

PROTECTING THE ROLE OF THE PRESS DURING TIMES OF
CRISIS

MARY-ROSE PAPANDREA *

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* Samuel Ashe Distinguished Professor of Constitutional Law, University of North Carolina School of Law. Many thanks to the William & Mary Law Review for inviting me to participate in its Symposium, The Role of the Courts in Socially and Politically Charged Moments, and to the other participants for their thoughtful comments on this Article.

INTRODUCTION

President Trump's daily tweets attacking the media have led many observers to express concern about the state of the press in our nation. Trump has called the press "the ... enemy of the [American] people,"¹ encouraged a climate of hatred toward journalists at his rallies,² refused to condemn Saudi Arabia for the brutal killing of reporter Jamal Khashoggi,³ and accused the media of writing "fake news."⁴ The public's trust in the institutional press has simultaneously diminished.⁵ Combined with the continuing economic challenges journalists face, the press is certainly facing some difficult times.

1. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (May 20, 2019, 4:20 AM), <https://twitter.com/realDonaldTrump/status/1130433207487336450> [<https://perma.cc/QAM6-ASQW>] ("The Mainstream Media has never been as corrupt and deranged as it is today. FAKE NEWS is actually the biggest story of all and is the true ENEMY OF THE PEOPLE! That's why they refuse to cover the REAL Russia Hoax. But the American people are wise to what is going on.").

2. Pete Vernon, *A Climate of Hate Toward the Press at Trump Rallies*, COLUM. JOURNALISM REV. (Aug. 2, 2018), https://www.cjr.org/the_media_today/trump-acosta-rally.php [<https://perma.cc/T7U9-H5TF>]. Reporters have been assaulted at Trump rallies. See, e.g., *Man Arrested for Assaulting Reporter Outside of Trump's Reelection Announcement Rally*, U.S. PRESS FREEDOM TRACKER (June 20, 2019), <https://pressfreedomtracker.us/all-incidents/man-arrested-for-assaulting-reporter-outside-of-trumps-reelection-announcement-rally/> [<https://perma.cc/876E-M7TS>]. President Trump's Press Secretary, Sarah Huckabee Sanders, has said that Trump does not support violence against journalists but that it is a "two-way street." See Press Briefing by Sarah Sanders, White House Press Sec'y (Aug. 1, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-080118/> [<https://perma.cc/UU5B-95P9>] ("We certainly support a free press. We certainly condemn violence against anybody. But we also ask that people act responsibly and report accurately and fairly.").

3. See, e.g., Jason Lemon, *Trump Defends Saudi Arabia's Murder of Journalist Jamal Khashoggi by Saying Iran Kills People, Too*, NEWSWEEK (June 23, 2019, 3:17 PM), <https://www.newsweek.com/trump-defends-saudi-arabia-jamal-khashoggi-iran-kills-people-1445430> [<https://perma.cc/DLE4-VCPK>].

4. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 8, 2019, 4:25 PM), <https://twitter.com/realDonaldTrump/status/1137500852778864645> [<https://perma.cc/5PMM-V3F4>] ("Watched MSNBC this morning just to see what the opposition was saying about events of the past week. Such lies, almost everything they were saying was the opposite of the truth. Fake News! No wonder their ratings, along with CNN, are WAY DOWN. The hatred Comcast has is amazing!").

5. Matthew Ingram, *Most Americans Say They Have Lost Trust in the Media*, COLUM. JOURNALISM REV. (Sept. 12, 2018), https://www.cjr.org/the_media_today/trust-in-media-down.php [<https://perma.cc/V9PP-K93K>].

Nevertheless, things are not as dire as they seem, and it is because the courts have continued to embrace the largely press-protective interpretation of the First Amendment that arose in another time of crisis in the 1960s and 1970s. In *New York Times Co. v. Sullivan*⁶ and *New York Times Co. v. United States*⁷ (*Pentagon Papers*), the Supreme Court provided meaningful protection for the press in a time of great crisis and doctrinal uncertainty. Occurring during the civil rights movement and the Vietnam War, respectively, these cases represent the high point of constitutional protection for the press. These landmark decisions continue to provide meaningful protection for the press today. In both of these cases, the press faced fundamental threats to its role in checking government power and informing our democracy, and in both of these high-stakes cases, the press emerged victorious.⁸

Over time, however, these decisions have provided less protection than they may have initially appeared to provide. In the case of *Sullivan*, the scope of this protection has been narrowed,⁹ while the prosecution of Julian Assange threatens to unravel the state of “benign indeterminacy”¹⁰ that resulted from the *Pentagon Papers* opinion.¹¹ Although the news from the courts these days is still largely good for the press, we should be cautious about expecting the courts to be the press’s savior. Specifically, the courts have not aggressively protected the rights of journalists to gather information;¹² in addition, court decisions favorable to the press appear to do very little to stem the public’s growing mistrust of the media.¹³

6. 376 U.S. 254, 279-80, 283 (1964) (holding public officials asserting defamation claims must demonstrate the defendant published the challenged statements with “actual malice”).

7. 403 U.S. 713, 714 (1971) (per curiam) (holding unconstitutional a prior restraint prohibiting the publication of secret history of United States involvement in the Vietnam War).

8. See *N.Y. Times Co.*, 403 U.S. at 714; *Sullivan*, 376 U.S. at 292.

9. See *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 351 (1974) (refusing to extend “privilege to defamation of private individuals”).

10. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 936 (1973).

11. See *infra* notes 119-23.

12. See, e.g., Editorial, *The Uninhibited Press, 50 Years Later*, N.Y. TIMES (Mar. 8, 2014), <https://www.nytimes.com/2014/03/09/opinion/sunday/the-uninhibited-press-50-years-later.html> [<https://perma.cc/Z9Z5-MM26>] (discussing how the Obama administration tried “aggressively shutting down avenues of inquiry”).

13. See Ingram, *supra* note 5.

It is also far from certain that today's Supreme Court would be as sympathetic to the role of the press as the Court was in the 1960s and early 1970s.

Part I will discuss defamation law with a focus on the Court's decision in *New York Times Co. v. Sullivan*. This decision "constitutionalized" the common law tort of defamation and dealt a death blow to a series of lawsuits by southern government officials aimed at silencing the publication.¹⁴ The decision has since provided an essential foundation for press freedom for over fifty years.¹⁵ At the same time, because the decision did not grant the press (or the public generally) absolute immunity for the publication of defamatory information about matters of public concern,¹⁶ speakers potentially face years of distracting and expensive litigation, even if they ultimately prevail.

Part II turns to protections for the publication of national security secrets. In *United States v. New York Times Co. (Pentagon Papers)*, the Court held that the executive branch could not prevent the press from publishing a damning study of the United States's involvement in the Vietnam War.¹⁷ But this decision does not provide immunity for defamation or the publication or collection of national security secrets and leaves journalists—as well as their sources—exposed to civil and criminal liability.

Part III examines the Court's failure to recognize constitutional protection for newsgathering activities. Although the Court has held that the First Amendment provides a broad right of access to criminal proceedings,¹⁸ this right belongs to the public and not the press. Furthermore, this decision stands as something of an anomaly in the Court's right of access jurisprudence. One reason—although not the only one—for the Court's reluctance to recognize a more extensive right of access is its unwillingness to give the right to the entire public as well as its inability to define

14. See GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 229-55 (2006) (discussing the lawsuits against the *New York Times* in the South).

