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Media Freedom and Technological Change

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Media Freedom and Technological Change

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SUMMARY

The concept of media freedom developed in the 20th century alongside efforts to advance governmental transparency and accountability in democracies. Media freedom empowers journalists, enabling them to act as checks on governments and other powerful social actors, and allowing them to contribute to a democratic discourse that is fact-based and accessible. The principle also provides an analytical framework for interrogating the central role that the news media plays in democratic societies. Even so, current understandings of media freedom remain rooted in the historical postwar moment that gave rise to the concept: a period that predates the information revolution and the proliferation of new communications technologies.

Technological change has transformed the economics of the news industry and undermined the ad-supported business models of legacy media organizations. This destabilization poses a fundamental challenge to the old model of media freedom, forcing questions of who today is entitled to media freedom and whether current media freedom protections are sufficient. To ensure the ongoing relevance of media freedom, the concept must evolve to address the contemporary conditions of news production, and the new impediments to gathering and disseminating fact-based information in the public interest.

Starting Point

Media freedom doctrine developed alongside other rights guarantees aimed at fostering governmental transparency and accountability in the postwar era. Yet its purpose and application are distinct from other rights protections, such as freedom of expression.

We propose that media freedom remains relevant and useful for three interrelated reasons:

1. Media freedom confers special rights, privileges, and protections on entities engaged in journalistic activity. While the scope of these protections requires further clarification, media freedom recognizes and affirms the constitutional role that the media plays in society by subjecting the process of gathering, editing, and distributing news to mass audiences to a different legal regime than other forms of expressive activity.
2. Media freedom is uniquely attuned to the structural dynamics of news production: it safeguards not only individual journalists, but also the enterprise and practice of journalism from interference by the state and other powerful social actors.
3. Media freedom provides a framework for critically analyzing the extent to which government involvement in the ethos and

profession of journalism may be necessary or desirable, insofar as it includes both a positive and negative rights conception of the term.

Technological Challenges and Opportunities

In today's media ecosystem, the enhanced protections that media freedom affords journalists are no longer sufficient to support the production of high-quality journalism. While digital technologies have introduced new opportunities to reinforce media freedom (like enabling greater citizen participation in journalistic activities), they also have contributed to an erosion of the institutional and economic support that media organizations depended upon for decades. Meanwhile, artificial intelligence (AI) and other emerging technologies are also reshaping the journalistic process, from production through dissemination, in ways that may negatively affect media pluralism, threaten the security of individual journalists, or impede their access to news audiences. Emerging technologies have brought further risks to media freedom, such as media manipulation, surveillance, and deepfakes. At the same time, technologies are being used to protect and empower journalists through computational journalism, open source intelligence techniques, and encryption tools.

A renewed approach to media freedom—one grounded in the modern political economy of information dissemination—is thus essential to enhancing the quality, inclusivity, and reliability of public discourse, while reducing the polarization of online environments.

The Path Forward

The concept of media freedom needs to be refined. Governments and other stakeholders should expand and refine the doctrine by precisely defining the nature of the rights and privileges it accords, and specifying to whom within the contemporary media ecosystem it applies.

As the private sector continues to develop and adopt new technologies that are transforming the news media landscape, it is becoming increasingly important to determine whether such businesses are under any obligation to mitigate the potentially disruptive effects on media freedom, or to develop standards of conduct consistent with the flourishing of media freedom.

Renewing media freedom doctrine in light of the challenges posed by technological change is a project of practical importance. In the course of their work, journalists are being exposed to new kinds of threats that risk their personal security and professional work. With the spread of

information disorders, including misinformation, disinformation, and “fake news,” public confidence in the media is eroding. A strengthened media freedom regime will ensure that the media may fulfill its democratic function of supporting fact-based public discourse into the 21st century.

INTRODUCTION

The understanding that the news media plays a constitutional role in society has been at the heart of democratic theory since at least the 18th century, after the political philosopher Edmund Burke described the media as the “fourth estate.” The importance of high-quality, factual information on matters of public interest is keenly felt among elected representatives, news organizations, independent journalists, and members of the public eager to ensure the health and viability of democratic political systems. Policymakers and advocates have employed the concept of media freedom to support and uphold the central role that the media plays in democratic societies. However, the term has proven to be ill-defined and correspondingly ill-equipped to address the dizzying array of technology-driven changes to the media and journalism. These changes—including the role played by algorithmic systems in promoting the spread of misinformation, disinformation, and “fake news”—has intensified concerns about whether the media is fulfilling its democratic function.

Media freedom emerged in the 20th century as a body of law aimed at supporting, protecting, and incentivizing the production of honest, fact-based information on public affairs. Along with the development of universal human rights, the concept of media freedom arose out of a shared desire on the part of democracies in the early postwar era to foster governmental transparency and accountability. This was achieved through the creation of a legal infrastructure capable of safeguarding journalism from interference by the state and other powerful social actors. Media freedom is thus related to, yet distinct from, human rights protections: although it derives from and overlaps with free expression doctrine, its purpose and application are unique in conferring special protections on entities engaged in journalistic activity. As an analytical framework for examining the conditions and limitations of contemporary media production, media freedom is particularly well-suited to an age in which the uncontained spread of information—however sensational, inaccurate, or distorted—has undermined the quality and reliability of public discourse. As described below, media freedom protections are expansive; their possible scope ranges from the protection of newsgathering processes to a positive obligation on states to promote media pluralism.

This report examines the historical origins of media freedom doctrine with the aim of redeveloping the understanding of media freedom in the 21st century. Following the First and Second World Wars, growing awareness of the role propaganda played in manipulating public opinion and inciting conflict led to calls to strengthen professional, public-interested journalism. The development of journalistic conventions such

as separating news from opinion, canvassing multiple sources prior to publishing, and other professional norms and standards, reflects the underlying view that as a profession, journalism involves an ethical commitment to finding and reporting objective truth.

To a significant extent, the concept of media freedom has remained embedded in the political, economic, and technological moment that gave rise to it. Prior to the information revolution of the 1990s, mass information dissemination involved high fixed costs with relatively low variable costs. Although entry barriers to participation in media were high, such that information flows were largely controlled by elites, the profitability of the existing business model for news distribution meant that mainstream news organizations were able to pour considerable resources into reporting.

The doctrine of media freedom protects journalistic activity, defined here as gathering and reporting information of public concern to mass audiences. In a changed political economy, however, where new communication technologies enable anyone equipped with an internet-connected device to share content, where the business model of legacy media organizations has been upended by the widespread availability of information online and the structural dynamics of the internet, and where there are new gatekeepers on the scene in the form of social media platforms and search engines—what exactly does media freedom entail, and to whom do its protections extend?

Today's media ecosystem suffers from a variety of access barriers, shortcomings, and information disorders, with the result that media freedom has been compromised in new ways. This report marks an effort to ensure the ongoing relevance of media freedom as an analytical framework: its capacity to respond to old and new threats alike, from the commercial viability of news providers and the need to develop alternative business models, to security threats to the lives of media personnel.

It also addresses definitional gaps in the concept of media freedom itself, made plain by the information revolution of the past three decades and the increased availability of communications technology: in a world where anyone has the potential to reach mass audiences, what is the meaning of media freedom? Does it protect bloggers, Breitbart, even social media? In grappling with these questions, this paper offers a renewed understanding of media freedom and the ways in which it is shaped, for better and worse, by emerging technologies, with a view to providing recommendations to governments on what they should do about it.

Sharpening the concept of media freedom can also pave the way for it to be more useful as an analytical tool. As like-minded governments look to support media freedom to strengthen democratic systems, effective analysis is needed to assess the current landscape and future policy interventions, particularly since new technologies bring new problems as well as new opportunities for the media landscape. Furthermore, media freedom could be used as a tool to analyze the impact of technology companies in the media ecosystem. This is especially the case since media freedom is currently left out of most corporate human rights due diligence processes and human rights impact assessments.

Section 1 considers what exactly media freedom is. Through investigating the literature, we find that the concept is undertheorized and that not enough has been done to define media freedom and what it encompasses with precision. Correspondingly, the term is used in the literature in a manner quite different from the freedom of expression, as it includes privileges and protections for the news media that can be categorized as both negative and positive rights.

Section 2 considers how technology is impacting existing conceptions of media freedom and the practice of journalism more generally. We find that technological change has lowered the costs of producing and distributing news to a mass audience, at the very same time as other tech-fueled changes in the economy have undermined the ad-supported media business model that predominated in the Global North in the late 20th century. Correspondingly, the enhanced legal protections that media freedom provides for the gathering and dissemination of information of public interest to mass audiences no longer adequately supports the production of high-quality journalism. Technological change has also introduced new substantial threats to journalists in the forms of media manipulation, surveillance, and “deep” and “shallow” fakes that pose challenges for our ability to tell truth from fiction. On a more positive note, however, technological change is leading to innovations in journalism, such as technology-facilitated newsgathering, all the while making it easier than ever for journalists outside the mainstream to find their voice and their audience.

In **Section 3**, we suggest interventions by governments and others that can help to refine, clarify, and adapt the concept of media freedom to meet the challenges posed by new technologies, thereby ensuring a strong, independent, and plural news media that can fulfill its functions that are essential to a healthy democracy.

1. DEFINING MEDIA FREEDOM

Media freedom has not been defined with the same rigour and precision as other rights and freedoms that are protected by law. This may be because media freedom is not a term that appears in very many legal instruments at either the international or domestic levels.⁶ Compared to the right to life, the right to free expression, or even the right to privacy, which are guaranteed in many different treaties and constitutions, references to media freedom in such documents are infrequent. Correspondingly, the same kinds of understandings that have developed around the meaning of other rights have yet to develop around media freedom.

These difficulties are compounded by disagreements on what constitutes “the media” for the purpose of media freedom. Even before the rise of the internet, there were debates about whether media freedom applied exclusively to the “news media” engaged in reporting about current events, or whether this concept protected other forms of mass media, such as cinematic productions, music broadcasting, and the printing of fictional works.⁷

While conceptual debates are important, they are mostly beyond the scope of this paper. Given the consensus that “news media” merit the protections of media freedom, this paper will focus on the concept of media freedom as it pertains to *news media*—defined as those individuals and organizations that are engaged in *journalistic activity*. This latter term, in turn, can be defined for present purposes as the gathering of information on matters of public interest for mass dissemination.⁸

Following from the above, media freedom as it pertains to the news media is best understood as the set of rights, privileges, and protections that are accorded to actors engaged in journalistic activity. These

⁶ There are some notable exceptions to this general statement. For example, Article 11(2) of the European Union’s Charter of Fundamental Rights states that “[t]he freedom and pluralism of the media shall be respected” (see Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02). Similarly, Article 5(1) of Germany’s Basic Law states that “[f]reedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship” (see *Grundgesetz der Bundesrepublik Deutschland*, Art 5(1) GG [Germany]).

⁷ Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015), 52.

⁸ Our definition of journalistic activity is adapted from Oster, *supra* note 7 at 268. See also Karl N. Renner, “The Historical Development of Norms of Journalism,” in *Journalism and Media Privilege*, ed. Maja Cappello (Strasbourg: European Audiovisual Observatory, 2017), 3–6, <https://rm.coe.int/journalism-and-media-privilege-pdf/1680787381>. We acknowledge that journalistic activity involves much more than the mere gathering of information on matters of public interest for mass dissemination. Even so, Oster’s parsimonious definition of journalistic activity is sufficient to help us refine our understanding of what is meant by media freedom.

protections⁹ exceed those provided by the right to free expression (and related rights, such as the right to information) that are guaranteed to all persons by human rights law. Some of these rights, privileges, and protections have a close nexus to the right to free expression, but others do not.

While media freedom is certainly related to the right to free expression, the two concepts are distinct. Free expression and related rights are universal human rights that are enjoyed by all persons.¹⁰ These rights are subject to limitation by governments only when exacting criteria are met (such as “strict scrutiny” in the U.S. First Amendment context,¹¹ or proportionality tests in many other jurisdictions).

