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News as Surveillance

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Erin C. Carroll[†]

I. INTRODUCTION

Before I was a lawyer, I was a journalist. I spent a chunk of my twenties armed with a notebook and pen. I attended planning and zoning commission meetings, read police logs, sifted through court filings, went on ride-alongs with detectives, asked questions, got yelled at by all manner of officials, and did a lot of listening.

I developed a devotion to the craft of journalism and a reverence for the skepticism, fearlessness, and truth-telling that I saw regularly in newsrooms. But of late, I have been frustrated. Journalists are not telling a story that readers should hear. Although journalists have admirably revealed and explained the ways in which government and businesses surveil us online, they have been mostly mum on a key fact: the press is spying on us as well.

As inhabitants of the Information Age, we are increasingly aware of the amount and kind of data that online platforms like Google and Facebook collect on us. Far less publicized, understood, and discussed, however, is how much data news organizations collect on us as we read the news online and how they allow third parties to collect that personal data as well.

Despite the press's commitment to transparency, discussion of these data-collection practices in journalism circles is mostly taboo. It has been called a "third rail."¹ Little hard data is available. Yet, a handful of studies by computer scientists reveal that, as a group, news websites are among the

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1. See Doc Searls, *There are better ways to save journalism*, DOC SEARLS WEBLOG (Sept. 1, 2019), <http://blogs.harvard.edu/doc/2019/09/01/journalism-2/> [<https://perma.cc/T75S-WNFF>].

internet's worst offenders when it comes to tracking their visitors.² News sites contain more cookies and other like devices aimed at vacuuming up user data than do gaming, shopping, sports, or pornography sites.³

On the one hand, this surveillance is unsurprising. It is capitalism at work. The press's business model has long been advertising-based.⁴ The more information news organizations gather about their online readers and the more they allow third parties to amass, the more precisely advertisers can target those readers. This translates to higher ad rates and more revenue. More revenue means more journalism. As *The New York Times*'s publisher explained in a recent op-ed, *The Times*'s journalism is, in part, paid for by "collecting, using and sharing of reader data."⁵

Yet, today, this prevalent press business model raises new First Amendment concerns. Among the data being collected are readers' browsing histories. That means news sites, along with the many third parties they invite onto their pages, can know which articles readers are clicking on, how much time they spend with them, whether they comment on them, and whether and how they share them with others. Some news organizations, like *USA Today*, *The New York Times*, and ESPN.com, are even trying to predict how a particular piece of news might make a reader feel and to target advertising accordingly.⁶ In the case of ESPN.com, if a reader's favorite sports team is losing, the site might avoid showing that reader ads altogether.⁷

2. See Timothy Libert & Reuben Binns, *Good News for People Who Love Bad News: Centralization, Privacy, and Transparency on US News Sites*, WEBSCI '19: PROC. 11TH ACM CONF. ON WEB SCI. (June 2019), https://timlibert.me/pdf/LIBERT_BINNS-2019-GOOD_NEWS.pdf [<https://perma.cc/MFX4-QMKG>]; Steven Englehardt & Arvind Narayanan, *Online Tracking: A 1-million-site Measurement and Analysis*, PRINCETON WEB CENSUS, <https://webtransparency.cs.princeton.edu/webcensus/> [<https://perma.cc/Q9C6-Z2JJ>] (last visited Mar. 20, 2020); Tim Libert & Victor Pickard, *Think You're Reading the News for Free? New Research Shows You're Likely Paying with Your Privacy*, CONVERSATION (Nov. 6, 2015, 6:04 AM), <https://theconversation.com/think-youre-reading-the-news-for-free-new-research-shows-youre-likely-paying-with-your-privacy-49694> [<https://perma.cc/5SBC-LA5U>].

3. See Englehardt & Narayanan, *supra* note 2.

4. See, e.g., Anders Hofseth, *Emily Bell Thinks Public Service Media Today Has Its Most Important Role to Play Since World War II*, NIEMAN LAB (Apr. 2, 2018, 8:30 AM), <https://www.niemanlab.org/2018/04/emily-bell-thinks-public-service-media-today-has-its-most-important-role-to-play-since-world-war-ii/> [<https://perma.cc/K7QK-5TCC>] (noting that news has "always traditionally been supported by advertising").

5. A.G. Sulzberger, *How The Times Thinks About Privacy*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/opinion/sulzberger-new-york-times-privacy.html> [<https://perma.cc/6729-J9KG>].

