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LECTURE

REVIVING THE PRESS CLAUSE

Floyd Abrams *

It's a great pleasure and a more than memorable honor to me to have been invited to deliver the third Karl Llewellyn Lecture. His extraordinary stature, let alone that of the two more than distinguished individuals who preceded me in the role I play this evening, makes that honor all the clearer and my task all the more challenging.

Most of my professional career has related in one way or another to representing newspapers, broadcasters, and other entities that present news to the public, not least the journalists who write about and analyze events as they occur in the world. That has led me to write for courts, classes, and sometimes in books for the general public, about the scope and nature of First Amendment protection of the press and the ongoing threats to the press. This evening I thought I would speak more broadly about one of those threats and how the law might change to assure that the press might remain both free and relevant.

Unfortunately, today there are a number of threats to the press that cannot be ignored. What looks like the all but suicidal collapse of the *Washington Post* as a great newspaper is only one example. I will focus on another one of longer standing. In November 2023, a member of the *New York Times* editorial board wrote a piece taking a hard look at the role of the press in our nation.[1] From the beginning of the 20th century to that date, the article noted that the amount of daily and weekly newspapers had decreased from approximately 24,000 to around 6,000.[2] Since then, the situation has worsened to the point that only 5,400 U.S. newspapers remain alive, with two more newspapers disappearing each week.[3] The *Atlanta Journal-Constitution* and Newark's the *Star-Ledger*

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1. Serge Schmemann, Opinion, A Powerful Tool for Fighting Corruption Is Going Extinct, N.Y. Times (Nov. 26, 2023), https://www.nytimes.com/2023/11/26/opinion/local-newspapers-democracy-journalism.html (on file with the *Columbia Law Review*).

2. Id.

3. Zach Metzger, The Medill Local News Initiative at Northwestern Univ., State of Local News Report 9 (2025).

stopped offering print editions last year.[4] On January 7 of this year, the *Pittsburgh Post-Gazette* announced it would cease its operation on May 3—a fate that was only prevented by a journalism-focused nonprofit's last-minute purchase of the newspaper.[5]

With newer forms of technology abounding, threats to the economic viability of newspapers and the like are unmistakable. Any diminution of the legal protections the press now has could well be economically disastrous. So too, I submit, would the failure to provide the press still more protection than it has now.

Let's begin with a brief view of some features of our history and the way the Framers of our nation viewed the press. A starting point is that the press was the only for-profit privately-owned nongovernmental entity even mentioned, let alone protected, in the Constitution.[6] When James Madison, on June 8, 1789, first submitted a draft, here in New York, of what became the First Amendment, it contained this language: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[7]

Note Madison's use of the word "inviolable." That word was commonly used when the notion of protecting the press in the future was considered. For example, the Delaware Declaration of Rights in 1776 contained language asserting that "the liberty of the press ought to be inviolably preserved";[8] the Constitution of Georgia in 1777 provided for "[f]reedom of the press and trial by jury, to remain inviolate forever";[9] and the Maryland Constitution of 1776 declared that "the liberty of the press ought to be inviolably preserved."[10]

Sweeping legal protection for the press was viewed by the Framers as an essential element of freedom in the new nation and was reflected in

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4. J. Scott Trubey, AJC to Move to Fully Digital Publication, Phase out Print Dec. 31, Atlanta J.-Const., https://www.ajc.com/business/2025/08/ajc-to-move-to-fully-digital-publication-phase-out-print-dec-31/ (on file with the *Columbia Law Review*) (last updated Aug. 28, 2025); Tracey Tully, A Storied Newspaper Prepares to Print Its Own Obituary, N.Y. Times (Feb. 1, 2025), https://www.nytimes.com/2025/02/01/nyregion/new-jersey-star-ledger-prints-final-edition.html (on file with the *Columbia Law Review*).

5. Kris B. Mamula, Post-Gazette to Publish Final Edition and Cease Operations on May 3, Pittsburgh Post-Gazette (Jan. 7, 2026), https://www.post-gazette.com/local/city/2026/01/07/pittsburgh-post-gazette-final-edition/stories/202601070073 (on file with the *Columbia Law Review*) (last updated Jan. 9, 2026); Jeffrey A. Trachtenberg, Pittsburg Post-Gazette Is Being Sold to Baltimore Banner Owner, Wall St. J. (Apr. 14, 2026), https://www.wsj.com/business/media/pittsburgh-post-gazette-is-being-sold-to-baltimore-banner-owner-01a969bd?mod=lead_feature_below_a_pos1 (on file with the *Columbia Law Review*).

