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Social Media and the Press

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SOCIAL MEDIA AND THE PRESS*

LILI LEVI**

The Internet and social media are transforming news as we knew it, yet the precise consequences of these changes are not yet clear. Journalists now rely on Twitter, crowdsourcing is available through social media, facts and stories are googled, traditional print newspapers have websites and reporter blogs, “open newsrooms” invite community participation in the editorial process itself, video from citizen journalists is commonly used in mainstream media storytelling, bloggers consider themselves journalists, and media consolidation marries entities like AOL and the Huffington Post. In turn, changes in the news-access practices of readers are increasingly influencing the length, breadth, and subjects of reporting, whether online or in print. While recognizing the reality of the many positive changes facilitated by social media—including the potential for an Internet-mediated renaissance of public engagement with news—this Article explores some particular challenges posed for the democratic press by the new reality of social media.

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INTRODUCTION

On October 20, 2011, Libyan rebels announced the death of Muammar el-Qaddafi.¹ The day before, amateur video posts of his last moments went viral on the Internet.² The images undercut official

1. See Robert Mackey, *Updates on the Death of Muammar el-Qaddafi*, N.Y. TIMES (Oct. 20, 2011, 8:14 AM), <http://thelede.blogs.nytimes.com/2011/10/20/latest-updates-on-the-search-for-qaddafi/>.

2. See *id.*

Libyan government accounts of how el-Qaddafi died.³ Last spring, a series of tweets—from both a computer consultant living in Abbottabad, Pakistan, and the chief of staff of a former U.S. secretary of defense—spread virally and preempted President Obama’s planned address to the nation announcing the capture and death of Osama bin Laden.⁴ More recently, on the home front, video of a campus police officer pepper spraying students who were seated in protest at the University of California, Davis, as part of the nationwide Occupy movement galvanized public attention, triggered additional demonstrations, and spawned critical YouTube remixes.⁵ In all of these instances, the mainstream print and television media found themselves in the position of merely reacting to news made and disseminated by people with no professional journalistic credentials or institutional affiliations.

The Internet and social media⁶ are transforming news as we knew it. Journalists now rely on Twitter, crowdsourcing⁷ is available through social media, facts and stories are googled, traditional print newspapers have websites and reporter blogs, “open newsrooms” invite community participation in the editorial process itself, video from citizen journalists is commonly used in mainstream media storytelling, bloggers consider themselves journalists, and media consolidation marries entities like AOL and the *Huffington Post*. The audience too has changed: in 2010, the Pew Internet Project concluded that “people’s relationship to news is becoming portable,

3. *Id.*; Robert Mackey, *Video Offers Glimpses of Qaddafi and His Son in Rebel Hands Before Their Deaths*, N.Y. TIMES (Oct. 21, 2011, 4:31 PM), <http://thelede.blogs.nytimes.com/2011/10/21/new-videos-piece-together-qaddafis-last-minutes/>.

4. See *The People Formerly Known as the Audience*, ECONOMIST, July 9, 2011, at 9, 9; Brian Stelter, *How the Bin Laden Announcement Leaked Out*, N.Y. TIMES (May 1, 2011, 11:28 PM), <http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/>.

5. See Jennifer Medina, *California’s Campus Movements Dig in Their Heels*, N.Y. TIMES, Nov. 22, 2011, at A17; Jason Cherkis, *UC Davis Police Pepper-Spray Seated Students in Occupy Dispute*, HUFFINGTON POST (Nov. 19, 2011, 10:59 AM), http://www.huffingtonpost.com/2011/11/19/uc-davis-police-pepper-spray-students_n_1102728.html; Jenna Wortham & Nick Bilton, *Pepper-Spray Incident Spawns Remixes*, N.Y. TIMES (Nov. 21, 2011, 7:16 PM), <http://bits.blogs.nytimes.com/2011/11/21/occupy-wall-street-pepper-spray-incident-turns-into-internet-meme/>.

6. For purposes of this Article, “social media” are broadly defined to include both social networking (such as Facebook, Google+, LinkedIn, Twitter, and MySpace) and blogs.

7. As used here, crowdsourcing refers to the outsourcing of a journalistic task, such as fact checking, to the general public, without compensation, via the Internet.

personalized, and participatory.”⁸ In turn, changes in the news-access practices of readers are increasingly influencing the length, breadth, and subjects of reporting, whether online or in print.

The precise consequences of these changes are not yet clear. Will the immediacy of Twitter corrode journalistic standards of accuracy? Or will the availability of 800 million Facebook subscribers create a fact-checking matrix sure to combat the enhanced accountability challenges likely to arise in the modern journalistic ecosystem, which feature press-release-parroting “churnalism”⁹ and sensationalist-scoop mania by mainstream print and electronic outlets? Do social media affect journalism in ways that increase the likelihood of defamation liability, privacy legislation, and property and contract suits, while undermining a special role for the press? Or, do they help operationalize an ideal marketplace of ideas with self-corrections for market failure and virtually no barriers to entry? Too much of the discourse on these questions is binary—with new-media triumphalists squaring off against new-media catastrophists.¹⁰ Yet the best answer at this point is: “*It’s complicated*.”¹¹ While recognizing the reality of the many positive changes facilitated by social media—including the potential for an Internet-mediated renaissance of public engagement with news—this Article explores some particular challenges posed for the democratic press by the new reality of social media.

8. KRISTEN PURCELL ET AL., PEW INTERNET & AM. LIFE PROJECT, UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER 2 (2010), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf.

9. Ben Schott, *Churnalism*, N.Y. TIMES (Feb. 24, 2011, 3:00 PM), <http://schott.blogs.nytimes.com/2011/02/24/churnalism/> (defining churnalism as “[n]ews stories that simply churn out the contents of a press release”).

10. Compare Dean Starkman, *Confidence Game: The Limited Vision of the News Gurus*, COLUM. JOURNALISM REV., Nov./Dec. 2011, at 121, 122 (identifying—and disagreeing with—a “vanguard of journalism thinkers” he dubs “the future-of-news (FON) consensus” who believe “the future points toward a network-driven system of journalism in which news organizations will play a decreasingly important role”), with Clay Shirky, *Institutions, Confidence, and the News Crisis*, CLAY SHIRKY (Dec. 2, 2011, 3:52 PM) <http://www.shirky.com/weblog/2011/12/institutions-confidence-and-the-news-crisis/> (responding). For the terminology, see Jeff Jarvis, *The Distraction Trope*, BUZZMACHINE (Feb. 24, 2011, 7:56 AM), <http://www.buzzmachine.com/2011/02/24/the-distraction-trope/> (referencing Elizabeth Eisenstein’s characterization of arguments about the printing press between “triumphalists” and “catastrophists”).

11. See *It’s Complicated*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=It%27s%20complicated> (last visited May 6, 2012) (“One of the options for ‘Relationship Status’ on Facebook. Refers to a couple in an ambiguous state between ‘friends’ and ‘in a relationship.’ May also be used to indicate dissatisfaction with an existing relationship.”).

Part I describes the current state of American newspapers and the electronic press. Part II catalogs the benefits and hazards of social media for the press. Part II.A highlights four of the significant effects of social media on journalism: the “mutualisation of news,”¹² changes in the audience of news consumers and the nature of their consumption, the effects of “the link economy”¹³ on journalistic output, and the diminishing significance of journalistic institutions as such. Part II.B sketches some of the consequences that flow from these changes, including challenges to journalistic norms of accuracy, objectivity, and accountability. This Part also addresses the effect of the socially mediated notion of news on the kinds of journalism produced and the shifts in power presaged by the deinstitutionalization of the press. Part III points to the legal implications. Part III.A argues that the new, social-media-intensive journalism could increase the likelihood of press liability for defamation (both domestically and as a result of “libel tourism” abroad) and for violations of privacy rights. Part III.B describes recent congressional and administrative attempts to regulate online advertising and the collection and use of consumer information, and it raises the question of whether such consumer protection regulation could have unintended negative consequences for the future of news. Part III.C addresses the possible effect of the journalistic changes detailed in Part II on: (1) current calls for special constitutional press status under a revived First Amendment Press Clause and (2) the recent history of the federal shield law designed to protect journalistic news gathering. Part IV sketches some modest suggestions to help enhance the benefits brought to journalism by social media while diminishing the potential costs. Given that these costs fall principally into the categories of accuracy, accountability, and press power, Part IV’s suggestions attempt specifically to address these areas.

I. THE FUTURE OF JOURNALISM

A widespread discussion of the state and future of the news media has been taking place in American public discourse. From

12. This phrase, coined by Alan Rusbridger, the editor-in-chief of *The Guardian*, describes how “[t]he web has led to a news community where ideas and news are shared rather than delivered” and how journalists and readers are now “equal partners” as a result. *The Mutualisation of News*, GUARDIAN (July 27, 2009, 2:03 PM), <http://www.guardian.co.uk/sustainability/report-mutualisation-citizen-journalism>.

13. Jeff Jarvis, *AP Took It to the Wire but Needs To Rethink Its Role*, GUARDIAN (June 29, 2008), <http://www.guardian.co.uk/media/2008/jun/30/digitalmedia>.

Congress¹⁴ to the Federal Trade Commission (“FTC”)¹⁵ and the Federal Communications Commission (“FCC”),¹⁶ from the daily newspaper¹⁷ and journalism magazines¹⁸ to the blogosphere¹⁹ and countless academic conferences,²⁰ observers are trying to imagine the post-Internet journalism landscape and generating plans for adaptation.²¹ The discourse spans both mainstream media—such as newspapers, broadcast, and cable—and the online environment.

A. *The State of Newspapers*

The impending demise of the printed newspaper has been widely discussed and foretold since 2009.²²

14. See, e.g., SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R40700, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION 2 (2010) (discussing congressional attention as of 2010), available at <http://www.fas.org/sgp/crs/misc/R40700.pdf>; see also Megan Garber, *Congressional Hearing: Newspapers and “the Impact on the Economy and Democracy,”* COLUM. JOURNALISM REV. (Sept. 24, 2009, 10:00 AM), http://www.cjr.org/the_kicker/congressional_hearing_newspape.php (linking to House Committee hearing).

15. See, e.g., *How Will Journalism Survive the Internet Age?*, FTC (June 15, 2010), <http://www.ftc.gov/opp/workshops/news/index.shtml>.

16. FCC Chairman Julius Genachowski launched an initiative to explore the future of media in 2010. Press Release, Fed. Comm’n Comm’n, FCC Launches Initiative To Examine Future of Media (Jan. 21, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295855A1.pdf.

17. For an archive of *New York Times* articles regarding the state and future of newspapers, see *Times Topics: Newspapers*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/subjects/n/newspapers/index.html> (last visited May 6, 2012).

18. See, e.g., Robert Kuttner, *The Race*, COLUM. JOURNALISM REV., Mar./Apr. 2007, at 24, 24; Madhu Rajaraman, *Embracing the Digital Future*, AM. JOURNALISM REV. (Sept. 2010), <http://www.ajr.org/article.asp?id=4921>; Starkman, *supra* note 10, *passim*; *The Digital Landscape: What’s Next for News?*, NIEMAN REPS. (Summer 2010), <http://www.nieman.harvard.edu/reports/issue/100062/Summer-2010.aspx>.

19. See, e.g., Alan D. Mutter, REFLECTIONS OF A NEWSOSAUR, <http://newsosaur.blogspot.com/> (last visited May 6, 2012); Jay Rosen, PRESS THINK, <http://pressthink.org/> (last visited May 6, 2012).

20. See, e.g., Philip Meyer, *The Elite Newspaper of the Future*, AM. JOURNALISM REV., Oct./Nov. 2008, at 32, 34 (referencing Carnegie-Knight Task Force conference on the Future of Journalism at Harvard University); *Duke Nonprofit Media Conference*, DUKE SANFORD SCH. PUB. POL’Y, <http://sanford.duke.edu/nonprofitmedia/> (last visited May 6, 2012) (compiling reports from Duke conference held May 4–5, 2009).

21. See, e.g., Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Nov./Dec., 2009, at 28, 28.

22. See, e.g., THE CTR. FOR THE DIGITAL FUTURE, UNIV. OF S. CAL. ANNENBERG SCH., SPECIAL REPORT: AMERICA AT THE DIGITAL TURNING POINT 13 (2012), available at http://annenberg.usc.edu/News%20and%20Events/News/~media/PDFs/CDF_DigitalReport.aspx (concluding that “[m]ost printed daily newspapers will be gone in about five years”); Preethi Dumpala, *The Year the Newspaper Died*, BUS. INSIDER (Jul. 4, 2009, 7:00 AM), <http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7>; Jay Rosen, *Rosen’s Flying Seminar in the Future of News*, PRESS THINK (Mar. 26, 2009, 1:08 AM), http://archive.pressthink.org/2009/03/26/flying_seminar.html.

1. The Declining Daily

Although American newspapers were in a slow decline for most of the twentieth century,²³ everyone agrees that newspapers have faced overwhelming challenges since the mid-2000s.²⁴ The print press has experienced a profound decline in circulation and advertising since then.²⁵ Many papers went bankrupt, approached financial failure, or sharply curtailed their operations.²⁶ Reports indicate that over one hundred daily and weekly newspapers, including the venerable 150-year-old *Rocky Mountain News*, stopped publishing print editions in 2009.²⁷ Vastly fewer of those, including the *Seattle Post-Intelligencer*, are publishing online-only editions.²⁸ The *Seattle*

23. See STEVEN WALDMAN & THE WORKING GRP. ON INFO. NEEDS OF CMTYS., FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 10, 34–57 (2011) [hereinafter INFORMATION NEEDS OF COMMUNITIES REPORT], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf; Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, NEW REPUBLIC, Mar. 4, 2009, at 28, 28–30. See generally C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) (describing the history of advertising and American newspapers).

24. In 2008, publicly traded newspaper stock prices fell 83%. PEW RESEARCH CTR'S PROJECT FOR EXCELLENCE IN JOURNALISM, STATE OF THE NEWS MEDIA 2009: EXECUTIVE SUMMARY 10 (2009), available at <http://www.stateofthemedial.org/files/2011/01/COMPLETE-EXEC-SUMMARY-PDF.pdf>. While the advertising revenue freefall of 2008 and 2009 did not continue into 2010, ad revenues still fell—about 6.3%, compared to 26% in 2009. See Rick Edmonds, Emily Guskin & Tom Rosenstiel, *Newspapers: Missed the 2010 Media Rally*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedial.org/2011/newspapers-essay/> (last visited May 6, 2012); Tom Rosenstiel & Amy Mitchell, *Overview*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedial.org/2011/overview-2/> (last visited May 6, 2012).

25. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 39–40 (describing diversion of classified advertising to Google, specialty sites, and Craigslist).

26. KIRCHHOFF, *supra* note 14, at 1. As of 2009, thirty-three newspapers—including the *Los Angeles Times*, *Chicago Tribune*, and *Philadelphia Inquirer*—had sought bankruptcy protection under Chapter 11 of the Bankruptcy Code. *Id.* at 7–8. Some of those bankruptcies may have been due largely to the papers' inability to meet their debt obligations stemming from prior acquisitions. *Id.*

27. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 41 (listing newspapers that closed or eliminated a newsprint edition between 2007 and 2010); VICTOR PICKARD, JOSH STEARNS & CRAIG AARON, SAVING THE NEWS: TOWARD A NATIONAL JOURNALISM STRATEGY 5 (2009), available at http://www.freepress.net/files/saving_the_news.pdf. Information about newspaper closures can also be found at Newspaperdeathwatch.com and the Paper Cuts website. See NEWSPAPER DEATH WATCH, <http://newspaperdeathwatch.com/> (last visited May 6, 2012); PAPER CUTS, <http://newspaperlayoffs.com/> (last visited May 6, 2012).

28. See Richard Pérez-Peña, *As Cities Go from Two Newspapers to One, Some Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, at A1. The *Christian Science Monitor* is published primarily online, with only one weekly printed edition. Others have reduced their days of production or migrated entirely online. Home delivery has been cut or reduced in many communities. In addition, there has been a significant amount of consolidation in

Post-Intelligencer became a web-only publication after 146 years in print. Even in cities or regions with remaining daily newspapers, owners engaged in massive cost cutting; reduced newspaper pages, coverage, and depth; and cut personnel.²⁹ A recent study indicates that newspaper newsrooms are now 30% smaller than in 2000,³⁰ and another report states that between 2006 and 2009, daily newspapers cut their editorial spending by \$1.6 billion per year.³¹ Newspaper ownership has shifted from families to publicly held companies to private equity.³² It is unclear how much turn-around time hedge-fund owners will give struggling newspapers, but some publishers suspect it may be as little as two years.³³

While newspapers still have a significant readership,³⁴ the Internet and other news sources have clearly had an erosive effect on the print medium.³⁵ With the notable move to mobile news access,³⁶

newspapers. See, e.g., *id.*; Russell Adams, *Consolidation Weighed for Newspaper Publishers*, WALL ST. J. (Jan. 18, 2011, 10:40 PM), <http://online.wsj.com/article/SB10001424052748703954004576090360936814594.html>; Martin Langeveld, *The Shakeup at MediaNews*, NIEMAN JOURNALISM LAB (Jan. 20, 2011, 4:00 PM), <http://www.niemanlab.org/2011/01/the-shakeup-at-medianews-why-it-could-be-the-leadup-to-a-massive-newspaper-consolidation/>.

29. See Edmonds et al., *supra* note 24. Some sources put the number of lost journalism jobs at over 20,000 as of 2009 (although 2010 saw some improvement in this picture). See Rosenstiel & Mitchell, *supra* note 24. Media economist Robert Picard observes that “we are seeing the ‘de-skilling’ of journalism and progressively fewer of the kinds of jobs that could support a family.” See Edmonds et al., *supra* note 24. However, 2010 also marked a thaw in the news hiring climate. *Id.*

30. Rosenstiel & Mitchell, *supra* note 24; see also INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 40 (estimating the drop to be more than twenty-five percent and noting that many newspapers experienced staff cuts “far exceed[ing]” the national average).

31. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 10 (quoting Poynter Institute figures).

32. As a result of bankruptcies, private equity funds now own and operate a substantial portion of the industry. The era of newspapers being dominated by expanding publicly traded corporations is now winding down. Seven of the twenty-five largest papers are now hedge-fund owned. See Edmonds et al., *supra* note 24; Rosenstiel & Mitchell, *supra* note 24.

33. Rosenstiel & Mitchell, *supra* note 24.

34. See Edmonds et al., *supra* note 24 (describing print circulation); Martin Langeveld, *Print Is Still King: Only 3 Percent of Newspaper Reading Happens Online*, NIEMAN JOURNALISM LAB (Apr. 13, 2009, 11:00 AM), <http://www.niemanlab.org/2009/04/print-is-still-king-only-3-percent-of-newspaper-reading-actually-happens-online/>; Jeremy W. Peters, *Newspaper Circulation Falls Broadly but at Slower Pace*, N.Y. TIMES (Oct. 25, 2010, 11:21 AM), <http://mediadecoder.blogs.nytimes.com/2010/10/25/newspaper-circulation-falls-broadly-but-at-slower-pace/> (listing circulation figures for various papers).

35. According to one 2008 study, 40% of respondents overall, and 59% of “under 30s,” said that they got most of their national or international news from the Internet. Kenny Olmstead, Amy Mitchell & Tom Rosenstiel, *Online: Key Questions Facing Digital News*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedias.org/2011/online-essay/>

news has now become omnipresent—available on every platform at any time.³⁷ Ninety-two percent of Americans get their daily news from multiple platforms.³⁸ It is still true, however, that newspapers produce most of the journalistic content consumed by the audience.³⁹

2. Transitions Toward New Revenue Models

Newspapers have had to change their revenue models simply to stay solvent. Traditionally, newspapers were funded by a combination of corporate advertising, subscriptions, and classified advertising. This funding model for newspapers has faced extensive challenges, both from the migration of classified advertising to Craigslist on the Internet and from the difficulty in replicating the extent of traditional newspaper advertising in the Internet context. By 2010, newspaper classified advertising had fallen 71%; newspapers' advertising revenues fell nearly 48% since 2006, declining 6.3% in 2010.⁴⁰ The advertising that migrated to the newspapers' online editions did not make up for the loss of advertising from newspapers' print editions.⁴¹

(last visited May 6, 2012). In 2011, more respondents to survey reported getting their news from the web than from newspapers. Rosenstiel & Mitchell, *supra* note 24.

36. E-readers; smartphones, like Apple's iPhone, Google's Android, and others; the iPad; and tablets have proliferated. Eighteen months after the introduction of the iPad, 11% of U.S. adults now own a tablet computer of some kind. About half (53%) get news on their tablet every day, and they read long articles as well as headlines. See AMY MITCHELL, LEAH CHRISTIAN & TOM ROSENSTIEL, PEW RESEARCH CTR., *THE TABLET REVOLUTION AND WHAT IT MEANS FOR THE FUTURE OF NEWS 1* (2011), available at http://www.journalism.org/sites/journalism.org/files/The%20tablet%20revolution%20and%20what%20it%20means%20for%20news_FINAL.pdf. Offerings on all these types of platforms will continue to proliferate. Perhaps such platforms will become the dominant form of reading news in the near future. For now, whatever added revenues the new devices bring to news organizations are shared with the device makers. Edmonds et al., *supra* note 24. Apple, particularly, insists on controlling customer contacts and data, and rules on a case-by-case basis what is an acceptable app for sale on the iPad and iPhone platforms. *Id.*

37. Deborah Potter, Katerina-Eva Matsa & Amy Mitchell, *Local TV: Good News After the Fall*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedias.org/2011/local-tv-essay/> (last visited May 6, 2012).

38. PURCELL ET AL., *supra* note 8, at 3.

39. See Starr, *supra* note 23, at 28; Rosenstiel & Mitchell, *supra* note 24.

40. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 10, 39–40; Edmonds et al., *supra* note 24.

