

## Beyond the Watchdog

### *Using Law to Build Trust in the Press*

*Erin C. Carroll\**

#### 5.1 INTRODUCTION

It was 1971 and *Los Angeles Times* editor Nick Williams had what he called a “terribly uneasy feeling.” In a letter to one of the paper’s Washington correspondents, he wrote of his suspicion that journalism had “lost credibility . . . with an alarming percentage of the people.” If the plummet continued, Williams fretted, journalists will have “destroyed or weakened a keystone of our Constitution.”<sup>1</sup>

Williams’s assessment was not entirely wrong. Polling data from 1971 confirmed that a dismal 18 percent of Americans had a “great deal of confidence” in the press.<sup>2</sup>

But he also wasn’t quite right. Far from undermining American government’s democratic foundations, the press was likely shoring them up, having already entered what has been called its “Glory Days.”<sup>3</sup> This era was brought about, in part, by the press’s performance of its watchdog role, exposing political corruption and government cover-ups. It was also brought about by something else: law. The Supreme Court and legislatures boosted the press by celebrating this watchdog role and granting it tools to enhance this work.<sup>4</sup>

Today, 1971 feels familiar. Polls again register dreadfully low levels of trust in the media. “Terribly uneasy” may be a generous description of how journalists feel

\* I am grateful to Ashutosh Bhagwat, Jane Bambauer, and Helen Norton for their insightful feedback on this chapter. Many thanks also to Gus Hurwitz, Kyle Langvardt, and Elana Zeide for spearheading this project. And, finally, special thanks to Tom Rosenstiel for conversations that informed this work. All errors are mine.

<sup>1</sup> MATTHEW PRESSMAN, ON PRESS: THE LIBERAL VALUES THAT SHAPED THE NEWS 59 (2018).

<sup>2</sup> *Id.* at 58.

<sup>3</sup> RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255–56 (2014).

<sup>4</sup> See generally *New York Times Co. v. United States*, 403 U.S. 713 (1971) (The Pentagon Papers Case); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Neb. Press Ass’n. v. Stuart*, 427 U.S. 539 (1976).

about the public's perception of them and the press's ability to continue playing its democratic role.

Are we again on the verge of a reinvigorated and newly effective press, or is trust headed deeper into the abyss? Institutions, including the press, are at an inflection point. History gives press advocates a basis for optimism. Yet, history provides no failsafe template.

Today, if journalists were to double down on their still-vital watchdog role as a way of building trust, such an effort might backfire. There is a risk that in our hyper-polarized society, citizens would recoil, finding this aggressive brand of journalism too cynical, negative, and politicized. A new approach is needed.

A promising approach would be to embrace another key journalistic function, one that has received far less attention and adulation from judges, legislators, and legal scholars than the press's watchdog role: the press's role as a convener and facilitator of the public square. As Bill Kovach and Tom Rosenstiel write in their journalism classic, *The Elements of Journalism*, a key function of journalism is to "provide a forum for public criticism and compromise."<sup>5</sup> Of late, journalists themselves are embracing this role as they develop what has alternately been called "community-centered journalism," "social journalism," and "engaged journalism."

This journalism movement envisions the relationship between journalists and citizens very differently than watchdog journalism does. In watchdog journalism – true to the metaphor – journalists are protectors of the public. As watchdogs, they use their professional expertise and privileged position as members of the Fourth Estate to expose government wrongdoing. In this way, the press exercises a position of power over citizens. The intent is to wield power benevolently and in the public interest, but it is a hierarchical relationship nonetheless.

In contrast, community-centered journalism intentionally seeks to minimize that power differential. It brings citizens into the news-making process – from deciding what to cover, to assisting with information-gathering, to providing post-publication feedback – creating what Tom Rosenstiel has called a "virtuous circle of learning."<sup>6</sup> Some community-centered journalists have gone so far as to say that the movement's primary aim is not necessarily the creation of news; it is building trusting and healthy communities. News is a by-product.

<sup>5</sup> BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* xxvii (4th ed. 2021). The Harvard-based *Nieman Reports* has said of the book, "Since its publication in 2001, *The Elements of Journalism*' has been the industry-standard text on the ethics and practice of journalism." Bill Kovach & Tom Rosenstiel, *In Praise of Digital: An Excerpt from the New Edition of "The Elements of Journalism,"* NIEMAN REPORTS (July 17, 2014) (describing the book in an introduction to an article by the book's authors).

<sup>6</sup> Mónica Guzmán, *What Exactly Is Engagement and What Difference Does It Make?*, AM. PRESS INST. (May 2, 2016), <https://perma.cc/WP7M-EBVY> (quoting Tom Rosenstiel, *News As Collaborative Intelligence: Correcting the Myths About News in the Digital Age*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS 3 (June 2015), <https://perma.cc/7S47-65KU>).

