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## Symposium: Truth, Trust and the First Amendment in the Digital Age: Foreword: Whither the Fourth Estate?

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## Symposium:

### Truth, Trust and the First Amendment in the Digital Age

#### Foreword Whither the Fourth Estate?

*Lyrissa Lidsky*\*

As a professor of Media Law, I have devoted my career over the past quarter of a century to the idea that the press plays a special role in our democracy. That role is largely encapsulated by the concept of the press as Fourth Estate – an unofficial branch of government in our scheme of separation of powers that checks the power of the three official branches.<sup>1</sup> In our constitutional scheme, the press is the watchdog that informs us what the legislative, executive, and judicial branches of government are up to and continually replenishes the stock of news – real news – that enables informed public discussion and rational public policy.

Currently many observers, including the distinguished contributors to our Price Sloan Symposium Issue, believe that the Fourth Estate is under threat. The threat comes from various quarters.

Perhaps the biggest threat is economic. The Internet has changed the way Americans seek and consume news to the detriment of the legacy newspapers and other legacy media that have traditionally comprised the Fourth Estate. Since at least the early 2000s, legacy media have had to compete for eyeballs

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1. See generally Potter Stewart, *Or of The Press*, 50 HASTINGS L.J. 705 (1999). As Professor RonNell Andersen Jones points out, the press may in turn be checked by the executive branch when it exercises the power of the bully pulpit to correct the public record. RonNell Andersen Jones, *The Press and the Expectation of Executive Counterspeech*, 83 MO. L. REV. 939, 955–56 (2018).

in an information marketplace teeming with free, if not always reliable, content.<sup>2</sup> Coming on the heels of a prolonged period of declining audiences for news, the last year was a hard one for news media. According to a 2017 Pew Research poll, “the audience for nearly every major sector of the U.S. news media fell in 2017 – with the only exception being radio.”<sup>3</sup> Newspapers lost 11% in weekday circulation and 10% on Sunday.<sup>4</sup> Meanwhile, the viewership of evening and morning news programs declined substantially – 7% and 10%, respectively.<sup>5</sup> Local television news also lost out, with a 15% decline in morning news viewership and a 7% decline in evening news viewership.<sup>6</sup> Even cable faced a declining number of evening news viewers in 2017, though cable news profits were up in the same period.<sup>7</sup>

As these statistics suggest, the economic threat to legacy media undermines their ability to perform the watchdog role. As profits have declined, the resources, expertise, and talent traditionally devoted to investigative reporting and even simple news gathering have declined correspondingly.<sup>8</sup> To make matters worse, legacy media are far less willing to litigate to protect their constitutional rights or statutory privileges or lobby to gain more.<sup>9</sup>

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2. *Newspaper Fact Sheet*, PEW RES. CTR. (June 13, 2018), <http://www.journalism.org/fact-sheet/newspapers/>.

3. Michael Barthel, *5 Facts About the State of the News Media in 2017*, PEW RES. CTR. (Aug. 21, 2018), <http://www.pewresearch.org/fact-tank/2018/08/21/5-facts-about-the-state-of-the-news-media-in-2017/>.

4. *Id.*

5. *Network News Fact Sheet*, PEW RES. CTR. (July 25, 2018), <http://www.journalism.org/fact-sheet/network-news/>.

6. *Local TV News Fact Sheet*, PEW RES. CTR. (July 12, 2018), <http://www.journalism.org/fact-sheet/local-tv-news/>.

7. *Cable News Fact Sheet*, PEW RES. CTR. (July 25, 2018), <http://www.journalism.org/fact-sheet/cable-news/>.

