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I. Introduction

The diagnosis is in: The newspaper is dying. Technological, economic, and social factors have combined to lead most observers to predict that what was once the foundation of the traditional American press will disappear entirely within the next generation.[1] Scholars and commentators have been closely monitoring this decline for several years,[2] and much has been written about the ways in which the demise of traditional mainstream media might negatively impact the flow of information to the public, and ultimately undermine the strength of our democracy.[3] Although critically important, these conversations have been underinclusive. The dialogue has almost exclusively emphasized the deleterious effect on democracy that is foreseen if newspapers cease to engage in the obviously democracy-enhancing work of newsgathering and the dissemination of information in the public sphere.[4]

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1. *See* PEW RES. CTR. FOR THE PEOPLE & THE PRESS, LIFE IN 2050: AMAZING SCIENCE, FAMILIAR THREATS 5 (2010), http://people-press.org/reports/pdf/625.pdf (last visited Mar. 21, 2011) (noting that 64% of Americans believe paper editions of newspapers will no longer exist by 2050) (on file with the Washington and Lee Law Review).

2. *See* S. Elizabeth Bird, *The Future of Journalism in the Digital Environment*, 10 JOURNALISM 293, 293 (2009) ("Everywhere we look, commentators are sounding the death knell for print journalism."); Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER, Mar. 31, 2008, at 48 ("Few believe that newspapers in their current printed form will survive."); Don Campbell, *Can Newspapers Weather the Techno-Storm?*, USA TODAY (Dec. 12, 2005, 10:09 PM), http://www.usatoday.com/news/opinion/editorials/2005-12-12-campbell-edit_x.htm (last visited Mar. 21, 2011) (describing the decline of print newspapers) (on file with the Washington and Lee Law Review).

3. *See, e.g.*, W. LANCE BENNETT & ROBERT M. ENTMAN, MEDIATED POLITICS: COMMUNICATION IN THE FUTURE OF DEMOCRACY 19 (2001) (noting that "mediated communication" may impede "democratic engagement"); BRIAN MCNAIR, JOURNALISM AND DEMOCRACY: AN EVALUATION OF THE POLITICAL PUBLIC SPHERE 7 (2000) (noting an "adverse impact on journalists' ability to report politics objectively"); CASS R. SUNSTEIN, REPUBLIC.COM 8 (2001) [hereinafter SUNSTEIN, REPUBLIC.COM] (discussing policy reforms designed to "ensure that the new communications technologies serve democracy, rather than the other way around").

4. *See* SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R40700, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION 21 (2010), *available at* http://www.fas.org/sgp/crs/

Yet scholars and commentators have neglected a second—perhaps less obvious, but arguably more important—consequence of the death of newspapers. Indeed, with all of the discussion of the ramifications for the gathering and dissemination of the news, discussions about the risks that might accompany the death of newspapers have almost entirely ignored the ramifications for development and enforcement of the law.

For the past 100 years, newspapers and traditional media companies have played a critical role as legal instigators and enforcers. In this role, these entities claim credit for the establishment and implementation of some of the nation's most important statutory and constitutional mandates. Their death threatens the preservation, enforcement, and further development of these mandates. This neglected threat—which is of nothing less than constitutional proportions—is arguably more serious than the much-discussed threat to newsgathering and dissemination. While new players in the changing media ecology may ultimately fill the investigative and information-dissemination roles of newspapers that have been so important to our democracy, there is no apparent successor to the role of legal instigator and enforcer. As a result, the academic and public discussion must expand to consider ways to mitigate the fall-out from the waning of the legal instigation and enforcement once performed by these dying entities.

This Article begins that important inquiry. It establishes for the first time the critical, but underappreciated, role that traditional media entities have played as legal instigators and enforcers. These organizations, most

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misc/R40700.pdf ("Some observers suggest that escalating problems in the newspaper industry could have broad social and civic implications, as fewer reporters monitor increasingly complex decisions by government and business."); Virginia Gray, *The Decline of Newspaper Coverage*, *in* OLD MEDIA, NEW MEDIA, AND THE CHALLENGE TO DEMOCRATIC GOVERNANCE: FINDINGS FROM THE PROJECT ON MEDIA & GOVERNANCE 40 (Univ. of Va. Miller Ctr. of Public Affairs ed., 2010) [hereinafter MILLER REP.], *available at* http://web1.millercenter.org/publications/mediagovt.pdf ("Newspapers and mass media in general serve two purposes in a democracy: Educating the public and acting as 'watchdogs.' It is hard to imagine democracy without a free press serving those functions."); Michael Hirschorn, *End Times*, ATLANTIC, Jan.–Feb. 2009, at 41, 43 (noting that the collapse of print journalism "will seriously damage the press's ability to serve as a bulwark of democracy"); John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, THE NATION, Apr. 6, 2009, at 11, 11 (arguing that the end of newspaper journalism will bring with it "the most serious threat in our lifetimes to self-government"); Benjamin L. Cardin, Op-Ed., *With No Newspapers, as Thomas Jefferson Knew, Democracy Suffers*, U.S. NEWS & WORLD REP. (May 4, 2009), http://www.usnews.com/opinion/articles/2009/05/04/with-no-newspapers-as-thomas-jefferson-knew-democracy-suffers.html (last visited Mar. 21, 2011) (noting that across the nation, "small towns and big cities are losing something irreplaceable") (on file with the Washington and Lee Law Review).

prominently known for engaging in conventional newsgathering and dissemination, have also been pursuing constitutional and statutory litigation, lobbying for legislation, and pushing for openness in government with large-scale, coordinated efforts.[5] Even if the dismantling of the many newsgathering functions once performed by newspapers is accompanied by equivalent or even superior conveyance of information to the public by other entities in the new media ecology, the traditional news media's legal-instigator role remains unfilled. For various reasons, no obvious replacement has emerged to take on that role.[6]

Part II outlines the literature surrounding the pending death of newspapers[7] and demonstrates the ways in which this discourse has focused

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5. *Infra* Part II.

6. *Infra* Part III.

7. Television news is also experiencing significant decline. *See, e.g.*, Brian Stelter, *Job Cuts at ABC Leave Workers Stunned and Downcast*, N.Y. TIMES (May 1, 2010), http://query.nytimes.com/gst/fullpage.html?res=9D04E1D61E3DF932A35756C0A9669D8B63&scp=2&sq=Job%20Cuts%20at%20ABC%20Leave%20Workers%20Stunned%20and%20Downcast&st=cse (last visited Mar. 21, 2011) (noting that "it is exceedingly rare for a newspaper or a network to shed a quarter of its employees all at once, as ABC has done," and emphasizing that "digital journalists" will be doing the work of many former television reporters) (on file with the Washington and Lee Law Review); Don Irvine, *CBS's Kaplan: CNN 'In a Freefall,'* AIM.ORG (Apr. 21, 2010), http://www.aim.org/don-irvine-blog/cbss-kaplan-cnn-in-a-freefall/ (last visited Mar. 21, 2011) (highlighting that "there were 24 million people watching news on a given day last year," while "[t]hirty years ago, it was over 100 million") (on file with the Washington and Lee Law Review); *see also The Future of Journalism: Hearing Before the Subcomm. on Communication, Technology, and the Internet of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 3 (2009) (statement of Sen. John F. Kerry, Chairman, Subcomm. on Communications, Technology, and the Internet) [hereinafter *Future of Journalism Hearing*] ("Most experts believe that what we are seeing happen in newspapers is just the beginning. Soon, perhaps in a matter of a few years, some predict that television and radio will experience what newspapers are experiencing now."); Pew Res. Ctr. Project for Excellence in Journalism, *Network TV*, THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (Mar. 15, 2010), http://stateofthemedia.org/2010/network-tv-summary-essay/ (last visited Mar. 21, 2011) [hereinafter STATE OF THE MEDIA 2010, *Network TV*] ("Collectively, in the evening, the three network newscasts lost more than 565,000 viewers during the year, or 2.5%, from the year before.") (on file with the Washington and Lee Law Review); Pew Res. Ctr. Project for Excellence in Journalism, *Local TV*, STATE OF THE MEDIA 2010, http://stateofthemedia.org/2010/local-tv-summary-essay/ (last visited Mar. 21, 2011) [hereinafter STATE OF THE MEDIA 2010, *Local TV*] ("[V]iewership at affiliates of the four major networks, which produce most of the local television news in the U.S., declined across all timeslots.") (on file with the Washington and Lee Law Review); Chris V. Thangham, *Research*: *More People Getting News Online Than From Newspapers*, DIGITAL J. (Dec. 26, 2008), http://www.digitaljournal.com/article/264000 (last visited Mar. 21, 2011) (noting that "[a]mong adults under 30, the Internet already ties TV as the primary source for news for 59 percent of the population," a number that appears to be increasing substantially over time) (on file with the Washington and Lee Law Review). This Article focuses primarily on

on the impact this collapse will have on information dissemination and societal communications about important public issues. It asserts that the death of newspapers can also be expected to bring about a critical lapse in legal efforts to demand accountability and accessibility of government. Using examples in the areas of (1) groundbreaking constitutional litigation, (2) state open-meetings and open-records acts, and (3) important democracy-enhancing federal legislation, it demonstrates that the major players in all three of these areas have been newspapers, most of which are now defunct or in serious financial straits. Using real-world case studies of legal instigation and enforcement by the traditional press, it argues that many of the last generation's most important advances to democracy would be unlikely to be replicated today because the individual newspapers or newspaper-based organizations that historically spearheaded such efforts are no longer in a position to litigate cases and no longer have the financial means to support legislative efforts on Capitol Hill. Moreover, these real-world examples demonstrate that these efforts are ongoing battles—ones that cannot be fought once and permanently won—and that there is a serious risk of retrenchment once newspapers are no longer able to fight the fight.

Part III highlights the reasons to doubt that the new media that have stepped in to perform some of the newspapers' other, information-sharing functions will be able or willing to fulfill these critical legal instigation and enforcement roles. Emphasizing the almost total disaggregation of a wide variety of roles that newspapers once unitarily played in American society, it argues that the entities that seem poised to fill the newsgathering and public information tasks nevertheless lack the "fourth estate" self-identity and the cohesive industry structure to take on the legal instigation and enforcement pursuits that were outgrowths of newspapers' more aggregated functions. Equally important, these entities also lack the corporate coffers and capitalist motivations to consistently fight the long-term legal battles that, in the past, simultaneously served newspapers' overarching business model while unquestionably resulting in greater public good.

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newspapers, because newspapers have traditionally engaged in more political and investigative reporting that required open-government litigation. *See, e.g.*, Edward Felsenthal, *Trial By Journalism: Toward a Burden of Proof for Investigative Reporting*, COMM. & THE L., July 1994, at 21, 24 (noting that traditionally "investigative reporting was considered primarily a print enterprise because of the amenability of newspapers to nonvisual, detailed, and complex events" and that "[t]elevision reporters rarely can spend that long on any story because of the rapid pace of television newsgathering"). Additionally, many press organizations that have supported litigation and legislation efforts have been heavily populated by newspapers. *Infra* notes 119–24, 160.

Part IV concludes by outlining several initial options for filling these legal instigation and enforcement gaps, including pro bono efforts, university-based programs, public subsidies of "watchdog" lawsuits, the retooling of open-government legislation, and the creation or expansion of non-profit lobbying and litigation entities. It discusses the benefits and disadvantages of these prospects as potential replacements for the critical legal roles newspapers have performed. It observes that even if other sources of funding might sustain something approximating our former system of journalism as the old media die away, there are serious difficulties in creating the litigation and legislation incentives that motivated newspapers to fulfill the legal instigation and enforcement roles within the old media framework.

II. Dying Newspapers and the Loss of Legal Instigation and Enforcement

Although the problem has rarely been acknowledged in even the most dire of forecasts about the future of American media,[8] the death of newspapers can be expected to bring about a perilous lapse in legal efforts to demand government accountability and accessibility.

A. The Decline of the American Newspaper

The forecast for newspapers is certainly grim. It is now almost without question that the American media ecology will radically and permanently change in the near future and that newspapers as they now exist will cease to be a part of that landscape.[9]

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8. *See, e.g.*, Bird, *supra* note 2, at 293 ("Everywhere we look, commentators are sounding the death knell for print journalism."); Paul Farhi, *Don't Blame the Journalism: The Economic and Technological Forces Behind the Collapse of Newspapers*, AM. JOURNALISM REV. (Oct.–Nov. 2008), http://www.ajr.org/Article.asp?id=4623 (last visited Mar. 21, 2011) ("I suspect someday our former readers will be peering forlornly toward their empty doorsteps and driveways and wondering where the paper they once loved has gone.") (on file with the Washington and Lee Law Review); Alterman, *supra* note 2, at 48 ("[I]t no longer requires a dystopic imagination to wonder who will have the dubious distinction of publishing America's last genuine newspaper."); James Warren, *When No News Is Bad News*, ATLANTIC (Jan. 21, 2009), http://www.theatlantic.com/magazine/archive/2009/01/when-no-news-is-bad-news/7267/ (last visited Mar. 21, 2011) (chronicling the "seeming death spiral" of the media industry) (on file with the Washington and Lee Law Review).

9. *See* Alterman, *supra* note 2, at 48 ("[I]t no longer requires a dystopic imagination to wonder who will have the dubious distinction of publishing America's last genuine

The change already is well underway. For years, big-city newspapers were anchors of the mass media world. Today, they are collapsing with great frequency. The 150-year-old *Rocky Mountain News*, a Denver, Colorado daily newspaper that had won four Pulitzer Prizes in the last ten years, closed its doors in early 2009.[10] The *Christian Science Monitor* ended its daily print edition,[11] and the *Seattle Post-Intelligencer* and *Honolulu Star-Advertiser* soon followed suit.[12] Many newspapers widely regarded as the great regional dailies—including the *Chicago Tribune*, the *Los Angeles Times*, the *Philadelphia Inquirer*, and the *Minneapolis Star Tribune*—are in bankruptcy.[13] The *Miami Herald*, the *Detroit News*, the *Seattle Times*, and the *Boston Globe* may also be poised to fall. [14] Equally significant, numerous newspaper chains, including those that own and operate smaller and mid-sized newspapers, are struggling or failing entirely.[15] "It is now possible to contemplate a time in the near future when major towns will no longer have a newspaper."[16] Indeed, the Project for Excellence in Journalism predicts that this occurrence looms forebodingly

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newspaper.").

10. Christine Tatum, *In Denver, Residents Lament the Closing of a Newspaper*, N.Y. TIMES, Mar. 2, 2009, at B5.

11. *See* Stephanie Clifford, *Christian Science Paper to End Daily Print Edition*, N.Y. TIMES, Oct. 29, 2008, at B8 ("After a century of continuous publication, the *Christian Science Monitor* will abandon its weekday print edition and appear online only, its publisher announced Tuesday.").

12. *See Honolulu Advertiser Prints Last Edition; 400 Lose Jobs*, L.A. TIMES, June 6, 2010, at A25 ("That rivalry ends Sunday when the *Advertiser*, Hawaii's largest newspaper, publishes its last edition after being bought out and combined with its smaller rival. More than 400 reporters, pressmen and other workers are losing their jobs."); William Yardley & Richard Pérez-Peña, *Seattle Paper Shifts Entirely to the Web*, N.Y. TIMES, Mar. 17, 2009, at A1 ("The *Seattle Post-Intelligencer* will produce its last printed edition on Tuesday and become an Internet-only news source, the Hearst Corporation said on Monday, making it by far the largest American newspaper to take that leap.").

13. *See* Rachel Smolkin, *Cities Without Newspapers*, AM. JOURNALISM REV. (June–July 2009), http://www.ajr.org/Article.asp?id=4781 (last visited Mar. 21, 2011) (noting that "six companies that publish daily newspapers have sought Chapter 11 bankruptcy protection") (on file with the Washington and Lee Law Review).

14. *See* Richard Pérez-Peña, *As Cities Go from Two Papers to One, Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, at A1 ("Many newspapers—from the *Miami Herald* to the *Chicago Sun-Times*—have been put up for sale, with no buyers on the horizon.").

15. *See* Nichols & McChesney, *supra* note 4, at 13 (noting past and prospective job cuts).

16. Walter Isaacson, *How to Save Your Newspaper*, TIME.COM (Feb. 5, 2009), http://www.time.com/time/business/article/0,8599,1877191,00.html (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

on the horizon.[17] "Among the cities faced with that distinction are New Haven, Connecticut, whose *New Haven Register* is the flagship of the bankrupt *Journal Register* chain, and San Francisco, whose *Chronicle* has been losing money for years."[18]

As observers track the industry decline,[19] the statistics tell the story of an era drawing to a close. In the last three years, 15,000 reporting and editing jobs have disappeared, shrinking already-diminishing newsrooms by another 30%.[20] Newspapers now annually devote $1.6 billion less to news than they did in 2007.[21] The newspaper industry has nearly 20% fewer employees than it had a decade ago, with a total of more than 50,000 jobs lost since mid-2008.[22]

Although the questions of what entities will replace newspapers and how they will do so remain the subject of great academic and industry debate,[23] one clear trend is the movement toward what some

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17. *See* Pew Res. Ctr. Project for Excellence in Journalism, *Overview*, THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2009), http://www.stateofthemedia.org/2009/newspapers-intro/ (last visited Mar. 21, 2011) [hereinafter STATE OF THE MEDIA 2009, *Overview*] ("There is not yet a major city without a newspaper, but that, too, could be coming soon.") (on file with the Washington and Lee Law Review).

18. *Id.*

19. The website "newspaperdeathwatch.com" chronicles the seemingly endless wave of newspaper closures. Newspaper Death Watch, http://newspaperdeathwatch.com/ (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review). Others, dubbed "Paper Cuts" and "newspaperlayoffs.com," track personnel layoffs and eliminations. Paper Cuts, http://newspaperlayoffs.com/ (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

20. Pew Res. Ctr. Project for Excellence in Journalism, *Key Findings*, STATE OF THE MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (Mar. 15, 2010), http://www.stateofthemedia.org/2010/overview_key_findings.php (last visited Jan. 14, 2011) ("Newspaper staffs continued to shrink in 2009. We estimate with colleague Rick Edmonds that by year's end 5,900 more full-time newsroom jobs were lost, disproportionately at larger papers, on top of a similar number in 2008.") (on file with the Washington and Lee Law Review).

21. Pew Res. Ctr. Project for Excellence in Journalism, *Newspapers*, STATE OF THE MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (Mar. 15, 2010), http://www.stateofthemedia.org/2010/newspapers-summary-essay/ (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

22. *Id.*

23. *See* Robert Kuttner, *The Race*, COLUM. JOURNALISM REV., Mar.–Apr. 2007, at 24, 24 (discussing the possibility of newspapers "stay[ing] alive as hybrids" with primarily online presence); Smolkin, *supra* note 13 ("Tiny but ambitious nonprofit online ventures are springing up as supplements or alternatives to the *newspapers* in their cities. They focus on public affairs and watchdog journalism—the very functions that metro *newspapers* have long prided themselves on providing."); Fred Brown, *Studies: Americans Are Tuning Out*

have called the "disaggregation"[24] of newspaper product.[25] A generation ago, the newspaper was the primary—or perhaps only—source of a wide range of useful information for many citizens.[26] They went to it for classified ads, for movie listings, for recipes, and for sports commentary.[27] Some went to it for local news about city councils and county zoning commissions, and some went to it for national news about the actions of Congress and the President. Most significantly, many who went to it for classified ads, movie listings,

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Traditional News, QUILL, Dec. 2005, at 34, 34 ("[*N*]*ew* information media aren't necessarily fully replacing the old . . . some people—maybe only a few, possibly quite a few—just drop *out* of the world of news entirely."); John Nichols, *Newspapers . . . And After?*, THE NATION, Jan. 29, 2007 at 11, 16 ("[W]hile a few high-profile journalists have begun to migrate . . . to the blogosphere, they tend to arrive as commentators rather than gatherers of news . . . . [T]he web may someday be home to sites that generate the revenues needed . . . to produce meaningful journalism, [but] that day has yet to arrive in any real sense.").

24. *See*, *e.g.*, Conor Friedersdorf, *They Came for the Classifieds . . . and Then the Sports . . .* , ATLANTIC (July 20, 2009), http://andrewsullivan.theatlantic.com/the_daily_dish/2009/07/they-came-for-the-classifieds-and-then-the-sports.html (last visited Mar. 21, 2011) (noting that the "disaggregation of newspaper content is an inevitability") (on file with the Washington and Lee Law Review).

25. *See, e.g.*, Philip M. Napoli, *Navigating Producer-Consumer Convergence: Media Policy Priorities in the Era of User-Generated and User-Distributed Content* 16 (Donald McGannon Comm. Res. Ctr., Working Paper, 2009), *available at* http://fordham.academia.edu/PhilipNapoli/Papers/175952/Navigating_Producer-Consumer_Convergence_Media_Policy_Priorities_in_the_Era_of_User-Generated_and_User-Distributed_Content (discussing fragmentation of media context and platforms, and noting that "many people who may have bought a newspaper primarily for the sports or business section subsidize the production of less popular sections (e.g., international affairs)," but that "disaggregation undermines the various cross-subsidy mechanisms that long have been central to media content production"); Cathy Taylor & Pew Res. Ctr. Project for Excellence in Journalism, *The Future of Advertising*, *in* THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (Mar. 17, 2008), http://stateofthemedia.org/2008/special-reports-the-future-of-advertising/ (last visited Mar. 21, 2011) ("The underlying reason for many of the downward spending trends [in newspaper advertising] is digital technology, which has, effectively, splintered mass media.") (on file with the Washington and Lee Law Review); Pew Res. Ctr. Project for Excellence in Journalism, *News Investment*, *in* THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2007), http://www.stateofthemedia.org/2007/overview/news-investment (last visited Mar. 21, 2011) ("[N]ewspapers . . . were one of the last platforms attempting to provide people with a complete diet of the news—from international to local, from hard news to lifestyle.") (on file with the Washington and Lee Law Review).

26. *See* Philip Meyer, *The Elite Newspaper of the Future*, AM. JOURNALISM REV. (Oct.–Nov. 2008), http://www.ajr.org/Article.asp?id=4605 (last visited Mar. 21, 2011) ("A metropolitan newspaper became a mosaic of narrowly tailored content items. . . . Sending everything to everybody was a response to the Industrial Revolution, which rewarded economies of scale.") (on file with the Washington and Lee Law Review).

27. Napoli, *supra* note 25, at 16.

recipes, or sports stumbled upon the local and national news along the way, and in so doing became a part of a wider informed citizenry.[28] Today, as newspapers' circulations plunge[29] and papers of all sizes face financial woes unparalleled in earlier eras,[30] one explanation for the public's abandonment of newspapers as a resource is that the information that once was served in a bundle by the newspaper has now disaggregated into a vast array of specialty information sources.[31] Nearly all of these disaggregated sources are housed online and offered for free or at limited cost, and most do an arguably better job of focusing on a limited category of information than the newspaper once did of providing all of it—in part because technology now allows online interactive searching and permits readers to put the information immediately to use.[32] Technology has "scrambled every aspect of the relationship between news producers and people who consume news."[33] Readers who once relied upon the

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28. *See* ROGER F. FIDLER, MEDIAMORPHOSIS: UNDERSTANDING NEW MEDIA 246 (1997) (reporting that aggregated news content "attempts to broaden our perspectives and provide a dynamic context for introducing new subjects of importance and potential interest," while disaggregated content, "by design, limits perspectives and restricts exposure to new ideas, issues, and topics"); Friedersdorf, *supra* note 24 (observing that there was "civic utility in the fact that a guy going for the sports page happened to see what his local mayor was up to by virtue of flipping through the sections"); Cass R. Sunstein, *Boycott the Daily Me!*, TIME.COM (June 4, 2001), http://www.time.com/time/interactive/politics/undemocratic.html (last visited Mar. 21, 2011) [hereinafter Sunstein, *Boycott*] (noting that the dangers of disaggregation were "diminished by general-interest newspapers, magazines and broadcasters" and that "[w]hen reading the local newspaper, you may come across stories . . . that you might read but which you might not have placed in your Daily Me") (on file with the Washington and Lee Law Review).

29. *Infra* notes 78, 326 and accompanying text.

30. *Infra* notes 319–27 and accompanying text.

31. *See* MILLER REP., *supra* note 4, at 38 (noting increased availability of topic choice and the Internet's ability to "unbundle news").

32. *See, e.g.*, *id.* ("Specialized content and content providers do not allow for information spill-over. Sports enthusiasts will not accidentally read political news headlines by going to *Sports Illustrated*'s web site, whereas they may have done so with a print newspaper."); Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1554 (2008) ("The new Internet media may cater to more individualized and fractured tastes, ignore local, state, and federal political institutions, and be even more beholden to the goals of advertisers . . . ."); Andrew Nibley, *The Internet and the New Generation of Newsreaders*, 20 HIST. J. OF FILM, RADIO, AND TELEVISION 37, 38 (2000) ("Personalization and fragmentation of the news audience is taking place [through the Internet]."); David Simon, *Does the News Matter to Anyone Anymore?*, WASH. POST, Jan. 20, 2008, at B1 ("Soon enough, when technology arrived to test the loyalty of longtime readers and the interest of new ones, the newspaper would be offering to cover not more of the world and its issues, but less of both.").

33. Pew Res. Ctr. Project for Excellence in Journalism, *Understanding the*

newspaper now visit Craigslist or other local online classified advertising websites for buying and selling products, Fandango for movie listings, ESPN.com for sports commentary, and the Food Network's website for recipes.[34] They rely on a favorite blog,[35] Facebook posts,[36] or individualized Google or Yahoo homepages to provide the news headlines that are of specific interest to them.[37] Just two years ago, a major tipping point was reached when, for the first time in history, the Pew Research Center for the People and the Press, in its annual study of news

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Participatory News Consumer: The News Environment in America, JOURNALISM.ORG (Mar. 1, 2010), http://www.journalism.org/analysis_report/news_environment_america (last visited Mar. 21, 2011) [hereinafter *Understanding the Participatory News Consumer*] (on file with the Washington and Lee Law Review).

34. The use of online classified advertising sites doubled from 2005 to 2009, with 9% of online adults using an online classified advertising site on a typical day. In the meantime, newspaper classified advertising revenue has dropped from over $17.3 billion in 2005 to $9.975 billion in 2008. Pew Res. Ctr. Internet & Am. Life Project, *Online Classifieds* (May 22, 2009), http://www.pewinternet.org/Reports/2009/7--Online-Classifieds.asp (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review); *see also* Brooks Barnes, *Across U.S. ESPN Aims to Be the Home Team*, N.Y. TIMES, Jul. 19, 2009, at A1 (noting ESPN's "expanding network of cable channels, Web sites and mobile services."); David Twiddy, *Movie Theaters Cut Print Show Times as Web Gains*, PREVIEWS, Sept. 2009, at 4, 4, *available at* www.natocalnev.org/pdf/NATO_September_09.pdf ("Filmgoers who have long turned to the local newspaper to find theatres and show times for movies may have to start looking elsewhere as theatre chains rethink the value of paper and ink in a digital age.").

