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JOURNAL OF MEDIA LAW & ETHICS

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Articles

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Editorial

This issue of the *Journal of Media Law & Ethics* features articles in social media influencing, broadcast indecency, invasions of privacy, digital manipulation of images, and the politics of media access. It offers the reader a small window, I hope, to see how freedoms and obligations in modern society depend upon a robust media system operating under rule of law.

Elon Musk, materially the world's richest person, has bid nearly $43 billion to purchase Twitter, sparking concentration-of-ownership concerns for a platform that would otherwise represent little concentration of anything. The multibillion-dollar Nexstar Media Group faces a class action suit from patrons of a political news site who claim it has knowingly disclosed personally identifiable information to Facebook, which, like YouTube, is frequently criticized for condoning "fake" news and manipulating influence. Young Joon Lim and Lynse Larance Guerra look at egregious cases of deceptive influencing and offer an argument for the Federal Trade Commission to get involved with social media influencers whose activities hide financial gains.

Broadcasters in the United States briefly cut off sound in Will Smith's profanity-laced exchange with Chris Rock at the 2022 Academy Awards to comply with Federal Communications Commission rules about indecent content, but, of course, that meant even more viewers would check social media platforms for the full swap. Christopher Terry and Kyla P. Garrett Wagner's article, which tracks the earlier public controversy surrounding J-Lo's 2020 Super Bowl Halftime act in light of the history of U.S. broadcast indecency regulation, urges the FCC to end "reactionary" enforcement.

Relative to competitors worldwide, Apple reputedly taps less private data from its services such as Apple Maps and Siri and from its products, App Store and Apple Music. TikTok's relatively young U.S. user base is particularly vulnerable to abuse and invasions of privacy. Concerns surrounding privacy are not, however, limited to the United States. Surveying media professionals in Vietnam in light of behavioral theory, Huu Dat Tran and Pham Phuong Uyen Diep identify factors, including perception of work supervisors, that shaped Vietnam media professionals' attitudes toward privacy rights in its state-controlled media system.

Disinformation, such as manipulated images, is fueled by market failure and normalized by a demand from netizens who have grown accustomed to the thrill of sensation, a new book by California law professor Richard L. Hasen argues. Among other nations, Turkey is considering legislating prison sentences for knowingly distributing false information online. A Russian court has threatened to slap fines on Google and Wikipedia owner Wikimedia Foundation for failing to delete alleged disinformation about the Ukraine war. In his survey of U.S. photojournalists, Bradley Wilson finds video photographers to be as reluctant as their print counterparts to publish digitally manipulated images, but less tolerant of publishing graphic news images.

The National Association of Broadcasters has urged the FCC to conclude its overdue quadrennial review of media ownership limits, which exist to encourage localism, competition and diversity, including minority and female ownership of local stations. Benjamin Medeiros looks at political ideology evident in seeking compelled access to counter market dominance of large-tech platforms under a "public function" test by which federal courts have determined a forum administrator to represent the state. He finds that in this effort, avowed conservative priorities of freedom of speech have inched logically and surprisingly close to traditionally progressive priorities.

– Nikhil Moro, Editor; nmoro@ksu.edu

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Calling for Guidance to Social Media Influencers in the Digital Age: An Application to Influencers and Brands

Young Joon Lim* and Lynse Larance Guerra**

As the popularity of social media and influencers in the digital age experiences exponential growth, the Federal Trade Commission (FTC) must issue legal guidance for influencers and the brands they represent. Target audiences should have a clear understanding of the financial gain influencers receive and the reason behind their blogs, posts, and tweets. This article argues that influencer marketing on social media platforms must be governed by consumer protection laws at the federal and state levels. Additionally, consumers should have a private right of action for products bought under fraudulent pretenses. The article examines federal and state online marketing laws and principles applicable to influencer marketing. Its core concept is the material connection between the influencers and brands, raising awareness of the legal responsibilities both face when social media posts are designed to deceive or mislead consumers. By presenting two actual cases of fraudulent and deceptive influencer marketing, the article highlights legal opportunities of compensatory damages for suffering customers and punitive damages for a societal sense of justice and decency.

Key words: influencer, FTC, legal guidance, social media, consumer protection

I. Introduction

"Influencers" are online opinion leaders who have the power to influence the public's or the target audience's behavior when purchasing goods and services. For over a decade, corporations and organizations have used social media platforms such as Facebook, Instagram and YouTube to promote their brands and share commercial messages by putting conventional advertisements online. Such advertisements serve as a means of marketing communication paid by advertisers to reach out to people likely to purchase the company's product, service or cause.[1] In the traditional advertising industry, the advertiser is armed with controlling authority over the content, timing, and media channels for the advertisement, which is easily identified as paid media. In this system, most consumers of the advertisement acknowledge it as a marketing ploy or just simply an advertisement they want to avoid while watching television or listening to the radio.[2] The public's undesired daily exposure to numerous advertisements creates a tendency toward advertisement avoidance, a behavior characterized by an unbridled hatred for advertising, and the distrust of advertisements where 96 percent of consumers do not trust any advertisements.[3] As a result, advertisers turn to public relations tactics that facilitate

[1] *See* Jack Neff, *Future of Advertising? Print, TV, Online Ads; ARF, Wharton School Study Finds WOM Largely Driven by Paid Media Ads*, ADVERTISING AGE, June 1, 2009, at 80.
[2] Brittany R. L. Duff & Ronald J. Faber*, Missing the Mark: Advertising Avoidance and Distractor Devaluation*, 40 J. ADVERTISING 51–62 (2011).
[3] Tim Wu, *Is Ad Avoidance a Problem?*, THE NEW YORKER (Oct. 23, 2013), https://www.newyorker.com/tech/annals-of-technology/is-ad-avoidance-a-problem; Dakota Shane, *96 Percent of Consumers Don't Trust Advertisements. Here's How to Sell Your Product Without Coming Off Sleazy*, INC. (Aug. 13, 2020), https://www.inc.com/brit-morse/minority-led-companies-black-owned-businesses-phase-4-paycheck-protection-program.html.

communication techniques of earning media publication where journalists happen to advocate filtered or tested advertising messages via a gatekeeping process. Not surprisingly, 92 percent of consumers trust earned media, according to Cision's State of the Media Report.[4]

Since advertisers viewed journalists as opinion leaders who foster trustworthiness on traditional, intrusive, but easily escapable advertisements such as live-television advertisements, earned media seemed a promising method of disseminating promotional messages. However, earning media coverage is more difficult for companies than ever, as newsrooms get smaller and journalists cover multiple beats in the digital age.[5] Opinion leadership of journalists has shrunk during the same time period. As a result, advertisers emigrated to the online community of influencers who were willing to build a partnership with brands.

Influencers are trusted by the consumers who follow them, particularly on Instagram or YouTube.[6] Followers continue to trust influencers because social media content created by the influencers is effective, informative, inspiring and compelling. This leads to building mutual and real relationships between the influencer and his or her followers.[7] Furthermore, there exists a strongly positive correlation between influencers and trustworthiness "among savvy 18-to-34-year-old consumers who seek out trusted influencers and follow their every move."[8] That "following their every move" inclination is key for influencers to attract brands in hopes of creating collaborative social media marketing strategies.

Advertisers utilizing social media marketing practices become familiar with emerging marketing models, including consumer to consumer (C2C) and user-generated content (UGC). These are innovative ways to allow customers to interact with one another online or on social media platforms, as opposed to traditional markets requiring business-to-customer relationships. Products can gain stronger commercial momentum if there are trusted, credible sources that recommend particular products as third-party endorsers.[9] In lieu of looking for opinions from authorities with established credibility, customers expect influencers to serve as their credible decision-making sources when deciding to make purchases of goods or services.

In a similar vein, brands expect influencers to convey their marketing messages to the target audience through influencer-driven commercial networks on social media. Influencers function as the intermediaries between customers and brands for business deals to be executed.[10] In the online community of advertising and marketing, opinion leaders are replaced by influencers whose world revolves around marketing. Their revenue-motivated objectives lay the foundation for marketing collaboration with companies and brands. From an advertising perspective, influencer marketing is not significantly different from traditional marketing using

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[4] Cision's 2019 Global State of the Media Report (2019), https://www.cision.com/us/resources/white-papers/2019-sotm/.
[5] Katie Boyles, *Rethink Media Relations' Role in Your Communication Strategy*, AXIA (Aug. 15, 2019), https://www.axiapr.com/blog/earning-media-coverage-is-harder-than-ever.
[6] Sybil Grieb, Ann Newland, & Melinda Po, *The Power of Influencers*, EDELMAN (Jun. 18, 2019), https://www.edelman.com/research/the-power-of-influencers.
[7] *Id.* ("Sixty-three percent of consumers told us they trust what influencers say about brands more than they trust the brand's advertisements. Consumers are following influencers primarily because they have interesting ideas or are entertaining.").
[8] *Id.*
[9] Jesse Elias & Pamela M. Ling, *Invisible Smoke: Third-Party Endorsement and the Resurrection of Heat-Not-Burn Tobacco Products*, 27 TOBACCO CONTROL 96–101 (2018), doi:10.1136/tobaccocontrol-2018-054433.
[10] Abha Bhattarai, *Cutting Out Middleman to Reach Preteen Buyers; Retailers Tap into Apps to Market Directly to Kids Who Increasingly Are Shopping Online*, L.A. TIMES (Aug. 14, 2018), https://www.pressreader.com/usa/los-angeles-times/20180814/281900184045824.

third-party endorsements. If not executed properly, influencer marketing assumes a series of legal risks, such as fraud and false or deceptive advertising.[11]

In addition to the legal risks of influencer marketing linked to unfair or deceptive practices in commerce and marketing transactions, this article explores the scope of regulatory compliance of influencer marketing between brands and influencers under legal standards for advertising, based on the Federal Trade Commission Act (FTC) on the federal level and the various forms of the Deceptive Trade Practices Act as it has been adopted on the state level.[12] Under the laws and regulations of influencer marketing, disclosure is required when a material connection can be found between an advertiser and an influencer. A "material connection" exists "when someone has a relationship with the company that could affect the weight or credibility the consumer may give the endorsement, particularly where the relationship would not be expected by the consumer."[13] With a focus on deceptive influencer marketing, this article argues that if the material connection between influencers and brands is kept secret for marketing purpose, they both would violate the FTC requirement for a clear and conspicuous disclosure.

The stated mission of the Federal Trade Commission is "protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity."[1] Since its founding in 1914, the scope of business in the United States has grown exponentially. The dawn of sales and advertising via social media was perhaps an economic expansion that the FTC was not equipped to regulate. The FTC recently required social media companies such as Facebook, TikTok and YouTube to respond to inquiries on how user data was being collected and used.[2] It has done little to address how social media influencers are promoting products to unsuspecting consumers. The FTC issues advisory opinions, often at the request of industry groups, to clarify FTC rules.[3]

In November 2019, the FTC published its "Disclosures 101 for Social Media Influencers."[4] As a result, many reputable influencers began putting notices on their social media posts that products and services they were promoting were paid endorsements. However, many social media influencers continue to promote products without the necessary disclosures outlined by the FTC. In March 2020, the FTC settled a complaint against Teami, LLC. The complaint alleged that Teami promoted a line of teas for weight loss and myriad other health benefits. Teami advertised

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[11] Federal Trade Commission Consumer Information, 10 Things You Can Do to Avoid Fraud, https://www.consumer.ftc.gov/articles/0060-10-things-you-can-do-avoid-fraud.

[12] Under federal law, FTC regulations about specific marketing practices and the promotion of products and services in advertising can be found at https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road#laws, while state laws regulating advertising vary from state to state.

[13] *FTC and State Ags Continue Focus on Deceptive Social Media Marketing*, JD SUPRA (Jan. 28, 2020), https://www.jdsupra.com/legalnews/ftc-and-state-ags-continue-focus-on-71801/#:~:text=Section%205(a)%20of%20the,or%20affecting%20commerce.%E2%80%9D%2015%20U.S.C.&text=As%20social%20media%20marketing%20continues,to%20curb%20online%20deceptive%20practices.

[1] Federal Trade Commission, About the FTC, https://www.ftc.gov/about-ftc.

[2] Resolution Directing Use of Compulsory Process to Collect Information Regarding Social Media and Video Streaming Service Providers' Privacy Practices, https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-social-media-service-providers/6b_smvss_resolution.pdf (last visited Mar 12, 2021).

[3] Advisory Opinions, Federal Trade Commission (2021), https://www.ftc.gov/policy/advisory-opinions (last visited Mar. 11, 2021).

[4] *See* FTC.gov (2021), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf (last visited Mar. 14, 2021).

primarily through social media. The complaint included claims that many social media influencers promoting the Teami products were not making the required disclosures that they were being paid for their endorsements.[5]

While the Teami complaint is being cited in the legal community as a cautionary tale of what can happen to social media influencers, in reality the FTC is taking little action against the practice. Until 2017, the FTC had never dealt directly with social media influencers. After receiving petitions from the organization Public Citizens, the FTC sent out more than 90 letters to celebrities, athletes, and other influencers.[6] These letters advised the social media influencers to disclose their relationship with the companies and products they were promoting.[7] They instructed the posters to make sure their ads were clear and conspicuous. They also advised that posts such as #Thanks [Brand] or #partner were not so sufficiently clear that a consumer would understand it was a paid sponsored post. Further, the FTC advised disclosures should be easy to find and not buried in a string of hashtags. While these steps by the FTC are helpful in teaching social media influencers how they should behave, it remains unclear why the FTC has not taken the necessary step to direct more complaints at social medial influencers who fail to comply.

This article first provides two real influencer marketing cases, which implicate legal trouble, rather than merely ethical issues for both the influencers and their brand sponsors. Second, the article provides important background information on the FTC Act and its new online commerce guidance, which can be applicable to influencer marketing by raising awareness of influencers and brands about avoiding any legal and regulatory issues in their marketing strategies. Third, the article details state online marketing laws and principles for the protection of consumers that are applicable to both parties involved in influencer marketing. Finally, the article suggests that both influencers and their marketing partners be held legally accountable for deceptive influencer marketing using social media platforms, including compensatory damages for suffering customers and punitive damages for a societal sense of justice and decency.

II. Deceptive Influencer Marketing In South Korea and the United States

This section highlights the most recent cases of deceptive influencer marketing involving material connections between the influencers and the brands they represent, as well as the intentional deceptions perpetrated by the influencers in pursuit of financial gain. One case took place in South Korea in July of 2020, and the other occurred in the United States in August of 2020. These cases offer the article an opportunity to explore possible legal implications to the thriving practices of influencer marketing.

A. Sponsorship Deals Disguised as Honest Third-Party Endorsements

On July 15, 2020, the YouTube community of South Korea exploded with angry and disappointed comments toward celebrity stylist Han Hye-yeon and Kang Min-kyung, a member of K-pop duo Davichi after *Dispatch*, a Korean online tabloid magazine, reported that the two celebrity influencers' deceptive practice of influencer marketing involving material connections between the influencers and the brands they represented.[8] Both influencers uploaded luxury

[5] Lesley Fair, FTC's Teami case: Spilling the tea about influencers and advertisers, FTC.gov (Mar. 6, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers.
[6] David Klein, Social Media Influencer Marketing and FTC Enforcement, Klein Moynihan Turco LLP (Mar. 16, 2020), https://kleinmoynihan.com/social-media-influencer-marketing-and-ftc-enforcement/.
[7] FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, FTC press release (2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose (last visited Mar. 7, 2021).
[8] *Kim Ji-ho & Song Soo-min*, 내돈내산? 남돈내산!"...강민경·한혜연, 유튜브 장사의 실체, DISPATCH, (July 17, 2020). English Translation: "*My Money My Purchase? Sponsored Money My Purchase… Kang Min-*

product review videos on their YouTube channels and claimed that the items were purchased with their own money for their own reviews to offer sincere and objective evaluations to their followers.[9] The claims were aimed to maintain and enhance their credibility and authenticity as trustworthy influencers who share the same feeling of animosity toward paid advertisements or product placements. However, it turned out that Han and Kang were paid up to $30,000 USD to promote each item by lying to their followers.

For example, Han, in one of her popular series named "내돈내산," which translates as "What I Bought with my own money," uploaded a video on her YouTube channel, SchususuTV, saying, "내가 서서 돌아다니는 직업이라 신발의 중요성을 누구보다 잘 알아. 이거 모아 오느라 너무 힘들었어. 돈을 무더기로 썼어" (My job requires me to stand up and walk around, so I know the importance of shoes. It took me so much of effort to get these shoes. I splurged on them).[10] Han actively promoted the product as if she had to go out of her way to pay for shoes and other sponsored products with her own money, saying, "When I tried these pair of shoes on, they felt so comfortable," while concealing and distorting the fact that her compliments on the shoes and other products such as cosmetics and diet food were sponsored by brands.[11]

Vlog, Kang's YouTube channel, posted a video showing Kang holding a handbag. She says, "오늘은 짐이 많이 없어서 이 가방을 들고 나갈 건데요. 심심하니깐 가방 안에 뭐가 들어있는지 보여 드릴게요" (Today I don't have much stuff so I will carry this handbag out. Let me show you what's inside 'cause I am bored).[12] Kang was paid about $15,000 USD to promote the handbag without disclosing the sponsored content, and later she linked the brand's website on her Instagram.[13] Kang's influencer strategies on her social media platforms are to make sponsored products look far from being seen as product placements by enjoying her daily life in sponsored dresses, shoes, and with foods on her social media content, convincing her YouTube subscribers and Instagram followers (combined of about 2 millions) that she would not accept any sponsorship to promote "handbags, clothes, and footwear for many different brands" and never post everyday photos that capture her holding sponsored products.[14]

After the exposé article in *Dispatch*, angry, critical comments flooded into the influencers' social media platforms, such as: "they were fooled into believing the products promoted on their channels were genuinely recommended with goodwill"; "It's wrong to think of your subscribers as just consumers"; "I feel really betrayed by this"; "I'm going to unsubscribe"; "You have lied so I don't want to watch your videos anymore."[15]

Kyung Han Hye-Yeon, The Reality Of Youtube Marketing." (The authors translated the Korean into English.)

[9] *Id.*

[10] *See* SchususuTV, 편한 슈즈가 너희를 자유케 하리라, YouTube, English Translation: "Comfy shoes will free you." (The authors translated the Korean into English), https://www.youtube.com/watch?v=A-zjupMBEzM.

[11] Vague about advertising products, *Kang Min Kyung and Han Hye Yeon Give Different Explanations*, OSEN, (July 15, 2020), https://channels.vlive.tv/C7A6F1/vtoday/1.15692372.

[12] Kim & Song, *supra* note 21. See Kang's YouTube channel, https://www.youtube.com/channel/UCfqVrM2cvwxG3-EvxbsN0KQ where she took down the controversial video. (The authors translated the Korean into English.)

[13] *Id.*

[14] *See* Kim & Song, *supra* note 21.

[15] Haydn An, Han Hye Yeon and Kang Min Kyung post apologies in response to their recent product placement controversy, ALLPOP, (July 17, 2020), https://www.allkpop.com/article/2020/07/han-hye-yeon-and-kang-min-kyung-post-apologies-in-response-to-their-recent-product-placement-controversy; Lee Minji, Advertising controversy grips S. Korean mukbang YouTubers, YONHAP NEWS AGENCY, (Aug. 7, 2020), https://en.yna.co.kr/view/AEN20200807005900315.