8. See ALEX JONES, *LOSING THE NEWS: THE FUTURE OF THE NEWS THAT FEEDS DEMOCRACY* 7 (2009). “Building the relationships and trust that generate high-stakes investigative reporting requires a news organization’s patient support. A skilled investigative reporter can cost a news organization more than \$250,000 a year in salary and expenses for only a handful of stories.” *Id.* at 7. Investigative reporting “also often means incurring legal risks and igniting the wrath of powerful interest, which is one reason there is so little of it on the web.” *Id.*

9. Jonathan Peters, *Survey: Editors See Media Losing Ground as Legal Advocate for 1st Amendment*, COLUM. J. REV. (Apr. 21, 2016), [https://www.cjr.org/united\\_states\\_project/knight\\_survey\\_editors\\_first\\_amendment.php](https://www.cjr.org/united_states_project/knight_survey_editors_first_amendment.php).

[T]he news industry, especially newspapers, has shaped American media law for decades by paying the bills to bring the big cases – to unseal court papers, to open meetings, to protect confidential sources, and to compel the disclosure of public records. But in the past decade, as the report notes, economic trends have put pressure on the capacity of news organizations to litigate and otherwise to take stands to advance free speech and press rights.

The picture is not universally bleak. In the last two years, subscriptions to *The Washington Post* and *The New York Times* have increased.<sup>10</sup> Legacy newspapers such as these as well as the non-profit digital newcomer *Pro Publica*<sup>11</sup> have been providing excellent investigative journalism. Meanwhile, cable news is thriving<sup>12</sup> along with a cadre of digitally native news organizations that have come on the scene<sup>13</sup> and are hiring reporters.<sup>14</sup>

Even so, the growth in these segments of the media does not adequately compensate for the declining number of local and print reporters. Local reporters in particular are the bedrock of public interest journalism, devoting themselves to the systematic gathering and reporting of information about the communities they serve. Fewer reporters and fewer resources devoted to news-gathering together with the decimation of expertise in U.S. newsrooms threaten the ability of the Fourth Estate to perform its constitutionally assigned role.

Certainly, the public questions whether today's news media are adequately performing their role and even whether that role is a valuable one. Just a half-century ago the public considered the news media "one of America's most trusted institutions."<sup>15</sup> Today, only some segments of the public still value traditional news media. Although 89% of Democrats still support the press' watchdog role, only 42% of Republicans do, according to a recent Pew

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*Id.*

10. Ken Doctor, *Trump Bump Grows into Subscription Surge – and Not Just for the New York Times*, THE STREET (Mar. 2, 2017), <https://www.thestreet.com/story/14024114/1/trump-bump-grows-into-subscription-surge.html> (noting *The Washington Post* "doubled digital subscription revenue in [2017], with a 75% increase in new subscribers," and *The New York Times* recently reached unprecedented subscriber rates).

11. See generally PROPUBLICA, <https://www.propublica.org/> (last visited Oct. 13, 2018).

12. See *Cable News Fact Sheet*, *supra* note 7.

13. See *Digital News Fact Sheet*, PEW RES. CTR. (June 6, 2018), <http://www.journalism.org/fact-sheet/digital-news/>.

14. See *Pew: Newsroom Jobs Fall, Digital Native Jobs Grow*, NEWS & TECH (Aug. 6, 2018), [https://newsandtech.com/dataline/pew-newsroom-jobs-fall-digital-native-jobs-grow/article\\_93be12d6-99aa-11e8-89bc-03b6a065358e.html](https://newsandtech.com/dataline/pew-newsroom-jobs-fall-digital-native-jobs-grow/article_93be12d6-99aa-11e8-89bc-03b6a065358e.html). Having more free content for the citizenry to consume seems like a positive public good, and certainly I have previously touted the democratizing effects of the Internet and social media. See generally Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000). But having more speakers with access to mass media platforms is not substitute for having a greater stock of reliable information from which to draw to undergird public discussion and opinion formation. Traditionally, it is legacy media who have performed the critical task of gathering the information critical to self-governance, and their waning political and economic power means we have more content and more opinions but less news.