6. U.S. Const. amend. I.

7. 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834).

8. Del. Const. of 1776, Declaration of Rts., § 23.

9. Ga. Const. of 1777, art. LXI.

10. Md. Const. of 1776, § 38.

the constitutions of the new states. As summarized by historian Wendell Bird in his book *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act*,

> It is remarkable that nine of the eleven infant states adopting new fundamental law (plus Vermont, an independent government) protected liberty of press in their new declarations of rights or constitution during 1776–1783—more than protection of any other right except liberty of conscience and a right to jury trials. It is still more remarkable that every one of those states described that right in the broadest terms.[11]

Similarly, state conventions in North Carolina, Rhode Island, and Virginia described freedom of the press as one of the "greatest bulwarks of liberty, [which] ought not to be violated" in proposals about what to include in the new federal constitution;[12] and New York proposed language stating that "the Freedom of the Press ought not to be violated or restrained."[13]

As for the key Framers themselves, Madison's drafting and advocacy of what became the First Amendment speaks for itself. It was entirely consistent with his assertion in 1800 in his Report on the Virginia Resolutions that "to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression."[14]

Thomas Jefferson's advocacy of sweeping protection for the press was also exuberant in its breadth. When he was the first American ambassador to France, he all but threatened to oppose ratification of the Constitution if it lacked a Bill of Rights with a clause protecting the

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11. Wendell Bird, The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act 303 (2020).

12. North Carolina Hillsborough Convention Amendments, 2 August 1788, reprinted in 18 Documentary History of the Ratification of the Constitution 454 (John P. Kaminski & Gaspare J. Saladino eds., 1995); Rhode Island Recommendatory Amendments, 29 May 1790, Ctr. for the Study of the Am. Const., https://csac.history.wisc.edu/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/rhode-island-recommendatory-amendments-29-may-1790/ (on file with the *Columbia Law Review*) (last visited April 11, 2026); Virginia Recommendatory Amendments, 27 June 1788, Ctr. for the Study of the Am. Const., https://csac.history.wisc.edu/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/virginia-recommendatory-amendments-27-june-1788/ (on file with the *Columbia Law Review*) (last visited April 11, 2026).

13. New York Recommendatory Amendments, 26 July 1788, Ctr. for the Study of the Am. Const., https://csac.history.wisc.edu/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/new-york-recommendatory-amendments-26-july-1788/ (on file with the *Columbia Law Review*) (last visited April 11, 2026).

14. James Madison, The Report of 1800 (Jan. 7, 1800), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/01-17-02-0202 [https://perma.cc/5YX6-5BTQ] (last visited Mar. 30, 2026).

press.[15] "It astonishes me," he wrote to William Stephens Smith regarding American opposition to a Bill of Rights, "that threefourths of [our countrymen] should be content to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press" and other rights.[16] "Our liberty depends on the freedom of the press," Jefferson wrote, "and that cannot be limited without being lost."[17] And still more memorably, that if he had to choose between "a government without newspapers, or newspapers without a government" that he would "not hesitate a moment to prefer the latter."[18] And finally, and unforgettably, "where the press is free, and every man able to read, all is safe."[19]

Inexplicably, such statements by the two most significant Framers and advocates of sweepingly broad First Amendment protection for the press have yet to be substantially relied upon in Supreme Court opinions involving press freedom. Nor has the Press Clause itself. When a group of colleagues and I drafted a recent law review article, we titled it "The Press Clause: The Forgotten First Amendment."[20]

We were not exaggerating. Our article set forth in detail our concerns that the Supreme Court has yet to recognize unique protections needed for journalists to best perform their role in a democratic society.[21] Rather, the Court's precedents have often treated violations of the rights of news organizations no differently than that of any other speaker or private enterprise.[22] Even key decisions arising out

15. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0454 [https://perma.cc/7WKG-W4N7].

16. Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0590 [https://perma.cc/6FLZ-TWQ5].

17. Letter from Thomas Jefferson to James Currie (Jan. 28, 1786), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-09-02-0209 [https://perma.cc/VQ6G-EY64].

18. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-11-02-0047 [https://perma.cc/J9UD-676B].

19. Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/03-09-02-0209 [https://perma.cc/25KZ-Z5VL].