Such comments clearly demonstrate the psychological disappointment of the followers in their beloved influencers and frustration and outrage caused by the sense of betrayal. The two influencers' misguided efforts to preserve the followers' trust without disclosing endorsement deals and with lies ignited a backlash by the followers showing emotional distress and mental anguish. In response to the followers' ferocious criticism of the influencers, Han uploaded a video on her YouTube channel wearing all black in front of a black background, and she said in Korean:

> I'm really sorry I have to appear and meet you guys this way. I apologize. I am so sorry because everyone had high expectations for my YouTube channel and in return, you are very disappointed in me…In the future I will disclose any product placements so I won't disappoint you again. … I apologize for causing confusion. Once again, I apologize.[16]

The next day, July 17, 2020, Kang also issued an apology on her Instagram. Her post said in Korean, translated in English by the authors:

> Hello this is Kang Min Kyung, I want to explain about the articles on my YouTube channel/Instagram … I had seemed to be on cloud nine as my YouTube channel was gaining many subscribers, which led me to receive an army of inquiries for advertisements and sponsorship … I was inconsiderate of my followers because of the thrilling feeling … I sincerely apologize to anyone who felt uncomfortable because of me.[17]

After the scandals of famous influencers, many requests by followers and commentators were made, calling for indictment of fraudulent influencers who deceive or lie to followers and the public on social media platforms for their financial gain. One of the Korean radio stations, *CBS News Show*, interviewed a Korean attorney. Asked if the influencers could be indicted under fraud crimes, the lawyer declared it not fraudulent. "Not all lies are fraudulent," the lawyer sa*id*." If you look at YouTube's profit structure, subscribers don't pay money to influencers. What is the damage to those who watch this channel right now?"[18] The lawyer added, "If influencers didn't disclose paid advertisements, they could be given instructions to fix the violation of advertising disclosure laws from the Korea Fair Trade Commission … but there are no current laws to punish such activities."[19]

In fact, even if an influencer promoted a sponsored product on social media platforms without disclosing the deal, failure to disclose that the promotion was an advertisement is difficult to punish for fraud under the current Korean law.

B. Proposal made by self-claimed influencer for brand promotion in the United States

In August 2020, a Reddit user, "dakotaraptors," posted a screen shot that showed exchanged messages between a teen influencer and a business owner.[20] A jewelry store owner,

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[16] *See* Han's apology video (July 16, 2020), https://www.youtube.com/watch?v=j2gDDblgumU. (The authors translated the Korean into English.)

[17] *See* Kang's apology post (July 17, 2020), https://www.ggilbo.com/news/articleView.html?idxno=788989.

[18] Kim So-jung, "강민경·한혜연, 사기죄로 처벌 가능할까?" (Kang Min-Kyung, Han Hey-Yeon, is it possible to be punished for the crime of fraud?") EDAILY NEWS (July 21, 2020). (The authors translated the Korean into English.) https://www.edaily.co.kr/news/read?newsId=01997526625836816&mediaCodeNo=257&OutLnkChk=Y.

[19] *Id.*

[20] *See* Reddit post (Aug. 6, 2020), https://www.reddit.com/r/ChoosingBeggars/comments/i30kxn/i_get_a_lot_of_dms_daily_from_teen_tiktok_stars/.

dakotaraptors wrote, "I get a lot of DMs daily from teen tiktok 'stars' asking for free stuff from my business." The owner posted an example:

> Hi, I'm a teen influencer with 47.2 K tiktok followers and I get 100k views per video. Most of my audience is 14-17 years old and would LOVE your jewelry and tee shirts! I want to collab with you by advertising your products to help you grow your business. If you send me three of the most expensive items in your store, I'll make a tiktok vid about them. I hope to hear back from you.[21]

In response to the influencer's marketing proposal, dakotaraptors visited the teen influencer's TikTok page and found that the self-identified influencer had only 12 followers on TikTok.[22] Despite the fact that the influencer solicited her social media sponsors with a lie and deceptive proposal, the jewelry business owner sent a polite message back to the influencer as follows:

> Hi there, the best way you can support our small business is by purchasing from it. I clicked on your tiktok and it seems like you get 200 views per video, and your followers are 12. Unless your 1000 tiktok followers with no forms of currency can help me pay off my student loans, please stop asking small businesses for free stuff. Thanks.[23]

While the exchanged messages drew waves of online praise for the owner, an overwhelming number of cynical and critical comments were posted targeting the influencer. "I don't understand how someone could possibly be such an egotistical entitled piece of human garbage," one wrote.[24] "There are influencers who are just beggars with stats," said another.[25] The post received more than 2,000 comments. Many of them were posted by business owners who shared their experiences of being approached by self-claimed social media influencers who offered them free online promotion in exchange for free goods.

For example, dakotaraptors also posted a comment, noting "Last week or two weeks ago I had three 'Pinterest' influencers (didn't even know that's a thing) ask me for free stuff, and all three of them lied about their engagement."[26] It is not uncommon these days for so-called influencers to initiate the first approach to business owners, asking for free gifts or free food in exchange for promotion worldwide.[27] However, the opposite approach is more commonly practiced for influencer marketing, in which brands, after thorough research to identify influencers, first contact the influencers for a partnership.[28]

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[21] *Id.*
[22] Dillon Thompson, *Store Owner Slams 'Teen Influencer' Over 'Entitled' Social Media Request: 'Please Stop Asking,'* YAHOO NEWS (Aug. 6, 2020), https://sports.yahoo.com/store-owner-gets-freebie-request-161356633.html.
[23] *See* Reddit post, *supra* note 33.
[24] *See* Thompson, *supra* note 35.
[25] *See* Reddit comment by Thermalconvection, https://www.reddit.com/user/ThermalConvection/.
[26] Reddit comment by dacotaraptors, https://www.reddit.com/user/dakotaraptors/.
[27] Dillon Thompson, *Restaurant Owner Claps Back at Influencer's 'Selfish' Demands: 'You're making a fool of yourselves' Yahoo News*, (Aug. 4, 2020), https://sports.yahoo.com/greek-restaurant-owner-shares-creative-152025451.html.
[28] Shama Hyder, *New Report Says B2B Influencer Marketing Still Has Massive Room For Growth*, FORBES, (Sep. 1, 2020), https://www.forbes.com/sites/shamahyder/2020/09/01/new-report-says-b2b-influencer-marketing-still-has-massive-room-for-growth/#1353a358dcbb.

According to the Digital Marketing Institute, an influencer serves as a means for business and brands to build a reputation on social media platforms with "a huge audience" that will act on the influencer's recommendations.[29] There is no absolute numeric standard or law to be a qualified influencer on YouTube, Instagram, or other popular social media platforms. Consequently, a self-claimed teen influencer cannot be proven to have committed a fraudulent online solicitation.

However, some guidance seems to be needed in the digital age to prevent naïve and young social media users, who have the fantasy of becoming rich influencers, from violating ethical business norms. More importantly, if the teen influencer's intent was to promote the jewelry store without disclosing sponsorship, she could have violated various state and federal laws. If the store owner accepted the offer, and promotional content was posted on TikTok, they both would have practiced deceptive endorsement activities unless the owner demanded disclosure. Therefore, this article argues that both parties, the sponsor and the influencer, not just in the influencer, should be held accountable in the deceptive practice of influencer marketing. The sponsor must require the influencer to post the paid advertisement lawfully, and then dutifully monitor compliance.

III. Legal Standards and Communication Principles Applicable to Influencer Marketing

A. Legal Standards and Principles on the Federal Level: Section 5 of the Federal Trade Commission Act and Consumer Protection Statutes

Influencer marketing is a still-developing concept and practice. It has rapidly grown since the popularity of YouTube and Instagram took off in the early 2010s. The *word* "influencer" become an official word in the English language in May 2019.[30] The rapid and powerful emergence of social media platforms has transported influencer marketing into a fast-growing billion-dollar industry in less than 10 years.[31] As the history of relevant laws and regulations shows, it is impossible for laws and regulations to keep abreast of new societal phenomena. The Federal Trade Commission (FTC) has primary responsibility for protecting consumers from unfair and deceptive practices in the marketplace at the federal level.[32]

In particular, Section 5(a) of the FTC Act (15 USC §45) prohibits "unfair or deceptive acts or practices in or affecting commerce." Under federal law, most advertising in a mass communication context is governed by Section 5 of the FTC Act, which states "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[33] This statement allows the FTC Bureau of Consumer Protection to initiate investigations or enforcement actions against deceptive and unfair acts or practices of advertising. For example, based on Section 5 of the Act, the FTC declares that a representation, omission or practice is deceptive "if it is likely to mislead consumers and affect consumers' behavior or decisions about the product or service."[34] In other words, advertising must

[29] Digital Marketing Institute, 9 of the Biggest Social Media Influencers on Instagram, https://digitalmarketinginstitute.com/blog/9-of-the-biggest-social-media-influencers-on-instagram .
[30] Robert Klara, *Don't Look Now, but 'Influencer' is Finally an Official Word in the English Language*, AD WEEK (May 6, 2019), https://www.adweek.com/brand-marketing/dont-look-now-but-influencer-is-finally-an-official-word-in-the-english-language/.
[31] Aaron Brooks, A Brief History of Influencers, Social Media Today (May 9, 2019), https://www.socialmediatoday.com/news/timeline-a-brief-history-of-influencers/554377/.
[32] Federal Trade Commission, About the FTC, https://www.ftc.gov/about-ftc.
[33] 15 U.S.C. § 45 (a)(1).
[34] Federal Trade Commission Bureau of Consumer Protection, Advertising and Marketing on the Internet, 1 - 12 (2020), https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf.

tell the truth and not mislead consumers. However, consumers of these products have no private right of action under the FTC Act to pursue their own claims against the influencers or the brands.

This article asserts a number of legal principles applicable to influencer marketing that can be guided by FTC guidance and policies in different areas of advertising law:

> (1) Sellers are responsible for claims they make about their products and services. Third parties such as advertising agencies or website designers and catalog marketers may also be liable for making or disseminating deceptive representations if they participate in the preparation or distribution of the advertising, or know about the deceptive claims.[35]
>
> (2) Disclaimers and disclosures must be clear and conspicuous. That is, consumers must be able to notice, read or hear, and understand the information. Still, a disclaimer or disclosure alone usually is not enough to remedy a false or deceptive claim.[36]
>
> (3) Connections between an endorser and the company that are unclear or unexpected to a customer also must be disclosed, whether they have to do with a financial arrangement for a favorable endorsement, a position with the company, or stock ownership.[37]
>
> (4) When the content in which an endorsement is disseminated is not identifiable by consumers as advertising, consumers would not ordinarily expect an endorser to be speaking on behalf of a sponsoring advertiser and such connection must be disclosed to avoid deceiving consumers.[38]

All of the FTC legal guidance above served as a stepping stone for the customized legal principles for influencer marketing, *Disclosures 101 for Social Media Influencers* (published in September 2019), designed to instruct influencers and brands "to stay on the right side of the law."[39] The disclosures document, which clearly recognized the material connection, states: "If you endorse a product through social media, your endorsement message should make it obvious when you have a relationship ('material connection') with the brand."[40]

The FTC also demands that the influencer disclose when he or she has any financial, personal, or family relationship with a brand.[41] More specifically, the FTC states that the material connection disclosure should be superimposed over the picture on Instagram and in the video for YouTube.[42] The FTC further states, "If posting from abroad, U.S. law applies if it's reasonably foreseeable that the post will affect U.S. consumers. Foreign laws might also apply."[43] Since

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[35] Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(a) (2010) [hereinafter Endorsement Guides].
[36] Federal Trade Commission Bureau of Consumer Protection, *supra* note 47 at 3.
[37] *Id.* at 10.
[38] *See* Endorsement Guides, 16 C.F.R. § 255.5 (Disclosure of material connections) at 9, https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.
[39] Lesley Fair, Disclosures 101: New FTC resources for social media influencers, THE FTC, (Nov. 19, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2019/11/disclosures-101-new-ftc-resources-social-media-influencers.
[40] Disclosures 101 for Social Media Influencers, The FTC, (Sept. 2019), 1-8, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.
[41] *Id.* at 2.
[42] *Id.* at 4.
[43] *Id.* at 3.

September 2019, with the conspicuous guidance by the FTC for influencer marketing, the FTC warns that the responsibility of all current and future influencers is "to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws."[44]

B. Legal Standards and Principles on the State Level: The Uniform Deceptive Trade Practices Act

Many states' laws aiming to hold sellers and brands liable for violating state consumer protection policies govern deceptive and fraudulent marketing practices. Such state-level laws are typically derived from the Uniform Deceptive Trade Practices Act (UDTPA), essentially a state level version of the FTC Act.[45] Under the UDTPA, unfair or deceptive business practices or omissions include misleading sales of goods by false advertising and consumer confusion as to the source and sponsorship of goods or services.[46] If an influencer's promotion causes the likelihood of confusion, the consumer can bring a suit depending on intent to deceive (and to what degree).[47] Nearly all states enforce their own version of the UDTPA, such as the Ohio Deceptive Trade Practices Act, Illinois Consumer Fraud Act, California Unfair Competition law, and Texas State Deceptive Practices Act.

State-level laws typically cover commercial entities, not merely individuals like influencers. For example, Ohio Rev. Code 4165.01 (D) states, "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, limited liability company, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity."[48] The Code also specifies it is a violation of the law if a "person" causes likelihood of confusion or misunderstanding as to "the source, sponsorship, approval, or certification of goods or services."[49]

In a similar way, the state of Texas enforces its own Deceptive Trade Practices Act (DTPA), designed to "protect[ ] consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty."[50] The Texas DTPA focuses on the protection of a consumer who is victimized by false, misleading, and deceptive marketing practices. For example, it points out that it is unconscionable for a seller to "take[ ] advantage of consumers' lack of knowledge, ability, experience, or capacity to a grossly unfair degree."[51] Similar to other state laws and the FTC, the DTPA also characterizes as deceptive the failure to disclose relevant information: "The failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."[52]

More detailed and customized laws and guidance for influencer marketing on the state level have yet to be developed since the FTC issued *Disclosures 101 for Social Media Influencers* in September 2019. As Section 5 of the Federal Trade Commission Act paved the way for creating mini-FTC acts or Uniform Deceptive Trade Practices Acts for state governments, the 2019 FTC guidelines for influencers can be adopted and modified for each state to protect consumers from

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[44] *Id.* at 2.
[45] Phil Nicolosi, *What Are Deceptive Trade Practices Under State Laws?*, INTERNET LEGAL ATTORNEY, https://www.internetlegalattorney.com/what-are-deceptive-trade-practices-under-state-laws/.
[46] *Id.*
[47] *Id.*
[48] OHIO REV. CODE ANN. §§ 4165.01 (D).
[49] *Id.* at § 4165.02 (2).
[50] TEX. BUS. & COMM. CODE § 17.41 et. seq., Texas Deceptive Trade Practices Consumer Protection Act.
[51] *Id.*
[52] *Id.*

being victimized or deceived by influencers and brands in connection with any relationship or material connection.

IV. Legal Punishment for Non-Compliance

The Federal Trade Commission's (FTC) Endorsement Guides offer the following example of a third-party endorsement:

> Suppose you meet someone who tells you about a great new product. She tells you it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably. Now suppose the person works for the company that sells the product – or has been paid by the company to tout the product. Would you want to know that when you are evaluating the endorser's glowing recommendation? You bet.[53]

The guides' conspicuous statement about the disclosure of the material connection states: "If there's a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed."[54] In addition, two more guidelines can be found at the FTC 2009 Endorsement and Testimonials Guidelines: (1) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers;[55] and (2) Disclosure of any "material connections" between the advertiser/seller and its endorser is required.[56]

The FTC Act makes clear that the brand can be held liable if does not monitor and train the influencer who is being paid to promote its products. Additionally, the brand must take steps to halt the continued publication of deceptive representations when they are discovered.[57] In a nutshell, under the FTC guidelines both influencers and brands can be held liable for any wrongdoing in influencer marketing. According to the Federal Trade Commission Bureau of Consumer Protection in 2018, if influencers and brands failed to comply with the law and guidelines under the FTC's jurisdiction, they could face enforcement actions or civil lawsuits. Remedies include:

- Orders to cease and desist, with fines up to $41,484 per violation should they occur.[58]
- Injunctions by federal district courts. Violations of some Commission rules also could result in civil penalties of up to $41,484 per violation. Violations of court orders could result in civil or criminal contempt proceedings.[59]
- In some instances, refunds to consumers for actual damages in civil lawsuits.[60]

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[53] The FTC's Endorsement Guides: What people are asking, https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.
[54] *Id.*
[55] 16 C.F.R. § 255. 1 (d).
[56] *Id.* § 255.5
[57] *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR § 255, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf.
[58] Federal Trade Commission Bureau of Consumer Protection, Advertising and Marketing on the Internet, 1 – 16, last adjusted March 2018, https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf.
[59] *Id.* at 11.
[60] *Id.*

On February 12, 2020, the FTC issued a statement saying it planned to review its endorsement guidelines to protect consumers from influencer advertising/marketing.[61] Specifically, the FTC was considering whether "whether to create new requirements for social media platforms and advertisers and whether to activate civil penalty liability."[62]

While the FTC is still in the process of developing rules for compensatory and punitive damages for victims of influencer marketing, some states offer particular guidelines for consumers. For example, the Texas Attorney General's Office offers the following:[63]

> When you fall victim to illegal practices covered by the DTPA, you may have the right to sue for damages under the act. If you win your suit and prove that the defendant knowingly deceived you, you may be eligible to recover up to three times your damages. If you want to pursue an individual case under the DTPA, you should talk to a private lawyer, as the Office of the Attorney General cannot represent you. Refer to Section 17.41 in the Deceptive Trade Practices Act.

The Texas DTPA covers the damages incurred as a result of deceptive trade practices and is applicable to influencers and brands. If a suit is filed by a consumer as the plaintiff, the DTPA has created legal rules that can result in certain remedies. If a court finds that the conduct of the seller was committed "knowingly" and "intentionally," a court may also award not more than three times the amount of mental anguish and economic damages for the consumer. The court may also issue a permanent injunction against the influencers' YouTube and/or Instagram account and revoke a business defendant's license to engage in a particular business. Courts also, typically, award the consumer's costs and attorney's fees be paid by the defendants.[64]

This article argues that when third parties such as brands and advertisers strategize to convey marketing messages to promote their products or services on social media platforms through influencers, they must also comply with the self-regulating responsibility for monitoring influencers' content and claims. Brands must guide influencers to be transparent and truthful, with no deception and manipulation. Brands and advertisers must lead individual influencers in the area of marketing strategies and business ethics. They should ensure that naïve and younger influencers practice ethical and lawful marketing strategies, rather than condoning influencers' lies and deceptions as means of promoting products or services on YouTube and Instagram. The followers need to know they can sue influencers and brands for compensatory damages under some states' Deceptive Trade Practices Acts. All parties should understand that "[a]dvertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers."[65]

V. Conclusion

The thriving popularity and promising power of influencer marketing ensures that the partnership between influencers and brands or advertisers will remain viable in the digital age. There is no doubt that some influencers and brands have enjoyed an undisclosed material connection and the lucrative profits that follow. This has caused disappointment among loyal followers on social media platforms. This article presented two real cases from South Korea and

[61] Statement of Commissioner Rohit Chopra, THE FTC (Feb. 2020), at 1-3, ohttps://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf.
[62] *Id.* at 1.
[63] Attorney General of Texas, Consumer Rights, https://www.texasattorneygeneral.gov/consumer-protection/file-consumer-complaint/consumer-rights.
[64] TEX. BUS. & COMM. CODE § 17.41 et. seq., Texas Deceptive Trade Practices Consumer Protection Act.
[65] 16 C.F.R. § 255. 1 (d).

the United States with a view toward raising awareness of the actual practices of influencer marketing.