Judges, legislators, and legal scholars should take note of this shifting journalistic landscape. Just as law helped to build and maintain public trust in the watchdog press in the 1960s and 1970s, it likewise has a part to play now. The legal system can solidify the role of the press not only as a watchdog (still a necessary function) but also as a facilitator and convener, as exemplified by the community-centered press movement. And it can do so using methods drawn from the Glory Days: positive rhetoric about the press and legislation that eases the press's ability to fulfill its democratic functions. Legislation could be as straightforward as allocating funds for local meeting spaces and training for journalists. By creating a legal framework for the press that is richer and more reflective of diverse journalistic practices, law would strengthen the "virtuous circle" Rosenstiel describes.<sup>7</sup> Greater public trust in the press could be a by-product.

## 5.2 TRUST, THE WATCHDOG PRESS, AND THE SUPREME COURT: A VERY BRIEF HISTORY

To the extent that something as intangible as trust can be measured, pollsters have tried to do so. For at least sixty years, they have asked American citizens to rate the strength of their trust in the mass media, including newspapers, TV, and radio.<sup>8</sup> That trust was at a nadir in 1971 when the *Los Angeles Times's* Nick Williams was expressing alarm.<sup>9</sup> Yet, in the next handful of years, trust soared. By 1976, in a Gallup poll, 72 percent of Americans expressed a "great deal" or "a fair amount" of trust in the media to report "the news fully, accurately and fairly."<sup>10</sup> This was a high point; in the nearly fifty years since, Gallup has recorded a steady decline in this trust. It dipped to 32 percent in 2016 – the lowest number on record for the poll (which began in 1972).<sup>11</sup> It has hovered around this level ever since.<sup>12</sup>

What shifted? Trying to pinpoint causes for the deterioration of trust is difficult; they are numerous and intertwined. One especially tempting explanation – blaming the internet and social media – is simplistic and wrong-headed. Trust was declining long before the internet was widely used.

At least a few threads can be pulled from the tangle of possibilities and identified with some confidence. First, Americans' declining trust in the press (in the late 1960s and today) came at times of national upheaval and uncertainty. In the 1960s this included the Vietnam War, a racial reckoning, and high-profile assassinations. Today, we face a racial reckoning anew, intense political polarization, growing

<sup>7</sup> *See id.*

<sup>8</sup> PRESSMAN, *supra* note 1, at 58.

<sup>9</sup> *Id.*

<sup>10</sup> Megan Brenan, *Americans' Trust in Media Dips to Second Lowest on Record*, GALLUP (Oct. 7, 2021), <https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx>; Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <https://perma.cc/Z3LD-J697>.

<sup>11</sup> Swift, *supra* note 10.

<sup>12</sup> Brenan, *supra* note 10.

wealth inequality, global democratic regression, and a pandemic. Second, both deep dips in press trust track the public's declining trust in institutions generally.<sup>13</sup>

Beyond social, economic, and political conditions, the press shares in the blame. As Kenneth Newton and Pippa Norris's "institutional performance model" holds, the public's trust in institutions falters when those institutions perform poorly.<sup>14</sup> There is plenty we could critique about the press's performance both in the 1960s and today. This could include reporter bias, a lack of diversity, and too thin a wall between the business and journalism sides of many news organizations.

But if the press is partially responsible for the southward turn in trust, then it should also take some credit for the mid-1970s spike. The numbers indicate that, at that time, the public believed the press was doing something right. A strong candidate for that something right: watchdog reporting. More generically called investigative reporting or accountability reporting, this is the brand of journalism that focuses on exposing government malfeasance and corruption. Watchdog reporting gained public recognition in the early to mid-1970s.

In 1971, both *The New York Times* and *The Washington Post* began publishing excerpts of and writing about the Pentagon Papers, secret government documents detailing the United States' involvement in the Vietnam War.<sup>15</sup> In 1972, *The Washington Post* helped to expose that a burglary at the Watergate was part of broad spying and sabotage effort aimed at re-electing President Richard Nixon.<sup>16</sup> The fallout prompted Nixon's resignation in 1974.

Of course, despite its impressive shoe-leather reporting, the press did not boost its own image single-handedly. Credit is also due to other institutions that lionized the press at this time, the U.S. Supreme Court and Congress. Law – whether judge-made or statutory – was essential in amplifying the way in which the press already performed its democratic roles and in providing tools and inspiration for the press to continue to play those roles.<sup>17</sup>

<sup>13</sup> See Ethan Zuckerman, *Mistrust, Efficacy and the New Civics: Understanding the Deep Roots of the Crisis of Faith in Journalism*, ASPEN INST. (2017), <https://perma.cc/U6QC-NQZK>. By "the press," I mean an institution comprised of journalists and others (editors, designers, data scientists, etc.) regardless of publishing medium who are committed to the mission of providing the public with the information that it needs to engage in democracy. See KOVACH & ROSENSTIEL, *supra* note 5, at 7 ("The primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.").