41. See, e.g., INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 39, 127. "Digital revenue now typically accounts for 11.7% of the total industry ad revenue and is certain to be the base of future growth." Edmonds et al., *supra* note 24; see also *Reinventing the Newspaper: Making News Pay*, ECONOMIST, July 9, 2011, at 7, 7 ("The trouble is that online advertising typically brings in less than 20% of a newspaper's advertising revenue, and rates on all but the most prominent pages are falling. There are billions of pages on the internet, so the value of an individual page is lower than that of a printed page. And now that advertisers can measure the effectiveness of advertisements,

Although online ad revenue for the newspaper industry as a whole grew by \$1 billion, the loss on print advertising totaled \$24.6 billion, leading to the quip that “print dollars were being replaced by digital dimes.”⁴² The 2011 Pew study of the state of the news media concluded that because there is no consensus on the most useful measure of online traffic, the effort to understand the economics of the web is stalled.⁴³ Nevertheless, online ad revenue surpassed print newspaper ad revenue for the first time in 2010.⁴⁴ All this “result[s] [in] a news ecology full of experimentation and excitement, but also one that . . . has uncertain financial underpinning.”⁴⁵

a. From Free Online to Pay Walls

Newspapers have attempted to adapt to digital media by developing their own web presences, with varying degrees of reach and success.⁴⁶ Most newspapers began their online transitions by making their website content free to consumers. But as it became clear that the traditional newspaper advertising model was not translating seamlessly to the web, newspapers began exploring pay walls and new forms of targeted advertising to offset their extensive losses of revenue.⁴⁷ In a recent study of the news media, researchers found that although less-than-predicted progress had been made in charging for news, “there are some signs of [consumers’] willingness

they may have realised they were paying too much. Optimists (such as executives at Google, which dominates online advertising) insist that internet advertising will become more valuable as it becomes more targeted, which will drive up prices. Revenue from online advertising is growing, but not fast enough to fill the gap opened up by the decline in revenue from print advertising and circulation. Gregor Waller, a former head of strategy at Axel Springer, a big European newspaper publisher, estimates that by 2020 newspaper circulation will have fallen by 50%, classified advertising revenue by 90% and display advertising revenue by 30%.”).

42. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 39.

43. Rosenstiel & Mitchell, *supra* note 24.

44. *Id.*

45. *Id.*

46. See Jesse Johnson, *The Use of the Internet by America's Largest Newspapers (2008 Edition)*, BIVINGS REP. (Dec. 18, 2008), <http://www.bivingsreport.com/2008/the-use-of-the-internet-by-americas-largest-newspapers-2008-edition/>.

47. Edmonds et al., *supra* note 24. Websites that restrict access to some or all parts of their content to paying subscribers are said to be behind “pay walls.” Experiments with pay walls have been going on for some time. The *New York Times* rolled out its most recent pay wall in 2011. Jeff Bercovici, *Why Other Papers Aren't Racing To Copy the NYT Paywall*, FORBES (Oct. 21, 2011, 11:41 AM), <http://www.forbes.com/sites/jeffbercovici/2011/10/21/why-other-papers-arent-racing-to-copy-the-nyt-paywall/>. For descriptions of other experiments with pay models, see INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 264–65.

to pay.”⁴⁸ At the same time, although subscriptions may be successful funding sources for specialized newspapers like the *Financial Times* and the *Wall Street Journal*, and even perhaps elite journalistic institutions such as the *New York Times*,⁴⁹ observers have questioned how well pay walls would serve the typical general-readership regional paper.⁵⁰ Local media reportedly have a “discouraging” track record in charging for content.⁵¹ Consumers might also resist paying for content on new newspaper websites which lack the benefit of prior branding.

b. From Print Ads to Targeted Ads: Advertising Revenues

Web advertising differs markedly from traditional print advertising.⁵² Compared to the scarce page space in a printed newspaper, webpages are plentiful, web advertising is more measurable, and online advertising rates “mostly pale” compared to advertising rates for other media.⁵³ Because advertisers have a decreasing need to place advertising in an editorial context on the

48. *Major Trends*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedias.org/2011/overview-2/major-trends/> (last visited May 6, 2012). Even new community media sites are energetically chasing new revenue streams in addition to creating content. *Id.*

49. See Bercovici, *supra* note 47. There has been no official public statement about the effectiveness and success of the new *New York Times* pay wall.

50. See *Major Trends*, *supra* note 48 (“At the moment, the only news producers successfully charging for most of their content online are those selling financial information to elite audiences—the *Financial Times* is one, the *Wall Street Journal* is another, *Bloomberg* is a third—which means they are not a model that will likely work for general interest news.”). Similarly, critics have dismissed funding by micropayments. Clay Shirky, *Fame vs Fortune: Micropayments and Free Content*, CLAY SHIRKY (Sept. 5, 2003), http://www.shirky.com/writings/fame_vs_fortune.html (arguing that the micropayment model “doesn’t work, because the act of buying anything, even if the price is very small, creates what Nick Szabo calls mental transaction costs, the energy required to decide whether something is worth buying or not, regardless of price”). Moreover, micropayments and crowdfunding might well have significant skewing effects on what is covered and how. Critics have also questioned the prospects of profitability for hyperlocal news. See *Major Trends*, *supra* note 48 (describing the push toward hyperlocalism as “ill-conceived, expensive and insufficiently supported by ads”). A hyperlocal focus also limits the type of news that is made available. On the other hand, at least one online news site with some hyperlocal content focus is reportedly succeeding. See Josie Duckett, *The Texas Tribune Case Study: “Community Engagement” as Journalism Strategy*, TEXASINSIDER.ORG (Jan. 13, 2012, 2:59 PM), <http://www.texasinsider.org/?p=57332>.

51. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 23.

52. See *id.* at 126–27 (describing the effects of individualized, targeted advertising on the Internet).

53. *Id.* at 17, 127; Scott Karp, *Newspaper Online vs. Print Ad Revenue: The 10% Problem*, PUBLISHING 2.0 (July 17, 2007), <http://publishing2.com/2007/07/17/newspaper-online-vs-print-ad-revenue-the-10-problem/>.

web⁵⁴ and technology now allows for extensive data collection and coordination, there has been a turn toward targeted advertising approaches.⁵⁵ Yet there are extensive privacy-based critiques of such targeted behavioral advertising,⁵⁶ as well as questions about whether behavioral advertising is sufficiently sophisticated at this point to be effective. Finally, evidence suggests that advertising declined overall as a result of the impact of the economic downturn on advertisers themselves.⁵⁷ Although the bailout of the auto industry contributed to the media's "modest recovery in 2010,"⁵⁸ it is unclear whether, in what sector, and to what extent advertising will rebound in the post-bailout long run. As a result, analysts have recommended other possible revenue sources.

c. Government and Philanthropic Support

Some of those who are less sanguine about the viability of ad-supported newspapers in today's news ecosystem call for support from the nonprofit sector and government.⁵⁹ New but well-regarded

54. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 23.

55. See *Major Trends*, *supra* note 48 (noting that many see targeted display ads as "key to the future"). From congressional hearings to FTC inquiries to newspaper articles and NGO activism, much attention has been paid to online behavioral advertising. See, e.g., Steven C. Bennett, *Regulating Online Behavioral Advertising*, 44 J. MARSHALL L. REV. 899 *passim* (2011); Brian Stallworth, *Future Imperfect: Googling for Principles in Online Behavioral Advertising*, 62 FED. COMM. L.J. 465 *passim* (2010). A discussion of such advertising is beyond the scope of this Article.

56. See, e.g., Eric C. Bosset et al., *Private Actions Challenging Online Data Collection Practices Are Increasing: Assessing the Legal Landscape*, INTELL. PROP. & TECH. L.J., Feb. 2011, at 3, 3; Paul M. Schwartz & Daniel J. Solove, *The Pii Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1819 (2011).

57. See, e.g., INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 40; Tanzina Vega & Stuart Elliott, *After Two Slow Years, An Industry Rebound Begins*, N.Y. TIMES, Jan. 3, 2011, at B3 ("During the financial crisis and its aftermath, most advertisers reduced spending in virtually all forms of media, even those that had been enjoying strong growth in ad revenue.").

58. See *Major Trends*, *supra* note 48. It should be noted that unlike the print media, in which advertisers strategically placed their ads in particular editorial contexts, the web enables advertisers to reach consumers more efficiently without doing so. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23 at 128–29 (noting that only a small percentage of online advertising is in display ad form, which would be of most economic benefit to content creators).

59. Since advertising no longer serves to cross subsidize the production of news, which is a public good, these analysts call for public and/or foundation subsidy of news organizations. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 18, 125–26, 148–49, 155, 266, 399 n.60. Several different public support models—including direct and indirect government subsidies—have been discussed. See, e.g., *A New Age in for [sic] Newspapers, Diversity of Voices, Competition and the Internet: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of C. Edwin Baker, Nicholas F. Gallicchio Professor, Univ. of

nonprofit institutions such as ProPublica already rely on foundation support for their investigative reporting.⁶⁰ Yet nonprofit and public sector journalism—while increasingly active and diverse—is still quite small.⁶¹ Critics have charged that there is insufficient money in the charitable sector to replace all regional newspapers, limiting the degree to which a nonprofit foundation-funding option could serve to make up for the decline in newspapers.⁶² Also, although foundations have increased their spending on journalism recently, foundation support of news efforts is a very small percentage of total foundation expenditures, and many beneficiaries of foundation funds focus on national rather than local reporting efforts.⁶³ It is likely that even if significant foundation support might prop up a few nonprofit news organizations, many others will still struggle to stay afloat.⁶⁴ Foundations also typically seek to provide seed money rather than

Pa. Law Sch.), available at <http://judiciary.house.gov/hearings/pdf/Baker090421.pdf> (tax credits for employing professional journalists); Downie & Schudson, *supra* note 21, at 45–50 (public support); Ellen P. Goodman & Anne H. Chen, *Modeling Policy for New Public Service Media Networks*, 24 HARV. J.L. & TECH. 111 *passim* (2010); David M. Schizer, *Subsidizing the Press*, 3 J. LEGAL ANALYSIS 1 *passim* (2011); John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Apr. 6, 2009, at 11, 14–20 (government subsidies). In addition, Congress has been considering legislative attempts to shore up failing newspapers by helping the traditional press, albeit without much success. See, e.g., KIRCHHOFF, *supra* note 14, at 2 (describing alternatives). Some nonprofit online news operations, such as *The Texas Tribune*, rely on a combination of philanthropic and corporate support, as well as membership contributions and event sponsorship. See Duckett, *supra* note 50.

60. See *About Us*, PROPUBLICA, <http://www.propublica.org/about/> (last visited May 6, 2012) (describing sources of funding for ProPublica). *ProPublica*, which is edited by a former managing editor of the *Wall Street Journal*, also engages in partnerships with traditional news organizations and offers investigative stories to traditional news organizations. Other nonprofit outfits are supported by subscriptions. See *id.* For example, *Mother Jones*, MinnPost.com, and voiceofsandiego.org are all grounded on subscription funding. One of the difficulties facing nonprofit web journalism start-ups is uncertainty about their tax status as charitable organizations that advance educational purposes. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 328–30.

61. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 16–19, 188–93. This is so, comparatively, even counting public broadcasting. *Id.* at 198.

62. Starr, *supra* note 23, at 34.

63. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 192–93 (describing community foundations and the funding problems they raise for accountability journalism).

64. The Chicago News Cooperative, a nonprofit journalism outfit that launched in 2009, ceased operations in February 2012. James O'Shea, *CNC Suspending Publication*, CHI. NEWS COOPERATIVE (Feb. 21, 2012), <http://www.chicagonewscoop.org/oshea-cnc-suspending-publication/>; see also Jeff Jarvis, *Profitable News*, BUZZMACHINE (Feb. 19, 2012), <http://www.buzzmachine.com/2012/02/19/profitable-news> (contending that the Chicago News Cooperative “found itself too dependent on a foundation (MacArthur), a customer/benefactor (The New York Times), not to mention the IRS (which needs to clarify the rules for not-for-profit news)”).

financing continuing operations.⁶⁵ Moreover, to the extent that nonprofit news organizations receive their funding from one or a few funding sources—whether private or public—there is a significant concern that their editors could feel constrained by the wishes of the principal funders.⁶⁶ Although the nonprofit sector “holds great potential”⁶⁷ to help fill gaps in news, information, and journalism, it faces obstacles on many fronts.⁶⁸

As for the government subsidy alternative, concerns have been expressed about the threat posed to the watchdog press by government financing.⁶⁹ There have been content-neutral subsidies in the past, as in postal subsidies, of course.⁷⁰ However, the history of funding battles over public broadcasting⁷¹ makes one question whether this would be a viable solution, especially in a time of recession with numerous government funding battles raging on the policy agenda.⁷²

In sum, according to *The State of the News Media 2011* report, “the new conventional wisdom is that the economic model for news will be made up of many smaller and more complex revenue sources than before.”⁷³

65. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 192.

66. *Cf. id.* at 192 (noting that some foundations only fund national reporting on subjects of particular interests to their donors or managers).

67. *Id.* at 198; MICHAEL R. FANCHER, RE-IMAGINING JOURNALISM: LOCAL NEWS FOR A NETWORKED WORLD 29 (2011), available at http://www.knightcomm.org/wp-content/uploads/2011/06/Re-imagining_Journalism_Local_News_for_a_Networked_World.pdf.

68. *See, e.g.*, INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 199.

69. *See, e.g., id.* at 162, 402 n.166 (noting Progress and Freedom Foundation representative comments); *cf. Schizer, supra* note 59, at 2 (proposing “a three-part analytical framework for evaluating press subsidies”).

70. *See generally* RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 38–40 (1995) (describing the history of the United States’s postal subsidy system); RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860s, at 39 (1989) (same); Richard B. Kielbowicz, *Postal Subsidies for the Press and the Business of Mass Culture, 1880–1920*, 64 BUS. HIST. REV. 451 (1990) (same).

71. *See* INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 152–54, 166.

72. Indeed, there may not be sufficient political support for funding journalism. *See* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 21 (2011).

73. Rosenstiel & Mitchell, *supra* note 24.

B. Television News: Broadcast and Cable

In addition to newspapers, the traditional news media has included radio, broadcast television, and cable since the late twentieth century. Although most Americans received their news of the day for much of the late twentieth century by turning to network television news,⁷⁴ that is now no longer the case. CBS, NBC, and ABC, the three commercial networks that once served as the country's principal purveyors of news, have lost 55.5% of the audience they had in 1980.⁷⁵ One network official admitted in 2010 that "[n]etwork news viewership is in irreversible decline . . . [and the] traditional network news business model is broken."⁷⁶ Although network news programming saw some increased revenue in 2010, all the networks have engaged in significant trimming of their news operations in order to cut costs.⁷⁷

The three-network oligopoly and its seventy-five percent share of television households allowed business goals to mesh with journalistic principles of balance and objective reporting, and permitted lavish expenditures on high-end journalism (or at least journalism with high production values) until the early 1980s.⁷⁸ The networks hired large staffs of highly qualified reporters, operated many foreign news bureaus, and offered cultural icons of credibility such as Edward R. Murrow and Walter Cronkite.⁷⁹ Media competition and resulting audience fragmentation have greatly reduced the significance of network news culturally, and the economic climate has slashed the resources devoted to network news.

Local television stations remain the audience's "No. 1 television news choice."⁸⁰ Such stations have historically found news to be profitable, and although there was a 62.9% drop in local TV news

74. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 72; Emily Guskin, Tom Rosenstiel & Paul Moore, *Network News: Durability & Decline*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedias.org/2011/network-essay/> (last visited May 6, 2012).

75. Guskin et al., *supra* note 74.

76. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 102 (quoting a vice president of NBC News).

77. See *id.* at 104.

78. See *id.* at 102.

79. See *id.* (focusing specifically on Cronkite).

80. Potter et al., *supra* note 37 ("Half of all Americans say they watch regularly and they have more choices than ever of when and where to watch it."); see also INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 13–14 ("Most Americans still get their news from the local TV news team . . ."). As for radio, the news-talk format is healthy, but consists primarily of nationally syndicated material rather than locally-produced and -focused programming. *Id.* at 14.

pretax profits between 1998 and 2008, local TV did better in 2010 and 2011.⁸¹ Local stations made up for shortfalls by adding more news hours and producing news for other stations.⁸²

However, despite the significant amount of time spent by local television stations on news, investigative reporting is declining at many stations.⁸³ Stations are still featuring sensational coverage captured by the criticism that, in local news, “if it bleeds, it leads.”⁸⁴ Reporters at many stations have been required to be “one man bands,” responsible for interviewing, shooting video, and editing, without an increase in staff.⁸⁵ Advertisers increasingly shape and influence news coverage through “pay-for-play” arrangements,⁸⁶ and until the FCC stepped in to enforce sponsorship identification regulations,⁸⁷ stations were known to have aired Video News Releases—often complete “stories” created by companies, governments, and others seeking influence over the news—without indicating their source.⁸⁸ Many stations either outsource their news operations to others or collaborate with their competitors on news to cut expenses.⁸⁹ And, most notably, a large number of stations do not broadcast news at all.⁹⁰ An FCC-sponsored report concluded that “if local TV news continues on its *current* path, it will not fill the gaps in accountability reporting left by newspapers.”⁹¹

The rise of cable television also posed a major challenge to network news.⁹² Although network television news still garners large audiences,⁹³ the thirteen cable news channels have grown exponentially since the early 1990s, only recently experiencing

81. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 73–75. As this report points out, various factors—such as the increasing amount of political advertising—distinguish local television stations from their print newspaper counterparts in terms of economic threats. *See id.*

82. *See* Potter et al., *supra* note 37.

83. *See* INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 87–88.

84. *See id.* at 88–89.

85. *See id.* at 89–90.

86. *See id.* at 91–92.

87. Communications Act of 1934, Pub. L. No. 73-416, § 317, 48 Stat. 1064, 1089 (codified as amended at 47 U.S.C. § 317 (2006)).

88. *See* INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 94; *see also* Zachary Roth, *CNN: Spinning PR into News*, COLUM. JOURNALISM REV. (Mar. 22, 2004, 11:13 AM), http://www.cjr.org/behind_the_news/cnn_spinning_pr_into_news.php?page=all (discussing airing of Bush administration).

89. *See* INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 96–99.

90. *See id.* at 100.

91. *Id.* at 14.

92. *Id.* at 103.

93. *Id.* at 104.

declines in audience.⁹⁴ Cable television has become a significant source of news and political commentary. By contrast to the network and local television news programs, however, cable news outlets have chosen to offer “ideological and opinion-driven talk,” especially in prime time.⁹⁵ Cable, which is supported both by advertising and subscriber fees, has projected increases in operating profits and all three cable news networks have increased investment in news.⁹⁶ Nevertheless, cable news is weaker at the local than the national level.⁹⁷

II. SOCIAL MEDIA AND MODERN JOURNALISM

Media historian Paul Starr properly notes that the important issue is not what newspapers as such will look like, but what will happen to news.⁹⁸ That question cannot be answered without looking at the impact of the Internet and, more specifically, social media websites such as Facebook and Twitter, on modern journalism.

A. *The Effects of Social Media on Journalism*

There are doubtless innumerable ways in which social networking will influence and change the practices of journalists now and in the future. Differences are already evident in (1) newsgathering and dissemination practices, (2) the audience, (3) journalistic outputs, and (4) institutional relationships.

94. *Id.* at 105–06.

95. Jesse Holcomb, Amy Mitchell & Tom Rosenstiel, *Cable: Audience vs. Economics*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedias.org/2011/cable-essay/> (last visited May 6, 2012) (noting that the two opinionated cable channels did better than CNN, which sought an image as “the sole neutral source of unbiased journalism in the medium, especially in prime time”). MSNBC and Fox News are clear in their liberal and conservative slants, respectively. *Id.*

96. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 106.

97. *Id.* at 14.

98. *See* Starr, *supra* note 23, at 35.

1. “News as a Process”⁹⁹ or “The Mutualisation of News”—Effects on Newsgathering and Dissemination

Every imaginable group has increasingly used Facebook, Twitter, and other social networking sites to announce information: celebrities, politicians, newsmakers, and affinity and interest groups. Even print, online, and television journalists have turned to social networks for both news content and sources.¹⁰⁰ Reporters from traditional news organizations have joined Facebook communities.¹⁰¹ Facebook is being used to report news. Twitter has become indispensable in the dissemination of information about breaking news.¹⁰² In addition to—or sometimes instead of—their ordinary sources, mainstream journalists have also used social media to gather background, ask questions, solicit story ideas, and crowdsource information for their reports.¹⁰³ Reports and videos from eye witnesses, “citizen journalists,” and YouTube have made their way into traditional news reporting as well. Newsgathering now includes receiving and disseminating reports and video from people not affiliated with professional news organizations, sometimes without

99. Jeff Jarvis, *The Article as Luxury or Byproduct*, BUZZMACHINE (May 28, 2011, 9:44 AM), <http://www.buzzmachine.com/2011/05/28/the-article-as-luxury-or-byproduct/>; see Matthew Ingram, *Retweeting Rumors and the Reality of News As a Process*, GIGAOM (July 29, 2011, 10:03 AM), <http://gigaom.com/2011/07/29/retweeting-rumors-and-the-reality-of-news-as-a-process/> (“[S]ocial tools . . . make the ‘news’ much more of a never-ending stream of updates and corrections and additions,” by contrast to the “traditional vision of journalism as a product that is punched out by newspapers and other mainstream sources at predictable times, with all the information necessary to know about a particular event.”).

100. See Paul Farhi, *The Twitter Explosion*, AM. JOURNALISM REV., June/July 2009, at 26, 27–28 (describing journalistic adoption of Twitter for scoops and breaking news); see also Dylan Byers, *Bloomberg, ‘Post’ Tap Social Media Companies for GOP Debate*, ADWEEK (Oct. 10, 2011), <http://www.adweek.com/news/technology/bloomberg-post-tap-social-media-companies-gop-debate-135679> (describing Republican debate cosponsors Bloomberg and the *Washington Post* using social networking services “to provide data and promote audience participation”). Posts can provide information and perspective when politicians issue limited official comments. Social media are also becoming more important on cable. See Holcomb et al., *supra* note 95 (describing CNN’s Twitter following).

101. Indeed, Facebook has now released tools to help journalists use Facebook for efficient reporting. See *Facebook + Journalists*, FACEBOOK, <https://www.facebook.com/journalists> (last visited May 6, 2012).