15. See Editorial, *supra* note 12.

16. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974).

17. 403 U.S. 713, 714 (1970).

18. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding the First Amendment provided a public right of access to criminal trials).

the “press” in a meaningful way. With the enormous changes in our media environment in the last two decades,¹⁹ it seems highly unlikely that the Court will use the Press Clause to provide expansive rights of access.

Despite all of President Trump’s attacks and the public’s growing distrust of the press, the fourth branch continues to play an important role in checking government power and informing our democracy. It is less clear, however, whether the press will be able to continue to rely on the courts to provide these constitutional protections for this important work.

I. *NEW YORK TIMES CO. V. SULLIVAN* AND DEFAMATION LAW

In May 2016, the *New York Times* published a front-page article revealing that then-presidential candidate Donald Trump had sexually assaulted several women.²⁰ Trump denied these allegations, and his lawyer sent the *Times* a letter asking the newspaper to remove the article from its website and apologize, and threatening to file a defamation lawsuit.²¹ *New York Times*’s Associate General Counsel David McCraw wrote a feisty letter in response that not only defended the accuracy of the story but also made clear that the newspaper had a public duty to publish it, saying, “It would have been a disservice not just to our readers but to democracy itself to silence their voices.”²² He concluded that if Donald Trump disagrees and “believes that American citizens had no right to hear what these women had to say and that the law of this country forces us and those who would dare to criticize him to stand silent or be

19. See, e.g., Munira Rangwala, *The Evolution of Social Media over the Last 2 Decades*, YOURSTORY (MAY 12, 2017), <https://yourstory.com/2017/05/evolution-of-social-media> [https://perma.cc/JE34-EDLZ] (discussing changes in social media over the past two decades).

20. Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/politics/donald-trump-women.html> [https://perma.cc/B77W-DCBL].

21. Letter from Marc E. Kasowitz, Attorney for Donald Trump, to Dean Baquet, Exec. Editor N.Y. Times (Oct. 12, 2016), <https://assets.donaldjtrump.com/DemandForRetraction.PDF> [https://perma.cc/KB4P-VSNK].

22. Letter from David E. McCraw, Vice President and Assistant Gen. Counsel N.Y. Times, to Marc E. Kasowitz, Attorney for Donald Trump (Oct. 13, 2016), <https://www.nytimes.com/interactive/2016/10/13/us/politics/david-mccraw-trump-letter.html> [https://perma.cc/5L52-SH4W].

punished, we welcome the opportunity to ... set him straight.”²³ David McCraw was not only confident that the story was factually accurate; he also knew that if Trump tried to sue for defamation, his newspaper had the First Amendment in its corner.²⁴

In *New York Times Co. v. Sullivan*, the Court held that public officials who bring defamation claims must demonstrate the defendant published the challenged statements with “actual malice,” or “with knowledge that it was false or with reckless disregard of whether it was false or not.”²⁵ The plaintiff in that case was Lester Bruce (L.B.) Sullivan, one of the three city commissioners for the city of Montgomery, Alabama who sued the *New York Times* for defamation based on minor errors in a paid advertisement in the paper by a group seeking to raise money to defend Martin Luther King, Jr.²⁶ The full-page advertisement, headlined “Heed Their Rising Voices,” detailed the treatment of King and of civil rights protestors throughout the South, including students at the Alabama State College in Montgomery.²⁷ The advertisement had several errors, most of which were inconsequential.²⁸ For example, it reported that the police had “ring[ed]” the campus when, in fact, they had surrounded the school on three sides; that King had been arrested seven times when, in fact, it was four; and that state officials had “padlocked” the college dining hall when the students refused to reregister in protest, when they merely banned unregistered students from eating there.²⁹ Had the *Times* fact checked the advertisement against its own reporting, it likely would have caught these errors.³⁰ Instead, its Advertising Acceptability Department

23. *Id.*

24. McCraw later said that he never expected his letter to go viral. The letter ended up on the *New York Times*’s “most emailed list.” David McCraw, *I Hardly Expected My Letter to Donald Trump to Go Viral*, N.Y. TIMES (Oct. 17, 2016), <https://www.nytimes.com/2016/10/18/insider/i-hardly-expected-my-letter-to-donald-trump-to-go-viral.html> [<https://perma.cc/764R-NRWD>].

25. 376 U.S. 254, 279-80.

26. *Id.* at 256-57.

27. *Id.* at 256-58; see also *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25.

28. See *Sullivan*, 376 U.S. at 258-59.

29. *Id.*; see also *Heed Their Rising Voices*, *supra* note 27, at 25.

30. See *Sullivan*, 376 U.S. at 261.

simply relied on the good reputation and uneventful prior dealings with the advertisement's sponsors.³¹

Although Sullivan did not claim he suffered any actual damages from the errors in the advertisement, a Montgomery jury awarded him \$500,000 in presumed damages.³² And Sullivan's case was just one of many defamation cases that had been filed or threatened against the *Times* (and other publishers).³³ It is clear that southern officials believed defamation actions were the way to keep the press out of the South. Indeed, by 1964, the *New York Times* was facing over six million dollars in potential libel damages, and one of its leading reporters, Harrison E. Salisbury, was indicted on forty-two counts of criminal libel as a result of his reporting in Birmingham, Alabama.³⁴ These civil and criminal libel claims threatened the future existence of the publication; at the very least, they impacted the paper's coverage of the South.³⁵

Until *Sullivan*, the Court had presumed—albeit in dicta only—that the common law of defamation posed no constitutional problems. In several prior decisions, the Court had listed libelous statements as a category of speech that fell outside the scope of First Amendment protection.³⁶ The general assumption was that libel law struck a balance between freedom of speech and protecting reputational interests.³⁷ Furthermore, the Court could have—and

31. *Id.* at 260-61.

32. *Id.* at 256, 260. "Presumed damages" are available under Alabama common law for libel per se, which includes defamatory statements that bring a person into public contempt arising out of conduct in office. A jury is permitted to "presume" the plaintiff suffered an injury and award damages accordingly. *See id.* at 262-63, 267.

33. *See* ROBERTS & KLIBANOFF, *supra* note 14, at 231, 234.

34. *See id.* at 234; *see also* Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197, 200 (1996) (explaining that southern officials brought close to \$300 million in lawsuits against the press).

35. Because the *Times* initially thought its strongest defense to Sullivan's libel case was the lack of personal jurisdiction, it kept all of its reporters out of the state of Alabama for over two years so that none of them could be served. *See* ROBERTS & KLIBANOFF, *supra* note 14, at 235.

36. *See Sullivan*, 376 U.S. at 268 & n.6 (listing cases in which the Court has stated that "the Constitution does not protect libelous publications").