<sup>14</sup> See Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture, or Performance?*, in *DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING TRILATERAL COUNTRIES* 61 (Susan J. Pharr & Robert D. Putnam eds., 2000); Zuckerman, *supra* note 13 (theorizing that the institutional performance model helps explain the current lack of trust in institutions).

<sup>15</sup> *The Watergate Story: Timeline*, WASH. POST (Jan. 18, 2023), <https://perma.cc/W8CE-AQ9T>.

<sup>16</sup> Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST (Oct. 10, 1972), <https://perma.cc/K6J2-5HDF>.

<sup>17</sup> Cf. Jones, *supra* note 3, at 255–56; RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 378–79 (2022).

First, with respect to the U.S. Supreme Court, from the late 1960s and through the early 1980s, the Court decided nearly all the cases that now comprise the press law canon. In these opinions, the Court laid rhetorical and legal groundwork for public trust in the press. As a group, these opinions are so laudatory of the press, this era has been referred to by legal scholars as the press's "Glory Days."<sup>18</sup> Many of these cases focus on the press's watchdog role. For example, in *New York Times Co. v. United States*<sup>19</sup> (known as the Pentagon Papers Case), Justice Black wrote that under the First Amendment, "[t]he press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."<sup>20</sup>

The Pentagon Papers Case, as well as other cases that discuss the press's role as a watchdog, evince the deep trust that the Court had for what it seemed to view as a sister institution. For example, in the 1966 case of *Sheppard v. Maxwell*,<sup>21</sup> the Court built up the press by calling it a "handmaiden of effective judicial administration" through "guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>22</sup> It is hard to imagine a demonstration of deeper trust than this – an expression by the Court that it needed the press to do its own job effectively.

A decade later, in *Nebraska Press Association v. Stuart*,<sup>23</sup> the Court reaffirmed its trust in the press and perhaps reflected the public's newfound surge in trust. In invalidating a bar on the press publishing accounts of confessions in a criminal trial, Justice Brennan's concurrence, joined by Justices Stewart and Marshall, spoke again of the importance of the press serving as a check on the judiciary. He wrote, "[F]ree and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."<sup>24</sup>

During these Glory Days at the Supreme Court, Congress was also laying groundwork for the press-trust bump. In 1966, Congress passed the Freedom of Information Act, which allows any person to request government agency records on any topic.<sup>25</sup> Newspapers were the driving force behind the law, and its key congressional sponsor cited the needs of a free press when urging its passage.<sup>26</sup> Despite

<sup>18</sup> Jones, *supra* note 3, at 255–56.

<sup>19</sup> 403 U.S. 713 (1971).

<sup>20</sup> *Id.* at 717 (Black, J., concurring).

<sup>21</sup> 384 U.S. 333 (1966).

<sup>22</sup> *Id.* at 350.

<sup>23</sup> 427 U.S. 539 (1976).

<sup>24</sup> *Id.* at 587.

<sup>25</sup> 5 U.S.C. § 552.

<sup>26</sup> John E. Moss, *Clarifying and Protecting the Right of the Public to Information* (June 20, 1966), <https://perma.cc/4SK7-E7DM> (quoting statement by Honorable John E. Moss from the June 20, 1966 Congressional Record).

criticism of its implementation by agencies, FOIA remains more than a half-century later a key tool for watchdog reporting.<sup>27</sup> Moreover, FOIA spawned transparency laws in state legislatures across the country.<sup>28</sup> All fifty states now have sunshine laws modeled on FOIA.<sup>29</sup>

None of this is intended to be a claim that courts or legislators single-handedly resurrected public trust in the press during the 1970s. Even proving that they moved the needle is difficult. Yet, it can be shown that watchdog journalism thrived toward the end of the press's Glory Days in the Court and after Congress's passage of FOIA.<sup>30</sup> Because the shift in journalistic practice towards a watchdog role surged post-Watergate, this suggests the press felt buoyed by positive rhetoric from the Supreme Court as well as by the tools granted to it legislatively. Given the potential of courts and legislatures to contribute to such a shift, it is worth asking how law can assist anew.

### 5.3 TRUST, AND THE PRESS AS FACILITATOR OF DELIBERATION IN PUBLIC SQUARES

As a starting point, it helps to return to journalistic first principles and consider whether any are apt to spark renewed trust and are also aligned with the press's democracy-enhancing role. In the 1960s and 1970s, the Supreme Court and legislatures homed in on the press as a watchdog. This role required trust in the institutional press's authority, particularly its role as a Fourth Estate and a check on the three branches of government.