102. Andy Carvin of NPR, for example, reported on the events of the Arab Spring by curating and retweeting extensively. See Ingram, *supra* note 99; Jeff Jarvis, *The Orthodoxy of the Article, Part II*, BUZZMACHINE (June 12, 2011, 4:13 PM), <http://www.buzzmachine.com/2011/06/12/the-orthodoxy-of-the-article-part-ii/>.

103. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 16. For a description of crowd-based fact checking, see *id.* at 243.

editing or fact checking.¹⁰⁴ Some have characterized the future of the news as being increasingly “pro-am” in that way.¹⁰⁵ Moreover, even the commercial newspaper sector is experimenting with “open news” or “open newsroom” models, in which the newspapers make some part of their editorial work visible to the public and solicit citizen participation.¹⁰⁶ In addition, over one hundred websites are reported to have been created by former newspaper reporters and concerned citizens to focus on news, particularly at the local level.¹⁰⁷

The creation of news has thus been recast as a fundamentally social endeavor, in which the reporter is only one part of a community.¹⁰⁸ Supporters claim that reporter participation in social media humanizes journalists and makes the journalistic process

104. For example, CNN’s iReport is a citizen journalism initiative allowing ordinary people, worldwide, to provide pictures of breaking news. CNN’s iReport claims that its stories are not edited, fact checked, or screened before being posted. See *About CNN iReport*, CNN, <http://ireport.cnn.com/about.jspa> (last visited May 6, 2012).

105. See Jeff Jarvis, *The Article and the Future of Print*, BUZZMACHINE (June 18, 2011, 7:35 PM), <http://www.buzzmachine.com/2011/06/18/the-article-and-the-future-of-print/>; Olmstead et al., *supra* note 35.

106. The most prominent example of this model is *The Guardian*, which is experimenting with an Open News List. See *Open News List*, GUARDIAN, <http://www.guardian.co.uk/news/series/open-newslist> (last visited May 6, 2012); see also Lauren Rabaino, *Five New Year’s Resolutions for Newsrooms*, MEDIABISTRO (Dec. 30, 2011, 5:24 AM), http://www.mediabistro.com/10000words/five-new-years-resolutions-for-newsrooms_b9610 (describing open news as a process in which the press involves readers “in the editorial process from the start, rather than hiding your content behind a wall and letting them react after the story is finished”). Other examples include the *Chicago Tribune*, which has a News Apps Blog and the *New York Times*, which runs the Open Blog. See *News Apps Blog*, CHI. TRIB., <http://blog.apps.chicagotribune.com/> (last visited May 6, 2012); *Open*, N.Y. TIMES, <http://open.blogs.nytimes.com> (last visited May 6, 2012). Additionally, the *Torrington Connecticut Register Citizen* invites citizens to visit the newsroom and attend editorial meetings. Damon Kiesow, *Editor: Social Media Broadens, Doesn’t Replace, Traditional Reporting Methods*, POYNTER.ORG (Jan. 19, 2011, 1:04 PM), <http://www.poynter.org/latest-news/media-lab/social-media/115348/editor-social-media-broadens-doesnt-replace-traditional-reporting-methods/> (describing a Connecticut paper’s open news policy).

107. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 16 (mentioning “MinnPost in Minneapolis, voiceofsandiego.org, the Texas Tribune, the Bay Citizen in San Francisco, the Sacramento Press, and the Chicago News Cooperative”). There are also reader-owned news cooperative plans, such as that proposed by the Banyan Project. *Main Page*, BANYAN PROJECT, http://banyanproject.com/index.php?title=Main_Page (last visited May 6, 2012).

108. See, e.g., Jeff Jarvis, *But Is It Journalism? (Damnit)*, BUZZMACHINE (Sept. 3, 2011, 3:50 PM), <http://www.buzzmachine.com/2011/09/03/but-is-it-journalism-damnit/> (“Journalism helps a community organize its knowledge so it can better organize itself. . . . [A] community can now share its information without us, so we journalists must ask how we can add value to that exchange.”); see also FANCHER, *supra* note 67, at 14 (“[J]ournalism must be re-invented as an interactive endeavor if it is to remain relevant and accountable.”).

transparent to the public (perhaps increasing credibility as a result).¹⁰⁹ Many natives of digital journalism see news as a “conversation” rather than the imposition of order through narratives by elite news organizations.¹¹⁰ They reject the view of news organizations as leaders of the conversation by setting the agenda, allowing the conversation (by inviting comments on stories after they are complete), judging the conversation, or controlling the conversation.¹¹¹ They see news as a real-time process of sharing and correction, in which journalists and the public truly collaborate—without journalistic priority or authority.¹¹²

2. “The People Formerly Known as the Audience”¹¹³—Effects on Consumers and Consumption of News

Social media impact not only journalistic processes, but also transform and empower the audience for news. Modern news consumers are by all accounts much more active than readers in the age of print newspapers, where the only option was passive consumption of packaged, top-down accounts by the institutional press of what the reader should find important.¹¹⁴

By contrast, the audience today directly demands content, interaction, customization, and participation.¹¹⁵ Readers do not automatically rely on the editorial judgment of professional newspaper editors even to create the front page.¹¹⁶ Instead, they

109. See Leah Betancourt, *The Journalist's Guide to Facebook*, MASHABLE (Aug. 3, 2009), <http://mashable.com/2009/08/03/facebook-journalism/>.

110. See, e.g., Jeff Jarvis, *News Is a Subset of the Conversation*, BUZZMACHINE (May 21, 2011, 11:55 AM), <http://www.buzzmachine.com/2011/05/21/news-is-a-subset-of-the-conversation/>; see also INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 132 (noting positively that “[t]he everyone-is-a-publisher economy has allowed for the rise of a new commentariat, and a system that is arguably more meritocratic than before,” that “[c]itizen contributions have enhanced the coverage of important topics,” that some reporting costs have fallen, and that links allow “an interested reader to access a far greater depth of information”).

111. See Jarvis, *supra* note 110.

112. *Id.*

113. Jay Rosen, *The People Formerly Known as the Audience*, PRESSTHINK (June 27, 2006), http://archive.pressthink.org/2006/06/27/ppl_frmr.html.

114. See *id.*; Jeff Jarvis, *The Progression of the Public*, BUZZMACHINE (Jan. 11, 2011), <http://www.buzzmachine.com/2011/01/11/the-progression-of-the-public/>.

115. See PURCELL ET AL., *supra* note 8, at 2.

116. Increasingly, readers use apps to customize the news pages they view on their tablets. See Mark Papia, *Can Flipboard Revolutionize the Publishing Business?*, IMEDIA CONNECTION (Feb. 12, 2012, 6:47 PM), <http://blogs.imediaconnection.com/blog/2012/02/12/can-flipboard-revolutionize-the-publishing-business/>. They use RSS feeds and other news aggregators to create an informational push of their interests. See Edmonds et al., *supra* note 24 (describing the move to mobile and tablets); Amanda Natividad, *Comparing the*

depend on their friends and social media networks to recommend what news to follow.¹¹⁷ Facebook recently released a revised format that would further enhance the sharing process.¹¹⁸ The editorial role in the traditional press—of story selection and agenda setting—has been subordinated to the efforts of the curatorial audience.

People's experience of news is becoming more social. In addition to story-linking in e-mails and Tweets, and commenting in discussion threads, Facebook members will now be able to use the new *Washington Post* Social Reader application ("app") and the *Wall Street Journal's* WSJ Social app to engage in news reading as a network activity.¹¹⁹ This allows consumers to participate in the dissemination of news. In turn, changes in the news access practices of readers are increasingly influencing the length, breadth, and subjects of reporting online, and even in mainstream print media.

3. "The Link Economy"¹²⁰ or "The Article as Luxury or Byproduct"¹²¹—Effects on Journalistic Output

The changes in journalistic routines and the character of the audience have led some media observers to suggest that the news output itself is and will be fundamentally different from the legacy models of print and even television. In the view of new media pundit Jeff Jarvis and other online journalists, the traditional goal of professional journalism—to tell a story through an article—is now a luxury.¹²² Their view is that there are likely to be (and properly should be) fewer articles of the traditional sort—that the long-form article

New Aggregators: Flipboard, Pulse, Zite, Float and More, GIGAOM (Dec. 9, 2011, 3:00 AM), <http://paidcontent.org/table/comparing-the-new-aggregators-december-2011/> (chart comparing popular electronic news browsing methods).

117. PURCELL ET AL., *supra* note 8, at 4 ("[Among those who get news online,] 75% . . . get news forwarded through email or posts on social networking sites and 52% . . . share links to news with others via those means.").

118. M.G., *Facebook: Sharing It All*, ECONOMIST (Sept. 23, 2011, 2:47 PM), <http://www.economist.com/blogs/babbage/2011/09/facebook> (describing Facebook's sharing enhancements).

119. Mike Isaac, *A First Look at Social Reader, WaPo's New Facebook App*, WIRED (Sept. 22, 2011, 12:09 PM), <http://www.wired.com/epicenter/2011/09/facebook-social-reader-wapo/> (describing *Wall Street Journal* initiative and "formidable" list of news organizations partnering with Facebook on the *Washington Post* app: The Associated Press, Reuters, Mashable, SB Nation, the *Washington Post*, Slate, and the Post Express). Trove, a news-aggregation website launched by the Post, powers the Social Reader. *Id.*

120. See Jeff Jarvis, *AriannaOL*, BUZZMACHINE (Feb. 7, 2011, 8:23 AM), <http://www.buzzmachine.com/2011/02/07/ariannaol/>.

121. Jarvis, *supra* note 99.

122. Jarvis, *supra* note 120.

will no longer be the staple journalistic form.¹²³ This means not only that news is constantly in a state of correction, editing, and revision, but that it becomes much more about information than about explanation or context. Most media sources have already exhibited a move in this direction as a result of the twenty-four-hour news cycle, and the trend is likely to intensify in the age of Twitter.¹²⁴ Information is king in the time of computer-written stories.¹²⁵ According to Jarvis, the appropriate role for the press is to provide some kind of undefined “value added” to the stream of material that is just as easily capable of dissemination by the citizen journalist as the professional.¹²⁶

Moreover, the journalistic output will not necessarily follow the conventions of third-person, neutral journalism. A number of digital journalists and academics focus on a changed role for reporters as participants in a community-based and community-building model.¹²⁷ As the online discussion about covering the Occupy Wall Street demonstrations suggests, the shift to a community-based model of reporting may increasingly blur the traditional line between advocacy and reporting.¹²⁸ Also contributing to this is the ability for community participants to publish as citizen journalists online.

123. *Id.*

124. Cf. C.W. Anderson, *Information's Triumph? Three Ways TechCrunch Challenges Ideas of Journalism*, NIEMAN JOURNALISM LAB (Sept. 7, 2011, 2:00 PM), <http://www.niemanlab.org/2011/09/informations-triumph-three-ways-techcrunch-challenges-ideas-of-journalism/> (“[J]ournalists are seen as those who provide information, and the success of that information provision is determined by the outcome of the workings of the free market. Under this definition of journalism, PR firms, databases, newspapers, TechCrunch, and government entities all have equal claim to the title of ‘journalist’ because each of them distributes information. Who is the best at the provision of this information is measured in pageviews and CPMs.”).

125. See Steve Lohr, *In Case You Wondered, a Real Human Wrote This Column*, N.Y. TIMES, Sept. 11, 2011, at BU3.

126. Jeff Jarvis, *Value-Added Journalism*, BUZZMACHINE (July 27, 2010, 7:53 AM), <http://www.buzzmachine.com/2010/07/27/value-added-journalism/>. Jarvis’s provocative point should not be exaggerated. His suggestion could be read as narrowly observing that most articles are unnecessary and reporters would do better by spending more resources on digging and reporting and writing fewer articles with more impact.

127. See, e.g., Robert Niles, *Journalism Is the Business of Building Communities*, ONLINE JOURNALISM REV. (Feb. 20, 2009), <http://www.ojr.org/ojr/people/robert/200902/1656/>. Facebook held an event in 2010 entitled *The Future of Journalism: Community-Building, Collaboration and Inclusion*, FACEBOOK, <http://www.facebook.com/events/1354432889260/> (last visited May 6, 2012).

128. See, e.g., Robert Niles, *Doing Journalism in 2010 Is an Act of Community Organizing*, ONLINE JOURNALISM REV. (Jan. 6, 2010), <http://www.ojr.org/ojr/people/robert/201001/1810/>.

One would also expect that news produced in the “link economy” is likely to be collaborative among institutions as well as reporters. The extensive networks enabled by social media can make collaboration and credit sharing easier.¹²⁹

Social media enable viralization and amplification of information immediately. Today, technology and people’s Facebook-influenced sharing norms mean that the news is more potentially global and certainly more apt to be viral in the world of tweets and social networking.¹³⁰

4. Deinstitutionalization of the Press

In another important effect, social media create a wedge of separation between journalists and the institutions that employ them. Students of digital media argue that journalistic claims to legitimacy depend on journalists’ personal “brands” as opposed to their mainstream institutional affiliations.¹³¹ When in the past the reporter’s credibility might have been based on her affiliation with a news outlet, trust is said to be more personal and less institutional in the world of socially mediated news.¹³²

In the disaggregated news context today, the institutional imprimatur that ensures the reliability of the newspaper as a whole is far less relevant than in the past because members of the audience increasingly function as their own aggregators of many different institutional outputs. Because the audience now creates its own newspaper on its iPads, or by using popular aggregators such as Yahoo News or iGoogle homepage, the role of the editor in selecting stories for importance, setting the agenda, and compiling an integrated product is much less significant.¹³³

129. For example, Florida news organizations have experimented with a model of shared journalism. Sherry Ricchiardi, *Share and Share Alike*, AM. JOURNALISM REV., Feb./Mar. 2009, at 28, 28–30, available at <http://www.ajr.org/article.asp?id=4685>. See generally FANCHER, *supra* note 67, at 19–20 (describing various collaborations).

130. Alan Cowell, *The Shifting Nature of News*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/world/europe/23iht-letter23.html>.

131. Indeed, Facebook’s instruction manual for journalism classes emphasizes the need for reporters to develop their own brands in their relationships with their publics. *Facebook + Journalists*, *supra* note 101.

132. See, e.g., Robert Hernandez, *For Journalism’s Future, the Killer App Is Credibility*, NIEMAN JOURNALISM LAB (Dec. 20, 2011, 11:00 AM), <http://www.niemanlab.org/2011/12/robert-hernandez-for-journalisms-future-the-killer-app-is-credibility/>.

133. See *supra* note 116 and accompanying text; see also Mark Bowden, *The Inheritance*, VANITY FAIR, May 2009, at 128, 176 (“The Internet has disaggregated the news. It eliminates the middleman—that is, it eliminates editors. At a newspaper, top editors . . . decide which [stories] are the most important or compelling, and then they

As the news is no longer perceived as solely the prerogative and property of an elite institution that decides what is fit to print, a particular newspaper's unitary view of what the public should see to understand the world on any given day is replaced by more flexible possibilities. The flattening of the institutional structures of traditional media and the decentralization of at least some new digital media may foreground the reporter.

At the same time, it is not clear whether the traditional lines of command within newspapers and other press institutions remain unchanged by the last five years of economic challenges. On the one hand, there is a sense that newspapers, for example, must develop a clear and consistent brand in order to succeed in holding on to audiences. On the other hand, cuts in reporting and editorial staffs, as well as structures that often separate the digital and print aspects of the newspapers, lead to the questions of whether particular press organizations' institutional coherence or ethical legitimacy are still intact.¹³⁴ Moreover, developments such as the possible sale of the *Philadelphia Media Network* to powerful local Democrats and political power brokers raises the possibility that news organizations will further turn from institutional independence to what media

prioritize and package them. When you buy a newspaper you are buying a carefully prepared meal. . . . The Internet replaces editors with an algorithm. Google is a search engine. It makes no value judgment about information unless you instruct it to.").

134. News organizations also participate in entrepreneurial profit-making activities aside from journalism as such. These range from examples like the *New York Times* store where the paper sells *Times*-themed products, to news organizations that provide various nonjournalistic services. See, e.g., April Castro & Michael Liedtke, *AP To Form News Group To Make Money from Mobile*, BLOOMBERG BUSINESSWEEK (Oct. 18, 2010, 4:04 PM), <http://www.businessweek.com/ap/financialnews/D9IUAGB82.htm> (describing the Associated Press's plan to start licensing news stories to mobile apps that aggregate news for users); Vadim Lavrusik, *How News Organizations Are Generating Revenue from Social Media*, MASHABLE (Nov. 5, 2010), <http://mashable.com/2010/11/05/news-social-media-revenue/>. Depending on their character, such nonjournalistic activities could blur—and perhaps even harm—the news organizations' institutional identities. Michele McLellan, *Emerging Economics of Community News*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemedias.org/2011/mobile-survey/economics-of-community-news/> (last visited May 6, 2012) (recounting Sacramento Press publisher's statement that two-thirds of its site revenue came from helping local businesses use social media); cf. Jane B. Singer, *Journalism Ethics Amid Structural Change*, DAEDALUS, Spring 2010, at 89, 90 ("One attractive and potentially lucrative alternative to traditional advertising is commercial sponsorship of parts of a website. . . . But what message do readers get when a travel agency sponsors a newspaper's online travel section, a local medical center its health section, or an investment company its financial section?"); Andrew Alexander, *A Sponsorship Scandal at the Post*, WASH. POST, July 12, 2009, at A15 (describing proposed *Washington Post* dinners—ultimately scrapped as triggering ethics issues—where sponsors of up to \$25,000 could guarantee policy discussion with administration officials, think tank experts, business leaders, and foundation heads).

scholars call “instrumentalization”—defined as media ownership by groups seeking to tap the press’s power for political or business interests of their own.¹³⁵

Finally, entities such as Facebook have recently moved aggressively into the news space, with “frictionless” sharing of news.¹³⁶ Many newspapers have accepted Facebook’s invitation to have their content accessed through Facebook itself.¹³⁷ It remains to be seen whether this incorporation into Facebook will serve to maintain or dilute the press entity’s separate institutional brand.

B. The Dark Side of the New News Environment

A bird’s eye view of the relationship between social media and the press at this time reveals a complicated picture. Each of the four changes described in Part A above has led to much innovation and productive interactivity in digital media. At the same time, each has also opened the door to important challenges to the democracy-supporting, watchdog role of the press. New media and social media triumphalists see little to concern them in these developments. They argue that a new era for news—better and more democratic than the newspaper era—has arrived as a result of flourishing social media tools.¹³⁸ Yet one does not have to be a social media catastrophist to be concerned about the consequences of these developments for reporting standards, the vigor of investigative journalism, accountability, and the power of press institutions. While concerns about these issues certainly antedate social media, the changed practices of the digital press may well sharpen and heighten their salience.

135. See Rasmus Kleis Nielsen, *The Rendell Inquirer? The Specter of the Instrumentalization of American News Media*, NIEMAN JOURNALISM LAB (Feb. 17, 2012, 12:00 PM), <http://www.niemanlab.org/2012/02/the-rendell-inquirer-the-specter-of-the-instrumentalization-of-american-news-media/> (describing proposed sale of the publisher of the *Philadelphia Inquirer*, the *Daily News*, and Philly.com to potential buyers such as former Pennsylvania governor Ed Rendell, and suggesting that such transactions would make American newspapers, like their counterparts elsewhere in the world, run as political tools of owners who seek to buy them to profit from their power).

136. See Jeff Sonderman, *With Promise of Audience Growth, Facebook Pulls News Organizations Within Its Walls*, POYNTER.ORG (Sept. 27, 2011, 11:39 AM), <http://www.poynter.org/latest-news/media-lab/social-media/147219/with-promise-of-audience-growth-facebook-pulls-news-organizations-within-its-walls/>.

137. *Id.* (noting that the *Wall Street Journal*, *Washington Post*, and *The Guardian* have done so).

138. See Rosen, *supra* note 113. See generally INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 116–22 (describing the ways in which the Internet has improved journalism).

1. Consequences of “The Mutualisation of News”¹³⁹

The “mutualisation” of news has led to an often-admirable shift away from the one-to-many model of the press, with real-time interactivity enhancing the diversity of sources available to reporters and potentially expanding the field of reporting. Benefits include increased consumer choice and opportunities for greater diversity of voices. However, the interactivity and immediacy of social media have simultaneously put pressures on journalistic goals of accuracy, completeness, contextualization, and accountability.

a. For Accuracy

Social networks and real-time microblogging services like Twitter have reduced the already-shortened time frame for news gathering, verification, and reporting during the twenty-four-hour news cycle. Because seconds rather than minutes or hours determine who gets a scoop in the world of Twitter, the new media require journalists to find, source, check, and break stories much more quickly.¹⁴⁰ Twitter, for example, has made changes in journalists’ fact checking and verification processes and enhanced some journalists’ tolerance for error.¹⁴¹ Norms of what constitutes sufficient verification and checking for accuracy have shifted even for mainstream news organizations, particularly with respect to their online products.¹⁴²

139. See *supra* note 12 and accompanying text.

140. See Singer, *supra* note 134, at 92 (describing how quickly stories are likely to appear).

141. Although the practice leads to controversy, some journalists retweet unverified reports on the understanding that news is a process and that Twitter resembles a newsroom where false rumors “get shot down—no harm no foul.” Ingram, *supra* note 99 (quoting a Reuters blogger). But see Rem Reider, *Spreading Rumors on Twitter*, AM. JOURNALISM REV. (July 28, 2011), <http://www.ajr.org/Article.asp?id=5120> (arguing that once tweeted, unsubstantiated information can spread quickly, may not be debunked quickly, and “can do real damage”). In one example, Facebook and Twitter posts about a man with an assault rifle on the campus of Eastern Carolina University were said to have caused authorities to “chase ghosts,” as the person in question was sporting an umbrella. *Umbrella, Not Gun, Causes Lockdown at ECU*, WRAL.COM (Nov. 16, 2011), <http://www.wral.com/news/local/story/10387437/>; see also Singer, *supra* note 134, at 92 (reporting on admissions of decreased accuracy from participants in a professional journalism conference).