37. Arthur L. Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 4-5 (1965) (noting that Professor Harry Kalven had examined the common law of defamation and concluded that it, "perhaps somewhat haphazardly, has struck the appropriate balance between the various values of free expression and the competing risks of harm from it").

almost did—resolve the case on the much narrower ground that Sullivan had failed to prove that the advertisement was “of and concerning” him.³⁸ The advertisement at issue did not mention Sullivan at all; indeed, the evidence failed to demonstrate he played any role in the police and state actions the advertisement criticized.³⁹

The *Times* argued to the Supreme Court that the First Amendment barred all libel lawsuits brought by public officials based on statements about their official conduct.⁴⁰ Although Justices Black, Douglas, and Goldberg embraced this view, this approach did not command a majority of the Court.⁴¹ Despite equating defamation actions by public officials with prosecutions under the Sedition Act, the majority excluded calculated falsehoods.⁴² Specifically, the Court held that defamatory statements are actionable if the plaintiff can demonstrate that the statements were made with “actual malice,” which it defined as “knowledge that [the statement] was false or [was made] with reckless disregard of whether it was false or not.”⁴³ The Court explained that this protection for false speech was necessary to create “breathing space” for public debate and avoid “chilling” truthful speech.⁴⁴ After all, the Court pointed out, “erroneous [speech] is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive.’”⁴⁵ Rather than sending the case back to the trial court for reconsideration based on the new actual malice standard, as it normally would, the Court declared for interests of judicial efficiency that the evidence submitted to the jury could not meet said standard.⁴⁶ The day after the Court released its opinion, *Times* publisher Arthur Ochs Sulzberger

38. See *Sullivan*, 376 U.S. at 259; Berney, *supra* note 37, at 19.

39. *Sullivan*, 376 U.S. at 258-59.

40. See *id.* at 262-63.

41. See *id.* at 293 (Black, J., concurring); *id.* at 298 (Goldberg, J., concurring).

42. *Id.* at 276-77, 279-80 (majority opinion).

43. *Id.* at 280.

44. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *id.* at 300 (Goldberg, J., concurring).

45. *Id.* at 271-72 (majority opinion) (quoting *Button*, 371 U.S. at 433).

46. See *id.* at 284-86.

declared, “The opinion of the Court makes freedom of the press more secure than ever.”⁴⁷

Sullivan is just one of a series of Supreme Court decisions protecting anyone who criticizes public officials. The Court has protected speech that causes public officials emotional distress,⁴⁸ as well as rhetorical hyperbole,⁴⁹ opinion,⁵⁰ and speech that is “substantially true.”⁵¹ The Court has also ruled in favor of the press on a variety of procedural issues, which make it harder for plaintiffs to prevail.⁵² The Court has also frequently repeated *Sullivan*’s statement that the First Amendment reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁵³

But protections for defamatory speech are hardly absolute. The actual malice standard is not the same as immunity; as a result, publishers routinely find themselves forced to engage in expensive litigation.⁵⁴ Well-established newspapers such as the *New York Times*, which has the resources to pay for lawyers as well as healthy insurance coverage,⁵⁵ can respond to litigation threats the way David McCraw has responded to Donald Trump, but publishers and speakers with fewer resources cannot. It is very difficult to win on actual malice or truth at the motion to dismiss stage, which means the litigation must go through expensive and time-consuming discovery. Although the actual malice standard may deter some plaintiffs from bringing defamation claims (or lawyers from taking their cases), well-financed plaintiffs are often willing to take the risk of losing a case and refuse to settle even when the outcome is uncertain.

This also means that sometimes plaintiffs will *win* their defamation claims, especially before a jury. Although courts of appeals

47. Editorial, *Decision Welcomed by Times Publisher*, N.Y. TIMES, Mar. 10, 1964, at 23.

48. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).

49. See *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970).

50. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990).

51. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 508-09 (1991).

52. See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (holding plaintiffs bear burden of proving falsity of allegedly defamatory statements).

53. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

54. See *Masson*, 501 U.S. at 499; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

55. See N.Y. TIMES CO., THE NEW YORK TIMES COMPANY 2018 ANNUAL REPORT 20 (2019).

frequently (but not always) overturn plaintiff victories,⁵⁶ bringing an appeal requires more expense and uncertainty. If the verdict is large enough, the risk of an unsuccessful appeal might make settlement more attractive. And as the Hulk Hogan/Gawker litigation demonstrated, it may not be possible to bring an appeal, at least when the publication cannot post the bond required to stay the execution of judgment.⁵⁷

Another problem with the Court's defamation jurisprudence is that the Court has refused to extend the actual malice standard to all defamation cases, or even to all defamation cases involving matters of public concern. For about ten years following *Sullivan*, the Court extended the reach of that decision.⁵⁸ Most significantly, the Court held that the actual malice standard applied in cases brought by public figures (and not just public officials).⁵⁹ In *Gertz*, the Court held that if a private plaintiff brings a defamation claim based on statements involving matters of public concern, state law could constitutionally permit recovery of actual damages on a showing of mere negligence (punitive and presumed damages would still require a showing of actual malice).⁶⁰ This means that while the *New York Times* can have great confidence it will escape liability for defamation when it reports on sexual harassment allegations made against President Trump, it must be significantly more careful when publishing allegations against individuals who might not be public officials or public figures. This is particularly important in cases involving sexual harassment or assault claims, given the inherent "he said/she said" nature of such accusations.⁶¹

56. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967).

57. See Peter Sterne, *Gawker Media Files for Bankruptcy: Company Files for Chapter 11 to Protect Assets from Seizure by Hulk Hogan*, POLITICO (June 10, 2016, 12:56 AM), <https://www.politico.com/media/story/2016/06/gawker-files-for-bankruptcy-to-protect-assets-from-hogan-004593> [<https://perma.cc/Y74Q-F5TE>].

58. See James J. Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 778, 796 (1975) (discussing how this extension was halted with *Gertz v. Robert Welch, Inc.*).

59. See *Curtis Publ'g*, 388 U.S. at 163-65 (Warren, C.J., concurring).

60. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 349 (1974).

61. See C. Amanda Martin, Stevens Martin Vaughn & Tadych, *Address at University of North Carolina's Festival of Legal Learning: The Law of Defamation: A Primer* (Feb. 10, 2018).

In *Gertz*, the Court focused far less on the importance of free speech for democracy and more on the reputational harm plaintiffs suffer.⁶² This emphasis stands in great contrast to *Sullivan*, where concerns for reputational harm were largely absent.⁶³ For whatever reason—perhaps because *Sullivan* was not a sympathetic plaintiff, or perhaps because the Justices were concerned about the press’s ability to cover the civil rights movement—the Court’s primary and virtually exclusive concern was to foster a robust public debate on public issues.⁶⁴ Indeed, Justice Brennan made clear that public officials were “men of fortitude,” and that the discussion of matters of public concern must be robust and wide open.⁶⁵ In *Gertz*, however, the Court ended years of uncertainty about whether the actual malice standard would extend to all matters of public concern, or only to cases involving public officials and public figures.⁶⁶ Now, states are free to impose liability for defamation on a showing of mere negligence.⁶⁷

As a result of the *Gertz* decision, a publisher’s risk of liability turns significantly on the status of the plaintiff, rather than the import of the statements.⁶⁸ This is problematic from a theoretical and jurisprudential perspective, but to those who rely on the protections of the actual malice standard when making publication decisions, it is more troubling as a practical matter. President Trump easily qualifies as a public official, but the inquiry is far less certain when it comes to other government employees,⁶⁹ company executives and corporations,⁷⁰ and other high-profile individuals.⁷¹

In a short article in 2000, now Justice Kagan argued that despite the deficiencies of *Sullivan* and its progeny, the protections for the

62. See *Gertz*, 418 U.S. at 341, 343-44.

63. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

64. See *id.* at 270.

65. *Id.* at 270, 273 (quoting *Craig v. Harvey*, 331 U.S. 367, 376 (1947)).