15. JOHNATHAN M. LADD, *WHY AMERICANS HATE THE MEDIA AND HOW IT MATTERS* 1 (2012).

research poll.<sup>16</sup> The decline in public support has been precipitous. In 2016, 77% of Republicans and 74% of Democrats still had faith in the special role of the press.<sup>17</sup> The partisan divide is even reflected in the media diet partisans consume.<sup>18</sup>

As these statistics suggest, legacy media are facing a crisis of legitimacy – at least among a large and important segment of the population. This crisis is exacerbated by President Donald Trump’s repeated attacks, asserted in over one thousand tweets in his first year alone,<sup>19</sup> on the press as purveyors of “fake news.” A growing body of commentary and scholarship examines the effects of the President’s Twitter campaign against mainstream media – or at least against those who dare to criticize him.<sup>20</sup> For example, Professors Sonja West and RonNell Andersen Jones have previously shown how the President’s attacks on the already weakened Fourth Estate jeopardize its ability to perform its constitutional role,<sup>21</sup> and Professors Andersen Jones and Lisa Sun have shown how the President’s repeated attempts to construct the press as an “enemy of the people” “subvert[ ] the democracy-enhancing functions of the press and empower[ ] the administration to delegitimize other institutions and construct other enemies – including the judiciary, the intelligence community, and certain races or religions.”<sup>22</sup> Is it a sign of hope or despair that the U.S. Senate

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16. Michael Barthel & Amy Mitchell, *American’s Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RES. CTR. (May 10, 2017), <http://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/>.

17. *Id.*

18. Increasingly, strong conservatives and strong liberals do not consume – or trust – the same news media sources. Amy Mitchell et al., *Political Polarization & Media Habits*, PEW. RES. CTR. (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>.

19. Jonathan Peters, *Trump Twitter Spreadsheet Tracks “A Perpetual Campaign Against the Press”*, COLUM. JOURNALISM REV. (Dec. 21, 2017), [https://www.cjr.org/united\\_states\\_project/trump-twitter-spreadsheet-press-attacks.php](https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php).

20. See, e.g., RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567 (2017); Jon Finan, *A Dangerous Time for Press and the Presidency*, ATLANTIC (Feb. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/02/a-dangerous-time-for-the-press-and-the-presidency/517260/>; Andrew Higgins, *Trump Embraces ‘Enemy of the People,’ a Phrase with a Fraught History*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html>.

21. See generally Andersen Jones & West, *supra* note 20.

22. RonNell Andersen Jones & Lisa Grow Sun, *Making an Enemy of the Press*, U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/making-an-enemy-of-the-press/>; see also RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1304 (2017).

passed a resolution in August 2018 declaring that “the press is not the enemy of the people”?<sup>23</sup>

In this Symposium issue, Professors West and Andersen Jones analyze new ways in which President Trump’s behavior threatens the ability of the press to check the power of the executive branch and provide information vital to democracy.

Professor West’s article, *Presidential Attacks on the Press*,<sup>24</sup> shows how the President’s attacks have gone beyond insult to injury. Her article identifies various threats to the Fourth Estate arising from President Trump’s recent behaviors, and she evaluates each according to its constitutional seriousness.<sup>25</sup> As Professor West explains, a number of President Trump’s tweets and statements have involved not just name-calling but threats to deny access and other benefits to those who criticize him.<sup>26</sup> He has asked for the firing of reporters, boycotting of specific media outlets, filing of lawsuits, and even jailing of reporters.<sup>27</sup> Most seriously of all from a First Amendment perspective, “President Trump has attempted to employ the federal government’s power and agencies to punish specific members of the press in retaliation for their reporting.”<sup>28</sup> He has threatened to use the powers of the Internal Revenue Service, the Federal Communications Commission, and the Justice Department’s Antitrust Division to retaliate against media owners or organizations who have criticized him.<sup>29</sup> Professor West convincingly argues, based on United States Supreme Court precedent, that the President has crossed a constitutional line by denying access to executive branch information to disfavored reporters and by threatening to use the power of the executive branch to punish disfavored individuals and media organizations.<sup>30</sup> Her article makes a valuable contribution by marshalling existing precedent to illuminate the constitutional line, and the arguments she makes will be critical in the First Amendment litigation that is sure to come.