35. *See Understanding the Participatory News Consumer*, JOURNALISM.ORG (Mar. 1, 2010), http://www.journalism.org/analysis_report/news_and_internet (last visited Mar. 21, 2011) (finding that 5% of Internet users who named a favorite online news site cited a blogger's site as their favorite, and 11% of online news users over the age of eighteen use a blogger's website on a typical day) (on file with the Washington and Lee Law Review); PEW INTERNET & AM. LIFE PROJECT, BLOGGERS: A PORTRAIT OF THE INTERNET'S NEW STORYTELLERS 5 (2006) (finding that "9% of internet users say they have gotten news from blogs and 3% do so on a typical day").

36. *See* Pew Internet & American Life Project, *Understanding the Participatory News Consumer: News Gets Personal, Social, and Participatory* (Mar. 1, 2010), http://www.pewinternet.org/Reports/2010/Online-News/Part-5/2-News-as-a-social-activity.aspx?r=1 (last visited Mar. 21, 2011) ("[Fifty-seven percent] of online Americans use social networking sites . . . and 97% of them are online news consumers. Some 51% of the social networking users who are in the online-news population say that on a typical day they get news from people they follow on sites like Facebook.") (on file with the Washington and Lee Law Review).

37. *See* Pew Res. Ctr. Project for Excellence in Journalism, *Understanding the Participatory News Consumer: How Internet and Cell Phone Users Have Turned News into a Social Experience* (Mar. 1, 2010), http://www.journalism.org/analysis_report/understanding_participatory_news_consumer (last visited Mar. 21, 2011) ("[Twenty-eight percent] of [I]nternet users have customized their home page to include news from sources and on topics that particularly interest them.") (on file with the Washington and Lee Law Review).

consumption, found more people saying they rely mostly on the Internet for news than on newspapers.[38] The entities from which they were receiving that news were not delivering all of the things newspapers once delivered in a bundle.[39]

There is a great deal of concern among scholars and commentators that this disaggregation necessarily signals the darkening of several once-vibrant sectors of our civic life.[40] The argument has been that the risk of losing the unitary newspaper model (and its accompanying come-for-the-sports-and-stumble-upon-the-city-council-meeting dynamic) is that the public simply will not have a structure in place to promote real and meaningful newsgathering about the public sphere.[41]

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38. Pew Res. Ctr. for the People & the Press, *Internet Overtakes Newspapers as News Outlet* (Dec. 23, 2008), http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review). *See also* USC ANNENBERG SCHOOL CTR. FOR THE DIGITAL FUTURE, 2010 DIGITAL FUTURE REP. 3 (2010), *available at* http://www.digitalcenter.org/pdf/2010_digital_future_final_release.pdf (finding that "56 percent of Internet users ranked newspapers as important or very important sources of information . . . a decrease from 60 percent in 2008 and below the Internet (78 percent), and television (68 percent)").

39. *See* MILLER REP., *supra* note 4, at 38 ("The increased availability of topic choice and the internet's ability to 'unbundle' news allows for citizens to access content they personally value, regardless of its democratic worth.").

40. *See* FIDLER, *supra* note 28, at 247 (noting that the *Daily Me* cannot expose readers to the same "socially significant stories" as newspapers).

41. *See* BENNETT & ENTMAN, *supra* note 3, at 19 (noting that though "new technologies hold the potential for creating common communication across broad communities," the trend "toward ever more personalized, individually targeted communication may result in greater fragmentation of interests, social realities, and political impulses"); MCNAIR, *supra* note 3, at 7 ("The substantive information content of political journalism is said to be diluted not only by market-driven commercialization . . . but by a second group of causes: The negative impact of new technologies on newsgathering and presentation. News is faster, more immediate, more 'live' than ever before . . . ."); MILLER REP., *supra* note 4, at 38–39 ("In the Internet age, more citizens opt out of consuming politically related information, meaning fewer are receiving political information and fewer are politically engaged. Second, citizens who self-select political information choose partisan or one-sided information sources without being exposed to a fuller marketplace of competing ideas."); SUNSTEIN, REPUBLIC.COM, *supra* note 3, at 8 ("[P]eople should be exposed to materials that they would not have chosen in advance. Unplanned, unanticipated encounters are central to democracy itself."); Nicholas D. Kristof, Op-Ed., *The Daily Me*, N.Y. TIMES, Mar 19, 2009, at A31 ("The danger is that this self-selected 'news' acts as a narcotic, lulling us into a self-confident stupor through which we will perceive in blacks and whites a world that typically unfolds in grays."); Sunstein, *Boycott*, *supra* note 28 ("If the public is fragmented and if members of different groups design their own preferred news packages, the consequence might well be greater fragmentation as group members move one another toward more extreme positions. Extremists will become even more extreme.").

A companion fear is that the new delivery mechanisms for the material that was once found in the newspapers' hard-news pages—bloggers, online news aggregators, and social media networks—are designed primarily to *pass along* information, but not to *generate* it. The shift away from newspapers, the argument goes, is not just a shift in delivery mechanism but a shift in function—a replacement of investigation with mere dissemination.[42]

There is at least some empirical basis for this position. A recent report from the Project for Excellence in Journalism states that for all the robust activity in social media and blogs, "these new media are largely filled with debate dependent on the shrinking base of reporting that began in the old media."[43] The Project's ongoing analysis of more than a million blogs and social media sites finds that 80% of the links are to mainstream, legacy media, which are themselves dying out at alarming rates.[44] Separate studies confirm that new media platforms do not yet serve as a primary source of local news.[45] Rather, they are more devoted to "repeatage" than to

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42. *See, e.g.*, *Future of Journalism Hearing*, *supra* note 7 (statement of David Simon, former newspaper journalist) ("The internet is a marvelous tool and clearly it is the informational delivery system of our future, but thus far it does not deliver much first-generation reporting. Instead, it leeches that reporting from mainstream news publications, whereupon aggregating websites and bloggers contribute little more than repetition, commentary and froth."); Arthur S. Hayes et al., *Shifting Roles, Enduring Values: The Credible Journalist in a Digital Age*, 22 J. OF MASS MEDIA ETHICS 262, 269 (2007) ("[A] diet of nothing but commentary increases the volume of discourse without necessarily adding to its quality. Similarly, aggregation can be helpful, and the ability to personalize information is a key benefit of the Internet. But aggregation relies on algorithms rather than the individual judgment."); Lucy Dalglish, Exec. Dir. of the Reporters Comm. for Freedom of the Press (RCFP), Prepared Remarks for the Association of Alternative Newsweeklies' First Amendment Lunch, (June 27, 2009), http://posting.altweeklies.com/aan/full-text-of-lucy-dalglishs-preparedremarks/Article?oid=1234148 (last visited Mar. 21, 2011) (complaining that Americans are unaware that entities from which they receive their news are not producing it, and asking, "don't they know that the Googles and Yahoos of the world rely on The Associated Press, which largely relies on stories from newspapers and broadcasters all over the country?") (on file with the Washington and Lee Law Review).

43. Pew Res. Ctr. Project for Excellence in Journalism, *Major Trends*, STATE OF THE MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (Mar. 15, 2010), http://www.stateofthemedia.org/2010/overview_major_trends.php (last visited Nov. 2, 2010) (on file with the Washington and Lee Law Review).

44. *Id.*

45. *The Future of Media and Information Needs of Communities: Serving the Public Interest in the Digital Era*: *Fed. Communications Comm. Workshop* (2010), http://reboot.fcc.gov/futureofmedia/serving-the-public-interest-in-the-digital-era (last visited Mar. 21, 2011) (statement of Andrew Jay Schwartzman) (on file with the Washington and Lee Law Review).

reportage.[46] Some have even suggested, in the wake of these developments, that the plural of "anecdote" is "blog."[47]

B. The Unrecognized Threat to Democracy

Interestingly, the constant undercurrent of this dialogue appears to be a presupposition that if only the newsgathering void can adequately be filled—that is, if, in the inevitable disaggregation of newspaper product, some entity retains or adopts the role of effectively disseminating information about public affairs—then democracy will be safe.[48] The assumption appears to be that if the world of communications can realign itself in such a way that the citizenry is purposefully or accidentally exposed to regular public affairs reportage, the threatened harms to democracy from the death of newspapers will not occur.[49]

This assumption is false. The truth is that newsgathering and the attendant provision of public affairs reporting is only one piece of what newspapers have done to preserve, stabilize, and advance our democracy—and maybe not even the most important piece. Without newspapers and newspaper organizations at the helm—instigating, enforcing, coordinating, and financing legal change, much, if not most, of the nation's important open-government law from the last generation simply would not have come to pass.

This Section explores three critically important ways in which this is true. First, it is evidenced in the area of important constitutional litigation, where newspapers and newspaper companies have been at the forefront of major U.S.

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46. *Id.*

47. A. Michael Froomkin, *The Plural of Anecdote Is 'Blog,'* 84 WASH. U. L. REV. 1149, 1149 (2006) (quoting Alex Harrowell, *The Plural of "Anecdote" Is Not "Data," It's "Blog,"* A FISTFUL OF EUROS (Apr. 20, 2006), http://fistfulofeuros.net/afoe/economics-and-demography/the-plural-of-anecdote-is-not-data-its-blog/ (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review)).

48. *See, e.g.*, MILLER REP., *supra* note 4, at 29, 46–51 (addressing concern that "the newspaper business has been subsidizing public interest journalism and . . . [it] will adapt in a way that reduces the volume and quality of journalism as a public good or that the public will lose a collective good for democracy"); Cardin, *supra* note 4 ("Do we need to create new options that will help ensure the survival of investigative and insightful reporting that is most often done today by newspapers? I believe we do . . . . I believe that a well-informed public is the core of our democracy."); David Swensen & Michael Schmidt, Op-Ed., *News You Can Endow*, N.Y. TIMES, Jan. 27, 2009, at A31 ("Readers turn increasingly to the Internet for information—even though the Internet has the potential to be, in the words of the chief executive of Google, Eric Schmidt, 'a cesspool' of false information. If . . . a well-informed citizenry is the foundation of our democracy, then newspapers must be saved.").

49. *See, e.g.*, MILLER REP., *supra* note 4, at 29, 46–51 (suggesting policies that might correct for the informational deficit developing as the result of newspaper closures).

Supreme Court battles that recognized far-reaching public rights. Second, in literally every state in the union, the major force behind the adoption of open-meetings acts and open-records laws, and the entities that overwhelmingly invoke them for public-serving purposes after their adoption, are newspaper companies. Finally, this democracy-enhancing legal instigation role of newspapers has been unmistakably seen in major movements for important federal legislation, most notably the watershed Freedom of Information Act, which was ushered in at the hands of a conglomeration of newspapers. In each of these areas, had the circumstances been different and newspapers not been in a position to lead the charge and finance the movement, the public losses undoubtedly would have been significant. This history, which has been largely unacknowledged in modern debates over the pending demise of newspapers, suggests that absent a clear replacement for these legal instigators, the doctrinal and legislative consequences for a nation without newspapers may be severe.

1. Important Constitutional Developments

Although it has rarely been acknowledged, newspapers have been the key legal instigator of openness in government in the United States. A sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively fought for fundamental democratic principles that had public benefits beyond the scope of the individual litigants' successes. These legal instigators, many of whom are now defunct, or facing significant financial crisis, were singularly responsible for moving the U.S. Supreme Court to recognize widespread categories of rights that are vital to the nation's participatory democracy.

Among the many notable examples is *Richmond Newspapers, Inc. v. Virginia*,[50] a landmark 1980 case holding that, absent extraordinary circumstances, the First Amendment guarantees citizens' access to courtrooms in criminal trials.[51]

In 1976, John Stevenson was tried and convicted for second-degree murder in Hanover County, outside of Richmond, Virginia.[52] The conviction later was reversed.[53] A second trial ended in mistrial, and then a third trial met

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50. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding that there is a right to attend criminal trials implicit in the First Amendment).

51. *Id.* at 580.

52. *Id*. at 559.

53. *Id*.

the same end because a prospective juror revealed information about the case to other prospective jurors.[54] On the eve of the fourth trial, in late 1978, the defense requested that the courtroom be closed, and the prosecution did not object.[55] Out of concern for pretrial publicity, and relying on a Virginia statute,[56] the trial court granted the defendant's motion to exclude the press and the public.[57] Because both parties agreed to the arrangement, the only voice of opposition was from the local newspaper company, Richmond Newspapers.[58]

At great expense,[59] and with the amicus support of other mainstream news organizations,[60] the mid-sized newspaper company argued the

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54. *Id*.

55. *Id.* at 559–60.

56. VA. CODE § 19.2-266 (Supp. 1980) (providing that a court may, at its discretion and for the purpose of ensuring a fair trial, exclude persons from the trial so long as the right of the accused to a public trial is not violated).

57. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 560 (1980) (plurality opinion).

58. *Id*.

59. *See* 110 CONG. REC. 6,541 (1964) (Statement of Sen. Humphrey) (addressing the significant expense of constitutional litigation and noting, for example, that *Brown v. Board of Education*, 347 U.S. 483 (1954), cost over $200,000 to litigate); Michael W. Bowers & Richard C. Cortner, *Financing Constitutional Litigation: Pursuing the Watergate Principle*, 10 HARV. J.L. & PUB. POL'Y 573, 573 (1987) ("It is no secret that even the strongest constitutional argument cannot win without money to finance its presentation."). Indeed, in an empirical study of four constitutional cases litigated between 1923 and 1947, the authors found that, in 1983 dollars, litigating these cases had cost as much as $176,000. Bowers & Cortner, *supra*, at 583; *see also* Bill Gloede, *Press Leaders Laud Richmond Ruling*, EDITOR & PUBLISHER: THE FOURTH ESTATE, July 12, 1980, at 12 (quoting Allen H. Neuharth, then Chairman of the American Newspaper Publishers Association (ANPA) Executive Committee and Chairman and President of the Gannett Co. as saying, after the *Richmond Newspapers* ruling, the newspapers would "continue to use [their] resources to work for courts that are truly open"). For more commentary on the cost of litigation, see generally FULBRIGHT & JAWORSKI, L.L.P., FULBRIGHT'S 6TH ANNUAL LITIGATION TRENDS SURVEY REPORT 49 (2009), *available at* http://amlawdaily.typepad.com/Fulbright report2009.pdf (reporting that some companies now spend between $100,000 and $499,000 to litigate a single-plaintiff employment case to conclusion); Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 219–22 (1985) (stating that "[t]he cost of litigation has become a matter of serious public concern," and that "more and more of the country's wealth [is] be[ing] spent on legal services"); N.C. Lawyers Weekly Staff, *Law Firm Economics: A Survey—How U.S. Law Firms Did in 2006*, N.C. LAWYERS WKLY., Aug. 27, 2007 (finding that the median hourly billing rate for partners was $304 and for associates was $200).

60. *See* Brief of the Washington Post et al. as Amici Curiae In Support of Reversal at 5, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion) (No. 79-243) ("*Amici* are fifty-six newspapers of general circulation and three broadcasting networks."); *see also* Brief of Reporters Comm. for Freedom of the Press, the Associated Press Managing Editors, the National Association of Broadcasters, the National Newspaper Association, the National Press Club, the Radio-Television News Directors Association, &

unconstitutionality of the courtroom closure to the Virginia Supreme Court[61] and, ultimately, to the U.S. Supreme Court in February 1980.[62] Based on arguments formulated by the newspapers, the Court held, 7-1,[63] that the exclusion of the press was unconstitutional because the trial judge neither pursued alternatives to courtroom closure nor made specific findings to support the order.[64]

The holding was not a narrow press victory based on media-specific rights. Rather, it was a bold statement on the needs of "people in an open society"[65] and the value of public observation of government proceedings.[66] Writing for the Court,[67] Chief Justice Warren Burger stressed the long history of open criminal trials at common law—that "throughout its evolution the trial has been open to all who cared to observe"[68]—and emphasized that the presumption of openness is central to the very nature of a criminal trial under our system of justice.[69] Although no specific constitutional provision demands a trial be open to the public, the Court held, the freedoms guaranteed by the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government . . . [I]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the *right of everyone* to attend trials so as to give meaning to those explicit guarantees."[70] Thus, the fruits of the

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the Society of Professional Jounalists-Sigma Delta Chi, and the Virginia Press Association as Amici Curiae in Support of Jurisdictional Statement, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion) (No. 79-243); Brief of Am. Newspaper Publishers Ass'n and Am. Soc'y of Newspaper Editors Amici Curiae in Support of Jurisdictional Statement, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion) (No. 79-243).

61. *Richmond Newspapers, Inc.*, 448 U.S. at 562. *See generally* Richmond Newspapers, Inc. v. Commonwealth, 1979 Va. LEXIS 307 (Va. July 9, 1979).

62. *Richmond Newspapers, Inc.*, 448 U.S. at 563.

63. Justice Powell did not participate.

64. *Richmond Newspapers, Inc.*, 448 U.S. at 580–81 (plurality opinion).

65. *See id*. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

66. *Id.*

67. The case produced six separate opinions.

68. *Richmond Newspapers, Inc.*, 448 U.S. at 564. Justice Burger, in writing for the plurality, expressly declined to address whether the First Amendment also guaranteed a right of access of civil trials, but noted that historically civil trials have been open. *Id*. at 580 n.17.

69. *Id.* at 564.

70. *Id*. at 575 (emphasis added).

newspapers' litigation efforts[71] were that "everyone" has an enforceable First Amendment right to access a criminal trial, absent exceptional and carefully specified circumstances demanding closure to assure the fair administration of justice—a situation that the Court made clear would be exceedingly rare.[72] As subsequent cases quickly acknowledged, *Richmond Newspapers* "firmly established . . . that the press *and the general public* have a constitutional right of access to criminal trials."[73]

Richmond Newspapers would not happen today. Of the two mid-sized newspapers operated by the litigant in that case, one, the *Richmond News Leader*, shut its doors in the early 1990s[74]—part of a great wave of two-newspaper towns that became able to sustain only a single publication.[75] The second, the *Richmond Times-Dispatch*, like nearly every other mid-sized American newspaper,[76] has experienced significant financial woes in

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71. Indeed, the newspapers' briefing itself focused on public, rather than press-specific, rights. *See* Brief of Appellants at 3, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion) (No. 79-243) (listing as a question presented: "Do the First, Sixth, and Fourteenth Amendments to the Constitution of the United States, singly or in combination, give *members of the public* a judicially enforceable right of access to criminal trials that can be asserted independently of the participants in the litigation?" (emphasis added)); *id.* at 9–10 ("Although the First Amendment does not unseal government records or unlock private files, its central meaning requires that people remain free to seek understanding and information in those forums that have traditionally been open *to* the public, at least when their function depends vitally upon access *by* the public."); *id.* at 27 ("Appellants now urge this Court to recognize a . . . right of members of the public to attend criminal trials, a right essential to intelligent self-government[,] . . . a right government may not limit without a compelling justification, and never by closing an entire criminal trial.").

72. *Richmond Newspapers, Inc.*, 448 U.S. at 581 (plurality opinion).

73. Globe Newspaper Co. v. Superior Court (*Globe*), 457 U.S. 596, 603 (1982) (emphasis added). *Globe*, too, was brought by a mid-sized newspaper company. *See id*. at 598 (explaining the genesis of the case). The *Globe* Court amplified the *Richmond Newspapers* holding, making clear that a court proceeding could be closed only if the closing was "necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." *Id*. at 607.

74. *After 104 Years, Richmond Newspaper Closes*, N.Y. TIMES, May 31, 1992, at 27.

75. *See, e.g.*, Steve Hallock, *Fewer Two-Newspaper Cities*, ST. LOUIS JOURNALISM REV., Sept. 2007, at 24, 24–25 (discussing the dwindling number of two-newspaper towns); Steve Raabe, *Economy, Internet Whipsaw Two-Newspaper Towns*, DENVER POST (Dec. 14, 2008), http://www.denverpost.com/search/ci_11222657 (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

76. *See* PEW RES. CTR. PROJECT FOR EXCELLENCE IN JOURNALISM, *The State of the News Media: An Annual Report on American Journalism 2007* (Mar. 12, 2007), http://www.journalism.org/node/7222 (last visited Mar. 21, 2011) (noting that "deep cuts" in newsroom staff occurred at mid-sized papers) (on file with the Washington and Lee Law Review).

the last several years.[77] Its circulation has plummeted, and its workforce decreased by nearly 170 employees in a single year's time.[78] Hit hard in the last round of layoffs was the newsroom, which lost twenty-eight reporters, photographers and editors.[79] Media General, the paper's parent company, announced it is taking cost-cutting measures companywide, including closing its six-person news bureau in Washington D.C.[80] This is no longer a company that can be expected to have copious funds available for litigation in the public interest.

There are countless such examples. Aside from the *New York Times*,[81] perhaps the most notable newspaper name in media law is the *Press-Enterprise*, a regional newspaper that serves Riverside and San Bernardino County, California.[82] In the 1980s, the newspaper fought not one, but two major public-access cases that ultimately were decided by the U.S. Supreme Court,[83] again at great expense in terms of both time and financial resources.[84]

The first case, *Press-Enterprise I*, won by the newspaper in 1984, involved the rape and murder of a teenage girl.[85] The newspaper requested that the examination of all potential jurors in voir dire be open for public

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77. *See id.* (reporting the financial difficulties of the *Richmond Times-Dispatch*).

78. John Hoke, *The Times-Dispatch Lays Off 59 Employees*, RICHMOND TIMES-DISPATCH (Virginia), Apr. 3, 2009, at B-01.

79. *Id*.

80. *Media General Will Close Washington Bureau*, N.Y. TIMES, Mar. 14, 2009, at B2.

81. *See, e.g*., New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (finding that the government had not met the burden required to obtain an injunction preventing the *New York Times* from disseminating sensitive information); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (requiring public-official plaintiffs to establish actual malice in order to sustain a defamation action).

82. *About Us*, PRESS-ENTERPRISE, http://www.pe.com/about/aboutus.html (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

83. *See* Press-Enterprise Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 14 (1986) (requiring a substantial probability of prejudice before a case is closed to the public); Press-Enterprise Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 505 (1984) (finding that the presumption of openness applies to voir dire).

84. *See High Court Hits Secrecy*, QUILL, Feb. 1984, at 3 ("SPJ, SDX, along with other media groups, allocated substantial resources in support of the Press-Enterprise."); James E. Roper, *Pretrial Hearings Must Be Opened*, EDITOR & PUBLISHER: THE FOURTH ESTATE, July 5, 1986, at 14, 29 ("Howard Hays, editor and publisher of the Press-Enterprise, commented: 'We went to considerable efforts and expense not only to protect our own right . . . but because . . . openness is the most important characteristic of free government and that openness may be more important in the court than anywhere else.'").

85. *Press-Enterprise I*, 464 U.S. at 503.

observation.[86] After this request and a request for the subsequent transcript both were denied,[87] the paper litigated the case through the California courts and to the U.S. Supreme Court,[88] which agreed that the public has a right to attend jury selection for criminal trials.[89] The Court's unanimous opinion relied significantly on extensive historical research provided by newspaper and traditional-journalism organizations, whose meticulous amicus brief painstakingly detailed the history of openness of proceedings from before the time of the Norman Conquest.[90] In reaching its constitutional conclusion, the Court traced the evolution of voir dire proceedings using the same structure, sources, and, in several instances, precise language, as the media's brief.[91]

Not two years later, the Press-Enterprise expended these immense resources again in *Press-Enterprise II*, after its reporters were excluded from the pretrial hearing of Robert Diaz, a nurse who was accused of

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86. *Id*. The focus of the newspapers' briefing to the Court was the public, not the press. Brief for Petitioner on the Merits at 3, *Press-Enterprise I*, 464 U.S. 501 (1984) (No. 82-556) (asking the Court to consider whether "the *public* [has] a First Amendment right of access to the voir dire proceedings of criminal trials and a concomitant right to the transcript of the proceedings," and whether the trial court violated "the *public's* First Amendment right of access to criminal trials"); *id*. at 19 ("Just as this Court must look to the voir dire process to test for fairness, so must the public have access to the process to make its own determination of fairness. Without an open voir dire process the public is unable to make an informed judgment of the entire trial proceedings . . . ."); *see also* Brief of Amici Curiae In Support of Petitioner, Filed on Behalf of USA Today et al. at 28, *Press-Enterprise I*, 464 U.S. 501 (1984) (No. 82-556) (arguing that "[t]he public has a right to know whether justice is being done" and that "[u]ltimately, public understanding and acceptance of our system of law is dependent on" awareness of the jury selection process).

87. *See Press-Enterprise I*, 464 U.S. at 504 (discussing the Court's denial of petitioner's motion for release of a complete transcript). The voir dire consumed six weeks and all but approximately three days was closed to the public. *Id.* at 510.

88. *Id*. at 504–05.

89. *Id.* at 508. The unanimous Court again chastised the trial judge's failure to articulate findings with the requisite specificity and failure to consider alternatives to closure and to total suppression of the transcript, emphasizing that "[t]he trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected." *Id.* at 513. It held that the proceedings cannot be closed unless specific, on-the-record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510.

90. Brief for Society of Professional Journalists et al. as Amici Curiae at 14–23, *Press-Enterprise I*, 464 U.S. 501 (1984) (No. 82-556) (providing an account of the jury selection process from the time of the Norman Conquest to modern day Supreme Court rulings).

91. *Compare id.* (discussing the "open-air" nature of trials before the Norman Conquest and their tradition in Anglo-American history), *with Press-Enterprise I*, 464 U.S. 501, 505–08 (1984) (tracing the history of open trials to the common law in England, beginning before the Norman Conquest).

committing twelve patient murders.[92] The closure motion was initially unopposed by the parties to the case.[93] In 1986, five years and hundreds of thousands of dollars after the closure, the newspaper successfully argued to the U.S. Supreme Court that the public has a constitutional right to attend preliminary hearings in criminal cases.[94] It was joined by dozens of supporting newspapers and media organizations,[95] whose briefs to the Court again offered the critical historical research demonstrating the longstanding tradition of access to the proceedings[96] and the important policy arguments about the public benefits of openness.[97]

Again, the holdings of these cases litigated by newspapers are sweeping. The Court held, at Press-Enterprise's insistence, that the *public* cannot be excluded from these proceedings.[98] In *Press-Enterprise I*, the

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92. *Press-Enterprise II*, 478 U.S. 1, 5 (1986).

93. *Id*. at 3–4.

94. *Id*. at 13 ("We therefore conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California."). Employing its so-called "experience and logic" test, the Court found a tradition of public accessibility to preliminary hearings of the type at issue in that case. *Id.* at 9–10. It also found that although the adjudication is without a jury and the hearing cannot result in a conviction, public access to such hearings is essential to the proper functioning of the criminal justice system. *Id*. at 12. It noted that "[b]ecause of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding." *Id*.

95. *See, e.g.*, Brief for American Newspaper Publishers Association et al. as Amici Curiae, *Press-Enterprise II*, 478 U.S. 1 (1986) (No. 84-1560) (arguing that the trial court's decision to close the preliminary hearing violates the First Amendment); Brief for California News Organizations, Filed on Behalf of The Copley Press, Inc. et al. as Amici Curiae Supporting Petitioner, *Press-Enterprise II*, 478 U.S. 1 (1986) (No. 84-1560) (arguing that public access to preliminary hearings is a First Amendment right).

