

**ALL THE NEWS THAT'S FIT TO BE
IDENTIFIED:
FACILITATING ACCESS TO HIGH-
QUALITY NEWS THROUGH
INTERNET PLATFORMS**

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Roughly half of Americans get some of their news from social media, and nearly two-thirds get some of their news from search engines. As our modern information gatekeepers, these internet companies bear a special responsibility to consider the impact of their platform and site policies on users' access to high-quality news sources. They should adopt policies that clear the digital pathway between the public and press by facilitating such access. To that end, the companies must first, address the threshold issue of how best to identify high-quality news sources. This article examines factors that would be useful, drawing from legal and scholarly sources (e.g., statutes and law review articles) that evaluate the characteristics of journalism and the people who produce it. We relate those sources to the current policies of major internet platforms and the public interest in timely and trustworthy news.

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INTRODUCTION

The primary draftsman of the First Amendment, James Madison, referred to the free press as among the “choicest privileges”¹ and “great rights”² of the American people. Our modern speech landscape, however, looks exceedingly different than it did when Madison uttered those words. While he warned of the danger of government efforts to silence the press, today the entities with the most practical power to affect our daily interactions with the press are non-governmental internet platforms.

1. 1 Annals of Cong. 453 (1789) (Joseph Gales ed., 1834).

2. *Id.*

The internet’s architecture consists of privately owned websites and servers, routers and backbones, algorithms and filters—all working together to enable ordinary people to speak and receive information online.³ Yet, because private actors are generally not subject to the constitutional limits that prohibit government actors from violating the First Amendment rights of individuals,⁴ that same speech-enabling architecture empowers companies like Google, Twitter, and Facebook to regulate speech through their policies regarding user content.

Although there is growing uncertainty around the norms that should apply on the companies’ platforms and services, there is, nonetheless, broad agreement that the policies and practices of those platforms and services significantly affect the Constitution’s core expressive values.⁵ This article addresses some of that uncertainty by exploring the public interest in high-quality news available through major internet platforms, beginning with the threshold issue of how best to identify such sources.

Today, roughly half of Americans get some of their news from social media, and nearly two-thirds get some of their news from search engines.⁶ As modern information gatekeepers, these internet companies are responsible for considering their platform and site policies’ impact on user access to high-quality news sources. They should adopt policies that clear the digital pathway between the public and press by facilitating such access. To that end, the companies must first address the threshold issue of how best to identify high-quality news sources. This article examines factors that would serve that end, drawing from legal and scholarly sources (e.g., statutes and law review articles), that evaluate the characteristics of journalism and the people who produce it. The article relates those sources to the current policies of major internet platforms and

3. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 377 (2010).

4. Jonathan Peters, *The “Sovereigns of Cyberspace” and State Action: The First Amendment’s Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 991–92 (2017) (“A threshold question in all First Amendment cases...is whether an alleged violation was committed by a government actor. Courts so far have held that private online service providers are not state actors for First Amendment purposes.”).

5. See, e.g., Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27 (2019); Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 26 (2018); Jack Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011 (2018).

6. Elisa Shearer, *More Than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/> [https://perma.cc/XZQ8-HPKP].

the public interest in timely and trustworthy news. The article begins, however, with a brief, general overview of platform governance and content moderation to provide greater context for the narrow issue this article is exploring.

I. PLATFORM GOVERNANCE AND CONTENT MODERATION

Recent months have seen countless headlines about issues regarding shadow-banning (the practice of limiting the reach of a particular post or an account through algorithmic means), deplatforming (the deletion of a user's account, sometimes with little to no notice), post removals, and copyright strikes.⁷ These are all manifestations of platform governance (the rules, practices, and design decisions that influence how content is presented in a community) and content moderation (the “practice of screening user generated content . . . to determine the appropriateness of the content for a given site, locality, or jurisdiction”).⁸ When a user signs up for an account with an internet company or provider, they must agree to its terms and policies, which typically include content-related rules. Those rules are intended, among other things, to ensure and enact community values, offer users certain experiences, and comply with the law.

Content moderation is typically carried out in two ways: (1) by people and (2) by artificial intelligence.⁹ Human moderators review content and apply relevant rules to it, moving quickly and in difficult working conditions.¹⁰ In the past, nearly all content moderation was performed by humans. However, with the advent of modern social media, which generates trillions of posts and interactions every day, individual-level moderation alone is not feasible.

Algorithmic content moderation addresses this scalability problem using both natural-language processing methods and artificial-intelligence (AI) methods.¹¹ The former scans posts for content that matches targeted content within a certain probability

7. Robert Gorwa et al., *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 *BIG DATA & SOC'Y*, Feb. 28, 2020, at 1, 2 (2020).

8. Sarah T. Roberts, *Content Moderation*, in *ENCYCLOPEDIA OF BIG DATA* 211, 211 (Laurie A. Schintler & Connie L. McNeely eds., 2022).

9. See generally Ysabel Gerrard & Helen Thornham, *Content Moderation: Social Media's Sexist Assemblages*, 22 *NEW MEDIA & SOC'Y* 1266, 1269 (2020).