142. See, e.g., Angela Phillips, *Transparency and the New Ethics of Journalism*, 4 JOURNALISM PRAC. 373, 378 (2010); Singer, *supra* note 134, at 92 (describing decreased care taken on online versions of newspapers and quoting comment by Mike Richard of the *New York Times* that “the ‘desire for perfection’ must be balanced with the reality of having to let things go, especially when editing for the Web”); cf. Jeff Jarvis, *Hard Economic Lessons for News*, BUZZMACHINE (Apr. 25, 2011, 8:39 AM), <http://www.buzzmachine.com/2011/04/25/hard-economic-lessons-for-news/> (questioning the necessity and value of the traditional verification process).

Particularly when professional reporters are using work provided by citizen journalists, additional layers of vetting are necessary but can be difficult or inconvenient to obtain. The possibility of error and reliance on strategic or one-sided sources is ever present. For example, online posts can incorrectly identify the poster. There are stories of news reporters repeating Twitter hoaxes.¹⁴³ Through Twitter feeds and Facebook posts, politicians are able to control their images and avoid real-time interviews with seasoned and tough interviewers. Various scenarios of manipulation by sources can be anticipated.¹⁴⁴ Moreover, journalists are often asked to perform multiple, different sorts of tasks and use formats with which they have little expertise.¹⁴⁵ The enhanced job pressures on journalists—the need to write long form stories while blogging, tweeting, and remaining in constant touch with the audience—doubtless distracts reporters, presents incentives to reduce fact checking, and increases

143. See, e.g., Damon Kiesow, *UK Paper Issues Apology After Quoting a Fake Twitter Account*, POYNTER.ORG (Jan. 26, 2011, 11:17 AM), <http://www.poynter.org/latest-news/media-lab/social-media/116375/uk-paper-issues-apology-after-quoting-a-fake-twitter-account/> (describing apology by *The Independent* for a story attributing sexist comments on Twitter to a soccer commentator on the basis of quotes from a spoof Twitter account); Jeff Sonderman, *Earthquake Reminds Journalists They Risk Falling for Online Hoaxes When News Breaks*, POYNTER.ORG (Aug. 25, 2011, 6:52 AM), <http://www.poynter.org/latest-news/media-lab/social-media/143842/earthquake-reporting-shows-risks-of-journalists-falling-for-online-hoaxes-when-news-breaks/> (reporting aggregator BreakingNews.com reporter's view that there is a rise of "semi-sophisticated efforts to dupe people during breaking stories" and observing that "[j]ournalists are especially vulnerable during big, developing news situations when they are urgently seeking the latest scoop by hunting or crowdsourcing on social networks"). In addition, retweeting can give the impression that the journalist and even his or her employer news organization endorses what is republished. See Jeff Sonderman, *The Problem with Retweets & How Journalists Can Solve It*, POYNTER.ORG (Nov. 9, 2011, 10:43 AM), <http://www.poynter.org/latest-news/media-lab/social-media/152448/the-problem-with-retweets-how-journalists-can-solve-it/> [hereinafter Sonderman, *Retweets*] (describing endorsement issue and recommending solutions).

144. Another important aspect of this development is that news organizations and reporters are themselves the subjects of reporting. See Jeremy W. Peters, *Covering 2012, Youths on the Bus*, N.Y. TIMES, Aug. 31, 2011, at A1. Journalists' gaffes, tweets, and personal emails can be used to discredit them, sometimes as part of partisan political attacks. *Id.* ("In the hands of a political partisan looking to discredit a news organization, these slip-ups can become powerful and fatal ammunition."). The more immediate and unguarded their communications, the more reporters open themselves up to strategic manipulation. See, e.g., Jay Rosen, *Lefty Journalism Professor Tries To Discredit the Tea Party by Passing Along Sensational Footage to His Buddies at the Times!!!*, PRESSTHINK (Oct. 28, 2011, 4:48 AM), <http://pressthink.org/2011/10/lefty-journalism-professor-tries-to-discredit-the-tea-party-by-passing-along-sensational-footage-to-his-buddies-at-the-times/> ("Yesterday I was the target of a 'sting' operation by right wing trickster James O'Keefe.").

145. Singer, *supra* note 134, at 92.

the possibility of error.¹⁴⁶ Ironically, the shift to multiplatform reporting is reported to have led to shoddier approaches to accuracy on legacy news organizations' websites despite the fact that so many readers now first turn to the web for news.¹⁴⁷

More broadly, accuracy is valued in traditional journalism because of its connection to truth telling.¹⁴⁸ Yet characteristics of the Internet—such as the unlimited space to tell a story and unlimited participants in its telling—“accommodate[] an understanding of truth that is far more open and more fluid than the one enclosed by traditional journalistic structures.”¹⁴⁹ The journalist no longer fully controls the content or sources of what is published and what happens to it.¹⁵⁰ Stories are viewed as “works in progress.”¹⁵¹ It is possible that the networked architecture of news will in fact help fact checking and lead to crowdsourced accuracy.¹⁵² Perhaps a “different, more multifaceted version of the ‘truth’ of a story than the one the lone journalist started with”¹⁵³ will substantially benefit public understanding. Social media have already enhanced government transparency.¹⁵⁴ But, as Professor Jon Garon has noted in a different context, large communities are not necessarily self-correcting.¹⁵⁵

146. See John Cameron, *Journalists Evaluate Social Media*, OBSERVER (Sept. 20, 2011), <http://www.ndsmcobserver.com/news/journalists-evaluate-social-media-1.2599799>.

147. Singer, *supra* note 134, at 92.

148. *Id.* at 93.

149. *Id.*

150. *Id.* at 93–94 (“In short, the journalist no longer is alone in carrying out the process of determining what is true and meaningful—or in disseminating the results of that process. The construction of meaning is more widely shared in a network that encompasses many seekers of truth and incorporates many voices in reporting and relaying it.”).

151. *Id.* (quoting the *New York Times*’s Mark Richard’s statement that the web “is a canvas that never dries”).

152. Readers and commenters can respond to and correct facts stated in news stories. Accuracy can therefore be crowdsourced, using readers as fact checkers who can lead to the immediate correction of factual statements by the journalist.

153. Singer, *supra* note 134, at 94.

154. For example, a British soccer player wishing to avoid public discussion of charges that he had an affair obtained a so-called “super-injunction” in London prohibiting the news media from publishing both the story and the existence of the injunction. Sarah Lyall, *Parliament Joins the Fray as Twitter Tests a Law*, N.Y. TIMES, May 24, 2011, at A4. Both the injunction and the applicant’s name were publicized in 75,000 Twitter posts even though newspapers could not report on them. See *id.* A tweet by the editor of *The Guardian* led to the revelation of another super-injunction prohibiting the publication of secret documents regarding disposal of gasoline waste in Ivory Coast. Noam Cohen, *Twitter and a Newspaper Untie a Gag Order*, N.Y. TIMES, Oct. 19, 2009, at B3.

155. Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 135 (2010) (discussing collaborative wiki authorship and challenging assumption of reliability based on large size of community).

Given the amplifying character of the Internet and social media, and in light of the decline in authority of the institutional press, there is good reason to be concerned about the impact of uncorrected inaccuracy.

b. For Accountability

While the “mutualisation of news” can lead to accountability opportunities by increasing the transparency of the journalistic process, it can also lead to accountability challenges as a result of various conflicts of interest that are more likely to arise. One type of problem is likely to be generated by an apparently increasingly common blurring of lines and roles between journalist and participant. One high-profile example of such conflicts of interest occurred when Mike Arrington, founder of the popular tech industry news site TechCrunch, announced the launch of the CrunchFund, a venture fund that would invest in companies discussed on TechCrunch.¹⁵⁶ Arrington—a tech industry news blogger—nevertheless saw no conflict, saying that he had not purported to be a journalist.¹⁵⁷

Another version of this “line-blurring” concern relates to the popular shift, highly touted by some social media triumphalists, from objectivity and independence to transparency as the fundamental journalistic goal.¹⁵⁸ It has been pointed out that journalists’ increased

156. Anderson, *supra* note 124. Arrington was criticized for the potential conflicts of interest and ultimately fired by AOL, TechCrunch’s parent company. Farhad Manjoo, *The Meaning of Michael Arrington*, SLATE (Sept. 8, 2011, 6:08 PM), http://www.slate.com/articles/technology/technology/2011/09/the_meaning_of_michael_arrington.html?wpisrc=newsletter_tis.

157. Anderson, *supra* note 124. Those who wrote in his defense relied on his denial of being a journalist, although others reminded that “[h]e certainly *acts* like a journalist when it suits him [and] his journalism occasionally intersects with issues of real public concern.” *Id.*; see also Jarvis, *supra* note 108 (discussing Arrington’s claims that he is not a journalist); cf. Eric Wilson, *Magazines Begin To Sell the Fashion They Review*, N.Y. TIMES, Sept. 26, 2011, at B1 (discussing the blurring of lines between journalism and commercialism in the context of the fashion industry).

158. See Anderson, *supra* note 124. For a recent report on the contrast among news media, Twitter, and political blogs with respect to neutrality in political reporting from May to November 2011, see generally PROJECT FOR EXCELLENCE IN JOURNALISM, PEW RESEARCH CTR., TWITTER AND THE CAMPAIGN: HOW THE DISCUSSION ON TWITTER VARIES FROM BLOGS AND NEWS COVERAGE AND RON PAUL’S TWITTER TRIUMPH (2011), available at http://www.journalism.org/sites/journalism.org/files/FINALTWITTER_ANDCAMPAIGN.pdf, and Jeff Sonderman, *Pew: Twitter Chatter About GOP Candidates Less Factual, More Negative*, POYNTER.ORG (Dec. 8, 2011, 4:58 PM), <http://www.poynter.org/latest-news/media-lab/social-media/155241/pew-twitter-chatter-about-gop-candidates-less-factual-more-negative/> (quoting Project for Excellence in Journalism report findings that “traditional media are most likely to produce coverage that reflects neutrally on a

involvement in marketing and promotion—through, for example, Twitter feeds, social media presences, and blogs—has led to shifts in narrative structures away from the “detached professional stance” of the traditional journalist.¹⁵⁹ Moreover, a shift to news analysis, interpretation and opinion, and the development of the journalism blog also involve a move away from neutral, fact-intensive accounts.¹⁶⁰

In light of the widespread recent critiques of the possibility of objectivity, and the common public belief in press bias, many call instead for transparency (rather than objectivity or neutrality) as the metric for journalistic accountability.¹⁶¹ On this view, stakeholder investigative journalism, for example, can substitute for watchdog journalism by the independent press if the affiliations of the producers are revealed.¹⁶² Online journalists have argued, for example, that retweeting unverified Twitter reports is acceptable if the reporter makes clear that the information is unverified (and perhaps even asks for verification from the Twittersphere).¹⁶³ On the other hand, it is a mistake to rely too much on the corrective effect of this kind of transparency. There are always questions about how the journalistic caveat will be interpreted and whether the readers will discount it.¹⁶⁴ Some journalists point out, on the basis of behavioral economics research, that transparency can have pernicious effects as well—permitting journalists to pass on much more doubtful information than they might otherwise have done.¹⁶⁵ Moreover, regardless of the caveats with which revelation is couched, the harm is done upon release if the information turns out to be false and yet

candidate, while posts on political blogs are more likely to show a candidate in either a positive or negative light,” and that “[t]he political discussion on Twitter ... is measurably different than the one found in the blogosphere—more voluminous, more fluid and even less neutral”).

159. Singer, *supra* note 134, at 93.

160. *Id.* at 94.

161. See, e.g., *id.* at 95–96 (discussing transparency norm); Katherine Travers, *Objectivity v Transparency: Does Journalism Need a New Ideology?*, WANIFRA (Nov. 2, 2011, 6:06 PM), <http://www.editorsweblog.org/2011/11/02/objectivity-v-transparency-does-journalism-need-a-new-ideology>.

162. See Mark Lee Hunter & Luk Van Wassenhove, *Disruptive News Technologies: Stakeholder Media and the Future of Watchdog Journalism Business Model* 7–11 (Soc. Innovation Ctr., INSEAD Working Paper No. 2010/15/TOM/ISIC), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582324.

163. Ingram, *supra* note 99 (describing a disclosure strategy used by NPR reporter on Arab revolution reports).

164. See Sonderman, *Retweets*, *supra* note 143.

165. See Anderson, *supra* note 124.

accepted as true by millions of readers.¹⁶⁶ Depending on the content and context, lasting harmful effects may follow from republication of unverified social media communications. Also, social science data in the context of political advertising suggest that because people remember statements that have been repeated, corrections can sometimes have the unfortunate effect of reinforcing the repeated false belief rather than correcting it.¹⁶⁷ If so, false tweets can have impacts that are difficult to erase.

A related difficulty may come from decisions by news organizations to focus on journalistic subject specialization as a profit strategy.¹⁶⁸ Reporter specialization in a particular subject matter brings many public benefits—namely expertise, accuracy, and market responsiveness. At the same time, some notable dangers accompany these benefits. A specialist press is likely to promote the use of limited groups of repeat players as sources regarding their particular industry or governmental office.¹⁶⁹ While this kind of journalist-

166. See Sonderman, *Retweets*, *supra* note 143.

167. See, e.g., Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 160–63 (2010).

168. See Bowden, *supra* note 133, at 176–77; Jeff Jarvis, *Worthless Readers*, BUZZMACHINE (Nov. 27, 2009, 8:38 AM), <http://www.buzzmachine.com/2009/11/27/worthless-readers/>. To the extent that consumers are more willing to pay for specialized, expert content, such a development is predictable. Cf. Meyer, *supra* note 20, at 35 (suggesting in 2008 that newspaper resources should be focused not on the mass audience, but on the “leadership audience” if they seek to remain viable).

169. Indeed, from the congressional and White House beats to the state house to the health, pharmacology, business, and entrepreneurship beats, both government and industry present the possibilities of such limited sourcing. There is also evidence that false or misleading information designed to manipulate markets was disseminated through financial reporters during the financial crisis. See Dean Starkman, *Buying the Bull: How Could 9,000 Business Reporters Blow the Biggest Story on Their Beat?*, MOTHER JONES, Jan.–Feb. 2009, at 36, 39, 78; Dean Starkman, *Power Problem*, COLUM. JOURNALISM REV., May/June 2009, at 24, 30 (“The business press exists within the Wall Street and corporate subculture and understandably must adopt its idioms and customs, the better to translate them for the rest of us. Still, it relies on those institutions for its stories. Burning a bridge is hard. It is far easier for news bureaucracies to accept ever-narrowing frames of discourse, frames forcefully pushed by industry, even if those frames marginalize and eventually exclude the business press’s own great investigative traditions.”). In fact, there is a phenomenon known as “beat sweetening,” where a reporter will write an anodyne and generally flattering portrait of a government official who she or he wishes to cultivate as a source. See Ryan Chittum, *Slate’s Beat-Sweetener Reader*, COLUM. JOURNALISM REV. (Apr. 9, 2009, 11:54 AM), http://www.cjr.org/the_audit/slate_on_beat_sweeteners.php; Timothy Noah, *A Beat-Sweetener Sampler*, SLATE (Apr. 8, 2009, 2:27 PM), http://www.slate.com/articles/news_and_politics/chatterbox/2009/04/a_beatsweetener_sampler.html. Judith Miller, a Pulitzer-winning former *New York Times* reporter, was subject to extensive criticism for articles uncritically reporting her White House sources’ false claims about weapons of mass destruction in Iraq prior to the Iraq war. See MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ 27 (2004) (describing media

source relationship can bring extensive rewards, it can also lead to coziness and what has been called “capture” in the administrative law literature.¹⁷⁰ In the traditional institutional newspaper context, the editor could serve as an insulating layer between the journalist and her source, potentially mitigating the effects of such coziness. The decline of the traditional editorial role and institutional power may reduce or eliminate an important insulating factor for reporters vis-à-vis their sources. This may be a particular problem with reporters who are insufficiently trained or lacking a sophisticated understanding of a complex industry and so can be more easily misled by their sources. Capture and lack of expertise can hobble the journalists’ incentives or ability to engage in investigative or “accountability” journalism. A specialized press is also likely to see its “clients” as a subset of the general public, in contrast with the general journalistic norm of representing the public interest as a whole.¹⁷¹

Relatedly, the new media environment creates some enhanced opportunities for manipulation of journalists and the media.¹⁷² The humanization of reporters through social media provides useful information for those who wish to “play” journalists (who may have

criticism of Miller); see also Roni Caryn Rabin, *Conflicts of Interest May Ensnare Journalists, Too*, N.Y. TIMES (Nov. 21, 2008), <http://www.nytimes.com/2008/11/22/health/22journalists.html?ref=health> (discussing health reporters).

170. The literature on agency capture is extensive. See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 3 (2d ed. 1971); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167 *passim* (1990); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685–88 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). The argument that agencies with broader regulatory jurisdiction are likely to be less susceptible to capture than single issue agencies is particularly suggestive with respect to the point in text. See Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 100–02 (1992).

171. See Anderson, *supra* note 124; see also Starkman, *Power Problem*, *supra* note 169, at 30 (noting the differences between writing from the perspective of investors and citizens as part of an explanation for the failure of the business press to unveil adequately the problems in the financial system in the late 2000s).

172. This is not to mention the ways in which the availability of new media permit journalists to behave unaccountably, illegally, and manipulatively. See, e.g., *British Phone Hacking Scandal (News of the World)*, N.Y. TIMES (Jan. 4, 2012), http://topics.nytimes.com/top/reference/timestopics/organizations/n/news_of_the_world/index.html (collecting *New York Times* coverage of British tabloid phone hacking scandal whose discovery caused Rupert Murdoch’s *News of the World* to cease publication and led to a government inquiry into the state of the British press); see also THE LEVESON INQUIRY: CULTURE, PRACTICE AND ETHICS OF THE PRESS, <http://www.levesoninquiry.org.uk/> (last visited May 6, 2012) (website of the Leveson Inquiry).

let their professional guards down in social media's equalizing space).¹⁷³ The massive amount of information available for culling by overworked¹⁷⁴ reporters may ironically drown out salient information not only about the accuracy of what a source reports, but also the source's own particular agenda, if any. It may also lead reporters to rely overly on press releases and official statements by governmental and other powerful institutions.¹⁷⁵

Of course, the effect of social media on journalist accountability is double-edged. On the one hand, community engagement through social media is likely to promote journalistic expertise by providing potential sources and answers to virtually any inquiry. The ability to leverage the manpower of social media with the development of increasingly sophisticated tools for data analysis could lead reporters to engage in data-intensive investigative projects that the mainstream press has been criticized for avoiding. Commenters in the journalist's social media circles can debunk misinformation peddled by industry insider sources. The availability of potentially competing sources of information can also serve to constrain sources' incentives to mislead reporters for fear that they will be found out and not trusted in the future. The association of Tweets with social graphs¹⁷⁶ and the fact that Facebook does not permit anonymity in posting may help reduce some opportunities for manipulation of journalists. On the other hand, the journalist can be manipulated by such commenters and unaware of hidden agendas they may have. If specialized reporters

173. Last fall, a Wikipedia-style website called News Transparency was launched, with the goal of "find[ing] out more" about journalists and "hold[ing] them accountable" by listing hundreds of journalists, with profiles containing biographical information, social media accounts, political affiliations, charitable donations, professional and personal networks, and inviting readers to edit the profiles. Agence France-Presse, *New Website Seeks To Hold Journalists Accountable*, GOOGLE (Oct. 31, 2011), <http://www.google.com/hostednews/afp/article/ALeqM5hKuQeVqk52LZzgskmYr3mQ4jFpOA?docId=CNG.d7a343176532873611b236b0d74a9579.651>; *About News Transparency*, NEWS TRANSPARENCY, <http://www.newstransparency.com/about/> (last visited May 6, 2012).

174. Dean Starkman, *The Hamster Wheel*, COLUM. JOURNALISM REV., Sept./Oct. 2010, at 24, 26–27, available at http://www.cjr.org/cover_story/the_hamster_wheel.php?page=all (describing "hamsterism" of newspaper reporters).

175. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 244.

176. See Rohn Jay Miller, *Social Graphs: What They Are and Why You Should Care*, SOCIALMEDIATODAY (May 2, 2011), <http://socialmediatoday.com/rohnjaymiller/291471/social-graphs-what-they-are-and-why-you-should-care> (explaining that a "Social Graph," a tool created and used for marketing and advertising, is "a network of personal connections" that "explain[s] how one person's connections leads to broader network of friends"); MG Siegler, *Twitter's Social Graph Is About To Get Pumped Up*, "Who To Follow" Is Social Steroids, TECHCRUNCH (Aug. 5, 2010), <http://techcrunch.com/2010/08/05/twitter-recommendations/> (describing Twitter's then-newly released "Who to Follow" feature).

are subject to at least some of the factors that lead to concerns about administrative agency capture, then the narrow focus of such specialist journalism and the changes in the extent of professional oversight should not be ignored.

2. Consequences of the New Audience and “The Link Economy”

To be sure, the benefits of an engaged audience to journalism and democracy should not be underestimated, and there is an undeniable democratic attractiveness to the turn toward audience centeredness. But the new participatory audience as the touchstone for journalism also presents pitfalls worth considering.¹⁷⁷ The socially mediated elements of the new journalism have a complex relationship with traditional journalistic norms of completeness and context setting. The reader’s ability to follow links in stories can lead to a deeper understanding and contextualization of events than the surface summaries that would previously have been available in the limited space of a traditional news story. This convenient opportunity for immersion can lead to a much more complete and nuanced understanding of events. At the same time, however, readers do not always act as optimizing consumers of information. It may be that the need to follow links will dissuade some readers from gathering the contextual information necessary to understand the event and place it in perspective.

