

## OBSTRUCTION OF JOURNALISM

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### ABSTRACT

Identifying oneself as press—with a badge on a lanyard, label on a helmet, or sign on a car—used to be a near-grant of immunity. It meant safer passage through dangerous terrain. But today, being recognizable as a journalist may be more likely to make one a target.

Physical assaults against journalists in the United States increased nearly 1,400% in 2020. Journalists were assaulted by police as they covered Black Lives Matter protests and by a pro-Trump mob as they reported on certification of the presidential election. In public spaces, performing their democratic role, journalists were dragged, beaten, and bloodied.

This physical violence is only the most visible danger journalists face. The rate of online violence against journalists is soaring, and it is even more pervasive than physical violence. It is aimed at women, and women of color in particular. In a recent United Nations study of violence against journalists, nearly three-quarters of the respondents identifying as women said they had experienced online abuse, harassment, threats, and attacks.

The impact of this violence on individual journalists is severe, sometimes even debilitating and career ending. But the impact extends beyond the individual journalists targeted. Because this violence is aimed almost entirely at women, people of color, non-Christians, and non-straight journalists, it threatens a very particular impact on news and our information ecology. Journalists within these groups are often the journalists who report on topics that challenge social hierarchies and inequities. Their work regularly gives voice to others from marginalized populations. Thus, this violence disproportionately silences voices already relegated to the edges. Rather than letting our national conversation branch and proliferate, the violence attempts to shear it to a white, male, Christian, and straight trunk.

At its core, democracy requires that new voices and stories can be heard so that the same stock stories—and the hierarchies they support—do not become entrenched. Journalists exist, in part, to tell us these new stories about ourselves and our communities—stories that bring us into conversation with one another and thereby help us to successfully self-

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govern. In this way, the violence is an assault on the freedom of the press, freedom of expression, and democracy itself. And it is continuing with impunity.

To address the systemic harm caused by violence against journalists, this Article proposes a federal “obstruction of journalism” statute modeled on the federal obstruction of justice ones. The obstruction of justice statutes are aimed at preserving the effective functioning of our justice system by criminalizing threats against that system. Likewise, the obstruction of journalism statute proposed in this Article would criminalize physical violence and particularly severe threats against reporters with the aim of protecting journalism, another system integral to the functioning of democracy.

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#### INTRODUCTION

Identifying oneself as press—with a badge on a lanyard, label on a helmet, or sign on a car—used to be a near grant of immunity. It meant safer passage through dangerous terrain. But today, being recognizable as a journalist may be more likely to make one a target.

Physical assaults against journalists in the United States increased nearly 1,400% in 2020.<sup>1</sup> Journalists were assaulted by police as they covered Black Lives Matter protests and by a pro-Trump mob as they reported on Congress's certification of the presidential election.<sup>2</sup> In public spaces, performing their democratic role, journalists were dragged, beaten, and bloodied.<sup>3</sup> A photojournalist was permanently blinded in one eye.<sup>4</sup>

This physical violence is only the most visible danger journalists face. The rate of online violence against journalists is soaring, and it is even more pervasive than physical violence.<sup>5</sup> It is aimed at women, and women of color in particular. In a 2020 United Nations study of violence against journalists, nearly three-quarters of the respondents identifying as women said they had experienced online abuse, harassment, threats, and attacks.<sup>6</sup> This included graphic and epithet-filled threats of rape, murder, or harm to family members.<sup>7</sup> The report emphasized that online attacks can lead to offline ones.<sup>8</sup>

The impact of this violence on individual journalists is severe, sometimes even debilitating and career ending.<sup>9</sup> But the impact extends beyond

1. See *Assault*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/physical-attack/> (last visited Mar. 28, 2022) (showing that forty-one journalists were assaulted in 2019 and 436 journalists were assaulted in 2020); telephone interview with Kirstin McCudden, Managing Editor of the U.S. Press Freedom Tracker (Oct. 8, 2021) (notes on file with author) (confirming updated numbers of forty-three assaults in 2019 and 593 in 2020).

2. See Angela Fu, *Reporters Covering the Capitol Attack Were Used to Harassment and Heckling. But Wednesday Was Different*, POYNTER (Jan. 13, 2021), <https://www.poynter.org/reporting-editing/2021/reporters-covering-the-capitol-attack-were-used-to-harassment-and-heckling-but-wednesday-was-different/>; Courtney Douglas, *Amid Black Lives Matter Protests, a Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/>.

3. See Douglas, *supra* note 2; Brittany Shammass, *Journalists Were Attacked, Threatened and Detained During the Capitol Siege*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/media/2021/01/09/he-was-documenting-chaotic-scene-when-suddenly-trump-supporters-turned-their-ire-him/>; Katelyn Burns, *Police Targeted Journalists Covering the George Floyd Protests*, VOX (May 31, 2020, 1:10 PM), <https://www.vox.com/identities/2020/5/31/21276013/police-targeted-journalists-covering-george-floyd-protests>.

4. Burns, *supra* note 3.

5. Julie Posetti, Nermine Aboulez, Kalina Bontcheva, Jackie Harrison, & Silvio Waisbord, *Online Violence Against Women Journalists: A Global Snapshot of Incidence and Impacts*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. 1, 1 (2020), <https://www.icfj.org/sites/default/files/2020-12/UNESCO%20Online%20Violence%20Against%20Women%20Journalists%20-%20A%20Global%20Snapshot%20Dec9pm.pdf> (“Online attacks on women journalists appear to be increasing exponentially.”).

6. *Id.* at 1–2, 5.

7. *See id.* at 6.

8. *Id.* at 1.

9. See Joseph A. Wulfsohn, *New York Times Reporter Taylor Lorenz Mocked For Claim ‘Online Harassment’ Has ‘Destroyed My Life,’* FOX NEWS (Mar. 9, 2021), <https://www.foxnews.com/media/new-york-times-taylor-lorenz-harassment-claim> (quoting Lorenz) (“It’s not an exaggeration to say that the harassment and smear campaign I’ve had to endure over the past year has destroyed my life. No one should have to go through this . . . [T]he scope of the attacks has been unimaginable. There’s no escape. It has taken everything from me.”); see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 24 (1993) (“Victims of vicious hate propaganda experience physiological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder,

the individual journalists targeted. Because this violence is aimed almost entirely at women, people of color, non-Christians, and non-straight journalists, it threatens to have a very particular impact on news and so, the broader information ecology.<sup>10</sup> Journalists within these targeted groups are often the journalists who report on topics that challenge social hierarchies and inequities. Their work regularly gives voice to others from marginalized populations.<sup>11</sup> Thus, this violence disproportionately silences voices already relegated to the edges. Rather than letting our national conversation branch and proliferate, the violence attempts to shear it to a white, male, Christian, and straight trunk.<sup>12</sup>

At its core, democracy requires that we create the means by which new voices and stories can be heard so that the same stock stories—and the hierarchies they support—do not become entrenched. Journalists exist, in part, to tell us these new stories about ourselves and our communities—stories that bring us into conversation with one another and thereby help us successfully self-govern. In this way, the violence is an assault on freedom of the press, freedom of expression, and democracy itself. And it is continuing with impunity.

To address the systemic harm caused by violence against journalists, this Article proposes a federal “obstruction of journalism” statute modeled on the federal obstruction of justice statutes. The obstruction of justice statutes are aimed at preserving the effective functioning of our justice system by criminalizing threats against that system.<sup>13</sup> Likewise, the obstruction of journalism statute proposed here would criminalize physical violence and particularly severe threats against reporters with the aim of protecting journalism, another system integral to the functioning of democracy.<sup>14</sup> Adopting an obstruction of journalism statute would signal that the integrity of our system for newsgathering and publication is a national priority on par with the integrity of our justice system.

This Article proceeds in three Parts. Part I describes the rapid increase in violence against journalists. This includes physical violence but

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hypertension, psychosis, and suicide. Patricia Williams has called the blow of racist messages ‘spirit murder’ in recognition of the psychic destruction victims experience.”)

10. See Silvio Waisbord, *Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism*, 8 DIGIT. JOURNALISM, 1030, 1032–34 (2020) (describing history of censorship against women and minorities and its impact on freedom of expression).

11. See Nicole A. Childers, *The Moral Argument for Diversity in Newsrooms Is Also a Business Argument—and You Need Both*, NIEMAN LAB (Nov. 24, 2020, 1:40 PM), <https://www.niemanlab.org/2020/11/the-moral-case-for-diversity-in-newsrooms-also-makes-good-business-sense/> (“[M]any journalists from marginalized communities have called for journalists not to be afraid to call out racism, sexism, or homophobia when it rises to the surface in their reporting.”).

12. See Gabriel Arana, *Decades of Failure*, COLUM. JOURNALISM REV. (2018), [https://www.cjr.org/special\\_report/race-ethnicity-newsrooms-data.php](https://www.cjr.org/special_report/race-ethnicity-newsrooms-data.php) (discussing how minorities are underrepresented in journalism).

13. See generally 18 U.S.C. §§ 1501–21.

14. This Article uses the term “obstruction of journalism” as both a descriptor of the harm being wrought on the press as well as the title of a federal statute that this Article proposes to address the harm.

more often online violence. Perpetrators select victims based on their identities, and the victims are primarily women. They are disproportionately women of color. This violence has historical roots. Today's violence is the latest in a series of surges that occur when its perpetrators perceive that minority voices might eclipse their own. Yet today's violence is also different—more pervasive and perhaps more intractable. Technology has made it easy to commit, so the potential for its frequency and reach seems unbounded.

Part II details how violence obstructs journalism. Obstruction operates on at least three levels: the story, the beat, and the pipeline. At the story level, threats and abuse prevent journalists from covering particular events or incidents. At the beat level, perpetual abuse around broad topics like politics, economics, and immigration dissuades reporters from aggressively covering these beats or even covering them at all.<sup>15</sup> At the pipeline level, violence leads reporters to leave or consider leaving the profession entirely. These forms of obstruction culminate in a harm greater than the sum of its parts. This harm is an erosion of freedom of the press and expression that threatens democratic governance.

Part III proposes a federal obstruction of journalism statute to address the systemic harm this violence causes. Obstruction of justice laws are aimed at protecting a democracy-enhancing institution, the judiciary, and its processes from violence and harm. Protecting the press and our news environment is similarly vital. Moreover, even while punishing words, an obstruction of journalism statute would promote First Amendment values under the Speech and Press Clauses. It would be speech-enhancing by promoting a diversity of voices and richer dialogue. It would also reflect a richer and more generative view of the Press Clause than the current *laissez-faire* one. Moreover, an obstruction of journalism statute would be rhetorically important; it would signal seriousness about the press's value to public dialogue and our fragile democracy.

### I. SURGING VIOLENCE AGAINST JOURNALISTS

“[J]ournalism has become one of the most dangerous professions in the world,” announced a 2020 report by the Council of Europe.<sup>16</sup> This has, of course, long been true in war-torn nations and under certain autocratic regimes. But historically, safety was not something that most American

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15. See Posetti et al., *supra* note 5, at 1 (quoting the United Nations Secretary General) (“Women who cover topics such as politics, law, economics, sport, women’s rights, gender and feminism are particularly likely to become targets of *online violence*.”); Waisbord, *supra* note 10, at 1033–34 (“[R]eporters who have produced critical stories about national politics, the presidency, immigration, right-wing extremism, guns, race, human rights, sexual abuses, and intelligence services have been common targets of vicious rhetoric and intimidation.”).

16. Lewis Jennings, *Mapping Media Freedom: “Journalism Has Become One of the Most Dangerous Professions in the World,”* INDEX ON CENSORSHIP (Nov. 12, 2018), <https://www.indexoncensorship.org/2018/11/mapping-media-freedom-journalism-dangerous-profession/>; see also Peter Noorlander, *Background Paper on the Implementation of CM/rec(2016)4 on the Safety of Journalists and Other Media Actors, for the Conference of Ministers Responsible for Media and Information Society (Nicosia, Cyprus, May 2020)*, COUNCIL OF EUROPE 1, 5 (2020).

journalists worried about on domestic soil.<sup>17</sup> The United States was viewed as a relative haven for journalists—a model for freedom of the press.<sup>18</sup>

This has changed. During 2020, physical violence against American journalists exploded.<sup>19</sup> Advice to journalists from industry organizations included, “think carefully about whether you display credentials openly.”<sup>20</sup> It continued that a press pass on a lanyard “can be used to strangle you in a scrum.”<sup>21</sup>

The physical violence is just the most visible form of hostility against journalists. Various forms of online abuse—including threats, digital privacy breaches, and disinformation campaigns—are also surging.<sup>22</sup> This violence is overwhelmingly targeted at non-male, non-white, non-straight, and non-Christian journalists.<sup>23</sup> Women journalists identify being online as the biggest hazard in their professional lives.<sup>24</sup>

This violence is not entirely new. Historically, it is rooted in a fear of women journalists and journalists from marginalized groups using their voices, occupying the public square, and setting the agenda.<sup>25</sup> Most recently, the violence has been stoked by former President Donald J. Trump and right-wing extremism and accelerated by the affordances of online social media platforms—anonymity, accessibility, speed, and scale.

### A. Forms of Violence

In 2020, the U.S. Press Freedom Tracker staff could not keep up with the reports of violence it was receiving. The nonprofit group, which collects and attempts to verify reports of violence against the press, included a caveat in its annual report: “As a small team, we’re overwhelmed by the

17. See Hannah Storm, *There Can Be No Free Press Unless Journalists Are Able to Do Their Jobs Safely*, POYNTER (May 18, 2021), <https://www.poynter.org/commentary/2021/there-can-be-no-free-press-unless-journalists-are-able-to-do-their-jobs-safely/> (“For too long there has been a sense that journalists were invincible, immune.”).

18. See *Why Freedom of the Press is Important*, U.S. EMBASSY & CONSULATES IN ITALY, <https://it.usembassy.gov/why-freedom-of-the-press-is-important/> (lauding America’s free press especially in contrast to places where journalists are being killed); ShareAmerica, *World Press Freedom with Richard Lui of NBC*, YOUTUBE (Feb. 16, 2021), [https://www.youtube.com/watch?v=K\\_nQELC1ebs&t=5s](https://www.youtube.com/watch?v=K_nQELC1ebs&t=5s) (praising modern day America as a bastion of freedom of the press).

19. See U.S. PRESS FREEDOM TRACKER, *supra* note 1 (referring to an increase in attacks from forty-one in 2019 to 436 in 2020).

20. AI Tompkins, *23 Guidelines for Journalists to Safely Cover Protests*, POYNTER (June 1, 2020), <https://www.poynter.org/reporting-editing/2020/23-guidelines-for-journalists-to-safely-cover-protests-this-weekend/>.

21. *Id.*

22. See Posetti et al., *supra* note 5, at 6.

23. See *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse Against Women on Twitter*, AMNESTY INT’L, <https://decoders.amnesty.org/projects/troll-patrol/findings> (last visited Mar. 28, 2022); Posetti et al., *supra* note 5, at 1.

24. Lucy Westcott, *‘The Threats Follow Us Home’: Survey Details Risks for Female Journalists in U.S., Canada*, COMM. TO PROTECT JOURNALISTS (Sept. 4, 2019, 9:00 AM), <https://cpj.org/2019/09/canada-usa-female-journalist-safety-online-harassment-survey/>.

25. See JOHN NERONE, *VIOLENCE AGAINST THE PRESS: POLICING THE PUBLIC SPHERE IN U.S. HISTORY* 15 (1994) (“[V]iolence was common when minorities claimed the press as a voice of their own.”).

sheer amount of press freedom violations reported to us this year, and are still working through hundreds more reports across nearly a dozen categories.”<sup>26</sup> According to its data, 593 physical assaults of journalists occurred in 2020.<sup>27</sup> In each of the three years prior (the only other three years comprehensively tracked), that number did not climb above fifty.<sup>28</sup> A spokesperson for Reporters Without Borders called the prevalence and strength of attacks on journalists in the United States “shocking” and added that the country was “no longer a champion of press freedom, either at home or abroad.”<sup>29</sup>

Some of this violence was highly visible—photographed, livestreamed, or broadcasted by journalists themselves. Photojournalist Linda Tirado shared a photo of herself with her left eyelid dark purple and swollen shut after police shot her with a foam bullet and permanently blinded her eye.<sup>30</sup> *Los Angeles Times* journalist Molly Hennessy-Fiske tweeted an image of her legs bruised and bleeding after police shot her with rubber bullets.<sup>31</sup> In Louisville, Kentucky, reporter Kaitlin Rust could be heard yelling, “I’m getting shot!” in the midst of a live television segment.<sup>32</sup>

This physical violence often occurred when police arrested journalists. During the protests in the wake of the police murder of George Floyd and in support of the Black Lives Matter movement, journalists were arrested in record numbers—nearly a 1,600% increase from 2019.<sup>33</sup> More than a third of the arrests were accompanied by assaults.<sup>34</sup>

This violence has continued since the summer of 2020 and occurs not only at large protests. Josie Huang, a reporter for Los Angeles’s National

26. *U.S. Press Freedom in Crisis: Journalists Under Arrest in 2020*, FREEDOM OF THE PRESS FOUND. 1, 15 (2020), [https://freedom.press/static/pdf.js/web/viewer.17c4a4bacc0.html?file=/documents/60/Journalists\\_Under\\_Arrest\\_in\\_2020\\_KLKbBVW.pdf](https://freedom.press/static/pdf.js/web/viewer.17c4a4bacc0.html?file=/documents/60/Journalists_Under_Arrest_in_2020_KLKbBVW.pdf).