20. Floyd Abrams, Sandra Baron, Lee Levine, Jacob M. Schriner-Brigg & Isaac Barnes May, The Press Clause: The Forgotten First Amendment, 5 J. Free Speech L. 561 (2024).

21. Id. at 564.

22. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); Associated Press v. Nat'l Lab. Rels. Bd., 301 U.S. 103, 132–33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws."); see also Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352–53 (2010) ("The law's exception for media corporations . . . results in a further, separate reason for finding this law invalid: Again by

of blatant violations of press freedom have often conflated speech and press freedoms to the point that the latter seems all but superfluous.[23]

This seems particularly inapt in light of recent disturbing events including a number of reporters in the last two presidential races being assaulted, arrested, and confined; news outlets hemorrhaging jobs; local governments utilizing their powers to undermine newsrooms; and other actions including barring journalists from witnessing executions.[24] These developments have led us to convene workshops of legal scholars and practitioners to discuss ways in which a more invigorated Press Clause could lead to a more robust press and better-educated public.

Of course, there is no shortcut available to fully revive a fading industry. As the modes of communication wax and wane in terms of their economic viability, there are obvious limits to what changes in law can accomplish. But a more robustly read and understood Press Clause could recognize and support the structural role that the press plays in our democracy, including acting as a check on the government and informing the voting public. Interpreting the Press Clause as an independent constitutional protection for journalists and news organizations could inspire changes to a status quo in which many legal barriers obstruct the reporting and publication process. Beyond the courts, this could also act as constitutional authority for new legislation to support and protect the press amid the many extralegal challenges it now faces.[25]

First, an invigorated Press Clause could prompt the courts and other government agencies to expand the First Amendment–rooted right-of-access beyond judicial proceedings.[26] Generally, the press is not guaranteed any "special access" rights beyond those of the general public

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its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views.").

23. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266–68 (1964) (justifying a heightened intent standard for defamation of public officials as required by both "the freedom of speech and of the press," referred to generally as "freedoms of expression"); see also, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) ("The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press . . . .").

24. See Abrams et al., supra note 20, at 564–65 (discussing the recent challenges faced by the press, including government suppression, financial burdens, and degradation of public trust); see also Associated Press v. Neal, 788 F. Supp. 3d 959, 962 (S.D. Ind. 2025) (challenging Indiana's ban on press access to executions).

25. See Abrams et al., supra note 20, at 636, 644–45 (discussing legislative solutions to current economic threats to the journalism industry, including Congressional subsidies for local journalism, expansions of public media offerings, and arrangements to help news organizations receive a cut of the advertising revenue their stories generate for tech platforms).

26. Id. at 569–71; see also *Richmond Newspapers*, 448 U.S. at 580 (holding that the right of the public to attend criminal trials is "implicit in the guarantees of the First Amendment").

under the First Amendment.[27] In fact, some states have policies that explicitly prohibit members of the news media from accessing certain spaces or otherwise limit their ability to do so.[28] This is particularly troubling with regards to executions, where states have adopted their own access rules in the absence of a clear federal standard.[29] Indiana, a death penalty state, completely prohibits the press from witnessing executions.[30] In 2025, a coalition of media organizations sued to challenge this law as unconstitutional under the First Amendment, but they were denied a preliminary injunction.[31] They are now appealing that ruling.[32] Another recent lawsuit has challenged Tennessee's restrictions preventing journalists from witnessing many key steps of the execution process, recently winning a temporary injunction.[33] Tennessee also sets a cap on the number of media witnesses for executions, a common practice in death penalty states.[34] Arkansas used to have a policy for executions in which reporters—of which only three were allowed—could not even use a pencil and paper to take notes, although they reversed course in 2017 after public pressure.[35] The presence of media witnesses is often the only way for the public to receive clear, reliable information when an execution is botched, as was noted in the plaintiffs' filings in the Indiana lawsuit.[36]

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27. See Pell v. Procunier, 417 U.S. 817, 834 (1974) ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.").

28. See, e.g., *Neal*, 788 F. Supp. 3d at 959; Sherman Smith, Kansas House Speaker Bans Reporters From Chamber Floor, Doesn't Say Why, Kan. Reflector (Jan. 13, 2025), https://kansasreflector.com/2025/01/13/kansas-house-speaker-bans-reporters-from-chamber-floor-doesnt-say-why/ (on file with the *Columbia Law Review*).