As the Korean case shows, all that disappointed followers could do was express their anger and unfollow the influencers, while the influencers and their sponsors were raking a handsome amount of money. More surprisingly, all of the condemnation was directed solely to the influencers, who issued apologies, with no blame attached to the brands. Under U.S. laws, the followers might seek damages for restitution if they bought the products under these false pretenses. The U.S. case exposes naïve and younger social media users, without any knowledge of lawful marketing practices, seeking a monetary opportunity as influencers. This article emphasizes that the FTC Act should be used to crack down on foreign YouTube and Instagram content linked to influencer marketing to protect U.S. consumers.

* Young Joon Lim is an associate professor in the department of communication at The University of Texas Rio Grande Valley; young.lim@utrgv.edu.

**Lynse Larance Guerra is a practicing attorney with the Skaggs & Guerra Law Firm, McAllen, Texas; sgllp@sbcglobal.net.

Super Bowl Halftime Shows, Wardrobe Malfunctions, Stripper Poles, and the Never-Ending Saga of Indecency Enforcement by the FCC

Christopher Terry* and Kyla P. Garrett Wagner**

Over-the-air radio and television stations in the United States remain subject to prohibitive Federal Communications Commission regulation of indecent content. In this paper, the authors examine the 2020 Super Bowl Halftime Show through a lens of the five major eras of FCC indecency enforcement beginning with the Pacifica decision of the U.S. Supreme Court through the contemporary, but rarely applied, "egregious situation" standard. Of the 1,312 complaints submitted to the FCC following the show, over 300 explicitly stated that the show was inappropriate for children and family audiences. The mention of "child" or "children" occurred over 700 times in the complaints, "family" 670 times, and the phrase "family-friendly" more than 180 times. The question was whether the complaints would be actionable in any of the FCC eras of indecency enforcement. Other reactions following the 2020 halftime show suggested that despite its sexual elements, many viewers perceived in the performances by J-Lo and Shakira a symbol of progress for women and minorities. Like complaints against broadcasters carrying commercial content that shows strong women voicing opinions and sharing culture through art, the legacy of reactionary enforcement of broadcast indecency, the authors argue, is one whose time has passed.

Key words: FCC, indecency, Super Bowl, J-Lo

I. Introduction

The 2020 Super Bowl Halftime show was an extravaganza of elaborate stage designs, loud party music, and multiple costume changes. This year's show featured a collection of Latin performers, including Shakira, Jennifer Lopez (aka, J-Lo), Bad Bunny, and J Balvin. The show opened with Shakira, dressed in a bright red sequined crop top and miniskirt, accompanied by a troupe of female performers belly dancing to Shakira's most popular songs, including "Hips Don't Lie," "Whenever, Whenever," and "She Wolf." Shakira's set featured a surprise appearance from the rapper, Bad Bunny, during which the two shared an all-Spanish-sung song. This opening performance gave way to J-Lo's entrance. She appeared on a lifted stage downing an all-leather, skintight bodysuit, with slats cut to accentuate her body's most feminine features. Lopez and her dancers, dressed in leather bounding reminiscent of BDSM costumes, performed a collection of songs, including her major hits like "Jenny from the Block." These performances gave way to J-Lo's big, and likely most memorable, transition of the show: her climbing a stripper pole in a sheer silver and crystal bodysuit.

Spinning in the air, surrounded by muscle-toned men grabbing and groping at her, J-Lo sang her famous hit, "Waiting for Tonight." This set gave way to a performance by rapper J Balvin, who was also accompanied by women inverted on poles. Balvin was then joined by J-Lo who proceeded to "grind" on Balvin as he completed his sexually-charged set. The show then transitions to a performance by J-Lo's preteen daughter, Emma, who sang a rendition of her mother's "Let's Get Loud." Emma appeared in, and was surrounded by, an illuminated cage singing – images said to be an acknowledgment of Latino children held in cages at the U.S./Mexico border. Emma then switched to singing "Born in the U.S.A." and was joined by her

mother, who reappeared fashioning a giant feathered red, white, and blue coat that featured the Puerto Rican flag on the inside and the American flag on the outside. The two were then joined by Shakira, who was now in a gold and fringe one-piece. J-Lo and Shakira closed the show with a shared singing of Shakira's "Waka, Waka," during which the two exchanged routines of belly dancing, salsa, and cha-cha.

Although the show is, at least at some level, just an extended commercial for the soft-drink Pepsi, the performance's combination of female leads and socio-political commentary earned multiple Emmy nominations. To some, the show is a triumph for women's empowerment and Latino culture and crisis representation. But to others, including the authors of 1,312 complaints, the content of the 2020 Super Bowl Halftime show was overly sexual, inappropriate for the family and adolescent audiences watching, representing yet another failure by the F.C.C. to police the airwaves for objectionable content.

While newspapers, internet content, and cable are not bound to the legacy of indecency enforcement, traditional, over-the-air broadcast radio and television stations remain subject to prohibitive FCC regulation of indecent content.[1] Although indecency has fallen from the regulatory centerpiece it became in the year that followed the 2004 Super Bowl Halftime show where Janet Jackson's infamous "wardrobe malfunction" occurred, the story of enforcement of by the Federal Communications Commission remains an uncompleted saga that problematically continues to influence broadcaster decisions about news and other content. This paper builds on an analysis completed after President Trump's "shithole" comment was aired,[2] and it explores the 2020 Super Bowl Halftime Show through the context of the five major eras of FCC indecency enforcement beginning with the *Pacifica* decision through the contemporary, but rarely applied, "egregious situation" standard.

II. Inception: Pacifica v. FCC to Sikes

In the 20th century, the law on distributing and broadcasting obscene or indecent content went through a series of iterations, starting with the 1927 Radio Act[3] and its prohibition of airing indecent content by broadcasters: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years or both."[4] This provision was later included in the 1934 Communications Act and then transferred into Title 18, Section 1464 of the U.S. Code, where it remains today.

Obscenity was formally classified as unprotected and illegal speech in the 1957 Supreme Court case *Roth v. United States*.[5] Following this decision, a series of tests were put forth to define obscene speech when, finally, in 1973 the Supreme Court settled on a three-part test in *Miller v. California*.[6] Since *Miller,* the courts have maintained that obscene speech is always illegal, regardless of its medium of expression or the audience of the speech.[7] The

[1] *See* generally FCC, Obscenity, Indecency & Profanity FAQ, FCC, https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts.
[2] Ali Vitali et al., *Trump Referred to Haiti and African Nations as 'Shithole' Countries*, NBC (Jan. 12, 2018, 7:47 AM), https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946.
[3] 47 USCS §§ 81-119.
[4] 18 U.S. Code § 1464.
[5] 354 U.S. 476, 484–85 (1957).
[6] 413 U.S. 15 (1973).
[7] *Id.* at 23.

secondary challenge, however, has been to define the rights and protections of legal, non-obscene speech – aka, indecency.

While closely related to the legal concept of obscenity, indecency has different legal standards and is functionally regulated using a time-place-manner standard. Indecency is protected speech,[8] but for broadcasters, it exists as a form of prior-restrained content. In practice, the FCC enforces a total ban against obscene content but regulates the time of day when broadcasters are allowed to carry indecent material.[9]

The time-place-manner treatment of indecency is a result of the 1978 Supreme Court case *FCC v. Pacifica Foundation*.[10] The case addresses a dispute between the FCC and a New York City radio station (owned by Pacifica) that arose after the FCC censured the station for one of the station's broadcasts. One early afternoon of October of 1973, the radio station aired a 12-minute segment by comedian George Carlin about seven words not allowed on television or radio.[11] Carlin's satire was part of a larger monologue on societal attitudes about modern language, which included a discussion about the irony that U.S. culture and language have significantly more words to describe "filthy" words than there are the actual filthy words. To draw out his point, in this portion of his monologue Carlin said the seven filthy words ("shit, piss, fuck, cunt, cocksucker, motherfucker, and tits") and repeated them numerous times. It was exactly this portion of Carlin's monologue that got aired over the radio. Aware of its profanity, the radio station preempted the broadcast with a warning to listeners about its content. Despite the warning, a father listening to the satire with his teenage son was upset by what his impressionable child has heard and filed the only recorded complaint to the FCC.

The FCC ruled that the language broadcasted from Carlin's monologue was "patently offensive," especially for the children likely in the audience for an afternoon broadcast.[12] In response, Pacifica argued that the broadcast was not indecent because it lacked "prurient appeal."[13] The Supreme Court ultimately found for the Commission, agreeing with the agency that the broadcast was indeed indecent and that the Commission had jurisdiction because it was not trying to suppress indecent speech, but it was acting to fulfill a societal goal to keep graphic content away from children.[14] Furthermore, the Court recognized that at the core of the case was a need to balance the rights of listeners while also considering the unique characteristics of broadcast media. According to the Court, listeners – specifically, adult listeners – have rights to receive indecent content like the kind in the case (as it is legal), but restrictions on time of day broadcasts of indecent content are valid due to the concern about the direct accessibility of broadcast content to children.[15] The daytime restrictions are further

[8] The FCC and Protected Speech, FCC (Dec. 30, 2019), https://www.fcc.gov/consumers/guides/fcc-and-freedom-speech ("[T]he Courts have said that *indecent material* is protected by the First Amendment to the Constitution and cannot be banned entirely. It may be restricted, however[.]").
[9] Broadcasters are allowed to air indecent, but not obscene, content between 10 PM and 6 AM local time in a period of each day known as "Safe Harbor." William Davenport, Comment, FCC, *Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (2005).
[10] 438 U.S. 726 (1978).
[11] *Id.* at 729.
[12] *Id.* at 726 ("The FCC characterized the language of the monologue as 'patently offensive,' though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to the law of nuisance where the law generally speaks to *channeling* behavior rather than actually prohibiting it.").
[13] *Id.* at 727 ("Respondent contends that the broadcast was not indecent within the meaning of the statute because of the absence of prurient appeal.").
[14] *Id.* at 738.
[15] *Id.* at 750.

justified because of the pervasiveness of broadcast. According to the Court, "[indecent material] presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[16]

Coupling together a need to protect children and the intrusive nature of broadcast has since validated the Commission's authority to regulate indecency in broadcasting. Immediately following the *Pacifica* decision, the FCC, for all practical purposes, adopted the seven dirty words proposed by Carlin as the model for indecency enforcement.[17] The FCC would determine a broadcast indecent only if 1) it contained one or more of the seven dirty words, which were 2) spoken repeatedly with the intent to shock the audience, and 3) if the program aired during the daytime hours children were likely to be in the audience (6 a.m. to 10 p.m.).[18]

III. Indecency: Sikes to 2001

Starting in 1987, under significant pressure from religious groups and other interested parties, the FCC's metric on indecency enforcement underwent a period of expansion.[19] The FCC began to apply indecency to content beyond Carlin's list of dirty words. During the 1989 confirmation hearings for Albert Sikes, as well as those of Sherrie Marshall and Andrew Barrett, indecency was brought up regularly as a regulatory issue requiring attention.[20] For the commissioners appointed between 1985-1987, indecency was never raised as a policy or enforcement issue during their confirmation hearings.[21]

Under the four years of Sikes's leadership, the FCC ramped up indecency actions. In addition to raising the potential fine for violations to $25,000, the FCC issued 20 fines for the airing of indecent content.[22] This trend was continued by James Quello, who was FCC chair for a short time during 1993 when four fines for indecency were issued by the agency.[23] The FCC continued the more aggressive stance under Clinton appointee Reed Hundt with 17 fines between 1993-1997, and William Kennard, who was FCC Chair from 1997-2001,[24] participated in the issuing of 18 fines during his term. Under Kennard's leadership, the FCC created the Enforcement Bureau in 1999 and empowered it with the agency's investigations of indecency complaints.[25]

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[16] *Id.* at 748.
[17] 41–60 F.C.C. 2d 364 (1978) (indicating that the standard introduced in Pacifica controlled indecency determinations).
[18] *Regulation of Broadcast Indecency: Background and Legal Analysis*, CONG. RSCH. SERV. (Apr. 16, 2013), https://www.everycrsreport.com/reports/RL32222.html.
[19] Milagros Rivera-Sanchez & Michelle Ballard, *A Decade of Indecency Enforcement: A Study of How the Federal Communications Commission Assesses Indecency Fines (1987-1997),* 75 JOURNALISM & MASS COMM. Q. 143 (1998).
[20] *Id.* at 145.
[21] *Id.*
[22] Jan H. Samoriski, John L. Huffman & Denise M. Trauth, *Indecency, the Federal Communications Commission, and the Post-Sikes Era: A Framework for Regulation,* 39 J. BROADCASTING & ELECTRONIC MEDIA 51, at 62 (1995).
[23] https://web.archive.org/web/20180430215122/https://transition.fcc.gov/eb/broadcast/ichart.pdf.
[24] *Id.*
[25] Federal Communications Commission Reform for the New Millennium: Hearing on H.R. 3011 Before the H. Subcomm. on Telecommunications, Trade, and Consumer Protections, H. Comm. Commerce., 106th Cong. 14 (1999) (statement of William E. Kennard, Chairman, Federal Communications Commission).

During this era of indecency enforcement, the agency focused on three categories: 1.) expletives, such as those used by Carlin in his monologue; 2.) sexual innuendo, where the sexual meaning was inescapable; and 3.) patently offensive descriptions of sexual or excretory activities or organs. Radio content was the prime suspect in violation of the FCC rules on indecency during this era of enforcement. Of the thirty-eight fines the FCC issued between 1993-2000, just one was for television. Fines peaked during 1994 as a total of $674,500 was assessed for seven violations, all for radio station content. At the end of the Clinton administration, by comparison, there were seven fines in 2000, again all for radio content, but the FCC issued just $48,000 in fines.

IV. Indecency: New Guidelines and The Super Bowl

The FCC released a five-part series of guidelines in a policy statement explaining what would make broadcast content indecent in the eyes of the Commission.[26] These "2001" guidelines required the Commission to first make two determinations regarding material that may be indecent. Specifically, the content in question had to be: "[L]anguage or material that, in context, depicts or describes in terms patently offensive as measured by the contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[27]

Under the 2001 rules, the full context of the material was assessed when determining if the material was patently offensive. The agency applied the contemporary community standard generically, which in practice meant that the offensiveness of the content was not geographically tied to the location where the infraction occurred.[28] To determine context, the Enforcement Bureau examined all three elements, but in practice, the enforcement bureau could find any combination as the basis for a formal finding of indecency.[29]

1) The explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;

2) Whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;

3) Whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[30]

Investigations of indecent material were handled by the recently empowered Enforcement Bureau following the filing of a complaint.[31] If the programming segment material met the description or depiction requirements for sexual or excretory functions or actions; and if the material was aired outside of the safe harbor hours, 10 p.m.-6 a.m. local time, the bureau would launch a formal investigation.[32]

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[26] Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency. 16 FCC Rcd. 7999 (2001).
[27] *Id.* at 8000.
[28] *Id.* at 80002 ("The determination as to whether certain programming is patently offensive is a not a local one and does not encompass any particular geographic area. Rather the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.").
[29] *Id.* at 8003.
[30] *Id.*
[31] *Id.* at 8015.
[32] *Id.*

Although the 2001 rules represented a significant expansion of material that could be found indecent, the rules were enforced only minimally until the broadcast of the 2004 National Football League Super Bowl Halftime Show.[33] During the broadcast of the Super Bowl, pop singer Janet Jackson's right breast was partially exposed for 19/32 of a second.[34] The Enforcement Bureau charged that even though Jackson's breast was exposed for only a fraction of a second, when placed into the full context of the Halftime Show, the program was sexually-orientated because of its lyrics and suggestive dancing.[35] By applying the context of the full half time show to the complaints, it allowed the Commission to find the segment patently offensive according to the titillation and pandering prong.[36] In assessing the then-record $550,000 fine, the FCC only took action against the Viacom-owned-and-operated CBS affiliates that carried the program.[37]

There was a rapid and robust public outcry for indecency enforcement in the wake of the Super Bowl broadcast. The FCC received a record number of complaints and as a result, 2004 represented the agency's high-water mark for indecency enforcement.[38] In response, Congress raised the limit on fines for single instances of indecency from $32,500 to $325,000. Reading the proverbial tea leaves and facing record fines from an agency with a sudden interest in enforcement, major media organizations with unresolved indecency cases willingly entered into high-dollar consent decrees with FCC. A large proportion of the fines collected during 2004 were actually made up of the consent decrees the Commission entered into with Clear Channel,[39] Emmis[40], and Viacom.[41] Each consent decree, while assessing a financial penalty to the companies, settled all of each company's pending indecency complaints. [42]

Although it was video that brought indecency back into the regulatory mainstream, nine of the twelve Notices of Apparent Liability (NALs) issued during 2004 were for

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[33] Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 FCC Rcd. 19230 (2004).
[34] *Id.* at 19235.
[35] In fact the FCC noted specifically that the lyrics ("gonna have you naked by the end of this song") that Justin Timberlake sang at the moment of the clothing malfunction were persuasive in coming to its conclusion. *Id.* at 19236.
[36] *Id.*
[37] The fine imposed was the sum of the statutory maximum for each offense. *Id.* at 19230. *See* generally *Id.* at 19344 for an appendix listing Viacom owned CBS Television Network affiliates.
[38] In 2003, the FCC issued three NALs for a total of $440,000 in fines. "Complaints regarding various television broadcasts between February 2, 2002 and March 8, 2005," https://www.fcc.gov/document/complaints-regarding-various-television-broadcasts-between-february-2-2002; "Complaint and enforcement statistics," https://www.fcc.gov/general/complaint-and-enforcement-statistics. In 2004, the FCC issued 12 NALs and made three Consent Decrees for a total of $7,928,080. "Consent Decrees," https://transition.fcc.gov/eb/broadcast/CD.html.
[39] This order was the Consent Decree with Clear Channel and its subsidiary broadcast companies to settle all pending indecency violations for $952,500. Clear Channel Communications et al., Order, 19 FCC Rcd. 10880 (2004). – 19 FCC Rcd. 10883 (2004) states that the sum of the consent order was $1.75 million.
[40] This order was the Consent Decree between Emmis and the FCC and was settled for $258,000. Emmis Communications Corp., 19 FCC Rcd. 16003 (2004). (19 FCC Rcd. 16007 (2004) states that the sum of the consent order was $300,000).
[41] This order was the Consent Decree between the FCC and Viacom, settled for $3,059,580. Viacom Inc., 19 FCC Rcd. 23100 (2004). This is listed as $3.5 million at 19 FCC Rcd. 23105 (2004).
[42] The Viacom consent decree did not cover the fines in the NAL issued for the Super Bowl Halftime Broadcast. *Id.* at 23103.

programming that had aired on radio.[43] Howard Stern was fined multiple times for on-air behavior when his syndicated program was on over-the-air broadcast stations, including twice during 2004.[44] The Enforcement Bureau also issued fines for sexual and excretory descriptions or depictions in seven radio segments of the Bubba the Love Sponge program,[45] and for a radio segment that included an interview with pornography actor Ron Jeremy, who, on his birthday, described how he was once able to perform oral sex upon himself.[46] The Enforcement Bureau also issued NALs for radio discussions ranging from the on-air use of a penis-pump[47] to the way to humiliate a woman after sexual intercourse,[48] a segment that described an in-progress game of "Naked Twister,"[49] as well as one where on-air personalities encouraged the public simulation of a sex act as part of a contest to win a video game console.[50]

The FCC issued three indecency fines for television programs during 2004 including the Super Bowl Halftime Show, a segment on a San Francisco television that showed a fleeting image of a penis during a morning news interview with two performers in a stage show entitled, "Puppetry of the Penis."[51] In the third, the FCC issued a fine to every Fox network affiliate that carried an episode of the program, *Married by America* in 2003. The program was recorded, and as such, the FCC argued that local affiliates should not have carried the program.[52] In the episode, which featured the contestants attending a bachelor and bachelorette party, both with exotic dancers, visible naked body parts were pixilated by the network to prevent full exposure.[53] The Enforcement Bureau rejected the network's claim that the pixilation prevented the Commission from finding the segment indecent,[54] issuing a $7000 fine to every Fox affiliate station that carried the program.[55]

Notably, despite the flurry of actions taken to enforce indecency after the 2004 Super Bowl broadcast, two of the NALs issued dealt with material broadcast during 2001, five dealt with content from 2002, and four resulted in content broadcast in 2003. In one case, the FCC eventually had to issue an order to cancel a NAL because the statute of limitations had expired before the Commission made a final ruling.[56] By 2005, the FCC had essentially declared victory on indecency, issuing no fines during the entire calendar year.