Many have noted that the problem of our age is not the dearth of information and access, but the over abundance of information. Studies show that in such circumstances, in which people constantly multitask and try to process and organize information, they have less time and ability to read carefully (and probably skeptically).¹⁷⁸ There also may be a tension between the desire of the audience to have content organized and curated, and the fetishization of information

177. Beyond the scope of this discussion, yet potentially important, are possible consequences of openness and collaboration on “security.” For example, a reporter’s compilations of online material could also unwittingly reveal identities and cause harm in ways that he could not easily anticipate from traditional journalistic experience, given the amplifying character of social media and the web. News media can also unintentionally serve as arms of the government in the context of document subpoenas. See RonNeil Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317 *passim* (2009) (updating empirical study of press subpoenas originally undertaken by Professor Vince Blasi); see also Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 416–60 (2011) (discussing benefits and drawbacks of using social media to engage the public in rulemakings).

178. See, e.g., Matt Richtel, *Hooked on Gadgets, and Paying a Mental Price*, N.Y. TIMES, June 7, 2010, at A1.

for its timeliness. To the extent that engagement with news happens via social recommendation, there is little control over the effects of undiversified social networks. Deficiencies in friends' own reading and decoding skills may exponentially enhance this effect. The social pressures of group interactions also raise the possibility of "groupthink."¹⁷⁹ What happens if the recommendation culture leads to the proliferation of inaccurate news or the equivalent of Wikipedia news? And what happens if the recommendation culture leads, at least for many people, to engagement with infotainment news instead of democracy-enhancing journalism?¹⁸⁰ Moreover, a recent report concludes that the customer-responsive model of digital news leads to the revival of old stories.¹⁸¹ While the possibility of reviving old news can serve as a positive counterweight to the pressures of the 24/7 news cycle, it can also lead to concerns about negative effects (such as the rumor that would not die).

Questions can also be raised about the impact of the "new journalism" on the kinds of stories and reporting selected in digital media—on what the modern press sees as newsworthy. If readers no longer have loyalty to a particular newspaper, each story must capture the interest of some part of the public. What kinds of stories will be seen as likely to achieve success on the social net and, perhaps, go viral? To the extent that subjects of journalistic interest will be determined by reference to "trending" on Twitter or behavioral information about the readers and their concerns culled through social media's data collection efforts, will this foster any particular skews?¹⁸² A tongue-in-cheek online study of trending on Twitter in 2011 captured one of the central concerns about audience-responsive journalism—news about Justin Bieber would trump news about world

179. See Robert M. Bond, Christopher J. Fariss & Jason J. Jones, *Tracking the Spread of Political (Mis)Information Through Social Networks* 5, 10–11, 13–14 (APSA 2010 Annual Meeting Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643969.

180. A clear dividing line between the two need not be drawn in order to achieve consensus distinguishing between the Miami entertainment news show *Deco Drive* and PBS news programs.

181. Jeff Sonderman, *Old News Is New Again Thanks to Facebook's Frictionless Sharing*, POYNTER.ORG (Nov. 28, 2011, 2:54 PM), <http://www.poynter.org/latest-news/media-lab/social-media/154220/old-news-is-new-again-thanks-to-facebooks-frictionless-sharing>.

182. See Singer, *supra* note 134, at 90 ("To what extent should user interest in a particular story or type of story (which, of course, can be precisely identified and tracked through website 'hit logs') affect journalists' news decisions? Does more coverage or better play of high interest items constitute serving the public, or is it merely what some in the newsroom deride as 'traffic whoring'?).

affairs.¹⁸³ At a minimum, to the extent that the selection of stories is influenced by trending on Twitter, it is possible that attention will be distracted by “superheated” stories whose relative importance is not assessed.¹⁸⁴

In the new technological and advertising environments, with enhanced data collection tools, news organizations can better tailor their fare to their readers directly. However, if news then becomes—even more than it already has become—simply another market product, the overall public interest is likely to suffer. Blogger and news ethnographer C.W. Anderson recently characterized the view of information “as the *ne plus ultra* of all journalistic activity” as “the dominant ideology that has shaped journalism over the past decade and a half.”¹⁸⁵ Under this definition of journalism, everyone who distributes information—whether public relations firm, newspaper, or government entity—has “equal claim to the title of journalist,” and “[w]ho is the best at the provision of this information is measured in pageviews and CPMs [cost per impression].”¹⁸⁶ Anderson properly wonders whether journalists *should* “see themselves as primarily providers of information whose success or failure in that provision is ultimately determined by the market.”¹⁸⁷

Although informational timeliness is important, always foregrounding information as such flattens and devalues the many other goals that professional journalists pursue in serving the public interest. In response to Jeff Jarvis’s statement challenging the centrality of the article as the proper journalistic output, one commentator wrote that “[t]here is little value to ‘information’ if you

183. See, e.g., Dave Olson, *Top Trending #Twitter Topics for 2011 from What the Trend #WtT*, HOOTSUITE (Dec. 6, 2011), <http://blog.hootsuite.com/top-twitter-trends-2011/>; Jennifer Van Grove, *Twitter Analysis: 40% of Tweets Are Pointless Babble*, MASHABLE (Aug. 12, 2009), <http://mashable.com/2009/08/12/twitter-analysis/>.

184. See Jesse Kornbluth, *Now You See It, Soon You Won't*, N.Y. TIMES, Sept. 25, 2011, at SR3 (calling Twitter trending of immediate, often pop-culture stories the “apotheosis of our A.D.D. media world”). This could look like an exaggerated, sped-up version of superheated television news. *But see* Matthew Ingram, *Can Watching Twitter Trends Help Predict the Future?*, GIGAOM (Oct. 19, 2011, 3:03 PM), <http://gigaom.com/2011/10/19/can-watching-twitter-trends-help-predict-the-future/> (describing “an emerging industry aimed at using the tweetstreams of millions of people to help predict the future”).

185. See Anderson, *supra* note 124 (quoting blogger’s defense of TechCrunch founder Mike Arrington’s decision to launch an investment vehicle that would trade in companies reviewed in his publication because “[i]nformation is all that matters. All the rest is bullshit.”).

186. See *id.*

187. *Id.*

don't really understand what it all means."¹⁸⁸ The best professional journalists are not just traders in information. Moreover, individual pieces of information are always part of some larger whole. Excessive unitizing or individuation in the notion of information can limit efforts to make broader sense of the whole.

One particular litmus test of the adequacy of a principally market-centered vision of news is its effect on what has been called "accountability" or "watchdog" journalism. The production of this kind of journalism is considered democratically desirable under any of the various theories of democracy salient today.¹⁸⁹ On the one hand, one might think that the resources of the social web would be a bonanza for this type of reporting.¹⁹⁰ On the other hand, one can hardly be assured that the serendipitous investigative initiatives of social media groups will play the democratically critical role of the watchdog press in disclosing corruption.¹⁹¹ The decline of the institutional daily newspaper has already led to a significant decline in this kind of journalism.¹⁹² Although online news sources have begun reporting rather than simply aggregating news,¹⁹³ it is still the case that most of the journalism online is grounded in the work of professional newspaper reporters.¹⁹⁴

188. Michael Rosenblum, to Jeff Jarvis, *The Article as Luxury or Byproduct*, BUZZMACHINE (May 28, 2011, 10:54 AM), <http://www.buzzmachine.com/2011/05/28/the-article-as-luxury-or-byproduct/>.

189. See generally C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998) (identifying watchdog journalism as a common baseline for all forms of democracy); Herbert J. Gans, *News & the News Media in the Digital Age: Implications for Democracy*, DAEDALUS, Spring 2010, at 8 (rethinking traditional "bulwark theory" in explaining journalism's role in democracy).

190. Amateur journalism is helpful for correcting errors; collecting material; disseminating new information instantly and widely to large networks of people; helping sort information, provide criticism, and provide information that might not be as available to mainstream news organizations, as we have seen with Twitter reporting from China and the Middle East. See Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 213–15 (2006) (describing self-correction mechanisms to which blogs are subject).

191. See, e.g., Starr, *supra* note 23, *passim* (suggesting that newspapers reveal and thereby help control governmental corruption).

192. See, e.g., INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 52–53.

193. For example, Politico was recently the first to break the story that two women had accused then-Republican candidate Herman Cain of inappropriate conduct when he was head of the National Restaurant Association. See Jodi Enda, *Politico, Act II*, AM. JOURNALISM REV., Winter 2011, at 14, 15; Jonathan Martin et al., *Herman Cain Accused by Two Women of Inappropriate Behavior*, POLITICO (Oct. 31, 2011, 9:18 PM), <http://www.politico.com/news/stories/1011/67194.html>.

194. Study after study demonstrates that "the growing number of web outlets relies on a relatively fixed, or declining, pool of original reporting provided by traditional media."

As the professional press struggles to find its way in this new environment, investigative news about local and regional government may well continue to be under produced.¹⁹⁵ An FCC-sponsored report concluded that there was a “measurable decline” in local accountability reporting.¹⁹⁶ There have been massive cuts in traditional media staffing for statehouse news and municipal news,¹⁹⁷ and many foreign news bureaus have closed, increasing the likelihood that reporters will fall back to reliance on government and corporate publicists and press releases, whether at home or abroad. While collaboration among news organizations is potentially extremely fruitful, especially with respect to this kind of coverage, content sharing among newspapers may lead to high transactions costs and reduce both competition and the diversity of news that would ideally be available.¹⁹⁸

Of course, the exposé or story that wants to be leaked will be. The press has in the past often served as a megaphone for insiders who wish to leak information and will continue to serve this function.¹⁹⁹ There may also be other types of exposés, even without strong press institutions, but it is likely that they will be more partisan and eschew neutrality and objective reporting. People engaging in investigation will likely do so in pursuit of their own political

See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 123; see also *id.* at 52–53 (noting that strong investigative teams have been retained by the *New York Times*, *Washington Post*, *Wall Street Journal*, *Dallas Morning News*, *Philadelphia Inquirer*, *Milwaukee Journal Sentinel*, *Oregonian*, *Seattle Times*, and *Gannett*). Many widely read online news sites, like the DRUDGE REPORT, <http://www.drudgereport.com/> (last visited May 6, 2012), are simply aggregators that link to traditional media stories.

195. See Starr, *supra* note 23, at 28 (pointing out many of the newspapers that are in trouble or have folded were regional newspapers). National papers are likely to focus on general national news and the federal government. As it is, extensive cuts were made in statehouse (and municipal government) coverage at newspapers. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 44–45 (citing a finding that the number of statehouse reporters dropped by one-third in 2009, with more than fifty newspapers and news companies nationwide having stopped covering state houses entirely since 2003).

196. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 21, 52.

197. See *id.* at 11.

198. See Singer, *supra* note 134, at 91 (discussing ethical issues posed by collaborations). *But cf.* INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 272 (describing fruitful collaboration between for-profit and nonprofit sectors).

199. See Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 455–68 (2006) (describing history of leaking); Mary Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 249–55 (2008) (describing complex relationship between press and executive branch and use of leaks by high public officials).

agendas,²⁰⁰ in light of the apparent political polarization of the United States²⁰¹ and the political blogosphere.²⁰² The partisanship of such stories may ultimately be revealed, with potential effects on the credibility of the original reporters, if the story is picked up and further vetted by the professional journalist community. On the other hand, it may not.²⁰³ For this reason, the new media ecosystem

200. For example, Andrew Breitbart, the late conservative blogger on BigGovernment.com, prepared a video critical of ACORN by using hidden cameras to show a meeting where ACORN employees appeared, giving tax advice to two associates pretending to be a pimp and prostitute. Fox News originally aired segments of the video without discussing its partisan origins until that issue became a subject of discussion. See Justin Pritchard, *How the ACORN 'Pimp and Hooker' Videos Came To Be*, SEATTLE TIMES (Sept. 23, 2009, 3:23 PM), http://seattletimes.nwsources.com/html/nationworld/2009929363_apusacornvideo.html; see also Cohen, *supra* note 72, at 39–42 (describing Breitbart's misleading video of Shirley Sherrod, an African American Department of Agriculture employee, who appeared to admit to discrimination against whites in her work).

201. See generally AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CAMPAIGN 2010 (2011), available at <http://pewinternet.org/~media/Files/Reports/2011/Internet%20and%20Campaign%202010.pdf> (reporting Americans' views that the Internet increases political extremism); PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY (2011), available at <http://www.people-press.org/files/legacy-pdf/Beyond-Red-vs-Blue-The-Political-Typology.pdf> (discussing changes in the partisan divides among Americans); Sean M. Teriault & David W. Rohde, *The Gingrich Senators and Party Polarization in the U.S. Senate*, 73 J. POL. 1011 (2011) (discussing how party polarization in the House has contributed to polarization in the Senate).

202. See, e.g., Eric Lawrence, John Sides & Henry Farrell, *Self-Segregation or Deliberation? Blog Readership, Participation, and Polarization in American Politics*, 8 PERSP. ON POL. 141, 141 (2010) (finding that “blog readers gravitate toward blogs that accord with their political beliefs” and “are more polarized than either non-blog-readers or consumers of various television news programs, and roughly as polarized as US senators”); see also Yochai Benkler & Aaron Shaw, *A Tale of Two Blogospheres: Discursive Practices on the Left and Right*, 56 AM. BEHAV. SCIENTIST 459, 478–82 (2012) (describing research on the “cross-ideological divergence” in political blogosphere practices); M.D. Conover et al., *Political Polarization on Twitter*, 5 INT'L AAAI CONF. ON WEBLOGS & SOC. MEDIA, 2011 at 89, 95, available at <http://www.aaai.org/ocs/index.php/ICWSM/ICWSM11/paper/view/2847/3275> (finding highly polarized retweet network in weeks prior to 2010 congressional elections).

203. Partisan groups have claimed that their involvement has been necessary to combat the hidden partisanship of the mainstream press. In one example, which has come to be known as Rathergate, the right-wing blogosphere was responsible for revealing that CBS News appeared to have relied on forged documents in a *60 Minutes* broadcast critical of George W. Bush's service in the Texas Air National Guard. As a result of the affair, CBS News anchor Dan Rather left the network. For links to various aspects of the story, see *Memogate: CBS News and the Texas Air National Guard Story*, JOURNALISM.ORG (Jan. 15, 2005), <http://www.journalism.org/node/105>.

presents a threat to investigative reporting both at the local and the national level.²⁰⁴

Finally, some of the supporters of the new, participatory journalism seem to believe that the media's attempt to set the agenda is elitist and undemocratic and that the public's interests and concerns are more legitimately formed from the bottom up through affinity groups than top down through the institutional press.²⁰⁵ But it is a mistake to forget that these "grass-roots" and purportedly personal networks and connections—the very structures that select and create the social networks—are chosen, created, and mediated by commercial entities like Facebook—with their own business plans, proprietary software, and profits based on data collection.²⁰⁶ The apps that are available on these networks and devices—and those that are not—are determined by the contractual understandings and profit-sharing deals of Facebook and Apple.²⁰⁷ Perhaps the reader today,

204. Although the INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, mentions pressures facing national news, it focuses principally on the predictable declines in local accountability reporting because it characterizes the "far from perfect" national news market as "dynamic." *Id.* at 21. The dynamism of the national news market, however, should not eclipse the declines in national accountability reporting, the apparent decline in the number of working investigative journalists, *see id.* at 52, and the likely increase in the partisanship of the sources of such journalism.

205. *See* DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE, at xxiii, 126 (2004); ALFRED HERMIDA ET AL., INTERNATIONAL SYMPOSIUM ON ONLINE JOURNALISM 2011, UNIVERSITY OF TEXAS, THE ACTIVE RECIPIENT: PARTICIPATORY JOURNALISM THROUGH THE LENS OF THE DEWEY-LIPPMAN DEBATE 5–7 (2011), available at <http://online.journalism.utexas.edu/2011/papers/Hermida2011.pdf>.

206. After founder Mark Zuckerberg announced Facebook's new social reading and news page model at the f8 conference in 2011, a few voices warned about the potential harms of effectively funneling most or all news reading through Facebook. *See* Jeff Sonderman, *With Promise of Audience Growth, Facebook Pulls News Organizations Within Its Walls*, POYNTER.ORG (Sept. 27, 2011, 11:39 AM), <http://www.poynter.org/latest-news/media-lab/social-media/147219/with-promise-of-audience-growth-facebook-pulls-news-organizations-within-its-walls/>; *see also* Lori Andrews, *Facebook Is Using You*, N.Y. TIMES, Feb. 5, 2012, at SR7 (describing Facebook and Google's use of personal data); *cf.* Rosenstiel & Mitchell, *supra* note 24 (noting that, while news organizations still produce most of the content audiences consume, new players in connecting the content and the audience—such as aggregators, social networks, device makers, and software developers—add complexity and reduce news organization control).

What exactly the Facebook funnel could do to threaten news is not yet clear. Someone might claim that the availability of the social reader is nothing more than an added convenience for the public. If Facebook's behavior becomes problematic, then the newspaper sites will cease their participation, and the reader can avoid Facebook and read the newspaper's own site directly. On the other hand, the selection of news pursuant to the data calculations of a non-news entity is troubling.

207. *See* Claire Cain Miller, *Should Google Tweak the News We Consume?*, N.Y. TIMES (Sept. 29, 2011, 9:17 AM), <http://bits.blogs.nytimes.com/2011/09/29/should-google->

rather than being liberated and empowered to create her own (and her social circle's) news environment, has instead traded the agenda-setting function of the professional newspaper editor for the intermediation of commercial entities like Facebook, Twitter, and Google. These are no more "authentic" than the professional norms of traditional journalists. To be sure, we should not make too much of this. The simple point is that at some level the social network is not necessarily more "truly" democratic and "really" unmediated than other versions of the relationship between the audience and the press.

3. Consequences of Deinstitutionalization

The most significant consequence of deinstitutionalization is a likely reduction in power and influence of the press as an institution, especially vis-à-vis government.²⁰⁸ A well-funded institutional press has resources to resist governmental intimidation and attempts to censor. Also, the mere existence of a highly resourced and tenacious press doubtless serves to inhibit officials from engaging in activities whose disclosure they would fear. These constraining effects cannot be adequately achieved, certainly overall, by independent, disaggregated press entities or social-media-generated affinity groups. Admittedly, the amplifying character of social media and the Internet may give some officials pause before malfeasance. Yet the sheer rush of information in Twitter feeds can also minimize the risk that any one item of unflattering information will be noticed.²⁰⁹ The Wikileaks saga of last year also demonstrates the continuing power distinction between the institutional press and other information

tweak-the-news-we-consume/ (discussing debate at Google conference on whether Google should "play an editorial role in presenting readers with news"); Edward Wasserman, *News Business Is Being Played*, CHARLOTTE OBSERVER (Oct. 12, 2011), <http://www.charlotteobserver.com/2011/10/12/2684048/news-business-is-being-played.html> ("The entire news business is being played. What's under way is a deliberate marketing campaign to deputize the rising generation of journalists as auxiliary recruiters for an industry of social media giants whose business requires assembling vast populations for advertising targeted by age, location, interest, taste, preference, alignment—and dozens of other factors that can be inferred from the news they watch and the comments they post.").

208. Ultimately, of course, there is the question of whether even if particular institutions will be weaker, the overall press will be weaker as the Fourth Estate. It seems likely to be, in light of the disaggregation discussed above.

209. In *Social Media, Libel Abounds but Lawsuits Are Rare*, MCCLATCHY-TRIB. NEWS SERVICE (Mar. 16, 2011), http://www.montrealgazette.com/story_print.html?id=4449173.

disseminators.²¹⁰ Delinking journalists and the institutional press can also pose difficulties for the journalists themselves. For example, those who seek to report but are unaffiliated with institutions that have legal and informational resources may be more subject to government harassment, threat, or intimidation.²¹¹ Finally, the deinstitutionalization of the press might well undermine the critical role that the traditional press—and predominantly newspapers—has played in promoting legal change promoting expression and government openness.²¹²

III. LEGAL IMPLICATIONS: INCREASED PRESS LIABILITY, UNINTENDED REGULATORY CONSEQUENCES, AND GLOOMY PROSPECTS FOR FUTURE CONSTITUTIONAL AND STATUTORY PRESS PROTECTIONS

The effects of social media on journalism have legal implications on three fronts. First, changing journalistic practices may invite

210. WikiLeaks is described as a whistle-blowing website launched by activist and journalist Julian Assange in 2006 for the purpose of revealing government and corporate secrets. *Times Topics: WikiLeaks*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html?scp=1-spot&sq=wikileaks&st=cse> (last updated Feb. 27, 2012) (archiving *New York Times* articles on the subject). Beginning in 2010, WikiLeaks released U.S. government documents concerning the Afghan and Iraq wars and almost 134,000 leaked diplomatic cables. Originally, WikiLeaks sought to release its documents in partnership with several newspapers (such as the *New York Times* and *The Guardian*). Ultimately, however, through what WikiLeaks founder Assange claimed to be an error, WikiLeaks posted many documents directly, without editorial review by newspapers. WikiLeaks's actions triggered an extensive governmental reaction—including the arrest and solitary confinement of Bradley Manning, assertedly Assange's source for much of the posted material and calls for prosecution of Assange under the Espionage Act. See Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 313–15 (2011). Private companies as well boycotted WikiLeaks, with Amazon removing WikiLeaks's content from its cloud computing platform and credit card companies such as Mastercard cutting off payment service to WikiLeaks. *Id.* at 314. See generally Sandra Davidson, *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of Wikileaks*, 34 HASTINGS COMM. & ENT. L.J. 27 (2011) (describing and putting the case in legal historical context). Not being a traditional news organization may well have made WikiLeaks an easier target for censorious action.

211. See, e.g., Jeffrey P. Hermes, *A Victory for Recording in Public!*, CITIZEN MEDIA L. PROJECT (Aug. 26, 2011, 8:16 PM), <http://www.citimedialaw.org/blog/2011/victory-recording-public> (describing incident where police on Boston Common arrested, under a state wiretapping statute, an individual who was publicly taping their arrest of a suspect because he was concerned about police brutality).

212. See Ronnell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 559 (2011) (“For the past 100 years, newspapers and traditional media companies have played a critical role as legal instigators and enforcers. . . . [Even if new players replace newspapers’ other roles], there is no apparent successor to the role of legal instigator and enforcer.”).

heightened legal liability for defamation or invasion of privacy claims against the press. Second, legislative and administrative developments that privilege privacy and consumer protection over press economics may have the inadvertent effect of deterring free, high quality news production. Third, concerns about press responsibility and the difficulty of defining the press in the new environment are likely to set back attempts to (1) promote a revival of the First Amendment's Press Clause and (2) pass a federal reporter's privilege.