29. See, e.g., Leah Roemer, New Resource: In Era of Secrecy, States Increasingly Restrict Media Access to Executions, Death Penalty Info. Ctr. (Nov. 22, 2024), https://deathpenaltyinfo.org/new-resource-in-era-of-secrecy-states-increasingly-restrict-media-access-to-executions [https://perma.cc/GYA9-Y3TM] (last updated Mar. 14, 2025) (detailing state policies governing media access to executions).

30. *Neal*, 788 F. Supp. 3d at 962 (describing the Indiana policy challenged).

31. Id. at 961.

32. Appellants' Principal Brief at 1, Associated Press v. Neal, No. 25-2025 (7th Cir. filed Jul. 28, 2025).

33. Memorandum of Law in Support of Plaintiffs' Motion for Temporary Injunction, Associated Press v. Nelsen, No. 25-1513-III (Tenn. Ch. Ct. filed Oct. 29, 2025); Chancellor's Order Granting Temporary Injunction, Associated Press v. Nelsen, No. 25-1513-III (Tenn. Ch. Ct. filed Jan. 16, 2026).

34. See Roemer, supra note 29 (identifying Tennessee among several states that have limitations on the number of journalists permitted to witness executions).

35. Jacob Kauffman, Update: Arkansas Bars Media From Using Pen & Paper to Document Executions, Little Rock Pub. Radio (Apr. 20, 2017), https://www.ualrpublicradio.org/2017-04-20/update-arkansas-bars-media-from-using-pen-paper-to-document-executions [https://perma.cc/N2JG-X4JC].

36. Appellants' Principal Brief at 42–45, *Neal*, No. 25-2025 (7th Cir. filed July 28, 2025).

Right-of-access claims, including those raised in these execution lawsuits, are now generally analyzed through a broadly discretionary "experience and logic" test, which weighs whether there is an established history of access and whether such access is beneficial to the "functioning of the particular process."[37] A more enlightened or sympathetic reading of the Press Clause could support a loosening or complete reframing of this doctrine. Asserting clear constitutional rights to access on a federal level would replace the current patchwork state-by-state approach.[38] It could also provide, as Justice Stewart proposed in his concurring opinion in *Richmond Newspapers v. Virginia*, that when there is limited access to government proceedings, space must be reserved for members of the press.[39] And it could lead courts and other government agencies to exempt the press from certain time, place, and manner restrictions, including generalized dispersal orders or curfews. This would facilitate better reporting on timely matters of public concern such as protests.[40] Curfews and dispersal orders are a common rationale for arresting journalists who are doing their jobs[41]—a press exemption from such orders could also function to protect individual reporters.

More broadly but still within practical limits, an expanded understanding of the Press Clause could be wielded to challenge laws that seriously limit newsgathering by reaffirming that newsgathering is a fundamental First Amendment press right. Media organizations enjoy no immunities from generally applicable laws, even those that would obstruct their reporting process, under Supreme Court precedents such as *Associated Press v. NLRB*.[42] Under tort or contract law, journalists can end up liable for damages as a result of newsgathering activities including going undercover, entering restricted locations, or recording without consent.[43] When the generally applied law's burden on free

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37. See, e.g., Press-Enterprise Co. v. Superior Ct. of Cal., 478 U.S. 1, 8–9 (1986); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605–06 (1982).

38. See Abrams et al., supra note 20, at 570–71 ("The Second, Fourth, Sixth, and Ninth Circuits have broadened the right of access beyond the context of criminal proceedings . . . . [T]he Sixth Circuit has held that there is a First Amendment right of access to executive branch deportation hearings and the Third Circuit has held that there is not." (citations omitted)).

39. 448 U.S. 555, 600 n.3 (1980) (Stewart, J., concurring).

40. See Tyler Valeska, A Press Clause Right to Cover Protests, 65 Wash. U. J.L. & Pol'y 151, 163–64 (2021) (arguing that the Press Clause supports journalist newsgathering rights at protests, including through media exemptions from curfews and special access rights).

41. See, e.g., Freedom of the Press Found., U.S. Press Freedom in Crisis: Journalists Under Arrest in 2020 11–13 (2020); Hannah Bloch-Wehba, Policing Press Freedom, Knight First Amend. Inst. at Colum. U. (July 16, 2024), https://knightcolumbia.org/content/policing-press-freedom [https://perma.cc/5T3L-UD3H].