10. Casey Newton, *The Trauma Floor*, *VERGE* (Feb. 25, 2019, 8:00 AM), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona> [<https://perma.cc/S7ND-FNQ5>].

11. Gorwa et al., *supra* note 7, at 2, 4–5.

threshold and flags or removes it.¹² The latter uses AI/machine learning to train algorithms to replicate human classification of content.¹³ This method is generally superior because it can account for more nuances within the content.

The policies of internet platforms can also have major impacts on the likelihood of users seeing (or not seeing) particular content. Various amplification systems, for example, can increase users' exposure to content through features like search results, rankings, newsfeeds, and recommendations.¹⁴ Amplification systems can be managed both manually and algorithmically.¹⁵

All of this is relevant, in broad terms, because content-moderation practices and internet-platform policies shape user access to high-quality news sources. This article explores below, in the context of platform governance, the public interest in accessing such sources as well as the threshold issue of how to identify them in the first place.

II. IDENTIFYING QUALITY NEWS SOURCES

The U.S. Supreme Court has repeatedly recognized that a free and independent press “lies at the heart of our democracy and [that] its preservation is essential to the survival of liberty.”¹⁶ In our democracy, the press fulfills the crucial functions of informing the public on matters of legitimate concern and of checking the government and the powerful.¹⁷ Access to the information provided by a vibrant and effective press fosters robust public debate and furthers our collective interest in self-government.

The world's largest internet platforms have all publicly stated that they recognize the central role the press plays in our public dialogue. These companies also claim to share the interest of promoting accurate and reliable information regarding matters of public concern. For example, Google announced that it is “committed to fostering a healthy and diverse news ecosystem because [Google knows] journalism is vital to strong, functioning societies.”¹⁸ As part of its program to support local journalists, Twitter stated: “it

12. *Id.*

13. *Id.*

14. See DAPHNE KELLER, KNIGHT FIRST AMEND. INST., AMPLIFICATION AND ITS DISCONTENTS 5 (2021), https://s3.amazonaws.com/kfai-documents/documents/aa82cf1b16/2.23.2023_-Keller-New-Layout.pdf [<https://perma.cc/QA77-WKLY>].

15. *Id.* at 3.

16. *Craig v. Harney*, 331 U.S. 367, 383 (1947) (Murphy, J., concurring).

17. See generally Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014) (discussing the Court's recognition of the press's unique constitutional functions).

18. *How News Works on Google*, GOOGLE, <https://newsinitiative.with-google.com/hownewsworks/mission/> [<https://perma.cc/6X3Q-MWXS>].

is pivotal that [journalists] and their industry are supported.”¹⁹ Facebook, meanwhile, observed that “[j]ournalism plays a critical role in our democracy. When news is deeply-reported and well-sourced[,] it gives people information they can rely on. When it’s not, we lose an essential tool for making good decisions.”²⁰

Taking these statements seriously means demanding internet platforms account for how their policies and practices impact the users’ accessibility to news the public needs. As Emily Bell, the director of the Tow Center for Digital Journalism at Columbia University, told the House Subcommittee on Communications and Technology: “Civic journalism[,] representative of the communities it serves, could be established and strengthened through a reform agenda which [heeds] the information needs of communities[.]”²¹ Protecting user access to high-quality news sources raises the critical question of how best to identify these sources. It is only once they are identified that the platforms will be able to develop or refine their policies for facilitating access to timely and trustworthy news.

As noted earlier, the First Amendment generally does not apply to the actions of privately owned companies. Thus, any concerns that platforms might violate actual constitutional rights by categorizing users for differential treatment are unfounded. Yet, even when considered under a constitutional framework, the mere act of identifying or promoting certain speakers does not necessarily violate principles of freedom of speech or press. Indeed, the United States has a long history of courts, legislatures, and other government actors singling out and supporting the press with rights and protections that serve the public interest.²² Government agencies routinely identify certain individuals and organizations through credentialing programs that award press passes or provide access

19. *Supporting Local Journalists on #WorldPressFreedomDay*, TWITTER (May 3, 2021), https://blog.twitter.com/en_us/topics/company/2021/wpfd-2021 [<https://perma.cc/UC8G-45L4>].

20. Campbell Brown, *Introducing Facebook News*, FACEBOOK (Oct. 25, 2019), <https://about.fb.com/news/2019/10/introducing-facebook-news/> [<https://perma.cc/6Q6P-CE58>].

21. *Fanning the Flames: Disinformation and Extremism in the Media: Hearing Before the Subcomm. on Comm’n and Tech. of the Comm. on Energy and Com.*, 177th Cong. 67 (2021) (prepared statement of Emily Bell, Leonard Tow Professor of Journalism, Director of the Tow Center for Digital Journalism, Columbia Journalism School).