6. See Kaitlyn Tiffany, *Online Ads Can Be Targeted Based On Your Emotions*, VOX (May 21, 2019, 1:20 PM), <https://www.vox.com/the-goods/2019/5/21/18634323/new-york-times-emotion-based-ad-targeting-sadness> [<https://perma.cc/W9TF-V6PX>]; Emily Bell, *How Ethical Is It For Advertisers to Target Your Mood?*, GUARDIAN (May 5, 2019, 9:00 AM), <https://www.theguardian.com/media/commentisfree/2019/may/05/how-ethical-is-it-for-advertisers-to-target-your-mood> [<https://perma.cc/MSM5-UN2U>].

7. See Bell, *supra* note 6.

Gathering reading history is a classic violation of what legal scholars call “intellectual privacy.” And here, undermining intellectual privacy has the potential to cause far-reaching harms. Not only does it injure the individual reader or citizen, it injures society. News consumption helps each of us engage in the democratic process. It is, in fact, practically a prerequisite to our participation. As journalist and philosopher Walter Lippmann wrote almost a century ago, “the real environment is altogether too big, too complex, and too fleeting for direct acquaintance.”⁸ Instead, he said, we “must have maps.”⁹ The press is our cartographer.

This surveillance also has a constitutional dimension because of the perpetrator. The press is a named beneficiary of the First Amendment. It is a First Amendment institution—one that the Supreme Court has said “serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials.”¹⁰ Its use of surveillance creates a constitutional tension—a First Amendment institution undermining our intellectual privacy. This privacy is foundational to our First Amendment freedom of speech. Moreover, for an institution whose success is dependent on its readers’ trust, one that checks abuses of power, this surveillance seems like a special brand of betrayal.

My argument is an indictment of this press practice. But even more so, it is an attempt to shield the press. As public opinion turns swiftly against technology platforms and their sweeping data-collection practices,¹¹ it is not hard to envision public frustration finding new targets. The press is a ripe one.¹² As of now, its data collection practices are largely hidden, but they are not secret. To assume that the public will simply blame Facebook and Google but not the press seems optimistic—especially given the level of vitriol aimed at the press from some quarters.¹³ So, for reasons both theoretical and practical, we should wrangle now with the use of news as surveillance.

8. See WALTER LIPPMANN, PUBLIC OPINION 8 (Courier Corp. 2012) (1922).

9. *Id.*

10. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

11. See, e.g., Jonathan Taplin, *Google Doesn't Want What's Best for Us*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/opinion/sunday/google-tech-diversity-memo.html?_r=0 [<https://perma.cc/QM9L-UT4F>].

12. See Libert & Binns, *supra* note 2 (“[I]t is unwise to assume the significant powers of the US government could not be turned against the news media, especially if justified under the pretence of national emergency.”).

13. See Paul C. Adams, *The Case of the Missing Cookies: Impacts of the GDPR on European Online News*, YOUTUBE, at 1:00 (Apr. 9, 2019), https://www.youtube.com/watch?time_continue=91&v=iaEQfsjA1VY [<https://perma.cc/AQ2E-XTQR>].

II. SURVEILLANCE OF READERS

The New York Times is a paragon of American journalism. It has also been held out as a paragon of reader surveillance.¹⁴ In a peek behind the curtain, *Times* technology reporter Farhad Manjoo recently allowed all of their digital activity to be monitored, and they reported on the results.¹⁵ Of the forty-seven sites Manjoo visited during the tracking window, news sites surveilled Manjoo the most heavily.¹⁶ Among them were Manjoo's own employer, *The New York Times*, as well as *The Washington Post*.¹⁷ "News sites were the worst," Manjoo concluded.¹⁸

Manjoo's findings are consistent with the handful of studies that exist. One conducted this year by computer scientists from Carnegie Mellon and Oxford examined 4,000 U.S.-based news sites.¹⁹ It found that on a given page of a news site, the number of third-party cookies is, on average, nearly three times greater than that number on non-news sites—sixty-three as opposed to twenty-three.²⁰ A 2016 study by Princeton researchers of the one million most visited websites, similarly found that "[n]ews sites have the most trackers."²¹

Trackers are invisible to the user. The computer scientists who wanted to investigate which and how many companies had trackers on news pages devised their own programs to do it.²² The rest of us are at the mercy of news sites' privacy policies. Those policies are remarkably opaque. Take that of *The Denver Post*. When you click on the link for that policy from the *Post*'s homepage, you are directed to a policy for MediaNews Group, a conglomerate of nearly 100 different publications.²³ It indicates that users'