It might be appealing to simply revisit the watchdog role and look for ways that law can reinvigorate the press's watchdog efforts. These efforts would likely be welcomed by journalists and press advocates. The press's watchdog role continues to be central to its self-image as well as its democratic function, especially in our current era of burgeoning autocracy.<sup>31</sup>

Yet, polling suggests that doubling down on watchdog journalism is likely not the best way to win public trust today. One recent study by Gallup and the Knight Foundation on trust in local news sources concluded that even though the press has a "mandate to help democracy flourish," "more aggressive coverage of social and political issues could further polarize views – and possibly lead to an erosion of trust" at least at the local news level.<sup>32</sup> A separate poll, published in 2021 by the Associated

<sup>27</sup> See Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Prefer the Press*, 2016 UTAH L. REV. 193, 210–15 (2016).

<sup>28</sup> See *Issue Brief: State Freedom of Information Laws*, SOCIETY AM. ARCHIVISTS (May 2015), <https://perma.cc/MGQ9-RZ9F>.

<sup>29</sup> See *id.*

<sup>30</sup> Daniel C. Hallin, *The Media, the War in Vietnam, and Political Support: A Critique of the Thesis of an Oppositional Media*, 46 J. POL. 1, 13 (1984).

<sup>31</sup> See Erin C. Carroll, *A Free Press without Democracy*, 56 U.C. DAVIS L. REV. 289, 313 (2022).

<sup>32</sup> KNIGHT FOUND. & GALLUP, *STATE OF PUBLIC TRUST IN LOCAL NEWS 1* (2019), <https://perma.cc/8VSP-CZLM>.

Press-NORC Center for Public Affairs Research and the American Press Institute, suggested that conservatives are less likely to see the value in watchdog reporting. Examining the relationship between people's "moral values" and the "core values" of journalism, the study found that those "who most value loyalty and authority are much less likely than others to endorse the idea that there should be a watchdog over those in power."<sup>33</sup> About 86 percent of those in the study who valued loyalty and authority identified themselves as conservative or moderate.<sup>34</sup> The report, which used trust as a way of thinking about how the press can appeal to a broader audience, concluded that "[t]o woo subscribers, the media will need to vary its messaging beyond traditional appeals about journalism being a watchdog."<sup>35</sup>

In keeping with this suggestion, another tack is to look to innovations in today's press – and those particularly aimed at journalism's democracy-enhancing mission – for guidance. In the late 1960s and 1970s, watchdog reporting was a focus for newsrooms and was coming into its own journalistically. It made sense for the Supreme Court and legislatures to amplify and celebrate this press role. Looking at journalistic practice today, at a time of significant institutional challenge and change, another press role is coming to the fore. That is the role of the press as a convener and facilitator of community conversation and deliberation. It is this role that helps build the shared epistemic foundations central for democracy.<sup>36</sup> In this way, it is a fundamental press role deserving of protection.

In one sense, journalists have recognized this convening role as a press function for decades. *The Elements of Journalism* lists as one of its ten elements of journalism that journalism "must provide a forum for public criticism and compromise."<sup>37</sup> In doing so, it references the 1947 Hutchins Commission report "A Free and Responsible Press," which stated that "[t]he great agencies of mass communication should regard themselves as common carriers of public discussion."<sup>38</sup> *Elements* authors Kovach and Rosenstiel stress that this forum must have two qualities. First, it "should adhere to all the other journalistic principles," including a dedication to "truthfulness, facts, and verification."<sup>39</sup> In addition, "it should relate directly to Madison's recognition of the central role of compromise in democratic society."<sup>40</sup>

<sup>33</sup> ASSOCIATED PRESS-NORC CTR. FOR PUB. AFFS. RSCH. & AM. PRESS INST., A NEW WAY OF LOOKING AT TRUST IN MEDIA: DO AMERICANS SHARE JOURNALISM'S CORE VALUES 1 (Apr. 2021), <https://perma.cc/33VJ-BLEM>.

<sup>34</sup> *Id.* at 4. The study found that liberals tended to especially value care and fairness. *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> See Aziz Huq & Tom Ginsberg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 130 (2018) ("The practical operation of liberal democracy requires a shared epistemic foundation.").

<sup>37</sup> KOVACH & ROSENSTIEL, *supra* note 5, at xxvii.

<sup>38</sup> *Id.* at 226.

<sup>39</sup> *Id.* at 232, 247.

<sup>40</sup> *Id.* at 247.