22. See generally Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91 (2018) (discussing the history, court precedent, and legislative history of differential treatment for the press).

to press facilities.²³ Federal and state lawmakers have identified the press for the purposes of providing unique protections from searches and seizures, testimonial subpoenas, and securities regulation.²⁴ In fact, the U.S. Supreme Court has explicitly encouraged lawmakers to find ways to provide members of the press with the special protections and tools that they need to do their work effectively.²⁵

However, acknowledging that internet platforms *may* categorize certain users as high-quality news sources does not answer the question of *how* to do it. Likewise, there is no consensus among lawmakers, courts, or scholars regarding the best methods for drawing these distinctions. There is general agreement, however, that the most effective frameworks take holistic and transparent approaches, relying on a variety of factors to help identify credible news sources.²⁶ Below is an examination of such factors, based on a review of legal and scholarly sources that identify members of the press and evaluate the characteristics of journalism and the people who produce it. The article then relates those sources and factors to the current policies of major internet platforms.²⁷

A. *Journalistic purpose and professionalism*

When discussing the constitutional role of the press, the U.S. Supreme Court has noted the press fulfills two unique functions in

23. JEFFREY HERMES ET AL., BERKMAN CTR. FOR INTERNET & SOC'Y AND SHORENSTEIN CTR. ON MEDIA, POL. AND PUB. POL'Y, WHO GETS A PRESS PASS? MEDIA CREDENTIALING PRACTICES IN THE UNITED STATES 1 (2014), https://www.dmlp.org/sites/dmlp.org/files/Who%20Gets%20a%20Press%20Pass_0.pdf [<https://perma.cc/G4PT-9SY7>].

24. WILLIAM E. LEE ET AL., THE LAW OF PUBLIC COMMUNICATION 490–525 (12th ed. 2022).

25. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (“Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.”).

26. See generally Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999).

27. The companies’ efforts to identify news sources can be found in a variety of their policies that serve different purposes, including verification programs, news page feeds, page registration requirements, and beyond. The goal of this discussion is to consider the types of factors these companies rely on to identify news sources and not how the companies are currently using or applying the factors.

our democracy: (1) gathering and disseminating news and information about matters of public concern²⁸ and (2) checking the government and the powerful.²⁹ Similarly, journalism scholars have observed that the press provides a window to the world,³⁰ with journalists acting as “proxy witnesses and information-gatherers” for the public³¹ and helping to generate discussion of public issues.³² Past attempts to identify the speakers and publishers fulfilling these roles have generally looked for evidence of journalistic purposes, activities, and standards.³³

1. Journalistic purpose or intent

One key difference between members of the press and other types of speakers or publishers is their clear and consistent journalistic purpose. Some courts and legislatures have emphasized journalistic intent when determining whether a person or entity could claim a particular right or protection—such as reporter’s privilege, which can allow a journalist, in certain circumstances, to refuse to testify about her confidential sources and/or produce notes or other materials related to her reporting.³⁴ The threshold question in these cases: Who qualifies to claim such a protection? What matters most, according to the U.S. Court of Appeals for the Second Circuit, is whether the person had “the intent to use material—sought, gathered or received—to disseminate information to the public and

28. See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (noting a free press functions “to supply the public need for information and education with respect to the significant issues of the times.”).

29. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

30. See GAYE TUCHMAN, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* 1 (1978).

31. Judith Clarke, *How Journalists Judge the ‘Reality’ of an International ‘Pseudo-Event,’* 4 *JOURNALISM* 50, 50 (2003).

32. William F. Woo, *Defining a Journalist’s Function*, 59 *NIEMAN REPS.* 30, 32 (2005).

33. See generally Calvert, *supra* note 26; see also Jonathan Peters & Edson C. Tandon, Jr., “People Who aren’t Really Reporters at All, Who Have No Professional Qualifications”: *Defining a Journalist and Deciding Who May Claim the Privileges*, 2013 *N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM* 34, 37 (2013).

34. See, e.g., Jonathan Peters et al., *A Paper Shield? Whether State Privilege Protections Apply to Student Journalists*, 27 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 763, n.111 (2017) (discussing one of Ohio’s shield laws that states “[n]o person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose. . .” (emphasis added)).

[whether] such intent existed at the inception of the newsgathering process.”³⁵ Likewise, the U.S. Court of Appeals for the Third Circuit articulated³⁶ a multipart test, holding that any person asserting the privilege must satisfy three elements, one of them being that “the claimant possessed the intent at the inception of the newsgathering process to disseminate the news to the public.”³⁷

An inquiry into a user’s journalistic intent (or lack thereof) can also be found in the policies of some internet platforms. Google’s guidelines, for example, state the purpose of a “news website homepage” is “to inform users about recent or important events.”³⁸ Facebook states news pages “must . . . primarily create journalism.”³⁹ Similarly, Google deems a website’s purpose as deceptive if it is exposed as having a non-journalistic purpose; for example, if a website “looks like a news source or information page, but in fact has articles to manipulate users in order to benefit a person, business, government, or other organization politically, monetarily, or otherwise.”⁴⁰

2. Journalistic activities and standards

In identifying legitimate and credible news sources, some scholars and government actors have focused on the performance of journalistic activities (e.g., gathering information, editing, fact-checking, and reporting) and on the enactment of journalistic standards. The Freedom of Information Act, for example, states the news media consists of “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”⁴¹ With regard to who may claim a reporter’s privilege, the Second Circuit held that the claimant need not be a member of the “institutionalized press,” as long as she is engaged

35. *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *see Schiller v. New York*, 245 F.R.D. 112, 119 (S.D.N.Y. 2007) (interpreting New York’s reporters’ shield law as requiring a showing that the person acted “with the intent of using the information collected, at least in part, to publish a report that would be widely and publicly circulated.”).