66. See *Gertz*, 418 U.S. at 333-36.

67. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

68. See *id.*

69. To get a sense of the disagreement among the lower courts, see generally Danny R. Veilleux, Annotation, *Who Is “Public Official” for Purposes of Defamation Action*, 44 AM. L. REP. 5th 193 (1996).

70. See generally Matthew D. Bunker, *Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures*, 23 COMM. L. & POL’Y 1 (2018).

71. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976) (holding Palm Beach socialite was not a public figure for purposes of defamation action).

press had the virtue of stability.⁷² It would be interesting to get her views on this question now, almost two decades later. Certainly Justice Thomas has made clear he would overrule *Sullivan*,⁷³ and it is possible that Justices Gorsuch and Kavanaugh would join him. Not just conservatives might overrule *Sullivan*; Breyer aggressively embraced case-by-case analysis in First Amendment cases and might readily adopt that same approach in a defamation case.⁷⁴ The facts of *Sullivan* presented a wonderful vehicle for the Court to “constitutionalize” defamation law. *Sullivan* was not really injured, the false statements were not too far off from the truth, and the *New York Times* was on the side of the civil rights movement.⁷⁵ If, and when, the Court reconsiders the scope of protections for defamatory speech, the balance of equities might not tilt so heavily in their favor.

II. *NEW YORK TIMES CO. V. UNITED STATES AND NATIONAL SECURITY SECRETS*

Although it would be hard to dispute that *Sullivan*’s actual malice standard has provided the most significant and robust protection for the press, the Court’s decision in *New York Times Co. v. United States (Pentagon Papers)* is no less significant for those publishers who disseminate national security secrets and for the public’s interest in learning what the government is doing in its name.⁷⁶ However, the Trump administration’s prosecution of Julian Assange threatens to undo the state of “benign indeterminacy” that has curbed both the government’s interest in prosecuting the press as well as the press’s care in publishing national security

72. Elena Kagan, *Libel and the First Amendment (Update)*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1608, 1608* (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

73. Adam Liptak, *Justice Thomas Calls for Reconsideration of Landmark Libel Ruling*, *N.Y. TIMES* (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html> [<https://perma.cc/E3E9-H3S7>].

74. See Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer’s Fluid Conceptions of Freedom of Speech*, 79 *ALA. L. REV.* 403, 475-76 (2016).

75. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256-60 (1963).

76. 403 U.S. 713, 714 (1971) (per curiam) (holding that the government failed to meet the burden for imposing a prior restraint).

information.⁷⁷ In addition, the decision offers no protection for the sources who provide the secrets to the press.⁷⁸

The *Pentagon Papers* case arose in a time of great cultural upheaval in the United States. In addition to the civil rights movement that began in the 1960s, the government had become embroiled in an increasingly unpopular war in Vietnam.⁷⁹ Daniel Ellsberg, a RAND employee, was the source of the Pentagon Papers.⁸⁰ Determined to expose the truth of how and why the United States was at war, Ellsberg copied this largely historical study and passed it along to the *New York Times*, the *Washington Post*, and other newspapers around the country.⁸¹ The *New York Times* was the first to publish excerpts from the Pentagon Papers, and at first President Nixon was not particularly concerned about them.⁸² On that day, the news around the country focused on his daughter's White House wedding; in addition, Nixon saw the documents as reflecting poorly on his predecessors rather than on himself.⁸³ But Nixon quickly came to regard the publication of these documents as "treasonable" and authorized the Department of Justice to seek a prior restraint enjoining the publication of additional portions of the Pentagon Papers.⁸⁴ The government claimed that the publication posed a grave threat to the national security of the United States.⁸⁵

The decisions from federal district courts in New York (against the *New York Times*) and Washington, D.C. (the *Washington Post*) made their way very quickly through the courts of appeals and then the U.S. Supreme Court.⁸⁶ Perhaps due to the speed with which the

77. Steve Vladeck, *Trump Administration's Assange Indictment Is a Referendum on the Constitution*, MSNBC THINK (May 24, 2019, 4:24 PM), <https://www.nbcnews.com/think/opinion/trump-administration-s-assange-indictment-referendum-constitution-ncna1010181> [<https://perma.cc/T4ET-X3G5>].

78. *See id.*

79. Jordan Moran, *Nixon and the Pentagon Papers*, UVA MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/first-domino-nixon-and-the-pentagon-papers> [<https://perma.cc/TF22-A5UR>].

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 355 (1993).

Court heard the case and decided it,⁸⁷ the Justices issued a very brief *per curiam* opinion that made clear only that the government bears a “heavy burden of showing justification” for a prior restraint and that it had failed to meet that burden in this case.⁸⁸

This decision was certainly a victory for the newspapers, but the nine separate opinions that followed the *per curiam* opinion revealed that the press’s victory was not complete.⁸⁹ Three Justices dissented and would have permitted a prior restraint;⁹⁰ three others made clear that they would regard subsequent criminal punishment for publishing national security secrets differently from prior restraints.⁹¹ Only Justices Black and Douglas would go so far as to give the press complete immunity from criminal prosecution for publishing national security secrets.⁹²

It is also hardly clear what sort of analysis the Court would undertake if the public value of the information were less obvious and the harm to the nation’s national security interests were greater. In the *per curiam* opinion, the Court simply concluded that the government had not met its high burden for a prior restraint.⁹³ The government had not made any sort of case for national security harm resulting from publication⁹⁴ (and subsequent commentators disagree about whether they could have).⁹⁵

The *Pentagon Papers* case is also arguably an aberration from the Court’s generally deferential approach to the government’s assertions of national security harm. In that case, the government failed to make much of a case for harm at all.⁹⁶ In other cases, it will not

87. See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 753 (1971) (Harlan, J., dissenting) (describing the rushed proceedings of the case).

88. See *id.* at 714 (*per curiam*).

89. See generally *id.*

90. *Id.* at 758 (Harlan, J., dissenting).

91. See *id.* at 733 (White, J., concurring); *id.* at 747 (Marshall, J., concurring).

92. Cf. *id.* at 719 (Black, J., concurring) (agreeing with a previous ruling by the Court to invalidate criminal sanctions for attending Communist meetings). For a more complete summary of the various opinions, see Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 279 (2008).

93. *N.Y. Times Co.*, 403 U.S. at 714.

94. See *id.*; see also Sims, *supra* note 86, at 377-92 (describing deficiencies in the government’s evidence that suggested there was no threat of harm to national security).

