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Policing Press Freedom

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For many years, press freedom advocates have seen law enforcement as a threat to journalism's autonomy and independence. But the nature of that threat is changing. In the past, press freedom concerns typically centered on the risk that law enforcement might compel or coerce journalists to become unwilling participants in prosecutions and investigations of third parties. Statutory, constitutional, and regulatory interventions have been developed in response to stave off that possibility. Yet those protections, while still meaningful, do not address the potential criminal liability that reporters face in gathering and reporting the news. Today, the prospect of journalists facing arrest and prosecution is not as far-fetched as it might once have seemed.

Consider a few representative incidents. In December 2017, prosecutors charged citizen journalist Priscilla Villarreal with violating Texas' prohibition on "misuse of official information" after she got a tip from a Laredo police officer.[1] In March 2019, San Francisco police searched freelance journalist Bryan Carmody's home and office, confiscating his devices, as they investigated who had leaked information about the sudden death of Public Defender Jeff Adachi.[2] In December 2021, sheriff's deputies arrested citizen journalist Justin Pulliam as he recorded a mental health check outside Houston.[3] In August 2023, police raided the newsroom and the home of the publisher of the Marion County Record, a local newspaper that was investigating a business owner's application for a liquor license.[4]

There are two competing ways of seeing these kinds of episodes. In the first vision, these kinds of occurrences are affronts to press freedom and show that press-specific

[1] Leif Reigstad, *Lagordiloca's Arrest Raises Constitutional Concerns*, Texas Monthly (Dec. 21, 2017), https://www.texasmonthly.com/articles/lagordilocas-arrest-laredo/.

[2] *Police to Acknowledge Press Protections After Disputed Raid*, AP News (May 26, 2020), https://apnews.com/general-news-2c00861e7b3da4d7276f43c065b71ffb.

[3] *Fort Bend Retaliation*, Inst. for Just., https://ij.org/case/fort-bend-retaliation/.

[4] Sherman Smith et al., *Police Stage "Chilling" Raid on Marion County Newspaper, Seizing Computers, Records and Cellphones*, Kansas Reflector (Aug. 11, 2023), https://kansasreflector.com/2023/08/11/police-stage-chilling-raid-on-marion-county-newspaper-seizing-computers-records-and-cellphones/.

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legal protections are necessary to blunt law enforcement's ability to target and harass the media. Faced with the question of how best to protect journalism and a free press, many scholars have zeroed in on what is sometimes called "press exceptionalism," calling for special protections for the press against generally applicable laws. Special protections constitute "targeted statutory and constitutional protection of the press functions."[5] A basic premise of press exceptionalism is that, although the press faces particular challenges in exercising its constitutional rights, it is treated the same as an ordinary individual or business.[6]

In the second vision, these incidents are disturbing examples of widespread dysfunction in law enforcement. Broad and vague laws are commonplace, overcriminalization runs rampant, and law enforcement enjoys substantial discretion in how to investigate, deter, and prevent crime.[7] Although the press may have particular complaints about these dynamics, these are not problems unique to the press. Perhaps these incidents underscore the unique and disproportionate effects of criminal charges and investigations on the press. But they also illustrate the fundamental inability of distinctive legal protections to shield the media from law enforcement activity that is, for a large number of Americans, simply expected and routine.[8]

As with all ailments, how we diagnose the problem will shape how we think about the right treatment. If the problem is press specific, then the law should address these challenges by treating the press differently, perhaps by conferring special advantages or relieving general burdens, enabling the press to engage in its constitutionally recognized functions in ways that it currently cannot. If the press's woes are symptomatic of a more systemic problem in law enforcement, however, then the press ought to prioritize limiting law enforcement's power and discretion in ways that would benefit the press alongside many others as well.

This chapter reflects on the limitations of press exceptionalism. In my view, even if press-specific interventions are valuable in other domains, they are unlikely to be effective remedies for most law enforcement activities that target the press. My reasons for pessimism have more to do with criminal law and procedure than with free expression. Because criminal law is so broad, many routine newsgathering activities might run afoul of any number of state and federal statutes.[9] Reporters might also be accused of soliciting unlawful disclosures or aiding sources who violate

[5] RonNell Andersen Jones & Sonja R. West, *An Introduction to Our Project: The Future of Press Freedom*, KNIGHT FIRST AMEND. INST. (Oct. 16, 2023), https://knightcolumbia.org/blog/an-introduction-to-our-project-the-future-of-press-freedom.

[6] Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014) ("The underlying problem journalists face is that they are treated by the law as being no different than the subjects they are covering or, perhaps, mere curious bystanders.").

[7] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

[8] Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 436 (2018) ("In cities big and small, rich and poor, north and south, police violence is routine.").

[9] For example, failure to obey/disperse, resisting arrest, trespass, interference with police duties.

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substantive criminal laws.[10] Even where law enforcement may not intend to pursue charges against a journalist, the existence of broad criminal liability enables police and prosecutors to evade procedural restrictions on investigations of the press.

Press-specific protections are not well matched to these law-enforcement dynamics. Even the strongest procedural defenses for the press are likely to falter in the face of substantive law that criminalizes the acts that constitute newsgathering. Press-specific status rules are also hard for law enforcement to administer on the fly. And experience has shown that existing remedies do little to disincentivize unconstitutional conduct by law enforcement agencies. Furthermore, and perhaps most important of all, a model of protection that relies on the press to litigate its rights on a case-by-case basis is almost by definition ill-suited to systemic law enforcement dysfunction.

Even assuming that special press protections are valuable, they also have significant, underappreciated costs. Enabling the press to claim special legal status may entrench distrust of press actors. Recognizing special press rights to be free of surveillance and monitoring, for example, can help to consolidate and legitimate law enforcement's substantial power to surveil and monitor everybody else. In the name of creating legal certainty and stability for newsgatherers, conferring special rights on the press also invites a different form of instability and uncertainty as decision-makers determine what terms like "newsgathering" and "press" mean. At least with respect to law enforcement – the focus of this chapter – press-specific protections are at best only mildly helpful and at worst counterproductive. The protections the press really needs are the same general safeguards against government overreach and broad law-enforcement discretion that all speakers should enjoy, not specific rules narrowly focused on the press.

The rest of the chapter proceeds in three main sections. First, I trace the existing protections for journalism – and those that are absent – to make the case that the press is relatively unprotected from law enforcement. Second, I argue that special protections are ill-equipped to solve systemic law enforcement problems. Finally, I point to some paths for the press to take a more aggressive role in reshaping law enforcement without using special protections to do so.

21.1 THE CURRENT LANDSCAPE

Many scholars have identified problems for press freedom that arise out of criminal law and procedure. Historically, a particular concern for the press was that it might

[10] Ann E. Marimow, *Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, Wash. Post (May 20, 2013, 6:55 PM), https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44_story.html; David Snyder & Duffy Carolan, *Fifth Judge Sides with FAC, Orders Release of Records in Bryan Carmody Raid*, First Amend. Coal. (Sept. 3, 2019), https://firstamendmentcoalition.org/2019/09/fifth-judge-sides-with-fac-orders-release-of-records-in-bryan-carmody-raid/.

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be dragged into investigations or prosecutions of its sources because it possessed information obtained in confidence that was evidence of criminality.[11] As a result, and in response to the lack of constitutional protection, a variety of statutory and regulatory constraints have developed to shield the press from being made to comply with these sorts of demands.

21.1.1 *Press-Specific Protections*

Many of the extant press-specific protections in state and federal law sprung up in the aftermath of the Supreme Court's decisions in *Branzburg v. Hayes* and *Zurcher v. Stanford Daily*, two germinal cases involving attempts to seek evidence in the possession of the press for use in prosecutions of third parties. In *Branzburg*, the Supreme Court held that the First Amendment does not confer an unqualified reporter's privilege that would prevent a journalist from being compelled to reveal the identity of their source before a grand jury. *Branzburg* prompted Congress to introduce dozens of shield bills, none of which were ultimately enacted.[12] *Branzburg* also stimulated state legislation: Before *Branzburg* was decided, seventeen states had enacted shield laws recognizing some version of a reporter's privilege.[13] Today, according to the Reporters Committee for Freedom of the Press, forty states have shield statutes, and eight more have recognized a reporter's privilege grounded either in common law or the state constitution.[14] In addition, a federal shield bill, the PRESS Act, was reintroduced in 2023; I return to that bill below.