36. *See In re Madden*, 151 F.3d 125 (3d Cir. 1998).

37. Calvert, *supra* note 26.

38. GOOGLE, SEARCH QUALITY EVALUATOR GUIDELINES 10 (Dec. 15, 2022), <https://static.googleusercontent.com/media/guidelines.raterhub.com/en//searchqualityevaluatorguidelines.pdf>.

39. *Register Your News Page*, META, <https://www.facebook.com/journalismproject/tools/news-page-registration> [<https://perma.cc/K8WC-JMZU>].

40. GOOGLE, *supra* note 38, at 36.

41. Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(ii) (2016).

in “activities traditionally associated with the gathering and dissemination of news.”⁴² Similarly, the U.S. District Court for the District of Columbia extended the privilege to a writer for the military publication *Stars and Stripes* because she had “interviewed a number of individuals while researching” a story and “engaged in traditional newsgathering activities such as keeping notes.”⁴³ In a different case, the same Court held the privilege applied to a publisher of indices about the natural gas market because the publisher had “engage[d] in journalistic analysis and judgment in addition to simply reporting data.”⁴⁴

When discussing the characteristics or work of journalist, scholars frequently refer to reporting or editing activities. One scholar said journalism is “the process of gathering, selecting, interpreting, and disseminating news.”⁴⁵ Another said, it is the “process of collecting, reporting, analyzing, and disseminating news and information.”⁴⁶ Two other scholars stated, “everyone who produces what is viewed as news . . . operates by relying on methods of testing and providing information”—in a “discipline of verification” involving such activities as “seeking multiple witnesses to an event, disclosing as much as possible about sources, and asking many sides for comment.”⁴⁷

Some of the major internet platforms also look to journalistic activities to identify legitimate and credible news sources. For example, in the summer of 2019, Google announced a change to its policies that would amplify sources engaging in core journalistic activities by “highlight[ing] articles that we identify as significant original reporting”⁴⁸ in recognition that “[a]ccurate, original, in-depth, and investigative reporting requires a high level of skill/talent and effort.”⁴⁹ According to the company, “very high quality” news is “[o]riginal reporting that provides information that would

42. *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987).

43. *Tripp v. Dep’t of Def.*, 284 F. Supp. 2d 50, 58 (D.D.C. 2003).

44. *U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 32 (D.D.C. 2005).

45. DONALD H. JOHNSTON, *JOURNALISM AND THE MEDIA* 2 (1979).

46. SHAYNE BOWMAN & CHRIS WILLIS, *MEDIA CTR. AT THE AM. PRESS INST., WE MEDIA: HOW AUDIENCES ARE SHAPING THE FUTURE OF NEWS AND INFORMATION* 9 (2003).

47. BILL KOVACH AND TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 101 (4th ed. 2021).

48. Richard Gingras, *Elevating Original Reporting in Search*, *GOOGLE: THE KEYWORD* (Sept. 12, 2019), <https://www.blog.google/products/search/original-reporting/> [<https://perma.cc/Q66F-47G3>].

49. *GOOGLE*, *supra* note 38, at 67.

not otherwise have been known had the article not revealed it.”⁵⁰ Google further relies on a news source’s reputation for high-quality journalism, with its guidelines stating that a credible news organization might have won “[p]restigious awards,” have “a history of high quality original reporting,” or otherwise receive “[r]ecommendations from known experts or professional societies.”⁵¹

A final shared characteristic of journalistic activity is adherence to ethical or professional standards. As two scholars noted, “many attempts to define a journalist grew out of debates about the industry’s professionalization and the idea that journalists are bound by certain ethical principles, such as honesty and fairness in gathering and reporting the news, treating sources and subjects with respect,” and acting in the public interest.⁵² In this context, “the motive for defining a journalist is . . . to separate credible contributors from less credible ones by establishing benchmarks of professional practice and measuring people against them.”⁵³ A complication is that new forms of journalism, enabled by new technologies, have challenged some traditional journalistic ethics and standards. One commentator put it this way: “[T]he Internet promises everyone can be a publisher. But not everyone has the skills or training to be a journalist, defined by their professional practices and codes of ethics.”⁵⁴

In this context, Google’s policies state credible news sites “should meet professional journalistic standards.”⁵⁵ Yet, not all internet platforms have focused on news sources that take care to verify their content and place information in appropriate contexts. Twitter, by contrast, has taken a looser approach—even prior to Elon Musk’s acquisition of the company in October of 2022.⁵⁶ The

50. *Id.*

51. *Id.* at 22.

52. Peters & Tandoc, Jr., *supra* note 33, at 45; see *Code of Ethics*, SOC’Y PROF’L JOURNALISTS, <https://www.spj.org/ethicscode.asp> [<https://perma.cc/2T6B-EG9Z>]; Stephen D. Reese, *Understanding the Global Journalist: A Hierarchy-of-Influences Approach*, 2 JOURNALISM STUD. 173, 183–84 (2001); Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241, 253 (2007).