14. See Libert & Binns, *supra* note 2 (including graphic on first page showing that "The New York Times homepage exposes visitors to 61 third-party domains"); Libert & Pickard, *supra* note 2 (noting that "The New York Times' homepage is potentially connected to a whopping 44 third-party servers"). Since this article was given as a keynote speech, the *Times* has announced it is curbing its use of trackers on Facebook and Twitter. See Sara Fischer, *Axios Media Trends*, AXIOS (Nov. 19, 2019), <https://www.axios.com/newsletters/axios-media-trends-a189a865-c7ed-4a0a-86ca-7182692eb74f.html> [<https://perma.cc/R2ZQ-7HWQ>] (quoting Chris Wiggins, the chief data scientist for the *Times* as saying, "We're moving away from tracking analytics on people and towards tracking analytics on stories"). It remains to be seen whether the *Times* starts curbing the use of trackers more broadly.

15. Farhad Manjoo, *I Visited 47 Sites. Hundreds of Trackers Followed Me*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/interactive/2019/08/23/opinion/data-internet-privacy-tracking.html?searchResultPosition=5> [<https://perma.cc/93TR-UAH8>].

16. *Id.*

17. *Id.*

18. *Id.*

19. Libert & Binns, *supra* note 2.

20. *Id.* A 2015 study by one of the same authors also found tracking by news sites to be about double that of other sites. See Libert & Pickard, *supra* note 2.

21. See Englehardt & Narayanan, *supra* note 2.

22. See, e.g., Libert & Binns, *supra* note 2 (describing use of "open-source software tool webXray").

23. See *Privacy Policy*, MEDIANEWS GROUP, <https://www.medianewsgroup.com/privacy-policy/> [<https://perma.cc/8AM9-5KDQ>] (last visited Mar. 20, 2020); *Trusted Brands Coast-to-Coast*,

personal data may be shared with MediaNews Group's corporate affiliates. The policy does not name those affiliates.

Figuring out who they are is a multi-day job.²⁴ Literally. Investigative journalist Julie Reynolds²⁵ charted the corporate structure of MediaNews Group and its owner, the hedge fund Alden Capital Group, and described the effort in a blog post for MediaNews Group's union membership.²⁶ The process involved reading an SEC filing and documents from two separate lawsuits, as well as creating a diagram of Post-its and string to try to make sense of it.²⁷ She called the result her "crazy wall" and compared it to the ones TV cops use to solve crimes.²⁸

And those are just the corporate affiliates. MediaNews Group's privacy policy notes that readers' personal information is also shared with third parties.²⁹ As with the affiliates, those third parties are not named.³⁰ But unlike corporate affiliates, you would need a computer science background to figure out who they are.

The Denver Post is a bit of an easy target because of its complex corporate structure.³¹ Yet, it is not a one-off. The opacity of its privacy policy is typical, judging by the findings of the Carnegie Mellon and Oxford researchers. They used a program to examine nearly 2,000 privacy policies. They determined that although the policies may name some of the third parties who have access to news pages, the vast majority are never named.³²

The transparency problem is chronic and likely intentional. If news organizations were to reveal who is lurking on their sites, readers—even those accustomed to being watched, digitized, and quantified—might be

MEDIANEWS GROUP, <https://www.medianewsgroup.com/our-brands/> [<https://perma.cc/7VKL-9J3D>] (last visited Mar. 20, 2020) (showing ninety-eight entries).

24. See Julie Reynolds, *The Alden Global Capital Crazy Wall*, #NEWSMATTERS (June 24, 2019), <https://dfmworkers.org/the-alden-global-capital-crazy-wall/> [<https://perma.cc/6NSN-5AWM>] (noting that discerning the corporate structure of MediaNews Group's parent company took more than two days).

25. Corey Hutchins, *Meet the Journalist Tracking Digital First Media's Hedge Fund Owner*, COLUM. JOURNALISM REV. (Mar. 29, 2018), https://www.cjr.org/united_states_project/digital-first-alden-newsmatters.php [<https://perma.cc/U22D-LMQP>].

26. See Reynolds, *supra* note 24; see Hutchins, *supra* note 25 (indicating that NewsMatters is "a project of the NewsGuild-Communications Workers of America labor union").

