, closely read, uncover unknowns, slow down, value impersonality, construct objectivity”).

<sup>252</sup> KOVACH & ROSENSTIEL, *supra* note 121, at 334.

<sup>253</sup> *Id.*

<sup>254</sup> 418 U.S. 241 (1974).

<sup>255</sup> *Id.* at 243, 258.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 256.

<sup>258</sup> JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* 184 (2020).



have. Sociologist Schudson sees the building of “social empathy” as one of the key things that press does for democracy.<sup>259</sup> This is the journalists’ ability, through story, to allow us to see one another with compassion.<sup>260</sup> It energizes the journalist’s own sense of curiosity and empathy to try to engender that in the audience which could be key to opening up with sociologist C. Wright Mills called “the sociological imagination.”<sup>261</sup> That is, an aim of the empathy function is to “show[] the connection between a person’s ‘private troubles’ and the ‘public issues’ that gave rise to them.”<sup>262</sup> Much the same sentiment was expressed far earlier by Thomas Paine.<sup>263</sup> According to Barbie Zelizer, Paine “is rumored to have said long ago that journalism helps us ‘see with other eyes, hear with other ears, and think with other thoughts than those we formerly used.’”<sup>264</sup>

I can personally speak to the truth of Schudson and Paine’s assessments. The empathy function was one I thought about regularly during the brief time I worked as a journalist (primarily covering county courts) before becoming a lawyer. I marveled that the job gave me what I felt like was a license, even a duty, to connect with people that I might not have otherwise interacted with in my daily life. Whether it was a criminal defendant, a judge, a cop, an accident victim, a grieving relative, or any number of others, I felt an obligation to try to convey them as more than that label. I thought as long and hard as deadlines allowed about how to use words to present an accurate story about that person that would help the audience to understand some facet of them, knowing that it was impossible to convey the whole of them. I can’t say I thought about this as an effort in support of democracy. I did consider it a humble effort to provide dignity and to recognize shared humanity.

I certainly did not think of my journalism as important to rule of law. But it was. According to Waldron, “a deep and important sense associated foundationally with the idea of a legal system [is] that law is a mode of governing people that treats them with respect, as though they had a view or perspective of their own to present on the application of the norm to their conduct or situation.”<sup>265</sup> This respect, and belief that a person has a perspective of their own, only come with empathy. They only come with the “ability to understand and appreciate another person’s feelings [and] experience.”<sup>266</sup> Waldron also writes, “Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality and entity one is dealing with.”<sup>267</sup> He adds, “As such it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as *beings capable of explaining themselves*.”<sup>268</sup>

The press can foster the empathy that is fundamental to all of this. It can do so both from introducing us to one another, whether it be through articles or in creating public fora. In that way we can practice this kind of listening and learning that is fundamental to the rule of law. The press can also foster empathy through its practices. Journalists need to be empathic in their selection, reporting, and publishing of stories.

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<sup>259</sup> MICHAEL SCHUDSON, WHY DEMOCRACIES NEED AN UNLOVABLE PRESS 17 (2008).

<sup>260</sup> *Id.* at 18.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> ZELIZER, WHAT JOURNALISM COULD BE, *supra* note 60, at 32.

<sup>264</sup> *Id.*

<sup>265</sup> Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 90, at 16.

<sup>266</sup> *Empathy*, OXFORD ENG. DICTIONARY.

<sup>267</sup> Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 90, at 16.

<sup>268</sup> *Id.*

I view this ability of the press to model and create empathy as a form of what philosopher Charles Taylor would call the “dual-language thesis” at work.<sup>269</sup> According to this thesis, language operates at two levels—a “lower, merely instrumental” level and a “higher, creative” level.<sup>270</sup> At the lower level, language is “simply an instrument to encode information, describing the reality that already lies open before us, and communicating the information to others.”<sup>271</sup> In contrast, Taylor writes, “there are levels of language which do something much more, where our expressions bring about the revelation-and-connection the language of insight yields.”<sup>272</sup>

Journalism operates on the full spectrum of these levels. It can be merely instrumental, providing the nuts and bolts of the news story at hand: the what, when, where, and how. But the press, through its journalism, can also create the less tangible things fundamental to rule of law—connection, caring, and empathy. So much of the public conversation about the press focuses on its lower and instrumental functions. Much more attention is needed on the “revelation-and-connection” potential that it has.<sup>273</sup>

#### IV. WHERE TO NEXT

The work ahead in reshaping, reimagining, and rebuilding the press such that it can better serve rule of law, democracy, and perhaps other values, is daunting but doable. Academics, public servants, journalists, and citizens all have contributions to make.

With respect to scholars, this Article has raised some issues for exploration. For example, is the press’s educator role in service of democracy a bi-directional one, as I have argued is true for the rule of law? I would strongly surmise that it is—the press gathers information from the governed and shares it with the governors in ways that shape legislation and other processes. How this works could be theorized and expanded upon.