So far, social media have not generated a plethora of lawsuits. There are multiple plausible explanations for this. Facebook and Twitter are still new. Google+, while growing apace, is newer still. Section 230 of the Communications Act of 1996 offers significant immunity from liability for providers and users of interactive computer services that publish information provided by other content providers.²¹³ There are also constitutional limits under the First Amendment on the extent to which the content of online journalism can be governmentally regulated. These factors, in turn, doubtless make lawyers less willing to take on Internet defamation suits on a contingency fee basis. Finally, the kind of dialogue that people expect, the informal norms of social media, the fact that participants perceive themselves to have cheap and equal opportunities to respond, and the possibility of effective punishment by the community may make formal lawsuits appear less necessary.²¹⁴ It is also impossible to quantify expression that has been chilled for fear of liability. Nevertheless, there have been notable congressional and administrative initiatives to regulate social media,²¹⁵ and litigation in that space appears to be on the rise.²¹⁶

213. 47 U.S.C. § 230 (2006) (providing immunity to providers and users of "interactive computer service"). "[I]nteractive computer service" has been interpreted to include bulletin boards, websites, blogs, and search engines. *See, e.g.,* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 & n.2 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44, 49–53 (D.D.C. 1998). The immunity specifically excludes intellectual property claims, federal criminal liability, and claims under the Electronic Communications Privacy Act. *See* 47 U.S.C. § 230(e)(1)–(4).

214. *See In Social Media, Libel Abounds but Lawsuits Are Rare, supra* note 209 ("Libel suits related to social media are rare nationwide . . . in part because users can fire off instant replies to nasty comments.").

215. *See infra* notes 250–58 and accompanying text.

216. *See infra* Part III.A. This Section limits its discussion to liability for defamation and privacy, and to the discussion of the special legal status of the press. There are, of course, other legal issues raised by journalism and social media. For example, journalists and news organizations engaging with social media are also likely to face property and contract claims as well. Claims contesting the use of intellectual property have already been made. Before ceasing operations, for example, the copyright troll Righthaven had brought several actions for copyright infringement. *See* Arthur Bright, *Want To Be the*

A. Press Liability

1. Defamation

Litigation involving social media has already begun, with the filing of defamation claims based on Twitter posts—now referred to as “twibel” suits.²¹⁷ The most discussed twibel cases thus far have involved celebrities Courtney Love and Kim Kardashian, who were sued for tweets regarding a clothing designer and a fad diet, respectively.²¹⁸

New Righthaven.com? Just Three Shopping Days Left!, CITIZEN MEDIA L. PROJECT (Jan. 3, 2012, 4:27 PM), <http://www.citmedialaw.org/print/9275>. CNN has used federal trademark and assorted state laws to sue impostors using CNN news logos to claim journalistic affiliation. See Mary Papenfuss, *CNN Sues ‘iReporter’ for Saying He Works for CNN*, NEWSER (Apr. 15, 2010, 3:15 AM), <http://www.newser.com/story/86092/cnn-sues-i-reporter-for-saying-he-works-for-cnn.html>. In addition, the ownership of intellectual property that is produced through processes of journalistic collaboration and audience participation is likely to lead to further contests over intellectual property ownership. While this often becomes an issue with jointly authored works, the fact that entities like Facebook contractually claim rights to use user-generated content adds another complicating element. *Statement of Rights and Responsibilities*, FACEBOOK (Apr. 26, 2011), <http://www.facebook.com/legal/terms>. In 2009, Facebook revised its terms of use to provide itself with an irrevocable license in perpetuity to user-generated content, permitting every possible use including the making and dissemination of derivative works. Facebook users were up in arms, and the company returned to its original terms of use in a short period of time. Brad Stone & Brian Stelter, *Facebook Backtracks on Use Terms*, N.Y. TIMES, Feb. 19, 2009, at B1. Facebook is presumably free to change its mind again when it sees fit. With respect to ownership, there is also pending a closely watched lawsuit about rights to Twitter accounts and followers. *Phonedog v. Kravitz* presents the U.S. District Court for the Northern District of California the opportunity to determine whether the Twitter account of followers developed by an employee when posting to Twitter as part of his employment should be considered corporate property or his to take upon leaving his employment. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ (N.D. Cal. filed July 15, 2011); see also John Biggs, *A Dispute over Who Owns a Twitter Account Goes to Court*, N.Y. TIMES, Dec. 26, 2011, at B1 (describing case and issue); Venkat Balasubramani, *An Update on PhoneDog v. Kravitz, the Employee Twitter Account Case*, ERIC GOLDMAN TECH. & MARKETING L. BLOG (Jan. 11, 2012), http://blog.ericgoldman.org/archives/2012/01/an_update_on_th.htm (linking to pleadings). This issue could become an important point of contention between journalists and their news organizations.

217. See, e.g., Jo Best, *Think Before You Tweet: Social Media Libel Cases Have Doubled*, ZDNET (Aug. 28, 2011, 9:46 AM), <http://www.zdnet.co.uk/news/business-of-it/2011/08/28/think-before-you-tweet-social-media-libel-cases-have-doubled-40154558/>; Ben Dowell, *Rise in Defamation Cases Involving Blogs and Twitter*, GUARDIAN (Aug. 26, 2011, 9:11 AM), <http://www.guardian.co.uk/media/2011/aug/26/defamation-cases-twitter-blogs>; Malley Jean Tenore, *What Journalists Need To Know About Libelous Tweets*, POYNTER.ORG (Aug. 14, 2011, 7:07 AM), <http://www.poynter.org/latest-news/top-stories/141987/what-journalists-need-to-know-about-libelous-tweets/>.

218. Kim Kardashian was sued for defamation by the creator of the Cookie Diet weight-loss program for comments she posted on her Twitter feed. Verified Complaint for Defamation, Siegal v. Kardashian, No. 2009-93439CA-15 (Fla. Cir. Ct. Dec. 29, 2009),

Thus far, only one defamation action appears to have been filed against a mainstream news organization for use of social media. In that case, an Associated Press reporter tweeted about a conversation between an NBA referee and a coach, purportedly implying that the referee fixed a game. The Associated Press settled the case.²¹⁹ Although such libel suits are still rare in the United States, they may nevertheless have a chilling effect.²²⁰

Even if existing defamation standards are not changed as a result of social media, their application is likely to be affected. Domestically, it is likely that journalistic shortcuts enabled and perhaps even fostered by social media will increasingly focus courts on judging the appropriateness of journalistic practices. Since the Supreme Court permitted defamation plaintiffs to inquire into the editorial practices of the press in *Herbert v. Lando*,²²¹ and since *Harte-Hanks v. Connaughton*²²² gave appellate courts the right of independent review of the existence of actual malice in defamation cases, courts in such cases have inquired into journalistic practices. In *Price v. Stossel*,²²³ for example, the U.S. Court of Appeals for the Ninth Circuit recently held that a district court had prematurely dismissed, under California's Anti-SLAPP Act, a defamation lawsuit against a network for a television program.²²⁴ The program contained

available at <http://www.courthousenews.com/2009/12/31/Kardashian.pdf>. Courtney Love reportedly settled a defamation action by a fashion designer over her tweets for \$430,000. John R. Zimmerman, *Mind Your Posts and Tweets*, NEV. LAW., June 2011, at 50, 50, available at <http://nvbar.org/articles/content/back-story-mind-your-posts-and-tweets>.

219. See Lauren Dugan, *The AP Settles over NBA Twitter Lawsuit, Pays \$20,000 Fine*, MEDIABISTRO (Dec. 8, 2011, 12:30 PM), http://www.mediabistro.com/alltwitter/the-ap-settles-over-nba-twitter-lawsuit-pays-20000-fine_b16514. Previously, in 2011, a blogger was fined \$60,000 when a jury found that he had defamed a community council member in blog posts associating the plaintiff with a mortgage fraud case in which he was never charged. See *In Social Media, Libel Abounds but Lawsuits Are Rare*, *supra* note 209 (describing a case which involved the former director of the Jordan Area Community Council and a Minneapolis blogger with the *nom-de-blog* Johnny Northside). For a review of libel cases involving bloggers and social media, and predicting an increase in such suits as social media overtake the blogosphere, see generally Hannah Rogers Metcalfe, *Libel in the Blogosphere and Social Media: Thoughts on Reaching Adolescence*, 5 CHARLESTON L. REV. 481 (2011).

220. Cf. QMI Agency, *CBC Journalist Retires Early After Scandal*, TORONTO SUN (Oct. 7, 2011, 3:28 PM), <http://www.torontosun.com/2011/10/07/cbc-journalist-retires-early-after-scandal> (noting that the head investigative reporter for the Canadian Broadcasting Company recently resigned because of statements he posted to his Facebook page).

221. 441 U.S. 153 (1979).

222. 491 U.S. 657 (1989).

223. 620 F.3d 992 (9th Cir. 2010).

224. *Id.* at 995–96 (referring to California's anti-Strategic Lawsuit Against Public Participation statute, California Code of Civil Procedure § 425.16(b)(1), "which provides

a statement which, although actually made by the public-figure plaintiff, was presented in a “misleading context, thereby changing the viewer’s understanding of the speaker’s words.”²²⁵ To the extent that journalism involving social media relies on 140 character Twitter quotes, citizen journalist video footage, open newsrooms, and collaborative journalism, there is a greater likelihood that courts will find liability on the ground that a report was defamatory because it was insufficiently contextual. This is particularly likely to the extent that digital journalism becomes more partisan.²²⁶ The journalistic tactics of digital journalists who use so-called “gotcha journalism” for ideological ends are likely to be particularly inviting to plaintiffs.²²⁷

Journalistic changes may also help defamation plaintiffs more easily establish actual malice²²⁸ on the part of defamation defendants. As Professor Lyrissa Lidsky has pointed out, “[t]he Supreme Court’s examples of what constitutes actual malice are geared to the investigative practices of the [traditional] institutional press.”²²⁹ The Court stated in *St. Amant v. Thompson*²³⁰ that “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”²³¹ Although the Court’s examples of what might reach that level cluster on the extreme end of reporter behavior,²³² and although courts have

for early dismissal of suits that threaten defendants’ right of expression under the First Amendment”).

225. *Price*, 620 F.3d at 995.

226. See *Facebook + Journalists*, *supra* note 101.

227. For example, Shirley Sherrod, a former U.S. Department of Agriculture official, filed an action for defamation, invasion of privacy, and intentional infliction of emotional distress against the late conservative political blogger Andrew Breitbart of BigGovernment.com for defaming her “by editing and publishing an intentionally false and misleading clip of Mrs. Sherrod’s speech” and adding narrative statements about Mrs. Sherrod to the clip. Complaint at 2, *Sherrod v. Breitbart*, No. 0001157 11 (D.C. Super. Ct. Feb. 11, 2011), 2011 WL 511488; see also *supra* note 200 (discussing Breitbart’s ACORN videos).

228. The Supreme Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), that a public official plaintiff in a defamation suit against the press must prove “that the [defendant’s] statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974) (defining “reckless disregard” as “subjective awareness of probable falsity”).

229. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 918 (2000).

230. 390 U.S. 727 (1968).

231. *Id.* at 731; see also Lidsky, *supra* note 229, at 918 (quoting *St. Amant*).

232. *St. Amant*, 390 U.S. at 732 (referencing examples where the defendant bases a story on “an unverified anonymous telephone call,” publishes statements “so inherently improbable that only a reckless man would have put them in circulation,” or publishes in

found that mere failure to investigate cannot constitute actual malice,²³³ the types of changes to journalism practice that could evolve as a result of the online environment might well lead to more common findings that the actual malice standard has been satisfied.²³⁴ Indeed, this would be particularly likely if there continues to be a gulf between articulated journalistic practice guidelines and the actual practices of different journalists and press organizations.

It is true, of course, that plaintiffs seldom win defamation cases and lawyers have little incentive to represent defamation plaintiffs on a contingency basis.²³⁵ Nevertheless, that might change if courts faced with social media defamation claims choose to interpret existing defamation standards in a manner more hospitable to plaintiffs.

The creation and dissemination of news globally via social media also implicates the type of trans-national forum shopping now commonly known as “libel tourism.”²³⁶ There are significant differences among the libel laws of the various countries where information is transmitted via the Internet. Countries like the United Kingdom and France, among others, have significantly more claimant-friendly defamation laws than the United States.²³⁷ This has led to the filing in Europe of a number of notable trans-national libel cases against Americans. In the most visible of these actions, Saudi Arabian billionaire banker Khalid bin Mahfouz sued American author Rachel Ehrenfeld for a book she wrote accusing bin Mahfouz of funding terror.²³⁸ Though the book was never published in England and only twenty-three copies were sold in the country via Amazon.com, bin Mahfouz succeeded in his suit under English libel

spite of “obvious reasons to doubt the veracity of the informant or the accuracy of his reports”).

233. See, e.g., *id.* at 733.

234. Analogously, Professor Lidsky has argued that “it may be relatively easy for plaintiffs to establish actual malice” against anonymous posters to online message boards. Lidsky, *supra* note 229, at 919; cf. Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL’Y 1093, 1134–35 (2009) (cataloging discussion regarding how press resort to tabloid tactics in newsgathering could increase legal pressure).

235. See Lidsky, *supra* note 229, at 872.

236. The phrase refers to a particular example of forum shopping: defamation plaintiffs choosing to sue in jurisdictions with relatively insignificant ties to the case but claimant-favorable substantive law. For discussions of “libel tourism,” see generally Trevor C. Hartley, ‘*Libel Tourism*’ and *Conflict of Laws*, 59 INT’L & COMP. L.Q. 25 (2010); Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507 (2012).

237. See, e.g., Levi, *supra* note 236, at 519–23.

238. See *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC (QB) 1156 [6]–[7], [12]–[13], [16], [27] (Eng.).

law.²³⁹ Responding to the lawsuit, Congress passed the SPEECH Act,²⁴⁰ prohibiting recognition and enforcement within the United States of foreign defamation judgments inconsistent with First Amendment protections. “Since the *Ehrenfeld* case, journalists, newspapers, university book publishers, editors of academic journals, and science commentators have all been targets of defamation suits brought by wealthy businessmen, corporate entities, academics, and others.”²⁴¹ Differences among nations’ defamation laws can be used strategically to constrain expression on matters ranging from politics and the global fight against terrorism to scientific and academic critique. The concern about chilling effects of such suits is particularly pressing now that publication is global rather than local, and because countries with the most speech-repressive libel laws can effectively set the limits on what can be said worldwide. The American SPEECH Act is unlikely to reduce the chilling effect significantly.²⁴² Increasingly fluid news reporting processes, such as those described in Part II.A, are likely to engender more suits or even criminal prosecutions abroad.

2. Privacy

Even if defamation liability is not significantly increased as a result of digital journalism practices, concerns about informational privacy in social media lay the groundwork for increased litigation with implications for journalism.

In the litigation context, the effects of social media on press practices are likely to exacerbate already-perceptible judicial skepticism. Analysts of press jurisprudence conclude that courts have become significantly less deferential to journalistic claims of newsworthiness in state law breach of privacy actions than they were

239. Ehrenfeld did not appear in the English suit, and a default judgment was entered against her. The judgment, which prohibited distribution of her book, *Funding Evil in the United Kingdom*, also ordered payment of £10,000 in damages and reimbursement of the plaintiff’s legal costs. *Bin Mahfouz*, EWHC, at [22], [38], [52]. Ehrenfeld sparked a widespread discussion of libel tourism in popular commentary. See, e.g., Editorial, *Libel Tourism*, N.Y. TIMES, May 26, 2009, at A18; *Libel Tourism Writ Large: Are English Courts Stifling Free Speech Around the World?*, ECONOMIST, Jan. 10, 2009, at 52, 52.

240. Securing the Protection of our Enduring and Established Constitutional Heritage (“SPEECH”) Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (to be codified at 28 U.S.C. §§ 4101–4105).

241. Levi, *supra* note 236, at 508, 512–18.

242. *Id.* at 529–30. The practical limit of the SPEECH Act is that it provides little protection for investigative and accountability journalism by professional news organizations with global assets.

a decade ago, even prior to the changes facilitated by social media.²⁴³ Professor Amy Gajda powerfully notes that—perhaps because of increased public distrust of the mainstream media—judges are more often using studiously imprecise and highly aspirational journalistic codes of ethics as the metrics by which to assess press liability.²⁴⁴ On this approach, liability can be imposed on journalists for behavior that would be acceptable to professional journalists but might fall short of the ideal professional standard in industry guidelines.

This particular problem is likely to increase in significance as a result of the press's current engagement with social media. Mainstream news organizations, as well as the American Society of Newspaper Editors ("ASNE"), have issued social media use policies for their reporters.²⁴⁵ On the social media side, both Twitter and Facebook have created guides for journalists.²⁴⁶ These developments lead to three problems: interorganization differences, new-and-old-media differences, and increasing disconnects between guidelines and practice. There are potential conflicts between the norms suggested in the social media for journalistic use and those adopted by the traditional news organizations. There are differences among social

243. See, e.g., Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1065 (2009). The same argument has been made in the defamation context. See, e.g., Brian Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 11–12 (1994) (criticizing the actual malice standard in defamation cases on the ground that "Sullivan did not free the press to do its job; it did not lift the burden of intrusion and second guessing that the Court had associated with the common-law tort of libel. Instead, by permitting the use of circumstantial evidence of journalistic behavior to prove the journalist's state of mind, the Sullivan rule has spawned a de facto set of judge-made standards that covers all aspects of journalistic behavior. These standards include the use of sources, the quality of writing, the demand for corroboration, the duties of editorial supervision, and the use of quotations.").

244. Gajda, *supra* note 243, at 1043; cf. Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 823–24 & n.181 (2009) (arguing that journalistic codes should be used, and that the Supreme Court's press standards are overly lax, and observing that "[s]ome state courts have recognized journalism ethics codes in defining the standard of care for journalists").

245. JAMES HOHMANN & 2010–11 ASNE ETHICS AND VALUES COMM., ASNE: 10 BEST PRACTICES FOR SOCIAL MEDIA: HELPFUL GUIDELINES FOR NEWS ORGANIZATIONS *passim* (2011), available at http://asne.org/portals/0/publications/public/10_Best_Practices_for_Social_Media.pdf; SOC'Y OF PROF'L JOURNALISTS, CODE OF ETHICS 1 (1996), available at <http://www.spj.org/pdf/ethicscode.pdf>; *Digital Publishing Guidelines*, WASH. POST (Sept. 1, 2011), <http://www.washingtonpost.com/wp-srv/guidelines/social-media.html>; *Ethics Codes by State*, ASNE, http://asne.org/key_initiatives/ethics/ethics_codes.aspx (last visited May 6, 2012); *The New York Times Company Policy on Ethics in Journalism*, N.Y. TIMES (Oct. 2005), <http://www.nytc.com/press/ethics.html>.

246. See, e.g., *Facebook + Journalists*, *supra* note 101; *Twitter for Newsrooms: #Report*, TWITTER DEVELOPERS, <https://dev.twitter.com/media/newsrooms/report> (last visited May 6, 2012).

media use guidelines of traditional news institutions. And there are tensions between the best practices guidelines adopted by traditional news organizations regarding the use of social media and the actual practices of many journalists. A look at the ASNE model demonstrates the difficulties faced by mainstream institutional journalism adapting to social media. Nontraditional online journalists criticize these social media guidelines as unrealistic attempts to translate old media norms into the new environment.²⁴⁷ Even mainstream reporters in institutions attempting to hew to professional guidelines doubtless cut corners. Furthermore, some journalists believe that social media enable the development of an entirely new type of community journalism whose norms are desirable particularly because they are more interactive and inclusive than the traditional model of objective, elite journalism.²⁴⁸ As a result of these new developments, invasion of privacy litigation is likely to grow and result in increased liability, even on the part of press defendants.

B. News vs. Privacy?: Unintended Consequences of Information Privacy Regulation

The regulatory front with respect to social media reflects a tension between a recognition of the need to promote journalism on the one hand and the pressure to protect consumer privacy interests in the digital context on the other. Here, the issue at hand is not whether there will be an increase in journalistic liability in litigation, as discussed in Part III.A, but whether regulatory initiatives to protect consumer privacy are likely to hamper the prospects for journalistic growth.

The increase in behavioral advertising on the web has led to much controversy.²⁴⁹ Consumer advocates have argued that businesses' extensive practices of collecting massive amounts of personal information from consumers' online behavior—in part in order to engage in targeted, personalized advertising—constitute broad-scale violations of privacy. Both Congress and the FTC have

247. See, e.g., Steve Buttry, *Journalists' Code of Ethics: Time for an Update?*, BUTTRY DIARY (Nov. 7, 2010), <http://stevebuttry.wordpress.com/2010/11/07/journalists-code-of-ethics-time-for-an-update/> (criticizing the ASNE code and arguing that it "should reflect the challenges, realities and values of good digital journalism").

248. See, e.g., Rosen, *supra* note 113.

249. See Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation*, 34 SEATTLE U. L. REV. 439, 451–55 (2011); Mark MacCarthy, *New Directions in Privacy: Disclosure, Unfairness and Externalities*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 425, 426 (2011); *supra* note 56 and accompanying text.

responded to these charges. On the legislative front, Congress has been considering “do not track” legislation to protect consumer privacy on the Internet and in social media and to limit online tracking for behavioral advertising purposes.²⁵⁰ Administratively, the FTC has been focusing on the collection and use of consumer data and targeted online advertising, particularly to children, since 2009.²⁵¹ Last fall, the agency reached important settlements with Facebook, Google, and Twitter with respect to matters of consumer privacy.²⁵² Consumer advocates have recently called on the FTC to act further in light of recent disclosures that Google has been circumventing Apple’s Safari browser privacy settings.²⁵³

250. See, e.g., Do Not Track Me Online Act, H.R. 654, 112th Cong. (2011). State legislation has sought to address social media use as well. In 2011, for example, the Missouri legislature passed a law to prevent teachers from using work-related websites or social media platforms to communicate with students without parental and administrator access. That part of the legislation was eliminated in the ultimate legislation signed by the governor. Brian Heaton, *Missouri Governor Signs Law Repealing Teacher Social Media Restrictions*, GOV’T TECH. (Oct. 25, 2011), <http://www.govtech.com/e-government/Missouri-Governor-Signs-Law-Repealing-Teacher-Social-Media-Restrictions.html>.