42. E.g., 301 U.S. 103, 132–33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

43. See, e.g., Food Lion, Inc. v. Capital Cities/ABC Inc., 194 F.3d 505, 510–11, 524 (4th Cir. 1999) (upholding a judgment against ABC television reporters for the torts of

speech is only supposedly "incidental," there is no viable First Amendment defense.[44] Under a structural reading of the Press Clause, newsgathering and the acquisition of information otherwise unknown to the general public could and should be seen as a fundamental function of the press in a democracy. As such, courts could provide news organizations with exemptions or additional due process protections from laws of general applicability that would obstruct the reporting process.

A more expansive reading of the Press Clause could also support overturning or modifying certain precedents that have refused to protect news organizations from invasive inquiries by the state. One clear target would be *Branzburg v. Hayes*, in which the Court rejected a First Amendment argument for protecting journalists from subpoenas forcing them to testify before grand juries and potentially reveal confidential sources.[45] In response to *Branzburg*, many states have adopted "reporter's privilege" legislation to shield journalists from certain compelled disclosures of confidential sources and information.[46] These protections could be extended nationwide, in recognition of the potential weaponization of subpoenas to chill the reporting process and threaten press freedoms.

Branzburg is not the only decision that has left open this possibility of limiting state power to threaten journalistic independence. Under a strengthened Press Clause, the Court should adopt an approach to journalistic freedom that directly rejects its holding in *Zurcher v. Stanford Daily*.[47] In that case, the Court concluded that a police search of a newsroom did not violate the First Amendment as long as the preconditions for a search warrant were met, even when the newspaper itself was not suspected of criminal activity.[48] This decision, like *Branzburg*, was then superseded by statute—although this time on the federal level. The Privacy Protection Act of 1980 set a much higher bar for searches and seizures of reporters' work product,[49] although its efficacy has come into question after the recent late-night search of the

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trespass and breach of duty of loyalty, which arose out of their undercover reporting activities at a grocery store chain).

44. See Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991) (noting that the case was controlled by a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

45. 408 U.S. 665, 691 (1972).

46. See, e.g., N.Y. Civ. Rights Law § 79-h(b) (McKinney 2025); Reporters' Privilege Compendium, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/reporters-privilege/ [https://perma.cc/AH9B-S2D7] (last visited Feb. 9, 2026).

47. 436 U.S. 547, 551 (1978).

48. Id. at 565–67.

49. 42 U.S.C. § 2000aa (2024).

home of a *Washington Post* reporter.[50] Such searches, like the subpoenas greenlit in *Branzburg*, provide a mechanism for threatening the privacy and editorial freedom of news organizations, and thus should be treated with major skepticism not only by lawmakers, but also by the courts.

Finally, a more sympathetic reading of the Press Clause could support greater protections for journalists who publish leaked information that may have been illegally obtained by sources. The Supreme Court's decision in *New York Times Co. v. United States* refused, in the context of the facts of the case, to allow prior restraints on the publication of highly classified government information, even as the Vietnam War continued.[51] The opinions in that case still left open the possibility of subsequent punishment after publication, with Justice Byron White in his concurrence discussing the possibility of convictions under the Espionage Act.[52]

Three decades later, the Court addressed this question of the media's liability for publishing illegally obtained information in *Bartnicki v. Vopper*.[53] The test established in *Bartnicki* shields a journalist from liability for publishing information on a matter of public concern if they "played no part" in the initially illegal acquisition and lawfully acquired the information themselves.[54]

Unsurprisingly, this test has been difficult to apply consistently, particularly due to technological developments that have changed the ways that information can be obtained and shared. Professors Erik Ugland and Christina Mazzeo, in their analysis of *Bartnicki*,[55] have instead suggested adopting a simple principle already set forth in the Court's decision in *Smith v. Daily Mail Publishing Co.*, a case that I argued and that held that when a newspaper "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[56] This approach is far more

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50. Adam Liptak, Search of Reporter's Home Tests Law With Roots in a Campus Paper's Suit, N.Y. Times (Jan. 19, 2026), https://www.nytimes.com/2026/01/19/us/politics/washington-post-search-press-freedom.html (on file with the *Columbia Law Review*).

51. 403 U.S. 713, 714 (1971). See generally Floyd Abrams, Speaking Freely (2005) (providing further context on the case and the publication of the Pentagon Papers).

52. *N.Y. Times Co.*, 403 U.S. at 735–37 (White, J., concurring) ("The Criminal Code contains numerous provisions potentially relevant to these cases . . . . [T]he newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish.").

53. 532 U.S. 514, 517–18 (2001).