27. See Interview with Kirstin McCudden, *supra* note 1.

28. See *Assault*, *supra* note 1 (showing statistics for physical attacks on members of the press each year).

29. Megan Specia, *In Turnabout, Global Leaders Urge U.S. to Protect Reporters Amid Unrest*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/06/04/world/attacks-press-george-floyd.html>.

30. See Matt Sepic, *Photographer Sues Minneapolis After Being Blinded in One Eye During Protests*, MPRNEWS (June 16, 2020, 10:26 AM), <https://www.mprnews.org/story/2020/06/16/photographer-sues-minneapolis-after-being-blinded-in-one-eye-during-protests>.

31. See Molly Hennessy-Fiske (@mollyhf), TWITTER (June 5, 2020, 2:50 PM), <https://twitter.com/mollyhf/status/1269008792194297866>.

32. Michael Safi, Caelain Barr, Naimh McIntyre, Pamela Duncan, & Sam Cutler, *‘I’m Getting Shot’: Attacks on Journalists Surge in US Protests*, GUARDIAN (June 5, 2020, 8:03 AM), <https://www.theguardian.com/media/2020/jun/05/im-getting-shot-attacks-on-journalists-surge-in-us-protests>.

33. See *Arrest/Criminal Charge*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/arrest-criminal-charge/>; interview with Kirstin McCudden, *supra* note 1 (confirming that the U.S. Press Freedom Tracker documented 142 arrests in 2020 and nine arrests in 2019).

34. *U.S. Press Freedom in Crisis*, *supra* note 26, at 3. Note that this calculation is based on the number of arrests accompanied by assault known as of December 14, 2020. The percentage may have shifted as more arrests (with or without accompanying assaults) have been confirmed.

Public Radio affiliate, was thrown to the ground, bruised, and cut for filming outside a hospital where sheriff's deputies were treated after being shot in an ambush.<sup>35</sup> The Los Angeles Sheriff's Department lied in saying that Huang did not identify herself as press and had to recant after video evidence surfaced.<sup>36</sup>

And police are not the only perpetrators. In 2017, Republican then-Congressman and now Governor of Montana Greg Gianforte was convicted of assault after he attacked a reporter.<sup>37</sup> In 2019, a BBC cameraman was knocked over at an El Paso, Texas rally for Trump.<sup>38</sup> The assailant was wearing a Make America Great Again cap and shouting "Fuck the media" as he was restrained.<sup>39</sup> As he was removed from the rally, some in the crowd shouted, "Let him go."<sup>40</sup>

Supporters of the former President also violently attacked journalists in the weeks before the inauguration. During the insurrection on January 6, 2021, the words "Murder the media" were written on a door in the Capitol.<sup>41</sup> John Minchillo, an Associated Press photojournalist, was dragged through a crowd, thrown over a wall, and threatened with death.<sup>42</sup> Erin Schaff, a photojournalist with the *New York Times*, described men becoming angry after reading her press pass, throwing her to the Capitol floor, and, as she screamed for help, "[p]eople just watched. At this point, I thought I could be killed and no one would stop them."<sup>43</sup>

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35. Tasneem Nashrulla, *Sheriff's Deputies Falsely Said This Reporter Had Failed to ID Herself: A Prosecutor Has Now Dropped the Case Against Her*, BUZZFEED NEWS (Sept. 24, 2020, 7:56 PM), <https://www.buzzfeednews.com/article/tasneemnashrulla/josie-huang-reporter-arrest-los-angeles-sheriff>.

36. *Id.*

37. Whitney Bermes, *Gianforte Sentenced to Anger Management, Community Service for Assault of Reporter*, BOZEMAN DAILY CHRON. (June 12, 2017), [https://www.bozemandailychronicle.com/news/crime/gianforte-sentenced-to-anger-management-community-service-for-assault-of-reporter/article\\_b6e6241e-e1a3-56fe-a32a-6a02ba234129.html](https://www.bozemandailychronicle.com/news/crime/gianforte-sentenced-to-anger-management-community-service-for-assault-of-reporter/article_b6e6241e-e1a3-56fe-a32a-6a02ba234129.html); OFF. GOVERNOR GREG GIANFORTE, <https://governor.mt.gov/> (last visited Mar. 28, 2022).

38. See Matthew Weaver & Erin Durkin, *BBC Cameraman Shoved and Abused at Trump Rally in El Paso*, GUARDIAN (Feb. 12, 2019, 8:11 PM), <https://www.theguardian.com/media/2019/feb/12/bbc-cameraman-shoved-and-abused-at-trump-rally-in-el-paso>.

39. *Id.*

40. *Id.*

41. Fu, *supra* note 2.

42. Jamie Ross, *'Get the Fuck Out of Here!': Video Shows Terrifying Moment Capital MAGA Mob Attacks AP Photographer*, DAILY BEAST (Jan. 8, 2021, 1:30 PM), <https://www.thedailybeast.com/video-shows-terrifying-moment-capitol-maga-mob-attacks-ap-photographer-john-minchillo>.

43. Nicholas Fandos, Erin Schaff, & Emily Cochrane, *'Senate Being Locked Down': Inside a Harrowing Day at the Capitol*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/07/us/politics/capitol-lockdown.html>.

Journalists for the *Los Angeles Times*, the *Washington Post*, and other news organizations wore bulletproof vests when they covered the inauguration.<sup>44</sup> The Committee to Protect Journalists issued a lengthy list of suggestions to reporters.<sup>45</sup> These included wearing body armor, using equipment that does not require cables (which could be used against reporters in an attack), avoiding black clothing (which is associated with “Antifa” groups), and tying long hair up “to prevent individuals from pulling you from behind.”<sup>46</sup>

As widespread as this physical violence is, it is not the most pervasive type of violence journalists face. Far more common is the online violence that journalists confront.<sup>47</sup> It includes cyberbullying,<sup>48</sup> doxing,<sup>49</sup> online impersonation,<sup>50</sup> swatting<sup>51</sup> and related digital privacy and security threats,<sup>52</sup> and disinformation campaigns.<sup>53</sup> It also includes abusive, harassing, and threatening language.<sup>54</sup> Rape and even death threats are lobbed at journalists with regularity.<sup>55</sup> A 2018 study found that one in ten journalists surveyed had been threatened with death in the past year because of the work they do.<sup>56</sup>

44. See Kerry Flynn, *Bulletproof Vests and Gas Masks: Journalists Prep for Inauguration Day*, CNN BUS. (Jan. 18, 2021, 3:10 PM), <https://www.cnn.com/2021/01/18/media/journalists-inauguration-preparation/index.html>.

45. *CPJ Safety Advisory: Covering the Build-up to the U.S. Presidential Inauguration*, COMM. TO PROTECT JOURNALISTS (Jan. 14, 2021, 10:21 AM), <https://cpj.org/2021/01/cpj-safety-advisory-covering-the-build-up-to-the-u-s-presidential-inauguration/>.

46. *Id.*

47. See Autumn Slaughter & Elana Newman, *Journalists and Online Harassment*, DART CTR. FOR JOURNALISM & TRAUMA (Jan. 14, 2020), <https://dartcenter.org/resources/journalists-and-online-harassment>; Michelle Ferrier, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting*, TROLL-BUSTERS & INT’L WOMEN’S MEDIA FOUND. 1, 22 (2018).

48. See *Defining “Online Abuse”: A Glossary of Terms*, ONLINE HARASSMENT FIELD MANUAL, <https://onlineharassmentfieldmanual.pen.org/defining-online-harassment-a-glossary-of-terms/> (defining cyberbullying) (“[W]illful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”).

49. See *id.* (defining doxing) (“[P]ublishing of sensitive personal information online . . . to harass, intimidate, extort, stalk, or steal the identity of a target.”); Jason Wilson, *Doxxing, Assault, Death Threats: The New Dangers Facing US Journalists Covering Extremism*, GUARDIAN (June 14, 2018, 10:41 AM), <https://www.theguardian.com/world/2018/jun/14/doxxing-assault-death-threats-the-new-dangers-facing-us-journalists-covering-extremism>.

50. See *Defining*, *supra* note 48 (defining online impersonation as creating a fake social media account to “post offensive or inflammatory statements to defame, discredit, or instigate further abuse”).

51. See *id.* (defining swatting) (“[A] hoax call to law enforcement detailing a completely false threatening event taking place at a target’s home or business, with the intention of sending a fully armed police unit (SWAT team) to the target’s address.”); Matt Stieb, *White Nationalist Arrested for Swatting Journalists and a Historically Black Church*, INTELLIGENCER (Feb. 26, 2020), <https://nymag.com/intelligencer/2020/02/neo-nazi-arrested-for-swatting-a-historically-black-church.html>; Daniel Villarreal, *White Supremacists Used ‘Swatting’ to Target Journalists, People of Color*, NEWSWEEK (July 22, 2020, 10:48 PM), <https://www.newsweek.com/white-supremacist-used-swatting-target-journalists-people-color-1519833>.

52. See Julie Posetti, *Online Violence: The New Front Line for Women Journalists*, INT’L CTR. FOR JOURNALISTS (Sept. 24, 2020), <https://www.icfj.org/news/online-violence-new-front-line-women-journalists>.

53. See Posetti et al., *supra* note 5, at 8.

54. See *id.* at 6–7.

55. See Ferrier, *supra* note 47, at 11, 22.

56. *Id.* at 22.

As with physical violence, the prevalence of online abuse appears to be skyrocketing.<sup>57</sup> In a 2020 study of women journalists and media workers worldwide, 73% said that they had experienced some form of online violence.<sup>58</sup> This is in marked contrast to a similar study from 2014 in which only about 23% of respondents reported experiencing online “intimidation, threats or abuse” related to their work.<sup>59</sup> With online violence, as well as gendered and racialized violence more generally, the actual incidence of abuse is likely far more prevalent than reported.<sup>60</sup> And although the available studies do not break out statistics on violence against transgender journalists, given that transgender people are disproportionately targeted with online abuse, chances are high that transgender journalists are likewise disproportionately targeted.<sup>61</sup>

These online attacks are aimed to intimidate.<sup>62</sup> Perpetrators hope to make journalists’ work so frightening and journalists’ concern for their own and their families’ safety so strong that work becomes impossible.<sup>63</sup> They want to create a state of high alert about privacy and safety that is so exhausting, it is untenable.<sup>64</sup> They often want to shame, humiliate, and professionally discredit journalists.<sup>65</sup> They want to see journalists’ careers toppled—for journalists to logoff and withdraw.<sup>66</sup> They want to silence

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57. See Posetti et al., *supra* note 5, at 5 (“Online attacks . . . appear to be increasing dramatically and uncontrollably.”). Other studies confirm the surge in abuse and document the severity of it. For example, a 2018 report by the International Women’s Media Foundation and Troll-Busters (a service for women journalists targeted by online harassment) found that 63% of respondents had been threatened or harassed online, and 90% said they believed online threats or harassment against journalists had increased in the last five years. Ferrier, *supra* note 47, at 22, 25.

58. See Posetti et al., *supra* note 5, at 2. And a similar, but smaller study conducted in 2018 by researchers at the University of Texas, noted that “[a]lmost all of the journalists we interviewed reported experiencing some form of harassment online that focused on their person, gender, or sexuality.” Gina Masullo Chen, Paromita Pain, Victoria Y. Chen, Madlin Mekelburg, Nina Springer, & Franziska Troger, *Women Journalists and Online Harassment*, CTR. FOR MEDIA ENGAGEMENT (Apr. 11, 2018), <https://mediaengagement.org/wp-content/uploads/2018/04/Report-Women-Journalists-and-Online-Harassment.pdf>.

59. See Posetti et al., *supra* note 5, at 5.

60. See Waisbord, *supra* note 10, at 1030 (noting that the number of attacks are underreported); Ferrier, *supra* note 47, at 41 (noting that fear of retaliation and fear of losing work led to underreporting); Michelle Ferrier & Nisha Garud-Patkar, *TrollBusters: Fighting Online Harassment of Women Journalists*, *MEDIATING MISOGYNY: GENDER, TECH., & HARASSMENT* 311, 321 (Jacqueline Ryan Vickery & Tracy Everback eds., 2018).

61. See AMNESTY INT’L, *supra* note 23 (noting in a study about violence against journalists that the focus was not on transgender people) (“[Amnesty’s] previous research shows that women of colour, religious or ethnic minority women, lesbian, bisexual, transgender or intersex (LBTI) women, and other women with different identities will often experience abuse that targets them in unique or compounded way[s].”).

62. See Ferrier, *supra* note 47, at 12 (“These attacks seek to discredit women journalists and media workers, damage their reputations, and ultimately silence them. Perpetrators of these physical and online threats operate for the most part with impunity, leaving individual journalists to navigate how best to respond.”); Waisbord, *supra* note 10, at 1036.

63. See Ferrier, *supra* note 47, at 11–12, 28; Ferrier & Garud-Patkar, *supra* note 60, at 320–21.

64. See Ferrier & Garud-Patkar, *supra* note 60, at 320–21.

65. See Ferrier, *supra* note 47, at 6, 32, 35.

66. See *id.* at 13, 35, 44.

journalists.<sup>67</sup> In one candid description of this strategy, the *New York Times* quoted an email between a venture capitalist and a “neo-reactionary” leader with a large online following.<sup>68</sup> One told the other, “If things get hot, it may be interesting to sic the Dark Enlightenment audience on a single vulnerable hostile reporter to dox them and turn them inside out . . . .”<sup>69</sup>

As this quote hints, online violence can presage offline violence. According to Julie Posetti, the Global Director of Research at the International Center for Journalists, “[t]he digital, psychological and physical safety threats confronting women in journalism are overlapping, converging and inseparable.”<sup>70</sup> For example, online attacks can reveal identifying and personal information that increases the risk of physical attacks.<sup>71</sup> The Committee to Protect Journalists found that in at least 40% of cases in which journalists were murdered, they had received threats before they were killed.<sup>72</sup> For example, Maltese journalist Daphne Caruana Galizia was relentlessly harassed both online and off before being murdered with a car bomb.<sup>73</sup>

### B. Targets of Violence

Violence against journalists is gender based. Posetti describes women journalists as sitting “at the epicentre of risk.”<sup>74</sup> Although male journalists are also victims of online abuse, “abuse directed against women journalists tends to be more severe.”<sup>75</sup>

Nearly every major study of online violence against journalists focuses on women. This is evident from a sampling of titles alone: *Online Violence Against Women Journalists—A Global Snapshot of Incidence and Impacts*;<sup>76</sup> *Attacks and Harassment: The Impact on Female Journalists and Their Reporting*;<sup>77</sup> *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse*

67. Posetti et al., *supra* note 5, at 1 (“The perpetrators range from misogynistic mobs seeking to silence women, through to State-linked disinformation networks aiming to undercut press freedom and chill critical journalism via orchestrated attacks.”).

68. Cade Metz, *Silicon Valley’s Safe Space*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/13/technology/slate-star-codex-rationalists.html> (discussing an email exchange between Curtis Yarvin, who helped popularize the neoreactionary movement, and Balaji Srinivasan, a venture capitalist at Andreessen Horowitz).

69. *Id.*

70. Posetti, *supra* note 52.

71. *Id.*

72. See Elisabeth Witchel, *Getting Away with Murder*, COMM. TO PROTECT JOURNALISTS (Oct. 31, 2017), <https://cpj.org/reports/2017/10/impunity-index-getting-away-with-murder-killed-justice-2/>.

73. Posetti, *supra* note 52; Juliette Garside, *Daphne Caruana Galizia: ‘Malta Has Made me a Scapegoat’*, GUARDIAN (Apr. 17, 2018), <https://www.theguardian.com/world/2018/apr/17/daphne-caruana-galizia-malta-has-made-me-a-scapegoat>.

74. Posetti, *supra* note 52.

75. Posetti et al., *supra* note 5, at 1 (citing the United Nations Secretary General in the Safety of Journalists and Issues of Impunity Report).

76. *Id.*

77. Ferrier, *supra* note 47.

*Against Women on Twitter*;<sup>78</sup> and *Women Journalists and Online Harassment*.<sup>79</sup> In fact, in a study by Amnesty International of tweets that contained the journalists' usernames (i.e., "mentions"), more than 7% of the tweets were "problematic" or "abusive."<sup>80</sup> As one respondent to a study by the Committee to Protect Journalists said, "Women whose work is published online face costs, in the form of threats and harassment, for almost every single piece they publish."<sup>81</sup>

Abuse and threats are compounded significantly for women who appear—based on online profiles and photographs—non-white, non-Christian, or non-straight.<sup>82</sup> In the Amnesty study, researchers found that women of color (Black, Asian, Latina, and "mixed-race" women) were 34% more likely to be targeted in abusive and problematic tweets than white women.<sup>83</sup> Black women were 84% more likely than white women to be targeted.<sup>84</sup> An American journalist, Imani Gandy, told Amnesty, "I get harassment as a woman and I get the extra harassment because of race and being a [B]lack woman. . . . Whatever identity they can pick they will pick it and use it against you."<sup>85</sup>

The threats and abuse are regularly misogynistic and sexualized.<sup>86</sup> In the 2020 United Nations study, nearly 20% of women who received threats said they were threatened with sexual violence.<sup>87</sup> Almost all women journalists who responded to a University of Texas study reported online harassment focused on their person, gender, or sexuality.<sup>88</sup> One editor stated, "It was not criticism of my work; it was actually the destruction of my person . . . ."<sup>89</sup>

This is not to say that men are immune. Michael Edison Hayden, a senior investigative reporter at the Southern Poverty Law Center said, "I've been deluged with violent threats. There were people threatening to kill my father on specific dates and times . . . . This stuff is not a game.