Of late, as journalists seek to rebuild lost trust, they have embraced this role in the form of “community-centered journalism.” Community-centered journalism – along with engaged and social journalism – seeks to involve the community more directly in the news-making process as a means of strengthening those communities. As one researcher describes engaged journalism, it is “an inclusive practice that prioritizes the information needs and wants of the community members it serves, creates collaborative space for the audience in all aspects of the journalistic process, and is dedicated to building and preserving trusting relationships between journalists and the public.”<sup>41</sup>

To do this, community-centered journalism shifts the power dynamic between journalist and citizen from one that has long been hierarchical and transactional to one that is more collaborative.<sup>42</sup> Rather than the press dictating what issues are important and so serving a gatekeeping function, engaged journalists look to the community to help assess needs and interests. For example, in her book *Community-Centered Journalism*, journalism scholar Andrea Wenzel features *Curious City*, “an ongoing news experiment” in which Chicago radio station WBEZ asks its listeners to submit questions that journalists can help answer. She notes that this approach marks a shift from the “traditional story cycle” in which the public only becomes involved at the time of publication, to a “public-powered story cycle,” in which it plays a role far earlier.<sup>43</sup> In an effort to build community and trust, and to be sure they reached all corners of the community, WBEZ journalists began driving around the city to solicit questions. They also partnered with community organizations, brewpubs, and libraries to build a stronger network.<sup>44</sup>

In this way, engagement journalism produces what one would expect – news – but its advocates say it does more: It builds and reinforces community. Speaking of a *Seattle Times* engagement-journalism project called the Education Lab, the project’s editor Sharon Chan said: “The discrete product . . . was the relationship.”<sup>45</sup> As with many engaged-journalism efforts, the Education Lab began with a “listening tour” aimed at hearing what issues teachers, students, parents, and other community leaders thought should be covered. To keep the community involved in the process, reporters “asked questions on social media, published guest columns by community members, held live Q&As with reporters about their stories and hosted events and even workshops to deepen conversations and make it easier for people to act.”<sup>46</sup> In presenting the project with an inaugural prize for community engagement, judges

<sup>41</sup> ANDREA WENZEL, COMMUNITY-CENTERED JOURNALISM: ENGAGING PEOPLE, EXPLORING SOLUTIONS, AND BUILDING TRUST 11 (2020) (quoting Lindsay Green-Barber, *Towards a Useful Typology of Engaged Journalism*, MEDIUM (Oct. 18, 2018), <https://perma.cc/6ZP8-CQHK>).

<sup>42</sup> See *id.* at 12.

<sup>43</sup> *Id.* at 51.

<sup>44</sup> *Id.* at 63.

<sup>45</sup> Guzmán, *supra* note 6.

<sup>46</sup> *Id.*



for the Associated Press Media Editors Awards said that “[t]he newspaper helped to turn often angry rhetoric into constructive dialogue that parents, educators, and community members craved.”<sup>47</sup>

Although the level of attention being paid to engaged journalism is new, the seeds of this method have been germinating for decades. Wenzel cites James Carey’s ritual view of communication – dating from the early 1990s – as an intellectual precursor. She writes that “[i]n Carey’s ideal . . . the value of the press comes from creating a space for the public to understand information through public discourse and by ‘encouraging the conversation of its culture.’”<sup>48</sup> She also credits Jay Rosen as a “founding proponent” of a “public or civic journalism movement of the 1990s” that, in Rosen’s words, called for journalists to “address people as citizens, potential participants in public affairs, rather than victims or spectators” as well as to “improve the climate of public discussion, rather than simply watching it deteriorate.”<sup>49</sup>

As this movement has bloomed, the broader journalism world has taken notice. The *Columbia Journalism Review*, a key industry publication, has featured engaged-journalism leaders and practices on its pages.<sup>50</sup> The Solutions Journalism Network, which advocates for a type of community-centered journalism, has grown from its two founding *New York Times* reporters in 2013 to an organization that has worked with more than 500 news outlets and 20,000 journalists.<sup>51</sup> The concept of community-centered journalism has also attracted philanthropic funding. The Democracy Fund, for example, runs “The Engaged Journalism Lab,” which is focused on “building trusted, inclusive, and audience-driven journalism.”<sup>52</sup> And the graduate journalism school at the City University of New York has a master’s program focused on “social journalism.”<sup>53</sup>

This recognition and support suggest that community-centered journalism is becoming a key journalistic practice. As Rosen wrote in 2019, “Engagement journalism, solutions journalism, less extractive journalism, a more agile, iterative newsroom. Nothing I have seen while watching these emerge suggests they are

<sup>47</sup> *Id.*

<sup>48</sup> WENZEL, *supra* note 41, at 14 (quoting James Carey, *A Republic If You Can Keep It: Liberty and Public Life in the Age of Glasnost*, in JAMES CAREY: A CRITICAL READER 220 (Eve Stryker Munson & Catherin A. Warren eds., 1997)).

<sup>49</sup> *Id.* at 10 (quoting Jay Rosen, *The Challenge of Public Journalism*, in THE IDEA OF PUBLIC JOURNALISM 44 (Theodore Glasser ed., 1999)).