95. See Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1450 n.3 (2012) (noting the disagreement).

96. See Sims, *supra* note 86, at 377-92.

be as difficult. The Court's decision in *Holder v. Humanitarian Law Project* provides the most recent example of this deference.⁹⁷ There, the Court relaxed its usually speech-protective jurisprudence to reject a First Amendment challenge to the material support statute as applied to U.S. citizens and organizations seeking to engage in teaching and political advocacy supporting the lawful activities of foreign terrorist organizations.⁹⁸ The Court recognized that the restriction amounted to a content-based speech restriction⁹⁹ but deferred to the government on the crucial question of whether criminalizing the support of lawful activities of terrorist organizations was narrowly tailored.¹⁰⁰

The Court's 2001 decision in *Bartnicki v. Vopper* has given the press some confidence that it would not face criminal prosecution for publishing leaked information,¹⁰¹ although whether that confidence is misplaced remains to be seen. In that case, two individuals involved in a teachers union's fight with a local school board sued a radio station under wiretapping laws for airing a recording of their illegally intercepted cell phone call.¹⁰² During this call, the plaintiffs said that they might need "to go to [the school board members'] homes" and "blow off their front porches."¹⁰³ The majority made clear at the outset that the First Amendment analysis was the same regardless of whether the defendants were members of the press.¹⁰⁴ The majority also made clear that under the facts of the case before it, the defendants had obtained the information "lawfully" even if they knew or should have known that their source had obtained the information unlawfully.¹⁰⁵ The *Bartnicki* defendants had played no

97. See 561 U.S. 1, 7-8 (2010).

98. See *id.*

99. *Id.* at 27-28 (rejecting the government's argument that the material support statute generally restricts only conduct, not speech).

100. *Id.* at 33-34 (stating that the Executive branch's conclusion "is entitled to deference" because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs").

101. See 532 U.S. 514, 517-18 (2001).

102. See *id.* at 518-19.

103. *Id.*

104. See *id.* at 525 n.8 ("[W]e draw no distinction between the media respondents and Yocum.").

105. *Id.* at 528 (summarizing the question presented as "[w]here the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication

role in the interception and did nothing to encourage the anonymous interceptor to give them the recording.¹⁰⁶ Furthermore, the Court determined (controversially) that the contents of the phone call were “a matter of public concern”;¹⁰⁷ Justice Breyer’s essential concurring opinion went so far as to suggest that the plaintiffs lacked a “legitimate” expectation of privacy in their calls because they were discussing an act of violence.¹⁰⁸

The Court could distinguish *Bartnicki* in a number of ways in a future national security publication case. If the press played any role in procuring the information, they would lack the clean hands that the defendants in *Bartnicki* had.¹⁰⁹ *Bartnicki* also, in part, rested on the assumption that criminal punishment of a downstream publisher was not essential to deter interceptions because the identity of the interceptors is typically known.¹¹⁰ With the rise of hacking, this is becoming less the case across the board.¹¹¹ In national security cases, the government is increasingly relying on technology to unmask leakers, but it surely cannot be said that sources are readily identifiable.¹¹² *Bartnicki* also downplayed the harm caused by both the interception and the subsequent publication—the privacy interests of the public officials¹¹³—whereas in a national security case, the harm might be more obvious, and the public value less so.

of that information based on the defect in a chain?” (quoting *Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

106. *See id.* at 519.

107. *Id.* at 535 (Breyer, J., concurring).

108. *See id.* at 539. Justice Breyer’s argument is controversial for two reasons. First, it seems likely that the plaintiffs were engaged in some rhetorical hyperbole and did not actually intend to engage in violent behavior. Second, it is not clear why an expectation of privacy in a phone conversation depends on the content of that conversation.

109. *See id.* at 519 (majority opinion).

110. *See id.* at 530-32.

111. *See* Larry Greenemeier, *Seeking Address: Why Cyber Attacks Are So Difficult to Trace Back to Hackers*, SCI. AM. (June 11, 2011), <https://www.scientificamerican.com/article/tracking-cyber-hackers/> [<https://perma.cc/N569-QA9X>].

112. *See, e.g.*, Greg Myre, *Once Reserved for Spies, Espionage Act Now Used Against Suspected Leakers*, NPR (June 28, 2017, 8:07 AM), <https://www.npr.org/sections/parallels/2017/06/28/534682231/once-reserved-for-spies-espionage-act-now-used-against-suspected-leakers> [<https://perma.cc/6JCK-KCLK>].

113. *See Bartnicki*, 532 U.S. at 534 (“In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.”).

Although both the *Pentagon Papers* case and *Bartnicki* leave open the possibility that subsequent criminal punishment of the press could comport with the First Amendment, the Department of Justice has never brought such a prosecution (putting Julian Assange to one side), notwithstanding extensive saber rattling and name calling.¹¹⁴ Instead, as some journalists have explained, the press and the government have continued to engage in an ongoing “game of leaks.”¹¹⁵ In this game, the government attempts to keep as much information secret as possible, and the press tries to get access to this information and share it with the public.¹¹⁶ Perhaps because the *Pentagon Papers* case left open the possibility of a prosecution based on the publication of national security secrets,¹¹⁷ the press has been generally responsible in its publication decisions.¹¹⁸

A number of factors have undermined this state of “benign indeterminacy,”¹¹⁹ but perhaps the most important is the creation of WikiLeaks by Julian Assange. Assange dramatically departs from the mold of “responsible journalism.”¹²⁰ Although initially it appears he did not publish all the secret information he obtained and instead engaged in some editorial discretion, in recent years, this restraint seems to have disappeared.¹²¹ Indeed, the Department of Justice, which has now indicted Assange on various charges,¹²²

114. See Papandrea, *supra* note 92, at 234-35 (outlining executive branch criticism of the *New York Times*'s decision to publish secret information about warrantless wiretapping).

115. I have discussed this “game of leaks” in more detail in my prior work. See, e.g., *id.* at 248-62.

116. See *id.* at 254.

117. *Id.* at 280. It is also possible that journalists are generally careful about their publication decisions because they follow canons of journalistic ethics and are not interested in publishing secrets just for the sake of publishing secrets.

118. See *id.* at 257-62.

119. Edgar & Schmidt, Jr., *supra* note 10, at 936.

120. See Bellia, *supra* note 95, at 1471 (discussing the obligation of the press to withhold harmful material).

121. See Gillian Branstetter, *WikiLeaks Just Wants to Watch the World Burn*, DAILY DOT (May 4, 2016, 5:30 PM), <https://www.dailydot.com/via/wikileaks-sony-emails-leak-julian-assange/> [<https://perma.cc/K5UY-3GZJ>].

122. See generally *Superseding Indictment, United States v. Julian Paul Assange*, No. 1:18-cr-00111 (E.D. Va. May 23, 2019), <https://www.justice.gov/opa/press-release/file/1165556/download> [<https://perma.cc/6VME-NSHQ>].

claims that Assange is not a journalist and WikiLeaks is not the press.¹²³

Nevertheless, as a doctrinal matter, it will not be so easy to draw a constitutional line between non-U.S. actors such as Assange and publications such as the *New York Times*. *Sullivan* and the *Pentagon Papers* case did not rest on the Press Clause but instead on the Speech Clause of the First Amendment.¹²⁴ Indeed, the Court has never relied on the Press Clause when ruling in favor of the institutional media.¹²⁵ Although the Court has not definitively ruled out giving separate meaning to the Press Clause,¹²⁶ it seems unlikely it ever will, given the difficulties of defining exactly who is the “press” and entitled to protections under that provision.