251. Recently, the FTC staff issued a report recommending more extensive privacy notices to parents for mobile apps targeted to children. See FTC, MOBILE APPS FOR KIDS: CURRENT PRIVACY DISCLOSURES ARE DISAPPOINTING *passim* (2012), available at http://www.ftc.gov/os/2012/02/120216mobile_apps_kids.pdf; see also Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59,804, 59,810–14 (proposed Sept. 27, 2011), available at <http://www.ftc.gov/os/2011/09/110915coppa.pdf> (proposing changes to the definition of “personal information” under 16 C.F.R. § 312.2). For prior FTC Staff Reports regarding behavioral advertising and privacy in the online environment, see FTC, PRELIMINARY FTC STAFF REPORT: PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS *passim* (2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>; FTC, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 46 (2009), available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>. In addition, the FTC has adopted Internet regulations grounded principally on consumer protection rather than privacy concerns. For example, the FTC extended its endorsement guidelines to encompass bloggers and social media explicitly in 2009. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2010).

252. See Somini Sengupta, *F.T.C. Settles Privacy Issue at Facebook*, N.Y. TIMES, Nov. 30, 2011, at B1; Press Release, Fed. Trade Comm’n, Facebook Settles FTC Charges That It Deceived Consumers by Failing To Keep Privacy Promises (Nov. 29, 2011), available at <http://www.ftc.gov/opa/2011/11/privacysettlement.shtm>; see also Press Release, Fed. Trade Comm’n, Membership Reward Service Aimed at College Savers Settles FTC Charges That Its ‘TurboSaver Toolbar’ Feature Deceptively Collected Consumers’ Personal Information (Jan. 5, 2012), available at <http://www.ftc.gov/opa/2012/01/upromise.shtm> (announcing proposed settlement with Upromise Inc.).

253. See, e.g., Brian X. Chen, *Google’s Cookie Trick in Safari Stirs Debate*, N.Y. TIMES (Feb. 17, 2012, 4:26 PM), <http://bits.blogs.nytimes.com/2012/02/17/iphone-google-safari/?scp=1&sq=google%20apple%20safari%20privacy&st=cse>.

At the same time, a question has been raised whether stringent behavioral advertising regulation potentially poses a systemic roadblock for the future of journalism. A recent report resulting from the FCC's Future of Media Project²⁵⁴ concluded that media changes had resulted in a distinct lack of local accountability journalism.²⁵⁵ Although the report recommended that the government should not be "the main player in this drama,"²⁵⁶ it nevertheless emphasized the critical importance of shoring up the new journalistic ecosystem.²⁵⁷ The report asked whether stringent limitations on targeted, behavioral advertising might cut against that goal:

Regulators and consumers have an extremely legitimate concern that targeted advertising might invade the privacy of Internet users. However, ad targeting, since it commands higher prices, offers one possible way for local content creators to build sustainable business models that can help finance local journalism. When considering privacy rules, the policymakers should therefore also consider the positive benefits of ad targeting for local news and journalism operations.²⁵⁸

Others as well have suggested that targeted advertising may be the most viable vehicle for the shift to funding commercial news media on the Internet.²⁵⁹ Industry groups such as the Interactive Advertising Bureau are now arguing that self-regulated behavioral advertising is particularly beneficial for small, hyperlocal news

254. See Public Notice, FCC, FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age 1 (Jan. 21, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-100A1.pdf. The goal of The Future of Media project was to "produce a report providing a clear, precise assessment of the current media landscape, analyze policy options and, as appropriate, make policy recommendations to the FCC, other government entities, and other parties." *Id.*

255. INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 6.

256. *Id.*

257. *Id.* at 30 ("Although each citizen will have a different view on which information is important—and who is failing at providing it—Americans need to at least come together around one idea: that democracy requires, and citizens deserve, a healthy flow of useful information and a news and information system that holds powerful institutions accountable.").

258. *Id.* at 352 (emphasis omitted).

259. See, e.g., ADAM THIERER, COMMENTS ON "THE STATE OF ONLINE PRIVACY" 7–10 (2011), *available at* <http://mercatus.org/sites/default/files/publication/comments-senate-hearing-state-online-privacy.pdf>; MacCarthy, *supra* note 249, at 431; Jeff Jarvis, *Debate on Privacy: The Fuller Text*, BUZZMACHINE (Nov. 15, 2011, 9:47 AM), <http://buzzmachine.com/2011/11/15/debate-on-privacy-the-fuller-text/>; Jeff Jarvis, *Do-Not-Track Hypocrisy*, BUZZMACHINE (Nov. 21, 2011), <http://buzzmachine.com/2011/11/21/hypocrites/>.

publishers.²⁶⁰ Although it is beyond the scope of this Article to reach any conclusions on that question, the issue of targeted advertising reveals an underlying tension between the two important values of privacy and expression.²⁶¹ The possibility of an unintended and negative regulatory effect on news calls out for further empirical study and evaluation.

C. *Gloomy Prospects for Further Constitutional and Statutory Press Protections*

On the First Amendment front, there is a “ubiquitous understanding” that the First Amendment “aims to protect a Fourth Estate or, more expansively, to protect media entities because of their instrumental contribution to democracy and a free society.”²⁶² And yet there has been no clear recognition by the Supreme Court of special constitutional press rights.²⁶³ *Branzburg v. Hayes*²⁶⁴ did not

260. See Brian Dengler, *IAB Counsel: Push To Regulate Online Ads May Lose Traction*, STREETFIGHT (Jan. 17, 2012), <http://streetfightmag.com/2012/01/17/iab-counsel-push-to-regulate-online-ads-may-lose-traction/> (quoting Interactive Advertising Bureau representative statement that “if you ‘take away the regulators,’ targeted advertisers can be a ‘leading factor’ for smaller, hyperlocal news publishers”).

261. In addition, query whether administrative attempts to curb social media entities like Facebook may be helpful in recalibrating the balance of power between news organizations and Facebook itself. A class action has also been brought against Facebook over its “sponsored stories” under a California commercial misappropriation statute prohibiting the use of a person’s name or likeness without permission. See Complaint at 1–3, 14–15, *Fraley v. Facebook*, No. 111CV196193, 2011 WL 6303898 (N.D. Cal. 2011). Facebook’s motion to dismiss was recently denied by the district court. CMLP Staff, *Fraley v. Facebook*, CITIZEN MEDIA L. PROJECT (Jan. 4, 2012, 2:02 PM), <http://www.citizemedia.org/print/9272>. A “sponsored story” is a type of social ad, which is generated when a user “likes” a product and is then automatically shown to the user’s friends on Facebook, without specifically advising the user. Jeff Sonderman, *Facebook Prepares for News Feed Ads, but Lawsuit Looms*, POYNTER.ORG (Dec. 21, 2011, 9:00 AM), <http://www.poynter.org/latest-news/media-lab/social-media/156942/facebook-prepares-for-news-feed-ads-but-lawsuit-looms/> (describing sponsored stories and the class action). The “frictionless sharing” of Facebook has implications for journalism as well. See Jeff Sonderman, *With ‘Frictionless Sharing,’ Facebook and News Orgs Push Boundaries of Online Privacy*, POYNTER.ORG (Sept. 29, 2011, 11:53 AM), <http://www.poynter.org/latest-news/media-lab/social-media/147638/with-frictionless-sharing-facebook-and-news-orgs-push-boundaries-of-reader-privacy> (observing and criticizing adoption of such approaches by news companies).

262. C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007).

263. For a sample of articles discussing the reporter’s privilege, see generally Lillian R. BeVier, *The Journalist’s Privilege: A Skeptic’s View*, 32 OHIO N.U. L. REV. 467 (2006); Cohen, *supra* note 72, at 46; Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist’s Privilege*, 154 U. PA. L. REV. 201, 202 (2005); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2007); Erik Ugland, *The New Abridged Reporter’s Privilege: Policies,*

definitively resolve the issue of a First Amendment reporter's privilege.²⁶⁵ And the Court recently observed in *Citizens United v. FEC*²⁶⁶ that "[w]e have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."²⁶⁷ As for statutory protections, Congress has not enacted a federal reporter's shield law, although numerous states have done so.²⁶⁸

1. On the Possible Revival of the Press Clause

Although most scholars of the Supreme Court's First Amendment jurisprudence contend that the Court has not in fact recognized the Press Clause as providing any press-specific rights beyond the Speech Clause,²⁶⁹ some legal theorists have recently called for an "awakening" of the Press Clause of the First Amendment—regardless of the *Citizens United* dictum and despite the bad odor in which the press finds itself both judicially and in the public eye.²⁷⁰

Principles, and Pathological Perspectives, 71 OHIO ST. L.J. 1 (2010); Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 166 (2006); Benjamin J. Wischnowski, Note, *Bloggers with Shields: Reconciling the Blogosphere's Intrinsic Editorial Process with Traditional Conceptions of Media Accountability*, 97 IOWA L. REV. 327 (2011).

264. 408 U.S. 665 (1972).

265. See, e.g., Cohen, *supra* note 72, at 45; Jonathan Peters, *Wikileaks Would Not Qualify To Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667, 672–73 (2011). Most federal courts addressing the matter, however, have recognized a qualified privilege. Peters, *supra*, at 672–76; *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 998 (2007).

266. 130 S. Ct. 876 (2010).

267. *Id.* at 905 (internal quotation marks omitted) (quoting Justice Scalia's dissent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990), which was overruled in *Citizens United v. FEC*, 130 S. Ct. at 892–913).

268. See, e.g., Cohen, *supra* note 72, at 46. Thirty-three states and the District of Columbia have reporter's privilege statutes. See, e.g., Henry Cohen & Kathleen Ann Ruane, *Journalists' Privilege: Overview of the Law and Legislation in the 110th and 111th Congresses*, 2 J. CURRENT ISSUES MEDIA & TELECOMM. 67, 70 (2010). These "shield laws" do differ, however, in their particulars. See *infra* note 276.

269. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002); Baker, *supra* note 262, at 956; Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1754 (2007). Professor Baker has pointed out that Justices Potter Stewart and William Brennan have argued forcefully for a Press Clause that is "meaningfully separate from the Speech Clause," but that the full Court "has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech." Baker, *supra* note 262, at 956. The question has raised significant debate in the academy as well. See, e.g., Schauer, *supra*, at 1754 n.30 (citing additional sources); Nestler, *supra* note 263, at 207–12 (describing some of the different views).

270. See, e.g., Sonja West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027 (2011) (arguing that in their debate in *Citizens United* over how to interpret the Press

Scholars of this view note that the Supreme Court's First Amendment jurisprudence reveals numerous glimpses of constitutional recognition for the press as such.²⁷¹

Because the Supreme Court's First Amendment jurisprudence involving the print press implicitly reflects a traditional vision of institutional journalism and its relation to democracy, one might argue that traditional journalistic institutions should be the beneficiaries of press clause protections.²⁷² Indeed, some who see the

Clause, Justices Stevens and Scalia "were blowing the dust off a constitutional question that the Court had not addressed in thirty years: Does the Press Clause have significance separate from the Speech Clause, or is it nothing more than 'complementary to and a natural extension of Speech Clause liberty' with no functional role?").

271. The Court's assertion in *Citizens United*, 130 S. Ct. at 902, was "almost offhanded" and has been subject to scathing critique. *E.g.*, Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649, 654-56 (2011) (rejecting the Court's statement on distinguishing media and nonmedia corporations as "stunningly incorrect," and suggesting that its analysis of the First Amendment's text and history were "inadequate, at best"). Professor Bezanson makes a persuasive argument that many of the "bold" statements in the opinion were unnecessary to decide the case. *Id.* at 650-52. The Court may well retreat from statements that, while providing clarity, could potentially upend both extensive regulatory regimes and prior Court precedent.

272. How can this be, in light of the "refusal of the Court to treat the press differently than it treats other speakers[?]" Schauer, *supra* note 269, at 1754. Perhaps the implicit vision of the press as the established media is simply due to the fact that the litigants before the Court in all these cases were in fact members of the mainstream media. See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 506-07 (2012). Even if the press does not enjoy special constitutional privileges as a result of the Press Clause, "[t]he Court has consistently offered a constitutional vision of the role of the press in the American political system." William P. Marshall & Susan Gilles, *The Supreme Court, The First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 172 (concluding that the Court's decisions affect journalistic practice). In fact, Professors Marshall and Gilles take the view that "the Court's decisions, taken as a whole, tend to create significant incentives for superficial journalism and disincentives for serious journalism." *Id.* at 170-71.

Whether good or bad, the vision of the press is traditional and hierarchical. In *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), the Court rejected a public right of access to newspaper opinion pages because "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." *Id.* at 258. Even in the constitutionally exceptional context of broadcasting, where the Court held, for example, that the FCC's fairness doctrine did not violate the First Amendment in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court did not rule that the Constitution required the fairness doctrine. Direct access to the media was not at issue and the broadcasters themselves were given the discretion to decide which views to air and how to achieve balance in their overall programming under the FCC's rules. Thus, even though the broadcasting jurisprudence might reflect the Court's association of radio with its historical roots in entertainment rather than news, editorial discretion loomed large in the Court's analysis. See also *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 125 (1973) ("For better or worse, editing is what editors are for.").

Press Clause as protecting the institutional press call for meaningful press freedoms for the narrowly defined group of professional news organization journalists.²⁷³ Others seek to limit the availability of constitutional privilege to publishers of matters of public concern.²⁷⁴ Others seek to identify the press functionally.²⁷⁵

The Court suggested in *Citizens United*, however, that the difficulty in identifying “the press” for Press Clause purposes is now a stumbling block to a reading of the provision that would offer particular constitutional protection to the press for its journalistic activities.²⁷⁶ Narrow institutional definitions are said to be

Even with respect to state media, the Court in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), ruled that a public broadcaster was not required to include a political candidate in a broadcaster-sponsored debate if it did not wish to do so as a matter of its professional journalistic discretion. *Id. passim*.

273. See, e.g., Barry P. McDonald, *The First Amendment and the Free Flow of Information*, 65 OHIO ST. L.J. 249, 350 (2004) (suggesting metric of “membership in a group or organization whose recognized function was to obtain information for the purpose of public dissemination”); West, *supra* note 270, at 1056–60. The view of the Press Clause as providing a structural protection for the institution of the press harks back to a speech of Justice Potter Stewart’s. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 *passim* (1975). Professor Randall Bezanson has argued that the Speech Clause protects individual speech and the Press Clause protects the institutional speech of the press. See, e.g., Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 807–09 (1995); accord Baker, *supra* note 262, at 959–84.

274. See Papandrea, *supra* note 263, at 578–81 (2007) (citing additional sources).

275. See, e.g., Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism To Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1375 (2003); McDonald, *supra* note 273, at 257; Erik Ugland, *Demarcating the Right To Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113, 180 (2008); cf. David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 49, 82–99 (2006) (arguing that governmental “restrictions that make it impossible for the press to fulfill its institutional role ... would be unconstitutional”).

276. *Citizens United*, 130 S. Ct. at 905–06 (“With the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”); see also Rodney A. Smolla, *First Amendment Martyr, First Amendment Opportunist: Commentary on Larry Flynt’s Role in the Free Speech Debate*, 9 FIRST AMEND. L. REV. 1, 10 (2010) (“The very fact that in some sense we could all be journalists . . . has made the Court reluctant to draw doctrinal lines in that direction.”). The legal status of bloggers provides an object lesson in why that might be the case. Since the advent of blogs in the mid-1990s, media traditionalists sought to detach professional journalism from the “parasitic activities” of amateur “pajama” bloggers. See Ribstein, *supra* note 190, at 203, 209. Many insisted on a clear distinction between bloggers—digital natives—and the “real” (i.e., newspaper) press because of concerns that bloggers largely traded in opinion, did not do their own reporting or fact checking, spoke to small audiences, were often nakedly ideological, and did not hew to standards of professional journalism, such as accuracy, neutrality, and accountability. Courts too varied in the degree to which they would protect bloggers under state law against compelled disclosure of their sources. See Wischnowski, *supra* note 263,

underinclusive in today's journalistic landscape.²⁷⁷ The changes to the press prompted by social media may thus further undermine the likelihood of judicial recognition of a special constitutional status for the modern press under the Press Clause.²⁷⁸ Therefore, in addition to

at 331–36 (describing jurisdictional differences in how statutes and courts treat the application of shield laws to bloggers).

Although numerous decisions have applied press protections to bloggers, some recent cases reflect the opposite approach. *See, e.g., Too Much Media, LLC v. Hale*, 20 A.3d 364, 376 (N.J. 2011) (interpreting New Jersey's shield law to require that a newsperson "have some nexus, relationship, or connection to 'news media' as that term is defined"). The court interpreted outlets not specifically identified in the shield law as news media to be protected only if "similar to traditional news media." *Id.* at 378. The court also did not read the First Amendment to require the application of a qualified privilege to anyone simply on the basis of intent to disseminate information to the public. *See Wischnowski, supra* note 263, at 336 (suggesting that the case "arguably jeopardizes the status of bloggers in future cases").

Another court assessed a blogger's journalistic bona fides by a granular functional comparison to traditional journalist functions. *Obsidian Fin. Grp., LLC v. Cox*, No. CV-11-57-HZ (D. Or. Nov. 30, 2011), 2011 WL 5999334, at *1, 4–5 (applying traditional journalistic norms and concluding blogger was nonjournalist and liable for defamatory posts). A motion for a new trial was filed on January 6, 2012, in *Obsidian*, inter alia on First Amendment grounds, by Eugene Volokh. Volokh argued that the institutional press does not have a monopoly on press protection under the Supreme Court's First Amendment jurisprudence. *See* Memorandum in Support of Defendant Crystal Cox's Motion for New Trial and in the Alternative for Remittur at 9–13, *Obsidian*, No. CV-11-57-HZ (D. Or. Jan. 4, 2012), 2012 WL 487846; Arthur Bright, *A New Heavyweight Steps in the Ring as Round 2 Begins* in *Obsidian v. Cox*, CITIZEN MEDIA L. PROJECT (Jan. 9, 2012, 4:25 PM), <http://www.citmedialaw.org/blog/2012/new-heavyweight-steps-ring-round-2-begins-obsidian-v-cox>. This motion was denied on March 27, 2012. *Obsidian*, No. CV-11-57-HZ (D. Or. Mar. 27, 2012), 2012 WL 1065484, at *17.

Many media watchers today contend that whatever the viability of these distinctions at the dawn of the blogosphere, they no longer hold, but the issue is still contentious in public rhetoric as well. *See, e.g.,* Bruce S. Rosen & Kathleen A. Hirce, *Are Bloggers, Citizen Journalists, and Other New Media Covered by Shield Laws*, COMM. LAW., Nov. 2011, at 16, 16; Jason M. Shepard, *Bloggers After the Shield: Defining Journalism in Privilege Law*, 1 J. MEDIA L. & ETHICS 186, 187–89, 205–08 (2009), http://law.ubalt.edu/downloads/law_downloads/JMLE_Volume1_Final_revised.pdf; Ellyn Angelotti, *A Broader Definition of 'Journalist'*, N.Y. TIMES (Dec. 12, 2011, 1:27 PM), <http://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists/we-need-a-broader-definition-of-journalist>; Stuart Benjamin, *Rethink Shield Laws*, N.Y. TIMES (Dec. 12, 2011, 1:27 PM), <http://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists/should-we-rethink-shield-laws>; David Coursey, *You Be the Judge: Are Bloggers Journalists?*, FORBES (Jan. 2, 2012, 11:41 PM), <http://www.forbes.com/sites/davidcoursey/2012/01/02/you-be-the-judge-are-bloggers-journalists/>; Kelli L. Sager, *The Problem with Pre-Internet Laws*, N.Y. TIMES (Dec. 12, 2011, 1:26 PM), <http://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists/the-problem-with-pre-internet-laws>; Kyu Ho Youm, *According to the Law*, N.Y. TIMES (Dec. 12, 2011, 1:26 PM), <http://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists/according-to-the-law>.

277. *See, e.g.,* Volokh, *supra* note 272, at 461–63.

278. *See, e.g.,* Cohen, *supra* note 72, at 14–57; Volokh, *supra* note 272, at 515; cf. Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L.

posing a challenge to the institutional press as governmental watchdog, social media triumphalists' views of the new journalism may derail an institutional turn in First Amendment law.²⁷⁹ Yet it may be now—when journalism is most threatened, economically and by governmental assertions of power—that the press may be most in need of special status.²⁸⁰

REV. 579, 580 (2005) (noting that changes to the press “now call into serious question the constitutional justifications for . . . qualified privilege”). Indeed, if the view of one commentator is correct that the editorial process of blogs is necessarily different from that of the traditional media—with the former being horizontal and peer-to-peer and the latter vertical and editor centered—then there is all the more reason to believe that journalism through the social media lens will be read as even less analogous to judicial notions of the press than blogs and Internet bulletin boards. See Wischnowski, *supra* note 263, at 330, 340–46 (noting editorial differences and recommending the adoption of a blog-specific standard).

279. It could be countered that an institutional approach can be consistent with the recognition of a disaggregated media ecosystem. Some scholars see the institution of the press as broadly embracing developing collaborative institutions like the blogosphere (and, presumably, social media). See, e.g., Cohen, *supra* note 72, *passim* (arguing against differential treatment of bloggers); Paul Horwitz, “Or of the [Blog],” 11 NEXUS 45, 58–62 (2006). Professor Horwitz has argued that “the norms developing in and around the blogosphere—both bloggers’ norms and readers’ norms—suggest the development of an institutional framework that may collectively do much of the verification, correction, and trust-establishing work that established news media institutions do individually.” Horwitz, *supra*, at 60. Given this, Professor Horwitz suggests that blogs “should be given substantial institutional autonomy by the courts. But the shape of that autonomy, built from the ground up based on what we know of social discourse in the blogosphere, might be different.” *Id.* Although this is a very attractive notion, it is unlikely to have much traction now, as a practical matter. Even if the universe of the kinds of blogs fitting Professor Horwitz’s notion of the institutional blogosphere is sufficiently definable to constitute a collective institution, the addition of social media such as Twitter and Facebook into the equation is likely to overextend the notion beyond practical usefulness. The bloggers of whom Professor Horwitz speaks also look far more like traditional journalists than today’s Twittering class, citizen journalist, and Facebook-native reporter. Or Wikileaks. In addition, the new space of journalism today could be said to have more contestation than consensus on behavioral norms.