96. *Compare Press-Enterprise II*, 478 U.S. at 10–12 (noting a tradition of public access to preliminary hearings and discussing how access serves an important role in the judicial process), *with* Brief for American Newspaper Publishers Association et al. as Amici Curiae, *supra* note 95, at 3–12 ("The right of access emanates both from our tradition of open judicial proceedings in criminal cases and from the vital role of public proceedings in maintaining the integrity of the judicial process and our system of self-government.").

97. *See* Brief for California News Organizations, Filed on Behalf of The Copley Press, Inc. et al. as Amici Curiae Supporting Petitioner, *supra* note 95, at 17–18 (discussing the ways that the judicial process and society benefit from public access to proceedings).

98. *Press-Enterprise II*, 478 U.S. 1, 12 (1986) ("[*P*]*ublic* access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion." (emphasis added)); *Press-Enterprise I*, 464 U.S. 501, 509–10 (1984) ("'[The] circumstances under which the press and *public* can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.'" (emphasis added) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982))).

Court spoke consistently of "community"[99] rights, stressed "the right of *everyone*" to attend the voir dire,[100] and highlighted that "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."[101] In *Press-Enterprise II*, the Court's focus likewise was not on the press but on the "public,"[102] and it again emphasized the widespread nature of the right and the societal value of openness, noting that "one of the important means of assuring a fair trial is that the process be open to neutral observers."[103] Ordinary citizens may invoke the "*Press-Enterprise*" rules, and they may do so because the Press-Enterprise cogently and persuasively argued that our Constitution and our democracy itself demand openness.

It is doubtful that the Press-Enterprise would pursue these cases if they arose today. On a single day in the spring of 2009, the Press-Enterprise laid off an executive news editor, an assistant managing editor, a city editor, and numerous reporters and photographers—nearly two dozen newsroom staffers in all.[104] It was responding to an edict from parent company A.H. Belo, which said that a total of more than 500 jobs would be lost at its newspaper holdings in light of sharp financial downturns.[105]

Viewed as a whole, this pattern recalls the empirical findings of Professor Charles Epp, whose watershed large-scale investigation of litigation in another context, civil rights, found that "rights are conditioned

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99. *Press-Enterprise I*, 464 U.S. at 508 (noting the "*community* therapeutic value" of open proceedings (emphasis added) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–71 (1980))); *id.* at 509 (stressing that "public proceedings vindicate the concerns of the victims and the *community* in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected" (emphasis added)).

100. *Id*. at 508.

101. *Id*.

102. *See Press-Enterprise II*, 478 U.S. at 7 ("The right to an open public trial is a shared right of the accused and *the public*, the common concern being the assurance of fairness." (emphasis added)); *id.* at 12 ("[T]he preliminary hearing in many cases provides 'the sole occasion for *public* observation of the criminal justice system.'" (emphasis added) (quoting San Jose Mercury-News v. Municipal Court, 638 P.2d 655, 663 (Cal. 1982))); *id.* at 13 (noting the absence of a jury as a safeguard against prosecutorial zeal "makes the importance of *public* access to a preliminary hearing even more significant" (emphasis added)).

103. *Id*. at 7.

104. Jack Katzanek, *Business Briefing*, PRESS-ENTERPRISE, Mar. 7, 2009, at E02; Gary Scott, *Layoffs at the Press-Enterprise*, DECISIVE THOUGHTS FOR PRECISE LIVING (Mar. 5, 2009, 3:44 PM, updated Mar. 9, 2009, 12:18 PM), http://reporter-g.blogspot.com/2009/03/layoffs-at-press-enterprise.html (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

105. Neil Downing, *Journal Co. Lays Off 74 Employees*, PROVIDENCE JOURNAL-BULLETIN (R.I.), Feb. 28, 2009, at Business 5.

on the extent of a support structure for legal mobilization."[106] The U.S. Supreme Court's agenda is largely limited "to cases that emanate from broad legal conflict in the lower courts"[107] and that have been the subject of extensive percolation and examination in those courts.[108] This breadth of exposure to a legal issue by the nation's courts cannot occur without extensive litigation, which "in turn, typically depends on the existence of substantial resources" by interested organizations.[109] "For this reason," Epp reported, "the development of the support structure for litigation has been especially important in the United States for providing access to the Supreme Court's agenda."[110] Historically, Epp found, sources of financing for litigation campaigns have been pivotal to the development of meaningful rights-based decisions by the Court.[111] So, too, have been the existence of cohesive support movements.[112] Epp's international comparative analysis concluded that "[u]nder conditions in which the support structure is deep and vibrant, judicial attention to rights may be sustained and vigorous; under conditions in which a support structure is shallow and weak, judicial attention to rights is likely to be intermittent and ineffective."[113]

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106. CHARLES R. EPP, THE RIGHTS REVOLUTION 198 (1998).

107. *Id*. at 44.

108. *Id*.

109. *Id*.

110. *Id.*; s*ee also id*. at 69–70 (noting that "the development and persistence of a broad support structure for rights litigation was a crucial condition" for watershed judicial decisions).

111. *Id*. at 58 (discussing that during periods of time—including during the Great Depression—when interested groups "lacked sufficient resources to finance more than a few court cases," the development of rights-based doctrines waned). Epp explains:

> The rights revolution in the United States . . . has developed within a broader political economy of litigation. The growth of a support structure for legal mobilization—consisting of rights-advocacy organizations, a diverse and organizationally sophisticated legal profession, a broad array of financing sources, and federal rights-advocacy efforts—propelled new rights issues onto the Supreme Court's agenda.

Id. at 69.

112. *See id.* at 48–49 (discussing the impact of rights-advocacy organizations on the rights revolution).

113. *Id*. at 198–99. Among the historical examples that Epp provides in his study are the efforts of the so-called "Free Speech League" in the early Twentieth Century. *Id.* at 48–49. Epp notes that because the group's "support for appellate litigation remained limited by a lack of organizational and financial resources," its "influence in the courts remained limited" and potential influence was "crippled." *Id*. at 48, 49. Conversely, Epp noted, "developments in the support structure for legal mobilization" were "crucial to the

Although their role in legal instigation has gone largely unnoticed, newspapers provided the support structure that mobilized the judiciary to interpret and apply the Constitution in ways that enhanced accountability and openness in government, shaped the First Amendment landscape, and brought about far-reaching rights doctrines that remain available for invocation by ordinary citizens. The loss of such a support structure undoubtedly is cause for concern.

2. State Open-Meeting and Open-Records Laws

Second, in every state in the nation, the major force behind the adoption of open-meetings[114] and open-records acts,[115] and the entities that

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emergence of judicial revolutions in freedom of speech and the press." *Id*. at 65.

114. ALA. CODE § 36-25A-1–11 (Supp. 2005); ALASKA STAT. § 44.62.310–.312 (2009); ARIZ. REV. STAT. § 38-431–431.09 (2007); ARK. CODE ANN. § 25-19-101–109 (2009); CAL. CONST. I, § 3(b), CAL. GOV'T CODE §§ 54950–963, 11120–132, 9027–31 (2009); COLO. REV. STAT. § 24-6-401–402 (2010); CONN. GEN. STAT. § 1-200–241 (2007); 29 DEL. CODE ANN. § 10001–05 (2009); D.C. CODE § 1-207.42 (1973); FLA. STAT. § 286.011–.012 (1991); GA. CODE ANN. § 50-14-1–6 (2006); HAW. REV. STAT. § 92-1–13 (1996); IDAHO CODE ANN. § 67-2340–2347 (2009); 5 ILL. COMP. STAT. § 120/1–6 (1995); IND. CODE § 5-14-1.5-1–8 (2007); IOWA CODE § 21.1–.11 (2009); KAN. STAT. ANN. § 75-4317–4320 (2008); KY. REV. STAT. ANN. § 61.800–.850 (1992); LA. REV. STAT. ANN. § 42:1–:13 (2008); ME. REV. STAT. tit. 1, §§ 401–410 (2009); MD. CODE ANN., STATE GOV'T § 10-501–512 (1995); MASS. GEN. LAWS CH. 30A, §§ 18–25 (2010); MICH. COMP. LAWS ANN. § 15.261–.275 (2001); MINN. STAT. § 13D.01–.07 (2001); MISS. CODE ANN. § 25-61-1–17 (1998); MO. REV. STAT. § 610.010–.035 (2004); MONT. CODE ANN. § 2-3-201–03 (2005); NEB. REV. STAT. § 84-1408–1414 (Cum. Supp. 2004); NEV. REV. STAT § 241.010–.040 (2009); N.H. REV. STAT. ANN. § 91-A:1–15 (2008); N.J. STAT. ANN. § 10:4-6–21 (2006); N.M. STAT. ANN. § 10-15-1–4 (1999); N.Y. PUB. OFF. LAW §§ 100–11 (2000); N.C. GEN. STAT. § 143-318.9–318.18 (1991); N.D. CENT. CODE § 44-04-19–21 (1997); OHIO REV. CODE ANN. § 121.22 (2008); OKLA. STAT. tit. 25, §§ 301–14 (2001); OR. REV. STAT. § 192.610–.690 (2005); 65 PA. STAT. ANN. §§ 701–16 (2004); R.I. GEN. LAWS §§ 42-46-1–14 (2008); S.C. CODE ANN. § 30-4-10–110 (2003); S.D. CODIFIED LAWS § 1-25-1–9 (2010); TENN. CODE ANN. § 8-44-101–201 (1995); TEX. GOV'T CODE ANN. § 551.001–.146 (West 2004); UTAH CODE ANN. § 52-4-101–104 (2006); VT. STAT. ANN. tit. 1, §§ 310–14 (1987); VA. CODE ANN. § 2.2-3701–14 (2010); WASH. REV. CODE § 42.30.010–.910 (1985); W. VA. CODE § 6-9A-1–11 (1999); WIS. STAT. § 19.81–.98 (2009); WYO. STAT. ANN. § 16-4-401–07 (2005).

115. ALA. CODE § 36-12-40 (Supp. 2005); ALASKA STAT. § 40.25.110–.125 (2005); ARIZ. REV. STAT. § 39-121–25 (2000); ARK. CODE ANN. § 25-19-101–09 (2009); CAL. CONST. I, § 3(B); CAL. GOV'T CODE §§ 6250–76.48 (2004); COLO. REV. STAT. § 24-72-201–06, § 24-72-301–09 (2010); CONN. GEN. STAT. § 1-200–41 (2002); 29 DEL. CODE ANN. §§ 10001–05 (2009); D.C. CODE § 2-531–40 (2006); FLA. STAT. § 119.01–.15 (1995); GA. CODE. ANN. § 50-18-70–77 (1999); HAW. REV. STAT. § 92F-1–42 (1996); IDAHO CODE § 9-337–48 (2006); 5 ILL. COMP. STAT. § 140/1–11 (2010); IND. CODE § 5-14-3-1–10 (2008); IOWA CODE § 22.1–.14 (2009); KAN. STAT. ANN. § 45-215–23 (2005); KY. REV. STAT. ANN. § 61.870–.884 (1994); LA. REV. STAT. ANN. § 44:1–22, § 44:31–41 (2002); ME. REV. STAT.

overwhelmingly invoke them on behalf of the public good after their adoption, are newspapers.[116]

a. Movements for Adoption of State Legislation

(1) State Open-Meeting Laws

From the very beginning of legislative efforts to adopt state open-meetings laws, in the early 1950s, it was the mainstream press that was fighting for the public's "right to know,"[117] motivated "by a feeling that an unnecessarily large amount of state and local government business [was] conducted behind closed doors."[118] In 1974, one observer noted:

> The development of state open meetings laws has been a phenomenon of the past quarter-century with members of the press playing the most influential role in promoting access legislation. By 1950 newspapermen had become disgruntled by the increasing frequency with which public officials were denying the press admittance to meetings of public bodies. As a remedial measure, the American Society of Newspaper Editors [ASNE] created the Committee on Freedom of Information. While newspapermen were, of course, personally frustrated by being

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tit. 1, §§ 401–10 (2009); MD. CODE ANN., STATE GOV'T § 10-611–28, (2004 & Cum. Supp. 2005); MASS. GEN. LAWS CH. 66, § 10(B) (2008); MICH. COMP. LAWS ANN. § 15.231–.246 (1997); MINN. STAT. § 13.01–.441 (2005); MISS. CODE ANN. § 25-41-1–17 (2005); MO. REV. STAT. § 109.180, § 610.010–.035 (2004); MONT. CODE ANN. § 2-6-101–12, § 2-6-201–14 (2001); NEB. REV. STAT. § 84-712–12.09 (2000); NEV. REV. STAT § 239.005–.330 (2007); N.H. REV. STAT. ANN. § 91-A:1–:15 (2008); N.J. STAT. ANN. § 47:1A-1–13 (2001); N.M. STAT. ANN. § 14-2-1–12 (2005); N.Y. PUB. OFF. LAW §§ 84–90 (2003); N.C. GEN. STAT. § 132-1–10 (1995); N.D. CENT. CODE § 44-04-18–18.19 (2009); OHIO REV. CODE ANN. § 149.43–.44 (2009); OKLA. STAT. tit. 51, § 24A.1–.29 (2001); OR. REV. STAT. § 192.410–.505 (2005); 65 PA. STAT. ANN. § 67.101–.3104 (2008); R.I. GEN. LAWS § 38-2-1–15 (2007); S.C. CODE ANN. § 30-4-10–165 (2003); S.D. CODIFIED LAWS § 1-27-1–33 (2009); TENN. CODE ANN. § 10-7-101–702 (1999); TEX. GOV'T CODE ANN. § 552.001–.353 (West 2004); UTAH CODE ANN. § 63G-2-101–1001 (2008); VT. STAT. ANN. tit. 1, §§ 315–20 (2003); VA. CODE ANN. § 2.2-3701–14 (2010); WASH. REV. CODE § 42.56.001–.900 (2006); W. VA. CODE § 29B-1-1–7 (1992); WIS. STAT. § 19.31–.39 (2003); WYO. STAT. ANN. § 16-4-201–05 (2001).

116. *See* Charles Layton, *The Information Squeeze*, AM. JOURNALISM REV., Sept. 2002, at 20, 28 [hereinafter Layton, *Information Squeeze*] ("[P]ractically every improvement in the open government laws since World War II—and every successful defense of those laws—has been due largely to the influence of the media.").

117. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1199 (1962) [hereinafter HARV. Note] (discussing the different press organizations that attempted to deal with "news suppression" in the 1950s).

118. *Id.*

> denied access to public proceedings and records, their primary reason for combating secrecy was said to be the recognition of their duty to stand for the public, keeping public officials in the public eye.[119]

When the press formed this Committee on Freedom of Information, only a single state, Alabama, had a modern open-meetings law.[120] Less than a decade later, twenty states had them on the books.[121] Within twenty-five years, there were more than forty.[122] Newspapers banded together to work as a collective whole to take advantage of efficiencies of scale. In 1956, Sigma Delta Chi, the organization that would later become the Society of Professional Journalists (SPJ), drafted a model open-meetings statute and "initiated a long campaign that helped lead to the . . . passage of open meetings . . . laws in every state by 1983."[123]

The efforts varied in their timing and content from state to state, but always were driven by local press associations in conjunction with larger national journalism organizations.[124] Often the laws were enacted because the newspapers coupled their lobbying efforts with the use of their publications as bully pulpits to galvanize public support for the initiatives. In California, the state's open meeting legislation was introduced after a ten-part series entitled "Your Secret Government" appeared in the *San Francisco Chronicle*.[125] The California Newspaper Publishers Association

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119. William R. Wright II, Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 MISS. L.J. 1151, 1158 (1974) (citations omitted).

120. *Id.*

121. *Id.*

122. *Id.*

123. Guy T. Baehr, *Society of Professional Journalists*, *in* ENCYCLOPEDIA OF AMERICAN JOURNALISM 485, 485 (Stephen L. Vaughn ed., 2008). Sigma Delta Chi was formed as "an honorary fraternity for aspiring newspapermen." *Id.* "By 1960, seeing the need for a broad-based professional association for journalists, delegates . . . voted to abandon the fraternity structure and reorganize as a national professional society." *Id.*; Sharon Hartin Iorio, *How State Open Meeting Laws Now Compare with Those of 1974*, 62 JOURNALISM Q. 741, 741 (1985).

> By 1976, each state had enacted open-meetings laws and federal legislation had been passed as well. Laws revised or written after the mid-1970s contain many provisions set out in the federal legislation and in "model" laws developed by the Society of Professional Journalists, Common Cause and The National Conference of State Legislatures.

Id.

124. Iorio, *supra* note 123, at 741 (discussing the role of professional journalism organizations and citizens' groups in promoting the passage of open meeting laws).

125. Albert G. Pickerell, *Secrecy and the Access to Administrative Records*, 44 CAL. L. REV. 305, 312 n.38 (1956).

actively supported the bill, which ultimately was passed in 1953.[126] In Oregon, the movement for legislation "originated . . . with newspapers and citizens who decried various secret meetings."[127] In addition to publication of editorials critical of these events, representatives of the Oregon Newspaper Publishers Association testified before the state's legislature to ensure passage of Oregon's open-meeting law.[128]

In Florida, likewise, the open-meeting law "found its genesis"[129] among newspaper reporters and editors. It was born in 1950 at a meeting of the Gainesville chapter of Sigma Delta Chi, with attendees recognizing that "the American press [was beginning] to lobby for more open government."[130] During that meeting, a Florida state senator "expressed concern about private meetings of public bodies throughout the state."[131] Press members rallied around the idea, "gathering examples of open meetings laws from other states" to assist in the legislative effort.[132] Though a bill was introduced as early as 1957, newspapers had to work for a full decade before changes to the state's political climate allowed for its passage.[133] The media's push for the measure was widely viewed as "instrumental in convincing legislators to [eventually] pass the Sunshine Law."[134] Indeed, as one commentator noted, "without media influence and pressure, 'Government in the Sunshine' might never have survived committee action."[135]

In smaller states, as well, scrappy groups of newspapers piggybacked on efforts from national journalism organizations to lobby for legislation that would require county councils and city zoning boards

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126. *Id*. at 312.

127. Bradford L. Bates, Comment, *Ambiguities in Oregon's Open Meeting Legislation*, 53 OR. L. REV. 339, 342 (1974).

128. *See id.* at 342 nn.22 & 27 (noting the widespread support that Oregon newspapers provided for the Open Meetings Bill).

129. Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 248 (2008).

130. *Id.*

131. *Id.* at 248–49.

132. *Id.* at 249.

133. *See id.* ("Lawmakers' resistance to unprecedented public access to government meetings stifled Cross's bill until 1967 . . . .").

134. *Id*.

135. Ruth Mayes Barnes, Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361, 361 (1971).

to conduct their business publicly. In places like Arkansas,[136] Indiana,[137] Kansas,[138] Tennessee,[139] and North Dakota,[140] the state press associations presented model statutes, galvanized significant lobbying efforts, and provided the key impetus for the enactment of the state codes requiring open meetings. Elsewhere, press associations rooted out open-meeting laws that were toothless or ineffective,[141] dedicating years of effort to

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136. *See* John J. Watkins, *Access to Public Records Under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741, 749–50 (1984) ("Although some Arkansas journalists campaigned against closed meetings in the 1930s, it was not until after World War II—when federal trends toward government secrecy drifted down to the state level—that the news media in Arkansas and other states began to press for open meeting legislation." (citations omitted)). Buoyed by the successes of national journalism groups that were pushing strongly for open meetings and open records legislation in every state, the Arkansas press lobbied hard on a local level with their own state legislators. *Id.* at 750–51. Although less organized than some of the national journalism groups, the Arkansas newspapers still realized success when, in 1953, the state assembly "enacted an open meeting statute applicable to local as well as state governmental bodies." *Id*.

137. *See* Jon Dilts, Note, *The "Open Door" Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 VAL. U. L. REV. 295, 296–97 n.6 (1980) (explaining that the "General Counsel for the Hoosier State Press Association . . . prepared the model statute used by Indiana" when the state's legislators enacted a new "Open Door" law).

138. *See* Bradley J. Smoot & Louis M. Clothier, *Open Meetings Profile: The Prosecutor's View*, 20 WASHBURN L.J. 241, 247 n.39 (1981) ("The Kansas effort to enact and improve its open meetings act mirrors efforts of jurisdictions around the country. As in other jurisdictions . . . the press provided much impetus for enactment of the Kansas Act.").

139. *See* Douglas Q. Wickham, *Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus*, 42 TENN. L. REV. 557, 559 (1975) (noting that in Tennessee, the state press association authored and sponsored the state's Sunshine Law).

140. *See* Donald S. Guy & Jack McDonald, *Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota*, 53 N.D. L. REV. 51, 53–54 (1977) (noting that Sigma Delta Chi's North Dakota chapter endorsed the national organization's model open meetings statute at its 1956 meeting and describing the "communication between legislators and the press through letters to the editors, public statements, and editorials," that led to the passage of the law); Lisa Hall, Comment, *Constitutional Right of Privacy Open Records: North Dakota Upholds Personnel File as Government Record Open for Public Inspection*, 65 N.D. L. REV. 241, 245 & n.30 (1989) (describing ways press groups "encourage[d] the North Dakota Legislature to enact the statute for the State" before it passed without opposition in 1957, and stating that the statute was also endorsed by the North Dakota Press Association).

141. *See* Samuel David Fleder, Comment, *Circumvention by Delegation? An Analysis of North Carolina's Open Meetings Law and the* Byrd *Loophole*, 31 CAMPBELL L. REV. 535, 543 (2009) (noting that North Carolina's Open Meetings Law did not contain effective compliance provisions until "lobbying efforts by the North Carolina Press Association"); Charles D. Mockbee IV, Comment, *Casting a Shadow on Illinois' Sunshine Laws:* Rice v. Board of Trustees, *762 N.E.2d 1205 (Ill. App. Ct. 2002)*, 28 S. ILL. U. L.J. 175, 181 (2003) (stating that in Illinois, the state's press association was instrumental in the effort to strengthen the state's sunshine law).

negotiating amendments and revisions that better served the public's right to know.[142] Press associations and their member newspapers have consistently monitored the enforcement of open-meetings laws "to determine the need for periodic legislative refinements or clarification."[143]

All told, newspaper organizations and other press groups unquestionably "began [the] crusade to open the governmental process" [144] to public view and "spearheaded the movement for open meetings laws"[145] that made government accountability a reality in cities and states across the country.[146] The laws, although enacted as a result of the newspapers' efforts, had wide public benefit, with the newly established right to attend public meetings made available to the entire citizenry.[147] The legal

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142. *See* James Tidwell, *An Open Meetings Act Primer*, 83 ILL. B.J. 593, 593 (1995) (discussing the fact that "[m]ajor changes in the Illinois Open Meetings Act" took effect in 1995 after "several years of negotiations between the General Assembly and such groups as the Illinois Press Association [and] Illinois News Broadcasters Association"); Brian J. Caveney, Note, *More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act*, 102 W. VA. L. REV. 131, 141 (1999) (describing the role of the state press association in West Virginia's statutory reform).

143. Reporters Committee for Freedom of the Press, *Open Government Guide LA Item*, http://www.rcfp.org/ogg/item.php?t=short&state=LA&level=F1 (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

144. Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1167 n.18 (1993).

145. *Id*.

146. *See id.* ("The crusade resulted in the enactment of numerous open meeting statutes. Today, thirty-four state constitutions require open meetings of legislative bodies." (citations omitted)).

147. *See*, *e.g.*, AZ. REV. STAT. ANN. § 38-431.01 (2010) ("All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings."); COLO. REV. STAT. § 24-6-402(2)(a) (2008) ("All meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times."); GA. CODE ANN. § 50-14-1(2)(c) (2009) ("The public at all times shall be afforded access to meetings declared open to the public . . . ."); IOWA CODE § 21.2(3) (2009) ("'Open session' means a meeting to which all members of the public have access."); MO. REV. STAT. § 610.011 (2010) ("It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law."); N.C. GEN. STAT. § 143-318.10(a) (2010) ("[E]ach official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting."); N.Y. PUB. OFF. LAW § 103(a) (McKinney 2010) ("Every meeting of a public body shall be open to the general public . . . ."); OR. REV. STAT. § 192.630(1) (2009) ("All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting . . . ."); R.I. GEN. LAWS § 42-46-3 (2010) ("Every meeting of all public bodies shall be open to the public . . . .");

instigation efforts of newspapers had a tangible effect on participatory democracy throughout the nation.

(2) State Open-Records Laws

Major press organizations had a similar role in the creation of open-records laws, many of which were enacted in tandem with the open-meetings provisions and on the legislative models put forth by the journalist groups.[148] Though a few states had enacted rudimentary public records statutes in the nineteenth century, at that time their primary focus was "to require government officials to preserve records for the benefit of their successors in office."[149] It was not until after World War II that most states replaced their common-law rules with statutes,[150] at least some of which were based on Sigma Delta Chi's model public-records act.[151]

In states with no records-access legislation or inadequately protective laws, newspapers and media groups pushed for the adoption of freedom of information measures. California's numerous statutory provisions that "relate to public records and their inspection"[152] were drafted and amended primarily in the late 1950s.[153] The state press association actively supported the legislative efforts, and "[n]ewspaper reporters, editors, and publishers were asked to help . . . by reporting specific instances of refusals or difficulties experienced in attempting to gain access to official records of

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TENN. CODE ANN. § 8-44-102 (2010) ("All meetings of any governing body are declared to be public meetings open to the public at all times . . . ."); TEX. GOV'T CODE ANN. § 551.002 (West 2010) ("Every regular, special, or called meeting of a governmental body shall be open to the public . . . ."); WASH. REV. CODE § 42.30.030 (2010) ("[A]ll persons shall be permitted to attend any meeting of the governing body of a public agency . . . .").

148. *See* Baehr, *supra* note 123, at 485 (stating that the journalism group Sigma Delta Chi drafted both model open records and open meetings laws).

149. Thomas H. Moore, Comment, *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law*, 72 N.C. L. REV. 1527, 1531 (1994).

150. *Id.*

151. Baehr, *supra* note 123, at 485. It was not until after the passage of the federal Freedom of Information Act in 1966 that many states began to fine-tune their legislation. *See* Moore, *supra* note 149, at 1531–32 ("Even those states with existing public records statutes revised their laws in the wake of congressional action.").

152. Pickerell, *supra* note 125, at 314.

153. *Id*. A separate act, the California Public Records Act, did not pass until 1968. *See* Stephan A. Barber, Comment, *The California Public Records Act: The Public's Right of Access to Governmental Information*, 7 PAC. L.J. 105, 106 (1976) ("In 1968 the California Public Records Act . . . was enacted in an attempt to clarify the scope of the public's right to inspect public records." (citations omitted)).

state, county, or city governments."[154] When New York passed its Freedom of Information Law in 1974,[155] it did so in the wake of immense press support, both in newspaper editorials and in direct lobbying efforts by Sigma Delta Chi to the state's assembly-members.[156]

In many other states, the pattern was the same. Newly formed local chapters of Sigma Delta Chi launched campaigns, spurred by material distributed by the national organization highlighting freedom of information issues.[157] These grassroots newspaper groups would energize a state representative to call for examinations of then-existing state statutes and access procedures,[158] and upon finding them inadequate, would propose new legislation based on the model statute or on successful freedom of information acts in other states.[159] Lobbying efforts focused on the public's right to know of its government's activities[160] and would include testimony from newspaper editors before legislative committees,[161] "letters to the editors, public statements, and editorials."[162]

Critically important, newspaper organizations were also key players in investigating existing and proposed model laws for actual and anticipated real-world consequences. In Florida, for example, while there was a rudimentary state public records access law as early as 1909, the state supreme court and attorney general had granted so many exceptions that the law became virtually meaningless.[163] Consequently, "[i]n 1983, with

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154. Pickerell, *supra* note 125, at 313. Again, these activities were "actively supported" by the California Newspaper Publishers Association. *Id*. at 312–13.