27. Reynolds, *supra* note 24.

28. *Id.*

29. See *Privacy Policy*, MEDIANEWS Group, *supra* note 23 ("We may disclose your Personal Information to a third party for a business purpose.").

30. See *id.*

31. Among the privacy policy examples in his presentation, Paul Adams also includes *The Denver Post*. See Adams, *supra* note 13, at 15:10.

32. Libert & Binns, *supra* note 2 ("Policies for both news and non-news sites fail to disclose the vast majority of third-parties. Only 10% of third-parties are disclosed in news privacy policies and only 14% in non-news policies. Both news sites and non-news sites share problematic features, with news sites once again faring worse.").

concerned.³³ These lurkers include some companies whose names are familiar: Google and Facebook.³⁴ Other repeat players may be less familiar, but they know us well. For example, Acxiom, a data broker that helps target advertising, has profiles on 700 million people.³⁵ Those profiles include up to 3,000 attributes such as political views, ethnicity, net worth, number of children or plans to have children, and interest in alcohol.³⁶

Acxiom has trackers on nearly half of all news pages.³⁷ Yet, it is only on nineteen percent of non-news pages.³⁸ This suggests that watching us as we read news yields especially valuable data. It is not difficult to imagine how this might be true. Reading story after story about Elizabeth Warren? Spending extensive time with articles about abortion or memory loss?³⁹ Regularly clicking on articles about local crime? Triangulated with other data, these pieces of reading history could conceivably point to political party, candidate preferences, health and healthcare choices, or level of anxiety.

III. FIRST AMENDMENT PARADOX

News organizations are, of course, not alone in adopting surveillance capitalism. Collection of personal data is a huge business. Numerous industries, including finance, insurance, health, and hospitality, take part.⁴⁰

But the press is unlike these industries—and really, any other industry—in two ways. First, it occupies a coveted constitutional perch. It is singled out by name in the First Amendment.⁴¹ Second, it produces a public

33. See Sarah Eskens et al., *Challenged by News Personalisation: Five Perspectives on the Right to Receive Information*, 9 J. MEDIA L. 259 (2017), <https://www.tandfonline.com/doi/full/10.1080/17577632.2017.1387353> [<https://perma.cc/9QF3-A6AK>].

(describing a European study that “noted how tracking users online can have a chilling effect on citizen participation in social, cultural, and political life, and endanger the exercise of the right to receive and impart information”).

34. Libert & Binns, *supra* note 2 (noting that Google is on ninety-eight percent of news sites, and Facebook is on fifty-three percent of news sites).

35. See Steven Melendez & Alex Pasternack, *Here are the data brokers quietly buying and selling your personal information*, FAST COMPANY (Mar. 2, 2019), <https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information> [<https://perma.cc/B29N-U6D9>] (containing a diagram showing various attributes Acxiom tracks).

36. *Id.*

37. Libert & Binns, *supra* note 2.

38. *Id.*

39. The abortion example was raised by Timothy Libert in an opinion piece in *The New York Times*. See Timothy Libert, *This Article Is Spying on You*, N.Y. TIMES (Sept. 18, 2019), <https://www.nytimes.com/2019/09/18/opinion/data-privacy-tracking.html> [<https://perma.cc/XYA3-JNXW>].

40. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 172 (2019).

41. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

good—the news—that generations of philosophers, historians, and even presidents, have said is fundamental to democracy.

This makes the press's adoption of surveillance capitalism uniquely problematic from a constitutional perspective. It creates a First Amendment paradox. The press, a First Amendment institution, is undermining the First Amendment value of intellectual privacy. Intellectual privacy is foundational to our freedom of speech. And this harm to intellectual privacy leads to other harms.

Let's start with the harm to reader privacy. When we read exclusively on paper, the threats to our reading privacy were minimal. But as reading has shifted online, the potential for violations exploded. In response, legal scholars have developed the theory of intellectual privacy and, its subset, reader privacy.⁴² The idea is that even in our online existence, we need places of refuge and anonymity in order to absorb the speech of others and to formulate our own. As privacy scholar Neil M. Richards has said, “[w]hat we read, watch, and listen to matter because they are how we make up our minds about important social issues; in a very real sense they are how we make sense of the world.”⁴³ This is perhaps never truer than when we consume news. News is a key means of allowing us to know and understand our neighbors and our communities.