53. Ugland & Henderson, *supra* note 52, at 243.

54. Alan Knight, *Who is a Journalist?*, 9 JOURNALISM STUD. 117, 123 (2008).

55. GOOGLE, *supra* note 38, at 67.

56. See *Legacy Verification Policy*, TWITTER HELP CTR., <https://help.twitter.com/en/managing-your-account/legacy-verification-policy> [<https://perma.cc/9KZ4-TGVT>]. This article relies on the pre-acquisition policies, because they are still in effect for accounts—including news organizations—that were verified prior to Musk’s acquisition and the post-acquisition verification standards are based almost entirely on subscription status. *How to Get the Blue Checkmark on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts>

company’s pre-acquisition verification policy focused on features such as public presence, references to the applicant organization as a news organization, and an official website that links to the organization’s Twitter account.⁵⁷

Under Google’s policies, signals of accuracy include a clear identification and description of sources.⁵⁸ Even an ostensibly accurate portrayal of a single expert opinion might be insufficient under Google’s standards if the report leaves out important context. News stories on a scientific or medical topic, for instance, should be “consistent with established expert consensus when it exists.”⁵⁹ YouTube’s policies stress, too, that “accuracy and authoritativeness are key” for pages featuring subjects like news, science, and historical events.⁶⁰ Twitter’s far less detailed blue badge verification standards highlight elements, such as Google trends evidence and Wikipedia articles about the news organization that satisfy Wikipedia’s “notability” standards.⁶¹ Meanwhile, Facebook’s policies mention accuracy only summarily and in the negative, stating that news pages “should . . . [n]ot have shared misinformation recently or repeatedly.”⁶²

B. *Serving the public*

Another core attribute of the press is its dedication to public service. As the U.S. Supreme Court has observed, the constitutional guarantees of a free press “are not for the benefit of the press so much as for the benefit of all of us.”⁶³ Numerous factors may indicate whether a news source is functioning for the public’s benefit, including the value to the public of the source’s content, the public availability of the content, and the extent of the source’s transparency to the public.

[<https://perma.cc/29S9-J9GW>]; see also Kate Conger & Lauren Hirsch, *Elon Musk Completes \$44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html>

[<https://perma.cc/XM6Y-W8NU>].

57. *Legacy Verification Policy*, *supra* note 56.

58. GOOGLE, *supra* note 38, at 67.

59. *Id.*

60. The YouTube Team, *The Four Rs of Responsibility Part 2: Raising Authoritative Content and Reducing Borderline Content and Harmful Misinformation*, YOUTUBE OFFICIAL BLOG (Dec. 3, 2019), <https://blog.youtube/inside-youtube/the-four-rs-of-responsibility-raise-and-reduce/> [<https://perma.cc/K3MN-QLCA>].

61. *Legacy Verification Policy*, *supra* note 56.

62. *Register Your News Page*, *supra* note 39.

63. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

1. Matters of public concern

The press works in the public interest, in part, by gathering and broadly disseminating information regarding matters of legitimate concern. The U.S. Supreme Court has reasoned the press operates as “a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees, and informing the citizenry of public events and occurrences.”⁶⁴ Some internet platforms also focus on a user’s practice of gathering and disseminating valuable information regarding matters of legitimate concern. Under Facebook’s guidelines, for example, news pages report “on current events or timely information.”⁶⁵ Twitter notes that it seeks to authenticate and differentiate accounts, including those of news outlets and journalists that are of high “public interest.”⁶⁶ In particular, the company seeks to verify “individuals employed by Verified news organizations in a public-facing news reporting role including reporters, news anchors, and editors.”⁶⁷

More than other platforms, Google places significant weight on the value of reliable news coverage of certain topics. High-quality journalism about matters of public concern falls into a category the company refers to as “Your Money or Your Life” (YMYL) pages. These pages contain information that “could significantly impact the health, financial stability, or safety of people,” perhaps because “the topic itself is harmful or dangerous” or “the topic could cause harm if the content is not accurate and trustworthy.”⁶⁸ Google notes, however, that not all articles by news outlets rise to the level of being YMYL pages; the company points to articles about sports, entertainment, and everyday lifestyle topics as examples.⁶⁹

2. Availability and dissemination to the public

Another indicator a news source is serving the public interest is whether its information is effectively reaching the public. A publisher, of course, is not fulfilling the function of informing the public if it does not broadly distribute information or if the public is unable to access its content. As one scholar put it: “The journalist ceases to be [one] if he cannot find an editor to print his product, and the

64. *Estes v. Texas*, 381 U.S. 532, 539 (1965).

65. *Register Your News Page*, *supra* note 39.

66. *Legacy Verification Policy*, *supra* note 56.

67. *Id.*

68. See GOOGLE, *supra* note 38, at 11, 13. (“[W]e have very high Page Quality rating standards for YMYL pages because low quality YMYL pages could potentially negatively impact a person’s happiness, health, financial stability, or safety.”).