78. AMNESTY INT'L, *supra* note 23.

79. Masullo Chen et al., *supra* note 58, at 1.

80. AMNESTY INT'L, *supra* note 23.

81. Lucy Westcott, *Why Newsrooms Need a Solution to End Online Harassment of Reporters*, COMM. TO PROTECT JOURNALISTS (Sept. 4, 2019, 9:00 AM), <https://cpj.org/2019/09/newsrooms-solution-online-harassment-canada-usa/>.

82. Waisbord, *supra* note 10, at 1033; Silvio Waisbord, *Trolling Journalists and the Risks of Digital Publicity*, JOURNALISM PRAC. (Sept. 29, 2020) ("Reporters who appear stereotypically non-white, female, Arab, Muslim, Jewish or non-straight, based on their bylines and photographs showing skin color and clothing, are targets."); Ferrier & Garud-Patkar, *supra* note 60, at 322 (citing Becky Gardiner, Mahana Mansfield, Ian Anderson, Josh Holder, Daan Louter, & Monica Ulmanu, *The Dark Side of Guardian Comments*, GUARDIAN (Apr. 12, 2016), <https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>).

83. AMNESTY INT'L, *supra* note 23.

84. *Id.*

85. *Toxic Twitter: Triggers of Violence and Abuse Against Women on Twitter*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-2/>.

86. See Posetti et al., *supra* note 5, at 2, 8.

87. *Id.* at 6.

88. Masullo Chen et al., *supra* note 58, at 2.

89. *Id.*

This isn't something people should do without some level of self-protection."<sup>90</sup>

Hayden's experience also points to another reason journalists are targeted—the subject matter on which they are reporting. Hayden investigates and writes about hate groups and extremists—topics that, unsurprisingly, trigger online trolling and violence.<sup>91</sup> Scholars have also noted that reporting on topics such as politics, race, gender, human rights, disinformation, immigration, national security, and guns attract vitriol.<sup>92</sup>

### C. Causes of Violence

Violence against journalists is a means of controlling the boundaries of legitimate public discourse. It is a power grab—a fight to maintain the centrality of whiteness and masculinity in the sphere of public discourse and to relegate all other identities and their stories to the margins. This has been true throughout American history, and the latest chapter of this history has happened in lockstep with the rise of Trump and authoritarianism.<sup>93</sup> Violence has been worsened significantly in the modern era because of social media platforms. Platforms—and the speed, scale, and anonymity that are baked into them—have been effective conduits for this terror.<sup>94</sup> More traditional forms of online communication, like email, have also been used to unleash a “tsunami of hateful attacks.”<sup>95</sup>

Historically, violence against the press has been the product of racism and fears over loss of power. The first “martyr” to American press freedom was Elijah Lovejoy, the editor of the *Observer*, an abolitionist newspaper in Alton, Illinois, who was murdered in 1836.<sup>96</sup> Lovejoy had originally been editing a religious weekly, but then wrote about a local lynching and protested the failure to convict the perpetrators.<sup>97</sup> Over time, he began to devote the paper more to abolitionist content.<sup>98</sup> Consequently, the paper's printing press was attacked and destroyed four times (once when it was

90. See Sara Sheridan, *How Can Journalists and Researchers Keep Themselves Safe While Reporting Online*, TOW CTR. FOR DIGIT. JOURNALISM (Jan. 12, 2021), <https://towcenter.medium.com/how-can-journalists-and-researchers-keep-themselves-safe-while-reporting-online-cf09b8e0d495>.

91. See *id.*; Michael Edison Hayden, S. POVERTY L. CTR., <https://www.splcenter.org/about/staff/michael-edison-hayden> (providing a sampling of Hayden's reporting).

92. Silvio Waisbord, *Mob Censorship: Online Harassment of Journalists & the Risks of Digital Publicity*, YOUTUBE (Apr. 1, 2020), [https://www.youtube.com/watch?v=u\\_-GtDBij2k](https://www.youtube.com/watch?v=u_-GtDBij2k) at 09:30; Waisbord, *supra* note 10, at 1033–34; Posetti et al., *supra* note 5, at 8.

93. See Waisbord, *supra* note 10, at 1036 (“Globally, right-wing populism has catapulted anti-press sentiments to the political mainstream in recent years.”).

94. See Jennifer R. Henrichsen, Michelle Betz, & Joanne M. Liosky, *Building Digital Safety for Journalism: A Survey of Selected Issues*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. 8 (2015).

95. See Julia Angwin, *Cheap Tricks: The Low Cost of Internet Harassment*, PROPUBLICA (Nov. 9, 2017, 7:00 AM), <https://www.propublica.org/article/cheap-tricks-the-low-cost-of-internet-harassment>.

96. NERONE, *supra* note 25, at 107.

97. *Id.*

98. See *id.*

thrown into a river) by those attempting to silence Lovejoy.<sup>99</sup> When a fifth press arrived, Lovejoy was killed, with a rifle in his hand, defending it.<sup>100</sup>

About a year after Lovejoy's murder, a twenty-eight-year-old Abraham Lincoln seemed to invoke Lovejoy when he gave a speech in Springfield, Illinois (about eighty-five miles from Alton), decrying the "mobocratic spirit" that was pervading the land.<sup>101</sup> The future president issued this warning:

[W]henever the vicious portion of the population shall be permitted to gather in bands of hundreds and thousands, and burn churches, ravage and rob provision-stores, throw printing presses into rivers, shoot editors, and hang and burn obnoxious persons at pleasure, and with impunity; depend on it, this Government cannot last.<sup>102</sup>

The speech was prescient, and it reveals that violence against the press is a facet of societal power struggles over entrenched hierarchies and inequities, including racism and sexism.<sup>103</sup> As John Nerone, a historian of violence against the press, has written, "Media are networks of relationships that can be constructed, reconstructed, and deconstructed in various ways with varying implications for where power is located and how it is exercised. Violent activity is often involved in the process of definition."<sup>104</sup>

Periods of sustained violence against the press are not random but rather, are a reaction to the ascendancy of minority voices.<sup>105</sup> Nerone points, in particular, to the Revolutionary period (when "newspapers were called on to serve as advocates of a movement") and the Antebellum period ("when reform editors set out to accomplish the nation's moral reconstruction").<sup>106</sup> Violence has been common "when minorities claimed the press as a voice of their own."<sup>107</sup> It is a method of intimidation and exclusion.<sup>108</sup> And it has occurred "wherever the press is seen to be an agent of real or potential political transformation . . . ."<sup>109</sup>

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99. *Id.*

100. *Id.*

101. *Id.* at 108; Abraham Lincoln, Lyceum Address (Jan. 27, 1838); *Speeches & Writings: Lyceum Address*, ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm> (last visited Mar. 28, 2022); see also *Distance from Springfield, IL to Alton, IL*, <https://www.distance-cities.com/distance-springfield-il-to-alton-il> (last visited Mar. 28, 2022).

102. Lincoln, *supra* note 101.

103. See NERONE, *supra* note 25, at 17.

104. *Id.*

105. See *id.* at 15.

106. *Id.*

107. *Id.*

108. See John Nerone, *Violence Against Journalists*, in THE INT'L ENCYC. OF COMM'N 5275, 5275 (Wolfgang Donsback ed., 2008).

109. *Id.* at 5276.

Take for example the now-iconic reporting of Black journalist Ida B. Wells.<sup>110</sup> In 1892, after publishing in the newspaper she owned, the *Memphis Free Speech*, an editorial denouncing lynching, Wells received countless death threats.<sup>111</sup> A white mob then destroyed the newspaper's offices and Wells (who was in New York at the time) left Memphis permanently.<sup>112</sup>

Viewed in this context, today's violence against the press seems almost predictable. Although there was scattered physical violence against the press throughout the Trump presidency, the sustained wave of physical violence occurred at Black Lives Matter protests in the wake of the murder of George Floyd—a moment in which protesters sought to focus attention on the scourge of police violence against the Black community.<sup>113</sup>

Previously marginalized voices have risen up in other spaces too, including newsrooms. Calls have grown louder for a racial reckoning over both the way the news is covered and who covers it.<sup>114</sup> In a June 2020 essay, Pulitzer Prize-winning journalist Wesley Lowery decried the failure of newsrooms “to employ, retain and listen to [B]lack people” and how the “views and inclinations of whiteness are accepted as the objective neutral.”<sup>115</sup> Lowery called on journalists to shelve this warped understanding of objectivity and to adopt a “method of moral clarity.”<sup>116</sup> History indicates that movements like these—movements that demand a shift in the hierarchy—will be met with a backlash. That backlash will often be violent.

Relatedly, surging anti-press rhetoric and the rise of right-wing movements are kindling for this violence.<sup>117</sup> Anti-press rallying cries have long been central to right-wing movements.<sup>118</sup> “Fake news” is the modern-day equivalent of the German *Lügenpresse* (“lying press”) used by the

110. In 2020, Wells was posthumously awarded a Pulitzer Prize. *Ida B. Wells*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/ida-b-wells> (last visited Mar. 28, 2022).

111. See Anne Helen Petersen, *The Cost of Reporting While Female*, COLUM. JOURNALISM REV. (2018), [https://www.cjr.org/special\\_report/reporting-female-harassment-journalism.php](https://www.cjr.org/special_report/reporting-female-harassment-journalism.php); NERONE, *supra* note 25, at 144 (noting that it is unclear whether the editorial was written by Wells or her business partner).

112. Petersen, *supra* note 111; NERONE, *supra* note 25, at 144.

113. See Cheryl Corley, *Black Lives Matter Fights Disinformation To Keep The Movement Strong*, NPR (May 25, 2021, 2:56 PM), <https://www.npr.org/2021/05/25/999841030/black-lives-matter-fights-disinformation-to-keep-the-movement-strong>.

114. See, e.g., Patrick Soon-Shiong, *The Times' Reckoning on Race and Our Commitment to Meaningful Change*, L.A. TIMES (Sept. 27, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-reckoning-on-race>.

115. Wesley Lowery, *A Reckoning Over Objectivity, Led by Black Journalists*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/opinion/objectivity-black-journalists-coronavirus.html>.

116. *Id.*

117. See 2020 World Press Freedom Index: “Entering a Decisive Decade for Journalism, Exacerbated by Coronavirus,” REPS. WITHOUT BORDERS, <https://rsf.org/en/2020-world-press-freedom-index-entering-decisive-decade-journalism-exacerbated-coronavirus> (describing threats to press freedom generally).

118. Waisbord, *supra* note 82, at 12 (“[T]rolling cannot be understood outside the context of right-wing aggressive, offensive rhetoric against ‘the media’ in contemporary politics. It has been

Nazis and, more recently, by German anti-immigrant activists.<sup>119</sup> Trump's Twitter account served as a megaphone for this rhetoric before being permanently suspended in the final weeks of his presidency.<sup>120</sup> During his time in office, Trump posted approximately 1,800 negative tweets about the media.<sup>121</sup> This included a twenty-eight-second video in which he is depicted wrestling and punching a figure whose head was replaced by a CNN logo.<sup>122</sup> Trump targeted specific organizations and even reporters calling them "nasty," "disgusting," "dumb," "fake," "dishonest," and more.<sup>123</sup> "Trump makes a very calculated decision about who he is going to pick on," said Lucy Daghli, former executive director of the Reporters Committee for Freedom of the Press and now dean of the journalism school at the University of Maryland.<sup>124</sup> "He's encouraging the public—actually calling on them—to harm journalists."<sup>125</sup> Trump singled out Black women journalists for particular abuse. During a few days in November 2018, he attacked three Black women journalists telling one she asked "a lot of stupid questions"; calling another a "loser" and demanding she sit down at a news conference; and telling a third that she had asked him a "racist question."<sup>126</sup>

Trump's attacks became a playbook for other authoritarian leaders. In a 2019 face-to-face meeting, Trump said to Russian President Vladimir Putin, "Fake news is a great term, isn't it? You don't have this problem in Russia, but we do."<sup>127</sup> Putin responded in English, "We also have . . . It's the same."<sup>128</sup> Trump's rhetoric has given foreign leaders more cover for anti-press actions, including violence. For example, it was during the

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central to the rhetoric of President Donald Trump and other right-wing populist leaders who regularly criticize 'the press' with epithets that echo far-right language, legitimize dehumanizing views of journalists, and cue in violent behaviors.") (internal citations omitted).

119. See Rick Noack, *The Ugly History of 'Lügenpresse,' a Nazi Slur Shouted at a Trump Rally*, WASH. POST (Oct. 24, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slug-shouted-at-a-trump-rally/>.

120. Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html>.

121. *Trump's Negative Tweets About the Press (Living Doc)*, <https://docs.google.com/spreadsheets/d/1uNA6nsgcRhhQ0b6USsMNzhYLMfuDRSMhbGZ00WkHk/edit#gid=0> (last visited Mar. 28, 2022); Stephanie Sugarsach, *The Last Trump Tweet Against the Media*, U.S. PRESS FREEDOM TRACKER (Jan. 11, 2021), <https://pressfreedomtracker.us/blog/last-trump-tweet-against-media/> (embedding a link to the Google Doc entitled *Trump's Negative Tweets About the Press (Living Doc)*).

122. Leonard Downie Jr., *The Trump Administration and the Media*, COMM. TO PROTECT JOURNALISTS (Apr. 16, 2020), <https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/#11>.

123. *Id.*

124. *Id.*

125. *Id.*

126. David Nakamura, *Trump's Insults Toward Black Reporters, Candidates Echo 'Historic Playbooks' Used Against African Americans, Critics Say*, WASH. POST (Nov. 10, 2018), [https://www.washingtonpost.com/politics/trumps-insults-toward-black-reporters-candidates-echo-historic-playbooks-used-against-african-americans/2018/11/09/74653438-e440-11e8-b759-3d88a5ce9e19\\_story.html](https://www.washingtonpost.com/politics/trumps-insults-toward-black-reporters-candidates-echo-historic-playbooks-used-against-african-americans/2018/11/09/74653438-e440-11e8-b759-3d88a5ce9e19_story.html).

127. Downie, *supra* note 122.

128. *Id.*

Trump presidency that Saudi Crown Prince Mohammed bin Salman ordered the murder and dismemberment of *Washington Post* columnist Jamal Khashoggi.<sup>129</sup> Likewise, in the Philippines, President Rodrigo Duterte’s government unleashed a torrent of online harassment and “cyber libel” criminal charges against journalist Maria Ressa, corecipient of the 2021 Nobel Peace Prize.<sup>130</sup> Ressa cofounded the *Rappler*, a Philippine news site that is one of few news organizations in the country that critically covers Duterte and his policies.<sup>131</sup> As the *Washington Post* editorial board wrote, “[D]aily, Ms. Ressa is told she should be killed or ‘publicly raped to death.’”<sup>132</sup>

But even though violence against the press can be historically situated and is, perhaps, even predictable now, its scale is new.<sup>133</sup> This is due to technology and widespread access to it.<sup>134</sup> A cell phone or a keyboard is the only weapon needed to attack a journalist.<sup>135</sup> It is no surprise that rates of cybercrime, including cyber harassment, have grown exponentially.<sup>136</sup> One media reporter described the recent surge in online vitriol writing, “The entire internet, from Facebook and Google on down, is groaning under the weight of hateful posts.”<sup>137</sup>

Journalists are also easy to find online. Being in public—whether that public is congregating in a literal public square or a virtual one—is fundamental to the profession.<sup>138</sup> This renders journalists “known citizens.”<sup>139</sup>

129. *Id.*

130. See Robyn Dixon, Shibani Mahtani, & Paul Schemm, *Journalists Known for Taking on Governments of Philippines and Russia Win Nobel Peace Prize*, WASH. POST (Oct. 8, 2021), [https://www.washingtonpost.com/world/nobel-peace-prize-maria-ressa-muratov/2021/10/08/0d0516e8-2806-11ec-8739-5cb6aba30a30\\_story.html](https://www.washingtonpost.com/world/nobel-peace-prize-maria-ressa-muratov/2021/10/08/0d0516e8-2806-11ec-8739-5cb6aba30a30_story.html).

131. *Maria Ressa: The Celebrated Philippine News Boss Enraging Duterte*, BBC (Oct. 8, 2021), <https://www.bbc.com/news/world-asia-49601038>.