155. *See* N.Y. PUB. OFFICERS LAW §§ 85–89 (McKinney 2010) (creating a right of citizens to access the records of government agencies and state legislative records); *see also* Sen. Ralph J. Marino, *The New York Freedom of Information Law*, 43 FORDHAM L. REV. 83, 83 (1975) ("On September 1, 1974, New York became one of the first states to effect a 'Freedom of Information Law.'").

156. *See, e.g.*, Marino, *supra* note 155, at 83 & n.5 (stating that the law was supported by the media and citing to a letter from Sigma Delta Chi).

157. *See* Guy & McDonald, *supra* note 140, at 53 ("In the early 1950's, Sigma Chi Delta, [sic] a national journalism association, prepared model open meetings and open records statutes, and encouraged its state chapters to seek state enactment." (citations omitted)). *See generally* Watkins, *supra* note 136, at 752; Hall, *supra* note 140, at 245.

158. *See* Watkins, *supra* note 136, at 752 (describing efforts with a legislator).

159. *Id.* at 755.

160. *Id.*

161. *See* Ted P. Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 U. KAN. L. REV. 205, 209 (1985) ("[S]ixteen representatives of Kansas newspapers, radio and television stations, and state and local governments—expressed dissatisfaction with the restrictiveness and ambiguity of existing statutes.").

162. Guy & McDonald, *supra* note 140, at 53–54.

163. *See* Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets*

encouragement from the Florida Press Association and the Florida Society of Newspaper Editors[,] . . . the legislature placed the machinery in motion to begin a reversal of the trend toward an increasing erosion of Florida's open government laws."[164] In Georgia, when the state amended portions of its Open Records Act "to put some teeth" into it,[165] the Georgia Press Association drafted the amendments.[166] In Montana, the press association led the charge to elevate public-records provisions to explicit constitutional status,[167] and "lobbied heavily, both on the floor and in the press" until the proposal prevailed.[168] When the Virginia General Assembly contemplated amendments to the state's open meetings provisions, "[t]he Virginia Press Association drove much of the legislation revision, bringing in a proposed rewrite that was broader than many had expected."[169]

Conversely, when proposals have arisen to amend records-related statutes in potentially restrictive ways, it has been the press that has fought against the efforts.[170] When the American Bar Association proposed a model public records law, media groups scrutinized the effort and determined that the statute as drafted might actually "shield many currently

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Open Government Exemptions, 13 FLA. ST. U. L. REV. 705, 706 (1986) ("[T]he Florida Supreme Court recognized judicial authority to grant exemptions from the law based upon public policy demands. For a period of seventy years following its enactment, a series of decisions, [and] attorney general's opinions . . . resulted in the steady erosion of the public policy embodied in the Act.").

164. *Id.* at 707; *see also* Kara M. Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525, 530–31 n.47 (1992) (describing that later Florida amendments also included "language recommended by and agreed to by . . . the Florida Press Association").

165. Suzanne F. Sturdivant, Legislative Review, *State Printing and Documents*, 16 GA. ST. U. L. REV. 262, 262–63 (1999) (quoting Rep. J. Glenn Richardson, House District No. 26, Address, *Georgia's Open Meetings and Open Records Law Revisited-1999* (Apr. 1999)).

166. *Id.* at 263; *see also* A. Jones, Legislative Review, *Public Records: Provide Definitions, Privileges, and Exemptions Relating to Inspection of Public Records*, 5 GA. ST. U. L. REV. 486, 489 (1988) (describing the press's role in introducing an earlier public records bill in Georgia, following "two years of collaboration by state officials, legislators, and the Georgia Press Association").

167. David Gorman, Comment, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 MONT. L. REV. 249, 257 (1978).

168. *Id.* at 258.

169. Daxton R. Stewart, *Designing a Public Access Ombuds Office: A Case Study of Virginia's Freedom of Information Advisory Council*, 9 APPALACHIAN J.L. 217, 225 (2010) (quoting Maria J. K. Everett, Freedom of Information Advisory Council executive director).

170. *See, e.g.*, Moore, *supra* note 149, at 1532 n.53 (noting that newspaper and television station influence kept a proposed model public records law from being implemented (citing Harold L. Nelson & Dwight L. Teeter, Jr., LAW OF MASS COMMUNICATIONS 419 (4th ed. 1982))).

available documents from public disclosure."[171] When the Conference of Chief Justices and the Conference of State Court Administrators issued guidelines and model proposals to restrict electronic access of state court records, media organizations contested the change.[172] After seven bills were introduced in the Idaho legislature aimed at restricting access to public records, mainstream media groups "sprang into action."[173] "In the end, only one bill passed, after being modified to actually strengthen the open records law," leading the president of the state press club to boast that "Idaho came through this nationwide assault on openness in government remarkably unscathed."[174] In 2002, "when it appeared that Florida lawmakers might pass scores of bills weakening the state sunshine law, a group of newspaper editors organized 'Sunshine Sunday,' a collaborative effort by 25 Florida newspapers and several radio and TV stations." [175] All agreed that as a lobbying effort they would run editorials on that day about threats to open government in Florida,[176] and in response, the state legislature backed down significantly.[177] Time and again, when governments have made moves that would further lock their doors or withhold their documents, it was newspapers who were watching closely enough to notice the threat, and who were active, organized, and well-funded enough to counter it.[178]

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171. *Id.* (citing Harold L. Nelson & Dwight L. Teeter, Jr., LAW OF MASS COMMUNICATIONS 419 (4th ed. 1982)).

172. *See* Richard J. Peltz et al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555, 634 (2006) ("Among the cataloged public comments on the Guidelines was criticism from access advocates, namely the New Jersey Press Association, the Silha Center for the Study of Media Ethics, the Virginia Coalition for Open Government, the Reporters Committee for Freedom of the Press (RCFP), the Society of Professional Journalists, the American Society of Newspaper Editors, and the Radio-Television News Directors Association.").

173. Layton, *Information Squeeze*, *supra* note 116, at 28.

174. *See id.* (quoting Betsy Russell, president of the Idaho Press Club).

175. *Id*.

176. *Id.*

177. *See id*. ("By the end of the session, only 10 bills had passed that would narrow public access to records, and most of those were deemed harmless by open-government lobbyists.").

178. By way of illustration, in Illinois, the state press association fought to maintain public access to court records after a judge allowed a private company to manage them. Craig D. Feiser, *Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 830 (2000). "Members of the media from all over the state of Illinois became alarmed when they realized [the company] would have exclusive control of all the records within the first seventy-two hours of existence before disbursing the information to the public," so they joined together to argue that the privatization effort inappropriately hampered public access.

In sum, in their lesser-known roles as legal instigators and enforcers, newspapers in all fifty states have overseen the passage, improvement, and defense of so-called "Sunshine Laws" that now give not only the press, but all members of the public,[179] the right to request important public records at a state and local level. Newspapers have played a critical role not only in bringing about important legislation that ensures public access to government affairs, but also in monitoring those laws for necessary expansions over time and in vigilantly staving off inevitable retrenchment efforts, as competing interests work to erode these protections and limit government openness. Standing almost entirely alone as the bulwarks of public accountability, newspapers have

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Id. In New Jersey, "[a]fter ordering more than 500 categories of information exempted" from the state's open records law, the governor "backed down under withering criticism from newspaper[s], [ultimately] keeping most of the records open." Layton, *Information Squeeze*, *supra* note 116, at 28. And when the Wyoming legislature introduced a bill to deny access to autopsy records, the state press association quickly countered the measure. *See* Catherine J. Cameron, *Not Getting to Yes: Why the Media Should Avoid Negotiating Access Rights*, 24 T.M. COOLEY L. REV. 237, 256 (2007) (describing the introduction of the bill and the subsequent opposition from the state press association). The executive director of the Wyoming Press Association directed newspaper publishers to contact representatives with real-life examples of records assisting the public, and argued at a committee hearing "that the public has a right to know how public institutions spend taxpayer dollars. Apparently this argument worked, as there was a seven-to-two vote against the bill." *Id.*

179. *See*, *e.g.*, ALA. CODE § 36-12-40 (2010) ("Every citizen has a right to inspect and take a copy of any public writing of this state . . . ."); CAL. GOV'T CODE § 6253(a) (2009) ("[E]very person has a right to inspect any public record . . . ."); FLA. STAT. § 119.01(1) (2010) ("[I]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person."); 5 ILL. COMP. STAT. 140/3(a) (2010) ("Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act."); MICH. COMP. LAWS § 15.231(2) (2010) ("It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act."); 19 NEV. REV. STAT. § 239.010 (2009) ("[A]ll public books and public records of a governmental entity . . . must be open at all times during office hours to inspection by any person . . . ."); OHIO REV. CODE ANN. § 149.43(B)(1) (West 2010) ("[A]ll public records . . . shall be promptly prepared and made available for inspection to any person . . . ."); OKLA. STAT. tit. 51, § 24A.5 (2010) ("All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction . . . ."); S.D. CODIFIED LAWS § 1-27-1 (2010) ("Each government entity or elected or appointed government official shall, during normal business hours, make available to the public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official."); UTAH CODE ANN. 1953 § 63G-2-201(1) (West 2010) ("Every person has the right to inspect a public record free of charge . . . ."); VA. CODE ANN. § 2.2-3704(A) (2010) ("[A]ll public records shall be open to inspection and copying by any citizens of the Commonwealth . . . ."); WIS. STAT. § 19.35(1)(a) (2009) ("[A]ny requester has a right to inspect any record.").

served a democratic function that will prove a critical loss if they cease to exist.

b. Waning Enforcement of State Laws

Although these open-meeting and open-records laws are designed to benefit the public and are available for invocation by any individual seeking access to government affairs, the press and media organizations have routinely acted as proxy for the larger public, putting the legislative tools to use after fighting for their enactment.[180] A critical loss with the death of newspapers, then, may well be that the public-serving invocations of these laws will greatly diminish.

To cite just one notable example, the Sunshine in Government Initiative, the coalition of organizations formed to promote policies that ensure that government is accessible, accountable, and open to the people, consists almost exclusively of newspaper and other mainstream media groups.[181] When the newspapers are gone, we might well expect many sunshine initiatives to go with them.

Likewise, when audits of state and local government compliance with freedom of information laws are conducted—sometimes resulting in "significant reforms"[182]—it is often representatives of local newspapers, chapters of the Society of Professional Journalists, state

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180. *See* Laura Frank, *Exposé: America's Investigative Reports: The Withering Watchdog* (June 2009), http://www.pbs.org/wnet/expose/2009/06/the-withering-watchdog.html (last visited Mar. 21, 2011) (noting that "the mainstream media has almost single-handedly wielded the clout and the cash to fight for the public's right to know") (on file with the Washington and Lee Law Review). The author also quotes the director of the RCFP: "'Anything that has to do with the public's right to know about what goes on in its institutions up to now has been funded by the media—mostly newspapers.'" *Id.*; *see also* Earl Maucker, *Watchdog: Who Challenges Government if Papers Can't?*, SUNSENTINEL.COM (Apr. 19, 2009), http://articles.sun-sentinel.com/2009-04-19/news/0904160215_1_fema-watchdog-sun-sentinel (last visited Mar. 21, 2011) ("Newspapers, by and large, have long accepted the responsibility of demanding access to public records and judicial proceedings—and, when denied or stonewalled, often filed suit to ensure the information reached the public.") (on file with the Washington and Lee Law Review).

181. *See* The Sunshine in Government Initiative, *Members* (Dec. 8, 2006), http://www.sunshineingovernment.org/index.php?cat=37 (last visited Mar. 21, 2011) (listing members, including the Associated Press, the National Newspaper Association, the Newspaper Association of America, the RCFP, the Association of Alternative Newsweeklies, ASNE, and SPJ) (on file with the Washington and Lee Law Review).

182. Layton, *Information Squeeze*, *supra* note 116, at 28.

press associations, or other media groups who perform the work.[183] Beyond these regular check-ups, newspapers and newspaper organizations have been primarily responsible for copious amounts of freedom of information litigation challenging state and local governments under these state statutes.[184] In major cases enforcing state open-meeting and open-records laws, it has regularly been a newspaper or press association that is the named party,[185] with other newspapers and media groups routinely signing on as amici.[186]

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183. *See, e.g.*, National Freedom of Information Coalition, *Audits and Open Records Survey*, http://www.nfoic.org/audits-and-open-records-surveys (last visited Mar. 21, 2011) (describing various audits and open-records surveys conducted by media organizations) (on file with the Washington and Lee Law Review).

184. *See* Dalglish, *supra* note 42 ("[T]here is not a single state open meeting or open records law or case in any state in America where the local news media were not the driving forces representing the public's right to know.").

185. *See*, *e.g.*, Copley Press, Inc. v. Superior Court, 141 P.3d 288, 295 (Cal. 2006) (holding that the California Public Records Act applies to administrative proceedings); Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1207 (Fla. Dist. Ct. App. 2009) (holding that documents placed by the NCAA on a secure Internet website used by member institutions were public records); Cowles Publishing Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs, 159 P.3d 896, 900 (Idaho 2007) (holding that e-mails between the manager of the juvenile education and training court and her supervisor, the county prosecutor, were public records); Cent. Kentucky News-Journal v. George, 306 S.W.3d 41, 45 (Ky. 2010) (holding that settlement agreements were not exempt from disclosure by virtue of Open Records Act's personal privacy exception); Herald Co. v. Tax Tribunal, 669 N.W.2d 862, 867 (Mich. App. 2003) (holding that financial information submitted by a hotel was not protected from disclosure by a FOIA exemption); Associated Press v. Bd. of Pub. Educ., 804 P.2d 376, 379 (Mont. 1991) (holding that the board of public education wrongfully closed a meeting, in violation of the Montana Constitution); Reno Newspapers, Inc. v. Haley, 234 P.3d. 922, 926 (Nev. 2010) (holding that the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation were public records open to inspection); Milwaukee Journal Sentinel v. Wis. Dep't of Admin., 768 N.W. 2d 700, 715 (Wis. 2009) (holding the legislature's ratification of a collective bargaining agreement did not amend the Public Records Law).

186. *See generally* Allen v. Barksdale, 32 So. 3d 1264 (Ala. 2009) (considering the joint amicus curiae brief of the Alabama Press Association, Huntsville Times, and Raycom Media, Inc., among others); Griffis v. Pinal Cnty., 156 P.3d 418 (Ariz. 2007) (considering the joint amicus curiae brief of the American Society of Newspaper Editors (ASNE), Newspaper Association of America (NAA), Reporters Committee for Freedom of the Press (RCFP), Radio-Television News Directors Association (RTNDA), Society of Professional Journalists (SPJ), and the Associated Press); Cnty. of Santa Clara v. Superior Court, 89 Cal. Rptr. 3d 374, (Cal. Dist. Ct. App. 6 2009) (considering joint amicus curiae brief of RCFP, the National Freedom of Information Coalition (NFOIC), the Bakersfield Californian, California Newspaper Publishers Association, Copley Press, Inc., Freedom Communications, Inc., Los Angeles Times Communications LLP, Medianews Group, Inc., and the Press-Enterprise); Dist. Att'y for the N. Dist. v. Sch. Comm. of Wayland, 918 N.E.2d 796 (Mass. 2009) (considering the amicus curiae brief filed by Massachusetts Newspaper Publishers Association); State *ex. rel.* Adams Cnty. Historical Soc'y v. Kinyoun,

Indeed, so constant and effective were newspapers in their heyday at litigating against government violations of these laws that the mere threat of litigation served to keep public officials in line and created openness for all of the citizenry.[187] In the years immediately following the state laws' enactment, "[t]he overwhelming consensus of newspaper editors" was that the statutes were making a monumental difference in assuring that they were admitted to meetings and not excluded from controversial governmental debates.[188] Some papers indicated that simply "'arming' reporters with a copy of the statute 'to flourish when needed' had enabled them to gain admittance to meetings of agencies that had formerly met behind closed doors."[189] Other editors even noted that meetings had been opened after "the simple statement that a reporter believed a closed meeting would violate the law."[190] "In the few instances where such warnings [did] not prove sufficient, the law [was] used as a 'club' in editorial attacks that apparently [were] successful in eliminating practices of closed meetings."[191]

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765 N.W.2d 212 (Neb. 2009) (considering the joint amicus curiae brief of ASNE, RCFP, RTNDA, SPJ, the Associated Press**,** the Association of Capitol Reporters and Editors, the Nebraska Broadcasters Association, and the Nebraska Press Association); Chanos v. Nev. Tax Comm'n, 181 P.3d 675, (Nev. 2008) (considering the amicus curiae brief filed by Nevada Press Association); Milwaukee Journal Sentinel v. Wis. Dep't of Admin., 768 N.W.2d 700 (Wis. 2009) (considering the joint amicus curiae brief of ASNE, RCFP, RTNDA, SPJ, the Associated Press, the Wisconsin Broadcasters Association, and the Wisconsin Newspaper Association); Zellner v. Cedarburg Sch. Dist., 731 N.W.2d 240 (Wis. 2007) (considering the joint amicus curiae brief of ASNE, NAA, RFCP, RTNDA, the Associated Press, the E.W. Scripps Company, Gannett Co., and the Newspaper Guild-CWA).

187. *See, e.g.*, *Administration of the Freedom of Information Act: Current Trends: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 111th Cong. 4 (2010) [hereinafter *Administration of FOIA Hearing*] ("[W]e know that the threat of litigation can be an effective method for agencies to comply with public records laws." (quoting statement of Dr. David Cuillier, SPJ Freedom of Information Committee Chairman)).

188. *See* HARV. Note, *supra* note 117, at 1216 (citing letter from executive editor of the *Cincinnati Enquirer* to the *Harvard Law Review*, Nov. 24, 1961).

189. *See id.* (citing letter from editor of the *Milwaukee Journal* to the *Harvard Law Review*, Nov. 9, 1961).

190. *See id.* (quoting letter from managing editor of the *Indianapolis News* to the *Harvard Law Review*, Nov. 10, 1961).

191. *See id.* at 1216–17 (citing letter from Paul Simon, sponsor of the Illinois Act, to Chief Editorial Writer of the *Chicago Sun-Times*, Nov. 20, 1961).

Those days, however, appear to be in the past. Early studies[192] and industry reports in professional journals[193] and at journalism conferences[194] strongly suggest that the severe budgetary cuts in traditional American newsrooms already are having an impact on openness in government.[195]

In a study of media lawyers recently conducted by the Media Law Resource Center, more than half of the respondents said they believed the frequency of open government violations has increased in the past two to five years, while less than one-third said that journalists in their jurisdiction have increased the number of freedom of information requests they are making.[196] More than half of respondents reported that media resources devoted to seeking legal compliance with open

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192. In the summer of 2009, based on "a hunch that . . . support for litigation and for the work of FOI coalitions themselves was threatened by the media economy," the National Freedom of Information Coalition (NFOIC) launched an informal survey soliciting comments on the subject from its own members. *See* National Freedom of Information Coalition, *New Knight Foundation Grant Allows State Groups to Take Up Freedom of Information Lawsuits* (Jan. 4, 2010), http://www.nfoic.org/knight-foi-defense-fund?s=open%20meetings%20activity (last visited Mar. 21, 2011) [hereinafter NFOIC survey] (describing the online survey and the survey results) (on file with the Washington and Lee Law Review). Based on the ominous responses to that survey, the NFOIC determined that a more rigorous study was in order. *See id.* ("What we found convinced us that we needed to move forward with a more rigorous look at the issue."). The NFOIC thus joined forces with the Media Law Resource Center, an organization whose membership consists primarily of media attorneys, to conduct a more formal study. *See id.* ("In July 2009, MLRC sent the attorneys of its Defense Counsel Section an electronic questionnaire developed in conjunction with the National Freedom of Information Coalition to collect information on the effect of the changes in journalism on the intensity of the battle for access to government records and proceedings."). As discussed in detail below, the results of the second, formal study were equally worrisome. *See* National Freedom of Information Coalition, *Open Government Survey* (2009), *available at* http://www.nfoic.org/uploads/foi_pdfs/MLRC-NFOIC-Open-Govt-Survey.pdf [hereinafter *Open Government Survey*] (describing statistical results of the survey).

193. *See* Michelle Rydell, *No Money to Fight*, QUILL, Sept.–Oct. 2009, at 34, 35 (noting that "there has been a steep plunge not only in the number of requests being made, but also in the number of lawsuits filed" and citing a media attorney as saying "there has been a dramatic decrease in the number of newsrooms that can afford to take a FOI denial to court").

194. *See, e.g.*, Jeanni Atkins, Mississippi Center for Freedom of Information, *National Freedom of Information Coalition Summit Highlights* (Spring 2010), http://www.mcfoi.org/newsletters/spring2010.html (last visited Mar. 21, 2011) ("Funding for FOI litigation is a casualty of the current economic woes engulfing newspapers around the country.") (on file with the Washington and Lee Law Review).

195. *See* Rydell, *supra* note 193, at 36 ("'It's a reluctant sacrifice, but it's a necessary one . . . . Although every news organization I have ever worked with regards public access as an extremely important priority, in a world of limited budgets, something has to give.'" (quoting Mark Anfinson, a media lawyer)).

196. *Open Government Survey*, *supra* note 192, at 2.

government laws have decreased, with almost 35% reporting resources have decreased substantially.[197]

Another poll of media attorneys found that nearly 80% reported decreasing levels of freedom of information litigation,[198] while 60% reported litigation had "fallen dramatically."[199] Eighty-five percent of respondents said they expected this litigation to "decline more dramatically in the next three years."[200] In anecdotal responses, attorneys reported drastic cutbacks in both newspapers' willingness to litigate cases and their expenditures on these efforts.[201]

Some of the downturn in open government requests by newspapers appears to be tied to staff cutbacks.[202] The first newsroom personnel cuts have been investigative reporters,[203] who tend to file the most requests under open-government laws; when these roles are eliminated from newspapers, the legal instigator role goes with it.[204] However, there are also more direct financial cutbacks to legal instigation and enforcement efforts. In open-ended response text, survey respondents repeatedly listed legal funding cuts as the reason that less litigation was being undertaken.[205]

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197. *Id*. at 4.

198. NFOIC survey, *supra* note 192.

199. *Id*.

200. *Id*.

201. *See id*. (quoting an unnamed Texas media attorney reporting that open government litigation activity was "way, way down" and that "[w]e are seeing almost nothing on records and meetings, and this is in a state in which we typically had a half-dozen cases underway at any given moment for years").

202. *See, e.g.*, *Open Government Survey*, *supra* note 192, at 8 (citing a "[l]ack of media client resources for investigative journalism and related litigation" as a reason for decline in open government litigation).

203. *See* Rydell, *supra* note 193, at 35 (quoting an investigative journalist and media observer Laura Frank as saying, "Investigative reporting is a prime target when cuts come. The reporters that do it tend to be the most experienced and skilled and thus most expensive"); *see also Open Government Survey*, *supra* note 192, at 6 (citing "[d]ramatically slashed budgets at media companies—both for the type of reporting that requires extensive use of public records law and for spending money on lawyers to challenge denials of access to public records").

204. *See* Rydell, *supra* note 193, at 36 ("There are fewer eyes on the ground now. There are fewer reporters doing enterprise work that involves FOIA." (quoting the executive director of the NFOIC, Charles Davis)).

205. *See, e.g.*, *Open Government Survey*, *supra* note 192, at 6–8 (noting various responses related to legal funding cuts given to explain the decrease in freedom of information litigation). Among the responses given were: "lack of funds to pursue discretionary litigation"; "media budgetary restrictions"; "economic problems for newspapers"; "lack of resources, which has led to substantial cut backs in news room staff and hesitance to dedicate resources to pursuing legal action against government agencies";

Litigation of government access issues has traditionally fallen within the newspapers' discretionary budgets,[206] the attorneys report, and "newspapers do not have the money to engage in the legal equivalent of 'elective surgery.'"[207] Because the newspapers once elected to fight even minor battles on principle, the cuts have struck deep. Lawyers "indicated an unwillingness by the news media . . . to even turn to the lawyers for an angry letter demanding access to information that clearly is public,"[208] because "they won't authorize the $250 it will cost" to send it.[209] One attorney reported that a newspaper client opted "not to move forward with an egregious FOI [freedom of information] case that we would have won easily because it was going to require $15,000 or so in costs. They felt confident they'd ultimately win the fees but just couldn't part with the money."[210] Some attorneys report that struggling newspapers are forced to choose between budgeting discretionary legal fees to fight important access issues or saving staff positions that would otherwise be lost to layoffs.[211] Overall, the study concluded, "where once the news business stood ready to defend openness, it now faces such relentless corporate cost-cutting pressure that litigation often is out of the question."[212]

Slashed newsroom budgets mean newspapers no longer have the resources to demand that the city council meeting be open or that the

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"media entities (especially newspapers) less willing to spend money on legal counsel when faced with declining circulation and uncertain futures"; "client resources have shrunk"; "newspapers and broadcasters are spending substantially less on access issues"; "our news media clients no longer have the financial resources to commit to access matters"; "client resource issues"; "decline in news media revenue"; "there has been a decrease in our intervention on behalf of traditional media clients, mainly due to tighter budgets"; "the economics affecting newspapers, particularly over the last 12 to 18 months"; "few papers willing to spend resources to pursue open records claims"; "not where the clients want to spend the resources"; "client budgets for this kind of activity is down"; "substantial reductions in newsroom budgets and personnel"; and "media clients have less money to spend on litigating these issues." *Id.*

206. *Id.* at 6, 7.

207. *Id.* at 7.

208. NFOIC survey, *supra* note 192.

209. *Id.* (quoting one respondent to online survey).

210. *Id*.

211. *Open Government Survey*, *supra* note 192, at 6, 7; *see also* Rydell, *supra* note 193, at 36 ("In the newspaper industry, everyone has pretty much acknowledged it's really hard to sue right now . . . . When you're laying people off, [finding funds to litigate] is hard."); Dalglish, *supra* note 42 (quoting a media lawyer as saying, "In one instance, the choice . . . came down to budgeting discretionary legal fees . . . to hire my firm . . . or to forego the upfront costs . . . in an effort to save a staff position or two for another year. . . . [T]he money was placed toward job retention, but surely there are greater societal costs").