<sup>50</sup> See, e.g., Darryl Holliday, *Journalism Is a Public Good. Let the Public Make It*, COLUM. JOURNALISM REV. (Dec. 15, 2021), <https://perma.cc/2PQU-QQWJ>; Lauren Harris, *Community-Engaged Journalism Is Both an End and a Means to Survival*, COLUM. JOURNALISM REV. (Aug. 26, 2020), <https://perma.cc/3YPM-8U39>; Andrea Wenzel & Letrell Deshan Crittenden, *Covering Germantown: The Road to Community Engagement*, COLUM. JOURNALISM REV. (Jan. 17, 2020), <https://perma.cc/FL3Y-HJ8G>.

<sup>51</sup> *Mission*, SOLUTIONS JOURNALISM NETWORK, <https://perma.cc/6A6Q-6HEQ>.

<sup>52</sup> *About*, ENGAGED JOURNALISM LAB, <https://perma.cc/7FP3-B73L>.

<sup>53</sup> See Carrie Brown, *Engaged Journalism: It’s Finally Happening*, NIEMAN LAB: PREDICTIONS FOR JOURNALISM 2020, <https://perma.cc/7SDX-DNDY>.

going away soon. The shocks to the system have been so many that the culture of the press is evolving.”<sup>54</sup>

Those running engaged-journalism projects are still discerning how best to measure their impact; data about their effect on citizens’ trust specifically is difficult to come by.<sup>55</sup> Yet, its scholars and practitioners believe it is indeed building trust. Andrea Wenzel argues that engaged-journalism projects “can contribute to a communication environment with greater trust between media, community members, and organizations, where residents feel more connected and invested.”<sup>56</sup>

Scholarship in other disciplines also suggests that engagement journalism has the potential to foment trust and is desperately needed. For example, philosopher Robert B. Talisse argues in his book *Overdoing Democracy* that for democracy to work, we need to invest in “civic friendship.”<sup>57</sup> In a world oversaturated with politics, this friendship is based on bringing community members – even those who “staunchly object” to one another’s values – together to build relationships through activities and conversation that are apolitical.<sup>58</sup> It is by building trust through civic friendship that we can start to rebuild a working democracy, argues Talisse.<sup>59</sup> Community-centered journalism is poised to do this by serving as a facilitator and convener, and law can help.

#### 5.4 THE ROLE FOR LAW IN PRESS TRUST-BUILDING

In some senses, law has already recognized the press’s facilitative role. The Supreme Court has understood the press to serve as a facilitator of the public square. In *Mills v. Alabama*,<sup>60</sup> the Supreme Court said that the Constitution “specifically selected” the press “to play an important role in the discussion of public affairs.”<sup>61</sup> Press law scholar RonNell Andersen Jones cites *Mills*, *Miami Herald Publishing Co. v. Tornillo*,<sup>62</sup> and other cases in arguing that the Court’s “Glory Days characterizations also positively portray the press as a dialogue builder – a critically important distiller of societal information and shaper of community conversations through the application of editorial insight and journalistic acumen.”<sup>63</sup>

In *Tornillo*, in which the Court struck down a Florida “right-of-reply” statute, the Court indicated that the metaphorical space in which the press serves as a dialogue

<sup>54</sup> Jay Rosen (@jayrosen\_nyu), TWITTER (Nov. 16, 2019, 3:05 PM), <https://perma.cc/5BL7-JLJN>.

<sup>55</sup> WENZEL, *supra* note 41, at 152–53.

<sup>56</sup> *Id.* at 4.

<sup>57</sup> ROBERT B. TALISSE, *OVERDOING DEMOCRACY* 150 (2021).

<sup>58</sup> *Id.* at 147, 163, 170; ASHUTOSH BHAGWAT, *OUR DEMOCRATIC FIRST AMENDMENT* 134–39 (2020) (arguing for a revival of civic association that is not focused on politics).

<sup>59</sup> TALISSE, *supra* note 57, at 35–36.

<sup>60</sup> 384 U.S. 214 (1966) (invalidating under the First Amendment a state criminal law banning election day newspaper editorials urging people to vote a certain way).

<sup>61</sup> *Id.* at 219.

<sup>62</sup> 418 U.S. 241 (1974).

<sup>63</sup> Jones, *supra* note 3, at 257.

builder is “the marketplace of ideas.”<sup>64</sup> That marketplace, said the Court, quoting *New York Times v. Sullivan*,<sup>65</sup> is a place where “debate on public issues should be uninhibited, robust, and wide-open.”<sup>66</sup> The *Sullivan* Court described a marketplace that was freewheeling and even inhospitable. It said the marketplace “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>67</sup>

Together, these cases describe an information ecosystem in which the press, exercising its editorial discretion, serves as a gatekeeper and agenda-setter for public discussion.<sup>68</sup> In this ecosystem, the relationship between press and citizen is hierarchical and unidirectional. The Court envisions the press as dictating the terms of the discussion that citizens take up with each other. It does not seem to envision press involvement in that conversation or even press listening. Exchanges are in the form of a “debate” rather than a conversation, collaboration, or deliberation. That debate is “caustic”; it is not for the faint of heart.