69. *Id.* at 11–12.

editor soon ceases to be an editor unless the product finds an audience that is willing to pay for it.”⁷⁰

This indicator is evident in the scholarly literature in the field of journalism studies. For example, in the first major national survey of American journalists, Professor John W.C. Johnstone and his colleagues selected their respondents, chiefly, by distinguishing news and opinion from other forms of communication.⁷¹ They believed outputs, described in terms of target audiences, could distinguish journalists from other communicators. Their survey only included respondents whose outputs were aimed at “channels of mass communication targeted at the public at large.”⁷² Other journalism scholars later did the same in their surveys, explaining that, “journalists who work for public communications media targeted at general audiences.”⁷³

In the legal field, the federal code defines the “news media,” for purposes of prison inmate correspondence, to include any newspaper that “circulates among the general public and publishes news of a general character of general interest to the public” or a news magazine with “a national circulation [that] is sold by newsstands and by mail subscription to the general public.”⁷⁴ According to the U.S. Court of Appeals for the Ninth Circuit, the central question regarding whether a person qualifies for a reporter’s privilege “is whether she is gathering news for dissemination to the public.”⁷⁵ State privilege statutes ask whether the claimant publishes at regular intervals, as opposed to infrequently or sporadically,⁷⁶ and some make specific reference to the audience. The Minnesota statute covers any person engaged in the gathering or production of “information for the purpose of transmission, dissemination or publication to the public.”⁷⁷ Nebraska’s covers “those who gather, write, or edit information for the public or disseminate information to the

70. Ernest Havemann, *Journalists and Jargonists*, 5 COLUM. JOURNALISM REV. 12, 14 (1966).

71. See JOHN W.C. JOHNSTONE ET AL., *THE NEWS PEOPLE: A SOCIOLOGICAL PORTRAIT OF AMERICAN JOURNALISTS AND THEIR WORK* 9 (1976).

72. *Id.* at 5.

73. David H. Weaver et al., *U.S. Television, Radio and Daily Newspaper Journalists*, 63 JOURNALISM QUARTERLY 683, 684 (1986).

74. 28 C.F.R. § 540.2 (2022).

75. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

76. See, e.g., 735 ILL. COMP. STAT. 5/8-902(B) (West 2022) (defining “news medium” as “any newspaper or other periodical issued at regular intervals . . . and having a general circulation”); IND. CODE ANN. § 34-46-4-1 (West) (applying a reporter’s privilege to persons connected with or employed by “a newspaper or other periodical issued at regular intervals and having a general circulation.”).

77. MINN. STAT. ANN. § 595.023 (West 2022).

public.”⁷⁸ The New Jersey statute covers those who produce news “for the general public.”⁷⁹ And so on.

Some internet platforms also consider the practical availability of a user’s content to the public. In 2021, of the six types of accounts that Twitter includes in its blue badge program, it required only one category—news organizations and journalists—to maintain entirely public accounts (i.e. “without protected tweets”).⁸⁰ Twitter also requires both independent and freelance journalists to establish regularity of publication by showing at least three bylined news credits within the prior six months.⁸¹ Facebook’s policy for registering as a news page requires the less onerous showing that a page has existed for at least 90 days and has been active in the previous 90 days.⁸²

In early efforts to identify the press, many statutes relied on a publisher’s medium of communication as a proxy for broad public distribution. Individuals and organizations were more likely to be considered members of the press if they disseminated their information via specific media, namely newspapers, magazines, television, radio, or wire services.⁸³ This approach is consistent with journalism studies that emphasize the significance of a journalist’s medium. Historically, journalism “was identified solely with print,”⁸⁴ a perception that persisted even after the coming of radio and television.⁸⁵ Yet, over time, conceptions changed and technological advances guaranteed that journalism would not be “understood as residing in a particular medium”⁸⁶ (most journalists, though, still identify “with the medium to which they devote most of their time and ... derive the greater part of their income”).⁸⁷ As a result, this approach to distinguishing the press—based on medium—has grown outdated and less popular.⁸⁸ Nevertheless, a

78. NEB. REV. STAT. ANN. § 20-144 (West 2022).

79. N.J. STAT. ANN. § 2A:84A-21 (West 2022).

80. Stacy M. Brown, *Twitter’s Blue Verification Mark: Does Platform Ignore Black Press and Embrace White Media*, SEATTLE MEDIUM (July 20, 2021), <https://seattle-medium.com/twitters-blue-verification-mark-does-platform-ignore-black-press-and-embrace-white-media/> [https://perma.cc/PD53-UBKV].

81. *Legacy Verification Policy*, *supra* note 56.

82. *Register Your News Page*, *supra* note 39.

83. *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1064–66 (2011) (discussing various statutory approaches to identifying the press).

84. CHARLES STEINBERG, *THE COMMUNICATIVE ARTS: AN INTRODUCTION TO MASS MEDIA* 63 (1st ed. 1970).

85. *See id.* at 78–79.