212. NFOIC survey, *supra* note 192.

important records be made public. Some within newspapers are speculating that even if high-publicity issues are pursued by larger newspapers, smaller battles for openness in government will not be fought because newspapers lack the requisite resources.[213] Given the complexity, expense, and time involved in making even simple requests, they are skeptical that members of the public will be able or willing to take up the effort alone.[214]

The fear is that the results of this waning legal advocacy will be "more secrecy and denials"[215] by government officials and an increased likelihood that "local governments [will be] aware that news organizations are reluctant to engage in litigation and thus [will be] emboldened to withhold records confident that the likelihood of a lawsuit is minimal."[216] As one survey respondent put it, "[w]ithout doubt, news organizations are prosecuting fewer enforcement actions under [our state's] open meetings and public records acts. What's worse, increasingly state and local public officials know they can withhold information and access with less risk of getting called on the question by once aggressive newspapers."[217] In the past, an attorney reported, "journalists could back a threat of litigation with

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213. *See, e.g.*, Tim Arango, *Despite Budgets, Some Newsrooms Persist in Costly Fight for Records*, N.Y. TIMES, Feb. 14, 2010, at B1, http://www.nytimes.com/2010/02/15/business/media/15hearst.html?scp=1&sq=despite%20budgets,%20some%20newsrooms%20persist%20in%20costly&st=cse (last visited Mar. 28, 2011) (on file with the Washington and Lee Law Review); Maucker, *supra* note 180 ("Under the financial pressures newspaper companies find themselves facing, can we really afford such costly litigation anymore? In many cases, yes, we'll still pursue the issues in the courts. But smaller, less-significant cases likely never will be pursued because of the costs involved.").

214. *See* Maucker, *supra* note 180 (quoting a newspaper attorney as saying that readers "would be surprised at . . . how often even a simple request becomes difficult. . . . We often wonder what happens when members of the public try to obtain records, especially when our own trained information gatherers face this amount of difficulty").

215. *See* Rydell, *supra* note 193, at 36 (quoting the chairman of SPJ's Freedom of Information Committee as saying that newsrooms can no longer afford to pursue legal action when a request is denied, and "some government officials have recognized this"); *id*. (describing one reporter's experience of noticing that "the threat of a lawsuit didn't have the same effect on government officials as it once did"). "Those who formerly may have buckled under the possibility of legal action when withholding public documents now challenge the reporters who threatened to sue . . . . They knew media organizations weren't spending the money." *Id*.; *see also id.* (noting that one media attorney says that if journalists are not "prepared to fight for what they know is legally theirs," government officials "will continue to become increasingly emboldened to deny requests").

216. *See* Atkins, *supra* note 194 (quoting the executive director of the RCFP).

217. *See* Dalglish, *supra* note 42 (quoting an NFOIC survey respondent); *see also Open Government Survey*, *supra* note 192, at 7 ("Public entities and courts also realize that their nondisclosure/[sealing] orders or access decisions are less likely to be challenged by the media."); *id.* at 12 (expressing fear that state officials will "tak[e] advantage of the obvious lack of resources for the news media to pursue access litigation").

an occasional lawsuit and even a fee recovery . . . . [W]e had a balance of power because editors and news directors could muster a budget for fighting the right fights or tackling the bigger issues. That balance is rapidly eroding with shrinking media revenues, audience and staff."[218] Without the press serving as the enforcement arm for open-government laws, government officials' closure decisions may well go unchallenged, and the accountability and openness guaranteed by the legislation may well prove illusory.

3. Freedom of Information Act

Third, the democracy-enhancing role of newspapers as legal instigators and enforcers is also evident in major movements for important federal legislation guaranteeing openness and accountability, and in litigation invoking those statutory rights.

a. Movement for the Adoption of the Freedom of Information Act

The single most notable example—indeed, the legislative development that arguably has done more than any other to advance the accessibility and usability of public records—is the Freedom of Information Act (FOIA).[219] Once again, "the nation's journalistic community . . . brought the freedom of information issues to the congressional doorstep."[220] The "[p]rincipal proponents" [221] of the legislation were newspaper organizations, "which had organized freedom of information committees as early as 1948,"[222] and which, in the decades that followed, "initiated a long campaign that helped lead to the enactment of the federal Freedom of Information Act in 1966."[223]

Initial efforts toward federal freedom of information legislation began when the American Society of Newspaper Editors (ASNE) charged its Freedom of Information Committee with the task of championing

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218. Dalglish, *supra* note 42 (quoting an NFOIC survey respondent).

219. Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings, 5 U.S.C. § 552 (2006).

220. Harold C. Relyea, *Faithful Execution of the FOI Act: A Legislative Branch Perspective*, 39 PUB. ADMIN. REV. 328, 328 (1979).

221. *Id.* at 331 n.6.

222. *Id.*

223. Baehr, *supra* note 123, at 485.

openness.[224] Other national press associations subsequently followed ASNE's lead and established their own "standing 'freedom of information committees'" to fight for government transparency.[225] These organizations banded together to engage in a campaign of "publicity and legal action" in order to gain access to government records.[226] "During the first half of 1953, for example, one group processed forty 'major cases,' the 'majority of which concerned secret government of one kind or another.'"[227] In addition to these litigation efforts, ASNE also "commissioned Harold L. Cross, veteran New York newspaper attorney, . . . to prepare a 'comprehensive report on customs, laws and court decisions affecting . . . free access to information . . . .' The result was his *The People's Right to Know*, published in 1953, and hailed as a 'manual of arms' for newspaper editors."[228]

> Cross found the right of inspection on the federal level to be a "rare exception," [and that] there was no enforceable legal right to general inspection of federal non-judicial records, the availability thereof being a matter of official grace, indulgence or discretion. Cross reported he had practiced newspaper law for 35 years without encountering a serious case of refusal of access to public records and proceedings. "Now," he commented in 1951, "scarcely a week goes by without a new refusal. The last five years brought more newspaper lawsuits to open records than in any previous twenty-five years."[229]

The Cross study that ASNE commissioned provided the freedom of information movement with the empirical data it needed to press Congress for legislation. Indeed, Cross concluded in his findings that "[c]itizens of a

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224. HARV. Note, *supra* note 117, at 1199 ("Organized activities to this end began in 1950 when the Freedom of Information Committee . . . of the American Society of Newspaper Editors directed its attention to problems of domestic news suppression . . . ." (citations omitted)); *see also* Pickerell, *supra* note 125, at 305 ("In 1950 the American Society of Newspaper Editors authorized its Freedom of Information Committee to undertake a general attack on the 'undemocratic practice' of news suppression." (citations omitted)).

225. Pickerell, *supra* note 125, at 305. Besides ASNE, the other organizations with Freedom of Information Committees included "the American Newspaper Publishers Association, the Associated Press Managing Editors Association . . . Sigma Delta Chi . . . and the National Editorial Association." *Id.* at 305 n.5.

226. *Id.* at 306.

227. *Id.* (quoting *A Growing Threat to Democracy: Secrecy in Government*, QUILL, Sept. 1953, at 7).

228. *Id.* at 306 (citations omitted).

229. *Id.* at 309–10 (citations omitted) (quoting HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW 199–201 (1953)).

self-governing society must have the *legal* right to examine and investigate the conduct of its affairs."[230] "The 'freedom of information' campaign reached a critical moment in 1955 when a special House subcommittee under the chairmanship of Representative John E. Moss of California opened hearings on government information practices."[231] But legislative action did not come quickly. After the subcommittee was formed, Moss recruited Cross to act as its legal counsel, purportedly based on recommendations from ASNE, Sigma Delta Chi, and the Associated Press Managing Editors.[232] In the decade that followed, journalists and media organizations expended immense amounts of energy, money, and persuasive influence to introduce and eventually pass FOIA.[233] And importantly, as with state open-records and open-meetings laws, the press

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230. HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW xiii (1953).

231. Pickerell, *supra* note 125, at 307–08; Martin Halstuk & Bill Chamberlain, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest In Knowing What the Government's Up To*, 11 COMM. LAW & POL'Y, Autumn 2006, at 517, 517, 526; Sen. Thomas C. Hennings, Jr., *A Legislative Measure to Augment the Free Flow of Public Information*, 8 AM. U. L. REV. 19, 20 (1959); Relyea, *supra* note 220, at 331 n.1. Called the Government Information Subcommittee of the House Committee on Government Operations, the body was charged with amending the public access portion of the Administrative Procedure Act (APA) and 5 U.S.C. § 22, known colloquially as "the Housekeeping Statute." Moss had pushed for the creation of the subcommittee after meeting with Cross in 1955 and becoming "interested in the access rights of the public to federal agency information." JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 6 (West Group 3d ed. 2000) (1979) (citations omitted). These early efforts resulted in a 1958 amendment to the Housekeeping Statute. Administrative Procedure Act, 5 U.S.C. §§ 551–59. P.L. 85-619, 72 Stat. 547 (1958). Even after the statute was strengthened, however, government withholding continued, making the need for FOIA even more apparent. *See* Halstuk & Chamberlain, *supra* note 231, at 529–30 (highlighting several instances of government withholding).

232. *See* Halstuk & Chamberlain, *supra* note 231, at 526–27 (discussing possible reasons for which Moss recruited Cross).

233. *See* O'REILLY, *supra* note 231, at 16 (discussing events preceding the passage of the Act). As O'Reilly notes:

> [T]he press pushed hard for the creation of a Freedom of Information Act for the public, not merely for the members of the media. . . . Publicity through the press played an important role in passage of the Act. All during the 1950s, while the Moss Committee was hearing 105 agency witnesses in opposition, publicity about the abuses of agency information practices was stimulating the reform movement. . . . That publicity, in the form of editorials in the home districts of congressmen facing reelection . . . swung many votes to the side of passage, over federal agency objections.

Id. (citations omitted).

sought access for the general public, not special access rights for the media.[234]

A review of FOIA's legislative history makes unmistakably clear that it was ushered into existence by a conglomeration of newspapers. Newspaper editors and media organizations lobbied hard for the legislation[235] over the course of multiple congressional sessions.[236] They visited Capitol Hill, testified about the dangers of closed government at countless hearings,[237] and reminded members of Congress and the President

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234. *See id.* at 100 ("The press did not seek any special access right greater than that of the general public." (citations omitted)). Indeed, at a subsequent congressional hearing, a representative from the New York Times reiterated this sentiment when he said: "We don't want freedom of the press for the benefit of the press. We want freedom of the press for the benefit of the people . . . ." *Executive Privilege, Secrecy in Government, Freedom of Information: Hearing Before the Subcomm. on Administrative Practice and Procedure and Separation of Powers of the S. Comm. on the Judiciary*, 93rd Cong. 169 (1973) (statement of Harding Bancroft, Exec. Vice Pres., *New York Times*) [hereinafter *Executive Privilege Hearing*].

235. *See, e.g.*, *Federal Public Records Law: Hearing Before the Subcomm. on Foreign Operations and Government Information of the H. Comm. on Government Operations*, 89th Cong. (1965) [hereinafter *Federal Public Records Hearing*] (featuring testimony by ASNE's Freedom of Information Committee, American Newspaper Publishers Association, Sigma Delta Chi, and Associated Press Managing Editors Association's Freedom of Information Committee, and written statements by National Association of Broadcasters, the Magazine Publishers Association, Allied Daily Newspapers of Washington, the Hidalgo Publishing and *Green Bay Press-Gazette*); *Administrative Procedure Act: Hearing Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. (1964) (documenting that the committee heard testimony from the Associated Press Managing Editors Association and the National Editorial Association); *Freedom of Information: Hearing Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the S. Comm. on the Judiciary*, 88th Cong. (1963) (providing transcripts of the testimony of representatives of ASNE, the National Association of Broadcasters, Sigma Delta Chi, the National Editorial Association, the American Newspaper Publishers Association, and Hearst Papers); *Freedom of Information and Secrecy in Government: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong. (1958) (providing transcripts of the testimony of members of ASNE's Freedom of Information Committee and Sigma Delta Chi; including written statements from Harold Cross for ASNE, the Magazine Publishers Association, the National Press Photographers Association's Freedom of Information Committee, and the Executive Editor of the *Washington Post* and *Times Herald*).

236. As noted above, Congress held hearings on FOIA from 1958 to 1965. *Supra* note 235.

237. *See* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L. J. 649, 650 n.4 (1984) (noting that between 1955 and 1960, Rep. Moss held 173 hearings related to open government); *Federal Public Records Hearing*, *supra* note 235, at 114 (statement of John H. Colburn, Editor and Publisher of the *Wichita Eagle and Beacon*, acting as an ANPA representative) ("All citizens have the right of legal recourse. Once this fundamental right is denied, then we do move closer to the garrison state."); *id.* at 159 (statement of Walter B.

about their own earlier statements regarding "the perils of secrecy and the virtues of openness."[238] As FOIA was being considered in Congress, Representative Moss noted on the floor that the bill had "the support of dozens of organizations deeply interested in the workings of the Federal Government," most notably those in the newspaper industry.[239] He added that the bill was "the fruit of more than ten years of study and discussion, [initiated by] media leaders and built upon by scholars such as the late Dr. Jacob Scher,"[240] a former journalist and professor at the Northwestern University School of Journalism who had drafted the bill's language.[241]

Potter, publisher of the *Culpeper Star-Exponent*, representing the National Editorial Association) ("[T]here is a crying need for legislation to force the Federal Government to cease suppression of information which the public has a right to know."); *id.* at 120 (statement of Richard D. Smyser, chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association) ("[W]hat the people do not know about the Federal Government will ultimately hurt the Federal Government and its officials . . . ."); *see also Freedom of Information and Secrecy in Government, Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 86th Cong. 10 (1959) [hereinafter *Freedom of Information and Secrecy in Government Hearing*] (statement of William H. Fitzpatrick, Associate Editor of the *Wall Street Journal*) ("Without knowledge there can be no logical discussion and without discussion there can be no guarantee that intelligent decisions will be reached."); *id.* at 8 (statement of Eugene S. Pulliam, Managing Editor of the *Indianapolis News* and member of ASNE's Freedom of Information Committee) ("[W]e must make known such information or the individual will become discouraged and discontinue an interest in his Government.").

238. FREEDOM OF INFORMATION AT 40, NAT'L SEC. ARCHIVE ELECTRONIC BRIEFING BOOK NO. 194 (Thomas Blanton ed., 2006), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm (last visited Mar. 21, 2011) [hereinafter FREEDOM OF INFORMATION] (noting that then-White House aide Bill Moyers assisted newspaper editors in their FOIA lobbying efforts by advising them to forward "quotes to White House staff from previous Johnson speeches about the perils of secrecy and the virtues of openness") (on file with the Washington and Lee Law Review); *see also Freedom of Information and Secrecy in Government Hearing*, *supra* note 237, at 25 (statement of James S. Pope, Executive Editor of the *Louisville Courier Journal*) ("We reported several years ago that 166 Federal tax officials had been fired, 60 for dishonesty, bringing from a Member of Congress a statement that the Bureau of Internal Revenue could 'never regain public confidence until it sheds its cloak of secrecy. . . .'").

239. S. COMM. ON THE JUDICIARY, 93RD CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 48 (Comm. Print 1974) [hereinafter FOIA SOURCE BOOK].

240. *Id.* Representative Moss also noted that "[t]he list of editors, broadcasters and newsmen and distinguished members of the corps who have helped develop the legislation over these 10 years is endless." *Id*.

241. *See* Wald, *supra* note 237, at 650 n.4 ("The chief organizer of the core concept of FOIA—the judicially enforceable citizens' right to federal documents—was a Northwestern University School of Journalism professor, Jacob Scher."); Halstuk & Chamberlain, *supra* note 231, at 530–31 ("The bill was drafted chiefly by Jacob Scher, who was named the Moss committee counsel after Cross died in 1959. Scher, an attorney and former journalist, was a

Despite this groundswell of support, however, government officials largely stonewalled the effort.[242] During one key legislative session, "[a]ll 27 federal agencies and departments that presented testimony opposed the bill."[243] Three successive administrations stalled it.[244] When, in the end, after incredible coordinated efforts by newspapers across the country, the bill passed both Houses of Congress and yet still appeared destined for death by pocket veto, the head of ASNE wired the White House with the following message: "Press of America concerned legislation overwhelmingly adopted by Congress may die through inadvertence."[245] Having been barraged with pleas and petitions from newspapers, President Lyndon Johnson relented and agreed to just sign "the damned thing."[246]

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professor at Northwestern University's Medill School of Journalism."). Scher had also been appointed legal counsel to Moss's committee in 1959 after Harold Cross died. *Id.*

242. *See, e.g.*, FREEDOM OF INFORMATION, *supra* note 238 ("All through 1965, the administration stalled Moss's bill.").

243. *Id.*; *see also* O'REILLY, *supra* note 231, at 9 n.17 (noting that "Moss heard 105 agency representatives in opposition to" various FOIA predecessor bills).

244. FREEDOM OF INFORMATION, *supra* note 238 (noting that "as long as Eisenhower was president, Moss could hardly find a Republican co-sponsor for his proposed openness reforms," and that the proposal went on to face opposition in both the Kennedy and the Johnson presidencies). Freedom of information legislation was introduced on numerous occasions in the 86th and 87th Congresses. *See, e.g.*, S. 3410, 87th Cong. (1962) (proposing "[t]o amend the Administrative Procedure Act," for freedom-of-information and other purposes); H.R. 9926, 87th Cong. § 1002 (1962) (proposing to "provide more adequate and effective information for the public"); S. 1907, 87th Cong. (1961) (proposing "[t]o amend section 3 of the Administrative Procedure Act (60 Stat. 238) to clarify and protect the right of the people to information"); S. 1887, 87th Cong. § 1002 (1961) (proposing to "provide more adequate and effective information for the public"); S. 1567, 87th Cong. (1961) (proposing "[t]o amend section 3 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information"); S. 2780, 86th Cong. (1960) (proposing "[t]o amend section 3 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information"); S. 1070, 86th Cong. § 1002 (1959) (proposing to "provide more adequate and effective information for the public"); S. 186, 86th Cong. (1959) (proposing "[t]o amend section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information").

By 1964, a comprehensive bill had passed in the Senate, "but the House failed to act before it adjourned because Senate and House lawmakers wrangled with the Department of Justice" over the scope of exemptions to access requirements. Halstuk & Chamberlain, *supra* note 231, at 531.

245. Telegram from Robert C. Notson, ASNE President, to Bill Moyers, Special Assistant to the President (July 2, 1966), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/Document%2010.pdf (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

246. Bill Moyers, President of the Schumann Center for Media and Democracy, *Address for the National Security Archive Twentieth Anniversary: In the Kingdom of*

Media efforts did not, however, stop there. As congressional committees subsequently amended FOIA and undertook related oversight functions, press organizations remained engaged.[247] In 1974, after the Watergate scandal, FOIA underwent major changes,[248] and once again, the press led the charge to ensure government openness.[249] Indeed, these efforts led one member of Congress to "express . . . appreciation to the officers and members of the many news media organizations who [had] helped spearhead the fight to preserve the public's right to know."[250] When, in recent years, it became clear that FOIA was again in need of revision, lobbying by the Society of Professional Journalists was instrumental in the passage of FOIA reform bills in 2007.[251] As part of the Sunshine in Government Initiative, the Society engaged in lobbying efforts,

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the Half Blind (Dec. 9, 2005), http://www.gwu.edu/~nsarchiv/anniversary/moyers.pdf (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review); *see also* Halstuk & Chamberlain, *supra* note 231, at 531 ("President Johnson signed the bill into law on July 4, 1966, despite continued and overwhelming agency objections and his own misgivings."). "One of the misconceptions about the bill's signing on Independence Day is that the date was purposely selected for its symbolism." *Id.* "In fact, the reason that the bill was signed on July 4 is that it was scheduled to die on July 5; President Johnson simply waited until the last possible moment, finally accepting that a veto would have been unpopular and politically unwise." *Id.*

247. *See, e.g.*, *Executive Privilege Hearing*, *supra* note 234 (statement of Harold F. Bancroft, Executive Vice President, *New York Times*) (discussing "the experience of the New York Times under the Freedom of Information Act").

248. *See* Freedom of Information Act, Pub. L. No. 93–502, §§ 1–3, 88 Stat. 1561–65 (1974) (codified at 5 U.S.C. § 552) (amending the original Freedom of Information Act).

249. *See, e.g.*, *Executive Privilege Hearing*, *supra* note 234 (testifying at this hearing, among others, were representatives from the National Newspaper Association, the Radio-Television News Directors Association, and Sigma Delta Chi, and statements for the record were also introduced by the American Newspaper Publishers Association and the *Oklahoma City Times*). During the FOIA Amendment hearings, supporting testimony was provided by representatives of the *Philadelphia Inquirer*, ASNE, the *American* [Ellwsorth, Maine], the Associated Press Managing Editors, the Radio-Television News Directors Association, the Ohio Newspaper Association, the National Newspaper Association, Sigma Delta Chi, the American Newspaper Publishers Association, the *Denver Post*, and the Association of American Publishers, Inc. FOIA SOURCE BOOK, *supra* note 239, at 270–71.

250. FOIA SOURCE BOOK, *supra* note 239, at 407. Representative William Moorhead noted that these groups included "the ASNE, whose president is Howard H. Hays, Jr., editor-publisher of the Riverside, Calif., Press-Enterprise; the National Newspaper Association, its executive vice president Theodore A. Serrill and William Mullen; Sigma Delta Chi, the Society of Professional Journalists; the Radio-Television News Directors Association; and the Association of American Publishers." *Id.*

251. BAKER HOSTETLER, ANNUAL REPORT TO THE BOARD OF DIRECTORS OF THE SOCIETY OF PROFESSIONAL JOURNALISTS AND THE SIGMA DELTA CHI FOUNDATION 4 (2007), *available at* http://www.spj.org/pdf/bhr2007.pdf [hereinafter BAKER HOSTETLER]; *infra* notes 411–12 and accompanying text.

including "making countless visits to members of the House Oversight and Government Reform Committee . . . and organizing a grassroots effort to draw attention to the bill."[252] Moreover, SPJ's president wrote an editorial, which "ran in more than 40 publications," thereby drawing attention to the reforms and "the Society's active role in the process."[253] The Sunshine in Government Initiative strategically placed "editorials in papers all across the country aimed at specific Senators and Representatives who were on the fence or who posed a risk to the bill."[254] After galvanizing constituents and engaging in extensive lobbying—and after having to, again, overcome presidential opposition[255]—the newspapers saw the reforms passed.[256]

b. Waning Enforcement of FOIA

Once again, from the time of its enactment, this legislation championed by newspapers resulted in broad public benefit, as it was put to use by regular citizens.[257] Today, the U.S. government answers more than four million FOIA requests each year.[258] The vast majority of these requests are made by veterans seeking records and individuals making

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252. BAKER HOSTETLER, *supra* note 251, at 5.

253. *Id*.

254. *Id.*

255. *See, e.g.*, Editorial, *Open Government: President Bush's Signature Would Strengthen the Freedom of Information Act*, WASH. POST, Dec. 28, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/27/AR2007122702132.html (last visited Mar. 21, 2011) ("There lies upon the president's desk a bill that would make a government . . . more responsive to the people who request information from it. Rather than make an affirmative statement of support for open government, President Bush seems content to let the legislation become law Monday without his signature.") (on file with the Washington and Lee Law Review).

256. *See* BAKER HOSTETLER, *supra* note 251 (stating that the FOIA reform bills passed the House by a vote of 308-117 and unanimously passed the Senate). These efforts resulted in enactment of the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act of 2007), Pub. L. No. 110–175, 121 Stat. 2524 (codified at 5 U.S.C. § 552). One significant aspect of this legislation was the creation of the Office of Government Information Services. 5 U.S.C. § 552 (h)(1)–(3) (2009). For more information on this office, see *infra* notes 411–16 and accompanying text.

257. *See* Martha Mendoza, *Four Million FOIA Requests in 2004 Tops Previous High*, ASSOCIATED PRESS, Mar. 18, 2005, http://www.ap.org/FOI/foi_031805a_000.html (last visited Mar. 21, 2011) (describing that a large majority of FOIA requests were "routine queries for family, personal or medical records") (on file with the Washington and Lee Law Review).

258. *Id.*

social security administration requests[259]—ordinary Americans accessing their government through a tool that newspapers fought to bring into existence. Even more tellingly, though, FOIA requests in the narrower category that one might think of as truly democracy-enhancing—investigative, large-scale inquiries into the operation and honesty of government—have uniformly been undertaken by newspapers.[260]

FOIA is a unique law, because it is in no way self-executing. There is no agency charged with making government open.[261] Rather, all agencies are charged with opening if someone demands as much.[262] Over time, well-funded newspapers have engaged in "FOIA activism," utilizing the legislative provisions to access government information that has fueled headlines bringing major national and local issues to light.[263]

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259. *See id.* (reporting that in 2004, the Department of Veteran Affairs received 1.8 million requests and the Social Security Administration received 1.5 million requests, mostly for genealogical information).

260. *See, e.g.*, *generally* New York Times Co. v. U.S. Dep't of Defense, 499 F. Supp. 2d 501 (S.D.N.Y. 2007) (describing efforts of the New York Times to obtain, via FOIA requests, information related to the National Security Agency's domestic wiretapping program); Associated Press v. U.S. Dep't of Defense, 395 F. Supp. 2d 15 (S.D.N.Y. 2005) (discussing the Associated Press's FOIA request for transcripts of Guantanamo Bay detainee trials); Washington Post v. U.S. Dep't of Defense, 766 F. Supp. 1 (D.D.C. 1991) (focusing on the Washington Post's attempts to acquire, pursuant to FOIA, information about the failed 1980 rescue mission of American hostages in Iran); New York Times Co. v. Nat'l Aeronautics and Space Admin., 679 F. Supp. 33 (D.D.C. 1987) (centering on efforts by the New York Times to obtain, through FOIA, a tape of voice recordings captured aboard the Space Shuttle Challenger prior to its explosion), *rev'd en banc* 920 F.2d 1002 (D.C. Cir. 1990); Alan Feuer, *Battle Over the Bailout*, N.Y. TIMES, Feb. 14, 2010, at MB1 (discussing FOIA requests submitted by *Bloomberg News*, *The Associated Press*, *The Wall Street Journal*, and the *New York Times* to the Federal Reserve Board for information regarding the federal government's bailout of private banks). One former California Assembly Member stated that "[n]ewspapers are the prime supporters not only of the [federal] Act, but also of the implementation of the Act. You just try to have a little secret meeting in California and watch the local headlines the next day. And that is as it should be." William T. Bagley, *Impact of the Sunshine Act on the Public's Access to Information and on the Internal Operations of Government Agencies*, 34 BUS. LAW. 1075, 1076 (1979).

261. *See* 5 U.S.C. § 552(h)(1)–(3) (2009) (stating that although the Office of Government Information Services is statutorily charged with reviewing FOIA "policies and procedures of administrative agencies," and with reviewing agency FOIA compliance, the office has no enforcement authority).

262. *See* 5 U.S.C. § 552(a)(3)(A) (2009) ("[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.").