54. Id. at 525.

55. Erik Ugland & Christina Mazzeo, Hacks, Leaks, and Data Dumps: The Right to Publish Illegally Acquired Information Twenty Years After *Bartnicki v. Vopper*, 96 Wash. L. Rev. 139, 194 (2021).

56. 443 U.S. 97, 103 (1979).

consistent with an interpretation of the First Amendment that prioritizes the role that a free and intrepid press plays in an informed democracy.

Whether the Supreme Court appears likely to provide any such interpretation is, at best, unclear. Indeed, repeated language of that Court suggests an unwillingness on its part to make much, if anything, of the explicit language of the First Amendment protecting the press. It is difficult otherwise to interpret the Court's repeated assertion that "we have consistently rejected the proposition that the institutional press has any constitutional protection beyond that of other speakers."[57] Perhaps it is only the undefined "institutional" press the Court had in mind. But however read, the Court's language can hardly be read as supportive of protecting the press—however defined—from governmental overreach.

In suggesting that some or all of what I have just proposed would significantly advance First Amendment interests, I think it useful to indicate what would not do so. That would involve our nation's adoption of what has become known as a "right to be forgotten," a quite different approach to balancing freedom of speech with claims of privacy which is in effect throughout most of Europe.[58]

In 2014, the Court of Justice of the European Union, in what has become known as the *Google Spain* case, articulated a "right to be forgotten" which effectively requires Google and other search engines to remove links to content initially published in newspapers or elsewhere that is determined to be "inadequate, irrelevant or no longer relevant."[59] Under that legal regime, truth is no defense.[60] Indeed the truthfulness of the targeted information is usually why it is sought to be forgotten.

The initial 2014 *Google Spain* decision establishing a right to be forgotten essentially required the search engine to delist certain newspaper articles from its search results. A 2023 decision of the European Court of Human Rights went further. In the case of *Hurbain v. Belgium*, that Court upheld a decision of a Belgian court ordering a

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57. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010) (internal quotation marks omitted) (quoting Austin v. Mich. Chamber of Com., 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783–84 (1985) (Brennan, J., dissenting) ("Accordingly, at least six Members of this Court . . . agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.").

58. See Robert C. Post, Data Privacy and Dignitary Privacy: *Google Spain*, The Right to be Forgotten, and the Construction of the Public Sphere, 67 Duke L.J. 981, 986–87 (2018) (describing the series of events that established the right to be forgotten in the European Union).

59. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ECLI:EU:C:2014:317, ¶¶ 94, 100 (May 13, 2014).

60. Id. ¶ 94.

newspaper to anonymize an article in its electronic archive.[61] The offending article asserted that a named individual had caused a car accident with two fatalities while under the influence of alcohol, for which he was convicted and imprisoned.[62] In the end, European courts agreed that the driver had a right to have his fatal car accident forgotten, expressing concern that the article had scarred the driver with "a virtual criminal record."[63] Other European newspapers have similarly found articles they published delisted from search engines for containing truthful but embarrassing information from the past including past criminal arrests or convictions.[64]

In September 2015, the English newspaper *The Telegraph* published almost one hundred examples of truthful articles it had published that Google was obliged to remove from its search results under the right to be forgotten.[65] Here are ten examples out of that hundred.[66]

1. An article about a former porn star and brother of a baroness who had been found guilty of two counts of insider trading.
2. An article about a pilot who was killed during a fundraising flight for his village church.
3. A story about a mother of two who was unanimously found not guilty of seven charges made against her by a sixteen-year-old male pupil who alleged that the pair had a ten-month relationship.
4. A story about a law student who was convicted of killing and burying in concrete his controlling father who wanted him to study at the Sorbonne in Paris.
5. A story about a detective who sparked an armed siege inside a police station after allegedly threatening to kill a colleague.

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61. Hurbain v. Belgium, App. No. 57292/16, ¶¶ 255–257 (Jul. 4, 2023), https://hudoc.echr.coe.int/eng?i=001-225814 (on file with the *Columbia Law Review*) (last visited Mar. 3, 2026).

62. Id. ¶ 13.

63. Id. ¶¶ 255–257 (internal quotation marks omitted).

64. See, e.g., Alex Hern, Google Stops Notifying Publishers of 'Right to be Forgotten' Removals From Search Results, The Guardian (Feb. 15, 2024), https://www.theguardian.com/technology/2024/feb/15/google-stops-notifying-publishers-of-right-to-be-forgotten-removals-from-search-results [https://perma.cc/LP2B-WYZ4]; see also Requests to Delist Content Under European Privacy Law, Google, https://transparencyreport.google.com/eu-privacy/overview?hl=en [https://perma.cc/8U42-7ENM] (last visited Feb. 16, 2026) (providing data on delisting requests received and granted by Google under the "right to be forgotten," including examples of real requests).