In *Stanford Daily*, the Supreme Court upheld the constitutionality of a newsroom search and seizure conducted after police obtained a search warrant based on probable cause. In response to the *Stanford Daily* decision, Congress enacted the Privacy Protection Act of 1980, which typically bars law enforcement from searching journalists' work product and documentary materials using a search warrant and requires them to use a subpoena instead.[15] Similarly, Department of Justice (DOJ) guidelines impose additional requirements when law enforcement uses compulsory process to seek information from or relating to the news media.[16]

These statutory and regulatory protections are particularly important because journalists and press institutions often have information that is relevant to criminal and national security investigations. The threat of subpoenas and other compulsory

[11] RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1222 (2013) (describing the reporter's privilege as "what journalists *see* as the First Amendment issue most critical to the flow of information in our democracy").

[12] Christina Koningisor, *The De Facto Reporter's Privilege*, 127 YALE L. J. 1176, 1198 (2018).

[13] *Id.* at 1201 n.131 (*citing* Branzburg v. Hayes, 408 U.S. 665, 689 n. 27 (1972)).

[14] *Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/reporters-privilege/ (last visited May 25, 2024).

[15] 42 U.S.C. § 2000aa.

[16] 28 C.F.R. § 50.10.

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process can deter sources from coming forward and otherwise chill reporting.[17] In other words, it is precisely the press's performance of its checking and watchdog functions that makes it an appealing target of compulsory process, and the threat of compulsory process is an effective way of managing the press's reporting and "silencing political dissent."[18]

Of particular relevance here, legal protections can mean that law enforcement agencies treat journalists differently than other individuals, shielding them from certain law enforcement methods and demands. Criminal procedure is replete with examples of this kind of differential treatment. If law enforcement has probable cause to believe that evidence of a crime is present in someone's office, they can ordinarily obtain a warrant to search the premises.[19] But if law enforcement wants to search a newsroom, it is barred by federal law from getting a warrant.[20] If law enforcement wants to subpoena an individual's cell phone or email records from a third-party communications provider, it can ordinarily do so without notice to the individual.[21] But if the Federal Bureau of Investigation (FBI) wants to subpoena a journalist's records, it must give the journalist notice and an opportunity to be heard.[22] If prosecutors want to call someone to testify before a grand jury, they are ordinarily entitled to "every man's evidence."[23] But if prosecutors want to call a journalist to testify, they must comply with state shield laws governing how they do so.[24]

21.1.2 *Substantive Criminal Law*

The special protections I outlined above limit law enforcement's ability to coerce the press to participate in investigations of others. What about when criminal law enforcement targets the press itself? Press-specific protections play a smaller and less robust role than we might expect in limiting law enforcement abuses. With few exceptions, press freedom laws are procedural rather than substantive. They tell us what kinds of rules law enforcement must abide by when they interact with the press. Surprisingly, however, there are many open questions about how criminal law can be used against the press.

[17] Koningisor, *supra* note 12, at 1251–53; RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 393 (2009) (describing the "nationwide chill" created by an uptick in media subpoenas).

[18] Koningisor, *supra* note 12, at 1254.

[19] Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[20] 42 U.S.C. § 2000aa.

[21] Hannah Bloch-Wehba, *Exposing Secret Searches: A First Amendment Right of Access to Electronic Surveillance Orders*, 93 WASH. L. REV. 145, 159 (2018).

[22] 28 C.F.R. § 50.10.

[23] Rebecca Wexler, *Ignorance of the Rules of Omission: An Essay on Privilege Law*, 76 VAND. L. REV. 1609, 1615 (2023).

[24] *Reporter's Privilege Compendium*, *supra* note 14.

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Some things are clear: For decades, it has been plain that the government must meet an exceptionally high bar in order to prevent the press from publishing even highly classified information.[25] Likewise, a similar, "exceedingly stringent" standard must be satisfied to justify criminal prosecution for the publication of "truthful materials of public concern."[26] These demanding standards limit government action against all speakers, not only press actors. On the other hand, the First Amendment affords "few, if any, protections" to sources who leak to the press.[27] This "mixed approach" generally confers substantial protection on the publishers of information, regardless of whether they are members of the press, and exceedingly limited protection on their sources.[28]

The press's potential criminal and civil liability for newsgathering activities is much murkier than its liability for publication. Indeed, the broad questions of whether and to what extent state and federal governments can choose to punish or constrain newsgathering activities are largely unresolved. First Amendment doctrine has long held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[29] If a law can generally be enforced against an ordinary speaker, it can also be enforced against the press.

To a limited extent, special protections prevent law enforcement from interfering with newsgathering. Special protections for the press might confer particular rights on journalists, such as when a press pass enables a journalist to attend a meeting or a hearing from which the general public is excluded. Special protections might also relieve reporters from generally applicable burdens, like when a curfew order contains an exemption permitting journalists to stay out when the general public must be off the streets.[30] However, these protections are typically local, piecemeal, and haphazard.

Criminal law, by and large, contains no exceptions for journalists or reporters. This explains why, in recent years, journalists have been arrested in droves while covering widespread protests and unrest.[31] In response to uprisings against police injustice, lawmakers in states across the country have also undertaken a new drive to

[25] N.Y. Times v. United States, 403 U.S. 713 (1971).

[26] 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, 354 (2011).

[27] Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 Wm. & Mary L. Rev. 1221, 1226 (2015).

[28] *Id.*

[29] Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

[30] Sasha Peters & Linda Moon, *Curfew Orders Without Media Exemptions May Be Unconstitutional Under First Amendment*, Reps. Comm. for Freedom of the Press (June 12, 2020), https://www.rcfp.org/curfew-order-special-analysis/.

[31] U.S. Press Freedom Tracker, https://pressfreedomtracker.us/; Joel Simon, Covering Democracy: Protest Police, and the Press, Knight First Amend. Inst. (June 20, 2023), https://knightcolumbia.org/research/covering-democracy.

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criminalize protest and immunize private violence against protestors, endangering journalists still further.[32]

Other lingering questions concern potential liability for publishing information that was obtained unlawfully. While "news gathering is not without its First Amendment protections,"[33] it remains an open question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."[34] Meanwhile, the prosecution of Julian Assange continues to raise questions about the potential liability of press actors who might be complicit in violations of the Espionage Act or other federal or state laws.[35]

Of course, this does not mean that there are no substantive First Amendment limits on criminal law. But proactive constitutional challenges appear to be more successful than post hoc assertions that arresting, prosecuting, or punishing journalism violates the First Amendment. For example, courts in several circuits have struck down so-called "ag gag" laws "aimed at stifling undercover investigations or whistleblowing" regarding animal welfare, environmental concerns, and working conditions.[36] Similarly, in upholding the material-support statute, the Supreme Court in *Holder v. Humanitarian Law Project* suggested that regulations of "independent speech" supporting terrorism or "material support" of domestic organizations would likely fail constitutional scrutiny.[37]

The legal risks for newsgathering are real. Consider the classic example: the Espionage Act.[38] The Espionage Act makes it a crime to receive or disseminate national defense information "to any person not entitled to receive it."[39] For decades, questions about potential criminal liability for news organizations that possess and publish classified information have plagued press institutions as well as scholars, advocates, and the courts.[40]

To date, the government has largely refrained from charging journalists under the Espionage Act, with only rare exceptions. Historically, the Espionage Act has been

[32] International Center for Not-For-Profit Law, US Protest Law Tracker, https://www.icnl.org/usprotestlawtracker/.

[33] *Branzburg*, *supra* note 13, at 707.

[34] Florida Star v. B.J.F., 491 U.S. 524, 535 n.8 (1989).