86. Uglund & Henderson, *supra* note 52.

87. WARREN BOVEE, *DISCOVERING JOURNALISM* 29 (1999).

88. *See, e.g.*, West, *supra* note 83 at 1064 (observing that “constantly changing technology and communication patterns could make the [medium-based] definition forever

news source’s use of a traditional medium may be a helpful signal; and it does not always appear in the policies of some internet platforms. In 2022, Twitter’s verification policy, for example, does not specify what a news organization must be.⁸⁹

C. *Authenticity, independence, and transparency*

For news sources to be of true value, the public needs to know who is behind the content and where the sources are getting their information. This principle is reflected generally in company/platform policies requiring evidence of authenticity, independence, and transparency from news sources. According to Google, its YMYL pages, like news websites providing information of heightened public importance, “require the most scrutiny” into accuracy, sourcing, and reputation.”⁹⁰ Google relies on a site’s transparency in assessing its quality, stating that it “should be clear” who the creator is because page quality rating includes the “identi[ty of] who created the [content] on the page.”⁹¹ News websites, in particular, are urged to link to the original version of an article—as opposed to posting copied or slightly rewritten versions—and to include bylines, information about the authors, date and time stamps, clear and accurate headlines, and contact information for the publication.⁹²

To register as a news page on Facebook, company policy requires that the page include date and time stamps and “transparent information about writers and editors.”⁹³ The company also requires news pages to provide a verified domain and confirm identities through its business verification process.⁹⁴ Twitter’s blue badge

at risk of becoming outdated”); Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45, 52 (2006) (“The medium by which that journalism is disseminated to the public matters far less than the fact that an individual has deliberately gathered and disseminated newsworthy facts.”).

89. *Legacy Verification Policy*, *supra* note 56. Notably, Twitter’s lack of clarification may also be due to an error on the company’s website, which replicates the description of government entities in the news organizations category.

90. GOOGLE, *supra* note 38, at 24.

91. *Id.*

92. See *Ways to Succeed in Google News*, GOOGLE: GOOGLE SEARCH CENTRAL BLOG (Jan. 17, 2019), <https://developers.google.com/search/blog/2019/01/ways-to-succeed-in-google-news> [<https://perma.cc/7Q9D-U6QG>]; see also *Best Practices for Your Article Pages*, GOOGLE: PUBLISHER CTR. HELP, <https://support.google.com/news/publisher-center/answer/9607104> [<https://perma.cc/P4NE-RXME>] (lists guidelines for best practices that support the advice provided in *Ways to succeed in Google News*).

93. *Register Your News Page*, *supra* note 39.

94. *Id.*

program states all verified accounts must confirm their authenticity through an official website and photo identification (an official email address with a relevant domain name might also help).⁹⁵

Increasingly, platforms want news and information sources to make clear who or what may be influencing their content, beyond the demands of objective and independent news reporting. According to Facebook's guidelines, news pages should "[c]learly distinguish news content from affiliate, promotional, advertising and marketing content, allowing users easily to tell the difference."⁹⁶ Google looks at whether a page includes clear labeling of editorial pieces and whether a page makes it easy for users to distinguish its news articles from any paid content or advertisements.⁹⁷

Other authenticity issues involve politically partisan actors presenting themselves as journalists and the complexities of state-funded news organizations.⁹⁸ The internet companies' responses to these issues have been mixed. Facebook policy, for example, states political candidates, campaign staffers, and government employees may not register as journalists.⁹⁹ Yet its self-reporting "honor system" policy for registration as a news page or journalist provides little enforcement.¹⁰⁰ Meanwhile, research by Columbia University's Tow Center for Digital Journalism "found that despite clear guidelines about inclusion in Google News, standards for identifying outlets as 'news sources' are inconsistently applied."¹⁰¹

Demanding transparency and confirming authenticity of news sources are measures that address specific problems related to how platforms operate; and for that reason, they have not received as much attention in court opinions or statutes dealing with the legal treatment of journalists. However, there has been judicial discussion of the role of independence in the press and the journalistic process. In a 2011 opinion, the Second Circuit held that a documentary filmmaker could not claim a reporter's privilege against a subpoena seeking his unpublished work product.¹⁰² The court found

95. *Legacy Verification Policy*, *supra* note 56.

96. *Register Your News Page*, *supra* note 39.

97. *See* GOOGLE, *supra* note 38, at 30, 63 (noting that a "lowest" quality rating is justified when the main content "is deliberately obstructed or obscured due to Ads"; providing an example of high quality content as that which contains clear opinion labels and opinion content that is "created by a skilled editorial board").

98. *See* The YouTube Team, *supra* note 60 ("[I]f people are viewing news videos uploaded by a public broadcaster or a government-funded news outlet, we show informational notices underneath the video about the news outlet.").

99. *Registering Your News Page*, *supra* note 39.

100. *See* Emily Bell & Sara Sheridan, *Google and Facebook Have a News Labeling Problem*, COLUM. JOURNALISM REV. (Oct. 9, 2020), <https://www.cjr.org/analysis/google-and-facebook-have-a-news-labeling-problem.php> [<https://perma.cc/787U-LVHE>].

101. *Id.*

102. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011).

the filmmaker did not have financial and editorial independence over the project and, thus, did not fall under the public policy rationales behind the privilege. The main rationale, the court concluded, is to “protect the public’s interest in being informed by a vigorous, aggressive and independent press.”¹⁰³ Therefore, “[a]n undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest.”¹⁰⁴

CONCLUSION

While the task of distinguishing news sources from other types of speakers and publishers is exceedingly important, it is not a novel endeavor. Americans have a long tradition of recognizing the unique role of the press in our democracy and the public’s enduring interest in the preservation of the free flow of information on matters of significant and legitimate concern.