And this gets at the second, broader harm that surveillance causes. The press is not simply undermining the reading privacy of a single reader. It is undermining that of millions. Those collective millions form the glue in an essential American relationship—that between the press and our democracy. For us as citizens to be the glue in that relationship, we need to be able to consume news freely, process it, and act on it. Surveillance upsets this dynamic. We may read less freely, avoiding controversial content or content that would reveal something about our identity or interests.⁴⁴ We may learn less, know less, grow less—and, when it comes to news specifically, that means we will likely know less about our neighbors, our commu-

42. See Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689, 691 n.7 (2013) (providing a “partial list” of others who have written about intellectual privacy).

43. See *id.* at 691; Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1006 (1996) (“Freedom of speech is an empty guarantee unless one has something—anything—to say.”); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 389 (2008) (noting that intellectual privacy is a “cornerstone of meaningful First Amendment liberties”).

44. See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1424–25 (2000) (“A realm of autonomous, unmonitored choice, in turn, promotes a vital diversity of speech and behavior. The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association—decisions that otherwise might be chilled by unpopularity or simple difference—is part of our constitutional tradition.”).

nities, and the world around us. When we act in personal and political capacities it may be from a place of ignorance. Likewise, we may avoid action altogether.

And even if surveillance doesn't chill our reading habits, it still has a harmful feedback effect. It constricts the menu of news from which we can choose. News organizations use the data they collect to "personalize" news. That is, they look to what we read, in part, to provide us more of what they think we will click on—to continue to capture our attention. But personalization can flatten the information landscape.⁴⁵ It can reduce the amount of surprise and serendipity. It preempts efforts at exploration and discovery. And there is the very real danger of journalists using likeability and shares as a measure of a story's importance. Speaking at a conference about the power of platforms over the press, Pulitzer Prize-winning reporter Julia Angwin said, "[e]ssentially journalism has become a game of how to game the algorithm as opposed to what is the news."⁴⁶

Thus, both news as surveillance and news as the product of surveillance threaten democratic functioning. The first can lead to self-censorship by news consumers and the second narrows the stream of news from which consumers can drink.⁴⁷ Multiplied across the population, these developments are troubling for democratic self-government and the processes that underlie it, which, as privacy scholar Julie E. Cohen has pointed out, are "unthinkably vulnerable" in our technological age.⁴⁸

Finally, surveillance injures the press itself. By surveilling its readers, the press harms its ability to play the roles it has assigned itself as educator, whistleblower, and even empathy.⁴⁹ Moreover, it violates the roles our Supreme Court has recognized that it plays. The Court has said that "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs" including "as a powerful antidote to any abuses of power."⁵⁰ It has even said that "[t]he extraordinary protections

45. See Titus Plattner, *Five Risks of News Personalization*, MEDIUM (June 12, 2018), <https://medium.com/jsk-class-of-2018/five-risks-of-news-personalizations-5bdc97fdbdce> [<https://perma.cc/X7D6-MHPN>]; Eskens et al., *supra* note 33, at 282 ("Personalisation may also entail prior restraints imposed by news organisations, since certain content may never reach you if it is filtered out.").

46. Open Markets Institute, *The New Gatekeepers: Journalism in the Era of Platform Monopoly*, YOUTUBE, at 21:15 (June 14, 2018), <https://www.youtube.com/watch?v=40HXpi0IzDk&t=3080s> [<https://perma.cc/C5UU-KU7B>] (speaking at the Open Markets Institute Conference on a panel titled "Break the News: Free Speech & Democracy in the Age of Platform Monopoly").

47. See Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 518 (2015) (noting the conforming effects in addition to the chilling effects of surveillance).

48. JULIE E. COHEN, *BETWEEN TRUTH AND POWER* 106 (2019).

49. See MICHAEL SCHUDSON, *WHY DEMOCRACIES NEED AN UNLOVABLE PRESS* 25 (describing the press's "informative, investigative, and social empathy functions").

50. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly.”⁵¹

By surveilling its readers, the press violates that duty. In doing so, it damages trust—one of its greatest assets—and it potentially undermines the moral authority it draws from the First Amendment. The Supreme Court has not decided a significant press case in more than a decade,⁵² but were it to take one now, I fear that it would not be nearly as predisposed to protect press freedom as it was in the days of *New York Times v. Sullivan*.⁵³