[35] Benkler, *supra* note 26; *An Open Letter from Editors and Publishers: Publishing Is Not a Crime*, N.Y. Times (Nov. 28, 2022), https://www.nytco.com/press/an-open-letter-from-editors-and-publishers-publishing-is-not-a-crime/.

[36] Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1439 (2015).

[37] Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010).

[38] Stephen L. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 Harv. L. & Pol'y Rev. 219 (2007).

[39] 18 U.S.C. § 793(d)–(e).

[40] David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 Harv. C.R.-C.L. L. Rev. 473, 478 (2013) ("[T]he Espionage Act remains dense, contradictory, and essentially unexplored as to whether it can be applied to publishers . . . and how.").

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chiefly enforced against those who *leak* defense information rather than against those who publish it.[41] The Espionage Act has been invoked to prosecute a third-party publisher of classified information only twice. In 1942, the United States attempted to prosecute the Chicago Tribune for publishing a story that revealed that the United States had "cracked a Japanese communications code," but the grand jury did not indict the paper.[42] More recently, Julian Assange, the founder of Wikileaks, pleaded guilty to a charge under the Espionage Act in exchange for a sentence that permitted him to return to Australia without serving additional time in a United States prison.[43]

The Espionage Act is far from the only statute under which prosecutors can charge journalists. Reporters covering protests are frequently charged with trespass or violating curfew or dispersal orders.[44] Journalists have also been charged for reporting on law enforcement under other state laws that criminalize obstruction or interference.[45]

Consider, too, the case of Priscilla Villarreal, perhaps better known as "Lagordiloca."[46] Villarreal is a citizen journalist from Laredo, Texas, where she "live-streams raw footage from local crime scenes – shootings, gruesome traffic accidents, tense hostage situations, immigration raids, and whatever else she comes across – to more than 80,000 loyal Facebook followers."[47] In 2017, Villarreal was arrested and charged with "misuse of official information" after she texted a source inside the Laredo Police Department to corroborate the details of a Border Patrol worker's suicide and a fatal car accident.[48] Under Texas criminal law, anyone who

[41] *Id.* at 474; Kitrosser, *supra* note 27, at 1240 (2015) (describing the "mixed approach" to leak prosecutions that affords few protections to leakers but substantial protection to third parties who publish leaked information).

[42] Michael E. Ruane, *Unsealed 75 Years after the Battle of Midway: New Details of an Alarming WWII Press Leak*, Wash. Post (June 5, 2017, 8:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2017/06/05/unsealed-75-years-after-the-battle-of-midway-new-details-of-a-critical-wwii-press-leak/.

[43] Mari Yamaguchi et al., *WikiLeaks' Assange Pleads Guilty to Publishing US Military Secrets in Deal that Secures His Freedom*, Associated Press (June 25, 2024, 11:38 PM), https://apnews.com/article/assange-justice-department-plea-wikileaks-saipan-australia-00eb380879ff636cc9b916f82f82ed40.

[44] U.S. Press Freedom Tracker, *supra* note 31.

[45] Gregory Royal Pratt, *Calumet City Drops Citations Against Daily Southtown Reporter Who Called Workers Seeking Comment*, Chicago Tribune (Nov. 6, 2023, 7:54 p.m.), https://www.chicagotribune.com/2023/11/06/calumet-city-drops-citations-against-daily-southtown-reporter-who-called-workers-seeking-comment/; Shant Shahrigian, *Daily News Reporter Arrested While Covering New Year's Eve Protest Near Times Square, Is Held Overnight*, N.Y. Daily News (Jan. 1, 2024, 9:44 p.m.), https://www.nydailynews.com/2024/01/01/daily-news-reporter-arrested-covering-new-years-eve-protest-midtown-manhattan/.

[46] Villarreal v. City of Laredo, Texas, 94 F.4th 374, 382 (5th Cir. 2024).

[47] Leif Reigstad, *For Lagordiloca, Live-Streaming Crime Scenes Is Just a Night's Work*, Texas Monthly (Jan. 2018), https://www.texasmonthly.com/true-crime/lagordiloca-livestreams-laredo/.

[48] *Villarreal*, 94 F.4th at 382.

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"solicits or receives from a public servant" nonpublic government information "with intent to obtain a benefit" is guilty of a felony.[49] Although a trial court found the statute under which Villarreal was charged unconstitutionally vague, Villarreal's First Amendment suit ultimately foundered in the Fifth Circuit on qualified immunity grounds.[50] In October 2024, the United States Supreme Court vacated the Fifth Circuit's decision and remanded the case for further consideration.[51]

Complicating matters further, the threat of substantive criminal liability can also be used to circumvent heightened procedural requirements constraining how law enforcement obtains information from the press. Return to the Espionage Act: Although direct prosecutions of news media actors have been rare, leak prosecutions and investigations have soared.[52]

Law enforcement can circumvent procedural limits on investigations by dangling substantive criminal charges for journalists. For example, in 2013, Fox News reporter James Rosen was named an unindicted co-conspirator in an indictment of a government leaker, enabling government investigators to "seize his e-mails to build their case against the suspected leaker."[53] By naming Rosen as an unindicted co-conspirator, law enforcement could avoid the limitations imposed by the Privacy Protection Act of 1980, which made it unlawful for the government to search for or seize a journalist's work product or documentary materials unless probable cause existed that the journalist "has committed or is committing the criminal offense to which the materials relate."[54] Although Rosen was never charged, his emails were important to the investigation of the leaker, Stephen Jin-Woo Kim, who ultimately served time in federal prison.[55]

Property laws can also be used to criminalize newsgathering and facilitate law enforcement searches that would otherwise be barred. In Bryan Carmody's case, law enforcement was investigating a leak about the suspicious death of Jeff Adachi, the longtime San Francisco public defender. Carmody, a freelance reporter, had obtained the death investigation report from the San Francisco police. In applying for a search warrant for Carmody's home and office, the police swore an affidavit that they were investigating state felony charges of receiving stolen property.[56]

[49] Tex. Penal Code Ann. § 39.06.

[50] Villarreal, 94 F. 4th at 384.

[51] Villarreal v. Alaniz, 2024 WL 4486343 (mem.).

[52] *See, e.g.*, McCraw & Gikow, *supra* note 40, at 492 (noting the rise in Espionage Act prosecutions under the Obama Administration); Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says*, N.Y. Times (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html.

[53] Marimow, *supra* note 10.

[54] 42 U.S.C. § 2000aa.

[55] Peter Maass, *Destroyed by the Espionage Act*, The Intercept (Feb. 18, 2015, 6:38 AM), https://theintercept.com/theintercept/2015/02/18/destroyed-by-the-espionage-act/.

[56] In re Search Warrants, Case No. MISC-2516764 (Cal. Super. Ct. S.F., Aug. 30, 2019), https://firstamendmentcoalition.org/wp-content/uploads/2019/09/Quinn-affidavit.pdf; *see also* Snyder & Carolan, *supra* note 10.

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Collectively, these developments suggest that the dominant legal mechanisms for guaranteeing press freedom are not well equipped to address criminal law enforcement. This is in part, to be sure, because of legal uncertainty or indeterminacy. But as I describe below, the real problem is that special protections for the press simply are not effectively backstopped by substantive limits on law enforcement.

21.2 THE LIMITS OF SPECIAL PROTECTIONS

Special protections such as shield laws and rules barring newsroom searches have operated somewhat well to protect press actors from being obligated to participate in criminal proceedings. To be sure, these protections do not function as well as many would like.[57] Indeed, the practical value of special protections is an open question, because they often fail to deliver on their promise. Calls for reaffirming the press's special protections are often loudest when existing protections fall short.

But press advocates are too optimistic about the potential of extending special protections to meaningfully constrain law enforcement. Indeed, special protections are both structurally and substantively ill-suited to the problems posed by law enforcement entanglements with the press.