Consider, for example, Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), which states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, *in writing or in print*, in the form of art, *or through any other media of his choice*. (Emphases added).

News media organizations certainly benefit from the protections of the right to free expression in reporting the news. For example, the proprietor of a newspaper exercises their freedom of expression in penning an editorial and their freedom “to impart information...in print” in publishing the same in their newspaper without undue government interference. Likewise, a polemicist exercises their right to free expression and “freedom of the press and other media of

⁹ Media freedom protections are sometimes described in the literature as “press freedom” protections, which, as explained above, are distinguishable from the guarantees of “freedom of the press” that one finds in many constitutions. We use the term “media freedom” throughout the document as it makes clear that the rights, privileges, and protections that pertain to journalistic activity apply regardless of the medium of communication involved (print, broadcast, online, or otherwise).

¹⁰ See e.g., U.S. Const. amend. I [United States of America]; *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Canada]; International Convention on Civil and Political Rights (New York, 16 December 1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, Art 19(1) [United Nations]; *Grundgesetz der Bundesrepublik Deutschland*, Art 5 GG [Germany].

¹¹ See e.g., *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989) [United States].

communication”¹² in producing and distributing pamphlets in various formats.¹³

The concept of media freedom, however, confers additional legal protections on organizations and individuals that are engaged in journalistic activity—as opposed to other forms of expressive activity. Specifically, media freedom subjects the process of gathering, editing, and distributing news to a mass audience to a different legal regime than other forms of expressive activity. These additional protections, which are described below, can be categorized as either negative or positive rights.

1.1. Negative Rights of the Media

In human rights discourse, negative rights are those rights that are enjoyed in the absence of state action that interferes with them. The media speech privilege, protections for the confidentiality of journalistic sources, and measures to protect the independence of media are among the aspects of media freedom that can be characterized as negative rights.

The *media speech privilege* is perhaps the most important negative right of the news media. The term, which originates in the jurisprudence of the European Court of Human Rights, provides stronger legal protections for the expressive activities of the news media than the right to free expression provides to others in society. Among other things, the media speech privilege protects:

- the methods used by the news media to gather and report the news;
- the choices journalists and editors make in presenting news content (such as the use of text, photographs, videos, illustrations, and even poems and cartoons); and
- the publication of expression by third parties (such as the contents of interviews) whose content may violate generally applicable laws (such as defamation), insofar as they are newsworthy.¹⁴

Even when a legal system does not recognize the media speech privilege as a concept, enhanced legal protections for media expression can often

¹² *Canadian Charter*, *supra* note 10.

¹³ *Branzburg v. Hayes*, 408 U.S. 665 (1972) [United States] (holding that “[f]reedom of the press is a ‘fundamental personal right’ which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. [...] The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion”) [*Branzburg*].

¹⁴ Oster, *supra* note 7 at 74–78.

be found in its laws and jurisprudence. This is especially true in the context of defamation, where a range of domestic courts and international human rights tribunals have recognized circumstances where the news media should be permitted to report information that would otherwise be defamatory when there is a strong public interest in the same.¹⁵

In a similar vein, data protection laws often exempt journalistic activity from the scope of their application, so as not to unduly interfere with the gathering and publication of personal data that may nonetheless be of public interest.¹⁶ For example, personal financial information is considered personal data under the European Union's General Data Protection Regulation (GDPR), yet the journalistic exception may nevertheless permit news media to obtain and publish such information as part of an investigation into official corruption or other matters implicating the public interest.¹⁷

Protections for the confidentiality of journalistic sources are another aspect of media freedom that can be conceptualized as a negative right.¹⁸ The laws and jurisprudence of many jurisdictions recognize that members of the media should be asked only as a last resort to reveal their sources for the purposes of investigating crimes.¹⁹ For example, in *Goodwin v. United Kingdom*, the European Court of Human Rights ruled that an order compelling a journalist to reveal her sources violated media freedom in

¹⁵ See e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) [United States]; *Grant v. Torstar Corp.*, 2009 SCC 61 [Canada]; *Shabanov and Tren v. Russia*, no. 5433/02, 14 December 2006, ECHR 2006-V [European Court of Human Rights]; *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012, ECHR 227 [European Court of Human Rights].

¹⁶ See e.g., EC, *Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ, L 199 at Art 85 (hereinafter "GDPR"); *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 4(2)(c) [Canada] (hereinafter "PIPEDA").

¹⁷ For a detailed exploration of the GDPR's journalistic exemption, see Nani Jansen Reventlow, "Can the GDPR and Freedom of Expression Coexist?" *AJIL Unbound* 114 (January 2020): 31–34, <https://doi.org/10.1017/aju.2019.77>.

¹⁸ Oster, *supra* note 7 at 87.

¹⁹ Jurisdictions that have media shield laws include Belgium, Australia, Norway, France, and the Philippines. See "Shield Law in Other Countries," Protecting News Sources: A Study of Shield Law, last accessed 8 June 2021, <https://weishenlawproject.wordpress.com/shield-law-in-other-countries/>; "Philippines: Expanded Law Broadens Scope for Protection of Journalist Sources," International Federation of Journalists, last accessed 8 June 2021, <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/philippines-expanded-law-broadens-scope-for-protection-of-journalist-sources.html>. In the United States, 48 of the 50 states have recognized the reporter's privilege in binding court decisions or through the passage of laws: see "Reporter's Privilege Compendium," Reporters Committee, last accessed 8 June 2020, <https://www.rcfp.org/reporters-privilege/>.

the context of the case.²⁰ The rationale for privileging the relationship between journalists and their sources is to create a relationship of trust between them, thereby enhancing the watchdog function of the news media.²¹ As the High Court of Ireland explained in a leading decision on this issue:

If journalism and the media did not enjoy at least a general protection in respect of their sources, that robust political debate—a sine qua non in any democratic society—would be stillborn. Only the naïve would suggest otherwise.²²

While courts in a number of countries have declined to recognize what is often known as the “reporter’s privilege” as a matter of constitutional law,²³ legislatures often respond to such rulings by enacting press shield laws to protect the confidentiality of journalistic sources.²⁴ At the international level, Principle 25 of the African Union’s Declaration of Principles on Freedom of Expression in Africa states that journalists can only be required to reveal their sources when necessary to investigate or prosecute a serious crime, the information cannot otherwise be obtained, and the public interest in disclosure outweighs the resulting harms to free expression.²⁵

Measures to protect the independence of the news media are another category of media freedoms that can be conceptualized as a negative right. The thrust behind such measures is to protect the news media from undue government interference, which may hinder their ability to report on matters of public interest, or undermine their credibility with the public. For example, many governments have enacted “firewalls” to protect the independence of public broadcasters, which are reliant on the state for much of their funding.²⁶ The African human rights system has gone further than many other legal systems in recognizing a role for

²⁰ *Goodwin v. United Kingdom* [GC], no. 17488/90, 17 March 1996, ECHR 1996-II [European Court of Human Rights].

²¹ Jorg Ukrow, “Introductory Remarks: Understanding the Concept of Media Privilege,” in *Journalism and Media Privilege*, ed. Maja Cappello (Strasbourg: European Audiovisual Observatory, 2017), 2, <https://rm.coe.int/journalism-and-media-privilege-pdf/1680787381>.

²² *Cornec v. Morrice*, [2012] IEHC 376 at para 46 [Ireland], cited in Eoin Carolan, “The Implications of Media Fragmentation and Contemporary Democratic Discourse for ‘Journalistic Privilege’ and the Protection of Sources,” *Irish Jurist*, New Series, Vol. 49 (2013): 184, <https://www.jstor.org/stable/44027257>.

²³ *Branzburg*, *supra* note 13; *R v National Post*, 2010 SCC 16 [Canada] [*National Post*].

²⁴ An example is Canada’s federal press shield law, enacted in the aftermath of the Supreme Court of Canada’s failure to recognize the reporter’s privilege in *National Post*, *supra* note 23. See *Journalistic Sources Protection Act*, SC 2017, c 22.

²⁵ African Commission on Human and Peoples’ Rights, *Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019*, [2019] 65th Ordinary Session, <https://www.achpr.org/legalinstruments/detail?id=69>.

²⁶ Oster, *supra* note 7 at 86.

governments to play in guaranteeing the “editorial independence” of the news media not simply against government interference, but also from the commercial considerations of the owners of news outlets that might have a bearing on editorial decisions.²⁷

Protections for the independence of the news media have long been recognized as vital to the health of democracies. In establishing the Office of the Representative on Freedom of the Media in 1997, the member-states of the Organization for Security and Cooperation in Europe (OSCE) noted that “free, independent and pluralistic media are essential to a free and open society and accountable systems of government.”²⁸

However, there are growing concerns that the independence of the news media is under attack, even in places where it was once taken for granted. For example, Freedom House’s 2019 Freedom of the Media Report notes that in many well-established democracies:

...the media have fallen prey to more nuanced efforts to throttle their independence. Common methods include government-backed ownership changes, regulatory and financial pressure, and public denunciations of honest journalists.²⁹

The above phenomenon, which has been termed “media capture” by a leading scholar,³⁰ is one aspect of a deteriorating environment for media independence in places where it was once thought to be secure.

The COVID-19 pandemic is further eroding media independence in many states as governments misuse the public health emergency “as an excuse to put in place undue restrictions on a free and independent media.”³¹ The Committee to Protect Journalists, a nonprofit organization that aims to promote press freedom worldwide, has chronicled how many states are misusing emergency powers that have been invoked to fight the pandemic to impose illegitimate and unjustified restrictions on

²⁷ African Commission on Human and Peoples’ Rights, *supra* note 25 at Principle 12.

²⁸ Organization for Security and Co-Operation in Europe (OSCE), Decision No. 193: Establishment of the Office of the OSCE Representative on Freedom of the Media (5 November 1997). OSCE Doc. No. PC.DEC/193 at para. 1.
<https://www.osce.org/pc/40131>

²⁹ Sarah Repucci, “Freedom and the Media 2019 - Media Freedom: A Downward Spiral,” Freedom House, last accessed 8 June 2021,
<https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral>.

³⁰ Anya Schriffin, ed., *Media Capture: How Money, Digital Platforms, and Governments Control the News* (New York: Columbia University Press, 2021).

³¹ “Media Freedom Coalition Ministerial Communique,” Global Affairs Canada, last modified 14 December 2020, <https://www.canada.ca/en/global-affairs/news/2020/11/media-freedom-coalition-ministerial-communique.html>.

media freedom and independence.³² These developments point to the need to further our understanding of the concept of media independence, and what efforts governments should undertake to further protect this important aspect of media freedom.

1.2. Positive Rights of the Media

Other elements of the concept of media freedom are best conceptualized as positive rights requiring affirmative state action to be fulfilled. These positive rights include privileged access for the news media to information in the public interest, protections for the safety of media personnel, as well as guarantees of media pluralism.

1.2.1. Privileged Access to Information

The news media enjoy privileged access to information in the public interest that exceeds the right to information that is guaranteed to all persons by protections for the freedom of expression.³³ For example, reporters are often provided with privileged access to places where the news is happening, such as government buildings, courthouses, sports facilities, or the scenes of crimes and accidents.³⁴ Such access may require reporters to be accredited by a government organization or a media self-regulatory body, such as through the issuance of a press pass.³⁵ News media personnel are often provided with privileged access to public officials, in the context of press conferences, media availabilities, or media pool arrangements to cover significant events. The foregoing can be conceptualized as privileges that the news media enjoy, given that ordinary citizens exercising their human rights are not entitled to access these places or people on such favorable terms.