280. There has been a spate of reports of journalists being harassed, jailed, and denied customary journalistic courtesy upon display of their credentials on the ground that the police could no longer distinguish journalists from citizens in the current journalistic context. See Michael Calderone, *Occupy Wall Street Protests Heighten Tension Between Police and Media Nationwide*, HUFFINGTON POST (Dec. 1, 2011, 6:43 PM), http://www.huffingtonpost.com/2011/12/01/police-media-occupy-wall-street_n_1123866.html. Police have arrested citizens for using cell phones to record arrest activity, in one case under the authority of the state’s wiretap statute. *Glik v. Cunniffe*, 655 F.3d 78, 80 (1st Cir. 2011); *Hermes*, *supra* note 211. Ultimately, although the U.S. Court of Appeals for the First Circuit ruled that *Glik*, the citizen photographer, was exercising clearly established First Amendment rights, *Glik*, 655 F.3d at 85, government officials’ expansive interpretation of law in order to avoid public scrutiny is troubling. See Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist’s Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1066 (2006); Erik

2. On the Federal Shield Law

Despite the fact that further constitutional exceptionalism for the press under the Press Clause is increasingly unlikely, proponents of a federal statutory reporter's privilege have been actively lobbying Congress for such protection for some time.²⁸¹ Although some argued against such a provision,²⁸² considerable legislative support for a federal shield law to protect reporters from compelled disclosure of confidential sources and documents had developed by 2009. In fact, the prospect of legislation appeared close at hand when, after drafting compromises on the scope and coverage of the privilege,²⁸³ the House passed the Free Flow of Information Act of 2009.²⁸⁴ Ultimately, however, the initiative stalled in the Senate. Accounts of the matter lay the blame on the controversy over who should be deemed a journalist in today's new, participatory media—particularly in light of Wikileaks's notorious release of confidential government documents.²⁸⁵ A new version of the shield bill has been reintroduced

Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 381–84 (2009).

281. Kielbowicz, *supra* note 199, at 455–68; Peters, *supra* note 265, at 688. The issue gained traction after 2005, when former *New York Times* reporter Judith Miller was jailed for eighty-five days for refusing to disclose her source for an article revealing Valerie Plame to be a CIA agent. See *In re Grand Jury Subpoena* (Miller), 397 F.3d 964, 965 (D.C. Cir. 2005) (describing the disclosure and holding Miller and other reporters in contempt for failure to comply with subpoena requesting source identities); Jeffrey Benzing, *Falling on Their Shield*, AM. JOURNALISM REV., Spring 2011, at 11, 11–12; Kielbowicz, *supra* note 199, at 464–68.

282. See, e.g., BeVier, *supra* note 263, at 468.

283. See, e.g., John P. Borger et al., *Recent Developments in Media, Privacy, and Defamation Law*, 46 TORT TRIAL & INS. PRAC. L.J. 483, 506 (2011); David Saleh Rauf, *Shield Law Showdown*, AM. JOURNALISM REV. (Sept. 2010), <http://www.ajr.org/article.asp?id=4959>.

284. H.R. 985, 111th Cong. (1st Sess. 2009). See generally Cohen & Ruane, *supra* note 268 (describing proposed legislation).

285. See *supra* note 210 (discussing WikiLeaks); Paul Farhi, *Wikileaks Is Barrier to Shield Arguments*, WASH. POST, Aug. 21, 2010, at C1; John Eggerton, *Is Shield Law the Next WikiLeaks Victim?*, BROADCASTING & CABLE (Dec. 5, 2010, 9:01 PM), http://www.broadcastingcable.com/article/460623-Is_Shield_Law_the_Next_WikiLeaks_Victim_php; Miranda Leitsinger, *As Manning Heads To Trial over WikiLeaks, New Push for Whistleblower Protections*, MSNBC.COM (Dec. 16, 2011, 6:45 AM), http://usnews.msnbc.msn.com/_news/2011/12/16/9483316-as-manning-heads-to-trial-over-wikileaks-new-push-for-whistleblower-protections (describing effect of WikiLeaks disclosures on proposed federal reporter's shield legislation). Wikileaks, although criticized by many members of the traditional press, is considered by some to be itself a modern press organization. See, e.g., Benkler, *supra* note 210, at 385–96.

as the Free Flow of Information Act of 2011, but its prospects are said to appear dim.²⁸⁶

IV. SOME MODEST SUGGESTIONS

As one commentator has trenchantly noted, journalists today face conflicting ethical pulls:

They cannot continue to do their jobs without economic resources, yet some attractive options for bolstering those resources jeopardize their independence. They retain a fundamental ethical commitment to truth-telling, but changes in organizational structure foster processes that make it difficult, if not impossible, to establish the accuracy or veracity of what is published online. The glut of digital information increases the value of information that is credible and trustworthy, but the Internet's narrative structures undermine the detached neutrality that journalists have relied on as both a badge and a safeguard of trustworthiness. And journalists who are tempted to use ethical guidelines to distance and differentiate themselves from readers are at the same time drawn into relationships that are more personal, more open, and more collaborative.

The future of journalism ethics may rest on finding optimal ways to retain the underlying principles—the professional commitments to truth-telling, to freedom from faction, to public service and accountability—while affording journalists and media organizations the flexibility to remain relevant in rapidly and radically changing circumstances.²⁸⁷

Engagement of journalists with social media is both inevitable and often likely to be advantageous. Social transmission of knowledge, via recommendation, for example, is potentially very beneficial in disseminating information widely, matching readers with material they would not otherwise have accessed, and even expanding the universe of readers. At the same time, it would be prudent for media theorists to think about ways to promote counterweights to the potential problems described in Part II of this Article. Such efforts

286. H.R. 2932, 112th Cong. (1st Sess. 2011); William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27, 29 (2012) Some take the position that even if such a federal shield law were to pass, it would represent an impoverished and narrow view of the kind of broad investigative and expressive autonomy that should attend news gatherers and reporters. See Ugland, *supra* note 263, 55–57, 64–69.

287. See Singer, *supra* note 134, at 97.

could forestall some of the worrisome legal consequences detailed in Part III, and create a fruitful environment for more protective treatment of the “new journalism.”

There is an expressed public appetite for trustworthy news material.²⁸⁸ Thus, with regard to journalistic practices, it is important to explore ways to foster accuracy. Most obviously, reporters and even active citizen journalists could benefit from specialized training in digital journalism.²⁸⁹ Newspapers and other journalistic organizations should also consider structural tailoring to promote accuracy, such as the assignment of digitally savvy teams of reporters to communicate over social media.²⁹⁰ Realistic guidelines for tweeting and retweeting would be helpful and need not be overly complex.²⁹¹

288. A recent report recounts that although the majority of Americans find it easier to keep up with news and information today, a full seventy percent agree that the amount of news and information available from different sources is overwhelming. PURCELL ET AL., *supra* note 8, at 6. The Generated By Users journalism blog recently conducted a reader poll of its readers' trust in user-generated content in news and reported that although its poll participants generally liked user-generated news content, they remained skeptical about it, needed to know that the content was trustworthy, and said that even if they were content with user-generated breaking news, they “want[ed] experienced journalists to sum up the day.” Andrew Mirsky, *How Citizen Journalism Can Vet Quality Through Lessons from Gaming*, CITIZENS MEDIA L. PROJECT (Dec. 8, 2011), <http://www.citmedialaw.org/blog/2011/how-citizen-journalism-can-vet-quality-through-lessons-from-gaming> (quoting Generated By Users blog).

289. See FANCHER, *supra* note 67, at 25–26. In addition to traditional journalism schools, institutions like Poynter, for example, provide such training. See *Poynter News University*, POYNTER.ORG, <https://www.newsu.org/> (last visited May 6, 2012). Temperament is likely important as well. Reporters assigned to a newspaper's Twitter feed, for example, should be selected for probity and good judgment. See Farhi, *supra* note 100, at 31.

290. Some institutions already do this, rather than simply assigning print reporters to both print and digital social media spheres. Many newspapers with web presences have bifurcated structures, with print journalists dealing with the print newspaper side, and digital journalists handling the web content. Others, like the Journal Register newspapers, have made a commitment to unitary staffs focused on a mandate of “Digital First.” See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 56 (describing the chain's approach).

291. See, e.g., Caitlin Johnston, *The Naked Retweet Dilemma*, AM. JOURNALISM REV. (Dec. 6, 2011), <http://ajr.org/Article.asp?id=5209>; Damon Kiesow, *Use an Accuracy Checklist Before Sending Twitter and Facebook Updates*, POYNTER.ORG (Jan. 19, 2011, 9:38 AM), <http://www.poynter.org/latest-news/media-lab/social-media/115261/use-an-accuracy-checklist-before-sending-twitter-and-facebook-updates/>; Sonderman, *Retweets*, *supra* note 143. Currently, some of the Twitter guidelines adopted by entities like the AP appear overly restrictive and unlikely to achieve very high compliance rates. See Nicholas Carlson, *Bloomberg's Insane Twitter Rules for Employees*, BUS. INSIDER (May 23, 2009, 8:55 AM), http://articles.businessinsider.com/2009-05-23/tech/30052040_1_web-sites-online-journals-rules; Ryan Tate, *Bloomberg Forbids Mentioning Competitors, or Linking to Them*, GAWKER (May 22, 2009, 1:06 PM), <http://gawker.com/5266146/>. There is some disagreement, however, within the journalistic community about appropriate retweeting

Improved curation and verification tools and procedures would be useful as well. The development of tools and institutions to help with verification and fact checking (such as factcheck.org, for example)²⁹² and those to help with editing and curating the mass of material on the web²⁹³ appear promising. When errors are made, or false or misleading information tweeted or retweeted, thought should be given to ways to enhance the visibility and effectiveness of corrections.²⁹⁴

Another important tool likely to enhance accuracy is enhanced access to reliable data. The Obama Administration has articulated an “open government initiative” designed to enhance transparency of government documents and functions.²⁹⁵ One of the central

etiquette. See, e.g., Reider, *supra* note 141 (describing and disagreeing with Reuters's reporter's view that individual bloggers could properly pass along rumors via Twitter); Ingram, *supra* note 99.

292. Other examples include Truthsquad, “a community fact-checking experiment led by NewsTrust, in partnership with the Center for Public Integrity.” *Join the Truthsquad: Fact-Check Your News*, NEWSTRUST, <http://newstrust.net/truthsquad> (last visited May 6, 2012); see Justin Ellis, *NewsTrust Dives into the Fact-Check Business with Expanded Truthsquad*, NIEMAN JOURNALISM LAB (July 26, 2011, 10:30 AM), <http://www.niemanlab.org/2011/07/newstrust-dives-into-the-fact-check-business-with-expanded-truthsquad/>. Admittedly, there is some controversy over political fact-checking services such as PolitiFact, a fact-checking organization launched by the *St. Petersburg Times*, over whether they are in fact either effective or as unbiased as they would suggest. See Mark Coddington, *This Week in Review: A Referendum on Fact-Checking, and the Times Co. in Transition*, NIEMAN JOURNALISM LAB (Dec. 23, 2011, 10:30 AM), <http://www.niemanlab.org/2011/12/this-week-in-review-a-referendum-on-fact-checking-and-the-times-co-in-transition/> (describing controversy over PolitiFact's announced Lie of the Year).

293. Storify, like Storyful, Tumblr, and Color, is a web start-up designed to help collect and filter the massive amount of information on the social web with a view to finding “the most important pieces.” Claire Cain Miller, *Filtering the Social Web To Present News Items*, N.Y. TIMES (Apr. 24, 2011), http://www.nytimes.com/2011/04/25/technology/internet/25storify.html?_r=1&ref=clairecainmiller#; Jeff Sonderman, *Three Trends from 2011 That Will Reshape Digital News in 2012*, POYNTER.ORG (Dec. 30, 2011, 9:26 AM), <http://www.poynter.org/latest-news/top-stories/157639/three-trends-from-2011-that-will-reshape-digital-news-in-2012/>.

294. There may be certain correction formats that are less susceptible to the repetition bias. Perhaps corrections can appear not only on Twitter or in newspapers, but also achieve further circulation by mass media and other social networks.

295. See WHITE HOUSE, THE OBAMA ADMINISTRATION'S COMMITMENT TO OPEN GOVERNMENT: A STATUS REPORT 13–16 (2011), available at <http://www.slideshare.net/whitehouse/open-government-status-report>; *Open Government Initiative*, WHITE HOUSE, <http://www.whitehouse.gov/open> (last visited May 6, 2012). The Obama Administration has created Data.gov, a database containing large numbers of government documents. See DATA.GOV, <http://www.data.gov/> (last visited May 6, 2012). Some have questioned whether the Administration has in practice fully adhered to its open government commitment. See, e.g., Jordy Yager, *Watchdogs Say Obama Has Not Done Enough on Government Transparency*, HILL (Dec. 25, 2011, 7:15 AM), <http://thehill.com/homenews/administration/201295-watchdogs-say-obama-has-not-done-enough-on-transparency>.

recommendations offered to the FCC by a working group convened to study the informational needs of communities is that the FCC “Emphasize Online Disclosure as a Pillar of FCC Media Policy.”²⁹⁶ If both state and federal government proceedings and documents are more easily available and searchable online, diminished journalistic resources can be used to monitor government activity more efficiently, with reduced cost.²⁹⁷

To the extent that modern journalism will increasingly feature citizen journalist participation, readers would benefit both from attempts to improve the product and from curation to make the morass of available information more useable. To improve quality, some news organizations have adopted policies prohibiting anonymous posting.²⁹⁸ The *New York Times* is currently experimenting with a “trusted commenter” category where readers whose comments are approved over a period of time will be invited to post comments to go public immediately.²⁹⁹ To the extent that press organizations experiment with open newsrooms and citizen participation on the editorial side, it would be critical to require training, participation guidelines, and full transparency concerning any potential conflicts of interest or particular agendas on the part of participants. There are also currently a number of attempts to use incentive techniques from online gaming to induce (and measure) consistently higher quality citizen journalism.³⁰⁰ Although those attempts are only as good as their inducements and their algorithms,

296. See INFORMATION NEEDS OF COMMUNITIES, *supra* note 23, at 28.

297. See *id.* at 29 (discussing state public affairs networks similar to C-SPAN, online publication of data in easily accessible and usable form, and enhanced availability of government hearings and proceedings online). Increasingly, technology like the Google Public Data Explorer can help journalists explore large datasets.

298. See Tim Ebner, *Is Facebook the Solution to the Obnoxious Comment Plague?*, AM. JOURNALISM REV. (Dec. 19, 2011), <http://www.ajr.org/Article.asp?id=5213> (describing new *USA Today* commenter identification requirement). Some news organizations operate their comment sections within Facebook, which prohibits anonymity. *Id.*

299. Jeff Sonderman, *New York Times Overhauls Comment System, Grants Privileges to Trusted Readers*, POYNTER.ORG (Dec. 1, 2011, 6:07 AM), <http://www.poynter.org/latest-news/media-lab/social-media/154615/new-york-times-overhauls-comment-system-grants-privileges-to-trusted-readers/>.

300. See, e.g., Alysia Santo, *Citizen Journos Level Up: Racking Up Points for Participation*, COLUM. JOURNALISM REV. (Oct. 24, 2011, 12:33 PM), http://www.cjr.org/the_news_frontier/citizen_journos_level_up.php?page=1 (describing various entities applying gaming concepts to citizen journalism, including Citizenside, Digital Journal, The Bay Area News Group, NowPublic, and, shortly, Examiner.com). Another version of this type is NewsIt, a mobile news sharing network that “espouses the ‘gamification’ of news, using math to rank ‘top citizen correspondents.’” Mirsky, *supra* note 288.

and can themselves be “gamed,”³⁰¹ they are a creative attempt to harness the technology that enables citizen reporting in the project of organically generating its own editorial standards.³⁰²

With regard to improving accountability, and particularly with respect to the questions raised by specialization and associated conflicts of interest discussed in Part II, a combination of transparency about relationships and attention paid by news ombudsmen and institutions of press self-criticism could be helpful. Increased significance of individual journalists’ reputations might also work to promote disclosure. In addition, companies are exploring automated conflict-of-interest reporting.³⁰³ Journalists can also, where appropriate, make their sources of information visible to interested readers, as ProPublica has done with its “Explore sources” button.³⁰⁴ Finally, to the extent that the future will see an increase in collaborations between for-profit and nonprofit entities, and between old and new media, possible mismatches between journalistic norms and goals will need to be resolved.³⁰⁵

Traditional journalistic institutions have attempted to address problems likely to be raised by social media by issuing guidelines for their journalists’ social media use.³⁰⁶ Individual news organizations as well have sought to provide their reporters with guidance.³⁰⁷ However, the news organizations’ ethics norms take insufficient account of the reality of reporting in the digital context today. They

301. Mirsky, *supra* note 288.

302. Tools and methods to enhance media literacy and critical reading should also become a priority in order to help the audience better assess the truthfulness and trustworthiness of available reporting in a time of overwhelming informational abundance.

303. Such a proposal was made at a workshop held by the FTC on March 9–10, 2010. *See supra* note 15.

304. Steve Myers, *ProPublica Makes It Easier To See Sources Behind a Story*, POYNTER.ORG (Dec. 15, 2011, 1:17 PM), <http://www.poynter.org/latest-news/top-stories/156226/propublica-makes-it-easier-to-see-sources-behind-a-story/> (describing the new feature).

305. *See* INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 24 (describing increase in collaborations); *see also* FANCHER, *supra* note 67, at 23 (“Ethical standards and values must be vigorously discussed and clearly articulated as old and new media operations work together.”). Professor Singer describes how new collaborative models “raise ethical issues, including questions about where loyalties lie.” Singer, *supra* note 134, at 91 (providing example of nonprofit MinnPost, which is funded by “member-donors,” some of whom are covered by the site’s reporters).

306. For example, ASNE has recently issued a list of best practices for social media. *See supra* note 245 and accompanying text.

307. The *Washington Post*, for example, has a social media policy as well. *See* Staci D. Kramer, *WaPo’s Social Media Guidelines Paint Staff into Virtual Corner; Full Text of Guidelines*, GIGAOM (Sept. 27, 2009, 10:50 AM), <http://paidcontent.org/article/419-wapos-social-media-guidelines-paint-staff-into-virtual-corner/>.

are also not necessarily consistent with one another. It would be helpful for news organizations and journalist groups to review their social media policies and revise them—not to compromise fundamental journalistic standards, but to provide more granular and realistic guidance to journalists working in different media environments today. The difficulty is that there appears to be a range of opinion even within the journalistic community about the propriety of various social media uses.³⁰⁸ That is one conversation that should occur sooner rather than later.

Whatever the benefits of social media for journalism, multiple models must be developed that will support the kind of press work that democracy needs.³⁰⁹ It is important to maintain a balanced perspective. Old and new media are complementary, instead of substitutive.³¹⁰ Despite the first flush of excitement over the possibilities opened up by social media, we should remember that traditional storytelling will and should still have an important role to play in democratic discourse. Without full-time professional journalists, communities will not be able to take adequate advantage of the benefits of the new media system.³¹¹ The role of pure moderator of other people's conversations is too limiting a goal for professional journalists. Just as the Internet has reduced the role of the editor, it has also increased the need for the editorial function.³¹² Beyond promoting community, today's journalists still face the important obligation to engage in watchdog journalism and investigative reporting in the new atmosphere. Promoting that kind of democracy-enhancing journalism is critical for the public interest. An aggressively market-centered press will not reliably provide that public good.³¹³ Of course, that kind of investigative journalism need not be limited to the traditional, Watergate-like story and can include documentary analysis under expanding government policies of access

308. See, e.g., Ingram, *supra* note 99; Reider, *supra* note 141.

309. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 30 ("There are many legitimate disagreements in the realm of media policy, but it is time to move past some of the false dichotomies. Do we need professional or citizen reporters? Obviously, we need both. Do we need old media or new media? Again, both. Objective or advocacy journalism? Commercial or nonprofit? Free or paid? Both, both, and both.").

310. *Id.* at 24.

311. *Id.* at 25.

312. Starr, *supra* note 23, at 30–31.

313. See INFORMATION NEEDS OF COMMUNITIES REPORT, *supra* note 23, at 125–26, 266; Lee C. Bollinger, Opinion, *Journalism Needs Government Help*, WALL ST. J., July 14, 2010, at A19; Starr, *supra* note 23, at 33.

to documents.³¹⁴ But watchdog journalism should not just be left simply to the struggling nonprofit and public media sectors. Although the commercial press has too often served as lapdog rather than watchdog, timidly refusing to challenge power, it is still a far larger sector than public and nonprofit media. The reality is that there are too few philanthropically supported entities like ProPublica or award-winning public television stations to justify reducing attempts to encourage the best journalistic work of private, commercial media.

CONCLUSION

This Article is not an example of social media catastrophism. It does not seek to wage a Luddite war on the new, participatory press out of misplaced nostalgia for the heyday of the daily newspaper. Instead, it takes social media and their influence on journalism as a given and seeks to identify the particular kinds of dangers they pose in order to recommend how to think about ways to inoculate the modern press against them. Of course, the benefits and innovations enabled by the new ecosystem of news—including an expansion of news readership—are many and fruitful. Yet they should not distract us from the need to shore up the accountability press and its institutional goal of serving as watchdog over government and the powerful. In light of the signal importance of this democratic role, the new, participatory press must at all times remain aware of, and attempt to counteract, the vices of its virtues. Doing so will better situate the evolving press both legally and in serving the public.

314. See Danielle Keats Citron, *Fulfilling Government 2.0's Promise with Robust Privacy Protections*, 78 GEO. WASH. L. REV. 822, 824 (discussing President Obama's "Transparency and Open Government" memorandum).