21.2.1 *Practical Problems*

Many of the proposals to limit law enforcement investigations of journalists are simply underinclusive. Start with the low-hanging fruit, the federal shield law. In 2023, Congress reintroduced a federal shield bill meant to prevent law enforcement from compelling journalists to reveal their sources.[58] The bill would have prevented federal law enforcement from compelling journalists to disclose "protected information" and from compelling third-party service providers to disclose journalists' records.[59] Essentially, it would have codified the DOJ guidelines covering media subpoenas, limiting the possibility that future administrations could repeal or reverse those rules.[60] After incoming President Donald Trump urged congressional Republicans not to pass the bill, the PRESS Act died in the 118th Congress.[61]

Even if the PRESS Act had not suffered the same fate that has befallen every other proposal for a federal shield law, it would have been wildly underinclusive.

[57] West, *supra* note 6, at 2435 ("On a day-to-day basis, American journalists deal with legal uncertainties in the pursuit of news.").

[58] Protect Reporters from Exploitative State Spying Act, H.R. 4250, 118th Cong. (2023).

[59] *Id.* §§ 3, 4.

[60] Oliver Darcy, *A Bipartisan Bill Aims to Protect Journalists from Being Forced to Reveal Their Sources*, CNN (June 22, 2023, 10:46 PM), https://www.cnn.com/2023/06/22/media/bipartisan-bill-journalism-protections-reliable-sources/index.html.

[61] Charlie Savage, *Trump Tells Republicans to 'Kill' Reporter Shield Bill Passed Unanimously by House*, N.Y. Times (Nov. 20, 2024), https://www.nytimes.com/2024/11/20/us/politics/trump-press-act-freedom-reporters.html.

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It overlooked the many other avenues that federal law enforcement has for acquiring and searching data: by purchasing records from private vendors, for example,[62] or by conducting searches of data that have already been acquired by other means, including through bulk national security surveillance.[63] Indeed, the FBI may and frequently does query data acquired under national security surveillance authorities for evidence of crimes without judicial oversight.[64]

This is not a problem that one can solve with simple statutory fixes. There is a more profound mismatch between the mechanism of a federal shield bill and contemporary law enforcement practices. Tactics of proactive and preventive policing, coupled with new technologies of data acquisition, storage, and interpretation, "produce dramatically different ways of identifying suspects."[65] These shifts in law enforcement techniques and technologies have produced new methods of investigation and identification that make traditional subpoenas and compulsory process less critical, although not entirely obsolete. The result is that much of the same information protected by shield laws is readily attainable by other means. The same problem animating the shield bill – the risk that compulsory process will lead sources and journalists to self-censor – also pervades bulk surveillance.[66]

In an era of bulk surveillance, retail protections for individual journalists from targeted compulsory process remain important, but they simply don't go far enough. The individualized protections offered by shield statutes do not, and cannot, address the shift in policing from reactive investigation of crime to models oriented toward proactive data acquisition, mining, and prevention.[67] Press-specific constitutional rights are not going to prevent the government from secretly acquiring and searching

[62] Matthew Tokson, *Government Purchases of Private Data*, 59 Wake Forest L. Rev. 269 (forthcoming 2024).

[63] Section 702 *Backdoor Searches: Myths and Facts*, Brennan Ctr. for Just., https://www.brennancenter.org/our-work/research-reports/fisa-section-702-backdoor-searches-myths-and-facts (last updated Nov. 30, 2023).

[64] Elizabeth Goitein, *The Year of Section 702 Reform, Part II: Closing the Gaps and Completing the Modernization of FISA*, Just Sec. (Apr. 18, 2023, https://www.justsecurity.org/86011/the-year-of-section-702-reform-part-ii-closing-the-gaps-and-completing-the-modernization-of-fisa/).

[65] Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 Harv. L. & Pol'y Rev. 15, 16 (2016).

[66] Leonard Downie, Jr & Sara Rafsky, *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America*, Comm. to Protect Journalists (Oct. 10, 2013), https://cpj.org/wp-content/uploads/2013/10/us2013-english.pdf; Human Rights Watch, *With Liberty to Monitor All: How Large-Scale U.S. Surveillance Is Harming Journalism, Law, and American Democracy* (July 28, 2014), https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and; Jesse Holcomb & Amy Mitchell, *Investigative Journalists and Digital Security*, Pew Rsch. Ctr. (Feb. 5, 2015), http://www.journalism.org/2015/02/05/investigative-journalists-and-digital-security/; PEN Amer. Ctr., Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor (Nov. 12, 2013), https://www.pen.org/chilling-effects.

[67] Tom Tyler, *Police Discretion in the Twenty-first Century Surveillance State*, 2016 U. Chi. Legal F. 579, 581 (2016) (raising "questions about the ability of traditional legal concepts to effectively restrain modern criminal justice systems").

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"vast stores of data about all of us, which they then can scrutinize whenever the fancy strikes them."[68] For one thing, there is no process or opportunity for individuals to intervene to object to the government's acquisition of information about them. In theory, legislation could require additional substantive or procedural standards to be met before the government could use data about or of the press, but, to date, restrictions on how lawfully acquired information can be used are rare.[69] In addition, the long-standing rule that the First Amendment is not offended as long as surveillance takes place in a manner consistent with the Fourth Amendment calls into question whether special rights would ever meaningfully constrain law enforcement's acquisition and use of information.[70]

More importantly, procedural protections such as the PRESS Act leave open law enforcement's ability to investigate journalists for substantive criminal violations. The PRESS Act appears to constrain law enforcement's ability to draw journalists into investigations of their sources, but because the avenues for substantive criminal liability remain quite broad, it may in fact create a perverse incentive to charge journalists directly as a way of avoiding the application of the special procedural rules that protect them. Journalists who publish government information are at risk of direct liability under a number of different statutes, including the Espionage Act, as well as the federal prohibition on receipt of stolen property.[71] The PRESS Act explicitly provides that it should not be construed to prevent law enforcement from investigating journalists who are "suspected of committing a crime."[72] In this respect, the PRESS Act is actually weaker than the DOJ guidelines that it is meant to codify; those guidelines apply whenever a reporter is "acting within the scope of newsgathering," defined to include the "receipt, possession, or publication" of information or the establishment of a way of receiving that information from a source.[73] In short, the DOJ guidelines explicitly provide that newsgathering is not a criminal act.[74]

Similarly, the Privacy Protection Act of 1980 generally requires law enforcement to use a subpoena instead of a warrant to conduct a newsroom search.[75] However, the Act contains a complicated, nested series of exceptions providing that a government official *may* conduct a search if there is probable cause that the journalist "has committed or is committing the criminal offense to which the materials relate," except if the offense is "receipt, possession, communication, or withholding" of the materials being sought.[76] In an exception to the exception to the exception, the

[68] Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. Rev. 1143, 1145 (2022).
[69] Andrew Guthrie Ferguson, *Surveillance and the Tyrant Test*, 110 Geo. L.J. 205, 276 (2021).
[70] *See infra* text accompanying notes 89–92.
[71] 18 U.S.C. § 641; Vladeck, *supra* note 38, at 228–31.
[72] Protect Reporters from Exploitative State Spying Act, *supra* note 58, at Sec. 6.
[73] 28 C.F.R. pt. 50.10(b)(2)(ii)(A).
[74] 28 C.F.R. pt. 50.10(b)(2)(ii)(B).
[75] 42 U.S.C. § 2000aa.
[76] 42 U.S.C. §§ 2000aa(a)(1), (b)(1).

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government *may* use a search warrant if there is probable cause to believe that the journalist violated the Espionage Act, the Atomic Energy Act, or child pornography laws.[77]

Even these exceptions may be underinclusive, however. Journalists may also face charges under theories of "third-party inchoate liability" for soliciting the disclosure of leaked information.[78] At the risk of repetition: The Privacy Protection Act does not apply to journalists who are charged with aiding and abetting or conspiring to violate the law. Procedural protections meant to prevent the state from using the press as a *source of evidence* in prosecutions of others do little to protect the press from opportunistic criminal prosecution. Instead, they simply submerge definitional questions about the scope of protection for newsgathering.