1.2.2. Protecting the Safety of News Media Personnel

The concept of media freedom imposes heightened, positive obligations on states to protect journalists and other news media personnel from

³² Katherine Jacobsen, “Amid COVID-19, the Prognosis for Press Freedom Is Dim. Here Are 10 Symptoms to Track,” Committee to Protect Journalists, last accessed 8 June 2021, <https://cpj.org/reports/2020/06/covid-19-here-are-10-press-freedom-symptoms-to-track/>.

³³ Oster, *supra* note 7 at 94.

³⁴ Compare *Pell v. Procunier*, 417 U.S. 817 (1974) [United States] and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) [United States] with *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, 21 June 2012, ECHR [European Court of Human Rights] and *Canadian Broadcasting Corp v Canada (AG)*, 2011 SCC 2 [Canada]. See also Michael Roffe, “Journalist Access,” Freedom Forum Institute, last modified 25 May 2004, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/journalist-access/>.

³⁵ See e.g., “Who Gets a Press Pass?” Digital Media Law Project, last accessed 8 June 2021, <https://www.dmlp.org/credentials>.

threats to their personal safety arising in the course of their work. Just like the media speech privilege, which provides protections for news media expression that exceed the background protections provided by the right to free expression, the positive state obligation to protect journalists goes above and beyond the duty of all states to protect the lives of all persons subject to their jurisdiction from foreseeable threats.³⁶ These heightened protections are necessary and justified in view of the important role that the news media play in society. As Jan Oster, a leading media law scholar, has noted:

...threats and attacks against journalists in particular, or a state's refusal to conduct a full investigation into such acts, is especially serious because of its detrimental impact on society as a whole. State omissions to protect journalists or impunity for the commitment of acts of aggression against journalists have a dissuasive effect on other journalists and deter them from doing their work for the benefit of society. Therefore, the state obligation to protect reporters follows not only from their right to life and personal integrity but also autonomously from media freedom itself.”³⁷

This obligation has been recognized by the community of nations in a variety of ways, including resolutions of the UN General Assembly and the UN Human Rights Council regarding the safety of journalists, joint statements by UN Special Rapporteurs on this issue, and numerous declarations, statements, and reports prepared under the aegis of regional human rights systems.³⁸

1.2.3. Media Pluralism

The concept of media freedom also imposes obligations upon states to promote and protect media pluralism—that is, the notion that there should be a diversity of news media outlets (in terms of ownership, business models, points of view, and other criteria) operating in a given space to provide multiple sources of coverage on current events on matters of public concern.³⁹ This obligation to protect media pluralism is

³⁶ UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life. U.N. Doc. CCPR/C/GC/36 (2018).

³⁷ Oster, *supra* note 7 at 94.

³⁸ UNESCO maintains a list of the principal international human rights documents pertaining to the safety of journalists on its website. See “Basic Texts Related to the Safety of Journalists,” UNESCO, accessed 1 June 2021, <https://en.unesco.org/themes/safety-journalists/basic-texts>.

³⁹ The definition of what constitutes media pluralism, and how it should be promoted, is contested. See D. Raeijmaekers et al., “Media, Pluralism and Democracy: What’s in a Name?” *Media, Culture & Society* 37, no. 7 (2015): 1042-1059. <https://doi.org/10.1177/0163443715591670>.

recognized in the European Union's Charter of Fundamental Rights, which recognizes that "[t]he freedom and pluralism of the media shall be respected."⁴⁰ This notion is also recognized in the African Union's Declaration of Principles on Freedom of Expression and Access to Information in Africa. Specifically, Principle 11 recognizes that "state or private monopoly" over media "is not compatible with the right to freedom of expression," while Principle 12 requires states to take "positive measures to promote a diverse and pluralistic media."⁴¹ State obligations relating to media pluralism may require them to prevent powerful groups from gaining control of the news media,⁴² such as by measures subjecting mergers and takeovers in the media industry to heightened scrutiny.⁴³

1.3. Conditioning Media Freedom

Protections for media freedom are different in kind from many other rights guarantees in two important respects. The first is that media freedom is only available to certain individuals and organizations that qualify as "the media," whereas most rights and freedoms are available to all persons unconditionally. Media freedom is hardly unique in the constellation of rights in being available only to persons or organizations meeting certain threshold criteria. For example, criminal procedural rights are only available to individuals that are under criminal suspicion, while only indigenous persons may exercise the rights that are guaranteed to indigenous peoples by international law.⁴⁴ The question of what individuals and organizations qualify as "the media" for the purposes of media freedom is discussed below.

In many legal systems, media freedoms are conditioned not only on an individual or organization being a recognized member of "the media," but also on their fulfillment of certain professional duties and responsibilities. These may include:

- abiding by standards of conduct in reporting, such as by taking reasonable steps to ensure the factual accuracy of information that is reported;

⁴⁰ Charter of Fundamental Rights of the European Union, *supra* note 6.

⁴¹ African Commission on Human and Peoples' Rights, *supra* note 25.

⁴² Oster, *supra* note 7 at 95

⁴³ See e.g., Lorna Woods, "United Kingdom" in *Journalism and Media Privilege*, ed. Maja Cappello (Strasbourg: European Audiovisual Observatory, 2017), 52, <https://rm.coe.int/journalism-and-media-privilege-pdf/1680787381> (describing how UK competition law takes media pluralism concerns into account in evaluating media mergers).

⁴⁴ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess, Supp. No. 49, U.N. Doc. A/61/L.67 (2007) at Art 1, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (hereinafter "UNDRIP").

- the demonstration of good faith concerning the factual accuracy of the reporting, and the motivation of the publisher in disseminating information; and
- conformity with generally accepted journalistic ethics regarding the newsgathering process and the ultimate dissemination of the information.⁴⁵

The conditioning of legal protections for the media in compliance with codes of journalistic ethics has aroused controversy among scholars and commentators, given that most such codes are voluntary and do not have the force of law.⁴⁶ Even so, the practice of the European Court of Human Rights—whose jurisprudence on media freedom is expansive—has been to condition the granting of media freedom protections upon compliance with such codes.⁴⁷

1.4. Why Media Freedom?

As the previous section explains, the concept of media freedom extends rights, protections, and privileges to the news media above and beyond those guaranteed to all persons by background human rights guarantees—notably the right to free expression. The question that naturally arises is why the news media should be accorded such preferential treatment. A full answer to this question is beyond the scope of this paper, yet a brief exploration is worthwhile to remind us of what is at stake in protecting media freedom.

One approach to this question starts with the theoretical foundations upon which the related right to free expression is built. Among the many reasons why human rights law protects free expression is the belief that wide-ranging discussions regarding public affairs are a prerequisite for democratic governance.⁴⁸ Indeed, some scholars argue that “[t]he individual’s right to participate in public discourse is constitutive of democratic self-government.”⁴⁹

While strong protections for the right to free expression may be necessary for democracy, they are not sufficient. Democracy is premised

⁴⁵ Oster, *supra* note 7 at 45–47.

⁴⁶ Dominic Broy and Christina Etteldorf, “The Development of Norms of Journalism at the International Level,” in *Journalism and Media Privilege*, ed. Maja Cappello (Strasbourg: European Audiovisual Observatory, 2017), 6–11, <https://rm.coe.int/journalism-and-media-privilege-pdf/1680787381>.

⁴⁷ Oster, *supra* note 7, citing *Ricci v. Italy*, no. 30210/06, 8 October 2013, ECHR 2013 [European Court of Human Rights] and *Pipi. v. Turkey*, no. 4020/03, 12 May 2009, ECHR 2009 [European Court of Human Rights].

⁴⁸ See C. Edwin Baker, “Is Democracy a Sound Basis for a Free Speech Principle?” *Virginia Law Review* 97, no. 3 (2011): 515.

⁴⁹ *Ibid*, summarizing the views of noted free expression scholars Robert Post and James Weinstein on the relationship between free expression and democracy.

on governments being accountable to their citizens. Accountability, in turn, requires oversight of government actions both during and between elections—the latter being essential to ensuring that voters can make informed decisions at the ballot box. Vincent Blasi describes this role of the news media as the “checking function,” which is fulfilled when journalistic organizations report upon and scrutinize the actions of the government and other powerful actors in society.⁵⁰ Correspondingly, the leading media freedom scholar Peter Coe has observed that:

Media freedom is not inherently valuable on a personal level. Instead, it is instrumentally and functionally valuable, as it protects individuals and legal persons fulfilling *a constitutional role for society*, rather than protecting expression for expression’s sake.⁵¹ (Emphasis added).

The notion of media freedom playing a constitutional role in society dates back to at least the 18th century, when the news media were first described (apocryphally by Edmund Burke) as the “fourth estate” of the British Parliament, alongside the traditional three estates (i.e., the Commons, the Lords Spiritual, and the Lords Temporal).⁵²

Although the rights, privileges, and protections that constitute media freedom are not always of a constitutional character, the importance of the news media in constituting democracy cannot be denied. Indeed, Burke’s 18th century notions of the importance of the news media to democracy find resonance in the *communiqué* of the Media Freedom Coalition’s 2020 ministerial meeting, which recognizes that:

a free media is *the cornerstone of democracy*. People need free and independent media to provide them with accurate information, facilitate informed public debate and discussion, hold governments accountable, and serve as a watchdog for the public interest.⁵³ (Emphasis added).

1.5. Reconciling Media Freedom and Other Public Policy Goals

A free media may be “the cornerstone of democracy,” yet media freedom and the protections it provides to the news media can be in tension with

⁵⁰ Vincent Blasi, “The Checking Value in First Amendment Theory,” *American Bar Foundation Research Journal* 2, no. 3 (1977): 521–649.

⁵¹ Peter Coe, “Redefining ‘Media’ Using a ‘Media-as-a-Constitutional-Component’ Concept: An Evaluation of the Need for the European Court of Human Rights to Alter its Understanding of ‘Media’ within a New Media Landscape,” *Legal Studies* 37, no. 1 (March 2017): 46–47, <https://doi.org/10.1111/lest.12133>.

⁵² Thomas Carlyle, *Sartor Resartus and on Heroes*, (London: J.M. Dent & Sons, 1908), 392, <https://www.gutenberg.org/files/20585/20585-h/20585-h.htm>.

⁵³ “Media Freedom Coalition Ministerial Communiqué,” *supra* note 31.

other public policy goals, as described below. Insofar as media freedom guarantees exempt the news media from generally applicable laws, society has determined that these protections are worth their cost in terms of other public policy objectives that might be foregone.

Courts typically use a range of balancing tests in determining whether media freedoms should prevail when they conflict with other laws or rights guarantees. Consider the example of journalist source protection, which like the other testimonial privileges (i.e., lawyer/client, doctor/patient) deprives the legal system of its entitlement to “every person’s evidence.”⁵⁴ As noted above, this privilege assumes that the public interest is best served when individuals with knowledge of malfeasance disclose such conduct to the news media, without fear of having their identities unveiled in the courts. Yet there remains a tradeoff in extending this privilege to the media between two pressing and substantial public policy objectives.

Other aspects of media freedom protection raise other similarly significant public policy choices as well. For example, the journalistic exemption to data protection law subjects individuals to what would otherwise be actionable violations of their data protection rights. This is based on weighing the harms to the affected individual’s right to privacy versus the interest in obtaining information that may be of public interest. Likewise, doctrines such as fair use and fair dealing relax the application of intellectual property law to news media expression, thereby permitting news outlets to use copyrighted or trademarked material in reporting stories that are of public interest.⁵⁵

Similar balances must also be struck between the freedoms enjoyed by the news media and the duty of governments to promote and protect public order. Notwithstanding the importance of the watchdog role of the news media, in exceptional circumstances public safety interests might override the public interest in journalistic investigations into national security practices, intelligence gathering techniques, and the like. Similarly, in the context of criminal proceedings, media reports may need to be limited when they are “likely to prejudice, whether

⁵⁴ For a history of this notion, see Donald Koblit, “‘The Public Has a Claim to Every Man’s Evidence’: The Defendant’s Constitutional Right to Witness Immunity,” *Stanford Law Review* 30, no. 6 (July 1978): 1211–1242.