132. Editorial Board, *Opinion: An Online Assault on a Female Journalist in the Philippines is a Worldwide Warning*, WASH. POST (Mar. 11, 2021, 2:35 PM), [https://www.washingtonpost.com/opinions/duterte-maria-ressa-online-harassment-philippines/2021/03/11/041ffa0e-81d8-11eb-81db-b02f0398f49a\\_story.html](https://www.washingtonpost.com/opinions/duterte-maria-ressa-online-harassment-philippines/2021/03/11/041ffa0e-81d8-11eb-81db-b02f0398f49a_story.html).

133. See Waisbord, *supra* note 10, at 1032 (describing how harassment of the press has become easier with digital tools).

134. See *id.* at 1032–33.

135. See *id.*; Mary Anne Franks, *Beyond ‘Free Speech for the White Man’: Feminism and the First Amendment*, in RSCH. HANDBOOK ON FEMINIST JURIS. 366, 374–75 (Robin West & Cynthia G. Bowman eds., 2019) (“Throughout history and continuing to the present day, men have responded with fear and rage when women speak, work, dress, travel or make decisions in ways they find unacceptable . . . . This reality has been exacerbated rather than ameliorated by the Internet.”).

136. See Masullo Chen et al., *supra* note 58, at 1 (“This harassment [of journalists]—vitriolic sexist attacks or inappropriately sexual barbs—mirrors the experiences of many women in general online.”).

137. Sara Fischer, *Hate Speech Has Soared Online Since George Floyd’s Death*, AXIOS (July 21, 2020), <https://www.axios.com/hate-speech-online-soars-after-george-floyds-death-463871bb-dfe4-4b0c-becc-e59cdefb6336.html>.

138. Waisbord, *supra* note 82, at 8 (“[J]ournalists are more prone to be targets of vicious attacks simply because they are prominent and easy to identify and contact . . . . Just as they can display their work and ideas publicly, journalists are also more likely to be scrutinized.”); see also Ferrier, *supra* note 47, at 11.

139. See Waisbord, *supra* note 82, at 8 (citing SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* 1–2 (2018) (explaining that the author took the phrase, in turn, from W.H. Auden’s “Unknown Citizen”)).

Journalists' whereabouts, thoughts, and work can be easily surveilled by anyone signing onto social media.<sup>140</sup> Personal branding on social media is an increasingly vital part of a journalist's job. Being verified with a blue check on Twitter is almost a qualification.<sup>141</sup> As one anonymous *Washington Post* reporter said in an internal report on the *Post*'s social media policies, "If I'm deathly afraid of driving, I can opt not to drive. I can take the bus. I feel like I don't have the option to opt out of tweeting."<sup>142</sup> Journalists use social media to cultivate sources and story leads, gather news, distribute and promote news, and interact with their audience.<sup>143</sup> They are often pushed to do this by the news organizations that employ them.<sup>144</sup> News organizations tend to frame journalists' engagement with their audience as an act of virtue and journalistic responsibility and ignore that not all of their audience members are the civically minded citizens envisioned by legal and journalism scholarship.<sup>145</sup> Journalists, if they want to keep their jobs, cannot simply log off.

Meanwhile, social media platforms have done little to protect the journalists who produce the news that draws so many to their sites and reaps them hefty profits.<sup>146</sup> After twelve people were murdered at the offices of the French satirical newspaper *Charlie Hebdo* in 2015, Mark Zuckerberg wrote in a Facebook post: "I'm committed to building a service where you can speak freely without fear of violence."<sup>147</sup> Yet, years later, Twitter does not have policies specific to trolling of journalists and

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140. See *id.*

141. See Ferrier, *supra* note 47, at 11; see generally *About Verified Accounts*, TWITTER HELP CTR., <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> (last visited Mar. 28, 2022).

142. National Social Media Committee, *Recommendations for Social Media Use on the National Desk* (Apr. 20, 2020), <https://int.nyt.com/data/documenthelper/7010-recommendations-for-social-med/a5c91e59333f4fa0c8bf/optimized/full.pdf#page=1>.

143. Ferrier, *supra* note 47, at 11.

144. National Social Media Committee, *supra* note 142 (noting that the *Washington Post*'s existing social media policy dates to an earlier era) ("[R]eporters were urged to build a brand online: Be on Twitter, manage your own Facebook page and post often."); Sarah Eberspacher, *Delete Your Account' or Deal with It? How News Organizations Are Failing to Support Female Reporters Against Online Harassment*, 21 *GEO. J. GENDER & L.* 143, 149–50 (2019).

145. See Thorsten Quandt, *Dark Participation*, 6 *MEDIA & COMMUN* 36, 37 (2018) (describing the early idealism about the internet's promise for citizen participation in journalism and the rise in "dark participation," which is "the evil flip side of citizen engagement").

146. See, e.g., Journalism Competition and Preservation Act, S. 673, 117th Cong. (2021) (proposing that journalists be allowed to collectively bargain with social media sites regarding the distribution of their content); News Release, Amy Klobuchar, Senator, United States Senate, Senator Klobuchar and Representative Cicilline Introduce Legislation to Protect Journalism in the United States (Mar. 10, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/3/senator-klobuchar-and-representative-cicilline-introduce-legislation-to-protect-journalism-in-the-united-states>; Jean-Hugues Roy, *Facebook Profits from Canadian Media Content, But Gives Little in Return*, *CONVERSATION* (Oct. 1, 2020, 3:29 PM), <https://theconversation.com/facebook-profits-from-canadian-media-content-but-gives-little-in-return-146385> (describing how Facebook profits from Canadian journalism).

147. Mark Zuckerberg, *FACEBOOK* (Jan. 9, 2015), <https://www.facebook.com/zuck/posts/10101844454210771>.

Facebook (now Meta) was only beginning to develop them.<sup>148</sup> Both platforms have mechanisms for reporting and blocking users.<sup>149</sup> But these “fledgling” efforts do little to help journalists.<sup>150</sup> Punishment or deplatforming of even serial abusers of the platforms is rare.<sup>151</sup> If users feel they are in danger, both Twitter and Meta recommend contacting law enforcement.<sup>152</sup> Women journalists rate Facebook the least safe of the platforms they use to do their work.<sup>153</sup> Meanwhile, Amnesty International has criticized Twitter for its failure to protect users of its site—especially journalists and politicians—saying that it has failed in its responsibility to protect women’s rights.<sup>154</sup> According to the human rights organization, Twitter’s inadequate responses lead women “to self-censor what they post and limit their interactions.”<sup>155</sup>

Finally, and beyond inaction by social media platforms, violence has also persisted because of the American legal system’s failure to curb it.

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148. See Antigone Davis, *Advancing Our Policies on Online Bullying and Harassment*, META (Oct. 13, 2021), <https://about.fb.com/news/2021/10/advancing-online-bullying-harassment-policies/>. As this Article was being edited, Meta announced that it would “now offer more protections for public figures like journalists and human rights defenders who have become famous involuntarily or because of their work.” *Id.* According to Meta, this would include removing “[s]evere sexualizing content” and “[a]ttacks through negative physical descriptions.” *Id.* Various threats including “[t]hreats that could lead to death (and other forms of high-severity violence)” violate Meta’s Community Standards. *Violence and Incitement*, META, <https://transparency.fb.com/policies/community-standards/violence-incitement/> (last visited Mar. 28, 2022). Threatening violence or “the glorification” of violence violates Twitter’s policies. *Violent Threats Policy*, TWITTER HELP CTR. (Mar. 2019), <https://help.twitter.com/en/rules-and-policies/violent-threats-glorification>. Twitter also has a page entitled “How journalists can use Twitter safely,” but the links it contains for reporting various issues do not appear to be unique to journalists. See Paul Armstrong, *How Journalists Can Use Twitter Safely*, TWITTER MEDIA, <https://media.twitter.com/en/articles/best-practice/2021/how-journalists-can-use-twitter-safely> (last visited Mar. 28, 2022).

149. See *What Is Blocking on Facebook and How Do I Block Someone?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/168009843260943> (last visited Mar. 28, 2022); *How to Block Accounts on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Mar. 28, 2022).

150. See Julie Posetti, Nabeelah Shabbir, Diana Maynard, Kalina Bontcheva, & Nermine Aboulez, *The Chilling: Global Trends in Online Violence Against Women Journalists*, UNESCO 1, 8 (Apr. 2021), <https://en.unesco.org/sites/default/files/the-chilling.pdf>.

151. See Caroline Sindere & Vandinika Shukla, *Some Very Simple Ways Platforms Could Better Protect Journalists from Harassment*, SLATE (May 5, 2021, 9:00 AM), <https://slate.com/technology/2021/05/twitter-facebook-reddit-harassment-journalists.html>. Facebook may actually aggravate harassment of journalists by treating them as public figures. *Id.*; Alex Hern, *Facebook Guidelines Allow Users to Call for Death of Public Figures*, GUARDIAN (Mar. 23, 2021, 3:28 PM), <https://www.theguardian.com/technology/2021/mar/23/facebook-guidelines-allow-for-users-to-call-for-death-of-public-figures>. This means they can be targeted in ways that would otherwise not be permitted on the site, including by death threats. See Hern, *supra*.

152. *Report Abusive Behavior*, TWITTER HELP CTR., <https://help.twitter.com/en/safety-and-security/report-abusive-behavior> (last visited Mar. 28, 2022); *How Do I Report Inappropriate or Abusive Things on Facebook?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/212722115425932/?helpref=related> (last visited Mar. 28, 2022) (mentioning how users can report messages including nudity, hate speech, and threats).

153. Posetti et al., *supra* note 150, at 36.

154. *Freedom of Expression*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/freedom-of-expression/> (last visited Mar. 28, 2022).

155. *Id.*

Violence against journalists is largely being committed without consequence.<sup>156</sup> Federal and state law enforcement have been critiqued for having “little capacity or drive” to prosecute online threats generally.<sup>157</sup> For example, Virginia Heffernan, a columnist for the *Los Angeles Times* who has been the target of an online hate campaign, tweeted that while local police have secured her house against physical threats, “They don’t have the resources or inclination to track coordination w/Reddit, Parler, Gateway Pundit, Ben Shapiro, Fox, etc.”<sup>158</sup> And so, at this point, the violence continues almost unabated.<sup>159</sup> Without action, indicators suggest that it will continue to surge.<sup>160</sup>

## II. HOW JOURNALISM IS OBSTRUCTED

Violence against journalists harms individual journalists physically and mentally. As described in the Introduction, American journalists have been bloodied and maimed covering protests.<sup>161</sup> They have even been murdered at their workplaces.<sup>162</sup> In 2018, five employees of the *Capital Gazette* in Annapolis, Maryland were shot and killed in their newsroom.<sup>163</sup> Their murderer was a man who was angry that a columnist at the newspaper had written about his online harassment of a former high school classmate.<sup>164</sup>

Journalist victims of online abuse describe depression, fatigue, headaches, and anxiety.<sup>165</sup> These effects can be debilitating.<sup>166</sup> One reporter described the aftermath of having to listen to abusive comments saying: “I had to spend most of the day in bed after listening to a five-minute conversation about how unpleasant but necessary a task raping me would be.”<sup>167</sup>

These individualized harms—including death—could not be more severe. But the aperture of our perspective on this violence needs to be widened to understand its collective impact. These acts are assaults on

156. Waisbord, *supra* note 10, at 1039 (“Widespread impunity perpetuates a cycle of anti-press violence.”); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 19 (2014).

157. See Amanda Hess, *Why Women Aren’t Welcome on the Internet*, PAC. STANDARD (June 14, 2017), <https://psmag.com/social-justice/women-arent-welcome-internet-72170>.

158. See Virginia Heffernan (@page88), TWITTER (Mar. 26, 2021, 8:37 AM), <https://twitter.com/page88/status/1375456758966198281>.

159. See Posetti et al., *supra* note 5, at 15 (“A climate of impunity for online attacks raises questions . . .”).

160. See *id.*

161. See Douglas, *supra* note 2; Shammas, *supra* note 3; Burns, *supra* note 3.

162. Ian Duncan & Nicholas Bogel-Burroughs, *Capital Gazette Shooting Suspect’s Anger Flared, and Fell Silent. Then Police Say, It Exploded*, BALTIMORE SUN (July 8, 2018, 5:00 AM), <https://www.baltimoresun.com/news/crime/bs-md-ramos-profile-20180705-story.html>.

163. *Id.*

164. *Id.*

165. See Ferrier, *supra* note 47, at 7; Lili Levi, *Racialized, Judaized, Feminized: Identity-Based Attacks on the Press* 1–2 (Univ. of Miami Legal Stud. Rsch. Paper No. 3925289, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3925289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3925289) (contextualizing the trauma that online violence inflicts specifically on African American and Jewish women journalists).

166. See Matsuda, *supra* note 9, at 24; Ferrier, *supra* note 47, at 35.

167. Westcott, *supra* note 24.

freedom of the press and freedom of expression. By precluding and changing the stories journalists share, this violence alters our national conversations.

Obstruction of journalism operates at three levels. The first is the story level. At this level, violence prevents journalists from covering certain events or occurrences.<sup>168</sup> The second is the beat level. Here, it prevents journalists from reporting on certain topics altogether.<sup>169</sup> Third, is the pipeline level. At this level, violence prompts journalists to leave the profession completely or perhaps not enter it.<sup>170</sup> All of these harms then contribute to a collective harm—one that is greater than the sum of its parts. It is the systemic suppression of particular voices, stories, and ideas in our information environment. This systemic suppression undermines freedom of the press and freedom of expression.

#### A. The Story Level

A 2018 column by Theresa Vargas in the *Washington Post* began this way: “Before last week, I had an idea for a column that I thought could speak to gender, power dynamics and motherhood.”<sup>171</sup> She continued, “It could be funny, illuminating and maybe even cause some small measure of change. It could also be—and this is why you will not read it anytime soon—risky.”<sup>172</sup> The headline on the piece was: “The column I won’t write because of a troll with a gun.”<sup>173</sup>

Vargas was voicing a decision that journalists are making quietly: not to publish a story because of fear of violence. In a 2018 study of violence against journalists by the International Women’s Media Foundation and Troll-Busters (a service for journalists who are victims of online attacks),<sup>174</sup> of those respondents who said they’d been threatened or harassed online, about 40% said that “they avoided reporting certain stories as a result of online harassment.”<sup>175</sup> This practice is so common that it has been given a name: strategic avoidance.<sup>176</sup>

This phenomenon has not yet been widely studied, and it is hard to know what the impact of journalists avoiding any one story might be. If another journalist picks up the story and reports on the event or occurrence, then perhaps the impact is small. Yet, given that many journalists have

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168. See Ferrier, *supra* note 47, at 7.

169. See Masullo Chen et al., *supra* note 58, at 2.

170. See Waisbord, *supra* note 10, at 1038.

171. Theresa Vargas, *The Column I Won’t Write Because of a Troll With a Gun*, WASH. POST (July 4, 2018), [https://www.washingtonpost.com/local/the-column-i-wont-write-because-of-a-troll-with-a-gun/2018/07/04/0dc6db64-7ee7-11e8-b0ef-fffcabeff946\\_story.html](https://www.washingtonpost.com/local/the-column-i-wont-write-because-of-a-troll-with-a-gun/2018/07/04/0dc6db64-7ee7-11e8-b0ef-fffcabeff946_story.html).

172. *Id.*

173. *Id.*

174. *About*, TROLLBUSTERS, <http://www.troll-busters.com/> (click on “About”).

175. Ferrier, *supra* note 47, at 7.

176. Waisbord, *supra* note 92, at 32:00.

broad control about what they cover within their designated beat, it is possible these stories simply do not get told.

Even when journalists tell certain stories, their fear of violent reprisals may shape their reporting and writing. A Latina newspaper journalist told researchers at the University of Texas that she was “extra-vigilant about showing multiple sides of a story to prevent complaints that may escalate into abuse.”<sup>177</sup> And a television journalist told the same researchers that she “tries to avoid details in her stories that she knows will upset people.”<sup>178</sup> The television journalist said: “Yes, it affects the way I do my stories . . . I am more careful.”<sup>179</sup>

Showing “both sides” and being “more careful” may initially seem like simply good journalistic practice, but they can be understood differently. In recent decades, “both sides” journalism has been roundly criticized as biased in its own right because certain topics do not lend themselves to this treatment—such as the scientific validity of climate change or white supremacy.<sup>180</sup> As Norm Ornstein, a resident scholar at the conservative American Enterprise Institute, wrote, “insisting on equivalence as the mantra of mainstream journalism, leaves the average voter at sea, unable to identify and vote against those perpetrating the problem.”<sup>181</sup> Rather than simplistically parroting each side of an issue as a means of getting at an ever elusive truth, journalism experts have called for transparency of methods and a “discipline of verification.”<sup>182</sup>

Plus, returning to the television reporter’s statement, it is also unclear what she meant by “more careful.” Of course, more accurate reporting is desirable; accuracy is the end goal of the “discipline of verification.”<sup>183</sup> But when the statement is paired with her comment that she avoids upsetting her audience, “more careful” can easily be understood as self-censorship rooted in fear.

### *B. The Beat Level*

Obstruction of journalism does not operate with equal force across all subject matters. Coverage of certain issues seems to be chilled more than others.<sup>184</sup> This is obstruction at the beat level. A beat is the topic or

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177. Masullo Chen et al., *supra* note 58, at 4.