Professor Andersen Jones’ contribution to this Symposium issue supplements both Professor West’s critique and her own earlier critique<sup>31</sup> of the threat

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23. S. Res., 15th Cong., 2d Sess. (2018), <https://www.schatz.senate.gov/imo/media/doc/FPR%2008-15-18.pdf> (“Reaffirming the vital and indispensable role the free press serves.”); see also Kathryn Watson, *Senate Adopts Resolution Declaring “The Press Is Not the Enemy of the People”*, CBS NEWS (Aug. 16, 2018), <https://www.cbsnews.com/news/senate-unanimously-passes-resolution-declaring-the-press-is-not-the-enemy-of-the-people/>.

24. Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915 (2018).

25. *Id.* at *passim*.

26. *Id.* at 920–22.

27. *Id.* at 921.

28. *Id.* at 922.

29. *Id.* Conversely, President Trump has promised favorable treatment to media owners and organizations he favors, such as Rupert Murdoch and Sinclair Broadcasting, and executive agencies have in fact treated them favorably. *Id.* at 930.

30. *Id.*

31. See discussion and citations *supra* notes 22–23.

posed by a president who casts the press as a public enemy.<sup>32</sup> All presidents use the bully pulpit and the powers of the executive branch to engage with the citizenry.<sup>33</sup> Indeed, the United States Supreme Court's government speech doctrine recognizes that governments must speak in order to govern; indeed, presidents secure the consent of the governed through public engagement and discussion.<sup>34</sup> President Trump, however, engages in public discussion in a manner different than his predecessors. As Professor Andersen Jones shows in her thoughtful article, *The Press and the Expectation of Executive Counter-speech*, this difference may rise to a level of constitutional significance and undermine democratic self-governance, the search for truth within the marketplace of ideas, and government accountability.<sup>35</sup>

Professor Andersen Jones shows that President Trump's campaign to label all adverse reporting as fake news without providing factual information to correct asserted errors contravenes long-standing norms governing how presidents interact with the press and the citizenry.<sup>36</sup> Historically, presidents engage in public discussion by providing "meaningful contributions to the marketplace of ideas designed to counter, refute, and clarify . . . ."<sup>37</sup> Professor Andersen Jones argues that a norm of executive counterspeech that is "responsive, factual, and evidence-based" is embedded in existing First Amendment precedent.<sup>38</sup> She shows that the President's failure to provide meaningful counterspeech contravenes democratic theory and First Amendment values and undermines our capacity for meaningful public discourse.<sup>39</sup>

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32. See generally Andersen Jones, *supra* note 1.

33. See *id.*

34. See Lyrrisa Barnett Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2017–21 (2011) (discussing the underpinning assumptions of government speech doctrine). Without the acquiescence of the governed, secured through public discussion, it is almost impossible for a democratic government to perform its roles and functions. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, government has to say something . . . ."); see also MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 14 (1983) ("The greater government's ability to reach mass audiences and to communicate successfully with those audiences, the greater the potential for effective implementation of government policy.").

35. Andersen Jones, *supra* note 1.

36. *Id.* at 940.

37. *Id.* at 943.

38. See *id.* at 965–66. The marketplace of ideas compassed by United States Supreme Court doctrine is one where "speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental policies." *Id.* at 954 (quoting *Dennis v. United States*, 341 U.S. 494, 503 (1951)).

39. See *id.* Both democratic theory and First Amendment values posit that the proper presidential response to an erroneous news report is for the president to "contribut[e] more information with additional accuracy" rather than simply "labeling the news coverage 'fake' without revealing what the truth is or shutting down dialogue with nonresponsive retorts." *Id.* at 940 (alteration in original).