⁵⁵ Pierre Vudrag, “Fair Use in News and Reviews,” *American Bar Association Entertainment and Sports Industries Forum*, 5 April 2019, https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/september/fair_use_news_reviews/.

intentionally or not, the chances of a person receiving a fair trial⁵⁶ or when they are necessary to protect the interests of crime victims.⁵⁷

⁵⁶ Oster, *supra* note 7 at 222. See also *Eerikäinen and Others v. Finland*, no. 3514/02, § 63, 10 February 2009, ECHR 2009 [European Court of Human Rights]; *Egeland and Hanseid v. Norway*, no. 34438/04, § 59, 16 April 2009, ECHR 2009 [European Court of Human Rights]; *R v Mentuck*, 2001 SCC 76 [Canada].

⁵⁷ See generally Jamie Cameron, *Victim Privacy and the Open Court Principle* (Ottawa: Government of Canada, 2013). <http://digitalcommons.osgoode.yorku.ca/reports/167>.

2. THE IMPACT OF TECHNOLOGY ON MEDIA FREEDOM

Technology-driven changes in the media landscape pose significant challenges to existing understandings of the concept of media freedom. It is essential that decision-makers, advocates, legislators, regulators, and judges who are charged with interpreting and applying media freedom principles in law and policy confront these changes if the concept is going to have ongoing relevance. Grappling with technological change is especially important if media freedom will continue to be used to protect the enterprise of journalism, the safety of its practitioners, and enhance the role that journalism plays in supporting the health of democracy.

The discussion below considers some of the ways digital technologies have made media freedom protections more difficult to apply; notably, by increasing access to tools of mass dissemination, lowering entry barriers to journalistic practices, and upending the political economy of the news media. Technology is also driving increased risks both to the journalistic process and to journalists themselves, as seen through a selection of non-exhaustive examples discussed below on media manipulation, surveillance, and deepfakes. The picture is not uniformly negative, however: technology also provides opportunities to protect and enhance media freedom through, for example, the use of digital encryption tools, open source intelligence, and computational journalism.

2.1. Technological Change and the Fragmentation of the Media

While the impact of technology on media is wide-ranging, this section focuses specifically on how technological change poses challenges in applying media freedom doctrine. The idea of media “fragmentation” can help describe the sense in which technological changes over the past several decades have, sometimes paradoxically, led to the decentralization of the legacy media structure, a proliferation of content producers, the segmentation of news audiences, and the establishment of powerful new actors in the marketplace. One consequence of media fragmentation is that legacy news organizations must contend with a transformed media landscape. While these organizations may still be structurally advantaged by the political economy of the internet ecosystem, their business models are no longer as effective in extracting value from the news they gather and distribute.⁵⁸

⁵⁸ Robert Picard, “Protecting News Today,” in *Making News: The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet*, ed. Richard John and Jonathan Silberstein-Loeb (Oxford: Oxford University Press, 2015);

Like much of the international human rights law framework, the concept of media freedom emerged in the mid-20th century. At the time, technologies of mass communication were comparatively expensive and in the hands of a relatively small group of actors in any given market. These constraints made it easier to identify who and what constituted “media” than it is today—namely, publishing and broadcasting undertakings that had the capacity to reach mass audiences—and who in turn was entitled to the enhanced protections that media freedom provides for journalistic expression.

Technology has fundamentally altered the dynamics of media production and distribution. The rise of the internet and the emergence of new technologies, such as blogs and social media, affords anyone with digital literacy and an internet connection the possibility of reaching an outsized audience compared to conventional means. Correspondingly, large fixed investments in publishing or broadcasting equipment no longer pose significant barriers to reaching mass audiences. This is in part because media companies today, in contrast to those of the 20th century, do not broadcast their own content exclusively; they also encourage mass participation by transmitting and serving as a platform for everyone’s content. Consequently, even individuals with relatively limited digital tools and know-how can gather information on matters of public interest, with the possibility that content can be circulated online for mass dissemination.⁵⁹ In theory, this increased access strengthens the ability of citizen journalists—or potential sources—to report the news and, in turn, be entitled to media freedoms.

Despite these transformations and the shift toward participatory content creation, it is important to note that legacy news outlets remain the dominant source of news, even if accessed primarily via ubiquitous social media platforms. In response to the continued dominance of mainstream news organizations, a growing body of scholarly work on the structural dynamics of news production has begun to examine the internet’s illusory promise of mass participation. To a large extent, major news outlets generating large volumes of web traffic are still at an advantage over citizen journalists and individual content creators in

Mira Milosevic, “Media Freedom: Media Independence and Sustainability,” Paper Presented at the Global Forum for Media Development, 16 November 2020. https://www.international.gc.ca/campaign-campagne/assets/pdfs/media_freedom-liberte_presse-2020/policy_paper-documents_orientation-independance-en.pdf.

⁵⁹ Oster, *supra* note 7 at 268.

terms of both their capacity to reach news audiences, and their ability to maintain professional control over content.⁶⁰

From this perspective, it would be a mistake to draw a simple equation between technological change and the “democratization” of the media, or to extend media freedom entitlements to a potentially limitless class of individuals. In shaping how the news is consumed, produced, and distributed, technology has also introduced new gatekeepers that influence the dissemination of news content. Rather than watching one of the few national newscasts available, or reading a local newspaper, many internet users get their news through news aggregation sites such as Google News and Apple News, or through social media feeds on services like Facebook and Twitter. These platforms use machine learning algorithms to show their users personalized content that maximizes user engagement and, correspondingly, ad revenues generated by the platforms. Such platforms have transformed the playing field upon which media outlets vie for viewership, while placing enormous strains on the ad-supported business model which sustained mainstream journalism in the Global North in the latter half of the 20th century. To the extent that mainstream journalism supported the public interest by holding governments in check and informing the citizenry, it is important to understand how technological changes to the media economy impact media freedom.

2.2. Technological Change and the Political Economy of the Media

Technological change is intertwined with structural changes in the political economy of the media, which in turn impacts the enjoyment of media freedom. Democratic societies rely on a free and independent media system to inform the citizenry and serve as a watchdog on public and private power. However, this role presupposes a healthy media ecosystem protected by the state and supported through an economically viable business model. If the political economy that supports media freedom is weakened due to socio-technical change, do governments have a responsibility to intervene?

As previously discussed, the concept of media freedom emerged at a time when the conditions of media production were vastly different, both in terms of market concentration and competition for attention. Given the many challenges facing news media today, some contemporary commentators look to the late 20th century as the “golden

⁶⁰ See e.g., Nikki Usher, “The Appropriation/Amplification Model of Citizen Journalism,” *Journalism Practice* 11, no. 2–3 (March 2017): 247–265, <https://doi.org/10.1080/17512786.2016.1223552>.

age” of journalism.⁶¹ Such reflections are borne, in part, out of a nostalgia for the media’s role in supporting democracy—large media organizations producing high-quality factual information that contributed to a well-informed electorate—and a desire to redevelop the conditions whereby contemporary media can serve to strengthen civic engagement.⁶²

It is important, however, not to overstate the historical relationship between the news media and democratic discourse, with its capacity to cultivate something resembling Habermas’ public sphere. In several respects late 20th century media, as with media today, fell short of these ideals. The challenge for 21st century regulators, then, is to look to the future instead of focusing on the past. Such a perspective ensures media freedom protections are consistent with the evolving nature of journalistic practices and the particular affordances of emerging technologies, rather than restricted to the conditions of the 20th century.

Nevertheless, it is worthwhile to contextualize the rise of media freedom, as a concept, with the historical post-WWII moment of journalism, in order to better understand the destabilizing effects wrought by technological change on the political economy of the media. Private media organizations benefited from a strong, ad-supported business model in the postwar period,⁶³ while public broadcasters enjoyed generous support from postwar welfare states. The media industry in the second half of the 20th century was extremely profitable, with annual returns of 12 percent and up to 30 percent in the U.S.⁶⁴ This profit margin is a stark contrast to the contemporary news landscape, where the financial viability and subscriber base of most daily newspapers are under threat, having been in decline since the mid-2000s.⁶⁵

A key feature of the economics of news media in the postwar era was cross-subsidization. Consider the daily newspaper, the primary source of news information in the postwar era: newspapers were general interest

⁶¹ Heidi Tworek and John Maxwell Hamilton, “Why the ‘Golden Age’ of Newspapers Was the Exception, not the Rule,” *Nieman Journalism Lab*, 2 May 2018, <https://www.niemanlab.org/2018/05/why-the-golden-age-of-newspapers-was-the-exception-not-the-rule/>. See also John Maxwell Hamilton and Heidi Tworek, “The Natural History of News: An Epigenetic Study,” *Journalism* 18, no. 4 (April 2017): 391–407, <https://doi.org/10.1177/1464884915625630>.

⁶² See, e.g., David Brooks, “The Mid-Brow American Magazine: Weakness, Adaptation, Endurance,” *Seattle Times*, 19 November 2010, <https://www.seattletimes.com/opinion/the-mid-brow-american-magazine-weakness-adaptation-endurance/>.

⁶³ Tworek and Hamilton, *supra* note 61.

⁶⁴ *Ibid.*

⁶⁵ “Newspapers Fact Sheet,” Pew Research Center, last modified 9 July 2019, <https://www.journalism.org/fact-sheet/newspapers/>.

publications, with sections on hard news, business, entertainment, sports, and classifieds. People interested in one kind of information had to buy the whole newspaper. This business model drove up subscriptions, which in turn drove up advertising rates. Hence, there were implicit cross-subsidies between people buying the paper for one kind of coverage versus another.⁶⁶

Such cross-subsidization was possible due to high barriers in accessing equipment to reach mass audiences (like printing presses, TV transmitters, etc.). Correspondingly, since media freedom arose in this era, the concept is linked to the historical idea of mass media featuring a small number of media outlets who could publish or transmit content to a mass audience.⁶⁷ A small group of privileged elites—in the context of the Global North, for example, mostly white, male, and socio-economically upper class—were responsible for deciding what content to publish, broadcast, or produce for the public, particularly in broadcast and national media. The concentrated model of media production, known as the “few-to-many” structure,⁶⁸ was emblematic of the barriers individuals and smaller outlets faced in publishing content. National broadcasters, publishing houses, and the like acted as gatekeepers, controlling what content could reach the general public.

Considered in this light, much of the current hand-wringing about the state of the media or the decline of the conventional media, which considers the postwar era of journalism as a golden age, is premised on shaky foundations. Legacy media came under withering criticism from critics for “manufacturing consent” by manipulating mass opinion to serve an elite agenda.⁶⁹ The extent to which media of the era contributed to a universal and enlightened public sphere is also overstated. The newsrooms (and certainly boardrooms) of the major media outlets largely excluded women as well as ethnic and cultural minorities. Moreover, much critical commentary has emphasized a lack of media attention to issues deserving more coverage.⁷⁰

These legitimate criticisms notwithstanding, there was a recognition in the postwar years that media could serve an important function in

⁶⁶ Hamilton and Tworek, *supra* note 61 at 401–02.

⁶⁷ Jack Balkin, “The First Amendment in the Second Gilded Age,” *Buffalo Law Review* 66, no. 5 (December 2018): 984.

⁶⁸ *Ibid.*

⁶⁹ See, e.g., Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).