263. *See, e.g.*, *A Breach of the Truth*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Mar. 4, 2006, at B6 (describing that a videotape obtained through FOIA shows that the federal government was aware of a possible levee failure prior to Hurricane Katrina); Rita Beamish,

Yellowstone Considers Wireless Tower Expansion, CENTRE DAILY TIMES (State College, Pa.), May 4, 2006, at A1 (revealing documents related to cellular tower expansion in Yellowstone National Park); Seth Borenstein, *Pentagon Accused of Ignoring Waste Allegations; At Issue is a Program that Lets Vendors Set their Own Prices; Defense Said the Program Worked*, PHILADELPHIA INQUIRER, Jan. 24, 2006, at A12 (exposing documents obtained through FOIA that disclose wasteful spending by the Pentagon); Ted Bridis, *Fighter Jet's Brake Failures Elicit Urgent Safety Alerts*, VIRGINIAN-PILOT (Norfolk, Va.), Aug. 5, 2005, at A14 (describing documents detailing brake problems with military fighter jets); Gilbert M. Gaul, *Inefficient Spending Plagues Medicare; Quality Often Loses Out as 40-Year-Old Program Struggles to Monitor Hospitals, Oversee Payments*, WASH. POST, July 24, 2005, at A1 (revealing that Medicare officials knew some hospitals were not in compliance with Medicare regulations); *Many Who Got Sept. 11 Loans Didn't Need Them; Some Loan Recipients Had No Idea their Funds Came from Terror-Relief Program*, RICHMOND TIMES-DISPATCH (Va.), Sept. 9, 2005, at A-1 (disclosing documents stating that post-September 11 relief loans were given to companies that did not need terrorism relief); Dave McKinney, *State Pols Jump Ahead in Line for Illini Tickets; For Ordinary Fans, It's Scalpers or TV*, CHI. SUN-TIMES, Feb. 27, 2005, at 3 (stating that FOIA documents reveal that Illinois state politicians easily obtain University of Illinois basketball tickets ahead of regular fans); Martha Mendoza, *Investigation Raises Questions About Birth-Control Patch*, VENTURA COUNTY STAR (Calif.), July 17, 2005, at 1 (describing released federal drug safety reports detailing the medical problems resulting from a new birth control patch); William Murphy, *A Haven for Handouts; Records: Funds for a Drug Program Run by Council Candidate Thomas White Went to Him and Employees*, NEWSDAY, July 18, 2005, at A08 (exposing documents obtained through FOIA that reveal misappropriation of funds by the J-CAP Foundation that were intended to provide money for drug treatment programs); Jim Nolan, David Ress & Jeremy Redmon, *Jail's Broken Locks are Widespread; Reports Detail Incidents of City Inmates Regularly Breaking Out of Their Cells*, RICHMOND TIMES-DISPATCH (Va.), June 7, 2005, at A-1 (revealing that up to 75 percent of the cells in the Richmond City Jail may have faulty locks); Charles Ornstein, *Report Slams UCI's Kidney Transplant Care*, L.A. TIMES, Feb. 16, 2006, at 5 (detailing an investigation of the UCI Medical Center that revealed the hospital failed to uphold satisfactory standards for its kidney transplant program); Sabin Russell, *Feds Fault Chiron for Lax Cleanup of Flu Shot Plant*, SAN FRANCISCO CHRON., June 21, 2006, at A1 (disclosing FOIA documents stating that the British pharmaceutical company Chiron Corp.'s Liverpool plant, which produces half of the United States' supply of the influenza vaccine, failed to meet FDA regulations); Frank Main, *More Army Recruits Have Records: Number Allowed in with Misdemeanors More than Doubles*, CHI. SUN-TIMES, June 19, 2006, at 03 (revealing that the percentage of Army recruits with waivers for misdemeanors and medical issues had doubled since 2001); David Shaffer, *Salmonella Rates High at State Plants; Tests at Turkey Processors in Minnesota Have Found Levels Close to Failing Federal Standards*, STAR TRIB. (Minneapolis, Minn.), Apr. 14, 2006, at 1A (exposing documents stating that samples from several ground turkey plants contained salmonella at a level twice the national average); Greg Toppo, *White House Paid Commentator to Promote Law; Pundit Got $240,000 to Pitch Education Reform*, USA TODAY, Jan. 7, 2005, at 01A (describing an investigation that disclosed the Bush Administration's payments to a political commentator to promote the No Child Left Behind Act on his television show); Gary Washburn, *Did Daley Make Him the Fall Guy? Water Department's Boss OK'd Probe of Scam, Then Lost Job*, CHI. TRIB., May 5, 2006, at 1 (suggesting through FOIA-obtained documents that Chicago Water Management Commissioner Richard Rice was the mayor's scapegoat for a timesheet scam in the Water Management Department).

A few powerful examples make the case. The Knight-Ridder/McClatchy Washington Bureau was once renowned for its FOIA activism.[264] Housed in the nation's capital and representing one of the nation's largest newspaper chains, at the height of its glory the Bureau was the Washington hub for nearly three dozen papers, including prominent mastheads like the *Philadelphia Inquirer*, the *Miami Herald*, the *San Jose Mercury News* and the *Kansas City Star*, as well as numerous mid-sized newspapers across America.[265] The Bureau consistently produced investigative pieces that were grounded in data generated through FOIA requests and empirical analysis of suspicious patterns in that data.[266] American Journalism Review once called the Bureau a "formidable journalistic force, emphasizing hard-nosed, fact-based watchdog reporting."[267] "Pound for pound," it said, "they might be the most seriously aggressive bunch of journalists in Washington."[268]

Perhaps most famously, the Bureau published nearly eighty revealing pieces related to the Iraq war between January 2002 and May 2005.[269] In the early stages of the war, it launched an intensive, large-scale federal FOIA battle to investigate treatment of wounded veterans, and produced numerous stories that in turn launched congressional inquiries.[270] Today,

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264. *See* Charles Layton, *White Knights*, AM. JOURNALISM REV., Apr.–May 2006, at 38, 40–45 [hereinafter Layton, *White Knights*] (describing the merger of Knight Ridder and McClatchy and the past FOIA investigations spearheaded by Knight-Ridder).

265. *See* Rem Rieder, *The Knight Ridder Fade-Out*, AM. JOURNALISM REV., Apr.–May 2006, at 6, 6 (detailing the nation-wide success of Knight Ridder and its eventual decline and purchase by McClatchy); Layton, *Information Squeeze*, *supra* note 116, at 41 ("Knight Ridder's 32 daily papers claim a combined circulation of more than 3.4 million daily and more than 5 million on Sundays. They include such prominent mastheads as the Philadelphia Inquirer, the Miami Herald, the San Jose Mercury News and the Kansas City Star.").

266. Layton, *White Knights*, *supra* note 264, at 41–45 (describing Knight Ridder's FOIA investigations that led to articles about FEMA's response to Hurricane Katrina, the Iraq War, and coal mine safety).

267. Layton, *White Knights*, *supra* note 264, at 40.

268. *Id.*

269. *Id.* at 42–43.

270. *Id.* at 44–45; *see also The State of the FOIA: Assessing Agency Efforts to Meet FOIA Requirements: Hearing Before the Subcomm. on Info. Policy, Census, and Nat'l Archives of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 80–82 (2007) (statement of Clark Hoyt, McClatchy Newspapers, on behalf of the Sunshine in Government Initiative) (chronicling the efforts of Knight-Ridder/McClatchy journalists to obtain records despite being "stonewalled" by the Veterans Administration (VA)). Hoyt also testified that the VA only capitulated after a lawsuit was filed, and that "because the VA surrendered the . . . records before [the] suit went to trial, [Knight-Ridder/McClatchy was] prevented from recovering" over $100,000 in legal fees. *Id.* at 81.

the Bureau is a shell of its former self, with the entire Knight-Ridder organization having faced massive cutbacks in the last twelve months.[271] It is not alone. Many Washington bureaus have entirely shut down in just the last few years, including Copley Newspapers, the chain that owns the *San Diego Union-Tribune*;[272] Advance Publications, the company that runs the *Newark Star-Ledger* and the *Cleveland Plain Dealer*;[273] and Cox, which operates more than a dozen papers, including the *Austin American-Statesman* and the *Atlanta Journal Constitution*.[274] Residents of Toledo, Des Moines, Pittsburgh, Houston, Salt Lake City, and San Francisco now read daily newspapers that no longer have a presence in the nation's capital,[275] where FOIA was a critical tool for acting as a check on the activities of the federal government.[276]

Of course, newspaper reporters outside of the Beltway also have made public-serving use of FOIA. One of the most heralded pieces of FOIA-based journalism in recent years was a series that ran in the *South Florida Sun-Sentinel*, a newspaper that filed a federal lawsuit to force the release of government records on the distribution of millions of dollars in disaster aid following the hurricanes of 2004.[277] The newspaper revealed FEMA's utter failure to release FOIA-requested records, and ultimately exposed that FEMA had spent nearly $31 million and approved nearly 20,000 Hurricane Frances claims in Miami-Dade, a county that was scarcely touched by the storm.[278] A companion survey conducted by the newspaper, examining

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271. *See* Rieder, *supra* note 265, at 6 (describing the financial decline of Knight Ridder and the eventual purchase by McClatchy).

272. Richard Pérez-Peña, *Big News in Washington, But Far Fewer Cover It*, N.Y. TIMES, Dec. 18, 2008, at A1.

273. *Id.*

274. *Id.*

275. John McQuaid, *The Demise of the Washington News Bureau*, AM. PROSPECT (Sept. 19, 2008), http://www.prospect.org/cs/articles?article=the_demise_of_the_washington_news_bureau (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

276. *See supra* note 263 (listing numerous articles from across the country that brought major national issues to light through FOIA-obtained documents).

277. Sally Kestin & Megan O'Matz, *FEMA Gave $21 Million in Miami-Dade, Where Storms Were 'Like a Severe Thunderstorm,'* S. FLA. SUN-SENTINEL, Oct. 10, 2004, http://www.sun-sentinel.com/news/local/florida/sfl-fema10oct10,0,4828022.story?page=1 (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

278. *See* Sally Kestin & Megan O'Matz, *FEMA Ruled on Disaster Before Verifying Dade Damage*, S. FLA. SUN-SENTINEL, May 15, 2005, http://www.sun-sentinel.com/news/local/southflorida/sfl-fema15may15,0,6384961.story (last visited Mar. 21, 2011) (reporting that Miami-Dade county suffered minimal damage during the hurricanes but still received a large amount of aid from FEMA) (on file with the Washington and Lee Law

Miami-Dade County and all thirty-four municipalities within it, found zero hard-hit areas and fewer than 100 homes with any damage at all.[279] The *Sun-Sentinel* "examined 20 of the 313 disasters declared by FEMA from 1999 through 2004, selecting cities where the agency's inspectors said they had encountered large-scale fraud . . . [and found that] of the $1.2 billion FEMA paid in those disasters, 27 percent went to areas where official reports showed only minor damage or none at all."[280] The series was heralded as exemplary large-scale investigative journalism.[281] It was of a style that the newspapers pioneered, using a legislative tool for which they fought hard on Capitol Hill. But the *Sun-Sentinel*, too, is a waning watchdog. In 2009 alone, thirty editors and reporters were laid off as the newspaper,[282] one of eight major dailies owned by the bankrupt Tribune Company, gave pink slips to one of every five newsroom employees.[283]

Thus, the evidence is overwhelming that in each of these areas—important constitutional litigation, state open meetings and open records legislation, and federal FOIA investigations—newspapers have been the key instigators of legal change and the principal enforcers of the democracy-enhancing legal mandates. Had the circumstances been different and

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Review).

279. *See* Sally Kestin & Megan O'Matz, *Probe Sought into Questionable Aid to Miami-Dade 'Hurricane Victims*,*'* S. FLA. SUN-SENTINEL, Oct. 12, 2004, http://www.sun-sentinel.com/news/local/florida/sfl-femafolo12oct12,0,7270233.story (last visited Mar. 21, 2011) (describing survey findings) (on file with the Washington and Lee Law Review).

280. *Id.*

281. Indeed, the series was a finalist for or won a number of awards, including the Pulitzer Prize for Investigative Reporting, the National Journalism Award for Public Service Reporting, SPJ's Sunshine State Award for Public Service, and the Florida Society of Newspaper Editors' Investigative Reporting Award. *See generally* The Pulitzer Prizes, *Investigative Reporting*, http://www.pulitzer.org/bycat/Investigative-Reporting (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review); Scripps Howard Foundation, *Scripps Howard Foundation Announces National Journalism Awards Winners* (Mar. 10, 2006), http://www.scripps.com/foundation/news/releases/06mar10.html (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review); *2006 SPJ Sunshine State Awards Winners*, http://www.spjsofla.net/wp-content/uploads/2011/03/2006-SPJ-Sunshine-State-Awards-Finalists.pdf (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review); Florida Society of Newspaper Editors, *FSNE 2006 Journalism Awards* (June 23, 2006), http://www.fsne.org/2006awards.shtml (last visited Mar. 18, 2011) (on file with the Washington and Lee Law Review).

282. *See* Megan Ballinger, Mei Lan Ho-Walker & Susan McGregor, *Pressure on the Presses*, WSJ.COM, http://online.wsj.com/public/resources/documents/NEWSPAPERS0903.html (last visited Mar. 21, 2011) ("Thirty-five *Sun-Sentinel* employees were laid off in February and March 2009 . . . .") (on file with the Washington and Lee Law Review).

283. *Id.*

newspapers not been in a position to lead the charge, the course of American democracy would have been significantly altered.

III. Barriers to New Media Filling Legal Instigation and Enforcement Roles

The loss of an entity that serves a particular set of public functions is not in and of itself cause for concern. History is filled with episodes in which once-useful industries lost their usefulness or morphed into new and better mechanisms for meeting consumers' needs.[284] Technological advances, in particular, are inevitable, and it therefore is inevitable that society will alter the primary delivery mechanisms for its important societal communications.[285] Indeed, in the primary debate already taking place about the death of newspapers—focused on the newsgathering and information-dissemination roles that newspapers once served—many commentators believe that the public could find itself equally, if not better, served by some replacement entities that are emerging.[286] Although the issue certainly is one of intense debate,[287] it remains entirely possible that both the dissemination of news and the enhancement of public dialogue will flourish in the new digital age, and that these aspects of democracy will be improved, rather than diminished, as more topics are investigated and more voices are heard.[288]

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284. DAVID D. PERLMUTTER & JOHN MAXWELL HAMILTON, *Introduction: The Challenge of Technological Change in Foreign Affairs Reporting*, *in* FROM PIGEONS TO NEWS PORTALS: FOREIGN REPORTING AND THE CHALLENGE OF NEW TECHNOLOGY 1, 6 (2007).

285. *See id.* (tracking technological change in the media from the Pony Express to the first transcontinental telegraph line to high-speed printing presses and the advent of radio, television, satellite news delivery, and the Internet).

286. *See generally* LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE 146 (1995) (forecasting that the Internet would give ordinary citizens "a degree of empowerment they never had before"); *see also* Julian Guthrie, *Fellow Anchors Defend Rather on Forged Papers*, SAN FRANCISCO CHRON., Oct. 3, 2004, at A2 (quoting news anchor Tom Brokaw in criticizing bloggers while acknowledging that they represent "a democratization of news").

287. *See, e.g.*, MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY 16, 18–19 (2009) (discussing the difference between "speaking" and "being heard," and arguing that "[m]ost online content receives no links, attracts no eyeballs, and has minimal political relevance," and that "[t]he Internet has served to level some existing political inequalities, but it has also created new ones").

288. In early cases dealing with the Internet, courts appear to have wholeheartedly adopted this belief. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 853 (1997) ("Any person or organization with a computer connected to the Internet can 'publish' information."). The Court in Reno added that through "the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Id.*

Hyperlocal news websites,[289] niche digital publications, investigative journalism websites,[290] and a variety of blogs and social media networks[291] are being celebrated as possible substitute mechanisms for the future distribution of news, and in at least some ways, they are argued to have benefits beyond what the traditional newspaper could provide.[292]

But if the disaggregation theory is viewed with a wider lens, it becomes clear that *even if* successful models are developed for providing the public with news, the entities taking on that role are unlikely to take on all of the roles that newspapers once unitarily played in American society. Indeed, the disaggregation approach presupposes as much. What the debate has failed to acknowledge is that one of those roles was a legal instigation and enforcement role, providing a support structure for legislation and litigation crucial to the nation's democracy.

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at 870. "Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer," and "the content on the Internet is as diverse as human thought." *Id.*; *see also* John Doe No. 1 v. Cahill, 884 A.2d 451, 455 (Del. 2005) (finding, as a factual matter, that "the Internet is a unique democratizing medium" that allows "more and diverse people to engage in public debate").

289. *See* Claire Cain Miller & Brad Stone, *'Hyperlocal' Web Sites Deliver News Without Newspapers*, N.Y. TIMES, Apr. 13, 2009, at B1 (quoting the founder of a hyperlocal blog who argues that "[i]n many cities, the local blog scene is so rich and deep that even if a newspaper goes away, there would still be plenty of stuff for us to publish"); John D. Sutter, *Future of Online News May Be 'Hyperlocal,'* CNN.COM (May 1, 2009), http://articles.cnn.com/2009-05-01/tech/future.online.news.hyperlocal_1_swine-flu-sites-hyperlocal?_s=PM:TECH (last visited Mar. 21, 2011) (defining "'hyperlocal' news sites" as those that "focus exclusively on a community in a tight geographic area") (on file with the Washington and Lee Law Review).

290. *See, e.g.*, Howard Kurtz, *Nonprofit's News Gathering Pays Off*, WASH. POST, Apr. 19, 2010, at C1 (noting that ProPublica "has earned substantial respect" as an investigative journalism service).

291. *See* Marshall Kirkpatrick, *Facebook Could Become World's Leading News Reader (Sorry Google)*, READWRITEWEB.COM (Feb. 1, 2010, 11:45 AM), http://www.readwriteweb.com/archives/facebook_aims_to_succeed_where_google_reader_faile.php (last visited Mar. 21, 2011) (noting that "it seems quite likely" that Facebook will become the "go-to place for hundreds of millions of users to find news") (on file with the Washington and Lee Law Review).

292. *See* Gary Moskowitz, *Are Hyperlocal News Sites Replacing Newspapers?*, TIME (Aug. 4, 2010), http://www.time.com/time/nation/article/0,8599,2005729,00.html (last visited Mar. 21, 2011) (quoting Michele McLellan of the Reynolds Journalism Institute, who argues that professional newsrooms "spend too much time on craft and not enough time on community" and that hyperlocals "even if they don't have the most polished reports, are flipping that [and putting] community first") (on file with the Washington and Lee Law Review); Sutter, *supra* note 289 (quoting Jan Schaffer as saying that hyperlocal sites "often do a better job at covering community news than large newspapers did, even before the papers started to collapse").

While at least some entities do seem poised to fill the newsgathering and information-dissemination tasks of last generation's newspapers, they nevertheless appear to lack some important characteristics that made newspapers uniquely suited to act as legal instigators and enforcers, and uniquely able to support the legal edifices of accountability and open government for the last century in America.

A. Self-Identity and Stability

First, these replacement newsgatherers currently lack the stability and the unified self-identity that newspapers long enjoyed. This important attribute incentivized newspapers to band together as a cohesive whole to pursue major changes in the law and made them uniquely well-situated to view legal issues with a long lens.

Newspapers' collective oneness has been especially well-suited to their role as legal instigators and enforcers because it has been a group identity that revolved around a legal notion: A fourth estate,[293] "watchdog" role.[294] Although they have served different markets, have differed widely in circulations, and have featured minor differences in approaches, newspapers also have conceived of themselves as a unified group with an important, even constitutionally mandated, role to play in America's democratic society.[295]

This structure has made newspapers institutionally and historically unique. With a vast pool of largely identically situated entities possessing a

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293. Thomas Carlyle attributes the initial coining of this phrase to Edmund Burke. *See* THOMAS CARLYLE, *Lecture V: The Hero as a Man of Letters. Johnson, Rousseau, Burns*, *in* ON HEROES AND HERO WORSHIP 141 (Michael K. Goldberg et al. ed., Univ. of Cal. Press 1993) (1841) ("Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all.").

294. *See, e.g.*, Editorial & Comment, *Proper Distinction Court's Ruling Helps Define "Public Records,"* COLUMBUS DISPATCH, May 7, 2000, at 2B ("Time and again, The Dispatch has supported efforts to ensure that records of government operations remain open to the public and the press, in its Fourth Estate role as the people's watchdog. And this newspaper has pressed the issue more than once in the courts.").

295. *See, e.g.*, Adam Liptak, *Shrinking Newsrooms Wage Fewer Battles for Public Access to Courtrooms*, N.Y. TIMES, Sept. 1, 2009, at A10 (noting that newspapers have historically fought for open access to courtroom proceedings because they view such lawsuits as "a matter of civic responsibility"); *see also* Brief for The Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Respondents at 11, Dep't of Defense v. ACLU, 130 S. Ct. 777 (2009) (No. 09-160) ("The news media is often the link between accessing important government information such as this and providing it to the public—the 'fourth estate' is the surrogate for the public in cases such as this.").

shared purpose, a shared identity, and a shared commitment to each other and to the legal structure within which they worked, newspapers have acted out of a duty to fight for principles that served this collective self-interest.[296] This sense of duty has motivated newspapers that witnessed breaches in government openness to fight against them, has motivated newspapers that were not directly involved in the particular legal battle to rally around those that were involved, and has motivated newspapers to organize themselves into associations that lobbied for these ideals with legislatures.[297] Because this collective duty was permanent and forward-looking, newspapers engaged in significant litigation or legislation efforts that were exceptionally unlikely to have any immediate or meaningful impact on their own financial bottom lines. It was inconceivable that Richmond Newspapers or the Press-Enterprise would experience enough of a boost in daily newspaper sales that they would win back the cost of their court-access litigation.[298] Indeed, by the time the famous cases brought by those newspapers were resolved by the U.S. Supreme Court, the moment for running the breaking news story had long since passed.[299] Instead, these newspapers felt compelled to fight the legal battle because they, like other newspapers in America, saw themselves as defenders of these principles *institutionally*. The waning of those *institutional* forms of journalism might be expected to produce a concomitant decline in legal instigation and enforcement.

By contrast, many new media reporting entities have an internal independence that is both potentially beneficial in other arenas and potentially harmful to the legal instigation and enforcement issue identified in this Article. Because they differ widely on grounds of ideology, region, approach, and purpose, and do not see themselves or even hope to see themselves as a collective whole, these entities cannot currently be neatly

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296. Gloede, *supra* note 59, at 12.

297. *See supra* Part II.B.1 (discussing the role of the press in litigating for the general public's access to courts); *supra* Part II.B.2 (highlighting the importance of newspapers in marshalling their resources as associations to lobby for state open-record and open-meeting laws); *supra* Part II.B.3 (demonstrating that press associations were instrumental in the passage and enforcement of FOIA).

298. *See supra* text accompanying note 70 (describing high litigation costs).

299. *See Press-Enterprise II*, 478 U.S. 1, 6 (1986) (noting that when the petitioner's request for the release of a court transcript in a criminal proceeding was finally before the Supreme Court "the specific relief petitioner [sought had] already been granted—the transcript of the preliminary hearing was released after Diaz waived his right to a jury trial"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980) (Burger, J., plurality opinion) ("The criminal trial which appellants sought to attend has long since ended . . . .").

clumped into a single cohesive self-identity the way the last generation's newspapers could.[300] This is not to suggest that some of the newsgathering entities in the new media ecology are not committed to the First Amendment or dedicated to openness in government; many fervently are.[301] But as the new media disaggregate their functions, the likelihood diminishes that any particular organization in this loose affiliation of replacement entities will have either the motivation or the wherewithal to serve as a meaningful advocate for democratic principles that benefit a broad swath of society.[302]

Much current scholarship and commentary suggests that new media entities lack the stability of business model and collective community presence that newspapers shared.[303] As Jan Schaffer, executive director of the J-Lab Institute for Interactive Journalism at American University noted, although blogs and other citizen media websites, *as a category*, are clearly a sustainable part of the emerging new local news universe, they have not proven to be individually sustainable.[304] Rather, ongoing news-sharing

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300. *See* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 74 (2008) ("[T]here is a media corollary to the phenomenon of assortative mating. Given unprecedented media choices, people self-segregate into their own gated media communities."); Katie Donnelly, *Hyperlocal News Aggregators Grow in Sophistication*, AM. U. SCH. OF COMMC'N CTR. FOR SOC. MEDIA, http://www.centerforsocialmedia.org/future-public-media/public-media-showcase/hyperlocal-news-aggregators-grow-sophistication (last visited Mar. 21, 2011) (noting that because hyperlocal sites focus in on specific locales, they necessarily have fragmented audiences with unique demands and must structure their approaches accordingly) (on file with the Washington and Lee Law Review).

301. *See About Us*, PROPUBLICA.ORG, http://www.propublica.org/about (last visited Mar. 21, 2011) ("This is . . . a moment when new models are necessary to carry forward some of the great work of journalism in the public interest that is such an integral part of self-government, and thus an important bulwark of our democracy.") (on file with the Washington and Lee Law Review).

302. *See* Pew Res. Ctr. Project for Excellence in Journalism, *Community Journalism*, STATE OF THE MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (Mar. 15, 2010), http://stateofthemedia.org/2010/special-reports-economic-attitudes/community-journalism/ (last visited Mar. 21, 2011) [hereinafter STATE OF THE MEDIA 2010, *Community Journalism*] (finding that, in a survey of individuals running "citizen journalism" sites, advocating for democratic principles was not among the stated motivations for creating such a site) (on file with the Washington and Lee Law Review).

303. *See* ROBERT W. MCCHESNEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN 79 (2010) (illustrating the community presence of traditional newspapers by quoting Dan Zweifel, "who recalls with no small measure of sorrow 'the days when a newspaper was as much a part of what pulled a city together as cheering for the baseball team'").

304. JAN SCHAFFER, CITIZEN MEDIA: FAD OR THE FUTURE OF NEWS? THE RISE AND

efforts "emerge in serial fashion, with fresh sites coming online to replace those that collapse as their founders" abandon the enterprise.[305]

A respondent in one of Schaffer's studies, who runs an independent local news site, put it this way: "I think you're going to see four or five hyperlocal sites per city in a few years, and none will be permanent. We'll never be big operations. I think what will be long-term is the *phenomenon* of citizen journalism."[306] This development may well mean positive things for news and the enthusiasm with which the newsgathering endeavor is pursued. But a *phenomenon* does not create a support structure for legal rights or form the powerhouse that fights long-term battles for openness and accountability of government. Entities with long-term identities and long-term goals do that. Newspapers did that.[307] Indeed, when those entities with the incentives to fight larger constitutional and legislative battles disappear and are replaced with entities with shelf-lives that are deliberately shorter, the result may be that the more fragile entities will choose the moment at which they are faced with the critical legal barrier as the moment to close up shop. Another site may well emerge to replace it, and the larger newsgathering and information-dissemination components of the newspaper disaggregation might still be achieved. But the damage to the legal instigation and enforcement role, and to the public's interest in accountability and open government, will be severe.

Importantly, this fragility is not limited to the very smallest, least visited, or most amateur of the new media. Even the most well-regarded online news entities are incredibly vulnerable.[308] The State of the News Media Report for 2010 reported that, of sixty well-regarded sites studied in 2009, "at least four had died" by the time the report set to discuss them was released.[309] Thus, at least at the moment, it seems that the new media's lack

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PROSPECTS OF HYPERLOCAL JOURNALISM 8–9 (2007), *available at* http://www.j-lab.org/citizen_media.pdf.

305. *Id.*

306. *Id.* (emphasis added).

307. *See supra* Part II.B (discussing the role of the press in litigating for public access).