65. Rhiannon Williams, Telegraph Stories Affected by EU 'Right to be Forgotten', The Telegraph (Sep. 3, 2015), https://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html [https://perma.cc/JSM9-MQBH].

66. Id.

6. An article about a director who was jailed for eight years for stealing more than 34 million pounds from a dotcom company.
7. An article about a former world boxing champion who was jailed for two and a half years after he was caught with £21,000 worth of cannabis in his car.
8. A story about the jailing of a doctor for six years for attempting to spike his pregnant mistress's drinks with drugs to cause her to miscarry their son. The link concerned was an article detailing an email he sent to a colleague following his arrest.
9. An article about a Scottish man who was jailed for life for strangling his wife with a tartan tie and hiding her body under their bed for a week.
10. An article about a company director who killed himself while on Skype with his partner.

Some of the pieces, but by no means all, may seem inconsequential, and depending upon one's view, even unworthy of publication in newspapers. And there is no doubt that all of them caused discomfort at some level to those written about. But taken separately, or as a whole, they reflected the reality of life as depicted in *The Telegraph*. The crimes described were real; the deaths occurred; the trials transpired. The articles related to matters of public interest, yet none may now be accessed through search engines.

The suppression of accurate speech of that sort is inherently troubling. In recent cases in Europe, the right to be forgotten has often been applied in cases in which the supposed vice of what has been published has been nothing less than the truthfulness of what has been published. In 2022, for example, the European Court of Human Rights, in a case entitled *Mediengruppe Österreich GmbH v. Austria*, upheld an order requiring a media company to refrain from publishing a photograph of the brother of the office manager of a candidate for President of Austria if he was referred to as a convicted neo-Nazi in the text.[67] The brother had been convicted as a neo-Nazi in 1995, spending several years in prison, but the conviction had since been erased.[68] To justify the restraint on future publication, the European Court of Human Rights reiterated the Austrian courts' rationale that the photo caption was "not complete" because it did not mention him having "served his sentence and . . . behaved well since."[69]

In this case and others, European judges have been making highly specific editorial decisions about how journalists and media organizations may report information. Right to be forgotten cases often

67. Mediengruppe Österreich GmbH v. Austria, App. No. 37713/18, ¶¶ 1, 6, 72 (Apr. 26, 2022), https://hudoc.echr.coe.int/eng?i=001-216975 (on file with the *Columbia Law Review*).

68. Id. ¶ 9.

69. Id. ¶ 71.

rely on a judge's balancing of discretionary factors to determine whether individuals deserve to have their pasts forgotten, or whether the public deserves to have access to certain information.

For example, in the first right to be forgotten decision by the UK High Court of Justice, two businessmen involved in past white-collar crimes received opposite verdicts when asking Google to take down evidence of their past misbehavior.[70] The court based its decision in part on the extent of each individual's "rehabilitation," deciding to grant the delisting demand only of the man who had "acknowledge[d] his guilt."[71] The right to be forgotten—the right rooted in the notion that truth may not be spoken of certain plainly newsworthy events—has yielded to this highly subjective approach by courts, a disturbing way to decide what truthful speech may be permitted.

Although European law now limits truthful speech in the service of avoiding what it views as undue harm, the United States is not alone in refusing to censor that speech. Brazil has offered a useful anti-censorial approach. In 2021, Brazil's highest court explicitly considered and denied the existence of a legal "right to be forgotten."[72]

That Court found that limiting the spread of truthful information would be incompatible with the nation's constitution,[73] which protects freedoms of expression, information, and the press.[74] The case that led to this determination was not an easy one. Decades after the sexual assault and murder of a young woman, Brazilian media giant Globo had aired photographs of her and her family members in a television broadcast.[75] The woman's surviving family sued for damages based on the unauthorized use of the truthful images.[76] In rejecting the claim, some Brazilian Supreme Court justices emphasized the importance of maintaining a "collective memory," including of the most painful and uncomfortable elements of a nation's history.[77] In her opinion, Justice Cármen Lúcia Antunes Rocha spoke powerfully about the value of preserving stories like the one sought to be forgotten in this case.[78] She asked, "Who will know about slavery, about violence against women, against indigenous people, against gays, except through accounts and the

70. NT1 & NT2 v. Google LLC [2018] EWHC (QB) 799 [5]–[7], [229]–[30] (Eng.).

71. Id. at ¶¶ 169, 222.

72. S.T.F., Recurso Extraordinário No. 1.010.606, Relator: Min. Dias Toffoli, 11.02.2021, Superior Tribunal de Federal Jurisprudência [S.T.F.J.], 4, https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=755910773 (on file with the *Columbia Law Review*).