⁷⁰ See, e.g., Peter Viggo Jakobsen, “Focus on the CNN Effect Misses the Point: The Real Media Impact on Conflict Management Is Invisible and Indirect,” *Journal of Peace Research* 37, no. 2 (March 2000): 131–43. <https://doi.org/10.1177/0022343300037002001>. See also Florian Otto and Christoph O Meyer, “Missing the Story? Changes in Foreign News Reporting and Their Implications for Conflict Prevention,” *Media, War & Conflict* 5, no. 3 (December 2012): 205–21. <https://doi.org/10.1177/1750635212458621>.

fostering democratic dialogue and governmental accountability. The development of a legal infrastructure to support media freedom arose, in part, out of a conviction regarding the media's fundamental role in maintaining the health and functioning of democratic societies. Indeed, a major vein of the academic disciplines of media and communication studies arising during that same period, particularly in the U.S., was borne out of alarm that the Nazi regime had deftly manipulated its citizens using state propaganda via the emerging technologies of radio, film, and television.

Technological changes that have upended the economics of distributing information to mass audiences also have consequences for the economic model that sustained mainstream media in the Global North in the 20th century—along with the legal doctrine of media freedom that developed to support it. At the same time, the dynamics of news consumption, along with the nature and composition of audiences, have been altered by the emergence of digital platforms. In particular, social media has contributed to increased audience segmentation. As a result, media outlets frequently cater content to particular consumer groups rather than to the public at large.

This transformation is unsurprising, given that the political economy of news and media changes significantly over time.⁷¹ Even before the internet, the economic model that sustained mass media in the Global North in the postwar years was under threat.⁷² The advent of the internet simply accelerated the decline that was already underway. Whereas media production in the mid-20th century was highly centralized, such that gathering, producing, and disseminating content was limited to the select few, now there is “a culture of mass participation rather than the culture of mass audiences.”⁷³ In short, media production has shifted to a “many-to-many” structure. Individuals can freely participate in the sharing of media content not just to one other person but to an indefinite number of people, and messages and posts can function as a form of mass communication.⁷⁴ An internet connected device and access to a social media platform is all one needs, in theory. However, the continued preeminence of legacy news outlets over individual producers indicates that there are still substantial barriers to equal participation in the distribution of news online; dominant power hierarchies underlying the distinction between professional and citizen content remain firmly in place.⁷⁵

⁷¹ Tworek and Hamilton, *supra* note 61.

⁷² Hamilton and Tworek, *supra* note 61 at 401–02.

⁷³ Balkin, *supra* note 67 at 985.

⁷⁴ *Ibid.*

⁷⁵ See, e.g., Usher, *supra* note 60 at 248.

Moreover, the internet has transformed advertising models in conventional media like print and television. Online advertising—whether on social networks, search tools, or websites—is much more targeted than offline advertising. Hence, advertising revenue that once sustained mainstream news media has largely dried up. According to Mira Milosevic of the Global Forum for Media Development, “[a]dvertising revenue for newspapers globally has been in free fall since 2008, plunging from \$103 billion, to \$49 billion in 2019.”⁷⁶

In short, the media industry’s economic model has been upended by technological change. Yet it was against the backdrop of this economic model that the concept of media freedom developed. The question now is: how do we adapt the concept of media freedom to our new technological age?

Before going further, we offer two suggestions for future lines of inquiry related to the political economy of the media. As noted in section 1, a positive rights conception of media freedom entails some level of government responsibility to ensure the economic viability of the media, particularly given the role the media plays in upholding democracy. While suggestions for a new and appropriate funding model for journalism are beyond the scope of this paper, further work is required to examine what obligations or responsibilities might exist for democratic states to foster the political and economic conditions necessary for media freedom to flourish.

Additionally, further exploration into the intersection between media freedom and the responsibility of businesses to respect human rights is required. The UN Guiding Principles on Business and Human Rights recognizes that states have a binding legal duty to protect human rights, while businesses have a soft law responsibility to respect human rights.⁷⁷ In effect, this means that businesses are required to avoid causing or contributing to adverse human rights impacts through their own activities, and must seek to prevent or mitigate adverse human rights impacts to which they are directly linked.

Without prejudice to whether media freedom constitutes a body of human rights law per se, the responsibilities of business with regard to media freedom still need clarification. The emerging dialogue in business and human rights literature about what responsibilities companies implementing disruptive technological change bear with

⁷⁶ Milosevic, *supra* note 58 at 2.

⁷⁷ Office of the United Nations High Commissioner for Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, and Remedy’ Framework,” U.N. Doc HR/PUB/11/04 (2011) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

regards to the full range of civil, political, economic, social, and cultural rights protected by international human rights law might serve as a useful entry point for future work on this topic.⁷⁸ For example, do companies that introduce technologies to reduce the amount of labour required to produce a good or a service have any human rights responsibilities toward the workers they displaced? Similarly, it is arguable that companies acting as agents of technological change affecting the production, distribution, and consumption of news bear at least some responsibility with regard to media freedom. The extent to which businesses serving as purveyors or gatekeepers of public interest content should be considered as partners with the state in strengthening media freedom, if at all, is a key question that must be addressed going forward.

At the same time as digital networked technologies propel changes in the political economy that sustains the news media, these technologies have also blurred the bounds of who and what constitutes the media. The following section considers the impact of emerging technologies on the nature and scope of media freedom entitlements. It points to some of the potential advantages of technological change in decentralizing and fragmenting conventional structures to allow for a more varied, horizontal media ecosystem—one that better reflects the interests and perspectives of individuals and groups traditionally excluded from legacy media organizations.⁷⁹

2.3. Revisiting Media Freedom Entitlements

With this deepened understanding of the contemporary media environment in mind, it is worthwhile to return to a discussion of media freedom entitlements. That is, to whom, or to what kinds of activities, should the concept of media freedom extend? In multiplying the opportunities for individuals to reach a mass audience via the internet, digital technologies also throw into question the appropriate scope of media freedom entitlements. In other words, the conventional definition of media freedom as applying to entities that gather information on matters of public interest for mass dissemination is no longer exclusive to centralized media organizations, but could just as well capture the content-sharing activities of individual users of the internet.

⁷⁸ Surya Deva et al., “Editorial: Business and Human Rights Scholarship: Past Trends and Future Directions,” *Business and Human Rights Journal* 4, no. 2 (2019): 201–12, <https://doi.org/10.1017/bhj.2019.17>.

⁷⁹ Imara Jones, “The Dire Need for a Decentralized News Media,” *Hyperallergic*, 4 November 2020, <https://hyperallergic.com/599483/ford-foundation-creative-futures-decentralized-news/>.

Scholars have proposed two approaches to defining “the media” for the purpose of media freedom entitlements: *organizational* and *functional*.

Organizational definitions of media freedom attribute media freedom protections to organized and formal institutions that publish news content. This includes media organizations (like newspapers and radio stations) and their journalists who engage in news reporting. By contrast, functional definitions grant media freedom protections and privileges to any individual who is engaged in journalistic activity insofar as they are following standards of journalistic ethics.

Although different jurisdictions follow different approaches to journalistic freedoms, the organizational definition is dominant. The European Court of Human Rights (ECtHR) has held that media rights only pertain to journalists who subscribe to “the ‘ethics of journalism’ and the principles of ‘responsible journalism,’” which refers to both the publication of material and the news gathering process.⁸⁰

The ECtHR and the Committee of Ministers of the Council of Europe refer to the media as “media professionals.” Moreover, in *Perrin v UK* and *Willem v France*, the ECtHR did not grant media freedom protections to internet publications operated by private individuals, on the basis that the individuals in question were not “media professionals.”⁸¹ Similarly, New York state’s press shield law only grants journalistic protections to professional journalists “working for gain or livelihood.”⁸²

There is a wide chorus of scholars and activists who believe that these definitions are too formalistic. Rather than an institutional approach, they argue for a functional approach to decide who should be entitled to media freedoms and rights. This shift is especially true with the advent of citizen journalism, defined by the journalist Courtney Radsch as “an alternative and activist form of newsgathering and reporting that leverages networked social media and functions outside but in relation to mainstream media institutions.”⁸³ Radsch identifies citizen journalists as non-professionals who engage in intentional acts of journalism like reporting, fact-checking, documenting, verifying, and the like using digital means.⁸⁴

In view of these technology-driven changes in the landscape of journalism, scholars and courts are starting to reconsider who is entitled

⁸⁰ Oster, *supra* note 7 at 47.

⁸¹ Coe, *supra* note 51 at 40.

⁸² *Ibid.*

⁸³ Courtney Radsch, “Dissidence & Political Change: Cyberactivism and Citizen Journalism in Egypt” (PhD diss., American University, School of International Service, 2013), 159.

⁸⁴ *Ibid.*

to media freedom. Jan Oster, a prominent advocate of the functional definition of the media, argues that the social value and function of the media for public discourse supports granting media freedom protections to non-professional journalists.⁸⁵ So long as non-professionals, such as bloggers or citizen journalists, follow journalistic standards of conduct, Oster argues that they should be entitled to media freedom protections when they engage in journalistic activity on some “periodical basis.”⁸⁶

The legal scholar Peter Coe suggests that extending media freedoms to non-professionals is necessary to fulfilling the media’s role in ensuring that the electorate is well-informed. He argues that media freedom should be accorded to:

(1) a natural and legal person (2) engaged in the process of gathering information of public concern, interest and significance (3) with the intention, and for the purpose, of disseminating this information to a section of the public on a regular basis (4) while complying with objective standards governing the research, newsgathering and editorial process.⁸⁷

Moreover, Coe suggests expanding Oster’s “periodical basis” requirement to people who contribute “on one-off occasions or on an ad-hoc basis.”⁸⁸

Courts are beginning to recognize aspects of the functional definition of the media. In its 2014 decision in *Slater v Blomfield*, the High Court of New Zealand held that a blogger could be considered a journalist for the purposes of the country’s reporters’ shield law.⁸⁹ Similarly, in *Cornec v Morrice*, the High Court of Ireland ruled that the director of an independent research organization that regularly blogged about their research should be granted the protections of the country’s press shield law and not be compelled to testify.⁹⁰ A state court in Florida reached a similar view in *Commins v Vanvoorhis*, when it ruled that the pre-suit notice requirement for civil action against “a newspaper, periodical or other medium” applied to a blogger whose aim in founding the blog was to “publicly comment on issues of public concern in an intellectual manner without tying [his] comments to [his] professional identity.”⁹¹

⁸⁵ Oster, *supra* note 7 at 66–67.

⁸⁶ *Ibid.*

⁸⁷ Coe, *supra* note 51 at 51.

⁸⁸ *Ibid.*

⁸⁹ *Ibid* at 50.

⁹⁰ Carolan, *supra* note 22 at 184.

⁹¹ *Comins v. Vanvoorhis*, 135 So. 3d 545 (Fla. Dist. Ct. App. 2014) [United States–Florida].

2.4. Technology-Specific Impacts on Media Freedom

The use of digital and emerging technologies at each stage of the journalistic process, from gathering to disseminating, has important repercussions for the concept and exercise of media freedom. A particular area of concern for policymakers in recent years has been the development and spread of artificial intelligence (AI) across multiple sectors of human life, and its increasingly significant role in shaping the distribution of online media content. As an entry point to this broad and dynamic area, this section considers Julia Haas's recent work on the impact of AI on media freedom. From the censorship and surveillance of independent journalists to the sorting and filtering of endless quantities of user-generated content, the many evolving applications of AI illustrate the need to define media freedom flexibly, so as to ensure its continued relevance as an analytical tool.⁹²

In her policy paper for the 2020 Media Freedom Coalition Conference, Julia Haas lays the groundwork for understanding how AI, media freedom, and freedom of expression are interlinked. As Haas explains, AI shapes the distribution of media content in two principal ways: through content moderation and content curation. Moderating content consists in flagging, demonetizing, deprioritizing, or removing certain “undesired” content, or banning specific accounts. Content moderation can occur either before the content has been shared publicly, in the form of upload filters, or once it is already published.⁹³ Content curation, on the other hand, involves applying AI to rank and showcase information “based on the predicted preferences of individual users.”⁹⁴ These functions are particularly important, given that information is algorithmically prioritized on popular social media platforms, like Facebook, that profit from keeping users engaged.⁹⁵ AI systems and machine learning play a central role in shaping the information sphere so that content is personalized and conforms to terms of services or community guidelines.⁹⁶

Haas' paper also finds that AI has the potential to negatively affect media freedom. This is true of both state and private deployments of such systems that may curtail freedom of expression by, for example,

⁹² Julia Haas, “Freedom of the Media and Artificial Intelligence” (paper presented at the Global Conference for Media Freedom, Online, 16 November 2020), 2 https://www.international.gc.ca/campaign-campagne/assets/pdfs/media_freedom-liberte_presse-2020/policy_paper-documents_orientation-ai-ia-en.pdf.