V. Indecency: 2006, Fleeting Expletives, and Fox Television v. FCC

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[43] Chart of Indecency Enforcement by the FCC 1993-2004, https://web.archive.org/web/20180430215122/https://transition.fcc.gov/eb/oip/ComplStatChart.pdf.
[44] Infinity Broadcasting Operations, Inc., 19 FCC Rcd, 5032 (2004); *see also* Clear Channel Broadcasting, 19 F.C.C.R. 6773 (2004).
[45] Clear Channel Broadcasting 19 FCC Rcd.. 1768–69 (2004).
[46] AMFM Radio Licenses LLC., 19 FCC Rcd.. 5005–06 (2004).
[47] AMFM Radio Licenses LLC., 19 FCC Rcd.. 10751 (2004).
[48] Entercom Sacramento Licensee, LLC., 19 FCC Rcd.. 20129–30 (2004).
[49] Entercom Kansas City License, LLC, and Entercom Wichita License, LLC, 19 FCC Rcd. 25011, 25014 (2004).
[50] Capstar TX Limited Partnership, 19 FCC Rcd. 4960, 4964 (2004).
[51] Young Broadcasting of San Francisco, Inc., 19 FCC Rcd. 1751–2 (2004).
[52] Complaints Against Various Licenses Regarding Their Broadcast of Fox Television Network Program "Married By America" On April 7, 2003, 19 FCC Rcd. 20191 (2004); *see Id.* at 20220 for Commissioner Martin's statement that stations have a responsibility to reject indecent content.
[53] *Id.* at 20193–94.
[54] *Id.*
[55] *See generally id.* at 20198 – 20219 for an exhaustive list of fined local affiliates.
[56] AMFM Radio Licensees LLC., 19 FCC Rcd. 10751 (2004); *see also id.* at 10773 (indicating Commissioner Martin's recognition that the statute of limitations had run out the prior year regarding the AMFM Radio Licenses enforcement proceeding).

In addition to the fines issued in 2004, the FCC also released a *Memorandum Opinion and Order* for the reconsideration of a complaint denial regarding the use of a single profanity during the broadcast of the Golden Globe Awards.[57] During the broadcast, U2 lead singer Bono was given an award and during his live acceptance speech, the singer exclaimed, "This is really, really, fucking brilliant. Really, really great."[58] The Enforcement Bureau initially denied the complaint about the broadcast, claiming the use of the profanity was fleeting and not used to describe a sexual or excretory function.[59] In response, a request for review was filed by the Parents Television Council.[60]

The PTC, an interest group long associated with policing the airwaves for objectionable content, countered by arguing that usage of the word "fuck" in any context is patently offensive.[61] Although the agency had rarely considered a fleeting profanity indecent if it lacked a sexual context, the agency bowed to the external pressure, and on reconsideration, the FCC declared the segment to be indecent despite the previous dismissal of the complaint.[62] Although the ruling declared the single utterance to be indecent, the Commission did not issue a fine in the case. Instead, the agency used the case to establish a new standard for indecency beginning in March of 2006 referred to as Fleeting Expletives.

> With respect to the first step of the indecency analysis, we disagree with the [Enforcement] Bureau and conclude that use of the phrase at issue is within the scope of our indecency definition because it does depict or describe sexual activities. We recognize NBC's argument that the "F-Word" here was used "as an intensifier." Nevertheless, we believe that, given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition. This conclusion is consistent with the Commission's original *Pacifica* decision, affirmed by the Supreme Court, in which the Commission held that the, "F-Word" does depict or describe sexual activities.[63]

The "fleeting expletives" standard was then implemented through a 2006 order and coupled with the $325,000 fine approved by Congress in response to the 2004 Super Bowl Halftime Show.[64]

> "We now depart from this portion of the Commission's 1987 *Pacifica* decision as well as all of the cases…holding that isolated or fleeting use of the "F-Word" or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent. We now clarify, as we have made clear with respect to complaints going beyond the use of expletives that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[65]

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[57] Complaints Against Various Licensees Regarding Their Airing of the Golden Globe Awards Program, 19 FCC Rcd. 4975–76 (2004) [hereinafter Golden Globes].
[58] *Id.* at 4976 n.4.
[59] *Id.*
[60] *Id.* at 4978.
[61] *Id.* at 4975.
[62] *Id.* at 4978.
[63] *Id.*
[64] Broadcast Indecency Enforcement Act, Pub. L. 109-235, §2(c)(ii), 120 Stat. 491 (2006).
[65] Golden Globes, *supra* note 60 at 4980.

Although a sexual or excretory context had been required for a finding of indecency since 2001, the fleeting expletive standard made usage of the words "shit" or "fuck" (or any derivative of either word) indecent. Importantly though, the fleeting expletive standard was an expansion or "clarification" of the 2001 indecency standard. Absent either of the profane words, the FCC could rule content indecent under the existing 3-part test implemented in 2001.

VI. Indecency: "Egregious" and WDBJ

The FCC's actions in the Golden Globes decision and the corresponding 2006 Indecency Order resulted in a series of lengthy legal challenges. Starting in 2007, the U.S. Court of Appeals for the Second Circuit heard *Fox Television Stations v. FCC*, a consolidation of several broadcast companies and their multiple disputes against new FCC policies and penalties for fleeting expletives.[66] In a 2-1 decision, the Second Circuit Court of Appeals overturned the FCC's 2006 order on procedural grounds, stating that the Commission failed to give fair warning and adequate explanation for changing its 30-year policy to zero-tolerance for a single fleeting expletive.[67] Furthermore, the court noted that the Commission's justification for the new policy, that children could be harmed by hearing even one fleeting expletive (the so-called "first blow" theory), had "no rational connection to the Commission's actual policy."[68] Importantly, though, the Second Circuit did not determine whether the FCC's new fleeting expletive policy was constitutional (i.e., a violation of free speech rights).[69]

The FCC then appealed to the Supreme Court, which decided in 2009 to reverse the lower court decision. According to the Court, "the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given. We decline to 'substitute [our] judgment for that of the agency' and we find the Commission's orders neither arbitrary nor capricious" (internal citations removed).[70] Despite this ruling, the constitutional question about the fleeting expletive policy again went unanswered. The Court, instead, remanded the decision and the constitutional question back down to the Second Circuit. [71]

On remand, the Second Circuit once again invalidated the FCC's fleeting expletives standard as unconstitutional. In invalidating the FCC's standard, Judge Pooler took the constitutional approach eschewed previously by the Second Circuit, stating, "We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's

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[66] FCC v. Fox Television Stations, 489 F.3d 444 (2d Cir. 2007), rev'd, 556 U.S. 502 (2009).
[67] *Id.* at 458 ("First, the Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful "first blow" for the nearly thirty years between *Pacifica* and *Golden Globes*. More problematic, however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives.")
[68] *Id.* ("Certainly viewers (including children) watching the live broadcast of The Early Show were "force[d] ... to take the 'first blow' " of the expletive uttered by the Survivor: Vanuatu contestant. Yet the Commission emphasized during oral argument that its news exception is a broad one and "the Commission has never found a broadcast to be indecent on the basis of an isolated expletive in the face of some claim that the use of that language was necessary for any journalistic or artistic purpose." The Commission further explained to this court that a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the courtroom, would "plainly not" be indecent or profane under its standards because of the context in which it occurred.").
[69] *Id.* at 462 ("Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks.").
[70] FCC v. Fox Television Stations, Inc. 556 U.S. 502, 530 (2009).
[71] *Id.*

current policy fails constitutional scrutiny."[72] Once again, the Commission appealed to the Supreme Court. In a mixed decision, the Court ruled that the Commission retained its authority to regulate indecency under the *Pacifica* precedent, but also ruled that the current regulatory implementation was invalid.[73] The Court, ultimately, denied answering the constitutional question, this time remanding the indecency enforcement back process to the agency.[74] But, as if to leave an asterisk on the decision, Justice Ginsburg stated in her brief concurring opinion: "In my view, the Court's decision in *FCC v. Pacifica Foundation* was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why Pacifica bears reconsideration."[75] Thus she suggested that the constitutional question about fleeting expletives, and the rights of indecency on broadcast, largely needs to be reconsidered.

After the Supreme Court handed down its final – for now – decision in for *FCC v. Fox Television* in 2012, the Commission responded to the remand in April 2013 with a proposal for a new enforcement approach labeled as "egregious situations."[76] According to the proposal, the agency would only make a ruling for indecency in high profile or very obvious situations.[77] Since then, only four fines have been issued by the FCC since the initial proposal of the 2013 "egregious" standard.

In 2013, in a consent decree, Liberman Broadcasting, Inc. agreed to pay $110,000 for indecency in episodes of the Spanish language Jose Louis program.[78] In April 2014, the FCC settled with KRXA–AM, a California radio station, for $15,000.[79] In August 2014, KBDR-FM, a Texas radio station, paid $37,500 to settle an investigation into allegations of indecent language after a listener complained to the FCC that during the morning show on May 18, 2011, host "Danny Boy" used indecent language during a discussion in which he asked his audience what it took to get a "blowjob" from a woman.[80]

The most notable indecency decision after *Fox Television* was also the largest single fine issued to a station by the FCC for indecency. WDBJ-TV was carrying a story during a 6pm newscast about a new local firefighter who had previously worked as an actress in pornographic films. In the coverage, WDBJ used a screen capture of images of actress Harmony Rose taken from a pornographic website.[81] In the corner of the screen, there was an advertisement for another adult website that included a video GIF of an erect penis being masturbated. The image appeared for approximately 3 seconds. For the infraction, the FCC fined WDBJ the maximum allowable penalty of $325,000.[82] Although WDBJ management initially suggested that the station would challenge the assessed fine, the station eventually

[72] Fox Television v FCC II, 613 F.3d 317, 335 (2d Cir. 2010).
[73] FCC v Fox Television II, 567 U.S. 239, 258 (2012).
[74] *Id.* at 259.
[75] *Id.* (Ginsburg, J., concurring).
[76] FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, 28 FCC Rcd. 4082–84. *See* generally FCC Extends Pleading Cycle for Indecency Cases, 78 Fed. Reg. 34099-34100 (June, 6, 2013) for the first notice of comment period extension.
[77] *Id.* at 4082–83.
[78] Liberman Broadcasting, Inc., 28 FCC Rcd. 15404 (2013).
[79] KRXA, LLC, 29 FCC Rcd. 3487 (2014).
[80] Border Media Business Trust, 29 FCC Rcd. 9488 (2014); *see also* Border Media Business Trust, 29 FCC Rcd. 9491– 92(2014).
[81] WDBJ Television, Inc., 30 FCC Rcd. 3025 (2015).
[82] *Id.* at 3025–26, 3034.

paid the full amount without mounting a legal challenge.[83]

The FCC's enforcement mechanisms have waned since WDBJ, and there have been no additional issued fines by the FCC, nor have any legal challenges to previous fines been filed. At the time of the 2020 Super Bowl, the "egregious situation" era of enforcement remains legally untested.

VII. Super Bowl 2020

In an audience of more than 103 million,[84] someone will inevitably disagree with creative choices made for a major event like the Super Bowl Halftime Show. An analysis of the FCC complaints suggests viewers had a variety of issues with the show, from the costumes worn by Shakira and J-Lo to the sexually-charged choreography. A direct review of the complaints reveals a shared grievance between the upset viewers: the show was not "family-friendly."

Of the 1,312 complaints submitted to the FCC, over 300 complaints explicitly state that the show was inappropriate for children and family audiences: "The simulated patting of J Lo's derrière is not for family television."[85] "The dancing was too sexual – it may be ok for an adult audiences, but not for kids. The Super Bowl should be a family-friendly event; ten-year-olds are watching."[86] "I had to send my kids OUT OF THE ROOM… This is WAY beyond what should be considered appropriate for a national family program."[87]

The mention of "child" or "children" occurred over 700 times in the complaints, while the word "family" is mentioned exactly 670 times, and the phrase "family-friendly" mentioned over 180 times. Without question, the resounding issue is that the Halftime show was not appropriate for adolescent or family audiences. Furthermore, there is a shared belief that the FCC is a, if not "the", responsible party for the Halftime show and needs to "do something" to protect these audiences: "Please help protect the public, especially our children."[88] "FCC: Please bring pure, family- friendly viewing back!",[89] and, "The FCC cannot possibly believe this is appropriate for family television."[90]

Overwhelmingly, complainants stated that the halftime show was supposed to be "family-friendly" television and that the F.C.C. was responsible for ensuring the show was appropriate for such audiences. Complaints directed at audience exposure to body parts were a common theme in complaints about the 2020 show, with over 50 devoted entirely to issues of bodily exposure or design of the costumes to expose body parts. Mentions of "butt"

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[83] The station paid the entire fine. Documentation obtained from FCC via FOIA #2018-000190. *See*, related, *Notice of Apparent Liability for Forfeiture*, https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0323/FCC-15-32A1.pdf; *FCC Plans Max Fine Against WDBJ for Indecent Material in Evening News*, https://www.fcc.gov/document/fcc-plans-max-fine-against-wdbj-indecent-material-evening-news.

[84] David Bauder, *Just Under 100 Million People Watch Super Bowl on Fox*, AP NEWS (Feb. 3, 2020), https://apnews.com/dd2e0b3a8a028f3d6061946e15a7114e.

[85] Super Bowl Halftime Complaints, WFAA, https://interactive.wfaa.com/pdfs/super_bowl_halftime_complaints.pdf (quoting complaint # 3795033) (last visited Aug. 15, 2020, 8:36 PM).

[86] *Id.* (quoting complaint # 3804531).

[87] *Id.* (quoting complaint # 3795381).

[88] *Id.* (quoting complaint # 3795175).

[89] *Id.* (quoting complaint # 3799629).

[90] *Id.* (quoting complaint # 3798666).

"buttocks," and other related anatomy occurred over 100 times, while over 200 complaints suggested that the costumes and performance were "pornographic."

According to many complaints, the show represented a display of sexual content and sexual behavior that was not only inappropriate for family audiences but also damaging to the development of younger girls: "I was watching with my 8 yo daughter and was so embarrassed by the thong outfit and the pole dancing. What kind of example does this set for our young children who enjoy watching super bowl halftimes?!",[91] and "What type of message are they trying to send, that it is ok for young girls to get the idea that it is somehow acceptable to show your butt and crotch to the world? How about presenting a wholesome image for family's to respect and gain value from."[92]

VIII. Discussion

The complaints collectively argue that the 2020 Halftime show was "inappropriate." Yet this entirely subjective viewpoint reflects indecency's traditional concern for younger children in the audience that has existed since *Pacifica*. As such, the complainants argue that the FCC must protect these audiences from the content they (the people who submitted the complaints) interpret as sexually charged. The question, however, is whether the complaints are actionable, or would they be under any of the five eras of indecency enforcement.

In terms of the *Pacifica* era, there was no content in the 2020 Halftime show that included any of Carlin's list of seven dirty words. Likewise, lacking any visual, audio, or lyrical use of the words "shit" or "fuck" during the broadcast, the content would not have been actionable under the 2006 fleeting expletive guidelines.

The assessment of indecency under the standards of the Sikes era or 2001 guidelines is less clear. The sexualized nature of the video in the broadcast was the type of content that religious and other interested groups were putting pressure on the Sikes-led FCC to do something about when they argued to the FCC and Congress in 1987 that Carlin's list of things one was disallowed to say on television did not cover the range of objectionable content broadcasters were carrying at the time. It would not be hard to imagine those groups actively objecting to the program, but the Sikes era's primary focus on radio content suggests that while there may have been an outcry against the show, it would not have been indecent in regulatory terms.

Where the analysis is the least clear, however, would be in applying the 2001 guidelines. Although the 2001 guidelines made three specific requirements for a finding of indecency, that standard was rarely applied in its entirety. In several cases, including the Married by America case, the FCC made subjective rulings finding indecency in content that was objectionable, even when that content did not meet all three of the required criteria. The application of the standard to the larger context of the actual content that could have been indecent often provided grounds for a finding of indecency. While the choreography, outfits, and sets of the 2020 show were sexualized, the real question in terms of the 2001 guidelines would actually have been along the lines of the non-local contemporary community standard. It is likely at the time the 2001 guidelines were being enforced, and certainly in the wake of the outrage over the 2004 Super Bowl Halftime Show, that the FCC would have looked at more than 1300 complaints as an opportunity for enforcement, even though the program did not meet the standing criteria at the time.

[91] *Id.* (quoting complaint # 3796102).
[92] *Id.* (quoting complaint # 3796217).

In 2020 though, the FCC would have to apply the 2013 egregious standard when adjudicating the complaints. While upsetting to some, the content of the 2020 halftime show was not so egregious that it would or even should warrant the assessment of a formal penalty. Perhaps best illustrated by its recent four Emmy nominations,[93] it is evident that opposite to the views in the FCC complaints, the 2020 Super Bowl Halftime show was a display not of pornography but one of progress by its cast of all-women headliners, who themselves are all Latin artists who employed a cultural-centric choreography that included acknowledgments of political crises. These are just a few of the elements that made some viewers of the 2020 Super Bowl Halftime Show call it a "triumph."[94] Many opinion articles following the halftime show suggest that despite its sexual elements, the performances by J-Lo and Shakira were a symbol of progress for women and minorities. Response on Twitter broke 1 million direct mentions of the Halftime show, with 69% of tweets expressing a positive sentiment.[95]

Likewise, articles from the *New York Times*, *Washington Post*, and *USA Today* rave about the halftime show being more than party, but a parade of cultural pride and gender empowerment. According to a review in the *New York Times*, "the halftime show was also a no-nonsense affirmation of Latin pride and cultural diversity in a political climate where immigrants and American Latinos have been widely demonized."[96] Referring to the female headliners as superwomen, "This halftime show was euphoria with a purpose."[97] Similarly, a review for the *Washington Post* stated that in the face of accusations that the Halftime show was "inappropriate" and "pornographic," "[The show] wasn't porn. It was a celebration of two women — and an epic one at that."[98]

IX. Conclusion

Despite the noise of 1300 F.C.C. complaints, reviews and Tweets about female empowerment and cultural representation dominated the 2020 Super Bowl Halftime Show discussion. Admittedly, the discussions included the scantily clad clothing and sexually-suggestive dancing. But to quote a review for USA Today, "Putting the world's biggest stars on the world's most-watched stage does not a G-rated concert make. Playing it safe isn't what got them to the Super Bowl, and it's not what they're going to do with their time in that spotlight."[99] At the very least, we can all think of worse Halftime shows, but we should also

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93 Mahita Gajanan, *Here Are the 2020 Emmy Nominations*, TIME (July 28, 2020, 2:33 PM), https://time.com/5872660/emmy-nominations-2020/.