This vision of the press as gatekeeper of a marketplace characterized by robust and uninhibited verbal sparring squares well with the press’s role as a watchdog. The watchdog role is, by its very nature, an adversarial one. It involves the press serving as a check on government. In doing this, the press acts as a defender and protector of the public.

The Court’s vision of the press as a gatekeeper of the public square and marketplace of ideas does not square quite as well, however, with the convener and facilitator role for journalism – what Kovach and Rosenstiel described as “provid[ing] a forum for public criticism and compromise.”<sup>69</sup> And it arguably squares even less well with the way in which community-centered journalism views the role of the press – as a co-creator of news with the public. In fact, the gatekeeper role and marketplace metaphor seem quite hostile to this vision.

Beyond being out of step with journalism’s evolving conception of its democratic role and its more recent innovations, the Court’s description of the press is also dated in another significant way. It is simply no longer true that the mainstream media is the major gatekeeper of the public square or marketplace of ideas. That role has largely been taken over by technology platforms, as the Court itself has recognized. In *Packingham v. North Carolina*,<sup>70</sup> the Court described social-media platforms as “the modern public square” and said that “[t]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”<sup>71</sup>

<sup>64</sup> *Tomillo*, 418 U.S. at 251.

<sup>65</sup> 376 U.S. 254 (1964) (setting the actual malice standard for defamation of a public official).

<sup>66</sup> *Tomillo*, 418 U.S. at 252.

<sup>67</sup> *Sullivan*, 376 U.S. at 270.

<sup>68</sup> Another case that depicts the same model is *Columbia Broad. System, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 187–88 (1973) (Brennan, J., dissenting).

<sup>69</sup> KOVACH & ROSENSTIEL, *supra* note 5, at xxvii.

<sup>70</sup> 137 S. Ct. 1730 (2017).

<sup>71</sup> *Id.* at 1737.

Law's first step then in generating more trust in the press, as it was in the press's Glory Days, is to recognize the ways in which today's press is promoting democracy and the promising directions in which it is headed. The Supreme Court's vision needs updating – both as to what the press is and does, as well as the space in which it operates. As the Court has long recognized, the press is and should remain a watchdog. But the press's role in perpetuating a functioning democracy is much broader than the Court's key press decisions – now decades old – have described.

The press is and should continue to be a facilitator and convener of community conversations. In so doing, the press builds trust between citizens and weaves the fabric of community. This role is not predominantly characterized by a hierarchy with the press sitting atop citizens. And it is not one dominated by aggression or opposition. Rather, it is one in which the press and citizens co-create the boundaries and substance of the space in which they operate. These are not spaces in which journalists or the press necessarily cede expertise, but instead spaces in which they recognize that they are not the only holders of it. Community members also bring wisdom and skills.

The spaces in which these conversations occur can be described not as one “public square” or “marketplace” but as public fora – a multiplicity of locales for community deliberation and collaboration. These press-facilitated or press-convened public fora could look and feel different from the marketplace and public squares that the Court has conjured in the past. They could also be different from one another. They could be physical, but they could also be virtual. They could be typified by speaking and conversation, but they could also include silence, listening, and even collaborative doing. As described, the press is already creating these spaces, and it should be encouraged to expand and embroider upon what it has started.

The Supreme Court could help. As noted, it could begin by updating its understanding of the press. In theory, this would not be difficult. It would not entail granting the press any special rights (something the Court has steadfastly avoided). As it was during the Glory Days, it could largely be a matter of rhetoric. As the Court celebrated the role of the press as a watchdog then, it could likewise laud the role of the press as a convener and facilitator today. To do so, it would not even need to take up a case involving the press as a party. One could imagine a discussion of this vital press role in any case in which the Court took account of public sentiment (reached through discourse and collaboration) or any case in which the Court exercised judicial restraint and deference to the political process (which could then involve citizens – with the help of the press – working through issues of public concern).