⁹³ *Ibid* at 3.

⁹⁴ *Ibid*.

⁹⁵ Adam D. I. Kramer, Jamie E. Guillory, and Jeffrey T. Hancock, “Experimental Evidence of Massive-scale Emotional Contagion Through Social Networks,” *PNAS*, 111, no.24 (June 2014): 8788–8790, <https://www.pnas.org/content/pnas/111/24/8788.full.pdf>.

⁹⁶ Haas, *supra* note 92 at 3.

surveilling online communications to suppress certain public interest content. Even in its more commonplace or apparently “neutral” uses as a predictive tool, AI has far-reaching implications for the field and practice of journalism—not to mention its effects on the quality of public discourse and democratic dialogue more broadly. For example, the use of AI to organize and present personalized content (including news content) to a platform’s users may have as a corollary effect the strengthening of users’ pre-existing views by decreasing the likelihood of exposure to a diversity of sources.⁹⁷ A high degree of AI-enabled user personalization can contribute to a distorted perception of reality. Similarly, there are serious doubts as to the accuracy and reliability of AI in analyzing and evaluating speech, particularly where cultural, linguistic, or conceptual nuances are at play. Haas warns that this may reinforce power imbalances and amplify polarization in online environments, while seriously threatening media pluralism.⁹⁸

This phenomenon, otherwise known as “filter bubbles,” typifies some of the risks associated with the unregulated use of new technologies. For instance, Haas highlights the opacity of AI-based decision-making and the invisibility of its application as particular areas of concern; by keeping users in the dark as to when and how AI is used, platforms and search engines are able to maintain an appearance of neutrality while regulating speech and online information dissemination according to their business interests.⁹⁹ As Haas notes, this has potentially “severe implications for public discourse, particularly in light of the market dominance of very few intermediaries.”¹⁰⁰ The reduction in media pluralism brought about through pervasive content moderation and content curation compounds this effect, so that users are ill-equipped to understand the ways in which their opinions and behaviour are influenced by intermediary gatekeeping. Independent journalists, for their part, are increasingly at the mercy of a few powerful companies to ensure that their reporting enjoys widespread circulation.¹⁰¹

In light of these impediments to media freedom, exacerbated by the application of AI, Haas argues for a positive obligation on the part of states to be transparent in their use of AI, and to deploy it in ways that promote rather than corrode media pluralism.¹⁰² Likewise, companies have a responsibility to implement democratic safeguards and enforcement regimes to ensure that their AI systems promote and respect media freedom. As explained above, media pluralism is a crucial

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 2.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at 4.

dimension of both freedom of expression and media freedom.¹⁰³ If journalists are unable to produce content without competing against sensational news or depending upon the obscure operations of a moderating algorithm, access to information and free speech are severely threatened.

2.5. Increasing Risks for Journalism: Media Manipulation, Surveillance, and Deepfakes

This section draws on a series of examples to help policymakers understand why safeguarding media freedom from developing threats to the practice of journalism and security of individual journalists is crucial.¹⁰⁴ Although certainly not an exhaustive analysis, this section considers in brief the heightened risk to journalists and the media created or facilitated by emerging technologies. This section addresses media manipulation and surveillance, two quickly evolving areas of study which have recently gained the attention of policymakers, due to the threats they pose to the democratic process and the online information ecosystem. Lastly, a spotlight on deepfakes, which have proliferated in online spaces in recent years, illustrates these themes in action, offering a concrete example of how media freedom is undermined by rampant uncertainty as to the legitimacy and impartiality of public interest content.

2.5.1. Media Manipulation

Media manipulation is a multifaceted term that refers to attacks on the vulnerabilities in the media ecosystem's current structure that can destabilize and sow distrust in the media.¹⁰⁵ This report offers only a preliminary overview of the subject—a wide-ranging and fast-evolving dimension of the current media ecosystem—with a view to encouraging future study of the issue as it affects media freedom.

¹⁰³ *Ibid.*

¹⁰⁴ For more extensive work on these issues, see Jonathon Morgan and Renee DiResta, "Information Operations Are a Cybersecurity Problem: Toward a New Strategic Paradigm to Combat Disinformation," *Just Security*, 10 July 2018, <https://www.justsecurity.org/59152/information-operations-cybersecurity-problem-strategic-paradigm-combat-disinformation/>. See also Camille François, "Actors, Behaviours, Content: A Disinformation ABC" (working paper presented at the Second Session of the Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression, Santa Monica, California, 9–12 May 2019), https://www.ivir.nl/publicaties/download/ABC_Framework_2019_Sept_2019.pdf.

¹⁰⁵ Alice Marwick and Rebecca Lewis, "Media Manipulation and Disinformation Online," *Data & Society*, 15 May 2017, 3 https://datasociety.net/wp-content/uploads/2017/05/DataAndSociety_MediaManipulationAndDisinformationOnline-1.pdf.

Media manipulation encompasses a range of activities and motivations for interfering with fact-based mainstream news production. Its primary manifestations are disinformation and misinformation: disinformation is defined as the intentional release of false information to mislead the public, while misinformation is the release of false information without such intent.¹⁰⁶ An infamous example of disinformation in the media sphere is the Russian interference with the 2016 U.S. presidential election. Another more recent example is the spread of misinformation and disinformation by media outlets about COVID-19 vaccines. In one case, a theory stating that vaccines had microchips embedded within them spread across social media platforms to the point where health care professionals began rebutting these claims.¹⁰⁷

From these terms grows an increasing number of technological strategies aimed at manipulating the media through online campaigns. For example, Joan Donovan describes the strategy of source hacking as “a set of techniques for hiding the sources of problematic information in order to permit its circulation in mainstream media.”¹⁰⁸ These carefully coordinated techniques are used by online media manipulators to plant false information during breaking news events or “across highly polarized wedge issues.”¹⁰⁹ Once the misleading or false information makes it past the fact-checking process, social media serves misinformation-at-scale to hundreds of millions of users especially when curated and promoted in trending pages and recommendations.¹¹⁰ Source hacking is thus revealing of the ways in which attackers are able to exploit structural vulnerabilities in the news media, such as the speed with which information is disseminated through social media. By way of these tactics, misleading or false information becomes implanted in news reports generated by seemingly trustworthy media outlets.

¹⁰⁶ Camille François, interview by Michel Martin, “Troll Watch: How Tech Is Cracking Down on Election Disinformation,” *NPR*, October 17, 2020, <https://www.npr.org/2020/10/17/924977208/troll-watch-how-tech-is-cracking-down-on-election-disinformation>.

¹⁰⁷ Ike Sriskandarajah, “Where Did the Microchip Vaccine Conspiracy Theory Come from Anyway?” *The Verge*, 5 June 2021, <https://www.theverge.com/22516823/covid-vaccine-microchip-conspiracy-theory-explained-reddit>.

¹⁰⁸ Joan Donovan and Brian Friedberg, “Source Hacking: Media Manipulation in Practice,” *Data & Society*, 4 September 2019, <https://datasociety.net/library/source-hacking-media-manipulation-in-practice/>.

¹⁰⁹ *Ibid.* Donovan identifies four techniques of source hacking: (1) viral sloganeering; (2) leak forgery; (3) evidence collages; and (4) keyword squatting.

¹¹⁰ *Algorithms and Amplification: How Social Media Platforms’ Design Choices Shape Our Discourse and Our Minds: Hearing Before the S. Comm. on the Judiciary Subcomm. on Priv., Tech., and the Law*, 117th Cong. (2021) (statement of Joan Donovan, Research Director, Harvard Kennedy School’s Shorenstein Center on Media, Politics and Public Policy) [United States]. Available at [https://www.judiciary.senate.gov/imo/media/doc/Donovan%20Testimony%20\(update%20d\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Donovan%20Testimony%20(update%20d).pdf).

The sophistication, variety, and pervasiveness of media manipulation tactics is a startling reminder of the need for infrastructural support to ensure the health of the contemporary news media ecosystem. Indeed, media manipulation constitutes an existential threat to media freedom, one that potentially weakens information access and inhibits the media from fulfilling its watchdog function. Deeper exploration and analysis of the ways in which media manipulation affects media freedom is needed to form a more complete picture of the kinds of protections that are required to combat it.

2.5.2. Surveillance

Digital technologies and online data collection have allowed for more widespread surveillance and monitoring of journalists. Such practices are as extensive as they are invasive; common techniques range from the targeted use of malware, spyware, and facial recognition software to forms of social media monitoring.¹¹¹ As digital rights advocates Nighat Dad and Shmyla Khan observe, “[s]urveillance and monitoring are often used as tools of intimidation and silencing of journalists. The fear of being subject to such practices has a chilling effect on speech and can also result in self-censorship.”¹¹²

This observation goes beyond large-scale surveillance, often taking the form of targeted attacks on journalists’ personal computers and smartphones.¹¹³ An example of this small-scale approach to media surveillance is the misuse of spyware created by companies like NSO Group that allows attackers to have complete access to a phone’s “messages, emails, media, microphone, camera, calls, and contacts.”¹¹⁴ This is the software that was allegedly used to target Jamal Khashoggi, a well-known journalist and critic of the Saudi Arabian government, prior

¹¹¹ Nighat Dad and Shmyla Khan, “Threats Against Journalists,” (paper presented at the Global Conference for Media Freedom, Online, 16 November 2020), 3 https://www.international.gc.ca/world-monde/assets/pdfs/issues_development-enjeux_developpement/human_rights-droits_homme/policy-orientation-journalists-journalistes-en.pdf.

¹¹² *Ibid.*

¹¹³ Interestingly, with the pandemic forcing more journalists to rely on technology to meet with whistleblowers, etc. there has been an increase in interferences. See Rowan Phillip, “How Journalists Are Coping with a Heightened Surveillance Threat,” *Global Investigative Journalism Network*, 26 August 2020 <https://gijn.org/2020/08/26/how-journalists-are-coping-with-a-heightened-surveillance-threat/>.

¹¹⁴ “NSO Group Spyware Used Against Moroccan Journalist Days After Company Pledged to Respect Human Rights,” *Amnesty International*, 22 June 2020, <https://www.amnesty.org/en/latest/news/2020/06/nso-spyware-used-against-moroccan-journalist/>.

to his assassination by Saudi agents in 2018.¹¹⁵ The Committee to Protect Journalists has documented numerous public reports of spyware being used to undermine media freedom, leading in some instances to the murder or imprisonment of targeted journalists.¹¹⁶

2.5.3. Spotlight: Deepfakes

A deepfake is a form of audiovisual manipulation or, more specifically, videos that use some form of “deep” or machine learning to insert or generate human bodies and faces.¹¹⁷ This type of audiovisual manipulation includes both the use of AI, as well as “cheapfakes” that rely on “conventional techniques like speaking, slowing, cutting, re-staging, or re-contextualizing footage.”¹¹⁸ This form of manipulated content spreads quickly through social media platforms, news broadcasts, and other channels. As these artifacts circulate, they discredit the information source and pollute the media ecosystem in ways that researchers are only beginning to uncover. Whether deep or cheap -fakes, the use of these technologies has negative impacts on individual journalists and a collective impact on the practice of journalism.