94 *See, e.g.,* Jenny Singer, *For Latinas, Super Bowl 2020 Was a Night of Triumph – And Debate*, GLAMOUR (Feb. 3, 2020), https://www.glamour.com/story/for-latinas-the-super-bowl-2020-was-a-night-of-triumph-and-debate.

95 Madeline Berg, *Super Bowl Halftime Show 2020: Twitter Reacts To Jennifer Lopez*, FORBES (Feb. 2, 2020, 8:50 PM), https://www.forbes.com/sites/maddieberg/2020/02/02/super-bowl-halftime-show-2019-twitter-reacts-to-jennifer-lopez/#96973f1cc2e7.

96 Jon Pareles, *Jennifer Lopez and Shakira Restore Sparkle to Super Bowl Halftime*, N. Y. TIMES: REVIEW (Feb. 2, 2020), https://www.nytimes.com/2020/02/02/arts/music/super-bowl-halftime-review.html.

97 *Id.*

98 *Emily Codik, Shakira and Jennifer Lopez's Super Bowl Halftime Show Wasn't 'Inappropriate.' It Was a Latin Party at its Finest*, THE WASHINGTON POST: PERSPECTIVE (Feb. 4, 2020, 5:37 PM), https://www.washingtonpost.com/arts-entertainment/2020/02/04/shakira-jennifer-lopezs-super-bowl-halftime-show-wasnt-inappropriate-it-was-latino-party-its-finest/.

99 "Hannah Yasharoff, JLo and Shakira's Super Bowl Halftime Performance Was Empowering, Not Objectifying. Here's Why," USA TODAY: OPINION (Feb. 3, 2020, 4:25 PM), https://www.usatoday.com/story/entertainment/celebrities/2020/02/03/super-bowl-halftime-why-jennifer-lopez-shakiras-performance-empowering/4643848002/.

ask the question if the FCC needs to continue to hold an entirely subjective standard that limits otherwise protected speech over the heads of broadcasters.

There's no accounting for taste, but that's doubly true with the staff of the Enforcement Bureau. Far past the on-air hijinks of the Howard Stern or Bubba the Love Sponge, there have now been multiple cases where news and editorial judgments have been made, in part, with a glance backward to the legacy of indecency enforcement by the FCC. Like complaints to mandate state action against broadcasters carrying commercial content that showed strong women voicing opinions and sharing culture through art, any reactionary enforcement of over-the-air indecency is a regulatory scheme whose time has passed.

* Christopher Terry is an assistant professor in the Hubbard School of Journalism and Mass Communication at the University of Minnesota; crterry@umn.edu.

**Kyla P. Garrett Wagner is an assistant professor in the S.I. Newhouse School of Public Communications at Syracuse University; kpwagner@syr.edu.

"Everyone Knows My Name": Exploring Perceptions, Attitudes, and Behaviors of Vietnamese Practitioners Toward Media Privacy

Huu Dat Tran* and Pham Phuong Uyen Diep**

Based on the theory of planned behavior, this mixed-method study aimed to identify factors influencing media practitioners' decisions to disclose personal information of characters featured in their journalistic works. The authors conducted 23 in-depth interviews with, and collected 204 online surveys from, media managers, media professionals, and media educators in Vietnam. The surveys found that the media practitioners' attitudes toward privacy, subjective norms, and perceived behavioral control influenced their behavioral intention and privacy practices in line with the theory; subjective norms (e.g., perceptions of the audience, supervisors, and the working environment) were the most influential factor. The interviews found that privacy practices were culture- and context-based, often adjusted under exceptional or unprecedented circumstances. Finally, the authors offered suggestions for media practitioners to reinforce their work ethics to prevent intrusion of characters' privacy, raise awareness about privacy rights in journalists, and put in place a code of conduct in newsrooms.

Key words: media, privacy, theory of planned behavior, Vietnam, COVID-19

I. Introduction

Privacy is a controversial topic in mass communications, particularly journalism, when citizens' rights of privacy are ignored by the news media.[1] From a legal viewpoint, individuals have the right to protect their privacy, while the public, on the other hand, has the right to know.[2] Ethical standards, including privacy-related ones, vary across newsrooms and countries. There are circumstances where an action may be legal but not thoroughly ethical, leading to formulation of professional journalistic codes.[3] The role of media practitioners as gatekeepers is crucial in balancing individuals' rights to privacy and freedom of the press,[4] more explicitly in deciding whether a piece of personal information should be disclosed in the media. Bivins (2017) has argued that newsrooms' decision-making norms should be situational and implemented on a case-by-case basis.[5] There exists a demand to reexamine and investigate

[1] THOMAS H. BIVINS, MIXED MEDIA: MORAL DISTINCTIONS IN ADVERTISING, PUBLIC RELATIONS, AND JOURNALISM (2017).
[2] Christopher Burkle & Gregory Cascino, *Medicine and the Media: Balancing the Public's Right to Know With the Privacy of the Patient*, 86 MAYO CLINIC PROCEEDINGS 1192–1196 (2011); Fred Cate, D. Annette Fields & James McBain, *The Right to Privacy and the Public's Right to Know: The Central Purpose of the Freedom of Information Act*, 46 ADMINISTRATIVE L. REV. 41–47 (1994); Brian Richardson, *The Public's Right to Know: A Dangerous Notion*, 19 J. MASS MEDIA ETHICS 46–55 (2004).
[3] BIVINS, *supra* note 1.
[4] Zhendong Sun, BALANCING FREEDOM OF THE PRESS AND THE RIGHT TO PRIVACY : LESSONS FOR CHINA ESCHOLARSHIP@MCGILL (2006), https://escholarship.mcgill.ca/concern/theses/8623hz052.
[5] BIVINS, *supra* note 1.

privacy-related media practices (referred to as media privacy henceforth) in an era of new-media expansion.[6]

During the beginning of the COVID-19 pandemic, contact tracing was perceived as crucial to contain the spread of the coronavirus. In several Asian countries, including Singapore, Taiwan, South Korea, and Vietnam, COVID-patients' private data (e.g., location) was made publicly available to track and locate exposed contacts. In these cases, news media joined hands with governments by frequently including data gathered from contact tracing in their publications, sparking privacy concerns, especially in Vietnam.[7] There is little literature scrutinizing privacy concerns in journalism in Vietnam. A literature search by the authors revealed no research to have examined either Vietnamese media practitioners' perceptions of media privacy or factors influencing their decisions on personal information disclosure.

The literature scarcity speaks to the need for greater academic recognition of the Vietnamese journalism landscape, particularly in media privacy. This study attempts to fill the gap by investigating Vietnamese media practitioners' perceptions, attitudes, intentions, and behaviors toward media privacy under a framework of the theory of planned behavior (TPB).[8] Additionally, research in the Vietnamese context also supplements the study of global journalism within the social sciences, efforts to de-Westernize communication scholarship, and a focus shift to the Global South.[9]

It should be noted that the media context in Vietnam is distinct from that in Western countries, especially the United States, as news organizations in Vietnam are fundamentally state owned and funded. Vietnamese news media are closely affiliated with and operate under the directives of the government.[10]

II. Literature review

Privacy and journalism

The definition of privacy in the United States, traditionally "the right to be left alone,"[11] was later developed to include the right to be free from intrusion by an individual.[12] In Vietnam,

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[6] CECILIA FRIEND & JANE B. SINGER, ONLINE JOURNALISM ETHICS: TRADITIONS AND TRANSITIONS (2007); Ginny Whitehouse, *Newsgathering and Privacy: Expanding Ethics Codes to Reflect Change in The Digital Media Age*, 25 J. MASS MEDIA ETHICS 310–327 (2010).
[7] D. T. Max, *The Public-Shaming Pandemic*, THE NEW YORKER (2020), https://www.newyorker.com/magazine/2020/09/28/the-public-shaming-pandemic; Hannah van Kolfschooten & Anniek de Ruijter, *Covid-19 and Privacy in the European Union: A Legal Perspective on Contact Tracing*, 41 CONTEMPORARY SECURITY POLICY 478–491 (2020); Vu Lam, PUBLIC SHAMING IS TERRIBLE, BUT SO IS POOR JOURNALISM THE DIPLOMAT (2020), https://thediplomat.com/2020/10/public-shaming-is-terrible-but-so-is-poor-journalism/.
[8] Lisa Beck & Icek Ajzen, *Predicting Dishonest Actions Using the Theory of Planned Behavior*, 25 J. RESEARCH IN PERSONALITY 285–301 (1991).
[9] Mohan J Dutta & Mahuya Pal, *Theorizing from The Global South: Dismantling, Resisting, and Transforming Communication Theory*, 30 COMMUNICATION THEORY 349–369 (2020); JAMES CURRAN & MYUNG-JIN PARK, DE-WESTERNIZING MEDIA STUDIES (2000); KARIN WAHL-JORGENSEN & THOMAS HANITZSCH, THE HANDBOOK OF JOURNALISM STUDIES (2009).
[10] Le Thu Mach & Chris Nash, *Social Media Versus Traditional Vietnamese Journalism and Social Power Structures*, 2 ASIAN J. JOUR. AND MEDIA STUDIES 1–14 (2019); Giang Nguyen-Thu, *Vietnamese Media Going Social: Connectivism, Collectivism, and Conservatism*, 77 THE J. ASIAN STUDIES 895–908 (2018).
[11] Samuel D. Warren & Louis D. Brandeis, *The right to privacy*, 4 HARV. L. REV. 193 (1890).
[12] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

Article 3 of the 2015 Law on Cyber-information Security and the 2007 Decree 64 on Application of Information Technology in State Agencies' Activities have conceptualized personal information as "sufficient information to accurately determine an individual's identity," such as a full name, date of birth, occupation, title, contact address, email address, phone number, identity card number, or passport number.

In journalism, the concept of privacy is more sophisticated, especially when journalists cover privacy-related issues.[13] The balance between individual and public interests, and between newsworthiness and personal privacy rights, becomes a vital object of inquiry in different contexts, although this balance is challenging to find.[14] The balance and its key actors, e.g., reporters and human subjects portrayed in the articles, has little relative research-based evidence, thus creating a demand to fill this gap.[15]

A characteristic of the relationship between the media, the public, legal, and ethical spaces is the boundary between individuals' right to be private and the public's right to know. Normatively, journalism has to balance individual rights and public interests; those rights, however, are often in conflict, being situated on a myriad of layers and realms.[16] Sun (2006) has urged that often because of newsworthiness, the press unintentionally violates individuals' privacy without prior consent at the newsgathering stage and discloses private facts in the publication stage.[17] Individuals' privacy, however, should only be violated if public importance outweighs the violation.[18]

Journalism-practice policies are usually formalized based on ethical values, but they are often built for individual entities rather than an entire industry.[19] In Vietnam, where there is no explicit code of ethics, journalists tend to decide privacy matters on a case-by-case basis.[20] As a result, media practitioners become decision-makers with diverse perspectives, and it thus becomes necessary to investigate their routines and the organizational factors that would affect media content.[21] Journalists can demonstrate high capabilities to make ethical decisions, yet may not always act ethically.[22]

Privacy in Vietnamese media coverage

Although media privacy is a subject of contemporary discussion worldwide, it is seldom taken seriously in Vietnamese journalism. The Government of Vietnam establishes laws, both civic and journalistic, to protect individuals' right to have complete control over their personal information. Article 21 of the 2013 Constitution of the Socialist Republic of Vietnam states: "Every citizen has an inviolable right to privacy, personal and family secrets, as well as a right to

[13] Wiebke Loosen, *Online Privacy as a News Factor in Journalism*, PRIVACY ONLINE 205–218 (2011).
[14] Pamela C. Laucella, *Arthur Ashe, Privacy, and the Media: An Analysis of Newspaper Journalists' Coverage of Ashe's AIDS Announcement*, 2 INT'L J. SPORT COMMUNICATION 56–80 (2009); Loosen, *supra* note 13; David E. Morrison & Michael Svennevig, *The Defence of Public Interest and The Intrusion of Privacy*, 8 JOURNALISM 44–65 (2007).
[15] Morrison & Svennevig, *supra* note 14.
[16] Loosen, *supra* note 13
[17] Sun, *supra* note 4.
[18] Louis Hodges, *The Journalist and Privacy*, 9 J. MASS MEDIA ETHICS 197–212 (1994).
[19] BIVINS, *supra* note 1.
[20] Laucella, *supra* note 14.
[21] PAMELA J. SHOEMAKER & STEPHEN D. REESE, MEDIATING THE MESSAGE THEORIES OF INFLUENCES ON MASS MEDIA CONTENT (2014).
[22] Angela M. Lee, Renita Coleman & Logan Molyneux, *From Thinking to Doing: Effects of Different Social Norms on Ethical Behavior in Journalism*, 31 J. MEDIA ETHICS 72–85 (2016).

protect their honor and reputation." As further examples, Articles 32, 34, and 38 of the Civic Code assert individuals' rights to protect their images, identity, honor, dignity, and family relations. Additionally, the collection, storage, use, and disclosure of private information can only be conducted with permission from the owner. Meanwhile, Article 9 of the Journalism Code prohibits several journalistic practices, including revealing private secrets; providing information that insults the reputation, honor, dignity of individuals; accusing without a court judgment; and providing information that impacts the normal physical and mental development of children. The Vietnam Journalists Association is the official, national-level, and government-affiliated journalism organization that has issued codes of conduct for journalists, yet none explicitly discuss privacy issues. Although Vietnamese schools and universities with journalism and communication programs offer embedded courses on journalism laws and ethics in their curricula, those issues are still neither systematically taught nor emphasized.[23]

Nevertheless, media practitioners in Vietnam still perceive the personal information of not only public figures but also ordinary people to be merely journalistic subjects. For example, Nguyen (2015) indicated that in 550 articles on sexual abuse, some about children, published in the five most popular news websites in Vietnam in 2012,[24] none of them censored victims' personal information (e.g., names, ages, and home addresses), even showing the victims' faces without pixelation.

Per Vietnam's 2009 Law on Medical Examination and Treatment, patients, in general, have the right "to keep confidential information about health status and private life recorded in medical records." Little research, however, illumines the gap between the law, journalism codes of conduct, and actual journalism practices related to medical patients in Vietnam. In the context of COVID-19, while the government's measures to contain the pandemic in Vietnam (e.g., contact tracing) have been widely accepted by the public, there are concerns that such measures may violate individuals' privacy. Additionally, some have expressed being troubled about the possibility that COVID-patients' identifying information being publicly disclosed.[25] Scholars have generally focused on examining Vietnam's successful handling of the COVID-19 pandemic, but ignored privacy concerns,[26] particularly the infringement of private information in media practices such as reporting.

Theory of planned behavior

The theory of planned behavior (TPB) suggests that individuals' behavioral intention (i.e., what people believe that they can, will, or should do) determines their behavior (i.e., what

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[23] Hang Dinh, *Vietnam's Journalism Training and Education Challenge of a Free Market Economy*, 1 ASIA PACIFIC MEDIA EDUCATOR 181–192 (2004).

[24] Thanh Nguyen, RIGHT TO PRIVACY IN VIETNAM MEDIA: WE ARE STILL FAILING OUR CHILDREN THANH NIEN DAILY (2015), http://www.thanhniennews.com/education-youth/right-to-privacy-in-vietnam-media-we-are-still-failing-our-children-42556.html (last visited Feb 12, 2022).

[25] An Dien Luong Nguyen, VIETNAM'S VIRUS-TRACING APP TREADS GREY LINE BETWEEN SAFETY, PRIVACY SOUTH CHINA MORNING POST (2020), https://www.scmp.com/week-asia/opinion/article/3098566/vietnams-coronavirus-app-bluezone-treads-grey-line-between-safety (last visited Feb 12, 2022); *supra* note 7.

[26] Thi Loi Dao, The Diep Nguyen & Van Thuan Hoang, *Controlling the COVID-19 Pandemic: Useful Lessons From Vietnam*, 37 TRAVEL MEDICINE AND INFECTIOUS DISEASE 101822 (2020); Dyani Lewis, *Why Many Countries Failed at COVID Contact-Tracing — But Some Got It Right*, 588 NATURE 384–387 (2020); Maurizio Trevisan, Linh Cu Le & Anh Vu Le, *The COVID-19 Pandemic: A View From Vietnam*, 110 AMERICAN J. PUBLIC HEALTH 1152–1153 (2020); Quang Van Nguyen, Dung Anh Cao & Son Hong Nghiem, *Spread of Covid-19 and Policy Responses in Vietnam: An Overview*, 103 INT'L J. INFECTIOUS DISEASES 157–161 (2021).

they actually do in reality); the intention, in turn, can be predicted by attitudes, subjective norms, and perceived behavioral control toward a particular behavior.[27] Among TPB constructs, attitude can be understood as behavioral belief or an individual evaluation (i.e., favorability or unfavourability) of performing the behavior in question.[28]

Meanwhile, subjective norms are beliefs about others' expectations toward the behavior in question. It is argued that individuals' self-behavior could be impacted by their perception of others' expectations and observed behaviors;[29] nevertheless, such beliefs may or may not reflect what others indeed perceive and expect. Subjective norms can be categorized into descriptive norms, i.e., beliefs about acceptable behaviors done by the majority of a social group, and injunctive norms, i.e., principles that an individual follows to avoid regulations.[30]

The third construct, perceived behavioral control, differentiates TPB from its predecessor, the theory of reasoned action (TRA).[31] Perceived behavioral control can be understood as individuals' perception of their capability of, as well as potential challenges in, performing the behavior in question. The two components that make up perceived behavioral control are facilitating condition, which refers to resource accessibility, and self-efficacy, which refers to individuals' self-confidence to perform the behavior.[32]

Scholars can also add more predictors (e.g., behavior contexts, background factors, or knowledge) to the TPB model.[33] People tend to have different attitudes, subjective norms, and perceptions of control based on the behavior context in which they participate. Those differences may occur because people yield distinct beliefs in particular behavior contexts.[34] In such novel and immediate situations, behaviors are influenced by normative expectations of others; the awareness of consequences and obstacles, in turn, requires careful decisions. For instance, Soffer & Gordoni (2018),[35] when examining comment behaviors, emphasized the importance of social contexts (e.g., the socio-political atmosphere in which actions take place) that may influence users' perceptions and behaviors.