In this way, the PRESS Act highlights the problematic relationship between substance and process in criminal law enforcement. As William Stuntz noted almost thirty years ago, "[p]rocedural rules make broader criminal liability more attractive, since the latter can be used as a device for evading the costs of the former."[79] Special procedural protections reduce the risk that high costs of criminal sanctions might be "imposed for no reason (i.e., on the whim of some government official) or for a bad reason (e.g., the defendant's race or politics)."[80] In other words, Stuntz wrote, "[i]f the rights work, the specter of punishment for no reason or for evil reasons vanishes."[81] But as Stuntz points out, procedural protections are not enough: Substantive law must also draw lines between those who "deserve punishment" and those who do not.[82]

But substantive criminal law often sweeps incredibly broadly.[83] The prevalence of very broad laws, investigative power, and discretion calls into question the notion that the problem for press freedom is special rather than general. Perhaps the problem is different: Perhaps the underlying problem is that a powerful state, armed with nearly unfettered power to enforce the law in discretionary and discriminatory ways, may exercise that power against the press and against its critics. Even if and when it chooses not to do so, the threat of potential enforcement becomes a "sword of Damocles," generating anxiety and potentially leading the press to pull its punches in response.[84]

[77] *Id.*
[78] Vladeck, *supra* note 38, at 221. In my reading, even the DOJ guidelines do not effectively resolve whether soliciting disclosure of information from a source might amount to conspiracy.
[79] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contem. Legal Issues 1, 10 (1996).
[80] *Id.* at 7.
[81] *Id.*
[82] *Id.*
[83] Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 Ariz. L. Rev. 641 (2019).
[84] Kiel Brennan-Marquez & Stephen E. Henderson, *Fourth Amendment Anxiety*, 55 Am. Crim. L. Rev. 1, 25 (2018).

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21.2.2 *Doctrinal Problems*

Special protections are of limited value, in part, because their enforcement almost always depends on press institutions and journalists to pursue litigation after the fact. Start with a basic premise that recognizing special rights and privileges for the press would "offer them reliable protection from prosecution," deter government officials from searching and seizing journalists' electronic devices, and otherwise shelter newsgathering from law enforcement meddling.[85] At bottom, the argument for special constitutional protections must hinge on the belief that recognizing rights under the Press Clause would create meaningful incentives for government actors to behave differently.

The problem is that the existing special protections that we have, although strong on paper, are not strong enough to prevent misconduct. Consider, again, the search of Bryan Carmody's office. Both California law and the federal Privacy Protection Act prevent law enforcement from using search warrants to acquire journalists' unpublished work product.[86] Yet that is precisely what the San Francisco police did in Carmody's case. And once they did so, what was Carmody's remedy? Though Carmody received a $369,000 settlement after the fact, the existence of precise, long-standing legal protections did not deter the police.[87] Similarly, the Marion County Record and some of its employees have filed lawsuits against city and police officials in Marion, Kansas, arguing that the newsroom searches there violated their First Amendment rights.[88]

While prosecutors and judges might act differently in a world with more special protections, the incentives for police are unclear. A major doctrinal problem is that, in multiple areas of criminal procedure, Fourth Amendment standards for government conduct subsume First Amendment protections for free expression. Take searches and seizures, for example: In *Stanford Daily*, the Court held that the Fourth Amendment's warrant requirement was sufficient to vindicate the First Amendment interests implicated by a newsroom search.[89] As Alex Abdo has observed, courts usually consider the constitutionality of government surveillance

[85] Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025, 1043–44 (2011).
[86] 42 U.S.C. § 2000aa; Cal. Evid. Code § 1070; Cal. Penal Code § 1524(g).
[87] Tim Cushing, *Documents Show SFPD Ignored the Press Pass the Department Had Issued to Brian Carmody in Order to Place Him Under Surveillance*, Techdirt (Jul. 13, 2020, 1:56 PM), https://www.techdirt.com/2020/07/13/documents-show-sfpd-ignored-press-pass-department-had-issued-to-brian-carmody-order-to-place-him-under-surveillance/.
[88] Sherman Smith, *Kansas Newspaper That Was Raided by Marion Police Sues Officials for Attack on Free Press*, Kansas Reflector (Apr. 1, 2024, 11:51 AM), https://kansasreflector.com/2024/04/01/kansas-newspaper-that-was-raided-by-marion-police-sues-officials-for-attack-on-free-press/; Katie Moore, '*Caught in the Crossfire*': *Third Lawsuit Filed After Police Raid on Kansas Newspaper*, The Kansas City Star (May 29, 2024, 1:46 PM), https://www.kansascity.com/news/state/kansas/article287220630.html.
[89] Zurcher v. Stanford Daily, 436 U.S. 547, 565–66 (1978).

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programs "primarily in Fourth Amendment terms."[90] The result is that, for many law enforcement demands, the existence of probable cause that a crime has occurred defeats a First Amendment claim that a search or seizure is overly intrusive. Similarly, the existence of probable cause supporting arrest typically trumps a claim that law enforcement unlawfully retaliated against an individual, including a journalist, for exercising their First Amendment rights.[91] Because the substantive criminal law is so broad, probable cause will often exist.[92]

A second problem relates to remedies. Ex post remedies are not particularly effective at deterring constitutional violations.[93] The key remedy for law enforcement conduct that is unconstitutional under the Fourth Amendment is the "widely reviled" exclusionary rule.[94] For many reasons, including because prosecutions of journalists are relatively rare, the exclusionary rule is unlikely to benefit the press. Civil rights lawsuits are also meant to deter police misconduct, but civil liability is difficult to come by. Qualified immunity shields from liability "all but the plainly incompetent or those who knowingly violate the law."[95] Money damages are also unlikely to meaningfully deter misconduct: Direct sanctions are rare, officers are often indemnified, and violations that cause "psychic injury" as their primary harm are hard to monetize.[96] Meanwhile, there are also barriers to injunctive relief: In *Los Angeles v. Lyons*, the Supreme Court held that litigants lack standing to get prospective injunctive relief unless they can demonstrate a "real and immediate threat" of future unlawful conduct by police.[97]

A third problem relates to the willingness of the press to litigate at all. In order for special protections to deter misconduct, the press would need to assert its newfound rights.[98] This is a familiar posture for press actors: In the past, press institutions have sometimes played the role of "legal instigators and enforcers" in both constitutional and statutory domains.[99] Indeed, the public's constitutional right of access to

[90] Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First?*, 127 YALE L.J. F. 444, 450 (2017–18).

[91] Nieves v. Bartlett, 139 S.Ct. 1715, 1726 (2019) ("The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.").

[92] Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

[93] Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1613 (2012).

[94] *Id.* at 1626.

[95] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[96] Bar-Gill & Friedman, *supra* note 93, at 1628.

[97] 461 U.S. 95 (1983).

[98] Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1380 (1984) ("Because rights have a social context, their realization as a fact of social life rather than their mere recognition in political and legal rhetoric requires that right-holders have the material and psychological resources that will allow them to exercise their rights.").

[99] RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 559 (2011).

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government proceedings was developed in litigation brought by newspapers.[100] But the news industry is also sometimes unwilling to assert itself. In part, of course, this is because shrinking budgets make costly litigation a luxury good.[101] In part, too, news industry participants are sometimes unwilling to litigate because the professional devotion to objectivity in journalism has made the press "reluctant to aggressively confront abuses of power."[102]

This is a particular problem in the context of law enforcement. As Oren Bar-Gill and Barry Friedman observe, "To achieve its deterrent effect, litigation over Fourth Amendment violations must occur regularly enough to be a plausible threat and to develop the law necessary to provide rules for police officials."[103] But even if they had the resources, most press institutions do not want to repeatedly sue the police. By doing so, they risk losing access to sources and places they need for reporting, as well as more targeted forms of retribution, and they may well become part of the story.[104]

21.2.3 *Conceptual Problems*

One problem with special protections of particular relevance to this volume is identifying who ought to receive them.[105] An exemption-based structure requires decision-makers (and, ultimately, courts) to determine whether a would-be claimant is entitled to protections intended for "the press" or not.[106] As Sonja West has described it in the context of campaign finance law, the structure immediately confronts the objection that "there is no acceptable way to identify which speakers should be allowed to claim a media exemption and which should not."[107]

Institutions have differing capacities to apply these exemptions. The stakes of identifying "the press" are undoubtedly higher as legacy media outlets have cratered and web publications, social media, podcasts, and other forms of content production have taken their place. In settings with ample time to consider whether an individual or an organization is a member of "the press," I think the identification hurdle, as it has been construed, is overstated: Courts and other decision-makers have been

[100] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty., 464 U.S. 501 (1984); Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty., 478 U.S. 1 (1986).