2.5.3.1. *Effects on Journalists*

Deepfakes pose new threats to journalists that can jeopardize their credibility or ruin their reputations. Individual journalists, especially women, regularly face online harassment and technological attacks designed to silence, intimidate, threaten, and discredit them.¹¹⁹ These attacks have far-reaching implications, resulting in more women exercising self-censorship, disengaging from social media, and being discouraged from seeking leadership roles—all of which has a chilling effect on media pluralism and freedom of expression for women, including journalists.¹²⁰

¹¹⁵ See David D. Kirkpatrick, “Israeli Software Helped Saudis Spy on Khashoggi, Lawsuit Says,” *New York Times*, 2 December 2018, <https://www.nytimes.com/2018/12/02/world/middleeast/saudi-khashoggi-spyware-israel.html>. See also “Two Years After Khashoggi’s Slaying, No Accountability for Spyware Firm or Saudi Government,” *Access Now*, 1 October 2020, <https://www.accessnow.org/khashoggi-two-years-later/>.

¹¹⁶ “Spyware and Press Freedom,” Committee to Protect Journalists, accessed 8 June 2021, <https://cpj.org/spyware/>.

¹¹⁷ Britt Paris and Joan Donovan, “Deepfakes and Cheap Fakes: The Manipulation of Audio and Visual Evidence,” *Data & Society*, 18 September 2019, <https://datasociety.net/library/deepfakes-and-cheap-fakes/>.

¹¹⁸ *Ibid.*

¹¹⁹ Dad and Khan, *supra* note 111 at 3.

¹²⁰ Lucina D. Meco and Kristina Wilfore, “White Paper: Canadian Women Leaders’ Digital Defense Initiative,” *Montreal Institute for Genocide and Human Rights Studies*

Through the use of cheapfakes or media manipulation tools, journalists are facing heightened forms of online gender-based violence. Increasingly, female journalists are singled out in defamation and disinformation campaigns designed to induce fear, attack their reputations, and cast doubt on their credibility.¹²¹ During the 2020 Media Freedom Coalition Conference, Brazilian journalist Patrícia Campos Mello recounted her experience of disinformation being used by politicians to target, delegitimize, and discredit journalists and media outlets. Specifically, women reporting on disinformation in municipal elections were targeted with disinformation/defamation campaigns with pornographic photographs and sexual undertones.¹²² Deepfake AI technology amplifies this harassment by providing attackers with new, more sophisticated tools, making it more difficult to assess the veracity of news items.

Another prominent example of this weaponization was against Indian journalist and human rights activist, Rana Ayyub. After campaigning for justice for a rape victim in Indian-held Kashmir, a deepfake pornographic video was released of Ayyub. Shortly after this release, she was doxxed (i.e., her address was released to the public), and she received rape and death threats.¹²³ Ultimately, deepfakes expand the range of digital tools that can be used to harass and silence journalists.

2.5.3.2. *Effects on Journalism*

WITNESS, a human rights organization, explains that deepfakes threaten journalism in two opposing ways: “You trust in something you should

(2020), 2 https://issuu.com/migsinstitute/docs/whitepaper_final_version.docx. This report goes further to state that gendered disinformation partnered with “covert political, economic, or social motives” are being used to challenge women’s rights and democracy and should be seen as a national security threat.

¹²¹ Julie Posetti et al., “The Chilling: Global Trends in Online Violence Against Women Journalists.” *UNESCO*, (April 2021): 6, <https://en.unesco.org/publications/thechilling>.

¹²² “Global Conference for Media Freedom 2020 – Agenda,” Government of Canada, accessed 8 June 2021, https://www.international.gc.ca/campaign-campagne/media_freedom-liberte_presse-2020/agenda-ordre_jour.aspx?lang=eng; Patrícia C. Mello, “LIVE: Canada and Botswana Co-Host Global Conference for Media Freedom,” 16 November 2020, 3:51:00–3:53:00, <https://www.pscp.tv/w/1YpKkzOVQaPxj>. See Cristina Tardáguila, “How Techno-Populists Put the ‘Hate Machine’ to Work in Spreading Disinformation,” Poynter, 3 September 2020, <https://www.poynter.org/fact-checking/2020/how-techno-populists-put-the-hate-machine-to-work-in-spreading-disinformation/> and see generally Patrícia Campos Mello, *A Máquina do Ódio: Notas de uma Repórter sobre Fake News e Violência Digital* [The Hate Machine] (San Paulo: Companhia das Letras Companhia das Letras, 2020).

¹²³ Rana Ayyub, “In India, Journalists Face Slut-Shaming and Rape Threats,” *New York Times*, 22 May 2018, <https://www.nytimes.com/2018/05/22/opinion/india-journalists-slut-shaming-rape.html>.

not, and you don't when you should."¹²⁴ From this perspective, deepfakes constitute an attack on the veracity of online communication itself—how can you trust what you read, watch, or hear? Legal scholars Danielle Citron and Robert Chesney refer to this phenomenon as “the liar’s dividend.”¹²⁵ Beyond their immediate utility as a form of fabricated evidence, the persistent use and growing public awareness of deepfake technology may have an indirect effect on media credibility by stoking skepticism as to the authenticity of video and audio recordings whose precise origins are unknown. Citron and Chesney posit that the climate of generalized mistrust and uncertainty promoted by deepfakes could empower bad actors to deny accountability for information that is in fact true. Although a relatively novel technological innovation, deepfakes threaten to accelerate mistrust in information and deepen the spread of misinformation and disinformation online.

Newsrooms are prime targets for the makers of deepfakes, given the role newsrooms play in disseminating information. For example, in breaking news situations, newsrooms are at a heightened vulnerability to publishing unverified information. Releasing a hyper-realistic deepfake as source material could seriously damage the reputation of a news organization, and undermine public confidence in media institutions.¹²⁶ Tom Van de Weghe elaborates on the potential vulnerabilities to newsrooms during high-intensity news cycles, such as “right before elections or in the aftermath of catastrophes, such as the fire of the Notre Dame in Paris,” bad actors could easily enter into the arena with falsehoods and misinformation which could be spread if not detected and subsequently reported on. Journalists and media organizations are in urgent need of tools to detect deepfakes to better equip themselves against the possibility of such attacks.

Deepfakes, whether or not involving the use of AI, raise critical questions about the relationship between media freedom and emerging technologies:

- What further protections do we need for journalists, both in reputation and safety, to combat the use of AI in this sphere?

¹²⁴ Sam Gregory, “Preparing for Deepfakes Against Journalism,” *Witness.org*, 2019, https://lab.witness.org/wp-content/uploads/sites/29/2019/12/case_23_preparing_for_deepfakes_against_journalism.pdf.

¹²⁵ Danielle K. Citron and Robert Chesney, “Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security,” *California Law Review* 107 (2019): 1753, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1640&context=faculty_scholarship.

¹²⁶ Tom Van de Weghe, “Six Lessons from My Deepfakes Research at Stanford,” *Medium*, 29 May 2019, <https://medium.com/jsk-class-of-2019/six-lessons-from-my-deepfake-research-at-stanford-1666594a8e50>.

- How will legacy media and citizen journalists detect and mark deepfakes?
- How can policy-makers respond to the “liar’s dividend” and how do we promote online accountability and trust?

2.6. New Opportunities to Empower Journalists and Protect Media Freedom

2.6.1. Computational Journalism and Data-Driven Journalism

Along with the risks to media freedom, we also observe how AI and emerging digital technologies may provide new opportunities to empower journalists and protect media freedom. Meredith Broussard’s work eschews tired tropes about robots replacing journalists and instead provides an example of how AI and automated technologies can augment journalistic activity. Broussard notes that “AI is a new medium through which journalists can express and exercise their ethical and normative values through the code they implement.”¹²⁷ The example of the Washington Post’s ModBot shifts the labour of moderating comments on a news site to an algorithmic system.¹²⁸ If these content moderation systems can be embedded with the values of quality standards, it could help determine if those comments are meeting quality standards or should be moderated away.

AI can also play a role in investigative journalism. In another example, Broussard discusses a Story Discovery Engine that can be used to anticipate the data points that a reporter needs to write a data-rich story and present them in a centralized, easy-to-navigate format.¹²⁹ By programming the algorithm and data architecture, the system helps journalists uncover potential stories, rather than having to wait for a whistleblower to come forward.¹³⁰

Emerging digital technologies have also empowered novel newsrooms, such as The Markup, where programmers and journalists collaborate to conduct data-driven investigative journalism with a mission to “watch Big Tech that is watching us.” In her keynote speech at the Fairness, Accountability, and Transparency conference, Julia Angwin, founder of The Markup, talks about “treating engineers as journalists with a different skill set” and outlines the importance of engineers’

¹²⁷ Meredith Broussard et al., “Artificial Intelligence and Journalism,” *Journalism & Mass Communication Quarterly* 96, no.3 (2019): 673, <https://journals.sagepub.com/doi/abs/10.1177/1077699019859901>.

¹²⁸ *Ibid* at 679.

¹²⁹ Meredith Broussard, “Artificial Intelligence for Investigative Reporting,” *Digital Journalism* 3, no.6 (2015): 818 <https://www.tandfonline.com/doi/abs/10.1080/21670811.2014.985497>.

¹³⁰ *Ibid*.

collaboration with journalists to help the public understand the risks and harms arising from technologies.¹³¹

2.6.2. Citizen Journalism, Open Source Intelligence

New digital tools are providing citizen journalists with greater capacity for news gathering and investigative journalism. Radsch defines citizen journalism as:

an alternative and activist form of newsgathering and reporting that leverages networked social media and functions outside but in relation to mainstream media institutions, often as a response to shortcomings in the professional journalistic field, and which tends to be driven by different objectives and ideals and rely on alternative sources of legitimacy than mainstream journalism.¹³²

The difference between professional and citizen journalists is that they “occupy different positions of power.”¹³³ Professional journalists operate within conventional, mainstream media and are paid professionally for their work, whereas citizen journalists initially existed within the “field of the blogosphere,” which is now evolving due to emerging digital technologies.¹³⁴

Techniques and advances in open source investigations are key examples of how digital tools can aid in analyzing and collecting evidence for journalists, especially those investigating human rights abuses. Empowered by tools for data collection, analysis, and forensics, individuals can investigate and triangulate evidence on the open web, social media, and news outlets. Uncovering facts and evidence that would otherwise be lost in the vast sea of online information serves some of the core tenets of media freedom and can hold the powerful accountable for their actions.¹³⁵

2.6.3. Digital Privacy and Encryption Tools

Privacy and encryption tools are important for journalists to push back against surveillance. For example, Signal—one of the tools mentioned by

¹³¹ Julia Angwin, “Keynote: Algorithms, Accountability and Journalism,” filmed 10 March 2021 at ACM FAccT Conference, video, 7:09–8:25, <https://www.youtube.com/watch?v=uVpQCXEQbDY>.

¹³² Radsch, *supra* note 83 at 159.

¹³³ *Ibid.*

¹³⁴ *Ibid* at 161.

¹³⁵ See, e.g., “About,” Bellingcat, accessed 8 June 2021, <https://www.bellingcat.com/about/> and “Berkeley Protocol on Digital Open Source Investigations,” Berkeley Law Human Rights Center, accessed 8 June 2021, <https://humanrights.berkeley.edu/programs-projects/tech-human-rights-program/berkeley-protocol-digital-open-source-investigations>.

the International Consortium of Investigative Journalists¹³⁶—provides end-to-end encryption, which enables only the participants in a conversation to read the messages being transmitted. Neither the Signal team nor third-party adversaries can listen to or unscramble the messages during transmission. Unlike cell phone calls or SMS texts, the metadata that can reveal location is minimized, or not collected at all.¹³⁷ Another tool, Tor, is an anonymity network that is a critical privacy technology for journalists, their sources (through their whistleblower submission system and SecureDrop), and their readers.¹³⁸ Tor's mission statement states that it serves "to advance human rights and freedoms by creating and deploying free and open source anonymity and privacy technologies, supporting their unrestricted availability and use, and furthering their scientific and popular understanding." Journalists use these features to strengthen confidentiality around themselves and their sources, and are particularly useful when operating in authoritarian regimes that suppress media freedom.¹³⁹ These examples suggest that technological development can have a positive impact on the media landscape, and that emerging technologies such as AI can create new opportunities for journalism in the 21st century.