Now, one critique to everything I have argued so far is that there is no First Amendment paradox here at all. After all, the press cannot inflict First Amendment harms. It is not, as we say, a state actor. This is true, and yet, I have a few responses to this critique. First, in the new information ecology, legal scholars are thinking more broadly about how speech harms arise. Some, like Kate Klonick, have helped to elucidate how platforms, in their role as gatekeepers and moderators of speech, are acting as the “New Governors” of the public sphere.⁵⁴ Others, like Jack Balkin, are devising new models for how we think about free speech relationships.⁵⁵ According to Balkin, the linear relationship between two parties—the government and the speaker—has been replaced by a pluralist model.⁵⁶ He compares it to a triangle, with governments in one corner, citizens and what he calls “legacy media” in another, and, finally, platforms and technological infrastructure in a third.⁵⁷

This free speech triangle can be used to think about violations of intellectual privacy and reading privacy. It is symbolic of the way government *and* private parties can harm citizens by collecting personal data.⁵⁸ Moreover, if you accept that the modern-day press is no longer just “legacy media” but a networked press that includes platforms, algorithms, and technological

51. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976). In this case, in which the Court had to balance fair trial rights against the rights of the press to publish, the Court went on to say that this was “a duty widely acknowledged but not always observed by editors and publishers.” *Id.*

52. See 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> [<https://perma.cc/49WC-H7VA>].

53. See *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in denial of certiorari) (questioning the correctness of the decision in *New York Times v. Sullivan* and noting with respect to defamation law that the Court “should reconsider our jurisprudence in this area”).

54. See generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (describing how Facebook, Twitter, and YouTube are governing our speech).

55. See Jack Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2014 (2018) (describing a pluralist model of speech regulation).

56. *Id.* at 2013–14.

57. *Id.* at 2014–15.

58. See *id.* at 2032 (“[S]peakers face multiple threats from public *and* private governance and power, instead of merely the traditional threats of old-school speech regulation.”).

infrastructure,⁵⁹ the triangle helps to illustrate how today's press can violate citizens' intellectual privacy and reading privacy as well.

And if the triangle is not helping to convince you, keep in mind that the government may be participating in news as surveillance as well. The chain of custody of our personal data is often murky. For example, personal data collected by Acxiom and other data brokers, was found to be part of an FBI data mining effort.⁶⁰ And Google and Facebook, who are on ninety-eight and fifty-three percent of news pages respectively,⁶¹ have cooperated with the National Security Agency.⁶²

Finally, perhaps the simplest response to the critique that the press is not a state actor and there really is no violation or paradox is that the harm is still real. The press is still stifling our ability to read freely both by potentially triggering our own self-censorship and by personalizing, and thus limiting, content to that which is believed to please. In doing so, the press risks failing in the roles that the Court has constitutionally understood it to play. In all of these ways, news as surveillance causes harms in need of remedies.

IV. JUSTIFYING THE PARADOX

As a former journalist, I am sensitive to the critique that I am attacking an institution that is already reeling. The press has been ravaged by technological change in the past two decades. Between 2001 and 2016, the number of news industry jobs in the United States was cut by more than half.⁶³ In about that same time period, nearly 1,800 newspapers shut down.⁶⁴ Numerous communities in the United States are without local journalism. The phenomenon is now so widespread, it has a name: "news deserts."⁶⁵

59. MIKE ANANNY, NETWORKED PRESS FREEDOM 4 (2018) (describing the members of the "networked press" as including "journalists, software engineers, algorithms, relational databases, social media platforms, and quantified audiences").

60. Libert & Binns, *supra* note 2 (citing Ryan Singel, *Newly Declassified Files Detail Massive FBI Data-Mining Project*, WIRED (Sept. 23, 2009, 7:00 AM), <https://www.wired.com/2009/09/fbi-nsac/> [<https://perma.cc/6BEK-D9RS>]).

61. See Libert & Binns, *supra* note 2.

62. See Libert, *supra* note 39.

63. See Sasha Lekach, *Not Fake News: News Jobs Are Disappearing*, MASHABLE (Apr. 4, 2017), <https://mashable.com/2017/04/04/newspaper-publishers-jobs-decline-bls/#a9KxxBTdXsqF> [<https://perma.cc/NF3Z-YMTF>].

64. See Penelope Muse Abernathy, *The Expanding News Desert*, UNC HUSSMAN SCH. JOURNALISM & MEDIA (2018), <https://www.usnewsdeserts.com/reports/expanding-news-desert/> [<https://perma.cc/ZX42-F4JA>].

65. See *id.*; Yemile Bucay et al., *America's Growing News Deserts*, COLUM. JOURNALISM REV. (Spring 2017), https://www.cjr.org/local_news/american-news-deserts-donuts-local.php [<https://perma.cc/EF8Y-XWAS>].