178. *Id.*

179. *Id.*

180. See Norm Ornstein, *Yes, Polarization Is Asymmetric—and Conservatives are Worse*, ATLANTIC (June 19, 2014), <https://www.theatlantic.com/politics/archive/2014/06/yes-polarization-is-asymmetric-and-conservatives-are-worse/373044/>.

181. *Id.*

182. See Tom Rosenstiel (@TomRosenstiel), TWITTER (June 24, 2020, 6:53 AM), <https://twitter.com/tomrosenstiel/status/1275773988053102592?lang=en>.

183. See BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 126 (3d ed. 2014).

184. Masullo Chen et al., *supra* note 58, at 2.

area a reporter covers day in and day out and about which the reporter develops sources and expertise.<sup>185</sup>

Those beats that inspire the most violence and abuse include what University of Texas researchers refer to as “divisive topics,” including “immigration, race, feminism, or politics . . . .”<sup>186</sup> Writing about disinformation also tends to lead to higher levels of abuse.<sup>187</sup> Of course, virtually no news is untouched by these topics, but their prominence in a story seems to provoke violence.<sup>188</sup> Coverage of other topics that led to particularly virulent attacks against journalists included stereotypically male domains like automobiles and video gaming.<sup>189</sup>

Harm at the beat level is of a different magnitude than at the story level. It may mean that journalists are not developing sources and specialized knowledge in these areas. This prevents them from doing as high-quality reporting as they otherwise might. It may also mean that certain beats receive little or no attention. According to journalism scholars Michelle Ferrier and Nisha Garud-Patkar, online harassment can lead to “the abandonment of a line of investigative inquiry.”<sup>190</sup>

It may not be particularly significant if women give up covering a beat like automobiles given that automobiles are not critical to democracy and our ability to self-govern. Yet, it is certainly significant if women cannot write about vital issues like race, immigration, or politics without being attacked. It is also significant if these issues are simply covered less often or less vigorously due to threats.

This avoidance is real.<sup>191</sup> For example, journalist Lauren Kirchner described being threatened by acolytes of Fox News host Tucker Carlson after Carlson aired a segment about Kirchner’s reporting on hate groups for news nonprofit *ProPublica*.<sup>192</sup> Kirchner said that “[t]he rape & death threats continued for weeks.”<sup>193</sup> Other women journalists have also been threatened and harassed by Carlson watchers—encouraged by Carlson, who has repeatedly berated women journalists during his program.<sup>194</sup> The

185. *The Ultimate List of Broadcast Journalism Terms*, N.Y. FILM ACAD. (Feb. 19, 2016), <https://www.nyfa.edu/student-resources/the-ultimate-list-of-broadcast-journalism-terms/>.

186. Masullo Chen et al., *supra* note 58, at 2.

187. See Posetti et al., *supra* note 5, at 8 (noting that of the story topics that led to higher level of online abuse, 16% of respondents said those stories were about disinformation).

188. Waisbord, *supra* note 10, at 1033–34.

189. Masullo Chen et al., *supra* note 58, at 2.

190. Ferrier & Garud-Patkar, *supra* note 60, at 319.

191. See Posetti et al., *supra* note 150, at 27 (quoting NBC disinformation journalist Brandy Zadrozny) (“I’m not in a war zone. I’m behind a computer. But the effect of online harassment and bad faith journalism from disinformation agents . . . is meant to silence us, meant to stop our reporting, meant to scare us. I think it does all those things . . . . And it takes a real toll on you.”).

192. Lauren Kirchner (@lkirchner), TWITTER (Mar. 10, 2021, 9:25 AM), <https://twitter.com/lkirchner/status/1369685947986612227>.

193. *Id.*

194. See Adam Gabbatt, *Tucker Carlson’s Targeting of Taylor Lorenz Follows Pattern of Berating Female Journalists*, GUARDIAN (Mar. 13, 2021, 9:00 AM), <https://www.theguardian.com/media/2021/mar/13/tucker-carlson-taylor-lorenz-pattern-berating-female-journalists>.

violence had a chilling effect, and Kirchner believes that effect was intentional.<sup>195</sup> She said, “I confess that it made me want to avoid reporting on that topic again. And that’s exactly why they do it.”<sup>196</sup>

### C. The Pipeline Level

Beyond stamping out stories or disrupting certain beats, another harmful effect of violence against journalists is starting to be borne out by the data. Violence is driving women away from the profession.<sup>197</sup> For example, the 2020 United Nations study found that 4% of women journalists who experienced online abuse responded by quitting their jobs and 2% quit the profession for good.<sup>198</sup> The report cautioned that although “these numbers might appear small, this is a significant indicator of the perniciousness of the problem.”<sup>199</sup> That warning seemed prescient when, one year later, Reporters Without Borders released a study indicating that digital harassment caused about a quarter of respondents to leave professional networks, resign, not want to renew contracts, or abandon specialties.<sup>200</sup>

If violence continues to climb, flight from the profession will likely increase.<sup>201</sup> In the Troll-Busters study, 29% of respondents said threats and attacks made them think about getting out of the profession.<sup>202</sup> And indicating a serious pipeline problem, early career journalists were nearly twice as likely to say this as journalists more than forty years old.<sup>203</sup>

Newsrooms are likely contributing to this problem. They have done little to help journalists address the deluge of violence.<sup>204</sup> As is true with violence against women generally, women journalists have long been counseled to accept the abuse and develop a thicker skin.<sup>205</sup> Especially as online violence began spreading, newsrooms told women to “toughen

195. Kirchner, *supra* note 192.

196. *Id.*

197. See Waisbord, *supra* note 10, at 1038 (noting that reporters are considering quitting journalism amidst increasing attacks).

198. Posetti et al., *supra* note 5, at 10.

199. *Id.*; Ferrier & Garud-Patkar, *supra* note 60, at 321 (“Some give up journalism or leave their jobs entirely; others may either stop reporting from specific localities, or be forced to relocate.”).

200. *Sexism’s Toll on Journalism*, REPS. WITHOUT BORDERS 1, 25 (2021), [https://rsf.org/sites/default/files/sexisms\\_toll\\_on\\_journalism.pdf](https://rsf.org/sites/default/files/sexisms_toll_on_journalism.pdf).

201. This cannot be predicted for certain, but avoidance of online violence is a common response to fear of harassment. A 2016 Data & Society report found that 41% of women ages fifteen to twenty-nine self-censor to avoid potential online harassment. Amanda Lenhart, Michele Ybarra, Kathryn Zickuhr, & Myeshia Price-Feeney, *Online Harassment, Digital Abuse, and Cyberstalking in America*, DATA & SOC’Y RSCH. INST. 1, 4 (2016), [https://datasociety.net/wp-content/uploads/2016/11/Online\\_Harassment\\_2016.pdf](https://datasociety.net/wp-content/uploads/2016/11/Online_Harassment_2016.pdf). Moreover, as Mari J. Matsuda has written, recipients of racist hate speech “have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.” Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2337 (1989).

202. Ferrier, *supra* note 47, at 44.

203. *Id.*

204. Posetti et al., *supra* note 5, at 13 (describing accounts of women who complained to their employers about online attacks and explaining the employers’ responses were most frequently “very unhelpful”).

205. Posetti, *supra* note 52.

up’ . . . because it was ‘only online’ and therefore not ‘real’ or ‘serious.’”<sup>206</sup> In a 2018 survey conducted by PEN America of writers and journalists, “an appalling number of them expressed how alone, isolated, and helpless they felt during episodes of online harassment.”<sup>207</sup>

The studies indicating that women are leaving or not entering the profession do not indicate whether those making these decisions are disproportionately women of color.<sup>208</sup> But given the impact of this violence on journalists of color, it would not be surprising if there were a strong correlation. This is especially concerning given journalism’s chronic sexism and failure to achieve diversity.<sup>209</sup> The author of a 2020 report commissioned by the Bill & Melinda Gates Foundation concluded that, “[i]n the 21st century, news is produced mainly by men, featuring more men, and is consumed by more men.”<sup>210</sup> This remains true two decades later. Women make up approximately 42% of all newsroom workers.<sup>211</sup> They are only 34% of newsroom supervisors.<sup>212</sup>

The failure to create racially and ethnically diverse staffs is likewise severe. In 1978, the American Society of News Editors set a goal that by the year 2000, newsroom diversity would match the diversity of the U.S. population.<sup>213</sup> More than twenty years post-deadline, newsrooms have fallen spectacularly short. Today, racial and ethnic minorities make up approximately 40% of the U.S. population.<sup>214</sup> Yet, people of color are about 22% of the salaried workforce at news organizations.<sup>215</sup> People of color make up fewer than 20% of newsroom managers at print and online publications.<sup>216</sup> In one particularly shocking example, in 2020, only about

206. *Id.*

207. See Laura Macomber, *A New Manual for Writers and Journalists Experiencing Harassment Online*, COLUM. JOURNALISM REV. (Apr. 20, 2018), <https://www.cjr.org/analysis/online-harassment-manual.php>.

208. See Ferrier, *supra* note 47, at 44 (concluding that nearly 30% of all respondents indicated that threats and attacks made them think about getting out of the profession but with no mention of how this may disproportionately impact women of color); see also *Sexism’s Toll on Journalism*, *supra* note 200, at 24–25 (outlining the repercussions of online attacks but similarly lacking discussion of how the attacks disproportionately impact women of color).

209. See Nicole A. Childers, *The Moral Argument for Diversity in Newsrooms is Also a Business Argument – And You Need Both*, NIEMANLAB (Nov. 24, 2020, 1:40 PM), <https://www.niemanlab.org/2020/11/the-moral-case-for-diversity-in-newsrooms-also-makes-good-business-sense/>.

210. Amaris Castillo, *The ‘Missing Perspectives of Women in News’ is Alarming and Grim, a New Report Shows*, POYNTER (Dec. 4, 2020), <https://www.poynter.org/business-work/2020/the-missing-perspectives-of-women-in-news-is-alarming-and-grim-a-new-report-shows/>.

211. *2019 Diversity Survey: Digital-Only Platforms Drive Race and Gender Inclusion Among Newsrooms in 2019 ASNE Newsroom Diversity Survey*, NEWS LEADERS ASS’N (Sept. 10, 2019), <https://www.newsleaders.org/2019-diversity-survey-results>.

212. CANDIS CALLISON & MARY LYNN YOUNG, *Opening Up Journalism’s Crisis, in RECKONING: JOURNALISM’S LIMITS AND POSSIBILITIES* 19 (Oxford Univ. Press 2020).

213. Clark Merrefield, *Race and the Newsroom: 7 Studies to Know*, JOURNALIST’S RES. (July 20, 2020), <https://journalistsresource.org/studies/society/news-media/newsroom-diversity-7-studies/>.

214. *Id.*

215. *2019 Diversity Survey*, *supra* note 211.

216. *Id.*; Rasmus Kleis Nielsen, Meera Selva, & Simge Andi, *Race and Leadership in the News Media 2020: Evidence from Five Markets*, REUTERS INST. (July 16, 2020), <https://reutersinstitute.politics.ox.ac.uk/race-and-leadership-news-media-2020-evidence-five-markets>.

13% of the *Los Angeles Times* newsroom was Latinx.<sup>217</sup> Latinx residents are half of Los Angeles' population.<sup>218</sup> Violence against journalists is becoming another obstacle to creating a press that looks like the communities it covers.

#### *D. Cumulative Obstruction*

These various levels of harm snowball into a broader one—an undermining of freedom of the press and freedom of expression. By capitalizing on fear and trauma, they distort the functioning of the press. And in so doing, they corrupt the operation of the public square so that conversation within it defaults to a white and male perspective. Violence aims to preserve a power hierarchy in which white males maintain their perch.

It is well established that journalism is a public good.<sup>219</sup> In fact, journalism scholars have gone further and called news and information “merit goods”—meaning that their production should not be dependent on popular choice but on social need.<sup>220</sup> Journalists are public watchdogs, storytellers, and creators of community. They are also educators and proxies for citizens.<sup>221</sup> The Supreme Court has called these roles a “[g]reat responsibility” and said that, “Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”<sup>222</sup> In other words, the press is central to citizens' ability to participate in democracy.

The importance of the press has been reaffirmed during the pandemic. In this period, the federal government and numerous states deemed journalists “essential” workers.<sup>223</sup> An executive order signed by the Governor of Kentucky somewhat lyrically labeled the media as “life-sustaining.”<sup>224</sup> It has even become clear that accurate news about COVID-19 is

217. Esmeralda Bermudez (@BermudezWrites), TWITTER (June 15, 2020, 5:35 PM), <https://twitter.com/bermudezwrites/status/1272674131679444993>; David Folkenflik, *Rancor Erupts in 'LA Times' Newsroom Over Race, Equity and Protest Coverage*, NPR (June 15, 2020, 5:14 AM), <https://www.npr.org/2020/06/15/874530954/rancor-erupts-in-la-times-newsroom-over-race-equity-and-protest-coverage>.

218. Folkenflik, *supra* note 217.

219. See FTC, FTC STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 4 (2010) (“The news is a ‘public good’ in economic terms.”).

220. VICTOR PICKARD, *DEMOCRACY WITHOUT JOURNALISM?: CONFRONTING THE MISINFORMATION SOCIETY* 64 (Oxford Univ. Press 2020).

221. RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 256–57 (2014).

222. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975).

223. *Updated: News Publishers Deemed “Essential” Businesses During Pandemic*, NEWS MEDIA ALL. (Apr. 7, 2020), <https://www.newsmediaalliance.org/important-news-publishers-essential-during-pandemic/>.

224. See Ky. Exec. Order No. 2020-257 (Mar. 25, 2020).

vital to public health. Epidemiologists have said that local news is a “bed-rock” for their work and understanding of disease spread.<sup>225</sup>

Violence against journalists shuts down these essential flows of information. Fear is a mighty censor. Even if journalists do not believe that harm is immediate, violent threats can still create an environment that is destabilizing because journalists are worried about the potential of danger to themselves and loved ones.<sup>226</sup> Instigating this fear is an attack on journalists’ autonomy, dignity, and ability to express themselves.<sup>227</sup> And when nearly 70% of women journalists say they are concerned about their online safety at work (and more than half are concerned about physical safety), that chills the public square in specific ways.<sup>228</sup> The voices of women journalists are silenced.<sup>229</sup> And, as noted, so are the voices of the women they interview and write about.<sup>230</sup>

In this way, it is perhaps instructive to understand the violence as akin to a prior restraint. Under a conventional understanding, prior restraints occur when the government precludes publication of certain information (e.g., the government trying to block newspapers’ publication of the Pentagon Papers in the 1970s).<sup>231</sup> The Supreme Court has gone as far as to say that preventing prior restraints is the First Amendment’s “main purpose,” especially when the restraints are aimed at news.<sup>232</sup>

Violence against journalists has this same impact. It prevents publication. It scares journalists from seeking out information in the first instance and even, as noted, forces some out of the profession.<sup>233</sup> In this way, it is perhaps the ultimate prior restraint. It is a complete silencing. Of course, the First Amendment cannot remedy these prior restraints because they are committed by private parties and not the government.<sup>234</sup> But, as will be discussed in the next Section, that does not mean that no remedy should exist.

225. Helen Branswell, *When Towns Lose Their Newspapers, Disease Detectives are Left Flying Blind*, STAT (Mar. 20, 2018), <https://www.scientificamerican.com/article/when-towns-lose-their-newspapers-disease-detectives-are-left-flying-blind/>.

226. Ferrier & Garud-Patkar, *supra* note 60, at 320–21.

227. *Id.* at 321.

228. See Ferrier, *supra* note 47, at 25.

229. *Id.* at 6 (“This hostile environment is a direct attack on freedom of expression worldwide with the intent to silence women’s voices and the stories they tell.”); see Ferrier & Garud-Patkar, *supra* note 60, at 319; see also ORG. FOR SEC. & COOP. IN EUR., *NEW CHALLENGES TO FREEDOM OF EXPRESSION: COUNTERING ONLINE ABUSE OF FEMALE JOURNALISTS* 33 (2016) [hereinafter *NEW CHALLENGES*] (“Digital threats to women journalists aim[] to do what misogyny has always done. They represent an attempt to prevent women from participating in public life.”).

230. *NEW CHALLENGES*, *supra* note 229, at 9 (“[W]omen make up only 24 per cent of those heard about in the news, although they constitute half of the population.”).

231. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

232. See *Neb. Press v. Stuart*, 427 U.S. 539, 557 (1976) (quoting *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907)) (“The main purpose of [the First Amendment] is ‘to prevent all such previous restraints upon publications as had been practiced by other governments.’”).

233. See Waisbord, *supra* note 10, at 1038.

234. See Jack M. Balkin, *Old School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2298–99 (2014).

Finally, when freedom of the press is undermined, freedom of expression is not far behind.<sup>235</sup> Violence against journalists is a precursor for state-sponsored repression and degradation of human rights.<sup>236</sup> If our information systems are coal mines, journalists are the canaries.<sup>237</sup> If journalism is being metaphorically asphyxiated, it is time to take heed.

### III. ADDRESSING OBSTRUCTION OF JOURNALISM

With its skyrocketing rates of violence against journalists, the United States can no longer fairly view itself as exceptional in the protections it affords the press. Americans cannot continue to smugly believe that the First Amendment's negative-rights approach has provided the press all the freedom and protection that it needs.