TPB has been extensively used to explain health and social behaviors. Its application in journalism research, however, is not common, although norms are crucial in a hierarchical journalism environment.[36] Limited journalism-related studies have applied TPB to identify

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[27] Icek Ajzen, *From Intentions to Actions: A Theory of Planned Behavior*, ACTION CONTROL 11–39 (1985); Icek Ajzen, *The Theory of Planned Behavior*, 50 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 179–211 (1991).
[28] Matthew P. Kan & Leandre R. Fabrigar, *Theory of Planned Behavior*, ENCYCLOPEDIA OF PERSONALITY AND INDIVIDUAL DIFFERENCES 1–8 (2017).
[29] ICEK AJZEN, ATTITUDES, PERSONALITY AND BEHAVIOR (2011); Lisa Beck & Icek Ajzen, *Predicting Dishonest Actions Using the Theory of Planned Behavior*, 25 J. RESEARCH IN PERSONALITY 285–301 (1991); Oren Soffer & Galit Gordoni, *To Post or Not to Post?*, 19 JOURNALISM STUDIES 1390–1408 (2017).
[30] MARTIN FISHBEIN & ICEK AJZEN, PREDICTING AND CHANGING BEHAVIOR: THE REASONED ACTION APPROACH (2010).
[31] Icek Ajzen & Martin Fishbein, *A Bayesian Analysis of Attribution Processes*, 82 PSYCHOLOGICAL BULLETIN 261–277 (1975).
[32] Soffer & Gordoni, *supra* note 29; Shirley Taylor & Peter Todd, *Decomposition and Crossover Effects in the Theory of Planned Behavior: A Study of Consumer Adoption Intentions*, 12 INT'L J. RESEARCH IN MARKETING 137–155 (1995).
[33] Icek Ajzen, *The Theory of Planned Behaviour: Reactions and Reflections*, 26 PSYCHOLOGY & HEALTH 1113–1127 (2011).
[34] *Id.*
[35] Soffer & Gordoni, *supra* note 29.
[36] M. Stead, *Development and Evaluation of A Mass Media Theory of Planned Behaviour Intervention to*

perception toward science-media interaction,[37] reporters' likelihood of using computers,[38] prediction for news literacy behaviors,[39] the moral-thinking versus moral-doing gap,[40] or the use of audience feedback on journalistic works.[41]

Identifying the gap in TPB application in journalism research, the study examined how innate attitude, subjective norms, and perceived behavioral control affect media practitioners' (i.e., media managers, journalists, editors, and educators in Vietnam) perceptions of media privacy, thus influencing their practical intentions and behaviors. Among several aspects of privacy intrusion, the study focused on the disclosure of personal information of human journalistic characters (referred to henceforth as characters) by the media (referred to henceforth as privacy practice). The study also examined participants' past practices, how they treated the private information (e.g., name, address, occupation, and other background information such as personal spending history, social status, or family) of individuals involved in their works, and their expressions of thought, explanation, or discussion, particularly in the cases of COVID-19 patients in Vietnam. An interpretative framework of social constructivism was applied, as the research would accept multiple realities through journalists' experience and interaction with other related parties, i.e., colleagues or characters. Those realities of perspectives and behaviors were constructed through in-depth interviews and researchers' philosophical assumptions via observations as media practitioners.

III. Research question and hypotheses

H1. Vietnamese media practitioners' innate attitude, subjective norms, and perceived behavioral control toward media privacy will predict their behavioral intention to disclose personal information.

H1a. Vietnamese media practitioners' innate attitude toward media privacy will predict their behavioral intention to disclose personal information.

H1b. Vietnamese media practitioners' perception of descriptive and injunctive norms will predict their behavioral intention to disclose personal information.

H1c. Vietnamese media practitioners' perceived behavioral control toward media privacy will predict their behavioral intention to disclose personal information.

H2. Vietnamese media practitioners' behavioral intention to disclose personal information will predict their privacy practice.

H2a. Vietnamese media practitioners' innate attitude toward media privacy has a direct effect, as well as an indirect effect via behavioral intention, on their privacy practice.

Reduce Speeding, 20 HEALTH EDUCATION RESEARCH 36–50 (2005); Edson C. Tandoc & Patrick R. Ferrucci, *Giving in or Giving up: What Makes Journalists Use Audience Feedback in Their News Work?*, 68 COMPUTERS IN HUMAN BEHAVIOR 149–156 (2017).

[37] Anne Dijkstra, Maaike M. Roefs & Constance H.C. Drossaert, *The Science-Media Interaction in Biomedical Research in The Netherlands. Opinions of Scientists and Journalists on the Science-Media Relationship*, 14 J. SCIENCE COMMUNICATION (2015).

[38] Somayyeh Varzandeh et al., *Towards an Understanding of Behavioural Intention to Use Online Journalism*, 3 GLOBAL MEDIA JOURNAL – MALAYSIAN EDITION 34-52 (2014). http://psasir.upm.edu.my/id/eprint/35873/ (last visited Feb 12, 2022).

[39] Emily K Vraga et al., *Theorizing News Literacy Behaviors*, 31 COMMUNICATION THEORY 1–21 (2020).

[40] Lee et al., *supra* note 22.

[41] Tandoc & Ferrucci, *supra* note 36.

H2b. Vietnamese media practitioners' perception of descriptive and injunctive norms has a direct effect, as well as an indirect effect via behavioral intention, on their privacy practice.

H2c. Vietnamese media practitioners' perceived behavioral control toward media privacy has a direct effect, as well as an indirect effect via behavioral intention, on their privacy practice.

RQ1. How do Vietnamese media practitioners' innate attitude, subjective norms, and perceived behavioral control toward media privacy predict and influence their privacy intention and practice?

IV. Methods

In-depth interviews

In-depth interviews were conducted with 23 Vietnamese media practitioners, specifically media managers, editors, journalists, and journalism and communication educators. They were recruited through purposive and snowball sampling as the study intended to examine perceptions and practices of media practitioners at multiple levels. First, the authors (who have practiced journalism in Vietnam) invited media practitioners whom they knew to participate in the interviews. Then, they asked those initial interviewees to introduce well-known, experienced media practitioners with whom the interviewees were acquainted or had worked. Interviews were conducted between November 21 and December 4, 2020 in the Vietnamese language, via video applications such as Zoom, Skype, FaceTime, or Facebook Messenger, and they were all recorded. The authors, who are Vietnam natives and professionally fluent in the English language, transcribed and translated interviews into English for qualitative analysis. They received approval for the study from an institutional review board and informed consent from the participants.

The questionnaire consisted of 20 five-level Likert scale questions and ten open-ended questions exploring participants' innate attitudes, subjective norms, perceived behavioral control, and behavioral intention toward disclosing personal information in the media. Follow-up questions were also discussed to expand the arguments and further understand participants' points of view. The questions were adapted from Ajzen (2006) and Tandoc and Ferrucci (2017),[42] but slightly modified to fit a media privacy context.

There were six additional questions about participants' demographic and professional backgrounds. At the beginning of each interview, the authors provided participants with the definition of personal information adapted from the European Commission (2018): "It is any information that relates to an identified or identifiable living individual, for example, name, surname, home address, email address, location data."[43] This definition is similar to the definition of personal information in Vietnamese laws mentioned in the literature review.

Surveys

[42] Icek Ajzen, CONSTRUCTING A THEORY OF PLANNED BEHAVIOR QUESTIONNAIRE (2006), https://people.umass.edu/~aizen/pdf/tpb.measurement.pdf; Tandoc & Ferrucci, *supra* note 36.
[43] Directorate-General for Justice and Consumers (European Commission), EU DATA PROTECTION REFORM : BETTER DATA PROTECTION RIGHTS FOR EUROPEAN CITIZENS. PHOTO OF PUBLICATIONS OFFICE OF THE EUROPEAN UNION (2018), https://doi.org/10.2838/024851.

The authors employed snowball sampling to collect quantitative data, initially sending out a web-based survey to media practitioners in Vietnam with whom they were acquainted or had worked. The web-based survey was disseminated to newsrooms, broadcasters, departments of journalism and communications, and the Vietnam Journalism group on Facebook. A limitation of the sampling method is a lack of respondent diversity in demographics and location. The survey method, which was chosen following Ajzen (2006),[44] is overwhelmingly employed in previous studies based on TPB. The questionnaire used to collect quantitative data was similar to the one used to collect qualitative data. After a period of three months between May 2021 and July 2021, the authors received 183 qualified responses from individuals who had at least one year of experience in journalism from the web-based survey. Along with the previous 21 responses from the in-depth interview group (two interviewees refused to complete their questionnaire), 204 responses were received as the units of quantitative analysis (N = 204), which was done using the statistical computing program R.

Measurements

Demographics

Regarding respondents' gender, 105 respondents (51.47%) were male, and 97 respondents (47.55%) were female; 2 respondents declined to disclose their gender. Respondents' age ranged from 20 to 60 years old, with an average age of 30.79 (Median = 28, SD = 8.41). The sample was relatively well educated, with majority of the participants (94.12%) having obtained a bachelor's or higher degree (156 bachelors', 31 masters', and five doctorates); 12 respondents (5.88%) stated they were in progress of completing their undergraduate education.

Professional background

In terms of professional background, 159 respondents (77.94%) were media professionals (e.g., editors, journalists, or collaborators), 25 (12.26%) were media managers (e.g., chief editors, vice-chief editors, or editorial secretaries), and 20 (9.80%) were journalism and communication educators (e.g., lecturers, or sequence heads). Respondents accumulated an average of 8.56 years of experience in media practices (Median = 6.50, SD = 7.02), with Respondent #66, a 60-year-old media manager, the most experienced (36 years). Meanwhile, 153 respondents (75%) were journalism or communication majors, while 51 were not.

TPB variables

Items to operationalize TPB variables were adapted from Ajzen (2006) and Tandoc and Ferrucci (2017),[45] and although slightly modified to fit a media privacy context, phrasing and sentence construction were faithful to the original.

Innate attitude (independent variable)

Respondents' innate attitude toward media privacy was based on three items rated on a 5-level Likert scale. Questions asked to what extent participants perceived disclosing personal information in the media as necessary or beneficial, and to what extent they supported

[44] Ajzen, *supra* note 42.
[45] Ajzen, *supra* note 42; Tandoc & Ferrucci, *supra* note 36.

disclosing personal information in the media; the scale was reliable (α = .88). An innate attitude index was calculated, with an average score of 3 (Median = 3, SD = .91).

Subjective norms – Descriptive norms (independent variable)

Respondents' perception of how other media practitioners' media privacy practices influence their media privacy-related decisions was based on three items rated on a 5-level Likert scale. Questions asked to what extent they would agree to disclose private information had the same information been previously disclosed by their colleagues, supervisors, or other media organizations; the scale was reliable (α = .88). A descriptive norms index was calculated, with an average score of 2.50 (Median = 2.67, SD = 1.04).

Subjective norms – Injunctive norms (independent variable)

Respondents' perception of how their privacy practices were controlled by laws and regulations was based on four items rated on a 5-level Likert scale. Questions asked to what extent journalism laws, code of conduct, and social norms influence their privacy-related decisions; α = .68. To make the scale more reliable, researchers dropped item Bin3, "The audiences care about personal data of character(s) in the media"; α = .76. An injunctive norms index was calculated, with an average score of 2.77 (Median = 3, SD = .82).

Perceived behavioral control (independent variable)

Respondents' perception of their capability to access and disclose private information on the media was based on three items rated on a 5-level Likert scale. Questions asked to what extent could they disclose private information in their works, access private information, and whether their organization allowed them to make privacy-related decisions; α = .55. While a scale's coefficient α below .70 is often translated as unreliable, Cortina (1993) and Sijtsma (2009) argued that an α less than .60 is acceptable if the scale consists of a small number of items and there was an acceptable amount of association between items.[46] Since Pearson's inter-item correlation for the scale was .28, which is within "the optimal range",[47] researchers decided to keep the scale as was. A perceived behavioral control index was calculated, with an average score of 3.34 (Median = 3.33, SD = .75).

Behavioral intention (dependent variable)

Respondents' behavioral intention in their media privacy practices was based on a 5-level Likert scale item, "I intend to disclose personal data of character(s) in the media." The average score for the behavioral intention scale was 2.78 (Median = 3, SD = .94).

Privacy practice (dependent variable)

Respondents' privacy practice was based on a 5-level Likert scale item, "How often do you disclose personal data of character(s) in the media?". The average score for the privacy practice scale was 3.31 (Median = 3, SD = .82).

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[46] Jose M. Cortina, *What is Coefficient Alpha? An Examination of Theory and Applications*, 78 J. APPLIED PSYCHOLOGY 98–104 (1993); Klaas Sijtsma, *On the Use, the Misuse, and the Very Limited Usefulness of Cronbach's Alpha*, 74 PSYCHOMETRIKA 107–120 (2008).

[47] Stephen R Briggs & Jonathan M Cheek, *The Role of Factor Analysis in The Development and Evaluation of Personality Scales*, 54 J. PERSONALITY 106–148 (1986).

V. Results

Survey results

Table 1. Descriptive analysis and correlations between TPB variables.

			Correlation				
	M	SD	A	Dn	In	Pbc	Bi
Innate attitude	3	.91					
Descriptive norms	2.50	1.04	.45***				
Injunctive norms	2.77	.82	.56***	.60***			
Perceived behavioral control	3.34	.75	.19**	.30***	.35***		
Behavioral intention	2.78	.94	.50***	.55***	.61***	.36***	
Privacy practice	3.31	.82	.23***	.29***	.38***	.32***	.45***

***p < .001 **p < .01 *p < .05

The descriptive analysis and correlations between TPB constructs are provided in Table 1. TPB posits that innate attitude, subjective norms, and perceived behavioral control predict practitioners' behavioral intention toward media privacy; behavioral intention, in turn, predicts individuals' behaviors. A hierarchical regression analysis was conducted to test H1; two observations were excluded from the regression analysis since they were multivariate outliers. The overall model was statistically significant, $F(4, 197) = 51.37$, $p < .001$, and explained roughly 50.06% of the variance in behavioral intention (Table 2).

Table 2. Hierarchical regression analysis on TPB predictors over behavioral intentions.

		Std. β	t	R^2	Adjusted R^2
Step 1	Innate attitude	.55	9.27***	.3004	.2970
Step 2	Innate attitude	.24	3.87**	.4892	.4815
	Descriptive norms	.21	3.24**		
	Injunctive norms	.38	5.40***		
Step 3	Innate attitude	.25	4.03***	.5105	.5006
	Descriptive norms	.19	2.95**		
	Injunctive norms	.33	4.72***		
	Perceived behavioral control	.16	2.93**		

***p < .001 **p < .01 *p < .05

H1a was supported. Innate attitude toward disclosing personal information in the media positively predicted behavioral intention to disclose personal information in the media, while controlling for other variables, $\beta = .25$, $t = 2.66$, $p < .001$.

H1b was supported. Both descriptive norms ($\beta = .19$, $t = 2.95$, $p < .01$) and injunctive norms ($\beta = .33$, $t = 4.27$, $p < .001$) related to media privacy positively predicted behavioral intention to disclose personal information in the media.

H1c was supported. Perceived behavioral control toward disclosing personal information in the media positively predicted behavioral intention to disclose personal information in the media, $\beta = .16$, $t = 2.93$, $p < .01$.

To test H2, a mediation analysis (Figure 1) was conducted.[48] The goals were to examine (1) whether behavioral intention to disclose personal information in the media could predict the actual disclosure of personal information and (2) the direct and indirect effects of other TPB predictors on behavior.

H2 was supported. Behavioral intention to disclose personal information in the media indeed predicted the actual disclosure of personal information in the media, adjusted $R^2 = .24$, $F(1, 200) = 65.23$, $p < .001$; $\beta = .50$ (CI = .33 to .54), $t = 8.08$. Furthermore, the mediation analysis revealed that innate attitude toward disclosing personal information in the media did not have a direct effect, but an indirect effect via behavioral intention on behavior, $\beta = .09$, 95% CI = .04 to .15, $p < .001$. Thus, H2a was partially supported.

Similarly, descriptive norms in media privacy did not have a direct effect, but an indirect effect via behavioral intention on behavior, $\beta = .06$, 95% CI = .02 to .12, $p < .01$. On the other hand, injunctive norms in media privacy had both a direct effect ($\beta = .31$, $t = 3.45$, $p < .001$) and an indirect effect via behavioral intention ($\beta = .13$, 95% CI = .07 to .21, $p < .001$) on behavior. Thus, H2b was partially supported.

Finally, perceived behavioral control toward disclosing personal information in the media had both a direct effect ($\beta = .21$, $t = 2.89$, $p < .05$) and an indirect effect via behavioral intention ($\beta = .07$, 95% CI = .01 to .13, $p < .05$) on behavior. Thus, H2c was supported.

[48] Reuben M. Baron & David A. Kenny, *The Moderator–Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, And Statistical Considerations*, 51 J. PERSONALITY AND SOCIAL PSYCHOLOGY 1173–1182 (1986); Patrick E. Shrout & Niall Bolger, *Mediation in Experimental and Nonexperimental Studies: New Procedures and Recommendations*, 7 PSYCHOLOGICAL METHODS 422–445 (2002).

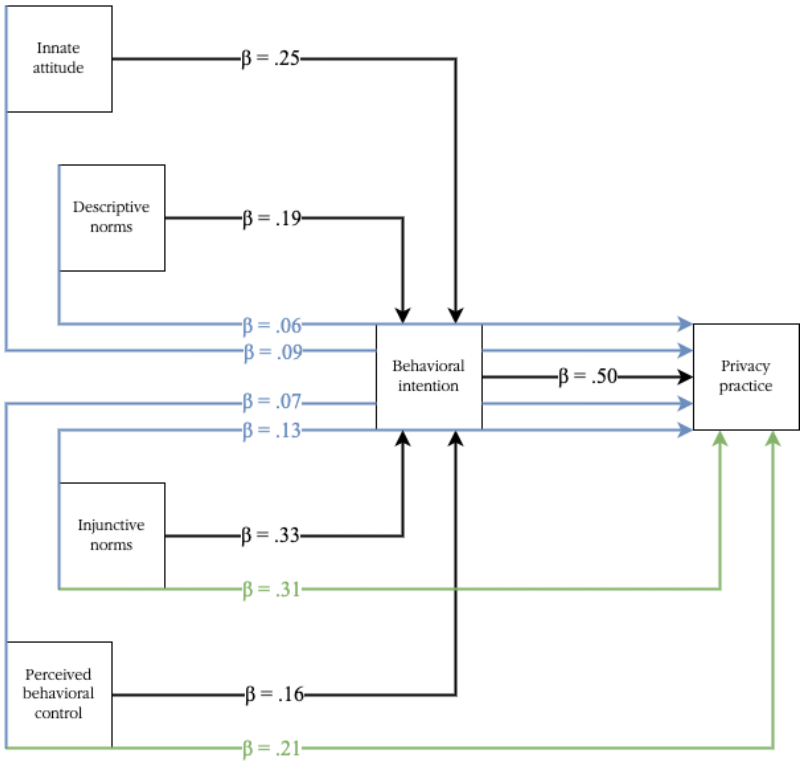

Figure 1. The model summarizes the mediation analysis results, highlighting the direct (green lines) and indirect (blue lines) effects of TPB predictors on media privacy practice; the numbers indicate regression coefficients.

In-depth interview results

Via 23 in-depth interviews, eight dominant themes regarding media practitioners' perception of media privacy and factors influencing their privacy practices were identified. They were social norms and awareness, the nature of Vietnamese journalism, citizens as prosumers, journalists as gatekeepers, case-by-case basis, character-based approach, novel situations, and social media. The gatekeeper theme was associated with two TPB constructs (i.e., innate attitude and perceived behavioral control), the case-by-case basis theme related to intention and past behaviors, and the other six themes were connected to subjective norms.