Far more work can also be done on the relationship between the press and the rule of law. The breadth and depth of the ties between the press and the rule of law need investigation. This Article is a first pass; it leaves many questions unanswered. For example, are there certain types of news organizations that better protect and uphold the rule of law? If, as Waldron argues, rule of law requires “respect for the freedom and dignity of each person as an active intelligence,” what types of press structures and practices facilitate this?<sup>274</sup> Scholars might also ask whether, depending on the value we want to advance (e.g., democracy or rule of law), there is a hierarchy among the benefits that the press provides. We might also build on some of the groundwork I’ve laid here to investigate whether certain press functions, namely the watchdog function, should shift (as I’ve suggested) in response to politics, audience, value being advanced, or other factors. Until now, legal scholarship on the press seems to assume that the press is functioning in all of its roles full bore at all times. But as law often recognizes conflicts between values (e.g., the First Amendment and privacy), there are likely trade-offs between press values as well.<sup>275</sup>

And in calling for more investigation of the contours of the relationship between the press and democracy as well as the press and rule of law, I do not assume that either democracy or rule

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<sup>269</sup> See CHARLES TAYLOR, COSMIC CONNECTIONS: POETRY IN THE AGE OF DISENCHANTMENT 13 (2024).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> See *id.*

<sup>274</sup> See WALDRON, THOUGHTFULNESS AND THE RULE OF LAW, *supra* note 2, at 86.

<sup>275</sup> See Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69, 73-74 (2017).

of law have a fixed meaning. My hope would be that by homing in on these connections, we reconsider what we want and need from democracy and rule of law as much as we consider what we want and need from the press.

The press plays other roles that we should name, memorialize, and thereby encourage. I have written about the possibilities elsewhere.<sup>276</sup> I've suggested that the press is a historian in the way that it creates a record of our daily successes and missteps such that later generations might learn from them and that it is a community storyteller and preserver of traditions.<sup>277</sup> Scholars need to continue to identify and define the various benefits that a free press provides.

For its part, the judiciary also needs to consider the press's role in advancing the rule of law and understand the ways in which the press is a sister institution rather than an enemy. The journalists who know the judiciary best understand this. Linda Greenhouse wrote, "I am naïve enough, and out of step enough with the prevailing journalistic culture, to think of these two institutions as, to some degree, partners in a mutual democratic expertise to which both must acknowledge responsibility."<sup>278</sup> The press can be a watchdog at times, a partner at times, and a sentinel all the time, with respect to the courts.

As a scholar working at the intersection of law and the press, I am still surprised by how often the institutions work in similar ways for similar goals and how unremarked upon these similarities are. I would venture that journalists and the judiciary rarely consider themselves to be partners. Too often, judges are quick to block access and chastise the press. They want their own institution respected (which is highly dependent on how the press portrays it), but don't see the irony in the way that they disparage or ignore the press. Judges and court employees need to realize that if publicity and transparency are necessities of the rule of law, a degree of understanding, cooperation, and respect for the press is fundamental.

Journalists have their work cut out for them as well. Most importantly, they need to try to step back from the frantic day-to-day (or even minute-to-minute) and consider how journalistic practice can best align with its ultimate ends, whether that be protecting democracy or rule of law or other values. This is a colossal task. In my experience, most journalists are not blindly chasing clicks or oblivious to the impact of their work. But they also don't have the luxury of time or the framework to think about the larger and communal import of their work. And the view is very different depending on a journalist's vantage point, whether it be the news organization they work for and its priorities or the historical moment. And that is OK. A multiplicity of different perspectives and approaches is needed.

But there is also a collectivity required that will be very hard to come by. If, for example, the watchdog role really does need to be balanced with positivity to support the legitimacy of the courts, how can that balance be found? Does it need to be found across news organizations and not simply within a single one? Is the evisceration of local news impeding such an effort? Is such an effort even possible?

Journalists have shown in limited contexts that they are capable of putting systems ahead of stories. For example, in the national security context, news organizations have been known to withhold information when it would endanger national security or particular lives.<sup>279</sup> This is

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<sup>276</sup> See Erin Carroll, *Press Benefits and the Public Imagination*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (June 13, 2024), <https://knightcolumbia.org/blog/press-benefits-and-the-public-imagination>.

<sup>277</sup> *Id.*

<sup>278</sup> Greenhouse, *supra* note 145, at 1561.

<sup>279</sup> See Michael Schudson, *Reluctant Stewards: Journalism in a Democratic Society*, DAEDALUS (Spring 2013) <https://www.amacad.org/publication/daedalus/reluctant-stewards-journalism-democratic-society> (describing the balance between revealing and concealing facts in a story involving national security).

perhaps an easy example because journalists don't want to be (or be seen as) the direct cause of tragedy. It would be harder to link the press to the results that might come from positive reporting on the judiciary, for example. And so, this circumspection may be very hard to motivate.

## CONCLUSION

The American press has long been the object of criticism and even cynicism. The criticism will always be present, and it should be; it is necessary. The press is perpetually and rightly under that “hot light” of scrutiny.<sup>280</sup> But that hot light need not blot out our understanding that the press is vital. It will always be imperfect and yet, still essential. The cynicism does not serve us.

Americans have long accepted that a free press is vital to democracy—even if we haven't thoroughly understood why. It is time that we investigate and theorize this more deeply, so that we might expand our understanding of both democracy and the press. We also need to examine what other values the press already serves, what roles we want it to serve better, and what roles it could serve. I have argued here that a key press role and benefit is upholding the rule of law. Given the Supreme Court's power to create a normative vision for the press, it should find a reason to name and promote this press benefit. It should do the same for the press's role as curator and empathy-builder. To repair our fractured information environment and politics, these roles will be vital. If the Supreme Court fails to act, lower courts could certainly take the lead. And there are undoubtedly other press benefits—existing and to-be-imagined—that should be recognized and memorialized by scholars, advocates, and judges in articles, briefs, and opinions.

Still buffeted by the omnicrisis, there has, perhaps, not been a harder time to do this work. But perhaps no time has offered so much promise. Enormous change is possible. What the free press will be is up to all of us.

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<sup>280</sup> See Campbell, *supra* note 123, at xxiii.