Instead, a rethinking of how to wield law as a tool to protect the press is urgently needed. A federal obstruction of journalism statute would begin to do this by recognizing violence against journalists as a threat to freedom of the press and freedom of expression. Obstruction of journalism would be modeled on federal obstruction of justice laws, which criminalize threats and force against a democracy-enhancing institution—the judiciary.<sup>238</sup>

Although it would punish the use of words, obstruction of journalism would help to realize values that underlie the First Amendment. It would be speech enhancing, and it could help prompt a turning point in our understanding of the First Amendment as a press-preservation mechanism. And beyond its substantive impact, an obstruction of journalism statute would have important rhetorical significance during this historical moment in which the press is widely held in low esteem but its work remains essential.

#### A. Borrowing from Obstruction of Justice

Properly combatting violence against journalists means combatting it holistically, recognizing that it injures not just individuals but an institution and freedoms collectively held by American citizens. A time-tested model for this effort exists: obstruction of justice laws. These laws were designed to protect our justice system and the judiciary as an institution.<sup>239</sup> Plus, they were specifically aimed at staving off the actual and threatened violence that could corrupt and damage it.

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235. See Waisbord, *supra* note 10, at 1031.

236. See Anita R. Gohdes & Sabine C. Carey, *Canaries in a Coal-Mine? What the Killings of Journalists Tell Us About Future Repression*, 54 J. PEACE RSCH. 157, 161 (2017).

237. See *id.* at 158; see also Waisbord, *supra* note 10, at 1031 (“Journalism has been historically the bellwether of speech conditions in the public sphere.”); Waisbord, *supra* note 92, at 14:00.

238. See 18 U.S.C. § 1503.

239. See Ellen S. Podgor, *Obstruction of Justice: Redesigning the Shortcut*, 46 BYU L. REV. 657, 667 (2021).

“Obstruction of justice” is a label assigned to a broad array of laws punishing a variety of conduct.<sup>240</sup> It includes a suite of twenty-two different statutes within Title 18 of the federal code.<sup>241</sup> Under the federal sentencing guidelines, it is also a basis for a sentencing enhancement.<sup>242</sup> But despite different wording and mechanisms, all of these variations on obstruction of justice have a single aim: the protection of the judicial process.<sup>243</sup> In fact, the 1831 statute that evolved into the modern-day collection of obstruction of justice laws was explicitly directed at protecting the “due administration of justice.”<sup>244</sup>

This aim is obvious from even a cursory scan of the relevant United States Code sections that criminalize obstruction of justice. Sections 1501 through 1520 outlaw things such as “assault on a process server,”<sup>245</sup> “influencing or injuring officer or juror generally,”<sup>246</sup> “obstruction of court orders,”<sup>247</sup> and “retaliating against a witness, victim, or an informant.”<sup>248</sup>

These laws criminalize obstruction—often obstruction that is waged through violence—against processes aimed at achieving justice. Perhaps the best example of this is § 1503, which is entitled “Influencing or injuring officer or juror generally.”<sup>249</sup> It is known as the “omnibus” or “catchall” obstruction of justice of statute.<sup>250</sup> And, it states that whomever “corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished. . . .”<sup>251</sup> The punishment is significant—a maximum of ten years in prison.<sup>252</sup> If the obstruction involves a killing or attempted killing, it can be twenty years or more.<sup>253</sup> This language could be morphed into a statute that protects journalism rather than justice. The details are set out in Section III.E.

Beyond borrowing language, an obstruction of journalism statute would signal a borrowing of purpose—the intent to protect a system and not simply those engaged in it. And the systems do have remarkable similarities. Both are ultimately aimed at preserving democratic functioning.

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240. *See id.* at 659, 666.

241. 18 U.S.C. §§ 1501–21 (federal obstruction of justice crimes); *see* Podgor, *supra* note 239, at 659 n.6.

242. U.S. SENT’G GUIDELINES MANUAL § 3C1.1 (U.S. SENT’G COMM’N 2018).

243. *See* 18 U.S.C. §§ 1501–21.

244. Act of Mar. 2, 1831, ch. 99, 4 Stat. 487–88 (1831); *see also* Podgor, *supra* note 239, at 664–65.

245. 18 U.S.C. § 1501.

246. *Id.* § 1503.

247. *Id.* § 1509.

248. *Id.* § 1513.

249. *Id.* § 1503.

250. *See* DEP’T OF JUST., 1724. Protection of Government Processes—Omnibus Clause—18 U.S.C. 1503, CRIM. RES. MANUAL (2020).

251. 18 U.S.C. § 1503(a).

252. *Id.* § 1503(b)(3).

253. *Id.* § 1503(b)(2).

The press's longtime moniker—the Fourth Estate—is a nod to its importance on par with the three official branches of government. Recently, we have seen in vivid terms how vital our news and information ecology are to our democracy. The insurrection on January 6, 2021 at the U.S. Capitol was fueled by the #StoptheSteal disinformation campaign.<sup>254</sup> Disinformation thrives in journalism vacuums.<sup>255</sup> Among the work that disinformation researchers are doing to combat information pollution is developing tools to locate information gaps on the internet and trying to fill them with signal (accurate and democracy-enhancing information).<sup>256</sup>

At a 2021 congressional hearing on misinformation, Joan Donovan of Harvard's Shorenstein Center on Media, Politics and Public Policy told legislators that the “biggest problem facing our nation is misinformation-at-scale. . . .”<sup>257</sup> She added that “[t]he cost of doing nothing is democracy's end.”<sup>258</sup> Yet, despite calls from misinformation experts like Donovan, as well as countless others—including Democratic lawmakers—the Biden Administration has yet to advance any major initiatives to address disinformation.<sup>259</sup> It has not even included disinformation in its list of “immediate priorities.”<sup>260</sup> Given the havoc misinformation can wreak on public health,<sup>261</sup> national security,<sup>262</sup> civil discourse,<sup>263</sup> and beyond, this policy vacuum is frightening. Obstruction of journalism is obviously not a solution, but it would be a piece of a systemic effort to rehabilitate our online spaces and simultaneously promote democracy, freedom of the press, and our collective freedom of expression.

254. See Joshua Kaplan & Joaquin Sapien, *New Details Suggest Senior Trump Aides Knew Jan. 6 Rally Could Get Chaotic*, PROPUBLICA (June 25, 2021, 5:00 AM), <https://www.propublica.org/article/new-details-suggest-senior-trump-aides-knew-jan-6-rally-could-get-chaotic>.

255. See David Ardia, Evan Ringel, Victoria Smith Ekstrand, & Ashley Fox, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online: A Summary of Current Research and Policy Proposals*, UNIV. N.C. CTR. FOR MEDIA L. & POL. 1, 2–3, 19 (2020).

256. See *The Weekly Briefing*, FIRST DRAFT (Jan. 15, 2021), <https://mailchi.mp/firstdraft-news/the-weekly-briefing-20210115?e=e1775485b4>.

257. *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds: Hearing Before the Subcomm. on Priva., Tech. and the Law of the S. Comm. on the Judiciary*, 117th Cong. 7 (Apr. 27, 2021) (statement of Joan Donovan, Research Director, Harvard Kennedy School Shorenstein Center on Media, Politics and Public Policy).

258. *Id.*

259. See, e.g., *id.* (“A problem this big will require Federal oversight.”); Maggie Miller, *Democrats Urge Biden to Address 'Infodemic' of COVID-19 Disinformation, Misinformation*, THE HILL (Dec. 10, 2020), <https://thehill.com/policy/cybersecurity/529757-democrats-urge-biden-to-address-infodemic-of-covid-19-disinformation-and>; Kevin Roose, *How the Biden Administration Can Help Solve Our Reality Crisis*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/technology/biden-reality-crisis-misinformation.html>.

260. *The Biden-Harris Administration Immediate Priorities*, WHITE HOUSE, <https://www.whitehouse.gov/priorities/> (last visited May 25, 2022).

261. See, e.g., Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment*, DEP'T. OF HEALTH & HUM. SERVS. 4 (2021), <https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf>.

262. See, e.g., Glenn S. Gerstell, *The National-Security Case for Fixing Social Media*, THE NEW YORKER (Nov. 13, 2020), <https://www.newyorker.com/tech/annals-of-technology/the-national-security-case-for-fixing-social-media>.

263. See YOCHAI BENKLER, ROBERT FARIS, & HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* 5 (Oxford Univ. Press, 2018) (“Echo chambers ringing with false news make democracies ungovernable.”).

The comparison made here between the judiciary and the press is likely to draw criticism, but that criticism can be countered. Some might argue that journalism is a flawed system unworthy of protection. Yet, our justice system is similarly flawed. Various movements—from prison abolition to engaged journalism—seek to overhaul the judiciary and the press.<sup>264</sup> Yet, as our judiciary remains the institution through which we try to achieve justice, so too, the press is the institution that is our best hope of providing news—accurate and contextualized information about important events and issues in our communities.

### *B. Existing Statutes and Efforts Are Inadequate*

Legal tools exist to address some of the harms individual journalists face. Physical violence could be criminalized under an array of state assault and battery laws. Many states outlaw online threats and cyberstalking.<sup>265</sup> Likewise, at the federal level, 18 U.S.C. § 875 criminalizes online threats.<sup>266</sup> Cyberstalking is prohibited by 18 U.S.C. § 2261A, enacted in 1996 as part of the Violence Against Women Act.<sup>267</sup> Although enforcement of the laws against online violence often lags, it could certainly be enhanced with the help of funding and other incentives.<sup>268</sup>

Prosecuting these crimes would put an end to impunity. There is ample evidence that perpetrators could be located and arrested.<sup>269</sup> Unlike in other nations, where politicians and police are often the assailants, there is no indication that online violence against American journalists is directly state sponsored.<sup>270</sup> Rather, perpetrators in the United States appear primarily to be white men with far-right ideologies who could be apprehended.<sup>271</sup> It is not uncommon for these actors to use accounts that would easily identify them to law enforcement.<sup>272</sup> In fact, in one study of online “firestorms”

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264. See, e.g., Carrie Brown, *Engaged Journalism: It's Finally Happening*, NIEMAN LAB: PREDICTIONS FOR JOURNALISM 2020, <https://www.niemanlab.org/2019/12/engaged-journalism-its-finally-happening/> (last visited Mar. 28, 2022); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–62 (2015).

265. See, e.g., VA. CODE ANN. § 18.2-60 (2021) (threats); D.C. CODE § 22-407 (2013) (threats); CAL. PENAL CODE § 653.2 (West 2010) (cyberstalking); N.Y. PENAL LAW § 120.45 (McKinney 2014) (stalking, including cyberstalking).

266. 18 U.S.C. § 875.

267. *Id.* § 2261A; KEATS CITRON, *supra* note 156, at 124.

268. See KEATS CITRON, *supra* note 156, at 132 (describing enforcement failings).

269. See Brian Stelter, *A Man Was Sentenced to Prison for Threatening Journalists. I Was One of Them*, CNN (Dec. 20, 2021), <https://www.cnn.com/2021/12/20/media/robert-lemke-sentence-threatening-journalists/index.html>; Waisbord, *supra* note 92, at 1:20:00.

270. Waisbord, *supra* note 10, at 1035 (“Attacks are generally conducted by individuals steeped in hate cultures. Sometimes they appear to be loosely coordinated, as in the cases of brigading, swatting, and multiple doxing. . . . While anti-press trolling is systemically planned and executed by state-sponsored networks in many countries, there is no compelling evidence of similar structures and actions in the US.”); *RSF Unveils 20/2020 List of Press Freedom’s Digital Predators*, REPS. WITHOUT BORDERS (Mar. 10, 2020), <https://rsf.org/en/news/rsf-unveils-202020-list-press-freedoms-digital-predators>.

271. See Waisbord, *supra* note 10, at 1034.

272. Waisbord, *supra* note 92, at 1:20:00.

(surges of online outrage), researchers found that non-anonymous individuals were even more aggressive than anonymous ones.<sup>273</sup> If arrests led to convictions, this might also have deterrent effects beyond the individual defendant. The media could help amplify that effect through coverage of these cases.

Yet, although these prosecutions might result in convictions and curb some future violence, they would still be insufficient. They would not squarely address the cumulative harm of this violence—the harm inflicted on the freedom of the press and expression. In cases under state or federal assault or cyberstalking laws, that the victim happened to be a journalist would not even be legally relevant to the prosecutions.<sup>274</sup> Those statutes are aimed at remedying harms against private individuals, not at combating systemic crimes against the free press and free expression.<sup>275</sup>

A handful of legislators at the state and federal levels recognize the need for laws that protect journalists against violence, but their proposals have shortcomings. At the federal level, in 2019 and again in 2021, Democratic lawmakers introduced the Journalist Protection Act.<sup>276</sup> It proposes amending a federal assault statute to provide a penalty for assault against journalists.<sup>277</sup> The Act would punish causing bodily injury to a journalist, committed with knowledge or reason to know the victim is a journalist while the journalist was newsgathering or with the intent of intimidating or impeding newsgathering.<sup>278</sup> The legislation had the support of the Society of Professional Journalists and other media organizations.<sup>279</sup> Yet, in 2019 the bill lingered without action and expired.<sup>280</sup> Again in 2021, the bill failed to gain traction.<sup>281</sup>

Although the Journalist Protection Act would likely provide journalists some protection against physical abuse, it would do nothing to address the far more prevalent problem of online abuse.<sup>282</sup> Given that online abuse

273. See Katja Rost, Lea Stahel, & Bruno S. Frey, *Digital Social Norm Enforcement: Online Firestorms in Social Media*, PLOS ONE, June 17, 2016, at 6.

274. See 18 U.S.C. § 2261A (making no mention of the victim's profession).

275. See, e.g., *id.*

276. Journalist Protection Act, H.R. 1684, 116th Cong. (2019–20); Journalist Protection Act, S. 751, 116th Cong. (2019–20); Journalist Protection Act, H.R. 4857, 117th Cong. (2021–22); Journalist Protection Act, S. 2528, 117th Cong. (2021–22).

277. See S. 2528.

278. *Id.*

279. See *SPJ Strongly Supports the Journalist Protection Act*, SOC'Y OF PRO. JOURNALISTS, (Mar. 12, 2019), <https://www.spj.org/news.asp?REF=1629>; Brandon Moseley, *Alabama Media Professionals Support Legislation Making It a Federal Crime to Attack a Journalist*, ALA. POL. REP. (Mar. 15, 2019), <https://www.alreporter.com/2019/03/15/alabama-media-professionals-support-legislation-making-it-a-federal-crime-to-attack-a-journalist/>.

280. See, e.g., H.R. 1684 (navigate to “Actions” to see the bill was introduced in 2019 and no further action was taken).

281. H.R. 4857 (last action occurred on July 29, 2021, where the bill was referred to the House Committee on the Judiciary); S. 2528 (last action occurred on July 29, 2021, where the bill was read twice and referred to the Committee on the Judiciary).

282. See Journalist Protection Act, H.R. 4857, 117th Cong. (2021–22); Journalist Protection Act, S. 2528, 117th Cong. (2021–22).

has proved to be a precursor to physical violence, this shortcoming is significant.<sup>283</sup> In December 2021, the White House announced that the State Department would provide up to \$3.5 million toward a “Journalism Protection Platform.”<sup>284</sup> It described the platform as providing “at-risk journalists with digital and physical security training, psychosocial care, legal aid, and other forms of assistance.”<sup>285</sup> Although promising, the true scope and effectiveness of this effort remains to be seen.

Meanwhile in Florida, a legislator proposed adding “member of the press” to a list of protected categories under the state’s hate crimes law.<sup>286</sup> When introducing the legislation in February 2021, state Senator Janet Cruz said, “It is a dark reality that members of the press in our country are facing a heightened risk of violent attacks as a result of irresponsible leadership throughout our country.”<sup>287</sup> Focusing on the democracy-promoting work of the press, Cruz added, “What sort of indictment is it on us if we fail to protect those that pursue no other goal but the interest of the public good?”<sup>288</sup>

The bill died in committee.<sup>289</sup> But even for press advocates, passage of the proposal might not have been the best outcome. Florida’s hate crimes law already protects “race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age of the victim.”<sup>290</sup> Homeless status was added about a decade ago.<sup>291</sup> Legislation (co-introduced in 2021 by Cruz) would have added gender and gender identity to this list; this legislation also died in committee.<sup>292</sup> As the list of protected categories grows, the law risks losing potency, and journalists may not gain much from being included. If one profession is added to the list of other traits—many of them immutable—it would seem an invitation to other professions. Solutions are needed that recognize the importance of journalism without degrading the effectiveness of essential hate crimes laws.

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283. See Witchel, *supra* note 72.

284. Press Release, The White House, Fact Sheet: Announcing the Presidential Initiative for Democratic Renewal (Dec. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/09/fact-sheet-announcing-the-presidential-initiative-for-democratic-renewal/>.

285. *Id.*

286. S.B. 1558, 2021 Leg., Reg. Sess. (Fla. 2021).

287. Celine Castronuovo, *Florida State Senator Proposes Making Assault on a Media Member a Hate Crime*, THE HILL (Feb. 23, 2021, 5:31 PM), <https://thehill.com/homenews/state-watch/540161-florida-state-senator-proposes-making-assault-on-a-member-of-the-media-a>.