To be sure, some of the allegations against Julian Assange reflect behavior we are unlikely to see from the institutional media. For example, one of the counts against him alleges that he assisted Chelsea Manning in her efforts to break into the government computer systems to obtain additional information;¹²⁷ this is not the sort of thing mainstream journalists typically do.¹²⁸ In addition, it is unclear whether the First Amendment even applies to Assange, given that he is not a U.S. citizen and he acted primarily outside of the United States.¹²⁹

But most of the conduct alleged in the indictment is very similar to things members of the institutional press do every day—actively seeking and collecting classified information from their sources even when they know their sources do not have authorized access, with

123. Elizabeth Goitein, *The U.S. Says Julian Assange “Is No Journalist.” Here’s Why that Shouldn’t Matter*, WASH. POST (May 25, 2019), <https://www.washingtonpost.com/outlook/2019/05/25/us-says-julian-assange-is-no-journalist-heres-why-that-shouldnt-matter/> [<https://perma.cc/B2RH-6MDF>].

124. See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

125. See Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 394 (2009).

126. See Clay Calvert & Mirelis Torres, *Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet*, 13 VAND. J. ENT. & TECH. L. 323, 339-40 (2011).

127. Superseding Indictment, *supra* note 122, at 6.

128. See Bellia, *supra* note 95, at 1471-72 (discussing responsible journalism).

129. Superseding Indictment, *supra* note 122, at 16-17, 19-35 (describing Assange’s citizenship and where the alleged crimes were committed).

the purposes of communicating that information to the public.¹³⁰ For example, the indictment alleges that Assange “took measures to conceal Manning as the source of the classified records to WikiLeaks, including by removing usernames from the disclosed information and deleting chat logs between ASSANGE and Manning.”¹³¹ Journalists solicit information broadly and work actively with sources who have information to share to aid in the transmission of that information, such as by providing a secure portal for receiving it.¹³² At least since Edward Snowden’s disclosure about National Security Agency (NSA) spying, reporters have become very adept at using encrypted messaging services such as Signal to communicate with their sources.¹³³ They also commonly redact documents in an effort to conceal the identity of their sources.¹³⁴

In sum, some of the institutional media’s relationship with their sources is not easily distinguishable as a legal matter from WikiLeaks’s and Assange’s relationship.¹³⁵ Although anonymous sources surely surprise journalists with national security information, such as the anonymous sources in *Bartnicki*,¹³⁶ it is very common for journalists to have long-standing relationships with their sources.¹³⁷ The mainstream press also encourages sources to come forward with information about the government and provides secure methods of

130. See *id.* at 2-3 (outlining Assange’s use of WikiLeaks to obtain classified information).

131. See *id.* at 36.

132. See Bellia, *supra* note 95, at 1472-73 (comparing the facts of the *Pentagon Papers* case to the WikiLeaks disclosures).

133. See Lauren Kirchner, *Encryption, Security Basics for Journalists*, COLUM. JOURNALISM REV. (Sept. 17, 2013), https://archives.cjr.org/behind_the_news/hacks_hackers_security_for_jou.php [<https://perma.cc/9YKE-8FDL>] (summarizing data security lecture to over seventy journalists in 2013). Encryption is becoming a common tool for journalists more generally. See, e.g., Kate Krauss, *Time for Journalists to Encrypt Everything*, WIRED (Mar. 10, 2017, 10:30 AM), <https://www.wired.com/2017/03/time-journalists-encrypt-everything/> [<https://perma.cc/H7NW-2E8G>].

134. See, e.g., Ted Han & Quinn Norton, *Protecting Your Sources When Releasing Sensitive Documents*, SOURCE (June 7, 2017), <https://source.opennews.org/articles/how-protect-your-sources-when-releasing-sensitive/> [<https://perma.cc/WA4E-VJNT>] (discussing how to redact documents to protect sources).

135. See Bellia, *supra* note 95, at 1472-73.

136. See *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2000).

137. See Steve Mills, *Defining the Delicate and Often Difficult Relationship Between Reporters and Sources*, PROPUBLICALL. (Apr. 24, 2018, 4:00 AM), <https://www.propublica.org/article/ask-propublica-illinois-reporters-and-sources-relationship> [<https://perma.cc/ESF9-L63J>] (discussing maintaining relationships with sources).

doing so.¹³⁸ As a result, the press is left to rely on assurances by the Department of Justice that it has no plans to prosecute the U.S. institutional media.¹³⁹

As we move forward, the likelihood that the Court will continue to protect the press's right to publish national security information may depend on the facts of the case that come before it. The *Pentagon Papers* case involved historical documents, rather than contemporary facts or data, that contained information of extraordinarily high public concern (how the United States got into the war in Vietnam and how the government lied to the American people while doing so).¹⁴⁰ The government was also unable to demonstrate how the publication of this information would pose any sort of real danger to the United States's national security interests, aside from embarrassment.¹⁴¹ In contrast, the WikiLeaks case involves information of much less significant value and much greater harm to the country's national security interests. Rather than focus on all of the war report and State Department cables WikiLeaks obtained from Manning, the Superseding Indictment focuses narrowly on WikiLeaks's disclosure of the names of human intelligence sources from repressive regimes.¹⁴² The precise identities of intelligence sources are generally not particularly newsworthy, while the potential that the sources may face retaliation (bodily harm, imprisonment, etc.) is very high. In addition, instead of having largely responsible and widely respected defendants such as the *New York Times*¹⁴³ and the *Washington Post*,¹⁴⁴ the case involves a publication that eschews journalistic norms¹⁴⁵ and engages in "information warfare."¹⁴⁶ All of

138. See Kirchner, *supra* note 133 (describing secure methods journalists use when contacting sources).

139. Papandrea, *supra* note 92, at 262.

140. See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971); Bellia, *supra* note 95, at 1454-55 (citation omitted).

141. See *N.Y. Times Co.*, 403 U.S. at 714.

142. Superseding Indictment, *supra* note 122.

143. See *id.*; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

144. See *N.Y. Times Co.*, 403 U.S. at 714.

145. See Branstetter, *supra* note 121 (describing WikiLeaks's lack of editorial discretion).

146. Eli Lake, *Is Assange a Journalist? It Depends on What Year You Ask*, BLOOMBERG (Apr. 17, 2019), <https://www.bloomberg.com/opinion/articles/2019-04-17/is-julian-assange-a-journalist-it-depends-what-year-you-ask> [<https://perma.cc/X2JA-3H5B>] (noting that WikiLeaks's most recent activities involve "publishing the fruits of Russian hacking to influence the 2016 presidential election" and technical information about the CIA's hacking programs).

these facts lay the groundwork for potentially devastating precedent providing no (or very little) First Amendment protection for the publication of national security information.