Admittedly, the U.S. Supreme Court revisiting and updating its conception of the press (at least in any press-favorable way) seems as elusive a proposition today as building trust is. As press scholars RonNell Andersen Jones and Sonja R. West have shown, the Supreme Court's characterizations of the press have plummeted in

quantity and favorability.<sup>72</sup> Jones and West have written: “Our data suggest that any hopes that the judiciary can be trusted to be a savior of press freedom in America might be misplaced.”<sup>73</sup> Yet, this need not be an insurmountable obstacle. It may mean that press advocates need to lean more heavily on lower courts and legislatures. Lower courts can just as easily engage in pro-press rhetoric as the Supreme Court. Legislatures too can do so not only through legislation, but through hearings, committee reports, floor statements, and the like. And even though being anti-press sometimes seems like part of the Republican platform, Congress has occasionally shown signs of press friendliness.<sup>74</sup>

Plus, there are fifty state legislatures that can also take up this call – not simply to engage in pro-press rhetoric, but to help create the conditions in which the press can best serve as a facilitator and convener. New Jersey has shown its willingness to participate in such efforts by creating the Civic Information Consortium aimed at “strengthening local news coverage and boosting civil engagement.”<sup>75</sup> And given that states can be more protective of press rights than the federal government is, bolstering the press at the local level makes sense. This goal is also aligned with community-centered journalism and its concern with assessing community wants and needs.

Proposals to boost the press’s role as facilitator and convener could be broad. They might involve providing public facilities for the press to use for gathering the public. This could range from subsidizing journalists’ use of existing spaces to building new community information hubs that could bring together journalists, librarians, historians, and other community information specialists. Other proposals might be aimed at creating and supporting programs that teach community-centered journalism practices to students and citizens. Proposals could also include loan-forgiveness programs for aspiring journalists interested in this work.

Both press advocates and press skeptics might rightfully ask whether the press is the best institution to play this role of community facilitator and convener. Perhaps community glue would be stickier if produced by religious organizations, book clubs, civic associations, or even facets of the legal system like juries and mediators. But the press has already tasked itself with this work and a growing movement of journalists is invested in it. Moreover, journalists’ skill set – interviewing, listening, and storytelling – is well-aligned with the facilitator and convener role. Journalists are capable, committed, and already playing this role.

<sup>72</sup> Jones & West, *supra* note 17, at 378–79.

<sup>73</sup> *Id.* at 380.

<sup>74</sup> See Meredith Conroy, *Why Being ‘Anti-Media’ Is Now Part of the GOP Identity*, FIVE THIRTYEIGHT (Apr. 5, 2021), <https://perma.cc/QHR6-YQD4>; Erin C. Carroll, *Obstruction of Journalism: A New Way to Combat Violence against Journalists*, COLUM. JOURNALISM REV. (Jan. 13, 2022), <https://perma.cc/N9UA-D2M3> (describing bipartisan support for the Fall Journalists Memorial Act).

<sup>75</sup> See Mike Rispoli, *Why the Civic Information Consortium Is Such a Huge Deal*, FREE PRESS (Mar. 24, 2022), <https://perma.cc/XLZ4-QGT9>.

## 5.5 CONCLUSION

By promoting community-centered journalism in these ways, journalists, judges, and legislators would be taking up the call from legal scholar Mary Anne Franks to move past the conventional wisdom of the internet as a “modern public square” and “quintessential site of democratic deliberation.”<sup>76</sup> To avoid recreating the hierarchies that have existed in our public square, Franks says “we can envision the flourishing of multiple spaces – online and off, public and private – that provide the conditions necessary for free expression and democratic deliberation.”<sup>77</sup> She cites as examples “homes, schools, workplaces, bookstores, hair salons, and clubs.”<sup>78</sup> Spaces created by community-based journalism could serve the same goals – these could be in newsrooms, but they could also be in restaurants, libraries, community halls, parks, community information hubs, and any number of other spots. They also need not be limited to physical spaces. Journalists could also convene online communities. Yet, as long as democracy has a geographic component, it will be important for some conversation and compromise to occur between people in physical community with one another.<sup>79</sup>

Yes, this vision expands the parameters of what the law (and even journalism) has imagined journalists and the press to be. That means that both journalism and law will need to engage in what sociologist Thomas Gieryn calls “boundary-work.” As Andrea Wenzel explains, this approach “looks at how groups compete in ever changing contexts to define what falls inside and outside a social boundary.”<sup>80</sup> Journalists – especially community-centered journalists – are already redefining these boundaries.<sup>81</sup> The law needs to join them. Judges, legislators, and legal scholars need to reflect on what our press is and what we need it to be. The press’s role as a convener and facilitator of public fora aligns with its role of providing citizens with the information that they need to participate in government.<sup>82</sup> If we use law to support this role, we could move ever closer to a more ideal democracy.

<sup>76</sup> Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. F. 427, 427 (Nov. 16, 2021).

<sup>77</sup> *Id.* at 429.

<sup>78</sup> *Id.* at 428.

<sup>79</sup> See NIKKI USHER, NEWS FOR THE RICH, WHITE, AND BLUE x–xi (2021) (describing the dominance of national journalism and noting that because “American political power is tied to geography, this [dominance] presents a serious problem for democratic life”).

<sup>80</sup> WENZEL, *supra* note 41, at 13.

<sup>81</sup> *Id.*

<sup>82</sup> See KOVACH & ROSENSTIEL, *supra* note 5, at 7 (“The primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.”).