288. *Id.*

289. S.B. 1558, 2021 Leg., Reg. Sess. (Fla. 2021).

290. FLA. STAT. § 775.085(1)(a) (2021).

291. Michael Stoops, *Homeless Hate Crime Legislation Gains Momentum*, NAT’L COAL. FOR THE HOMELESS (Apr. 21, 2010), <https://nationalhomeless.org/homeless-hate-crime-legislation-gains-momentum/>.

292. S.B. 194, 2021 Leg., Reg. Sess. (Fla. 2021).

### C. Obstruction of Journalism Statute's Substantive Benefits

The benefits of an obstruction of journalism statute would radiate far beyond the deterrence achieved by any single prosecution. Rather, the statute would enrich freedom of expression and could help kick-start a more robust form of press freedom than has previously existed in the United States.

Obstruction of journalism can be viewed as part of a broader movement among First Amendment thinkers to consider how to best create the conditions under which people can speak and be heard as opposed to simply defending anyone's right to speak at any cost. This movement is characterized as one aimed at protecting the values that underlie the First Amendment.<sup>293</sup> This statute would advance those values in ways tied to both the Speech and Press Clauses.<sup>294</sup> With respect to the Speech Clause, an obstruction of journalism law would be aimed at bringing and keeping a broader array of voices at the fore and therefore, encouraging debate rather than allowing violence to stifle it. And under the Press Clause, an obstruction of journalism law would be an outgrowth of a historically grounded (but too often ignored) thread of First Amendment theory under which the First Amendment requires support for the institutional press.

#### 1. Speech Clause Benefits

Constitutional law scholar Mary Anne Franks has written, "First Amendment advocacy has been particularly devoted to protecting the speech of white men that actively denigrates, vilifies or dehumanizes other groups of people."<sup>295</sup> But this is shifting, and a consensus is growing that online violence can and must be countered to promote free speech.<sup>296</sup> For example, Franks and privacy scholar Danielle Keats Citron have been at the forefront of successful legislative efforts to criminalize cyber harassment and so-called revenge porn.<sup>297</sup> Citron has argued that "online abuse can be proscribed without jeopardizing our commitment to free expression."<sup>298</sup> This is true, argues Citron, where speech makes "only the slightest contribution to public debate," and any contribution is outweighed by the serious harm it causes.<sup>299</sup>

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293. See MARTHA MINOW, *SAVING THE NEWS* 5–8, 103 (Oxford Univ. Press 2021) (describing the relationship between the First Amendment and private industry, as well as the contemporary challenges modern news outlets face because of technological advancements).

294. See *id.* at 103–04 (discussing potential reforms aimed at protecting journalism in the United States).

295. Franks, *supra* note 135, at 367.

296. See *id.* at 382–83.

297. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *WAKE FOREST L. REV.* 345, 349 (2014).

298. KEATS CITRON, *supra* note 156, at 26.

299. *Id.* at 26–27.

The data bear this out. As Franks has stated: “While First Amendment fundamentalists claim that regulations of unprotected speech lead to widespread censorship, there are few facts to support this.”<sup>300</sup> Franks cites a 2017 study finding that criminalizing online stalking and harassment “may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women.”<sup>301</sup> According to the study, even the knowledge that there are laws in place prohibiting harassment “may actually lead to more speech, expression, and sharing online among adult women online, not less.”<sup>302</sup>

In this vein, obstruction of journalism could be criminalized without jeopardizing free expression. Rather, an obstruction of journalism statute would be speech-enhancing.<sup>303</sup> Threats against journalists make no contribution to what the Supreme Court in *New York Times v. Sullivan*<sup>304</sup> described as our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . .”<sup>305</sup> The Court warned that the debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>306</sup> Rape and death threats are not simply “caustic” or “unpleasantly sharp.”<sup>307</sup> And they are certainly not an effort to engage in dialogue. They are the opposite. They are an attempt to instill fear and to silence. They aim to end any conversation, not to further it. And they attempt to end it in the bluntest of ways. Even if one believes wholeheartedly in the marketplace of ideas, this “speech” does not further the quest for truth through exchange.<sup>308</sup>

It is vital, in fact, that an obstruction of journalism statute not punish vociferous, caustic, and unpleasantly sharp attacks. Journalists who have been the victims of true threats have made this point. For example, Talia

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300. Franks, *supra* note 135, at 382–83.

301. *Id.* at 383 (internal quotation marks omitted).

302. *Id.* (internal quotation marks omitted).

303. The aim is that by curbing violence against speakers, the law would create an environment in which journalists would feel freer to speak without fear. See Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 *YALE L.J. F.* 427, 440 (Nov. 16, 2021) (“The threat of violence is fundamentally incompatible with free expression.”).

304. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). Here, the Supreme Court addressed whether Alabama’s “libel per se” standard violated the First Amendment guarantees of free speech and freedom of the press. *Id.* at 267–68. Referencing elected government officials, the Court reasoned that “[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.” *Id.* at 273. Ultimately finding for the *New York Times*, *id.* at 285–86, the Court held that the First Amendment requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice.’” *Id.* at 279–80.

305. *Id.* at 270.

306. *Id.*

307. See *id.*

308. Waisbord, *supra* note 10, at 1035–36 (“Mob censorship is packed with hostility, sentiments of social superiority, and contempt for specific groups of people. It is uninterested in engaging in productive dialogue. It is not based on commonly agreed speech norms. It is not intended to offer useful suggestions to improve press performance.”).

Lavin, a journalist who writes about white supremacy, has said that “newsrooms have been exclusive, patrician, nearly all white spaces forever,” and so, journalists “get critiques—even vociferous, collective critiques—on a disastrous headline, a racist or sexist column, on open or veiled bigotry from people whose job description is to present ‘objective’ reality.”<sup>309</sup> These critiques should be welcome and are a “necessary corrective,” according to Lavin.<sup>310</sup> But threats of violence against a reporter are different.

If, as described earlier, these threats are conceived of as a prior restraint, then using criminal law to tamp them out is even more justified. As Alexander Bickel argued in the *Morality of Consent*, “A criminal statute chills, prior restraint freezes.”<sup>311</sup> That is, a prior restraint harms free speech interests even more profoundly than the imposition of criminal liability.<sup>312</sup> Of prior restraints, Bickel wrote that they “fall on speech with a brutality and a finality all their own.”<sup>313</sup> For this reason, if we are balancing harms, then criminalization of violent threats is justified. By punishing perpetrators of threats and violence against journalists, obstruction of journalism would enhance freedom of the press and freedom of expression. It would encourage women, people of color, and others with marginalized identities to engage in journalism, engage in journalism on divisive topics, and share that journalism more widely. This would necessarily enhance dialogue in the public sphere. And given journalists’ high degree of visibility in this sphere, it would enhance dialogue in a particularly potent way.

## 2. Press Clause Benefits

As it would promote the values that underlie the Speech Clause, obstruction of journalism would promote Press Clause values as well. The First Amendment’s negative formulation of press rights—“Congress shall make no law . . . abridging the freedom . . . of the press”—has fueled a libertarian theory of the press that is more concerned with preventing government interference than ensuring the press’s existence or that citizens have access to it.<sup>314</sup> As Justice Douglas put it in his concurring opinion in *CBS v. Democratic National Committee*,<sup>315</sup> the “laissez-faire regime” toward the media and the “old-fashioned First Amendment” require that “Government shall keep its hands off the press.”<sup>316</sup> This negative-rights

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309. Lyz Lenz, *When the Mob Comes*, MEN YELL AT ME (Mar. 31, 2021), <https://lyz.substack.com/p/when-the-mob-comes>.

310. *Id.*

311. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (New Haven & London: Yale Univ. Press 1975).

312. *Id.*

313. *Id.*

314. See PICKARD, *supra* note 220, at 14–15 (“Liberalism also privileges individuals’ private property rights over collective needs of society. In media policy, this prioritization has historically led to a laissez-faire arrangement that treats media as private commodities whose value is dictated by the market. Such an approach does not privilege diverse voices, representations, and perspectives.”).

315. 412 U.S. 94 (1973).

316. *Id.* at 160–61 (Douglas, J., concurring).

formulation has assumed that the market—free of both excessive regulation and help—will function well enough to ensure that news is created and distributed.

Yet, in the past two decades, this view has proved wrong. Since 2000, more than half of the news industry jobs in the United States have disappeared.<sup>317</sup> In about the same time period, more than 2,000 American newspapers have shut down.<sup>318</sup> The advertising funds that fueled the American press for decades are now going primarily to Google and Meta.<sup>319</sup> Add to this the COVID-19 pandemic, and press watchers have said local news is in the midst of an “extinction event.”<sup>320</sup>

Given this, it is long past time to recognize the First Amendment as a mandate for press-protecting laws. In describing the need for such a mandate, Martha Minow has written: “[B]ecause the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance.”<sup>321</sup>

This positive-press-rights approach would be a definitive shift from current practice, but it would not be revolutionary. A historical narrative that supports this approach can be traced even alongside the dominant libertarian narrative.<sup>322</sup> Among its earliest plot points is evidence that the founders viewed the press as an institution whose “need for special protections exceeded individual speech freedoms.”<sup>323</sup> Moreover, the government has long supported the existence and freedom of the press through nonconstitutional law.<sup>324</sup> Most notably, it heavily subsidized the press through reduced postal rates beginning in the late eighteenth century.<sup>325</sup>

317. See Sasha Lekach, *Fewer than Half of Newspaper Jobs from 15 Years Ago Still Exist*, MASHABLE (Apr. 4, 2017), <https://mashable.com/2017/04/04/newspaper-publishers-jobs-decline-bls/#a9KxxBTdXsqF>.

318. Margaret Sullivan, *The Death Knell for Local Newspapers? It's Perilously Close*, WASH. POST (Nov. 22, 2019), [https://www.washingtonpost.com/lifestyle/style/the-death-knell-for-local-newspapers-its-perilously-close/2019/11/21/e82bafbc-ff12-11e9-9518-1e76abc088b6\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-death-knell-for-local-newspapers-its-perilously-close/2019/11/21/e82bafbc-ff12-11e9-9518-1e76abc088b6_story.html).

319. See Angela Fu, *Report: Google and Facebook Are Responsible for Depressed Advertising Revenue*, POYNTER (Jan. 12, 2021), <https://www.poynter.org/business-work/2021/report-google-and-facebook-are-responsible-for-depressed-advertising-revenue/>.

320. See Craig Silverman, *The Coronavirus is a Media Extinction Event*, BUZZFEED NEWS (Mar. 23, 2020, 4:00 PM), <https://www.buzzfeednews.com/article/craigsilverman/coronavirus-news-industry-layoffs>.

321. Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499, 543 (2018).

322. PICKARD, *supra* note 220, at 14 (“Liberal/libertarian theories of the press . . . primarily focus on protecting the press from government intervention rather than ensuring that people have access to the press.”).

323. *Id.* at 15.

324. See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 16 (2004) (“Precisely because of the interest in strengthening republican institutions, early American policy included strong positive commitments to information and communications, not merely the ‘negative liberty’ of individual rights to free expression.”); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1062 (2011) (describing the nonconstitutional benefits that the press has been granted including press passes, press planes, protections from searches and seizures and subpoenas, and preferential tax policies); MINOW, *supra* note 293, at 5–6.

325. PICKARD, *supra* note 220, at 16.

These reduced rates allowed the press to flourish in ways that otherwise would not have been possible.<sup>326</sup> As First Amendment scholar Genevieve Lakier argues, the reduced rates “enable[ed] rural newspapers to compete for readers against newspapers in the denser commercial centers” and so, “helped create the vibrant, diverse, and decentralized newspaper public sphere that Alexis de Tocqueville marveled at when he visited the United States in 1831.”<sup>327</sup> That is, pro-press law has facilitated and prioritized a public square that contains a diversity of voices.

Perhaps the high-water mark for a positive-press-rights theory was the 1945 case *Associated Press v. United States*.<sup>328</sup> In that case, the Court held that the Associated Press’s membership requirements violated the Sherman Antitrust Act by preventing nonmembers from getting access to news created by members.<sup>329</sup> In discussing the role of the First Amendment, Justice Black wrote, “It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”<sup>330</sup> As Justice Black’s opinion suggests, the First Amendment is premised on the existence of a functioning press.<sup>331</sup>

Unfortunately, the Court has not developed Justice Black’s conception of a positive press right. In that void, the libertarian theory has instead flourished and unnecessarily constrained creative thinking and innovation regarding how law can help to protect and strengthen the press, especially the local press. This absence of legal tools is evident even in the discussion among journalists and their advocates about how to combat violence against journalists.<sup>332</sup> Law rarely makes an appearance in these discussions.<sup>333</sup> Many of the studies examining violence against journalists make no or only passing reference to the possibility of legal remedies, despite it being clear that at least some of this violence could be prosecuted under existing law.<sup>334</sup> Typical of the conversations about addressing violence against journalists was a recent conversation thread in a newsletter by Columbia University’s Tow Center for Digital Journalism.<sup>335</sup> In it, experts shared their thoughts about keeping journalists safe online.<sup>336</sup> Among their ideas: using “burner” email accounts and VPNs, minimizing the use of

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326. *Id.* at 16–17; Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2310 (2021).

327. Lakier, *supra* note 326, at 2310.

328. 326 U.S. 1 (1945).

329. *See id.* at 21–23.

330. *Id.* at 20.

331. *See id.*; MINOW, *supra* note 293, at 5.

332. *See, e.g.*, Sheridan, *supra* note 90 (suggesting how to combat violence against journalists but not suggesting legal tools).

333. *See, e.g., id.*

334. *See, e.g.*, Posetti et al., *supra* note 150, at 93 (noting the need for legal responses but not delving into specifics).

335. *See* Sheridan, *supra* note 90.

336. *Id.*

personal details online (especially anything about children), disconnecting when possible, and engaging in “self-care rituals.”<sup>337</sup> None of the suggestions involved law enforcement or enforcement of legal rights of any kind.<sup>338</sup> This silence is telling. It is as if journalists do not even perceive the law as a resource.

An obstruction of journalism statute could be a part of a reinvigorated vision of the Press Clause—one that understands it not as a blanket prohibition against interfering with the press but rather, as a legal mandate to ensure the continued existence of a free and independent press. In this way, the First Amendment could be generative. It could serve as additional justification for nonconstitutional, press-protecting law such as obstruction of journalism.<sup>339</sup>

#### *D. Obstruction of Journalism Statute’s Rhetorical Benefits*

Beyond the substantive benefits of drawing from obstruction of justice to craft an obstruction of journalism statute, there would be a rhetorical benefit. So much of the press’s ability to serve as democracy-enhancing is dependent on the public’s level of trust in it.<sup>340</sup> Journalists can gather and publish news, but it is of no value if that news is not read and believed. And whether the press is trusted or not is impacted by public discourse about the press.<sup>341</sup> Trump is a case in point. Trump’s barrage of anti-press tweets—averaging more than one a day from the moment that he announced he was running for president in 2015 until his Twitter account was suspended in January 2021<sup>342</sup>—effectively fomented distrust in the press, especially among conservatives. From 2015 to 2020, the number of Republicans who said they trusted the media fell from an already-shaky 32% to an abysmal 10%.<sup>343</sup>

Increasing that number will likely take more time and effort than Trump spent sending it on a downward spiral. Positive rhetoric is key—and the language “obstruction” is especially potent. It sends a strong signal about the press’s importance to democracy. It also seems more serious than “censorship,” which, while accurate, has lost its muscle given the way

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337. See *id.*; Sinders & Shukla, *supra* note 151 (“The real systemic change needs to come from companies. To truly protect journalists, the policy and design of platforms need to change.”).

338. See Sheridan, *supra* note 90.

339. It is important that we begin to view non-First Amendment law as essential to protecting speech. Lakier, *supra* note 326, at 2344–45 (“[I]f we want to understand how well the existing body of free speech law is achieving the goals we set for it, we cannot look only to the constitutional law cases.”).

340. Press scholars RonNell Andersen Jones and Sonja R. West have called “the good will of the public” one of the “pillars” of press freedom. RonNell Andersen Jones & Sonja R. West, *Don’t Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html>.

341. See *id.*; Erin C. Carroll, *How We Talk About the Press*, 4 GEO. L. TECH. REV. 335, 345–46 (2020).

342. See Sugars, *supra* note 121.

343. See Meredith Conroy, *Why Being ‘Anti-Media’ Is Now Part of the GOP Identity*, FIVETHIRTYEIGHT (Apr. 5, 2021, 6:00 AM), <https://fivethirtyeight.com/features/why-being-anti-media-is-now-part-of-the-gop-identity/>.

in which right-wing politicians and pundits commonly use it to claim falsely that social media platforms silence them.<sup>344</sup> More broadly, the phenomenon of “cancel culture” has fetishized free speech to such a degree that updated language and frames are especially helpful to describe what is happening to the press.<sup>345</sup> And, as discussed earlier, what is happening to the press is occurring at such a scale and with such systemic impacts that obstruction of journalism is a fitting descriptor.