[101] Andersen Jones, *supra* note 99; *see also* Knight Foundation, *In Defense of the First Amendment* (2016) (reporting that "the news industry is weaker in its ability to pursue legal activity around First Amendment-related issues than it was 10 years ago").

[102] Hannah Bloch-Wehba, *The Ideology of Press Freedom*, 14 UC Irvine L. Rev. 1, 7 (2024).

[103] Bar-Gill & Friedman, *supra* note 93, at 1631.

[104] Bloch-Wehba, *supra* note 102, at 7.

[105] West, *supra* note 6, at 2437 ("Then there are the bloggers.").

[106] Sonja R. West, *Favoring the Press*, 106 Calif. L. Rev. 91, 115–20 (2018).

[107] Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. Pa. L. Rev. Online 253, 255 (2016).

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administering press-specific statutory exemptions for decades without much trouble.[108]

For police-making decisions on the fly, identifying journalists is a more serious challenge but still a manageable one.[109] Consider the uprisings against racial violence that occurred after George Floyd's murder in 2020. For over 100 days straight, people demonstrated in Portland, Oregon, frequently coming into conflict with city and federal law enforcement.[110] Soon after the uprisings began, a group of local legal observers and press actors filed a complaint in federal court alleging that law enforcement was targeting journalists and other "neutrals."[111] The district court issued a temporary restraining order barring city police from "arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer. . ., unless the Police have probable cause to believe that such individual has committed a crime."[112] The result was that, after the order was issued, protestors and bystanders could be arrested for failing to disperse, but press and legal observers could not.[113] In a chaotic situation, the police needed some way of identifying the press in order to afford them special protections, so the court defined "indicia of being a Journalist" – official press passes or "distinctive clothing that identifies the wearer as a member of the press."[114] In short, there were administrable ways of distinguishing "the press" from ordinary speakers even under challenging conditions.

The newly dynamic nature of the press makes the identification problem more difficult, however. As press functions become more widely distributed, the costs of protecting the press also rise. In part, the costs of protection are higher because the press industry is harder to contain as its powerful gatekeepers shrink and vanish. A full sketch of the news industry's downward turn is beyond the scope of this chapter. The short version is that the advertising-based business model of the press has been ill-equipped to compete with platform-based advertising.[115] The rise of programmatic advertising "disrupted the distribution model for news, took over the

[108] Richard L. Hasen, *From Bloggers in Pajamas to the Gateway Pundit: How Government Entities Do and Should Identify Professional Journalists for Access and Protection in* The Future of Press Freedom: Democracy, Law, and the News in Changing Times 271 (RonNell Andersen Jones & Sonja R. West eds., 2025) [hereinafter The Future of Press Freedom].

[109] *See* Simon, *supra* note 31, at Ch. 4 (describing LAPD and LASD's position that only law enforcement-issued credentials could serve as identification for a journalist).

[110] Luke Mogelson, *Revisiting Portland's "Summer of Rage,"* The New Yorker (June 20, 2023), https://www.newyorker.com/culture/photo-booth/revisiting-portlands-summer-of-rage.

[111] Complaint at 1, Index Newspapers LLC v. City of Portland, Case No. 3:20-cv-1035-SI (D. Or. June 28, 2020).

[112] Temporary Restraining Order at 8, Index Newspapers LLC v. City of Portland, Case No. 3:20-cv-1035-SI, (D. Or. July 2, 2020), ECF No. 33.

[113] *Id.*

[114] *Id.* at 9.

[115] Nikki Usher, News for the Rich, White and Blue: How Place and Power Distort American Journalism 134–35 (2021).

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creation and the pricing of the advertising market, and colonized audience attention."[116] Newspapers and legacy press outlets suffered from diminishing ad dollars. Many folded.

The same advances in information and communication technology that reshaped commercial advertising also changed journalism itself. The emergence of social media platforms redistributed the power to communicate from legacy news media institutions to individuals, nonprofits, civil society organizations, and others. Indeed, the digital age was widely heralded for its "democratization" of communications.[117] As Jack Balkin has observed, "changes in technology and the economics of mass communication" have fundamentally reshaped journalism.[118]

Technological shifts that "democratized" communications and demolished the news industry made it both easier and harder to identify press functions.[119] On the one hand, new platforms with new business models increasingly fulfilled some of the traditional functions of the press industry.[120] Partly as a result, methods of identifying the press based on business structure or medium would be underinclusive, leaving out freelance journalists or those who publish exclusively online.[121] At the same time, the profusion of online platforms and publications has made it easier for individuals to "act at times as a casual journalist."[122] As Sue Robinson and Cathy DeShano write, "Seldom has such a disruptive phenomenon penetrated the inner echelons of the press."[123]

The redistribution of the press function among so many different actors also makes press-specific protections more costly to law enforcement and to society at large. In a world in which the major press freedom cases were about reporters affiliated with recognized, mainstream news organizations, the press was not only easy to identify, it was also small and elite. Today, the elite press might be even smaller, but it is much more difficult to identify. The disintermediation of press activities, such as gathering and disseminating information, means that many other people can plausibly claim to be exercising at least some press functions. Some of them, as Professor Rick Hasen notes, are better described as faux journalists than real ones.[124]

[116] *Id.* at 141.
[117] Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2304 (2014); Reno v. ACLU, 521 U.S. 844, 870 (1997).
[118] Balkin, *supra* note 117, at 2302.
[119] Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, COLUM. JOURNALISM REV. (Mar. 29, 2017), https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php/.
[120] *Id.*
[121] West, *supra* note 6, at 2449.
[122] *Id.* at 2448.
[123] Sue Robinson & Cathy DeShano, *"Anyone Can Know": Citizen Journalism and the Interpretive Community of the Mainstream Press*, 12 JOURNALISM 963 (2011).
[124] Hasen, *supra* note 108.

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Administering press freedoms is therefore not only harder because the press is more difficult to identify. Rather, any press-protective rule will need to be farther-reaching, both to reach individuals who may not resemble legacy journalists and to accommodate a new mode of thinking about the press's functions, instead of its identity. In other words, the concern is not just about administrability or the extent to which a press-specific rule might violate the First Amendment; it's rather about the social costs that press-specific protections might produce once they are broadened to capture all the press's functions.

21.2.4 *Costs*

Special protections are not only disappointingly ineffective. Adopting them may also impose additional costs. The first is political: The recognition of press-specific rights may, perversely, reinforce distrust and resentment of the press. When we create special privileges for the in-group, we reinforce the inferiority of the out-group. As Jamal Greene points out, to the extent the recognition of constitutional rights hinges on a binary choice between those who do and do not hold rights, "it places us in an adversarial rather than a cooperative posture vis-à-vis other members of the polity."[125] This is, of course, always a concern, but is perhaps particularly salient amid widespread distrust of the press. My worry is that emphasizing the exceptional nature of the press may actually accentuate the tendency to "delineat[e] the press as an enemy . . . that ought to be distrusted, countered, and perhaps ultimately stripped of ordinarily observed rights and liberties."[126]

The second cost is that recognizing and protecting press rights can legitimate law enforcement activities that suppress others' rights.[127] In a sense, this is a cost related to the prevailing way in which press rights have been framed as examples of "negative liberty" to be free of government interference.[128] When we create special rights for the press, we enable certain individuals and institutions to be free of forms of government intrusion that are otherwise expected. We also forego the opportunity to recognize *positive* expressive rights for the broader public.[129]

[125] Jamal Greene, *Rights as Trumps?*, 132 Harv. L. Rev. 28, 80 (2018) ("If my assertion of rights depends strictly on your lack thereof, and vice versa, it is natural for me to *see* you not as a friend whose different commitments must be reconciled with mine but rather as an enemy who is, in too real a sense, out to destroy me.").