Theme 1: Social norms and awareness

The majority of participants assessed that Vietnamese people generally overlooked privacy issues, both of themselves and others, which facilitated privacy infringement by the media. One of the reasons was the collectivist culture of the nation. The level of consciousness to respect self and others' privacy was considerably low compared to Western perspectives.

> "The disclosure of personal information is underestimated. Personal identification information is easily disclosed by the Vietnamese," Respondent #5.

> "The awareness of privacy protection is not high; people accept privacy breach as an inevitable disturbance, not a big deal," Respondent #1.

> "The question of privacy violation has not been asked seriously, but the problem has been accepted as unavoidable situations," Respondent #2.

Personal information was disclosed not only by media practitioners or citizens, but also, perhaps carelessly, by high-level authorities. For instance, in the case of COVID-19 Patient #17, their identity was disclosed in a live-streamed press conference organized by the municipal government of the capital city of Hanoi, which consequently sparked a controversial debate on public shaming. Respondent #4 and Respondent #21 confirmed incidents in which officials disclosed COVID-patients' personal information. The media merely reported the information.

Many participants agreed that the notion of privacy was unfamiliar to Vietnamese, i.e., they have little perception or knowledge about the matter.

> "People rarely recognize their rights to secure privacy with the media, leading them to be potential victims who do not know what to do, like suing the media for information breach," Respondent #11.

> "People cannot avoid intentional and unintentional privacy violations by the media unless they understand their law-protected privacy rights," Respondent #14.

Theme 2: The nature of Vietnamese journalism

Some interviewees described journalism and journalistic practices in Vietnam as hierarchical, highly self-referential, and heavily dependent on experience. Supervisors, as defined by respondents, can be understood as not only their immediate bosses but also regulatory agencies such as the Central Propaganda Department (of the Vietnamese Communist Party, which is the only political party in the country).

There was a noticeable pattern in media practitioners' responses. In closed-ended questions, they would vehemently deny that power brokers influenced their practices, asserting additionally that they made their own decisions. However, they promptly changed their answers while responding to open-ended questions.

> "If my manager allowed or there was a documented request from the Central Propaganda Department, I still had to comply," Respondent #5.

> "When I have the pressure from supervisors, even if I do not want to disclose the information, I still need to rethink, since it influences my benefits," Respondent #7.

Most educators emphasized impact from the working environment. For example, they all agreed that journalism students were taught about privacy-related laws and journalism code of ethics at school, yet the working environment would influence them most.

> "The journalism landscape in Vietnam was extremely influential to reporters' practices," Respondent #15.

> "Each organization would have its own style and policies depending on their leaders and the managing body," Respondent #22.

Thus, adjusting syllabi was not a suggested core solution. Instead, many interviewees recommended that journalism education ought to focus on enhancing the awareness of privacy concerns in the working environment.

Theme 3: Citizens as prosumers

The theme emphasized the role of citizens as not only readers but also censors who influenced the decision of media practitioners to disclose personal information. As readers, their curiosity demanded that personal information be disclosed in the media, thus pressuring news organizations. Audiences were "always curious about personal identities." Consequently, news organizations "fulfilled this call"; the argument was that if one newspaper did not publish the information, readers would go out and seek it in others. Thus, "although information disclosure is our choice, we have to face the truth" and practiced following audiences' needs, said Respondent #6. On the other hand, the audience also acted as censors whose reactions impacted journalists' practices.

> "Citizens become one of the inspectors for the media. When they are not fully aware of the privacy issue, their impact will not be strong enough for the media to change," Respondent #1.
>
> "Literacy will direct individuals' social behavioral habits, including how to interact with the media. If society has a high level of awareness of the privacy issue, the media's wrongdoings will be criticized," Respondent #15.

Theme 4: Journalists as gatekeepers

The role of journalists as gatekeepers was predominantly focused on, with respondents emphasizing, firstly, their attitude and awareness of privacy issues and, secondly, their ability to access and decide whether to disclose personal information. Media practitioners and educators asserted that journalists, if they so wanted, would have full capacity to access and reveal personal information.

> "We have an extraordinary accessible capacity to special information; for instance, we knew most of the information about the treatment process of COVID-19 Patient #91 from the hospital," Respondent #20.

Nonetheless, like citizens, journalists' awareness of privacy issues was low. "Many reporters disclose personal information of characters on social media," said Respondent #6. Meanwhile, in newspapers, "there was a flood of patients' names published by news organizations at the beginning of the (COVID-19) pandemic," said Respondent #20.

> "Sometimes, reporters think that it is not a big deal to disclose personal information. For instance, many of them think they have the right to publish information about an accused criminal, which is not always right. If journalists possess knowledge about the issue, they will not practice like that. Hence, the foundation must be journalists' awareness," Respondent #15.
>
> "While a COVID-19 case was confirmed, a document fully disclosing information of the patient was sent to newspapers. So basically, we had it all, but we were commanded not to publish by the government," Respondent #5.

However, several organizations chose to disclose; "publish or not publish (COVID-19 patients' information) was newspapers' choice" since there had been no penalty for revealing such private information. In many cases, journalists also negotiated their roles, allowing themselves to serve mutual benefits, help the characters, or even educate society by judging characters. Such discussions were indeed relevant with themes 1 and 5.

Theme 5: Case-by-case basis

The case-by-case basis was considered the most noticeably influential factor to media practitioners. All participants mentioned or clarified in which contexts their decisions needed to be made. Contexts might include topics, characters and circumstances.

> "Privacy issues cannot simply be addressed by questions, but it depends on contexts, lots of contexts," Respondent #16.

> "It heavily relies on topics and characters. The higher social status the character has, the less privacy they acquire," Respondent #1.

Respondent #1 also mentioned the right to know of the public, especially about politicians. Nonetheless, many others, including Respondent #18, challenged the perspective, arguing that there should also be a limit in disclosing politicians' personal information, and journalists should only publish such information had they impacted society. Moreover, the media journalists used to convey their messages (e.g., texts, photos, or videos) also influenced their determination; for instance, several video journalists discussed recording and editing techniques that help censor characters' information.

> "Privacy is easily breached in photojournalism. Photojournalists need to have intensive awareness about the privacy of characters and their consents to be captured or appeared in the media," Respondent #13.

Theme 6: Character-based approach

Virtually all respondents agreed that the characters' preference was the most impactful factor to journalists' decision on disclosing personal information. The consideration of characters' desires and collateral damage to their future was also mentioned. For example, for Respondents #5 and #6, characters' preference influenced their determination "up to about 80%." Respondents #4 and #9 posited that even if authorities allowed or the outlet managers asked for the information to be disclosed, journalists still needed to have the characters' permits, and "that is the rule." Respondents #13 and #19 indicated that journalists "needed to respect the consent of characters" and "thought about the consequences that may happen to them if the personal information was published."

Still, factors mentioned in other themes also impacted their decisions. Additionally, media practitioners' evaluations depended on their role as gatekeepers. For instance, there was a wide belief that public figures and politicians had to accept their personal information to be disclosed. Thus, journalists can disclose such individuals' personal information even without their consent when reporting news related to them.

Theme 7: Novel situations

Media practitioners adjusted their perspectives of privacy in specific circumstances, e.g., the COVID-19 pandemic. Many participants agreed to disclose COVID-19 patients' personal information, primarily names, addresses, and contact-tracing locations, in the name of mutual social benefits and the pandemic's novelty. Respondents #11 and #14 believed the practices were necessary and "normal to Vietnamese."

> "Journalism has the mission to warn the society about COVID-19 patients to have proper containment solutions," Respondent #16.

> "The pandemic was too surprising and novel, so at the initial stage, the authority and news organizations had not had a clear orientation and policies on how to provide information," Respondent #3, a media manager, recalled.

COVID-19 was categorized as an emergency, sometimes compared to a war. These arguments were applicable in explaining practices during disasters or unprecedented events.

Theme 8: Social media

Social media indeed impacted journalists' practices. They were perceived as a channel for personal information disclosure by both citizens and journalists, as well as a space to facilitate public shaming. Specifically, when being asked if disclosing information in the media ignited the public shaming of COVID-19 patients, few respondents agreed. The majority of them, however, blamed social media due to its openness and accessibility. It was "too easy to find others' identities and information on social media" and to criticize other people "on their own social media platforms." Social media was also stated an excuse for journalists to publish or republish private information when they cited those platforms as sources.

VI. Discussion

Professional and societal influences on media practitioners' privacy practices

Survey results suggested that among TPB predictors, subjective norms, particularly injunctive norms, had the most significant influence on behavioral intention and behavior, underlining its impacts on media practitioners' privacy practices. The overwhelming dominance of subjective norms in six of eight themes related to the predictor in in-depth interview results further emphasized their importance. Media practitioners' privacy practices were indeed influenced by several parties, e.g., characters, audiences, colleagues, supervisors, as well as extensive working environments and social norms and culture.

Findings aligned with the analysis levels on hierarchy influences, i.e., individual, routines, organizational, extra-media, and ideological levels.[49] Journalistic products are perceived as news organizations' collective outcomes rather than individual journalists' solo work.[50] Thus, journalists would not, and cannot, unilaterally act and decide within their organization or among organizations, especially in a hierarchical, associative, and highly self-referential journalism structure like the one in Vietnam. Several interviewees mentioned that in the practical journalistic world, Vietnamese journalists must obey their supervisors' final decisions, although such decisions might not align with their wishes and intentions. The concept of the "supervisor" in Vietnam includes not only journalists' direct individual "boss" (e.g., chief editors, vice-chief editors, or editorial secretaries) but also governmental media-controlling bodies (e.g., the Central Propaganda and Education Commission). There are mandatory weekly meetings between the Central Propaganda and Education Commission and news organizations' leaders to review media-related activities and direct what should and should not be published.[51] News outlets, editors, and journalists in Vietnam, therefore, have limited capability in making independent decisions for their media products, which are often heavily regulated by the governmental media-controlling bodies.

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[49] Stephen D. Reese, *Understanding the Global Journalist: A Hierarchy-Of-Influences Approach*, 2 JOURNALISM STUDIES 173–187 (2001).
[50] CLAUDIA MELLADO, LEA HELLMUELLER & WOLFGANG DONSBACH, JOURNALISTIC ROLE PERFORMANCE: CONCEPTS, CONTEXTS, AND METHODS (2017).
[51] Nguyen-Thu, *supra* note 10.

Obijiofor and Hanusch (2011) proposed that the culture of a country or region would be a core determinant guiding the professional practices of journalists.[52] Journalism role conceptions were constructed based on societal and cultural influences in a non-Western context. Journalists in Vietnam, a socialist-communist country, expressed the belief that one of their career roles is to assist the government.[53] At the regional level, news coverage in Singapore, Malaysia, and Brunei inserted what it saw as Asian values, e.g., supportiveness and harmony.[54] It is reasonable to state that, to a certain extent, the communitarian and collectivist culture of Vietnam allows, accepts, and facilitates the publishing of personal information in news media, particularly amidst COVID-19 when social benefits seemingly outweighed individual rights.

Context-based perception adjustment

Given the situational nature of decision-making in newsrooms, context-based practices were predominantly and understandably accepted and employed by Vietnamese media practitioners. Newsroom decisions were made without a transparent and standardized code of conduct, as mentioned by respondents.[55] Under novel or unprecedented circumstances, such as the COVID-19 pandemic, the respondents adjusted their perspectives and behavior by convenience. They would typically hesitate to publish personal information, but willingly disclosed it in specific contexts when it was deemed necessary to do so.

One of the reasons for the adjustment is the negotiation of journalists' roles and identities, which is demonstrated via the theme of journalists as gatekeepers, focusing on their perception and ability to access and publish personal information. Raemy and Vos (2020) proposed the process of journalists' role negotiation model, which included three elements: institutional roles (i.e., for society), organizational roles (i.e., for profits), and personal identities (i.e., for themselves).[56] In the model, journalists' normative roles were negotiated differently across contexts depending on the relationships between the three mentioned elements, ultimately influencing their professional practices. Thus, Vietnamese media practitioners who participated in the study tended to evaluate and decide to disclose personal information distinctly when they thought about social benefits (e.g., COVID-19 containment or political transparency) or their news organization's profits (e.g., viewership).

In reality, many COVID-patients' identification information continued to be disclosed in the media even after the Vietnam Ministry of Health issued a document requesting patients' personal information not to be revealed by any means. The issuance was a legitimate response from the government to privacy concerns related to contact tracing. Nonetheless, responsible governmental agencies (e.g., the Ministry of Health or the Ministry of Information and Communications) did not sanction those who violated the directive. While formal directives and a lack of proper penalties for violations are not novel phenomena in the media context of Vietnam, its government, in the middle of the COVID-19 pandemic, appeared to receive more empathy from the Vietnamese public than usual.

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[52] LEVI OBIJIOFOR & FOLKER HANUSCH, JOURNALISM ACROSS CULTURES: AN INTRODUCTION (2011).
[53] Hong Tien Vu, Le Thanh Trieu & Hoa Thanh Nguyen, *Routinizing Facebook: How Journalists' Role Conceptions Influence Their Social Media Use for Professional Purposes in a Socialist-Communist Country*, 8 DIGITAL JOURNALISM 885–903 (2020).
[54] Brian L. Massey & Li-jing Arthur Chang, *Locating Asian Values in Asian Journalism: A Content Analysis of Web Newspapers*, 52 J. COMMUNICATION 987–1003 (2002).
[55] BIVINS, *supra* note 1; Laucella, *supra* note 14.
[56] Patric Raemy & Tim P Vos, *A Negotiative Theory of Journalistic Roles*, 31 COMMUNICATION THEORY 107–126 (2020).

Another reason is backed by the communication privacy management (CPM) theory, which argues that people ought to adjust their privacy rules in managing private information to accommodate different situations.[57] In the past, a state of emergency or unprecedented events have allowed provisional limitations of fundamental rights such as the right to privacy.[58] van Kolfschooten and de Ruijter (2020) indeed demonstrated that individual privacy protection was marginalized when the interest of public health took precedence.[59] The tension between public health concerns and personal privacy perhaps pressured journalists to disclose COVID-19 patients' identities. Many interviewees who are journalists admitted that they chose to publish the personal information of their characters after the information had already been available on social media. Journalists were afraid that if they did not include those "key words" (i.e., the private information) in the articles, readers would not read their stories. This showed that the notion of privacy varies by culture; health conditions are private and protected by law in some cultures, but they might be widely discussed in others.[60]

Implications

TPB has been rarely employed in media research to investigate privacy matters and privacy practices. The survey results showed, nevertheless, significant relationships between TPB predictors and behavioral intention and behavior, providing support for the employment of TPB in privacy-related studies. The study also tested the effect of demographic and professional background variables on media privacy intention and behavior, and did not find statistical significance. There was no difference in media practitioners' perception, intention, and behavior toward media privacy across ages, educational levels, years of experience, and professional positions.

Apart from using surveys to test and analyze the predictability of TPB predictors on intention and behavior, the current study used in-depth interviews to further understand how and why they could predict or influence journalists' decisions and professional practices. The authors suggest that mixed-method designs with quantitative and qualitative approaches would benefit studies employing TPB, helping receive profound and rational findings in media privacy research.

The study did not attempt to downgrade privacy perceptions and journalistic practices of media practitioners in authoritarian countries, particularly Vietnam, or compare them with Western-dominant journalistic norms. Instead, its goal was to illustrate a coherent view of how and why they were different. It was intended to appeal to scholars' calls to investigate context-based journalistic cultures by looking at country-specific journalists' roles.[61] Thus, the study can be a possible foundation for future studies on journalists' roles or privacy practices in other countries or a platform for journalists to voice opinions. It also narrows the ideal-practice gap in journalism and the journalist-researcher gap in the encoding and decoding process.[62] While mere content analysis often overlooks media practitioners' background and other determinants

[57] SANDRA SPORBERT PETRONIO, BOUNDARIES OF PRIVACY: DIALECTICS OF DISCLOSURE (2002).
[58] Emanuele Ventrella, *Privacy in Emergency Circumstances: Data Protection and the COVID-19 Pandemic*, 21 ERA FORUM 379–393 (2020).
[59] van Kolfschooten, *supra* note 7.
[60] Zheng Wang & Walter Gantz, *Health Content in Local Television News*, 21 HEALTH COMMUNICATION 213–221 (2007).
[61] Daniela V. Dimitrova, Patric Raemy & Lea Hellmueller, *Exploring Journalistic Cultures*, in GLOBAL JOURNALISM: UNDERSTANDING WORLD MEDIA SYSTEMS 57 (2021).
[62] *Id.*

of journalistic performance,[63] an aggregation of a mixed-method quantitative and qualitative approach based on journalists' perspectives allowed the authors to explore perceptions and interpretations of practices on privacy disclosure.

Findings also suggested several critical implications for media practitioners in Vietnam and nations that display a similar media system as Vietnam. Firstly, regarding subjective norms, while Dinh (2004) indicated that journalism graduates' practices were not evaluated positively partly due to the poor quality of journalism education, the issue of vocational training was not the only determinant of privacy practices.[64] Almost all educators who participated in the study asserted that journalism laws and ethics were taught to students, yet the working environment and news organizations heavily influenced professional practices. Results also illustrated the insensitivity of Vietnamese newsrooms' culture, particularly in ways journalists would treat human journalistic characters. Some newspapers even disregarded the governmental directive not to identify COVID-19 patients. Thus, the study highlighted a need for continuous professional journalism training to directly engage and connect with newsrooms and journalism associations to enhance media susceptibility in Vietnam.

Nevertheless, the average score indicating media practitioners' awareness of whether journalism laws allowed the publishing of personal information was relatively low (2.70). Participants were skeptical of legal knowledge, although Vietnam has laws regulating the disclosure of private information in the media. Meanwhile, the average score indicating media practitioners' awareness of audiences' curiosity about personal information was 3.82. Therefore, not only journalists but everyone ought to enhance awareness and knowledge about privacy rights, laws, and protection, which can be done via education, as suggested by many participants.

Furthermore, a mutual code of conduct across newsrooms should be established in addition to quality control desks to assure such a code is followed. Media organizations can refer to international newsrooms, then adapt and adjust their policies and codes within the Vietnamese context. There is, perhaps, no "global journalism ethics" agreement or universal journalistic codes, as settings and cultures in which news agencies operate vary widely.[65] Media practitioners are likely to be influenced by international journalism practice, but the perceptions to adapt to the domestic environment are prominent. Indeed, their interpretations and negotiations of these norms differ by sociocultural contexts.[66]

Limitations and future studies

The authors acknowledge several limitations. Participants were recruited by snowball sampling, and thus, they perhaps shared similar demographics and perceptions. For instance, media practitioners in the same organization could think alike, as the working environment would influence their perspectives and behaviors. Secondly, the survey was distributed via social media platforms due to geographic distance, and thus, it may not have reached specific groups of potential participants, e.g., those who were not active on, or familiar with, these networks.

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[63] *Id.*
[64] Dinh, *supra* note 23.
[65] Roberto Herrscher, *A Universal Code of Journalism Ethics: Problems, Limitations, and Proposals*, 17 J. MASS MEDIA ETHICS 277–289 (2002); *Stephen J. Ward, Philosophical Foundations for Global Journalism Ethics*, 20 J. MASS MEDIA ETHICS 3–21 (2005).
[66] Thomas Hanitzsch & Tim P. Vos, *Journalistic Roles and The Struggle Over Institutional Identity: The Discursive Constitution of Journalism*, 27 COMMUNICATION THEORY 115–135 (2017); Raemy & Vos, *supra* note 56.