To be sure, a chicken-and-egg problem exists here. Yes, an obstruction of journalism statute could help promote more positive rhetoric about the press. But passage of any press-protective legislation is likely difficult given the prevailing anti-press environment.<sup>346</sup> The low esteem in which the press is held may prevent meaningful action to protect it.<sup>347</sup> A pro-press coalition will be difficult to conjure.<sup>348</sup> It is hard to know if an obstruction of journalism statute would have a viable shot at passage without a shift in rhetoric about the press.

One thing that could help would be positive-press rhetoric from other branches of the federal government as well as from local government leaders. The executive branch is in a position to lead the charge on this. Jen Psaki’s first press briefing after President Joe Biden was sworn in provided an encouraging sign. During the briefing she said, “I have deep respect for the role of a free and independent press.”<sup>349</sup> She continued, “We have a common goal, which is sharing accurate information with the American people.”<sup>350</sup> Yet, it is worrisome that a short time later, Biden failed to take any significant steps to punish the Saudi regime or Crown Prince for the murder of *Washington Post* journalist Jamal Khashoggi.<sup>351</sup> The Biden Ad-

344. See Cat Zakrzewski, *The Technology 202: New Report Calls Conservative Claims of Social Media Censorship ‘a Form of Disinformation’*, WASH. POST (Feb. 1, 2021, 9:28 AM), <https://www.washingtonpost.com/politics/2021/02/01/technology-202-new-report-calls-conservative-claims-social-media-censorship-a-form-disinformation/>.

345. See Margaret Sullivan, *So You’re Being Held Accountable? That’s Not ‘Cancel Culture’*, WASH. POST (Jan. 31, 2021), [https://www.washingtonpost.com/lifestyle/media/cancel-culture-criticism-accountability/2021/01/29/8d24d2d4-6180-11eb-9061-07abcc1f9229\\_story.html](https://www.washingtonpost.com/lifestyle/media/cancel-culture-criticism-accountability/2021/01/29/8d24d2d4-6180-11eb-9061-07abcc1f9229_story.html).

346. See Conroy, *supra* note 343.

347. See Joe Heim, *Massive Investment in Social Studies and Civics Education Proposed to Address Eroding Trust in Democratic Institutions*, WASH. POST (Mar. 1, 2021), [https://www.washingtonpost.com/education/civics-social-studies-education-plan/2021/03/01/e245e34a-747f-11eb-9537-496158cc5fd9\\_story.html](https://www.washingtonpost.com/education/civics-social-studies-education-plan/2021/03/01/e245e34a-747f-11eb-9537-496158cc5fd9_story.html) (quoting *The Report: Educating for American Democracy Report – Excellence in History and Civics for All Learners*, EDUCATING FOR AMERICAN DEMOCRACY 9 (2021)) (“Dangerously low proportions of the public understand and trust our institutions.”) (internal quotations omitted).

348. See Conroy, *supra* note 343.

349. Annie Karni, *Jen Psaki’s Debut: No Attacks, No Lectures, No Crowd Size Fixation*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/us/politics/jen-psaki-press-secretary.html>.

350. *Id.*

351. Missy Ryan & Loveday Morris, *Media Advocacy Group Accuses Saudi Crown Prince, Aides of Crimes Against Humanity in Khashoggi Death*, WASH. POST (Mar. 2, 2021), [https://www.washingtonpost.com/national-security/khashoggi-killing-saudi-rsf-complaint/2021/03/01/2686ab7c-7af5-11eb-b0fc-83144c02d676\\_story.html](https://www.washingtonpost.com/national-security/khashoggi-killing-saudi-rsf-complaint/2021/03/01/2686ab7c-7af5-11eb-b0fc-83144c02d676_story.html) (noting that the Biden Administration imposed visa restrictions on some but failed to impose punishment on the Crown Prince).

ministration will likely exceed the low bar set by the previous Administration for treatment of the press, but by how much remains to be seen. And to be fair, White House support for the press may not have the desired effect. In our polarized environment, such support may only lower support among conservatives who have increasingly viewed being anti-press as part of their in-group identity.<sup>352</sup>

The judiciary is another source of potential pro-press rhetoric. In several highly-publicized cases during the Trump presidency, the courts defended press rights against challenges.<sup>353</sup> Judges are in a particularly good position to take note of the importance of a free press to democracy and to convey that in appropriate decisions.<sup>354</sup> Yet, the Supreme Court is unlikely to be a leader in this regard.<sup>355</sup> A recent study of the Supreme Court by Ronnell Andersen Jones and Sonja R. West indicates that the institution's characterizations of the press have been declining for years in both quantity and quality.<sup>356</sup> Lately, the Supreme Court has barely spoken of the press.<sup>357</sup> It is possible, but far from certain, that the lower courts will fill this vacuum.

Although beyond the scope of this Article, or any one article, the press will also need to re-envision itself and how it might better serve its core mission. That mission, according to a foundational text on journalism principles, is “tell[ing] the truth so that people will have the information that they need to be sovereign.”<sup>358</sup> This re-envisioning is happening, as it needs to, in a variety of places and ways. It is happening in places like Oakland, California, where a nonprofit newsroom called the *Oaklandside* was recently born from community listening sessions.<sup>359</sup> In those sessions, journalists heard that residents wanted a more accurate narrative about the city's underserved communities and wanted coverage of systems—including systemic racism—rather than just symptoms.<sup>360</sup> It is happening in Boston, Massachusetts, where the *Boston Globe* and Boston University's Center for Antiracist Research are launching the *Emancipator*, a modern-day

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352. See Conroy, *supra* note 343.

353. See, e.g., Kevin Breuninger, *Judge Orders Trump Administration to Restore CNN Reporter Jim Acosta's White House Press Pass*, CNBC (Nov. 16, 2018, 10:26 AM), <https://www.cnbc.com/2018/11/16/judge-orders-trump-administration-to-restore-cnn-reporter-jim-acostas-white-house-press-pass.html>.

354. *Pennkamp v. Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring) (“The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.”).

355. See Ronnell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 378–79 (2021).

356. *Id.*

357. See *id.* (noting that today's Supreme Court “is far less likely to talk about the press or press freedom in any context” than the Court a half century ago).

358. KOVACH & ROSENSTIEL, *supra* note 183, at 9, 20.

359. See Tasneem Raja & Cole Goins, *Built on a Foundation of Listening*, OAKLANDSIDE (June 16, 2020), <https://oaklandside.org/2020/06/16/building-on-a-foundation-of-listening/>.

360. *Id.*

analog to the abolitionist newspapers of the nineteenth century, as a means of thinking about systemic racism and ways to combat it.<sup>361</sup>

Through all these efforts, hopefully journalists and their advocates can begin to better convince the American public of the necessity of journalism to our democracy and freedom of expression more broadly. And hopefully, in the short term, legislators are convinced enough of this that they will act to curb violence against journalists. Perhaps then, the benefits of an obstruction of journalism statute—both rhetorical and substantive—would redound.

### *E. Crafting an Obstruction of Journalism Statute*

Although passage of an obstruction of journalism statute would inevitably be politically complex, the drafting of the actual language need not be. The omnibus obstruction of justice statute provides a template that has already been used in at least two other contexts. One obstruction statute outlaws interference with the work of government officials carrying out Internal Revenue Service mandates.<sup>362</sup> Another criminalizes interference with the Social Security benefits program.<sup>363</sup> The language of the omnibus provision could as easily be co-opted to protect journalists and freedom of the press.

In pertinent part, the omnibus provision states:

Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished. . . .<sup>364</sup>

This provision could be adapted to state:

Whoever corruptly or by threats or force, or by any threatening letter or communication, ~~influences~~, obstructs, or impedes, or endeavors to

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361. See Nora McGreevy, *New Project Reimagines the U.S.' First Antislavery Newspaper, the 'Emancipator'*, SMITHSONIAN MAG. (Mar. 19, 2021), <https://www.smithsonianmag.com/smart-news/antislavery-newspaper-boston-university-globe-180977273/>.

362. See 26 U.S.C. § 7212 (“Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined . . . or imprisoned.”).

363. See 42 U.S.C. § 1320a-8b (“Whoever corruptly or by force or threats of force (including any threatening letter or communication) attempts to intimidate or impede any officer, employee, or contractor of the Social Security Administration (including any state employee of a disability determination service or any other individual designated by the Commissioner of Social Security) acting in an official capacity to carry out a duty under this chapter, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or attempts to obstruct or impede, the due administration of this chapter, shall be fined not more than \$5,000, imprisoned not more than 3 years, or both.”).

364. 18 U.S.C. § 1503.

~~influence~~, obstruct, or impede *journalists engaged in newsgathering or news publication shall be punished.*

This proposed language preserves the *mens rea* (“corruptly”) and a key facet of the *actus reus* (“by threats or force”) of the original statute. The object of protection would shift from the administration of justice to the process of newsgathering and publication, in other words, journalism.

To keep the statute sufficiently narrow, other alterations are necessary. For example, the “influences” and “endeavors to influence” language in the original obstruction of justice statute would likely render an obstruction of journalism statute overly broad and would need to be stricken. Entire industries aim to influence the news.<sup>365</sup> Much of public relations work would be criminalized. Without this language, the statute would be limited to threats or force, which is precisely the type of conduct being aimed at journalists. The First Amendment protects neither true threats nor physical violence.<sup>366</sup> In fact, threats against journalists seem to fit precisely within the parameters of what the Supreme Court has established as a true threat. In *Virginia v. Black*,<sup>367</sup> in which the Court held a Virginia anti-cross-burning law was constitutional, the Court wrote of true threats that the speaker need not intend to carry out the threat.<sup>368</sup> Rather, the prohibition on true threats was necessary to “protect[] individuals from the fear of violence and from the disruption that fear engenders. . . .”<sup>369</sup>

Plus, it might be wise to build in a “nexus” requirement that the courts, in the obstruction of justice context, have adopted as a way to limit the statute’s scope. That requirement is the act of obstruction must relate “in time, causation, or logic with the judicial proceedings.”<sup>370</sup> Courts have specified that this means “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.”<sup>371</sup> This could be added to obstruction of journalism through a requirement that the threat or force has the natural and probable effect of interfering with the newsgathering or publication process. This would leave out more generalized threats and violence, but those could still be prosecuted under the assault, threat, and cyberstalking laws discussed earlier. Thus, this more robust version of the statute would read:

Whoever corruptly or by threats or force, or by any threatening letter or communication, obstructs, or impedes, or endeavors to obstruct, or impede journalists engaged in newsgathering or news publication shall

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365. See KOVACH & ROSENSTIEL, *supra* note 183, at 198 (“Every year millions of dollars are spent trying to sway public opinion.”).

366. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

367. 538 U.S. 343 (2003).

368. *Id.* at 360.

369. *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

370. *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

371. *Id.* The Supreme Court has also said more generally in the obstruction of justice context that, as with all federal criminal statutes, it will exercise “restraint in assessing [its] reach.” *Id.* at 600.

be punished. The endeavor must have the natural and probable effect of interfering with newsgathering or news publication.

In drafting or interpreting the statute, the legislature or courts would also need to answer the perennially thorny question of who qualifies as a journalist. Although there has been some skepticism about whether this can be done effectively in the constitutional context (i.e., for purposes of any special First Amendment protections for journalists),<sup>372</sup> statutes and regulations in different contexts have successfully defined the press.<sup>373</sup> And so, reshaping the language of obstruction of justice to criminalize violence against journalists is possible.

Although journalists tend to want to operate within a big tent and keep the definition of journalist broad,<sup>374</sup> a narrower definition would be better in this context for two reasons. First, because it is a criminal statute, limiting it makes sense so that a narrower range of conduct would be criminalized. Additionally, within this context, it is essential to delineate between the media broadly and journalists who are engaged in reporting and publishing in the public interest. This is because pundits, influencers, and other talking heads within the media sometimes facilitate violence against journalists.<sup>375</sup> As noted earlier, Fox News's Tucker Carlson has been a repeat harasser of women journalists.<sup>376</sup>

One source of language could be the Free Flow of Information Act—proposed federal reporter shield legislation that never passed.<sup>377</sup> That bill defined “covered persons” (i.e., journalists) as:

[A] person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the

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372. See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2453 (2014) (quoting Columbia University President Lee C. Bollinger describing the “definitional problem” of who constitutes “the press” as “seem[ingly] intractable”).

373. See, e.g., COLO. REV. STAT. § 13-90-119 (defining “Newsperson” for purposes of reporter shield law) (“[A]ny member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media.”); 40 C.F.R. § 2.104(f)(3) (defining “member of the news media” as “a person whose primary professional activity or occupation is information dissemination, although it need not be the requester’s sole occupation” for purposes of expedited processing of records requests to the Environmental Protection Agency).

374. See, e.g., Ellyn Angelotti, *We Need a Broader Definition of ‘Journalist,’* N.Y. TIMES (Dec. 12, 2011), <https://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists/we-need-a-broader-definition-of-journalist>.

375. See Posetti et al., *supra* note 150, at 14, 30–31 (“Partisan news outlets, media operating at the fringes of the political spectrum, and misogynistic journalists are instrumentalised to amplify and fuel attacks.”).

376. See Gabbatt, *supra* note 194.

377. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. (2017). Other versions of the Free Flow of Information Act were proposed by both House and Senate at various times. See, e.g., Free Flow of Information Act of 2013, S. 987, 113th Cong. § 11 (2013).

person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.<sup>378</sup>

Particularly helpful about this definition are its temporal and financial components. The journalist cannot be a mere "occasional public commentator."<sup>379</sup> That and the requirement that they depend on this work for their livelihood help guarantee professionalism. It would exclude "citizen journalists," which is reasonable given the severity of the punishment. To narrow this definition further and perhaps better carve out so-called influencers, it may be that the definition should require that any remuneration is provided by a recognized news organization.

As a final caveat to this obstruction of journalism proposal, it is important not to overstate the impact that an obstruction of journalism statute could have standing alone. As journalists have already expressed concern that law enforcement is unwilling or unable to prosecute the violence under existing law, incentives for prosecution under an obstruction of journalism statute would be necessary.<sup>380</sup> Here, it would be instructive for Americans to set aside feelings of exceptionalism and look to other governments and nongovernmental organizations who have thought about these issues harder and longer. For example, in March 2021, the United Kingdom released a "National Action Plan for the Safety of Journalists."<sup>381</sup> Among other things, the plan calls for every police force in the United Kingdom to have access to a "designated journalist safety liaison officer" and a "robust prosecutorial approach" to crimes against journalists.<sup>382</sup> It also commits to publishing an "Online Media Literacy Strategy" that promotes better public understanding of journalism's role.<sup>383</sup> At the intergovernmental scale, the Council of Europe has issued an extensive set of recommendations aimed at countering what it described as an "alarming" wave of offline and online abuse against journalists.<sup>384</sup> Among its recommendations are removing limitation periods for prosecution of crimes against freedom of expression and generating better statistics about complaints, investigations, prosecutions, and convictions.<sup>385</sup>

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378. H.R. 4382.

379. See West, *supra* note 372, at 2437 (coining the phrase "occasional public commentators").

380. See Hess, *supra* note 157 (noting concerns about lack of law enforcement resources and know-how to investigate these crimes).

381. *National Action Plan for the Safety of Journalists*, DEP'T FOR DIGIT., CULTURE, MEDIA, & SPORT (Mar. 9, 2021), <https://www.gov.uk/government/publications/national-action-plan-for-the-safety-of-journalists/national-action-plan-for-the-safety-of-journalists>.

382. *Id.*

383. *Id.*

384. See COUNCIL OF EUROPE, IMPLEMENTATION GUIDE TO RECOMMENDATION CM/REC(2016)4 ON THE PROTECTION OF JOURNALISM AND SAFETY OF JOURNALISTS AND OTHER MEDIA ACTORS 6 (2020).

385. *Id.* at 56–57.

## CONCLUSION

Violence against journalists cannot be allowed to continue with impunity. The United States is at an inflection point. It is not hyperbole to say that the local press—the most trusted form of news and one that has the potential to bind communities together—is perilously close to extinction. It has been bled by hedge funds, outmaneuvered by technology platforms, and kicked to the curb by many readers and viewers whose attention has flitted (or been dragged) elsewhere. Law has too often sat on a metaphorical folding chair on the sidewalk and watched. This should change. The United States needs to hold fast to its core principles of freedom of the press and freedom of expression. Recognizing obstruction of journalism would be a start.

Afghan journalist Farida Nekzad recently told Reporters Without Borders that “[e]liminating women journalists is tantamount to imposing silence on all other women.”<sup>386</sup> She added, “A news organisation without women is a guarantee that many subjects will never be covered.”<sup>387</sup> This is no less true in the United States than it is in Afghanistan. And it is not simply true with respect to gender, but with respect to race, religion, and other aspects of journalists’ identities.

Limiting the harm to freedom of the press and expression that results from violence against journalists requires a multifaceted approach. It needs to include more research and education; we must better understand the nature of the violence, its perpetrators, and their motives. It needs to include far greater efforts by newsrooms and especially social media platforms; platforms must proactively find ways to eliminate vitriol from their sites, and journalists should know where to turn when they are victimized. But it also needs to include law. An obstruction of journalism statute would recognize the tremendous importance of our news system to democracy and the serious harm that results from violence against journalists. It would signal a renewed and earnest American commitment to a free press and freedom of expression.

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386. *Sexism’s Toll on Journalism*, *supra* note 200, at 26.

387. *Id.*