Another disconcerting development for the press is that the government has dramatically increased the number of leak prosecutions.¹⁴⁷ This trend began under President Obama¹⁴⁸ and has continued under President Trump.¹⁴⁹ The Supreme Court has not yet specifically addressed whether the national security leaks are entitled to any First Amendment protection, but the related precedent suggests that it is unlikely to do so.¹⁵⁰ In *Snepp v. United States*, the Court did not even hold oral argument in a case in which a former government employee challenged a prior restraint preventing him from publishing nonclassified information relating to his former position without first going through prepublication review.¹⁵¹ Although the Court recognized that the government could not constitutionally prohibit him from publishing this information, it concluded that it could require him to undergo prepublication review “to ensure *in advance*, and by proper procedures, that information detrimental to national interest is not published.”¹⁵² The Court also recognized the government’s interest in creating an “appearance” that it could keep intelligence information secret.¹⁵³ The Court went so far as to impose a constructive trust on the profits the former employee earned from the publication of his book even though the government had not even requested that relief.¹⁵⁴

Snepp is not only inconsistent with the Court’s general First Amendment jurisprudence—especially the *Pentagon Papers* case—but it is also inconsistent with the Court’s other cases relating

147. See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 451-52 (2014).

148. See *id.*

149. See Avi Asher-Schapiro, *Leak Prosecutions Under Trump Chill National Security Beat*, COMMITTEE TO PROTECT JOURNALISTS (Mar. 6, 2019, 3:08 PM), <https://cpj.org/blog/2019/03/leak-prosecutions-trump-national-security-beat.php> [<https://perma.cc/D2F6-TZLQ>] (reporting that the Department of Justice under President Trump had brought six prosecutions against sources, a faster pace than leak prosecutions under President Obama).

150. Papandrea, *supra* note 147, at 512.

151. 444 U.S. 507, 507-08 (1980) (per curiam).

152. *Id.* at 513 n.8.

153. *Id.* at 509 n.3.

154. *Id.* at 515-16.

specifically to public employees.¹⁵⁵ Even though the Court has scaled back significantly on the First Amendment rights of government employees in cases such as *Garcetti v. Ceballos*,¹⁵⁶ it does not fit with the Court's continued holdings that employees have a right to engage in speech relating to matters of public concern, at least when the government's interest in secrecy does not outweigh the employee's interest in speaking.¹⁵⁷ So far, the lower courts have not embraced any arguments that leakers have First Amendment rights.¹⁵⁸ Furthermore, these cases tend to result in plea deals and do not make their way up to the appellate courts, much less the U.S. Supreme Court.¹⁵⁹

The increase in leak prosecutions threatens the press in a number of important ways. Most obviously, leak prosecutions deter sources from coming forward with information.¹⁶⁰ There can be no doubt that without sources willing to engage in the unauthorized transmission of information to the press we would not know very much about what our government is doing in our name.¹⁶¹ With the increased focus on prosecuting leakers comes more investigatory resources spent on identifying them for prosecution.¹⁶² This can involve highly invasive surveillance of possible sources, methods that frequently involve tracking the communications and movements of journalists.¹⁶³ Isolated instances of this have already

155. *But see* Bellia, *supra* note 95, at 1512 & n.295 (citing *Snepp*, 444 U.S. at 509-10; *United States v. Marchetti*, 466 F.2d 1309, 1311 (4th Cir. 1972) (explaining that the government has successful nondisclosure agreements in a couple of cases)).

156. 547 U.S. 410, 425-26 (2006).

157. *Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that a government employee's speech must involve a matter of public concern to receive First Amendment protection); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (restrictions on government employees' speech require a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

158. *See* Papandrea, *supra* note 147, at 512.

159. *See id.* at 458.

160. *Id.* at 460.

161. *See* Papandrea, *supra* note 92, at 254-55.

162. *See* Selina MacLaren, *How Do Leak Investigations Work?*, REP. COMMITTEE FOR FREEDOM PRESS (Aug. 8, 2017), <https://www.rcfp.org/how-do-leak-investigations-work/> [<https://perma.cc/Z3QT-W6D7>] (explaining the Department of Justice's leak investigation process).

163. *See, e.g.*, Papandrea, *supra* note 147, at 459-60 (citing examples of how the government investigates potential leakers).

happened.¹⁶⁴ Reporters can also receive subpoenas in connection with leak prosecutions and potentially face jail time if they are held in contempt for refusing to identify their sources.¹⁶⁵ And as the Assange indictment reveals, the government is laying the foundation to bring criminal charges against journalists for conspiring with government employees and contractors to reveal information in violation of the law.¹⁶⁶

III. LACK OF NEWSGATHERING PROTECTIONS

Although the press had great victories in *Sullivan* and the *Pentagon Papers* case, it has not always emerged from the Court victorious. The Court has been particularly reluctant to embrace constitutionally based newsgathering rights. Although the Court has recognized a First Amendment right of access to some judicial proceedings, it has not extended this right more broadly. This means that, although the press has robust protections for the distribution of information, its ability to obtain information is based largely on statutes and customary norms. One reason the Court has hesitated to recognize newsgathering rights is that it is unwilling to base any such rights on the Press Clause. Instead, such rights must extend to the public at large. This hesitancy is based in large part upon the difficulties of defining “the press” or “journalists.” This definitional problem is not going away any time soon. As a result, the modern press finds its right to access government information is fragile, and the court system will provide little recourse.

The Court has embraced the right of access to some judicial proceedings in a line of cases beginning with *Richmond Newspapers, Inc. v. Virginia*¹⁶⁷ in 1980. In that case, the Court held that the First

164. See, e.g., Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), <https://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html> [<https://perma.cc/AH5V-C9JQ>] (reporting that the government obtained personal and professional electronic communication records of AP reporters without prior notice).

165. See, e.g., *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013) (rejecting reporter James Risen’s challenge to a subpoena seeking the identity of his source in connection with Jeffrey Sterling prosecution).

166. See Pappandrea, *supra* note 147, at 455-62 (explaining changes that could make leak prosecutions more likely).

167. 448 U.S. 554 (1980).

Amendment requires criminal trials to be presumptively open to the public.¹⁶⁸ In subsequent cases, the Court embraced a two-prong inquiry for determining whether there is a presumptive First Amendment right of access to government proceedings: (1) whether history and tradition support open proceedings; and (2) whether “considerations of experience and logic” would support open proceedings.¹⁶⁹ If a presumptive right of access attaches, then any closure orders must satisfy strict scrutiny.¹⁷⁰ The Court has extended the right of access to preliminary hearings in criminal cases¹⁷¹ and jury selection for criminal trials.¹⁷²

While the right of access to judicial proceedings is relatively well established,¹⁷³ the Court has never embraced a right of access to government information more generally. Indeed, prior to its decision in *Richmond Newspapers*, the Court had rejected press arguments for a right of access to prisons. Although the Court’s decisions in part rested on the conclusion that the press was not entitled to a greater right of access than the public at large, the sweeping language of the opinions suggested that a majority of the Court believed the First Amendment provided no right of access at all to government information.¹⁷⁴ This apparent wholesale rejection of a First Amendment right of access in these cases led Justice Stevens to proclaim in *Richmond Newspapers* that the decision was “a watershed case” because “[u]ntil today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.”¹⁷⁵

168. *Id.* at 580 (Burger, C.J., plurality); *id.* at 584-85 (Brennan, J., concurring); *id.* at 599-600 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring). Only Justice Rehnquist dissented. *See id.* at 604-05 (Rehnquist, J., dissenting).

169. *Press-Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 8-9 (1986) (setting forth two-party test).

170. *Id.* at 9-10.

171. *Id.* at 10.

172. *Press-Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501, 513 (1984).

173. Of course, lower courts have not always concluded that the right of access attaches to all judicial proceedings, but courts generally apply the framework to determine if there is such a right and do not simply reject access claims out of hand.