308. *See* Daniel Lyons, *Arianna's Answer*, NEWSWEEK (July 25, 2010), http://www.newsweek.com/2010/07/25/arianna-s-answer.html (last visited Mar. 21, 2011) (cautioning that even the most successful online-only news sites, like the *Huffington Post*, "can't monetize very well" and noting that, even with its substantial readership of "24.3 million unique visitors" each month, "HuffPo generates just over $1 per reader per year") (on file with the Washington and Lee Law Review); *see also* STATE OF THE MEDIA 2009, *Overview*, *supra* note 17 ("The new media in aggregate are far from compensating for the losses in coverage in traditional newsrooms, and despite enthusiasm and good work, few if any are profitable or even self-sustaining.").

309. STATE OF THE MEDIA 2010, *Community Journalism*, *supra* note 302.

of stability and lack of unified self-identity position them differently from newspapers, such that there is cause to be concerned about the likelihood that they will pick up the torch as the instigators and enforcers of legal change.

B. Financial Considerations

Second, and equally important, these new media entities lack the corporate coffers and capitalist motivations to consistently fight the long-term legal instigation and enforcement battles that in the past have served newspapers' overarching business model but also unquestionably resulted in greater public good.

One pragmatic reason that newspapers have always been ferocious advocates for open government is that they, more than any other profit-making enterprise, have benefitted financially from open government.[310] Individual members of the public may *want* to know of their government's activities, but individuals have neither the incentives nor the organization to advocate for open-government legal reform in the courts or with the legislature. Newspapers, on the other hand, require open government in order to get the stories that they sell to the public, and thus have made expenditures to assure that access.

In the past, newspapers unquestionably had the financial resources to fund these fights.[311] Newspapering has traditionally been an extremely profitable industry. Before online competition fully emerged, a monopoly newspaper in a medium-sized market could command a profit margin of 20% to 40%.[312] The newspaper business was once the very best place to be in tough economic times: In 1971, in the midst of a significant recession, the profit margin for publicly traded newspapers was estimated at 7.9%—"more than twice the average for the top 500 corporations" and equal to the tobacco industry, which was "the third most profitable industry in the

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310. *See, e.g.*, AURORA WALLACE, NEWSPAPERS AND THE MAKING OF MODERN AMERICA: A HISTORY 163–64 (2005) (describing the New York Time's litigation to defend its publication of the Pentagon Papers, which gave the Times the lucrative scoop on "a massive study of how the United States went to war in Indochina," and preserved "the greater values of freedom of expression and the right of the people to know").

311. *See* Ben H. Bagdikian, *The Myth of Newspaper Poverty*, COLUM. JOURNALISM REV., Mar–Apr. 1973, at 19, 21 (presenting 1971 market research showing the newspaper industry to be one of the most profitable in the United States).

312. Philip Meyer, *Learning to Love Lower Profits*, AM. JOURNALISM REV., Dec. 1995, at 40, 40, 42.

country" that year.[313] Analysts suspected that privately held newspapers were doing as well or even better.[314] In 1991, during another recession, publicly traded newspaper companies averaged operating profits of 13%, and in 1997, they averaged 20%, with many well above 30%.[315] In some years, major newspapers had so much cash that they had to scramble to spend money in order to avoid exceeding profit limits designated by the government.[316] A longstanding industry joke was that owning a newspaper was like having a "license to print money."[317] With such prosperity, litigating a case all the way to the U.S. Supreme Court would have been economically feasible and worth the expense in the long-term, even if it would not necessarily improve the newspaper's bottom line in the short-term.[318]

Today, that economic viability is seriously threatened.[319] The value of stock shares for many newspaper companies has fallen below the price of a single daily paper.[320] Advertising, which has always been a major revenue

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313. Bagdikian, *supra* note 311, at 19, 21.

314. *See id.* ("Dirk Brothers', . . . probably the most careful analyst of newspaper economics in the market, says that its experience with privately held papers shows that there is not a significant difference between the profitability of publicly traded and privately held [newspapers] that are well managed.").

315. John Morton, *Hanging Tough When Profits Drop*, AM. JOURNALISM REV., Oct. 1998, at 88, 88. By way of comparison, Wal-Mart has operated on an average 5.4% pre-tax profit margin over the last five years. *Wal-Mart Stores Inc. Ratios & Returns*, FORBES, http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=wmt (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

316. Morton, *supra* note 315, at 88.

317. Alterman, *supra* note 2, at 49.

318. *See* WALLACE, *supra* note 310, at 168 (noting that, after their joint Supreme Court battle over the Pentagon Papers, "both the *Post* and the *Times* were lauded [by the public] for their actions").

319. *See, e.g.*, STATE OF THE MEDIA 2009, *Overview*, *supra* note 17 ("The industry remains profitable, but operating margins are dropping and now average in the mid to low teens, and they are under much greater pressure in 2009."); *see also Denver Post Owner Plans Bankruptcy Filing*, WASH. TIMES (Jan. 16, 2010), http://www.washingtontimes.com/news/2010/jan/16/denver-post-owner-plans-bankruptcy-filing/ (last visited Mar. 21, 2011) (reporting that the newspaper holding company MediaNews Group plans to file for bankruptcy, making it the thirteenth U.S. newspaper filing for bankruptcy in as many months) (on file with the Washington and Lee Law Review); Zachery Kouwe & Michael J. de la Merced, *Owner of Orange County Register May File for Bankruptcy*, N.Y. TIMES, Aug. 31, 2009, at B3 (highlighting that plans by the owner of the *Orange County Register* to file for bankruptcy "would be the latest by a newspaper publisher, as the industry struggles to cope with declining advertising revenue and heavy debt loads," and that the filing would "most likely wipe out the 45 percent equity stake held by two big private equity firms").

320. *See Newspaper Share Value Fell $64B in '08*, REFLECTIONS OF A NEWSOSAUR (Jan. 1, 2009, 12:01 AM), http://newsosaur.blogspot.com/2008/12/newspaper-share-value-fell-

stream for newspapers—accounting for up to 80% of newspaper revenues, and for essentially all of the profit[321]—has steadily dropped each year since 2006.[322] Newspapers have been hit particularly hard in the area of classified advertisements, with expenditures on classifieds dropping nearly 30% in 2008[323] and about 40% for each of the first three quarters of 2009.[324] One prominent media business analyst has suggested to publishers that "they might prudently plan for classifieds to go to zero" by 2013.[325]

The Inland Press Association, a not-for-profit newspaper organization that conducts research on behalf of its member entities, reports in its Trend Analysis that "[a] triple whammy of declining circulation, advertising and classified revenue" eroded profits industry-wide during the period from 2004 to 2008, with some newspapers reporting double-digit and triple-digit declines in operating profit.[326] In the words of financier Warren Buffet: "The days of lush profits from our newspapers are over."[327]

Notably, as a collective whole, the replacement entities in the new media ecology have not yet shown any meaningful promise of the kind of profit margin newspapers once enjoyed. The individuals who are sometimes derisively referred to as "pajama bloggers"[328] or "jammie

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64b-in-08.html (last visited Mar. 21, 2011) ("Trading for pennies, the shares of [several newspaper companies] are essentially worthless [and] were banished to the Pink Sheets earlier this year when [their shares all closed] below $1 per share for 30 days in a row."); Kuttner, *supra* note 23, at 24 (observing that "Wall Street so undervalues traditional publishing that McClatchy's stock price briefly rose when it sold off the Minneapolis *Star Tribune* at a fire-sale price," and that "newspaper stocks lagged the S&P 500 last year by 21 percent, after another disastrously down year in 2005").

321. Morton, *supra* note 315, at 88.

322. *See* Newspaper Association of America, *Advertising Expenditures: Annual*, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Mar. 21, 2011) [hereinafter *Advertising Expenditures*] (on file with the Washington and Lee Law Review).

323. *Id.*

324. *Id.*

325. STATE OF THE MEDIA 2009, *Overview*, *supra* note 17.

326. Adolfo Mendez, *Updated: U.S. Dailies See Declines in Revenue Profits Over 5-Year Span*, INLAND PRESS ASS'N (Apr. 1, 2010), http://www.inlandpress.org/articles/2010/08/02/knowledge/management_human_resources/doc4a53ce729fc97677262186.txt (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

327. John Morton, *Buffeted*, AM. JOURNALISM REV., Oct.–Nov. 2007, at 76, 76 (quoting Buffet's letter to shareholders of the *Buffalo News*).

328. *See* Paul Colford, *Big Blog Bucks*, N.Y. DAILY NEWS, Oct. 5, 2004, at 52 (quoting CNN president Jonathan Klein as worrying that the Internet has shifted too much power to "a guy sitting in his living room in his pajamas"); John Cook, *NYT Reporter Defends Afghani Minerals Piece, Lashes Out at Critics*, YAHOO NEWS (June 15, 2010, 9:04 PM), http://news.yahoo.com/s/ynews/20100615/pl_ynews/ynews_pl2616 (last visited Mar. 21,

surfers"[329] do not ordinarily have financial resources of any significance, and referring to them as independent journalists (a term that is more accurate in at least some subset of the cases) does not change this financial equation. This difficulty is shared by other, larger-scale new media entities.[330] Many non-profit and for-profit news-origination sites have yet to find revenue streams that can ensure their continued existence, let alone place them in the magnificent position that allowed newspapers the financial freedom to take on expensive legal battles.[331] Indeed, while some sites are searching for ways to reach financial sustainability,[332] others are not even concerned with bolstering revenue. According to the 2010 Project for Excellence in Journalism report, while new media founders, owners, and editors say they are looking for ways to increase traffic and attract volunteers, few showed any interest in receiving assistance to create profitable business models.[333] Asked to gauge their site's success, 73% declared it already to be successful, even if they were not profitable, which

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2011) (quoting *New York Times* reporter James Risen as saying, "Bloggers should do their own reporting instead of sitting around in their pajamas") (on file with the Washington and Lee Law Review); Sam Stein, *Bloggers Furious at White House for Anonymous Ridicule*, HUFFINGTON POST (Oct. 12, 2009, 11:21 AM), http://www.huffingtonpost.com/2009/10/12/bloggers-furious-at-white_n_317424.html (last visited Mar. 21, 2011) (reporting that "progressive bloggers" were upset over an anonymous White House advisor's comment that suggested such bloggers needed to "take off their pajamas, get dressed and realize that governing a closely-divided country is complicated and difficult") (on file with the Washington and Lee Law Review).

329. *See* Dalglish, *supra* note 42 (asserting that "those folks that in my office we often refer to as 'Jammie Surfers'—the independent volunteer reporters who work from their basements late at night and may or may not have training in collecting and reporting news—also don't have any money").

330. *See* Joel Kramer, *The New Front Page: The Digital Revolution*, NIEMAN REP., Spring 2009, at 5, 5 [hereinafter Kramer, *The New Front Page*] (noting that even large new media outfits, such as ProPublica, "depend[] for [their] success on the continuing generosity of foundations or very large individual donors"); Lyons, *supra* note 308 (recounting the *Huffington Post*'s challenges with monetization).

331. *See* SCHAFFER, *supra* note 304, at 8 ("Almost no sites are setting themselves up to be comprehensive substitutes for a full-blown local newspaper. Few have the resources.").

332. *See, e.g.*, Kramer, *The New Front Page*, *supra* note 330, at 5–8 (reporting the successes and challenges of MinnPost.org in seeking sustainability); Joel Kramer, *2009: A Remarkable Year for MinnPost*, MINNPOST.COM (Jan. 25, 2010, 12:03 AM), http://www.minnpost.com/insideminnpost/2010/01/25/15209/2009_a_remarkable_year_for_minnpost (last visited Mar. 21, 2011) (summarizing the 2009 year-end report of the *Minneapolis Post*'s finances) (on file with the Washington and Lee Law Review); Moskowitz, *supra* note 292 (noting that the West Seattle Blog, "after years of relying on donation drives to keep going . . . made six figures in revenue last year before taxes; the same is expected for 2010").

333. STATE OF THE MEDIA 2010, *Community Journalism*, *supra* note 302.

most were not.[334] "More than half (51%) said that continued operation of their sites did not require them to earn revenue" at all.[335]

Certainly, there are other models in place. Some entities in the new media ecology are hoping to sustain profitability based on donations from news consumers or micropayments for online content.[336] However, neither alternative has proven desirable or feasible, given that most polls suggest fewer than 10% of online news consumers would even consider paying for content from even their favorite site.[337] Other entities, like Talking Points Memo, transformed themselves from small blogs into larger-scale news organizations that can break even and potentially turn a profit based largely on online advertising content.[338] But this kind of success—which may be limited to entities that are geared toward one partisan vantage point[339]—has

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334. SCHAFFER, *supra* note 304, at 7.

335. *Id.*

336. *See, e.g.*, Isaacson, *supra* note 16, at 28 ("Under a micropayment system, a newspaper might decide to charge a nickel for an article or a dime for that day's full edition or $2 for a month's worth of Web access."); John C. Abell, *Wall Street Journal to Introduce Micro-Payment Scheme* (May 11, 2009, 10:15 AM), http://www.wired.com/epicenter/2009/05/wall-street-journal-to-introduce-micro-payments-scheme (last visited Mar. 21, 2011) (explaining that the Wall Street Journal is attempting to add the occasional online reader by introducing a micro-payments scheme) (on file with the Washington and Lee Law Review); Douglas MacMillan, *Online Journalism: Donations Accepted* (Dec. 24, 2008, 12:01AM) http://www.businessweek.com/technology/content/dec2008/tc20081223_783996.htm (last visited Mar. 21, 2011) (explaining that websites are soliciting donations to pay for the work of professional journalists) (on file with the Washington and Lee Law Review).

337. *See* STATE OF THE MEDIA 2009, *Overview*, *supra* note 17 (stating that "the free content genie cannot be put back in the bottle" and explaining that many websites probably will not be able to charge consumers); *see also* Michael Lesk, *Micropayments: An Idea Whose Time Has Passed Twice?*, 2 IEEE SEC. AND PRIVACY 61, 61–62 (2004) (presenting reasons why micropayment systems do not work); Nibley, *supra* note 32, at 38 ("[S]ubscriptions do not work—everyone who grew up with the Internet expects to have news for free. Experiments in charging for news have failed by and large."); Barb Palser, *Free at Last: Why Major News Outlets are Giving Up on Charging for Online Content*, AM. JOURNALISM REV., Feb.–Mar. 2008, at 48 ("[I]t would be a mistake to cast one's lot with the minority of readers willing to pay for online news . . . ."); Napoli, *supra* note 25, at 15 ("[J]ournalistic institutions are being confronted by the digital environment's nearly overwhelming pressure to make content available to audiences for free."). *But see Future of Journalism Hearing*, *supra* note 7, at 8 (statement of David Simon, former journalist) ("I have heard the post-modern rallying cry that information wants to be free. But information isn't . . . . It costs money to do the finest kind of journalism.").

338. Karen Carmichael, *Capital Investment: Talking Points Memo Launches a Washington Bureau, Augmenting Its Reporting Firepower*, AM. JOURNALISM REV., Winter 2009, at 8.

339. *See* David Weigel, *Examiner Leads Conservative Response to Liberal Blogosphere: Washington Paper Hires Right-Leaning Pundits, Reporters to Take on the "Nanny State,"* WASHINGTON INDEPENDENT (June 19, 2009, 6:00 AM),

not proven to be a wide-ranging solution to making newsgathering profitable online.[340] Other entities have had some success in turning to philanthropists and foundations with commitments to civic reporting and investigative journalism.[341] ProPublica, perhaps the most prominent of the current examples, operates on this model with some success, but is, by its own admission, at the mercy of the continued foundation support for its existence.[342] Most notably for purposes of this Article's analysis, ProPublica has an agreement with a large East Coast law firm that performs its necessary legal work pro bono—a model that is unlikely to be as viable as a large-scale option for all online news organizations.[343]

On the whole, it appears that new entities, which are creatively filling the newsgathering and information-dissemination functions once served by newspapers, simply do not anticipate financing the legal instigation and

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http://washingtonindependent.com/47884/examiner-leads-conservative-response-to-liberal-blogosphere (last visited Mar. 21, 2011) (describing both "conservative version" and "left-leaning opinion and investigative journalism sites") (on file with the Washington and Lee Law Review).

340. *See* Henry Blodget, *On Our Third Birthday, Some Thoughts on Digital Media and the Future of the Newspaper Business*, BUSINESSINSIDER.COM (July 20, 2010, 12:00 PM), http://www.businessinsider.com/dear-newspaper-folks-no-one-else-is-being-honest-with-you-so-we-will-be-2010-7#comment-4c45f4237f8b9a6827750300 (last visited Mar. 21, 2011) (noting that "the digital media business at least in its current form, . . . generates vastly lower revenue per reader than the print newspaper business does," and offering data demonstrating that even "wildly successful" online newspapers still would not produce enough funding to sustain a newspaper's current newsroom) (on file with the Washington and Lee Law Review).

341. *See* DAVID WESTPHAL, PHILANTHROPIC FOUNDATIONS: GROWING FUNDERS OF THE NEWS 3 (2009) ("A growing number of foundations are getting into the business of supporting news-and-information nonprofits."); Carol Guensburg, *Nonprofit News*, AM. JOURNALISM REV., Feb.–Mar. 2008, at 27 ("Beleaguered journalists who once clung solely to the business model of paid advertising and circulation now recognize the urgency of developing new revenue sources for labor-intensive newsgathering. For some, foundations hold increasing promise as allies in meeting the public's information needs . . . ."); Gilbert Cruz, *The Nightly News, Not-for-Profit*, TIME.COM (July 9, 2008), http://www.time.com/time/business/article/0,8599,1821376,00.html (last visited Mar. 21, 2011) (describing "Pro Publica, a non-profit news organization devoted solely to investigative journalism and funded to the tune of $10 million a year by California-based philanthropists Herb and Marion Sandler") (on file with the Washington and Lee Law Review).

342. *See* Edith Honan & Ellen Wulfhorst, *Online Sites Win Journalism Firsts at Pulitzers*, REUTERS (Apr. 15, 2010, 5:36 PM), http://www.reuters.com/article/id USTRE63B54Y20100412 (last visited Mar. 21, 2011) (explaining how ProPublica, which won a Pulitzer Prize for investigative reporting, is considered a new model for journalism) (on file with the Washington and Lee Law Review).

343. *See* ProPublica, *About Us: Supporters*, http://www.propublica.org/about/supporters/ (last visited Mar. 21, 2011) (indicating that the law firm Cleary Gottlieb provides pro bono legal services for ProPublica) (on file with the Washington and Lee Law Review).

enforcement functions. One recent illustration can be found in MinnPost.com, a professional non-profit regional news site in Minnesota that is working to sustain an entity focusing explicitly on local news and watchdog journalism.[344] MinnPost currently funds its operations through a blend of foundation grants, advertising, donations, and sponsorship.[345] Its editor and CEO, Joel Kramer, has stated that the organization aspires to break even by 2012, but he has acknowledged numerous challenges to reaching that goal.[346] Online advertising has proven to be less viable as a major source of funding than was originally hoped.[347] Advertising dollars are based on traffic, and while the website is able to boost traffic by running more shorter stories and fewer in-depth investigative ones, its goal of providing more local content for serious newsreaders is simply not conducive to increasing hits.[348] MinnPost, like so many other newspaper-replacement media entities, is by definition disaggregated, and as a result, it *necessarily* is not attractive to a large audience, no matter how important its work may be within its individual sphere.[349] Overall, Kramer has said that MinnPost will consider itself financially successful if, at some point, revenues from donations, advertising and sponsorships simply meet operating costs.[350] It does not appear that he or others in similar ventures have considered legal instigation and enforcement as an integral part of their mission. While they may generate enough funding to cover their journalistic operating expenses, they do not expect to become financially prosperous like the newspapers traditionally were.[351] The new media that aspire for serious public-serving reporting seem to be taking for granted the openness of government and significant freedoms won by their

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344. Joel Kramer, *MinnPost's Monthly Page Views Top 1 Million*, MINNPOST.COM (Feb. 20, 2009), http://www.minnpost.com/stories/2009/02/20/6847/minnposts_monthly_page_views_top_1_million (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

345. *Id*.

346. *Id*.

347. *Id*.

348. *See* Kramer, *The New Front Page*, *supra* note 330 ("Serious public affairs subjects and local orientation are both bad routes to maximizing traffic.").

349. *See* MinnPost, *About Us*, http://www.minnpost.com/about/ (last visited Mar. 21, 2011) (emphasizing that MinnPost is a journalism enterprise that deals with only Minnesota news) (on file with the Washington and Lee Law Review).

350. *Id*.

351. *See* Kramer, *The New Front Page*, *supra* note 330 (emphasizing that MinnPost has not proven that a nonprofit model for high-quality online journalism will work in the long term).

predecessors, but have failed to develop any realistic plans for aggressively financing additional efforts.

While it is of course possible that new revenue streams will materialize in the future, at the moment, they do not seem close at hand. Up to this point, no new journalism entity with a disaggregated approach has been able to accomplish what newspapers accomplished with their aggregated approach—namely, produce high-quality investigative news and local public affairs reporting while attracting enough revenue sources to turn profits large enough to subsidize major legal change in the public's interest.

C. Newspaper Subsidization of New Media Legal Battles

Finally, it is worth noting that recent incidents of legal woes by new media entities demonstrate that, at this moment of transition, these entities are still relying on the resources and structural protections of the failing mainstream media.

When blogger Josh Wolf was incarcerated in a federal detention facility for defying a grand jury subpoena seeking video footage that he recorded of an anarchist demonstration in San Francisco,[352] the Society of Professional Journalists, which has an overwhelmingly mainstream media membership, fought for the court to cap Wolf's legal expenses at $60,000.[353] It then went even further, and paid for more than half of those expenses through its own Legal Defense Fund.[354] SPJ members even engaged in fundraising efforts to help cover some of Wolf's personal expenses, including his rent and car payments.[355] The leaders of mainstream journalism organizations held a press conference to protest his jailing and called for the development of a federal shield law to protect journalists in situations like Wolf's.[356] The so-called "media coalition," composed overwhelmingly of newspaper companies and other mainstream media organizations, continues to fund lobbying efforts to push for a

352. *Jailing of Reporters Chills Free Flow of Information*, USA TODAY, May 14, 2007, at A10.

353. Society of Professional Journalists, *Freeing Josh Wolf*, http://www.spj.org/joshwolf.asp (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

354. *See id*. (stating that the SPJ's Legal Defense Fund paid for $31,000 of Wolf's legal costs).

355. *Id*.

356. *Id.*

broader definition of "covered journalists" in the proposed federal shield law.[357] The definition they have sought is significantly broader than is needed to fully protect the newspapers that are funding the effort.[358] As their own business models fail, the newspapers are fighting for rights that benefit the wider newsgathering community, including those who have shown no real signs of being able to take up the legal battles themselves.[359]

There are other, equally stark examples. WikiLeaks is a website that publishes anonymous submissions and leaks of sensitive documents from governments, corporations, and other organizations.[360] Although it has sparked considerable recent controversy after publicizing confidential war documents and diplomatic cables,[361] just a few years ago, it was a largely unknown and struggling entity, doing work that won a number of new media awards.[362]

In February 2008, WikiLeaks' domain name was taken offline after a Swiss Bank sued WikiLeaks and its domain registrar in a federal court in California and obtained an injunction ordering the shutdown.[363] WikiLeaks

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357. *See* HENRY COHEN & KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL 34193, JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN THE 110TH AND 111TH CONGRESSES 9–10 (2009) (indicating that one proposal for the Free Flow of Information Act of 2009 would cover all individuals engaged in journalism).

358. *Id*.

359. *See* Society of Professional Journalists, *Lawyer: Wolf Reaches Deal with Prosecutors, to Be Freed* (Apr. 3, 2007), http://www.spj.org/joshwolf.asp (last visited Mar. 21, 2011) (stating that various organizations are calling for rights that protect the secrecy of sources for journalists in general) (on file with the Washington and Lee Law Review).

360. *See* WikiLeaks, *Introduction to WikiLeaks*, http://wikileaks.org/media/about.html (last visited Nov. 4, 2010) ("We provide an innovative, secure and anonymous way for sources to leak information to our journalists (our electronic drop box). One of our most important activities is to publish original source material alongside our news stories so readers and historians alike can see evidence of the truth.") (on file with the Washington and Lee Law Review). WikiLeaks has been described, in fact, as "a media insurgency." Raffi Khatchadourian, *No Secrets*, NEW YORKER, June 7, 2010, at 40, 40.

361. *See* Charlie Savage, *Gates Assails WikiLeaks Over Release of Reports*, N.Y. TIMES, July 30, 2010, at A8 (stating that Defense Secretary Robert M. Gates denounced WikiLeaks for disclosing classified documents about the Afghanistan war); *The Iraq Archives: The Strands of a War*, N.Y. TIMES, Oct. 22, 2010, at A1 (reporting WikiLeaks' release of almost 400,000 documents regarding the war in Iraq); Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES, Nov. 28, 2010, at A1 (discussing the contents of 250,000 diplomatic cables posted on the WikiLeaks site).

362. *See* Lynn Hermann, *Opinion: WikiLeaks Moves Beyond High School Journalism*, DIGITALJOURNAL.COM (Apr. 6, 2010), http://www.digitaljournal.com/article/290112 (last visited Mar. 21, 2011) (stating that the site has won new media awards, including the 2008 Index on Censorship-Economist Freedom of Expression Award and the 2009 Amnesty International New Media Award) (on file with the Washington and Lee Law Review).

363. *See* Alex Altman, *A Disquieting Victory for WikiLeaks*, TIME.COM (Mar. 3, 2008),

had published documents that the bank alleged were stolen by a former employee and which purportedly revealed secret trust structures used for hiding assets, laundering money, and evading taxes.[364] Recognizing the serious First Amendment concerns arising out of any prior restraint, the Reporters Committee for Freedom of the Press assembled a coalition of press organizations to file a strongly worded amicus brief on behalf of this website[365]—a site that was so anonymous at the time that its operators were entirely unknown to those who fought for its constitutional rights.[366] The coalition that funded this effort was composed of major U.S. newspaper publishers and press organizations that are themselves primarily supported by newspapers.[367] The newspapers funding the legal battle argued that a forum for dissidents and whistleblowers—no matter how controversial—could not be shut down in this way because an injunction imposes a prior restraint drastically curtailing free communications and overshooting the boundaries set for the courts.[368]

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http://www.time.com/time/nation/article/0,8599,1718903,00.html (last visited Mar. 21, 2011) (stating that Julius Baer sued WikiLeaks, and as a result, an injunction sealing WikiLeak's U.S. address was issued) (on file with the Washington and Lee Law Review).

364. *Id.*

365. *See* Notice of Motion and Motion for Leave to File Brief of Amici Curiae; Memorandum of Points and Authority in Support Thereof at 3, Bank Julius Baer & Co. Ltd. v. WikiLeaks, 535 F. Supp. 2d 980 (2008) (No. CV08-0824 JSW), *available at* http://www.rcfp.org/news/documents/20080229-amicusbrie.pdf [hereinafter Notice] (explaining that news organizations and members of the press wanted to file a brief in support of the defendants because the outcome in the case would affect their free speech rights).

366. *See* Alanna Malone, *WikiLeaks Unplugged, Free to Flow*, NEWS MEDIA & L., Spring 2008, at 32, 32 (noting that after the lawsuit was filed, "[t]he court received no response from the owners of WikiLeaks: [T]he operators of the Web site are anonymous, so there was no official representative to take action against."). The founder of the site has since been identified as Julian Assange. Khatchadourian, *supra* note 360, at 40.