¹³⁶ Spencer Woodman, "Five Digital Security Tools to Protect Your Work and Sources," *International Consortium of Investigative Journalists*, 29 January 2018, <https://www.icij.org/inside-icij/2018/01/five-digital-security-tools-to-protect-your-work-and-sources/>.

¹³⁷ Martin Shelton, "Locking Down Signal: A Guide for Journalists," *Medium*, 9 November 2018, <https://mshelton.medium.com/locking-down-signal-d71678f653d3>.

¹³⁸ Jennifer Helsby and Parker Higgins, "Onions on the Side: Tracking Tor Availability for Reader Privacy on Major News Sites," *Freedom of the Press Foundation*, 6 October 2020, <https://freedom.press/news/onions-side-tracking-tor-availability-reader-privacy-major-news-sites/>.

¹³⁹ Lauren Kirchner, "Why Journalists Can Still Trust Tor," *Columbia Journalism Review*, 8 October 2013, https://archives.cjr.org/behind_the_news/can_we_still_trust_tor.php; Adrienne LaFrance, "The Tor Project Helps Journalists and Whistleblowers Go Online Without Leaving a Trace," *NiemanLab*, 19 June 2012, <https://www.niemanlab.org/2012/06/the-tor-project-helps-journalists-and-whistleblowers-go-online-without-leaving-a-trace/>; Alison Macrina, "The Tor Browser and Intellectual Freedom in the Digital Age," *Reference & User Services Quarterly* 54, no.4 (2015) <https://journals.ala.org/index.php/rusq/article/view/5704/7093>.

3. RECOMMENDATIONS AND NEXT STEPS

Our analysis reveals how the concept of media freedom has yet to be defined with the same level of precision as other rights guarantees. All the while, rapid technological change challenges the application of existing understandings of media freedom by fundamentally altering the environment in which the news media operates.

In undermining old media business models while permitting new ones to emerge, and in enabling novel methods of reporting while raising new risks to the safety of journalists, technological change is creating the need to evolve existing understandings of media freedom to grapple with new realities.

In the pages that follow, we draw upon our analysis of the doctrine of media freedom and the changing technological landscape facing the news media. We offer the following initial recommendations to governments and other stakeholders to consider in strengthening and adapting media freedom to the circumstances that prevail today. We believe that the Media Freedom Coalition (MFC) is well-positioned to explore this important work and, through deliberations with member-states and stakeholders, develop more concrete action-oriented recommendations for policy-makers and practitioners.

3.1. Refining the Concept of Media Freedom

Section 1 of our paper describes the doctrine of media freedom as it currently exists at the international level and in the domestic laws of a number of states. The discussion demonstrates how media freedom is related to, yet distinct from, the right to free expression at both the domestic and international levels. We also explain how media freedom confers rights, privileges, and protections upon the news media that can be conceptualized as either negative or positive rights.

Considerable work has been done to develop the doctrine of media freedom over the last several decades, yet the concept still lacks a clear definition. We believe it is important for governments to work with other stakeholders to further develop the concept of media freedom, defining it with the same level of precision as other rights guarantees.

Doing so is not merely of academic interest; we believe there is practical value in better defining the scope and ambit of media freedom as a distinctive set of rights guarantees. The value relates to the role that the media plays in enabling and protecting democratic systems of government. In our view, examining media freedom through the lens of

ordinary free expression guarantees ignores the distinctive “constitutional” role that the media plays in democracies.

Media expression is of a different character than the many other forms of expression that are protected by the free expression protections that are found in international and domestic human rights guarantees. Factual and reliable information on public affairs and other matters of public concern has long been understood to be constitutive of democracy itself, since an informed citizenry is a necessary condition for participatory governance. Correspondingly, news media expression deserves distinctive treatment in the law that reflects the constitutional significance of journalistic activity.

The crucial role the news media plays in enabling democracy speaks to the importance of developing and refining the concept of media freedom. Correspondingly, the MFC should support further research to refine the meaning of media freedom, and it could also use its significant convening power to bring together diverse stakeholders to canvas their views on how media freedom doctrine should evolve. The MFC could consider issuing a declaration in the near term that clarifies its views on media freedom—with a possible view to developing a new international legal instrument that recognizes the utility and distinctiveness of media freedom as a concept.

3.2. Media Freedom Entitlements

One part of the work of further defining and clarifying the concept of media freedom that requires special attention relates to the application of media freedom protections in our era of rapid technological change.

As the discussion above demonstrates, the concept of media freedom emerged during the mid-20th century, at a time when the political economy of the news media was considerably different from today. The relatively high fixed costs that were required to disseminate information to mass audiences posed high barriers to entering the news media market, which in turn led to the dominance of this market by a relatively small number of vertically integrated companies. Not surprisingly, media freedom doctrine, as it developed in the domestic laws of many countries, adopted an “organizational” approach to determining when media freedom protections (such as the reporter’s privilege) applied in particular circumstances that captured most (though by no means all) extant media organizations.

As the development of the internet and other technological changes have given rise to new models of journalism (notably citizen journalism), scholars, activists, and even some courts have begun to question the

appropriateness of the organizational approach to media freedom. Rather than extending media freedom protections on an organizational basis, there are growing calls to extend media freedom protections on a “functional” basis whenever an individual or organization engages in journalistic activity.

We do not express a firm view on whether the organizational, functional, or some third approach to extending media freedom entitlements is appropriate. Our analysis does make clear, however, that the functional approach offers significant advantages over the organizational approach in our era of rapid technological change. Even so, we believe this question requires more study, reflection, and debate that considers the incentives that extending media freedom protections on these various bases create for actors in the modern news media ecosystem.

In this regard, we note the emergence in recent years of a number of media outlets that are both publicly and privately owned which sometimes engage in bona fide journalistic activity, but at other times are engaged in spreading disinformation. We believe that further study is required on how media freedom doctrine should treat such outlets, so as to incentivize them to engage in high-quality reporting in conformity with the ethics of journalism, while dissuading them from perpetuating information disorders.¹⁴⁰ This work would benefit enormously from the support of the MFC, and it could be an integral part of the development and refinement of the doctrine of media freedom to meet the challenges of our new technological age.

3.3. Media Freedom throughout the News Delivery Ecosystem

Further work is also required to examine whether and how media freedom protections should be extended across the contemporary ecosystem of organizations that play a role in developing and disseminating news content.

One of the themes of this report is how technological change has led to the disaggregation of functions that were previously integrated within news media organizations. Given the role that social media companies, news aggregation websites, search engines, and other intermediaries now play in delivering the news, the question arises whether such organizations are entitled to some variety of media freedom protection.

¹⁴⁰ Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking*, (Strasbourg: Council of Europe, 2018) <https://rm.coe.int/information-disorder-report-version-august-2018/16808c9c77>.

Section 1 of our paper describes how media freedom doctrine protects journalistic activity, defined as the gathering of information of public interest for mass dissemination. Simply put, should entities whose role is to disseminate information of public interest that has been gathered in the first instance by others be brought within the edifice of media freedom?

Research has not progressed to the point where we can take a view on this question, but we do note that it merits exploration in the context of further work on media freedom *and* in the ongoing debates concerning the regulation of online platforms and other intermediaries. The question is particularly urgent to consider in view of the conversations underway in Canada,¹⁴¹ Australia,¹⁴² France,¹⁴³ and other nations on redefining the economic relationship between organizations that report the news, and those that play a role in distributing and curating news content.

3.4. State Realization of Positive Media Rights

There is also a pressing need for more work on how states should meet their duty to protect media freedom—especially when it comes to those aspects of media freedom that are best conceptualized as positive rights which can only be enjoyed through affirmative state action.

Consider, for example, the obligation of the state to protect the safety and security of news media personnel against various kinds of threats. As noted, the state obligation to protect media personnel is not simply a question of the fundamental human rights of the individuals who are facing down the threats. Rather, there is also a distinctive state obligation to protect media personnel that flows from the concept of media freedom itself—given the constitutional role the news media play in democratic systems of governance.

Much work has been done by the MFC and other intergovernmental and non-governmental organizations on journalist safety, but we believe it is now time to tie these discussions back to the concept of media freedom and to the nature of the obligations upon states to protect media freedom. Specifically, the MFC should focus the discussion on technology-directed threats to the safety of news media personnel as a

¹⁴¹ David Ljunggren, “Canada Vows to Be Next Country to Make Facebook Pay for News,” *CBC/Radio-Canada*, 18 February 2021,

<https://www.cbc.ca/news/politics/canada-next-country-facebook-news-1.5919665>.

¹⁴² Zoya Sheftalovich, “4 Takeaways from Facebook’s Australian Brawl,” *Politico*, 2 March 2021, <https://www.politico.eu/article/4-takeaways-facebook-australia-brawl/>.

¹⁴³ Timothy B. Lee, “French Regulator Says Google Must Pay to Link to News Sites,” *Wired*, 12 April 2020, <https://www.wired.com/story/french-regulator-says-google-must-pay-to-link-to-news-sites/>.

question of positive obligations upon states to protect media freedom. The MFC could also explore how new technologies can be developed to enhance journalist safety.

The same can be said with regard to the role of the state in protecting the independence of the media and media pluralism against threats that are both public and private in nature—as these are both viewed as aspects of media freedom whose fulfillment requires positive action by the state.

3.5. Business and Human Rights

By way of conclusion, we also believe that governments and other media freedom stakeholders need to consider how the growing recognition that businesses have a normative responsibility to respect human rights interacts with the concept of media freedom. We believe that the need is pressing, given that many of the most significant media freedom challenges documented in this report arise from the actions and activities of the private sector.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) recognize that states have a duty under international law to protect human rights, but that businesses and other private actors have a responsibility to respect human rights. In section 1 of this paper, we find that media freedom is a set of rights, privileges, and protections that are closely related to universal human rights guarantees, although it is not clear whether media freedom itself constitutes a branch of human rights law—inasmuch as only entities that are engaged in journalistic activity are entitled to it.

Regardless of the specific nature of the relationship between media freedom and human rights, there are still important questions of what normative responsibilities businesses bear in relation to media freedom. This is especially true in our era of disruptive technology-fueled innovation, which is impacting the news media landscape. For example, in heeding the command of the UNGPs to conduct due diligence into the actual and potential human rights impact of their business activities, should businesses consider their impact on media freedom? If so, what does such consideration look like? Can media freedom serve as an effective analytical tool to assess a business's impact on the media and information ecosystem in the markets where it operates? And how specifically do the responsibilities of business to respect a concept such as media freedom (to the extent that the responsibility exists) differ from the legal duty of the state to protect media freedom?

In this regard, the incipient literature on the business responsibility to respect human rights in the context of the right to free expression is helpful, inasmuch as it recognizes that states and businesses occupy different roles in society, and therefore what corporate respect for human rights entails is systematically different than what the state duty to protect does.¹⁴⁴ This literature offers a useful conceptual starting point for such discussions, which are pressing given how the adoption of new technologies by the private sector continues to transform the news media landscape.

¹⁴⁴ Evelyn Douek, “The Limits of International Law in Content Moderation,” *UCI Journal of International, Transnational, and Comparative Law*, forthcoming (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709566 and Evelyn M. Aswad, “To Protect Freedom of Expression, Why Not Steal Victory from the Jaws of Defeat?” *Washington & Lee Law Review* 77, no. 2 (Spring 2020): 609–660, <https://scholarlycommons.law.wlu.edu/wlulr/vol77/iss2/4>.

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