[126] RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 Ariz. St. L.J. 1301, 1308 (2017).

[127] *Cf.* Bloch-Wehba, *supra* note 102, at 49.

[128] Tushnet, *supra* note 98, at 1393 ("[T]he predominance of negative rights creates an ideological barrier to the extension of positive rights in our culture.").

[129] Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L.J. 1311, 1363 (2002); Victor Pickard, *Legal Foundations for Non-Reformist Media Reforms: A Positive-Rights Paradigm for Guaranteeing a Universal Press System*, *in* The Future of Press Freedom, *supra* note 108 (describing how the framing of press rights as negative rights "disproportionately benefit[s] media corporations' rights over the public's").

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Consider one example: Andrea Sahouri, a reporter for the Des Moines Register, was covering a Black Lives Matter protest in 2020 when she was arrested along with dozens of protestors. Unlike nearly every other reporter who was arrested during that summer, Sahouri was actually prosecuted on misdemeanor charges of failure to disperse and interference with an official act.[130] Sahouri, the Register, and amici argued that, as working press, Sahouri should not be prosecuted because her activities were fully protected by the First Amendment. She was ultimately acquitted.

Imagine that Sahouri had a unique right not to comply with a lawful order to disperse. What are the consequences of recognizing Sahouri's right for all of those other individuals who are expected to comply? There are, as I noted above, expressive consequences – the recognition of Sahouri's rights suggests that ordinary protestors have none and thus places the press and the public on unequal footing. It confers a privilege on Sahouri to engage in expressive activities while the public is simultaneously denied an ability to do so. There are thus distributional consequences. Protecting press actors may lead to more police time and resources being dedicated to arresting protestors instead of journalists.

Recognizing special rights will always create some inequality between rightsholders and non-rightsholders. But if recognizing special rights also aggravates unequal treatment by focusing law enforcement energies elsewhere, then the press not only benefits from but becomes a participant in a broader injustice. Moreover, once the press has received special rights that benefit it directly, it is less likely to act in solidarity with other speakers or advocate for the expressive rights of others.[131] Perhaps most alarming, then, is the fact that special rights, by separating press actors from other speakers and conferring special privileges upon them, make it less likely that the press industry will act in solidarity with other speakers.

21.3 NEW APPROACHES

The usual framing of press-specific protections – as special rights, privileges, or defenses that only press actors can invoke – is reactive rather than proactive. It assumes that the existence of press-specific protections will deter abuses and infringements on press freedom, and it relies on individuals and press institutions to litigate and pursue claims against powerful actors after violations have occurred.

The assumption that special protections will work to curtail the gravest threats to journalism is rooted in a fundamental faith that individual rights effectively

[130] Ryan J. Foley, *Reporter Faces Trial in Case Seen as Attack on Press Rights*, AP News (Mar. 5, 2021, 2:14 PM), https://apnews.com/general-news-domestic-news-domestic-news-3a3ad2a4765852832c2eab841ff2824b.

[131] Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 Cornell L. Rev. 43, 46 (1988) (summarizing basic insight of public choice theory that legislation is a product of influence by "pressure groups").

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safeguard government accountability. At bottom, they are designed for a different time, one in which the press and the government occupied a relatively stable "equilibrium," and each institution served as a check on the excesses of the other.[132] As Christina Koningisor and Lyrissa Lidsky have demonstrated with respect to government secrecy in particular, the "underlying beliefs that the press is sufficiently powerful and the government is sufficiently constrained" underpin many of the core features of press freedom jurisprudence.[133] Today, however, both elements of that equilibrium are under strain, with the diminishment of journalism and the rise in government power altering the balance in favor of the state.[134] Meanwhile, these shifts are occurring against a background of substantial uncertainty about the scope and reach of First Amendment protections.

Without dramatically limiting the discretion afforded to criminal law enforcement agencies, doctrinal exceptionalism will not provide sufficient protection to the press function. Yet we most often see narrow and procedural protections instead of broad and substantive ones. The reason is, at least in part, ideological: The appeal of special procedural protections is in part that they enable the press to claim legal protection without outright challenging or critiquing substantive criminal law. Press institutions often prefer not to challenge law enforcement power outright, as doing so "could be seen to undermine journalistic objectivity by inserting press institutions into a broader debate."[135] Instead, the press has embraced a strategy of "seeking specific protections for journalists or 'neutral' actors" while leaving broader substantive criminal law intact.[136] Press institutions have historically been reluctant to take a position on substantive issues related to criminal law enforcement. As I argue in earlier work, the press's commitment to journalistic objectivity has also influenced its legal strategy and shaped its choices about advocacy.[137] Because of a combination of scarce resources and institutional values, press institutions often prioritize litigation about issues such as government transparency or newsgathering rights instead of broader accountability-oriented litigation.

All of this is to say that I share the press exceptionalists' concern that reporters and journalists face unacceptable levels of uncertainty about their legal protections as they gather and report the news. Where we part ways is with respect to the appropriate solutions. If my account so far is correct, then special protections are not the right path forward. So how can we effectively constrain government meddling and interference with the press function without special rights?

Part of the answer must be that any rights-based approach to press freedom has to be backed up by meaningful police reforms that decrease law enforcement's ability

[132] Christina Koningisor & Lyrissa Lidsky, *First Amendment Disequilibrium*, 110 Va. L. Rev. 1, 18–19 (2024).
[133] *Id.* at 28.
[134] *Id.*
[135] Bloch-Wehba, *supra* note 102, at 48.
[136] *Id.* at 50.
[137] *Id.* at 43–44.

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to interfere with press functions. These reforms are more likely to be holistic than press-specific. To date, however, the press industry has typically stayed out of debates about police authority unless they directly implicate journalism.[138] The press has been short-sighted about the potential threats that criminal law enforcement may pose to cherished constitutional values.

If the press were to change strategies – if the industry were to pursue greater limits on law enforcement power to ensure that newsgathering could operate with fewer inhibitions – it would reshape their advocacy efforts. The press is a powerful interest group capable of influencing policymaking, but it has chosen not to engage in many legislative debates that have deep implications for newsgathering.

A primary area on which the press ought to take a more aggressive position is the policing of protest. As one press freedom advocate has put it, "[C]overing protests routinely is the most dangerous activity for journalists."[139] Mass arrests at protests are common, and law enforcement often uses aggressive techniques to maintain order that have dramatic implications for journalists' safety and ability to gather the news. For selfish reasons, then, the press industry ought to support meaningful reductions in law enforcement's power to curtail protest.

Some changes to law enforcement practices are already afoot to restrict police discretion in controlling demonstrations and protest. In the last several years, political pressure and court-ordered settlements have compelled some of the nation's largest law enforcement agencies to change how they police protests, including by creating new systems to respond to demonstrations[140] and restricting the use of "less-lethal" munitions.[141]

Although these changes undoubtedly benefit the journalists and reporters who interact with law enforcement, they are largely not "special rights" – they reflect that broader changes to the policing of dissent are necessary to protect expressive freedoms.[142] As Joel Simon pointed out in his report for the Knight First Amendment Institute at Columbia University, "Many of the most serious press freedom violations that have occurred in recent years do not stem from any difficulty on the part of the police in distinguishing who is and who is not a journalist."[143]

[138] *Id.* at 48.

[139] Simon, *supra* note 31, at Ch. 4.

[140] Maria Cramer, *N.Y.P.D. Must Rewrite Rules for Policing Protests After Sweeping Deal*, N.Y. Times (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/nyregion/nypd-settlement-protesters-penning.html.

[141] *See, e.g.*, A.B. 48, State Assemb., Reg. Sess. (Ca. 2021); S.B. 20-217, Gen. Assemb., Reg. Sess. (Colo. 2020); S 2963, 191st Gen. Court (Mass. 2020).