There may not be total agreement regarding exactly which factors best signal sources of quality news, but there is, nonetheless, an established practice of engaging in a holistic review of a variety of commonly shared characteristics as a means of identifying credible news sources.¹⁰⁵ Likewise, there is precedent for concluding, in certain situations, that it is necessary to identify the speakers who are fulfilling the unique functions of the press and protecting the public’s access to a robust and reliable news ecosystem.

Yet, simply identifying these sources is of little value if the internet platforms do not use this information in ways that promote and protect high-quality news sources. On the one hand, there is some evidence the companies may be moving in the right direction. For example, Google has stated its algorithms and news rankings now give heightened prominence to original reporting.¹⁰⁶ Moreover, updated guidelines for its more than 10,000 human search quality raters emphasize signals of quality news sources and now heavily

103. *Id.* at 306.

104. *Id.* at 308; see *In re McCray*, 991 F. Supp. 2d 464, 468 (S.D.N.Y. 2013) (finding a different documentary filmmaker did have journalistic independence despite a previous relationship with the subjects of her film and noting that “an established but attenuated professional relationship” did not alter the journalistic motivation behind the project).

105. See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2462 (2014) (discussing a holistic approach to identifying constitutional rights holders).

106. Dieter Bohn & Sean Hollister, *Google is Changing its Search Algorithm to Prioritize Original News Reporting*, VERGE (Sept. 12, 2019, 5:12 PM), <https://www.theverge.com/2019/9/12/20863305/google-change-search-algorithm-original-reporting-news-human-raters> [<https://perma.cc/U3TN-BB64>].

influence the company's determinations of a website's trustworthiness and authoritativeness.¹⁰⁷ Likewise, YouTube stated it has "redoubled [its] efforts to raise authoritative sources to the top and introduced a suite of features to tackle this challenge holistically."¹⁰⁸ Thanks to changes it has made to its platform, YouTube reported that users' "consumption on authoritative news partners' channels [grew] by 60 percent in 2019."¹⁰⁹

On the other hand, unfortunately, there are also reasons to conclude that these companies might not be doing all they can to highlight quality news sources for their users. A few weeks after the 2020 presidential election, *The New York Times* reported on a secret internal program at Facebook that had assigned news publishers a score based on their journalistic quality or "news ecosystem quality" (NEQ).¹¹⁰ The company, then, adjusted its algorithm to give the NEQ scores more weight and "to make sure authoritative news appeared more prominently."¹¹¹ The change, however, was merely temporary and was rolled back within weeks.¹¹²

At a minimum, it is clear that far more information about the internet companies' policies is needed. Facebook's method for calculating and using NEQ scores, for example, are still mostly a mystery, as are many of the processes of the other platforms. As social media researcher Jennifer Grygiel told the *Columbia Journalism Review* in 2021: "[W]e know that there is a taxonomy within these companies, because we have seen them dial up and dial down the exposure of quality news outlets."¹¹³ Yet, without more transparency from the platforms, it is somewhere between difficult and impossible to evaluate how effectively they are identifying or promoting quality journalism.¹¹⁴

107. Richard Gingras, *Elevating Original Reporting in Search*, GOOGLE: THE KEYWORD (Sept. 12, 2019), <https://blog.google/products/search/original-reporting/> [<https://perma.cc/L55Y-77MW>].

108. The YouTube Team, *supra* note 60.

109. *Id.*

110. Kevin Roose et al., *Facebook Struggles to Balance Civility and Growth*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/11/24/technology/facebook-election-misinformation.html> [<https://perma.cc/3VJM-C6SF>].

111. *Id.*

112. See Kevin Roose, *Facebook Reverses Postelection Algorithm Changes that Boosted News from Authoritative Sources*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/technology/facebook-reverses-postelection-algorithm-changes-that-boosted-news-from-authoritative-sources.html> [<https://perma.cc/A24G-SDW3>].

113. Emily Bell, *Off-Label: How Tech Platforms Decide What Counts as Journalism*, COLUM. JOURNALISM REV. (May 3, 2021), <https://existential.cjr.org/who/tech-platforms-labels/> [<https://perma.cc/GQ4T-F6BY>].

114. See *id.* (quoting Gordon Crovitz, former publisher of *The Wall Street Journal*) ("[I]f you are a news organization and you want to know how you are rated [by the internet platforms], you can ask them how these systems are constructed, and they won't tell

The policies of internet platforms have a significant impact on the public's exposure to reliable news sources. Determining the best and most transparent practices for identifying these sources is a necessary first step that will allow these companies to develop policies that support this vital democratic institution and protect their users' access to trustworthy and timely information about matters of public concern.

you.”); *see also* Julia Alexander, *YouTube Claims Its Crackdown on Borderline Content Is Actually Working*, VERGE (Dec. 3, 2019, 10:00 AM), <https://www.theverge.com/2019/12/3/20992018/youtube-borderline-content-recommendation-algorithm-news-authoritative-sources> [<https://perma.cc/8AWJ-8Y2M>] (observing that “until YouTube releases specific numbers [about its approach to authoritative sources], it’s difficult to assess what that really means.”).