Although the press has largely failed to monetize the journalism it produces, it cannot be wholly blamed for the gutting of its industry. Technology and the accompanying reader migration online have been tsunami-like forces. The Fourth Estate could not have withstood online migration intact no matter how prepared, fortified, or fast-moving. The press has opted to try to stand firm. It is doing what it has always done. It is relying primarily on advertising to fund its journalism. And it has adopted the same advertising business model that virtually every other online business has.⁶⁶

We—the consumers—also have not been all that helpful. Most of us do not pay the full cost of the news we consume. Neither did our parents or our grandparents. Advertising has long subsidized it. The internet—with its “free” content—has tamped down the willingness of many of us to pay for journalism. Meanwhile, we still expect much of the press. Again, writing in the 1920s, Lippmann said, “[w]e expect the newspaper to serve us with truth however unprofitable the truth may be.”⁶⁷ He added, “[e]thically a newspaper is judged as if it were a church or a school.”⁶⁸

I do not think the press is a church or a school. Yet, like these institutions, the press has its own codes and norms.⁶⁹ Today, in its effort to stay afloat financially, it is putting itself at odds with the value system it created.

V. LESSENING THE FIRST AMENDMENT TENSION

In thinking about how to create a press that is truer to its own values and First Amendment values, nostalgia looms. It looms for me, certainly. It is easy to romanticize the days when newspapers all over the country were regularly rooting out corruption. But we also need to be clear-eyed that the flush financial conditions that boosted the press in its so-called golden age no longer exist and, in fact, have been permanently altered. We also need to recognize that those financial conditions were always fraught.⁷⁰ The press has long been tethered to its advertisers.

Surveillance capitalism has, however, made what was already a fraught practice significantly more so. Plus, it is not working as a way to

66. ZUBOFF, *supra* note 40, at 10 (“Surveillance capitalism is no longer confined to the competitive dramas of the large internet companies, where behavioral futures markets were first aimed at online advertising. Its mechanisms and economic imperatives have become the default model for most internet-based businesses.”).

67. See LIPPMANN, *supra* note 8, at 244.

68. *Id.*

69. See, e.g., *SPJ Code of Ethics*, SOC’Y PROF. JOURNALISTS, (Sept. 6, 2014), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/A9UK-TVCM>].

70. See *Protecting Journalism in the Age of Digital Platforms*, STIGLER CTR. FOR STUDY ECON. & ST. 144 (2019), <http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> [<https://perma.cc/9MSP-HE6F>] (“The report’s starting point is that the marriage between quality accountability journalism and advertising revenues was always fraught with conflicts of interests, biases, battles for attention and challenges to the autonomy and integrity of news organizations.”).

bankroll journalism in the twenty-first century. Today, the model depends on scale, and it seems unfathomable that news organizations will reach the scale of a Google or a Facebook. This means that the First Amendment, financial concerns, and reader trust all point toward a reexamination of the press's predominant business model. As we reexamine, we can look to the practice of journalism itself. Certain journalistic values can help us find a starting point. These values are competition and transparency.

First, with respect to competition, creating a press that can perform its constitutional function requires diverse means and methods. Specifically, we need to devise an abundance of ways to fund the press—ways that would wean it from its dependence on advertising. These could include, as some scholars have proposed, an annual voucher from the U.S. Treasury that citizens could donate to and choose the media outlet of their choice.⁷¹ It could include public subsidies for programs like Report for America that place journalists in news-poor communities to report on civic issues.⁷² It could mean facilitating the process for news organizations to become nonprofits.⁷³

Yet, wholly separating journalism from capitalism is unlikely—and may not even be desirable if diversity of business models is key. That means we need to do more. For this reason, we should look to the value of transparency. To the extent the press continues to surveil, it should be clearer that it is doing so. Law may have its place in helping here. For example, indications are that the European Union's General Data Protection Regulation ("GDPR") is stemming spying. A professor in the Department of Geography and the Environment at the University of Texas, Paul Adams, has said that the implementation of the GDPR led to a twenty-two percent reduction of third-party cookies on European news websites.⁷⁴ Adams surmises that this reduction was due to an aspect of the GDPR known as "privacy by design" that limits the type of data that can be collected and how it might be used.⁷⁵ Timothy Libert, the Carnegie Mellon computer scientist

71. See *id.* at 176.

72. See *A Call to Service: The Crisis in Journalism Has Become a Crisis for Our Democracy*, REPORT FOR AMERICA, <https://www.reportforamerica.org/about/> [<https://perma.cc/8MHD-NMTV>] (last visited March 20, 2020).