73. Id.

74. Constituição Federal [C.F.] [Constitution], art. 220 (Braz.).

75. S.T.F., Recurso Extraordinário No. 1.010.606 at 97–98.

76. Id. at 98–99.

77. Id. at 81, 174.

78. Id. at 211.

exhibition of specific examples to prove the existence of aggression, torture, and femicide?"[79]

The full court concluded that "[t]he idea of a right to be forgotten, understood as the power to prevent, by reason of the passing of time, the publication of truthful facts and data, lawfully obtained, and published by digital or analogue communication media, is not compatible with the constitution."[80]

Brazil is an admirable example of a nation whose judges are prepared to defend truth-telling. Here too, an imposed right to be forgotten on truthful speech should be understood as utterly irreconcilable with our Constitution. The First Amendment should never allow courts to decide which truths from our past may and may not be unpublished. Preventing the importation of the right to be forgotten to our shores is part of the battle to assure that freedom of the press will remain inviolable.

A final word or two. The topic I have chosen for this evening is necessarily narrow, albeit of wide importance. It does not include, by way of example only, the direct threats mounted by this administration to freedom of the press by dispatching the FBI to raid the home of a *Washington Post* journalist in search of classified information.[81] Or the decision of that newspaper to eliminate its sports department entirely as part of its more general self-destruction.[82]

And second, but hardly secondarily, we're meeting this evening at a law school, a great law school, so I think it's appropriate to close with a few words about law firms and their behavior when confronted with direct threats to their existence by the Trump Administration.

The worst of those days seem to be over. A few firms—too few, of course—behaved gallantly, defending themselves and ultimately the legal profession as a whole from a frontal assault by the Trump Administration on nothing less than the willingness of law firms to represent clients that take positions critical of the government. Thus far the four firms that fought back have prevailed,[83] as they should have, and those that settled

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79. Id. (approximate translation).

80. Id. at 4 (approximate translation).

81. Liptak, supra note 51.

82. Benjamin Mullen, Washington Post Sports Department Was Among Last of Its Kind, N.Y. Times (Feb. 4, 2026), https://www.nytimes.com/2026/02/04/business/media/washington-post-layoffs-sports-section.html (on file with the *Columbia Law Review*).

83. Zach Montague, Judge Strikes Down Trump Order Targeting Another Top Law Firm, N.Y. Times (June 27, 2025), https://www.nytimes.com/2025/06/27/us/politics/trump-susan-godfrey-law-firm-order.html (on file with the *Columbia Law Review*); Zach Montague, Trump Loses Another Battle in His War Against Elite Law Firms, N.Y. Times (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/trump-law-firms-wilmerhale.html (on file with the *Columbia Law Review*).

have lost both reputation and money by doing so.[84] Perhaps the braver firms have taught a lesson to those who crumbled under the pressures of the Trump Administration—and to all of us as well. The First Amendment is a mighty cudgel but only when it is used.

84. See, e.g., Matthew Goldstein, Jessica Silver-Greenberg & Michael S. Schmidt, Inside Elite Law Firms, Protests and Quitting After Trump Deals, N.Y. Times (Apr. 2, 2025), https://www.nytimes.com/2025/04/02/business/trump-law-firms-skadden-paul-weiss.html (on file with the *Columbia Law Review*); Danielle Kaye, Lauren Hirsch & Maureen Farrell, Paul Weiss Deal With Trump Faces Backlash From Legal Profession, N.Y. Times (Mar. 21, 2025), https://www.nytimes.com/2025/03/21/business/paul-weiss-trump-reaction.html (on file with the *Columbia Law Review*); Michael S. Schmidt, Jessica Silver-Greenberg & Matthew Goldstein, Karen Dunn and Other Top Lawyers Depart Paul Weiss to Start Firm, N.Y. Times (May 23, 2025), https://www.nytimes.com/2025/05/23/business/karen-dunn-paul-weiss-partners.html (on file with the *Columbia Law Review*).