Professor Andersen Jones makes a number of important points about the failure of President Trump to engage systematically in executive counter-speech, but one of the most original and compelling is that such presidential counterspeech itself plays a “checking function” on inaccurate press coverage.<sup>40</sup> Without presidential pushback on the press with “substantive, specific, factual” information, the public may be insufficiently informed or “affirmatively misled.”<sup>41</sup> She also points out that the public is a key piece of the equation, which performs (or ought to perform) an important role in sanctioning violations of constitutional norms.<sup>42</sup> We citizens must engage and demand more of the press, the president, and public discourse.

If the changes wrought by social media form the backdrop of the first two articles in this Symposium issue, they move to the fore in the final contribution. Rachael Jones, former fellow at Reporter’s Committee for Freedom of the Press and the University of North Carolina Center for Media Law & Policy, asks whether the marketplace of ideas becomes an echo chamber without sufficient inputs of reliable information.<sup>43</sup> Jones’ article highlights ongoing changes in the marketplace of ideas that thwart its purported truth-seeking function and its role in forging public consensus on issues of public concern.<sup>44</sup>

In the early days of the Internet, many scholars, myself included, speculated that providing millions of ordinary citizens relatively inexpensive access to a medium of mass communication might revitalize the marketplace of ideas by eliminating structural and financial barriers to full participation in meaningful public discourse.<sup>45</sup> Even then, however, it was obvious that “[s]peech from ‘a multitude of tongues’ may lead to truth, but it may also lead to the Tower of Babel.”<sup>46</sup> Jones’ survey of the current landscape certainly makes the case for the latter. She highlights how many citizens lack the training or motivation to separate the wheat from the chaff as they each “curate” a path through a modern marketplace filled with false information.<sup>47</sup> She also chronicles the shifts in power from legacy media to platform owners and “social media influencers” who may or may not have the same incentives for accuracy as the legacy media.<sup>48</sup> She further points to the danger of propaganda crowding out fact when like-minded individuals reinforce and radicalize each other in social media echo chambers.<sup>49</sup>

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40. *Id.* at 949–52.

41. *Id.* at 965.

42. *See id.*

43. *See* Rachael L. Jones, *Can You Have Too Much of a Good Thing?: The Modern Marketplace of Ideas*, 83 MO. L. REV. 971 (2018).

44. *See* Jones, *supra* note 43, at *passim*.

45. *See, e.g.*, Lidsky, *supra* note 14, at 893–98 (discussing the “new” marketplace of ideas ushered in by the Internet). *See generally* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

46. Lidsky, *supra* note 14, at 902–03.

47. Jones, *supra* note 43, at 968.

48. *See id.* at 969.

49. *See id.* at 968 n.2.



Amidst this evidence of a dysfunctional marketplace, Jones identifies some rays of hope. Although it may be harder for truth to emerge from the clash of ideas in the social media marketplace, emerging tools, practices, and First Amendment jurisprudence continue to foster self-governance. As Jones points out, social media enables savvy citizens to engage in on-the-spot fact checking that was previously impossible.<sup>50</sup> Indeed, social media gives citizens access to more information than ever before, and it enables them to band together to push against bad ideas or to call for exclusion of those who purvey bad ideas from social media platforms. Finally, she sees cause for hope in the thoughtful adaptation of existing First Amendment doctrines to social media in cases, such as *Knight First Amendment Institute v. Trump*.<sup>51</sup> Judicial shaping of the modern marketplace to foster self-governance has begun, and the cacophony that “more speech” has brought may yet resolve into a functioning marketplace of ideas.<sup>52</sup>

The contributions to this Symposium underline why those of us in higher education must continue to train professional journalists and expert media lawyers. Now more than ever our democracy needs journalists who will engage the citizenry and replenish the stock of real news upon which our democracy depends, and now more than ever those same journalists need lawyers to defend their rights so they can continue to function as the Fourth Estate.

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50. *See id.* at 970 n.12.

51. *See id.* at 982; *see also* 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

52. Jones, *supra* note 43, at 982–83.