174. *See* Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 39-44 (discussing pre-*Richmond Newspapers* cases).

175. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 554, 582 (1980) (Stevens, J.,

The Court has not extended the constitutional right of access it recognized in the *Richmond Newspaper* line of cases outside of the judicial context. Quite remarkably, after hearing several cases in quick succession from 1980 to 1986—all of which involved access to judicial proceedings of some sort—the Court has not addressed the issue since then.

It does not seem likely that the Court would extend the right of access outside of judicial proceedings even if it did decide to take cases presenting the issue. The Court is well aware that right of access claims are “theoretically endless.”¹⁷⁶ The framework the Court has established to limit the recognition of a right of access currently depends upon a finding that there is a tradition of openness.¹⁷⁷ This will be extraordinarily difficult to demonstrate in most circumstances and is more likely to extend to proceedings than to documents.¹⁷⁸

Furthermore, the Court is not likely to grant the press any special right of access to government information.¹⁷⁹ The Court has never recognized the Press Clause as the basis for any constitutional right; instead, the most important cases for the press—including *Richmond Newspapers*—extend constitutional rights to the public at large.¹⁸⁰ Even before the Internet revolutionized and democratized our information ecosystem, the Supreme Court struggled to recognize press-specific rights due to the difficulty of defining the “press” or “journalists.” In a case rejecting a constitutional reporter’s privilege in the context of federal grand jury proceedings, the Court cited the “practical and conceptual difficulties” inherent in such an

concurring).

176. *Id.* at 588 (Brennan, J., concurring).

177. *Press-Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 8 (1986).

178. See Papandrea, *supra* note 174, at 204 (noting some lower courts have limited or ignored the “history and tradition” inquiry to find a right of access to some administrative proceedings).

179. Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People’s Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 728-29 (2014) (finding that disclosures under FOIA when the government has invoked the national security exemption have been exceedingly rare; article measured period from September 2001 to 2014).

180. *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.”).

undertaking.¹⁸¹ The first difficulty the Court cited is the difficulty of “defin[ing] those categories of newsmen entitled to the privilege.”¹⁸² The Court explained that the freedom of the press is a “fundamental personal right” that does not belong exclusively to journalists but rather extends to “the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”¹⁸³ Now that everyone can participate in the creation and dissemination of information to the public, this definitional problem is multiplied many times over.¹⁸⁴ Notwithstanding the *Branzburg v. Hayes* decision, some lower federal courts have recognized a constitutional or common law privilege in some contexts, but the law varies dramatically circuit by circuit.¹⁸⁵

As a result of the Supreme Court’s unwillingness to recognize a right of access to information outside of judicial proceedings, the press’s protection for information gathering depend almost exclusively on statutes and regulations, as well as custom and practice. Although the courts play a role in making sure that these statutory or customary rights of access are administered consistently with the due process clause,¹⁸⁶ the rights themselves are subject to change (or to be completely eliminated) depending upon the political winds.¹⁸⁷ For example, although an overwhelming majority of states recognize a statutory reporters privilege,¹⁸⁸ there is no federal shield law. Instead, in many instances journalists must rely solely on the judicially unenforceable Attorney General Guidelines restricting

181. *Id.* at 704.

182. *Id.*

183. *Id.*

184. For a more thorough discussion of these definitional problems, see Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 564-84 (2007).

185. For a general overview, see *id.* at 551-64.

186. *See, e.g.*, *Karem v. Trump*, 404 F. Supp. 3d 203, 216 (2019) (holding *Playboy* reporter stripped of his White House press pass demonstrated a likelihood of success on his due process claim).

187. *See, e.g.*, *Sherrill v Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (acknowledging that the White House is not required to “open its doors to the press, conduct press conferences, or operate press facilities”).

188. Memorandum from LibRA—Faculty Research Service, UNC Sch. of Law, to Mary-Rose Papandrea, Samuel Ashe Distinguished Professor of Constitutional Law, UNC Sch. of Law, Shield Laws—50 State Survey (Oct. 11, 2019) (on file with the author).

press subpoenas.¹⁸⁹ Similarly, although both the states and the federal government have freedom of information laws, these laws are full of loopholes and are subject to amendment. For example, after a federal appellate court ruled in favor of the ACLU's FOIA claim for access to images of the abuse of detainees in U.S. custody abroad,¹⁹⁰ Congress quickly acceded to President Obama's request to amend FOIA to prohibit their disclosure.¹⁹¹

As politicians increasingly turn to social media to communicate with the public, they are emboldened to restrict press access because they no longer "need" the press the way that they used to. Allowing public officials to control the flow of information to the public is potentially very dangerous for the future of our democracy, but it is hardly clear that the Supreme Court would be willing to interfere with this state of affairs.

CONCLUSION

At a time when the President attacks "the lamestream media"¹⁹² at every opportunity, the role of the courts to protect the Fourth Estate is more important than ever. Historically, the Supreme Court has served this function at these times, as demonstrated in its landmark decisions in *Sullivan*¹⁹³ and the *Pentagon Papers* case.¹⁹⁴ Over fifty years later, *Sullivan* continues to provide some important constitutional protection from state defamation claims.¹⁹⁵ The

189. See 28 C.F.R. § 50.10 (2015) (barring subpoenas to journalists unless information is "essential" and officials have balanced the public's interest in "[p]rotecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society").

190. *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008), *vacated and remanded by DOD v. ACLU*, 130 S. Ct. 777 (2009).

191. See The Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2184. Defense Secretary Robert Gates invoked the exception, and the Supreme Court vacated and remanded the appellate decision. Bill Mears, *Pentagon Bars Release of Photos Allegedly Showing Detainee Abuse*, CNN (Nov. 15, 2009, 11:33 AM), <https://www.cnn.com/2009/US/11/15/scotus.detainee.photos/index.html> [<https://www.perma.cc/6XX5-E8GQ>].

192. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2019, 12:08 AM), <https://twitter.com/realdonaldtrump/status/1192307862204108800?lang=en> [<https://perma.cc/RC7C-S72D>].

193. See *supra* Part I.

194. See *supra* Part II.

195. See *supra* Part I.

Pentagon Papers decision similarly created a culture of “benign indeterminacy” that fosters press and executive branch cooperation.¹⁹⁶

Yet even these decisions do not provide the press with all of the protection it might need in times of crisis. By embracing an “actual malice” standard in public official/public figure defamation actions, the Court has left the press exposed to expensive and time-consuming litigation even in cases that ultimately proven meritless. Furthermore, the Court has given publishers even less protection when speaking about matters of public concern. These gaps in the *Sullivan* framework are particularly troubling now that the press generally has fewer resources to engage in protracted litigation. The *Pentagon Papers* case likewise leaves the press exposed to the possibility of criminal prosecution for the collection and publication of national security information. The Julian Assange prosecution, which targets an unsympathetic non-American operating outside of the usual journalistic norms, threatens to create precedent that could be damaging for all journalists. Finally, the Court’s failure to recognize a constitutional right of access to government information outside of criminal judicial proceedings means that the press has no right to gather information necessary for an informed public debate. Instead, the right of access to information largely rests in the political process, and the judiciary’s role is limited in making sure that the government follows its own rules, and that it does so consistently with due process.

196. See *supra* Part II.