367. *See* Notice, *supra* note 365, at 2 (stating that RCFP was joined in the brief by ASNE, NAA, RTNDA, SPJ, Citizens Media Law Project, the E.W. Scripps Co., Gannett, the Hearst Corp., the Los Angeles Times, and the National Newspaper Association). These newspapers and associated organizations stood in support of WikiLeaks despite its operator's "complicated relationship with conventional journalism." Khatchadourian, *supra* note 360, at 50.

368. *See* Bank Julius Baer & Co. Ltd. v. WikiLeaks, 535 F. Supp. 2d 980, 984 (N.D. Cal. 2008) ("As made abundantly clear by the various submissions of the amicus curiae, the current request for an injunction, as well as the Court's original entry of a stipulated injunction, raises issues regarding possible infringement of protections afforded to the public by the First Amendment . . . ."). "[I]t is clear that in all but the most exceptional circumstances, an injunction restricting speech . . . is impermissible." *Id*. at 985.

The judge who had issued the injunction vacated his order, citing the First Amendment arguments of the newspapers.[369] WikiLeaks brought its site online again, and the bank dropped the case.[370] It seems without question that, even absent the anonymity issue, the then-financially-troubled WikiLeaks would not have been able to support the constitutional litigation in its own case in the way the newspaper coalition did.[371] In fact, because of fundraising problems, the site temporarily suspended all operations in December 2009, and did not resume full operation until minimum fundraising goals were met.[372]

The inability of online news entities to sustain their own litigation and legislative efforts, coupled with the declining ability of newspapers and other mainstream media groups to sustain efforts on their behalf, suggests strongly that the nation may soon face a drastic reduction of legal instigation and enforcement, and therefore a significant void in efforts for open government and public accountability.

IV. Future Considerations

As the above analysis demonstrates, the loss of newspapers as legal instigators and enforcers, coupled with the existence of barriers that appear to limit the ability of replacement entities in the new media ecology from taking up those roles, should give cause for concern that American democracy will suffer as legislation and litigation in the interest of open government wane. It is critically important that scholars whose work focuses on the death of newspapers begin to acknowledge this additional consequence of that industry change, and that they attempt to develop solutions to the looming problem.

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369. *Id*.

370. Malone, *supra* note 366, at 32.

371. *See* Khatchadourian, *supra* note 360, at 40 (explaining that WikiLeaks was under-resourced). Given the recent controversial decisions of WikiLeaks, about which this Article will not opine, it is admittedly unclear what economic support the organization might continue to receive from mainstream media. The larger point, however, remains: Even if newspapers wanted to support unconventional online entities in better economic times, they are now constrained from doing so.

372. *See* Steven Zyan Kain Mickels, *"Wikileaks" Website Down until Additional Funds Are Secured*, DIGITALJOURNAL.COM (Jan. 3, 2010), http://www.digitaljournal.com/article/284943 (last visited Mar. 21, 2011) (stating that the Site was temporarily deactivated in December until further funding was received) (on file with the Washington and Lee Law Review). The full archive of the site was back online by May of 2010. Khatchadourian, *supra* note 360, at 51.

A. University and Pro Bono Initiatives

University and pro bono initiatives may serve a critical role in meeting at least some of the needs in this area.[373] A few such programs are in their beginning stages now,[374] motivated by the pressing need for aid to journalists who are working as independent bloggers or for small online news organizations that lack the resources of a larger newspaper organization.[375] These initiatives are laudable and useful, but have obvious shortcomings as large-scale solutions to the problem identified in this Article. Students or pro bono lawyers, while perhaps willing and able to take on single cases through clinics, are not likely to be in a position to coordinate or execute larger litigation movements[376] or to fight significant legal battles that demand extensive, ongoing planning, funding, and other resources.[377] Nor will these students or volunteer attorneys be working for the same, long-term clients in a way that leads to mapping of overarching strategies and thoughtfulness about doctrinal movements and litigation or

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373. *See* Miranda Fleschert, *Law Schools Step in to Help Maintain Sunshine*, NEWS MEDIA & L., Fall 2009, at 16, 16 ("Other institutions have to pick up the slack and one of the alternatives is NGOs and law schools[.]").

374. Chicago-Kent Law School recently launched a Center for Open Government that trains law students to litigate public records cases. Chicago-Kent College of Law, *Chicago-Kent Establishes the Center for Open Government* (Aug. 26, 2009), http:www.kentlaw.edu/news/releases/cog.html (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review). Yale Law School has developed a student practicum on media freedom, which is offered as an externship in which students are paired with high-profile, practicing media lawyers who prepare them to handle both state open government cases and FOIA litigation at the federal level. Fleschert, *supra* note 373, at 17 (explaining the program at Yale Law School). Harvard's Berkman Center for Internet and Society directs a Citizen Media Law Project, which provides legal education and resources for individuals and organizations involved in citizen media. It operates the OMLN.org, Online Media Legal Network, which matches journalists who are working in new digital realms and encounter legal problems with media attorneys who have expressed willingness to do such work on a pro bono basis. Citizen Media Law Project, *About Citizen Media Law Project* (June 28, 2010), http://www.citmedialaw.org/about/citizen-media-law-project (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

375. *See* Fleschert, *supra* note 373, at 17 (quoting the director of the Chicago-Kent program as saying that there are "no lawyers to represent citizens who want to play a proper role in democracy, to move the levers of power . . . . I think there is a need for citizens to have representation in whatever context").

376. EPP, *supra* note 106, at 69.

377. *See id*. at 54 (emphasizing that economies of scale and a capacity for specialization and long-term planning are valuable assets in supporting large litigation campaigns (citing MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 1–3 (1991))).

legislation efforts.[378] More fundamentally, both law student clinics and pro bono initiatives presuppose that there exists a body of media law attorneys who already are being paid by someone and who have, through this fully-funded work, developed expertise that they can then teach by experience to law students and occasionally offer free of charge to publishers of new media as a public service.[379] Media law attorneys with paying clients from within the mainstream media do exist today, at this moment of transition, but if newspapers die, this will not necessarily be true long-term.[380]

B. Non-Profit Foundations and Advocacy Organizations

Another possible replacement for newspapers' efforts in these areas might be non-profit foundations and advocacy groups. Key to many of the efforts described in this Article were the efforts of organizations like the Society of Professional Journalists,[381] the American Society of Newspaper Editors (which, tellingly, recently changed its name to the American Society of *News* Editors),[382] and the Reporters Committee for Freedom of the Press.[383] These organizations, which have existed for years to assist individual publications with legal issues and to advocate for reform or pursue legislation or litigation, have traditionally been funded by member newspapers and other mainstream media companies.

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378. *See id*. at 18 (emphasizing that rights revolutions depend on sustained litigation and that successful rights litigation usually "consumes resources that are beyond the reach of individual plaintiffs—resources that can be provided only by an ongoing support structure").

379. *See* Berkman Center for Internet and Society, *Online Media Legal Network*, http://www.omln.org/ (last visited Mar. 21, 2011) ("The Online Media Legal Network (OMLN) is a network of law firms, law school clinics, in-house counsel, and individual lawyers throughout the United States will to provide pro bono (free) and reduced fee legal assistance to qualifying online journalism ventures and other digital media creators.") (on file with the Washington and Lee Law Review).

380. *See* Fleschert, *supra* note 373, at 17 ("Everyone is concerned now with pressure on budgets, and on personnel and staff time, that news organizations are going to do less litigating and less pursuing legal remedies in the area of First Amendment, open records and open meetings." (quoting David Tomlin, associate general counsel for the Associated Press)).

381. *See supra* Parts II.B, III.C (discussing SPJ's role in legislation and litigation).

382. *See supra* Parts II.B, III.C; *see also* Smolkin, *supra* note 13 ("In a further sign of the times, ASNE's members voted April 6 to change the group's name to the American Society of News Editors, dropping 'newspaper' from its title.").

383. *See supra* Parts II.B, III.C (discussing RCFP's activism in legislation and litigation efforts).

All of these groups have experienced huge reductions in membership, as mainstream media companies that once subsidized their reporters' membership fees will no longer do so.[384] But it remains possible that these organizations will embrace the new media—and vice versa—or that the new media will form their own unifying entities focused on litigation, legislation, or other legal instigation and enforcement tasks.[385] Some of these organizations and others that have actively supported open-government legislation and litigation may have sizable endowments that might sustain them until new media entities can become profitable enough to take up the baton.[386] Nevertheless, it is not at all clear that the groundswell of support for these organizational structures is the same from the new media as it was from the more cohesive newspaper industry.

Other nonprofit coalitions, like National Freedom of Information Coalition (NFOIC), are also working to instigate legal change for open government, and these donation-based models might have some success in the legal battles that once were fought by newspapers.[387] The Knight Foundation recently approved a $2 million grant to the NFOIC to support state open government groups by funding up-front costs like filing fees, depositions and initial consultation fees, if attorneys are willing to take cases that otherwise would go unfiled.[388] Again,

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384. *See, e.g.*, Richard Perez-Pena, *A Magazine Devoted to Print is Moving to the Web*, N.Y. TIMES, May 25, 2009, at B4 (noting that the Newspaper Association of America cut its staff by two-thirds); *see also* Howard Kurtz, *Under Weight of its Mistakes, Newspaper Industry Struggles*, WASH. POST, Mar. 1, 2009, at A4 ("[T]he American Society of Newspaper Editors canceled its convention, saying too many members planned to stay home.").

385. For example, the newly established Online News Association aims to bring together digital journalists for many of the same purposes that were the focus of legacy media advocacy groups. *See* Online News Association, *Mission*, http://journalists.org/?page=onamission (last visited Mar. 21, 2011) (citing goals of ensuring both "freedom of expression" and "freedom of access") (on file with the Washington and Lee Law Review).

386. Perez-Pena, *supra* note 384.

387. *See* Press Release, Knight Foundation Helps State Groups Take Up Freedom of Information Lawsuits (Jan. 4, 2010), http://www.knightfoundation.org/news/press_room/knight_press_releases.detail/dot?id=354928 (last visited Mar. 17, 2011) ("Many efforts to improve and preserve freedom of information and keep government open to the public would have been impossible in the past without the support of Knight Foundation . . . . This grant will help NFOIC and our state coalition partners expand that work at the state and local level.") (on file with the Washington and Lee Law Review).

388. Press Release, Knight Foundation, Knight Foundation Helps State Groups Take Up Freedom of Information Lawsuits (Jan. 4, 2010), http://www.knightfoundation.org/news/press_room/knight_press_releases/detail.dot?id=354928 (last visited Jan. 19, 2011) (on file with the Washington and Lee law Review).

however, NFOIC remains composed primarily of newspaper journalists and traditional journalism professors,[389] and the resources of newspapers have been key to its ongoing stability as an agent of legal change.

C. Publicly Funded Solutions

Should private and non-profit replacements prove insufficient, other alternatives that might be considered include systems in which these sorts of legal efforts are publicly funded. Indeed, a primary focus in the narrower "death of newspapers" debate has been the argument that government subsidies for newspapers should be utilized in order to keep the old model afloat for newsgathering and information-dissemination purposes.[390] A number of scholars and commentators have argued that the government should, through legislative efforts, aggressively ensure that there are competing independent newsrooms of well-compensated journalists in every state and every major community, and that tax dollars should be invested to create and maintain newsgathering, reporting and writing in the public interest.[391] Whatever the merits of these proposals—and they are being fiercely debated, even within

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389. National Freedom of Information Coalition Board of Directors, http://www.nfoic.org/board-of-directors (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

390. *See* GEOFFREY COWAN & DAVID WESTPHAL, PUBLIC POLICY AND FUNDING THE NEWS 13–14 (2010), *available at* http://communicationleadership.usc.edu/pubs/Funding%20the%20News.pdf (noting that "government should explore new and enhanced ways to support the production of news and information, as it has throughout our nation's history" and proposing related solutions such as tax breaks, relaxation of antitrust law, and the "establishment of a [Works Progress Administration] program for out-of-work journalists"); Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Nov.–Dec. 2009, at 28, 32 (arguing, among other things, for a federal fund to finance "local news reporting and innovative ways to support it"); Rosa Brooks, Opinion, *Bail Out Journalism*, L.A. TIMES, Apr. 9, 2009, http://articles.latimes.com/2009/apr/09/opinion/oe-brooks9 (last visited Mar. 21, 2011) ("It's time for a government bailout of journalism.") (on file with the Washington and Lee law Review).

391. *See* Nichols & McChesney, *supra* note 4, at 14 ("Only government can implement policies and subsidies to provide an institutional framework for quality journalism."); *see also* VICTOR PICKARD ET AL., SAVING THE NEWS: TOWARD A NAT'L JOURNALISM STRATEGY 10, 24–27 (2009), *available at* http://www.freepress.net/files/saving_the_news.pdf ("Inherent to the First Amendment's guarantee of the freedom of the press is the responsibility of government to promote the widest possible dissemination of diverse viewpoints.") The authors also propose several "public and government models" to promote journalistic efforts.

mainstream journalism[392]—they begin with the notion that journalism is a public good, and that its broad social benefits to the enhancement of democracy require subsidy.[393] Litigation and legislation in the name of accessibility and accountability may also be public goods, and may be the sorts of legal efforts the nation ultimately deems important enough to be paid for collectively by the whole of our democracy.

One possible model for this public subsidy could be a parallel to the public defender system already in place in the criminal defense context. That system has a basic structure that could prove to be a useful guidepost for other government funding of public-serving work by attorneys. One premise of the public defender program is a utilitarian one: Out of necessity, society has opted to pay from the public fisc for a specialized cadre of attorneys whose job it is to litigate against the government, ensure the observation of fundamental liberties, and guarantee the constitutionality of governmental proceedings.[394] In *Gideon v. Wainwright*,[395] the Supreme Court famously held that the right to counsel in a criminal trial is a

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392. *See, e.g.*, *Future of Journalism Hearing*, *supra* note 7 (statement of David Simon, former newspaperman) ("[T]here can be no serious consideration of public funding for newspapers. High-end journalism can and should bite any hand that tries to feed it, and it should bite a government hand most viciously."). Other observers acknowledge these arguments, but submit that "the rude calculus that says government intervention equals government control is inaccurate." Nichols & McChesney, *supra* note 4, at 16. Others also note that government subsidies have long been a part of the U.S. newspapers industry. *See, e.g.*, COWAN & WESTPHAL, *supra* note 390, at 1 ("News coverage on public radio and TV has the highest trust ratings of any American media. . . . [P]olicymakers have in public broadcasting an almost sure-fire bet for strengthening the quality and scope of news . . . . [M]ost commentators . . . seem unaware of the level of government support that journalism has enjoyed . . . .").

393. *See* PICKARD ET AL., *supra* note 391, at 14 ("Journalism is a public good. As a society, we all benefit from quality news and information. But like many public goods, journalism has always been heavily subsidized. The subsidy model that prevailed for the past century—advertising-supported journalism—appears to be dying.").

394. *See* Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 286–87 (1981) ("The conventional justification for the federal government's provision of legal aid is the utilitarian proposition that the state's duty to provide legal assistance exists to the extent that legal aid maximizes the general welfare."); Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 3 (2001) ("In criminal matters, the 1963 Supreme Court decision in *Gideon v. Wainwright* has effectively required the government to provide trial counsel for defendants.").

395. *See* Gideon v. Wainwright, 372 U.S. 335, 348 (1963) (concluding that the fact "[t]hat the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from this Court's interpretation").

fundamental right and a necessary safeguard to ensure fairness of proceedings.[396] The Court's statement in that case—that these kinds of attorneys were "necessities, not luxuries"[397]—may likewise prove true of legal actions to enforce openness and accountability in government, if no private entity can reasonably be expected to engage in the litigation. There are, of course, significant drawbacks to this model. The success of the public-defender program is plainly debatable.[398] Moreover, even if it were a system that worked perfectly, there are considerable theoretical differences that might preclude the adoption of this model for government-openness purposes. The public-defender system is a reactive rather than proactive model—requiring no determinations about which cases to take or what overall strategy to pursue, as the open-government movement by the newspapers has required.[399] Further, the public-defender system is undergirded by an individual constitutional right to effective assistance of counsel in a criminal case,[400] and there is significant individual risk of loss of liberty in a criminal case[401]—factors that do not exist in government accountability cases.[402]

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396. *Id.* at 343.

397. *Id.* at 344.

398. *See, e.g.*, Richard Klein, *Judicial Misconduct in Criminal Cases: It's Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195, 195 (2006) (focusing on "the failure of trial courts to act to ensure that the constitutional guarantees to the effective assistance of counsel and to a fair trial"); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680 (2007) ("[T]here is no effective remedy for defendants whose attorneys are constitutionally deficient at trial."); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 219 (2010) (citing underfunding and excessive caseloads as problems commonly associated with the public defender system); Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 152 (2009) ("[T]he hope of providing capable lawyers to all poor defendants in criminal cases is not being realized.").

399. *See Gideon*, 372 U.S. at 796–97 (concluding that "every defendant stands equal before the law," which necessarily requires every defendant to have counsel).

400. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

401. *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938) (noting that "the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel" in part because a conviction and sentence might "depriv[e] him of his life or his liberty").

402. Though not a constitutional right, numerous commentators have nevertheless called for extension of *Gideon* to the civil context, in the interest of ensuring greater "access to justice." *See, e.g.*, Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social*

Other public-subsidy models might shift the onus of governmental records openness from a request model to an obligation model. Eliminating the need for a private entity to call for the information and instead mandating that the government make public certain information without such a demand would diminish the harm incurred at the loss of the newspapers as information demanders. Retooling FOIA and state open-records acts to require that documents be made public without public requests[403] would have the salutary effect of eliminating the need for newspapers as legal enforcers. But the development of such a scheme would require significant care and consideration. The practical difficulties surrounding the cost[404] of such a program and the volume[405] of materials it would produce would be potentially crippling hurdles.

One might instead envision the creation of robust and independent ombudsmen offices, housed within the government itself but charged with acting as watchdogs in the way the mainstream press traditionally has done. Not only is there historical precedent for the development of such an internal check,[406] but

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Contract Demands?, 37 FORDHAM URB. L.J. 157, 175 (2010) ("[T]he assistance of a lawyer is essential to a fair hearing and to effective access to justice."); John T. Nockleby, *Introduction: Access to Justice: It's Not for Everyone*, 42 LOY. L.A. L. REV. 859, 860 (2009) ("[T]he American legal system does not, in fact, provide 'access' to everyone, if meaningful access includes meaningful legal representation . . . because a civil justice system that excludes many, if not most, people cannot satisfy the standards of justice if justice is not equally available to everyone."); *see also Administration of FOIA Hearing*, *supra* note 187, at 2 (statement of Dr. David Cuillier, SPJ's Freedom of Information Committee Chairman) (recommending that Congress enact legislation to provide "[l]itigation assistance for [FOIA] requesters," since "[i]t is unreasonable to expect an average citizen to take the time and money to sue the federal government for information").

403. The Obama Administration has taken some steps in this direction. In 2009, for example, Attorney General Eric Holder released a memorandum directing that "agencies should readily and systematically post information online in advance of any public request" under FOIA. Memorandum from Eric Holder, U.S. Attorney General, to the Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf. (quoting President Barack Obama).

404. *See generally* Harold C. Relyea, *The Administration and Operation of the Freedom of Information Act: A Retrospective*, 11 GOV'T INFO. Q. 285, 291 (1994) (discussing the cost of administering FOIA).

405. *See* Downie & Schudson, *supra* note 390, at 44 (noting that "a database is not journalism" and that providing so much raw information "runs the risk of drowning reporters in deep seas of data").

406. For example, some states in the early days of the republic had so-called "Councils of Censors" charged with observing the behaviors of the legislative and executive branches of government. Lewis Hamilton Meader, *The Council of Censors*, *in* PAPERS FROM THE HISTORICAL SEMINARY OF BROWN UNIV. 2 (1899). The Pennsylvania Council of Censors was established by the Pennsylvania Constitution of 1776. *See* P.A. CONST. OF 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania § 47. According to the constitution, the council was charged with inquiring whether "the constitution has been

but several states,[407] and even the federal government,[408] have recently taken modest steps in this direction—again at the urging of lobbying newspapers and mainstream media companies.[409] At least sixteen states, for instance, have public access ombudsmen "to help members of the public, media and government navigate public records and open meetings laws."[410] At the federal level, the OPEN Government Act of 2007 amended FOIA to create the Office of Government Information Services (OGIS),[411] which is charged with "offer[ing] mediation services to resolve disputes between persons making requests under [FOIA] and administrative agencies."[412] A number of challenges, however, have accompanied the creation of these offices,[413] not

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preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled [sic] to by the constitution." *Id.* To fulfill these duties, the constitution established that council members would have the power to, among other things, "send for persons, papers, and records." *Id.* The board of censors remained a part of the Pennsylvania Constitution until 1790, and was also included in that of Vermont from 1777 until 1869. Meader, *supra*, at 2. James Madison referred to Pennsylvania's council in the Federalist Papers. THE FEDERALIST NO. 48, at 311–12 & 317–18 (James Madison) (1987). He specifically noted the council's findings that numerous constitutional violations had occurred as a result of legislative and executive action. "[T]he council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated . . . it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances." *Id.* at 311.

407. *See generally* Jean Maneke & Jill Barton, *Providing Public Assistance for the Sunshine Law*, 63 J. MO. B. 74 (Mar.–Apr. 2007) (comparing programs of various states, including Indiana, Arizona, and Ohio).

408. *See* Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552 (h)(1)–(3)) (describing the Office of Government Information Service's duties of reviewing and recommending policies, procedures, and compliance of administrative agencies, as well as the duty to offer mediation to resolve disputes).

409. As noted above, the press was instrumental in passage of this law. *See supra* notes 251–256, and accompanying text (illustrating how media efforts were instrumental in the revision of FOIA); *see also* BAKER HOSTETLER *supra* note 251, at 4 ("The Society's lobbying paid . . . off this year with the passage of FOIA reform bills in both the House and Senate. . . . [T]he Society . . . continued the push, making countless visits to members of the House Oversight and Government Reform Committee . . . and organizing a grassroots effort to draw attention to the bill.").

410. Maneke & Barton, *supra* note 407, at 74.

411. *See* 5 U.S.C. § 552 (h)(1)–(3) (2009) (describing the Office of Government Information Service's duties of reviewing and recommending policies, procedures, and compliance of administrative agencies).

412. *Id.* § 552 (h)(3).

413. *See* Maneke & Barton, *supra* note 407, at 75 (noting that state access officials have a wide array of "power, responsibility, and independence" and that many can only offer advisory

the least of which is the clear disadvantage of having the governmental fox guarding the hen house.[414] Federally, this was made especially apparent when the Bush Administration, despite clear statutory language to the contrary,[415] placed OGIS within the Department of Justice[416]—the very department charged with defending other federal agencies against FOIA suits. In the face of subsequent attempts to keep it there, the Sunshine in Government Initiative once again marshaled its resources to lobby Congress and ensure accessibility to government.[417] Though this mainstream media group was able to help win this battle, the episode makes clear that such efforts require large-scale legislative reform of the sort traditionally supported financially and institutionally by newspapers. In the absence of the newspapers' considerable lobbying clout and monetary backing, open-

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opinions). From the federal perspective, OGIS also lacks any statutory authority to direct federal agencies to respond to FOIA requests and is instead limited to mediating disputes. 5 U.S.C. § 552 (h)(3). More tellingly, at its creation, OGIS was unfunded, and even after it received its first budgetary allocation, the office's general counsel stated that "most of the funds would go toward the office's director and a half dozen support staff" rather than toward operational efforts. Clint Hendler, *FOIA Ombudsman Gets $1 Million*, COLUM. JOURNALISM REV., Mar. 11, 2009, http://www.cjr.org/the_kicker/foia_ ombudsman_gets_1_million.php (last visited Mar. 21, 2011) (on file with the Washington and Lee Law Review).

414. These problems were evident from the beginning of these efforts. Though Madison recognized the Pennsylvania council as an "important and novel experiment in politics," for example, he also suggested that its deliberations were influenced by factions, and that many of its members had conflicts of interest. THE FEDERALIST NO. 50, at 261 (James Madison). Similar concerns persist today. At the state level, for instance, at least some of these ombudsmen "operate[] under the state attorney general's office," creating "at least a perceived conflict of interest because the attorney general's office often represents state agencies in disputes involving Sunshine laws." Maneke & Barton, *supra* note 407, at 75.

415. The OPEN Government Act placed OGIS within the National Archive and Records Administration. Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552 (h)(1)).

416. *See* Clint Hendler, *The Openness Ombudsman*, COLUM. JOURNALISM REV., Jan. 29, 2009, http://www.cjr.org/campaign_desk/the_openness_ombudsman.php (last visited Mar. 21, 2011) ("Congress chose to place the office within the National Archives, viewed by the FOIA community as a relatively non-political agency. President Bush, in a small note tucked in [an appropriations section of a massive budget bill], directed that OGIS's responsibilities be handled by the [office that defends FOIA actions].") (on file with the Washington and Lee Law Review).

417. *See Implementation of the Office of Government Information Services: Hearing Before H. Comm. on Oversight and Government Reform*, 110th Cong. 43 (2008) (statement of Rick Blum, Coordinator of the Sunshine in Government Initiative) ("After the Sunshine in Government Initiative found [OGIS had shifted to the Justice Department, it argued] that the last thing that those who championed FOIA reforms in Congress wanted was for Justice to be both the federal government's lawyer and independent mediator. The conflict of interest is inherent and unavoidable. ").

government initiatives may have limited chances of success with Congress or state legislatures.

D. New Business Models

One last, perhaps obvious, category of solutions to be explored would be to investigate ways in which business models could be developed that would sustain digital journalism on a large enough scale that it would be both coordinated enough and profitable enough to support legal instigation and enforcement in the way newspapers once did. Indeed, newspapers themselves may adapt and change into successful online entities that serve both the newsgathering and the legal instigation and enforcement roles.[418] Barriers to these developments are discussed above,[419] but with the new media ecology still in relative infancy, predictions about its ultimate course are nebulous in many ways, and the new media could yet produce a viable structure for legal instigation and enforcement. Nevertheless, the concern remains that old models are disintegrating faster than new models can come into place.

There are no easy solutions apparent, but one thing is plain: Now is the time for the dialogue on the death of newspapers to expand to address the consequences that this change will create for litigation and legislation promoting government openness and accountability. At a minimum, the question of how this legal instigation and enforcement will be supported in the future deserves the same meaningful attention that commentators are already giving to the question of how newsgathering and information-dissemination will be sustained in the new media ecology.[420] The risk of ignoring this important consequence of the pending change is a drastically diminished version of democracy.

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418. Kuttner, *supra* note 23, at 24 ("In this scenario the mainstream press, though late to the party, figures out how to make serious money from the Internet, uses the Web to enrich traditional journalistic forms, and retains its professionalism—along with a readership that is part print, part Web. *Newspapers* stay alive as hybrids." (emphasis added)).

419. *See supra* Part III.B (addressing the difficulties in creating profitability from exclusively online news).

420. *See Future of Journalism Hearing*, *supra* note 7 and accompanying text.