[142] In some jurisdictions, police treatment of journalists is governed by explicit special statutory requirements. Even there, however, special protections frequently fail to work as intended. Kevin Rector, *LAPD Treatment of Journalists Denounced, Again, After Abortion Rights Protest Downtown*, L.A. Times (June 25, 2022, 2:46 PM), https://www.latimes.com/california/story/2022-06-25/lapd-treatment-of-journalists-denounced-again-after-abortion-rights-protest-downtown.

[143] Simon, *supra* note 31, at Preface and Introduction.

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Instead, intentional targeting of press actors by law enforcement appears increasingly and disturbingly common.

The impediments to recovery of monetary damages for civil rights violations also suggest that the press ought to take a more aggressive and proactive role. The press could, for example, call for an end to qualified immunity, which often stands in the way of recovery for civil rights violations.[144] Return for a moment to *Villarreal v. City of Laredo*, the case in which Lagordiloca was charged with misdemeanor solicitation of nonpublic information. While the U.S. Court of Appeals for the Fifth Circuit conceded that Villarreal had the right to publish the information that she received, the majority held that the city of Laredo was entitled to qualified immunity because it was not "clearly established" that Villarreal had a right to solicit nonpublic information from a government source – in other words, that she had a right to gather the news.[145] The court suggested that Lagordiloca should have "followed Texas law, or challenged that law in court," before engaging in newsgathering.[146] As I write, the Fifth Circuit is reconsidering Villarreal's case after the Supreme Court remanded it.

Despite lingering uncertainty about the outcome for Lagordiloca, *Villarreal* suggests that press institutions should affirmatively seek legal clarity about the scope of newsgathering and thus invites the press to consider what such a litigation strategy could look like. In particular, there are two areas in which the law of newsgathering could be developed. First, the press could employ a coordinated litigation effort to clarify and develop newsgathering protections. Numerous states have laws that affect newsgathering. While Texas' prohibition on the solicitation of nonpublic information seems unique, many states have criminalized other elements of newsgathering through prohibitions on trespass, interference with official acts, or the receipt of stolen property. A litigation strategy oriented toward limiting the impact of these criminal laws on the free flow of information may produce some certainty about constitutional newsgathering protections. It may even produce major benefits for press freedom. It need not, however, be press specific or even centered on the press.

One such strategy might center on the role of subjective intent as a limit on broad criminal statutes that affect newsgathering. For First Amendment scholars, the role of intent in circumscribing potential civil and criminal liability is familiar: In cases involving obscenity, defamation, and true threats, the Supreme Court has required that, even in cases involving utterly unprotected speech, prosecutors must demonstrate that a defendant acted with subjective intent to produce the danger that the law is meant to prevent.[147] But many statutes criminalizing newsgathering already include mens rea requirements, limiting this strategy's utility. A further-reaching

[144] *See, e.g.*, Ending Qualified Immunity Act, H.R. 2847 118th Cong. (2023).
[145] *Villarreal*, 94 F.4th at 395.
[146] *Villarreal*, 94 F.4th at 381.
[147] Counterman v. Colorado, 600 U.S. 66, 76–78 (2023).

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strategy might be modeled on the successful effort to secure judicial recognition and protection of the right to record government officials in public.[148] That effort involved a mix of pre-enforcement challenges and Section 1983 suits.[149] Notably, although the ability to record is of critical importance to journalists and the press, the right to do so is not limited to those exercising the press function: It is a right possessed by all.[150]

Another area for development is the use of class action lawsuits against law enforcement agencies that systematically engage in actions that infringe on press freedom. Litigation over racial profiling in traffic enforcement provides a useful model: Class actions alleging a pattern or practice of discriminatory enforcement that violates the Fourth and Fourteenth Amendments have overcome some of the many barriers to police reform and resulted in ongoing court-ordered monitoring.[151] If press actors have compelling evidence that a police agency is purposefully engaging in practices to stifle newsgathering and retaliate against First Amendment-protected activity, law enforcement reform litigation can be a powerful tool. Indeed, police reform litigation is doubly significant for the press because it not only relies on government information (which the press might be skilled at uncovering) but also frequently uncovers additional information of significant public concern (which the press could use in its news reporting).[152]

Nevertheless, it is not at all obvious that efforts to "settle the law" through litigation will necessarily advance press freedom.[153] *Villarreal* itself reveals a circuit court that is highly deferential to criminal law enforcement. Efforts to clarify and strengthen the law of newsgathering may risk undermining the tenuous protections that currently exist. Indeed, in the context of the Espionage Act, some have suggested that "benign indeterminacy" ultimately may be preferable to settling the question.[154]

Broader restrictions are necessary to reshape police authority and law enforcement's relationship with the press. But legal action is unlikely to accomplish these goals without sustained pressure and community involvement. In this respect, it is a real problem that many press institutions have taken the position that objectivity

[148] Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. Rev. 167 (2017).
[149] *See, e.g.*, Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011); Fields v. City of Phila., 862 F.3d 353 (3d Cir. 2017).
[150] Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 Geo. L.J. 1559 (2016).
[151] *See, e.g.*, Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 Minn. L. Rev. 2257 (2020) (discussing barriers to structural police reform).
[152] Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 Cal. L. Rev. 917 (2021).
[153] Simon, *supra* note 31, at Ch. 4 ("The obvious solution is to try to settle the law.").
[154] William H. Freivogel, *Publishing National Security Secrets: The Case for "Benign Indeterminacy,"*3 Journal of Nat'l Sec. L. & Pol'y 95 (2009); Harold Edgar & Benno C. Schmidt, Jr, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 936 (1973).

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requires reporters to act apolitically. Indeed, many news organizations bar their employees from engaging in political activism or supporting political causes.[155] These policies inhibit the ability of journalists and reporters to challenge how law enforcement clamps down on free expression. Ironically, the objectivity paradigm prevents journalists from participating in grassroots organizing alongside others who are advocating for their First Amendment rights.

Even so, press institutions can take a more aggressive tack in addressing law enforcement agencies' choices in interacting with the communities they serve. Press institutions might take the lead in advocating for new training, policies, and regulations for how law enforcement engages with First Amendment rightsholders, for example. Or they might call for meaningful constraints on law enforcement surveillance, in recognition of pervasive monitoring's implications for free expression.[156]

21.4 CONCLUSION

As mainstream news outlets wither and the job of producing press coverage is distributed more broadly, the classic protections for press freedom are becoming less effective at protecting journalists. The distribution of press work means that journalists are harder to identify, and it is therefore more difficult to determine whether an individual is entitled to special protections or not. Meanwhile, very broad substantive criminal laws also permit law enforcement to investigate, monitor, threaten, and ultimately punish press actors, regardless of special protections that may apply. This dynamic is especially concerning as states have acted to criminalize protest activities,[157] undercover investigations,[158] and other expressive conduct.[159] Broad statutes are proliferating; at the same time, First Amendment doctrine supplies only limited avenues for effectively challenging them.

In short, the problem that press freedom faces is not simply a problem of insufficient protections; rather, it is that any procedural protections are likely to be less effective against a very powerful state.[160] Press freedom advocacy needs to become bolder, braver, and more aggressive if it is to ensure that the values of journalism remain viable amid threats to democratic discourse and critical news coverage.

[155] Bloch-Wehba, *supra* note 102, at 38.

[156] Press Release, Brennan Ctr. for Just., Senate Approves Massive Expansion of Government Surveillance Power; Brennan Center Reacts (Apr. 19, 2024) https://www.brennancenter.org/our-work/analysis-opinion/senate-approves-massive-expansion-government-surveillance-power-brennan.

[157] International Center for Not-For-Profit Law, *supra* note 32.

[158] Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); Animal Legal Defense Fund v. Reynolds, 8 F.4th 781 (8th Cir. 2021).

[159] Dream Defenders v. Governor of the State of Florida, 57 F.4th 879 (11th Cir. 2023); Oklahoma State Conference of NAACP v. O'Connor, 569 F. Supp.3d 1145 (W. D. Okla. 2021); McKesson v. Doe, 601 U.S. __ (2024).

[160] *Cf.* Brennan-Marquez, *supra* note 83.

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