73. See Christine Schmidt, *Meet The Salt Lake Tribune, 501(c)(3): The IRS Has Granted Nonprofit Status to a Daily Newspaper for the First Time*, NIEMAN LAB (Nov. 4, 2019, 1:52 PM) <https://www.niemanlab.org/2019/11/meet-the-salt-lake-tribune-501c3-the-irs-has-granted-nonprofit-status-to-a-daily-newspaper-for-the-first-time> [<https://perma.cc/A89C-4DJ9>]. In a sign that this is beginning to occur, recently, the IRS for the first time granted nonprofit status to a daily newspaper, and it did so faster than was expected. *Id.*; see also Steve Dubb, *Salt Lake Tribune Files with IRS for 501c3 Status—How Times Have Changed*, NONPROFIT Q. (June 5, 2019), <https://nonprofitquarterly.org/salt-lake-tribune-files-with-irs-for-501c3-status-how-times-have-changed/> [<https://perma.cc/F2Z8-SUBA>] (describing how even as recently as 2012 the IRS was skeptical of such applications by newspapers, but that more and more news organizations are applying for nonprofit status and wait times are decreasing).

74. See Adams *supra* note 13, at 2:40.

75. See *id.* at 3:40.

who is also studying surveillance by news organizations, has argued for U.S. implementation of the policy behind “privacy by design.”⁷⁶ That is, that systems be designed with privacy as the default and require users to opt-in to tracking.⁷⁷

Non-legal solutions are also key. Journalists themselves should be enlisted in the effort to reform their own institution. *The New York Times* deserves some credit here. As part of its “Privacy Project”—a months-long series about the erosion of privacy—it ran not only the article by Farhad Manjoo about tracking on news sites but also an opinion piece by Libert entitled, *This Article is Spying On You*, detailing surveillance by news organizations.⁷⁸ Although drawing attention to the issue could further erode trust in the press, I think the attention is inevitable. And if the media knows anything about its own business, it knows it should control the message.

News entities also need to reinvest in their own auditing systems. Until recently it was commonplace for news organizations to employ public editors or ombudspeople. These are employees paid by the news organizations to serve as independent watchdogs over them. As the press has been financially crunched, this position has all but disappeared.⁷⁹ Libert has gone as far as to propose a digital ombudsperson to focus on privacy concerns of readers.⁸⁰ I would be pleased with a resurrection of the role of ombudsperson even generally.

VI. CONCLUSION

Our press is imperfect. It always has been. And yet, even in its imperfection, it is vital. It is an investigator, educator, and curator of information at a time when we desperately need these things. In providing us with news, the press offers up a public good that in its breadth defies the meager size of its ranks and the limited nature of its resources.

Yet, the press cannot convincingly and credibly pursue truth and espouse transparency while also surveilling its readers. Although we should

76. See Libert, *supra* note 39.

77. See *id.*

78. See Libert, *supra* note 39. Yet, it could be argued that given *The New York Times*'s position in the upper echelon of the media hierarchy, outing surveillance is less of a financial risk for it than it would be for many other publishers. See also Jessica Davies, *After GDPR, The New York Times Cut Off Ad Exchanges in Europe—and Kept Growing Ad Revenue*, DIGIDAY (Jan. 16, 2019), <https://digiday.com/media/gumgumtest-new-york-times-gdpr-cut-off-ad-exchanges-europe-ad-revenue/> [<https://perma.cc/DHG3-ME5W>] (quoting a New York Times International advertising executive as saying “our digital advertising business continues to grow nicely” even after the implementation of the GDPR).

79. See Jackie Spinner, *Public Editors Disappear as Media Distrust Grows*, COLUM. JOURNALISM REV. (July 20, 2017) https://www.cjr.org/special_report/public-editors-disappearing.php [<https://perma.cc/3P45-8YBM>].

80. See Libert, *supra* note 39.

readily forgive journalists' mistakes, we should not abide the press's intentional surveillance. To let this continue unchallenged risks invading our intellectual privacy, tempering our ability to meaningfully participate in our democracy, and undermining the press's First Amendment standing. Moreover, it is not a winning long-term business model for the press. Perhaps it is unfair to hold the press to such a high standard, but the press has taken up its perch willingly. And I believe that perch is precisely where we need the press to be.