Generally, the main concern was the diversity of surveyed and interviewed groups, although the analysis of 23 in-depth interviews and open-ended answers in the survey reached thematic saturation. Finally, the application of TPB in studying organizational behavior has its limitations. TPB focuses on understanding individuals and their actions. Many interviewees suggested that journalists' privacy behaviors radically differed between when they had attended journalism school and when they worked in a newsroom. How, and to what extent, news organizations influence journalistic practices might be a topic for future studies to address.

*Huu Dat Tran is a doctoral student in the Manship School of Mass Communication, Louisiana State University; htran82@lsu.edu.

** Pham Phuong Uyen Diep is a master's student in the A.Q. Miller School of Journalism and Mass Communications at Kansas State University; uyendpp@ksu.edu.

Shades of Gray: Print and Video Photojournalists Display Different Ethical Standards

Bradley Wilson*

Editors have been making decisions about what kinds of photographs to publish since the early days of photography. In the past 25 years, both video and print photojournalists have had to deal with the immediacy consumers expect and the ease with which images can be manipulated while still adhering to standards of truth and fairness. In an online survey, print and video photojournalists generally accepted the rules of the profession as dictated in the National Press Photographers Association Code of Ethics and Statement of Principle, rules at the core of this deontological study. The survey revealed that broadcast photographers are less tolerant of publication of graphic spot news scenes and more willing to blur a face to protect a person's privacy and to flop a photo. Respondents to the survey also indicated that both print and video photojournalists, despite numerous cases showing the contrary, were unwilling to publish digitally manipulated images, with more-experienced photographers even less willing than less-experienced photographers.

Key words: photojournalism, ethics, digital manipulation, still photography, videography, broadcast journalism

I. Introduction

The world's first photograph is on display at the Harry Ransom Center in Austin, Texas. At first glance, it's little more than a gray plate with little detail visible. On the display, however, is a digitized version of the image simulating what it might have looked like before aging nearly two centuries. Still, the 1826 image taken from Joseph Niépce's upstairs estate in the Burgundy region of France is rather unspectacular. However, the technique he developed pioneered painting with light—photography, the medium used in this study.

While Niépce used his technique to document reality, it wasn't long before pioneers such as Hippolyte Bayard and inventor Louis Daguerre—one of the fathers of photography—created the world's first hoax photograph.[1] It was titled "Self Portrait as a Drowned Man," and was meant to make people believe that Bayard had committed suicide. Of course, Bayard didn't kill himself but did contribute significantly to the development of photography as a medium for the next 50 years. He did introduce the idea that photos could be used for things other than depicting reality. Mathew Brady—one of the fathers of photojournalism—was also known for manipulating scenes, for example, transporting or rearranging corpses on the battlefield to make his images more visually dramatic.[2]

[1] Michael Zhang, *The First Hoax Photograph Ever Shot*, PETAPIXEL (2012), https://petapixel.com/2012/11/15/the-first-hoax-photograph-ever-shot/.
[2] Mike Thomas, Mathew Brady, *The War Correspondent* (2012), https://www.npca.org/articles/1233-mathew-brady-the-war-correspondent.

Less than a decade later, Bernarr Macfadden began using retouched photographic collages, called composographs, to push forward his own brand of journalism, a tabloid of its day. With a focus on crime, gossip, sex, and scandals—and utter disregard for the truth—Macfadden pieced together images claiming to show events not actually caught on film such as movie idol Rudolph Valentino's 1926 operation, from which he never recovered, or Alice Jones Rhinelander baring her breast in court as part of the Kip Rhinelander divorce trial.[3] As seen in this study, much as photographers now use Adobe Photoshop or similar photo-editing software to alter reality or to create scenes that never existed in reality, Macfadden attracted viewers by using only a pair of scissors and some glue.

Such moments set the tone for lively discussions of media law and ethics as related to photojournalism until the present day—including this study examining the different ethical standards of print and broadcast photojournalists.

II. Literature Review

As Lowrey states, "Digital photo manipulation is often treated in the literature as a problem that occurs when individuals stray from a single set of ethical standards."[4] Most journalists subscribe to a deontological (rule-based) approach to ethics in their work, adherence to the codes of ethics written by leaders in the profession.[5] Such approaches often take an agent-centered or patient-centered approach. This study is no exception, using an agent-centered approach: an obligation for a particular agent (a photographer in this case) to take or refrain from taking some action without necessarily giving anyone else a reason to support that action.[6,7] Further, this study looks at the ethics of taking/publishing the picture and the ethics of digital manipulation in two environments—video and still—while still focusing on the rules dictated by the profession, such as the National Press Photographers Code of Ethics, that has, at its core, telling the truth. Regardless of the environment, such ethical discussions start with comments such as the one by Sebastian Jacobitz, a 28-year-old street photographer in Berlin who said, "Documentary and Street Photography have a simply duty: show reality. Any deliberate distortion by the photographer that does not fulfill this requirement disqualifies the images as Documentary."[8] Then it gets more complicated, with what is right or wrong moving along a continuum and including shades of gray in the decision-making process.

When to take and publish

Historically, it did not take long before the ethical standards of even documentary news photographers got called into question. During the time of the Civil War, photographers such as Mathew Brady carried their bulky cameras to show the battlefields, camps, towns, and people touched by the war. When a selection of Antietam photos went on exhibit in Brady's gallery in New York in 1862, the *New York Times* wrote: "Mr. Brady has done something to bring home to us the terrible reality and earnestness of war. If he has not brought bodies and laid them in our

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[3] Bob Stepno, *The Evening Graphic's Tabloid Reality (1997)*, http://www.stepno.com/unc/graphic/.
[4] Wilson Lowrey, *Normative Conflict in The Newsroom: The Case of Digital Photo Manipulation*, J. MASS MEDIA ETHICS 18(2): 123-142 (2003).
[5] BRUCE WALLER, CONSIDER ETHICS: THEORY, READINGS, AND CONTEMPORARY ISSUES, 3rd edition, New York: Pearson Longman (2011).
[6] SAMUEL SCHEFFLER (ed), *Introduction*, CONSEQUENTIALISM AND ITS CRITICS, 26 (1982).
[7] Larry Alexander and Michael More, *Deontological Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2021), https://plato.stanford.edu/entries/ethics-deontological/.
[8] Sebastian Jacobitz, *The Ethics of Photojournalism*, PETAPIXEL (2017), https://petapixel.com/2017/04/03/the-ethics-of-photojournalism/.

dooryards … he has done something very like it." As Naomi Rosenblum[9] said of photography at the time, "The photograph was regarded as an exemplary record because it was thought to provide an objective—that is, unaltered—view of solid fact and achievement." Yet it was during the Civil War that Alexander Gardner moved a corpse to illustrate a Union and a Confederate soldier, calling into question the accuracy of such early images.[10,11] Discussion of the ethical standards of photojournalists assigned to depict the harsh reality of life didn't stop at the battlefield.

In an era before cell phones and instantaneous Web access, an era when editors generally operated under a philosophy of "If it bleeds, it leads," in late January of 1987, the state treasurer of Pennsylvania, R. Budd Dwyer, shot himself to death in front of a dozen reporters and camera crews during a news conference in his office. When the story broke around noon, two television stations showed the moment of suicide but revised the story for the evening program. On an Action News Special Report, news editors reasoned that showing the suicide was too gruesome, too graphic, served no purpose, and that the audience did not want to see it. Pittsburgh 2Day, another locally produced show, however, devoted its entire hour to coverage of the suicide. A telephone poll of viewers revealed that 46 percent felt the entire suicide should have been shown and 54 percent felt it should not.[12] While televisions stations carried the conference live or with a short delay, the television evening news and the next day's print papers, waiting for photographers to develop their film and to make prints, had hours to discuss the situation. Still, editors with *The Miami Herald* initially chose two graphic images for the front page, but based on reader feedback, chose a less graphic image for a later edition. Researchers studying the situation concluded, "Any ethical dilemmas faced by journalists during decision making were put aside for later consideration. The material was edited quickly and according to similar patterns, or conventions … ."[13] The day after the event, the story itself became the subject of media coverage after headlines in newspapers nationwide read "Cameras Record Deadly Farewell," "Pennsylvania Treasurer Horrifies Reporters, Aides," "Disgraced Pa. Pol Blows Brains Out at News Conference," and "Suicide a Dilemma for Media."

More recently, images of the Sept. 11 attacks still remain vivid for anyone around to witness them. As Alicia Shepard said, it was the job of the journalist — print and television — to run toward danger on that day. "As we know, it's the journalist's job to document history. … [T]they were keenly aware of their social responsibility to calmly and reliably explain what was happening to a public that was desperate to understand."[14] For Richard Drew, an Associated Press photographer in New York City, his images — disturbing to viewers worldwide—allowed him to humanize the attacks. As he stood on West Street with firefighters, EMS crews, and police officers, he began noticing people coming out of the building, falling or jumping. One image in particular, an image that the *New York Times* published on page 7 in the Sept. 12 edition, of a man falling headfirst before the buildings fell, caused the biggest stir. "He was trapped in the fire," Drew said, "and decided to jump and take his own life, rather than being

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[9] NAOMI ROSENBLUM, A WORLD HISTORY OF PHOTOGRAPHY (1984).
[10] WILLIAM A. FRASSANITO, EARLY PHOTOGRAPHY AT GETTYSBURG (1995).
[11] Michael Ruane, *Alexander Gardner: The Mysteries of the Civil War's Photographic Giant*, THE WASHINGTON POST (Dec. 23, 2011), http://www.washingtonpost.com/local/alexander-gardner-the-mysteries-of-the-civil-wars-photographic-giant/2011/12/12/gIQAptHhDP_story.html.
[12] John Matviko, *How Far Do You Go and How Much Do You Show: Pittsburgh Television News Media and the R. Budd Dwyer Suicide*, paper presented at the Annual Meeting of the Eastern Communication Association (79th, Baltimore, Maryland) (1988).
[13] Patrick Parsons and William E. Smith, *R. Budd Dwyer: A Case Study in Newsroom Decision Making*, J. MASS MEDIA ETHICS 3(1) (1988).
[14] Stephen Hess and Alicia Shepard, Running Toward Danger: How the News Media Performed on 9/11 and Beyond. A Brookings Institution/Newseum Forum (Sept. 19, 2002).

burned."[15] Frankly, readers said, this wasn't the kind of picture they wanted to see over their morning cereal, as David House said in a Sept. 13, 2001, column in the *Fort Worth Star-Telegram*.[16] Drew disagreed. "It wasn't just a building falling down. There were people involved in this. This is how it affected people's lives at that time, and I think that is why it's an important picture. I didn't capture this person's death; I captured part of his life," Drew said. Disturbing as they are, images of 9/11's falling bodies have emerged as a significant concern in art and literature, fiction and nonfiction, from poetry to prose and from documentary film to sculpture.[17] And Kratzer and Kratzer's study of the images used after the attacks revealed that the debate over publishing the images centered around three fundamental issues: reader response, victims' privacy, and the ability of the photographs to communicate the story of the day. "Although many editors found the images disturbing, the overwhelming reason for publishing them was that they added to the visual storytelling about what happened during and after the terrorist attacks. Many editors believed that readers needed to be exposed to the disturbing images in order to fully comprehend the story of the day."[18]

The discussion could continue with an examination of almost any significant event since photography was invented: four-time Pulitzer winner Carol Guzy's images of refugees fleeing Kosovo, or the photo of the Syrian baby washed ashore, or the photos from the Boston Marathon bombing, or the most recent mass casualty shooting in America. Throughout the years, these cases, and dozens of others, have formed a foundation for the ethics of the photojournalism profession centered on the concepts of accuracy, fairness, and reality. Indeed, entire books have been written on the subject including *Image Ethics in the Digital Age* edited by Larry Gross, John Stuart Katz and Jay Ruby[19]; Paul Lester's *Photojournalism: An Ethical Approach*[20]; and John Long's report *Ethics in the Age of Digital Photography*.[21] However, even today, not everyone outside the profession agrees on what those concepts mean when it comes to publication of graphic spot news images—images that a reasonable person may find disturbing, taken at a news event for which there was no preparation or warning.

However, Jacobitz[22] remains adamant. "Photojournalists aren't responsible for the suffering of the people they photograph, they are simply the messenger that document life as it is—life is not always pretty. Don't shoot the messenger for translating reality into pixels or cellulose; instead, ask yourself what you can do to change the situation if you feel so strongly about images that show suffering. Photojournalists risk their lives to raise awareness and spread a message that can actually have a bigger impact than the limited help they can offer an individual." Fishman said, "[T]he death photograph must be carefully restricted and controlled because it has the power to affect the viewer in damaging and painful ways. … Ombudsman Nancy Zelizer claimed that photographs of the body 'stun like nothing else,' as they 'attack' and 'torment,' leaving the newspaper reader 'helpless.'"[23]

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[15] Peter Howe, Richard Drew, THE DIGITAL JOURNALIST (2001), http://digitaljournalist.org/issue0110/drew.htm.
[16] David House, *Photo of Falling Man Upsets Many Readers*, FORT WORTH STAR-TELEGRAM (Sept. 13, 2001).
[17] Laura Frost, *Still Life: 9/11's Falling Bodies*, in Ann Keniston and Jeanne Follansbee Quinn (Eds.), LITERATURE AFTER 9/11 180-206 (2013).
[18] Renee Martin Kratzer and Brian Kratzer, *How Newspapers Decided to Run Disturbing 9/11 Photos*, NEWSPAPER RESEARCH JOURNAL 24(1) (2003).
[19] LARRY GROSS, JOHN STUART KATZ, JAY RUBY, eds., IMAGE ETHICS IN THE DIGITAL AGE (2003).
[20] PAUL LESTER, PHOTOJOURNALISM: AN ETHICAL APPROACH (1991).
[21] John Long, *Ethics in the Age of Digital Photography* (September 1999), https://nppa.org/page/5127.
[22] Jacobitz, *supra* note 6.
[23] Jessica M. Fishman, *News Norms and Emotions: Pictures of Pain and Metaphors of Distress*, in L.P. GROSS, J.S. KATZ AND J. RUBY, IMAGE ETHICS IN THE DIGITAL AGE (2003) 66.

Digital ethics

The ethical question of how much digital manipulation is too much continues in the age of Adobe Photoshop and the iPhone, on which digital images can be easily manipulated in the field without any expensive equipment or expertise. The National Press Photographers Association, in its Statement of Principle, a set of guidelines also adopted by the Radio Television Digital News Association, opens with, "As journalists we believe the guiding principle of our profession is accuracy; therefore, we believe it is wrong to alter the content of a photograph in any way that deceives the public."[24] Such statements provide a foundation for the study of ethics in photojournalism as required in a deontological approach as postulated by philosopher Immanuel Kant.[25] Tom Wheeler and Tim Gleason[26] recommended four tests to help provide guidelines for photojournalists. First, they recommended a viewfinder test: Does the photograph show more than what the photographer saw through the viewfinder? Second, a photo-processing test: Do alterations go beyond what is routinely done in the darkroom to improve image quality, i.e., cropping, color corrections, lightening, or darkening? Third, a technical credibility test: Is the proposed alteration not technically obvious to the readers? And finally, a clear implausibility test: Is the altered image not obviously false to readers? And, most strongly, they stated, "Our ultimate test is one of honesty and perception. When in doubt, let us err in favor of the public trust."[27] Wheeler and Gleason concluded: "Readers have a 'qualified expectation of reality' that gives editorial photography its credibility and power. Readers believe that editorial photographs retain a strong link to the external world and that when an editorial photograph is manipulated in ways that deviate from that tradition … the publisher should make appropriate disclosure to the reader." [28]

Similarly, Edgar Shaohua Huang reported on readers' perceptions of digital manipulation, finding that readers are concerned that "once editors start making alterations, it is hard for anyone to know where they will draw the line."[29] He also said that readers are "much less accepting of alterations of hard news photographs." Readers said they believed documentary photos should not be altered. As one respondent said, "I would like to be able to pick up a newspaper or magazine or whatever and know what I am looking at really is what took place at that point." Huang also made five other conclusions based on his survey: Readers should know whether an image was altered; media outlets need to consider context when using an altered image; alterations should be kept to a technical minimum; media professionals should put themselves in the subject's shoes to see how they would feel about an altered picture of themselves; and, finally, media should consider moral-ethical guidelines and not be guided by what is strictly legal. In short, Huang defined when photojournalists should not alter an image, providing a glimpse into one end of a continuum, while leaving the other end wide open.

However, despite these guidelines and codes, news photographers continue to digitally manipulate images or work with images that have been digitally manipulated, all intended for documentary use and deemed as unacceptable by industry professionals. Here are a few just

[24] Statement of Principle on Digital Manipulation, Nat'l Press Photog. Ass'n. (Nov. 12 1990), https://nppa.org/page/5167.
[25] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (1785).
[26] Tom Wheeler and Tim Gleason, *Photography or Photofiction: An Ethical Protocol for the Digital Age*, VISUAL COMM. Q. 2(1) 8–12 (1995).
[27] Wheeler and Gleason, *supra* note 26.
[28] Wheeler and Gleason, *supra* note 26.
[29] Edgar Shaohua Huang, *Readers' Perceptions of Digital Alteration in Photojournalism*, J. & COMM. MONOGRAPHS 3(3) 147-182 (2001).

from the past decade or so; there are more at the Bronx Documentary Center exhibit on "Altered Images: 150 Years of Posed and Manipulated Documentary Photography."

- *African Geographic* disqualified the photographer who won its 2019 Photographer of the Year award due to photo manipulation. The ears of the elephant in the image did not accurately show what the elephant's ears look like.[30]
- *The New York Times* published a correction to a page one story, saying that the original main photo had a picture frame removed from the scene because it was causing glare.[31]
- In 2012, *National Review* published a cover showing President Obama speaking to a crowd at the Democratic National Convention, all holding blue "ABORTION" signs that originally had read "FORWARD." The photograph was attributed to Reuters, but *National Review* publisher Jack Fowler later admitted staffers there had altered the signs.[32]
- The Official Korean Central News Agency distributed a doctored image of military maneuvers being carried out in 2013.[33]
- The White House blurred part of an image showing the members of the National Security Council watching the capture of Osama bin Laden. The image was distributed with a note, "Please note: a classified document seen in this photograph has been obscured."[34]
- The cover of *The Economist* shows President Barack Obama alone on a Louisiana beach examining the aftermath of the BP oil spill in the Gulf of Mexico. Several other people who were with him had been digitally removed.[35]
- In Amsterdam, the World Press Photo announced that it was revoking an award given to Stepan Rudik of Ukraine for a series titled "Street Fighting, Kiev, Ukraine." A foot was removed from the image despite contest rules that say, "The content of the image must not be altered."[36]
- Sepah News, the media arm of Iran's Revolutionary Guard, added a missile to a photo of missiles being launched when one failed in 2008.[37]

III. Hypotheses

What none of those lists include are examples of video manipulation and the ethical consequences of such manipulation. However, advances in artificial intelligence manipulation make video image manipulation almost as easy as editing a text document. Yet, while Al

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[30] Michael Zhang, *Wildlife Photo Contest Winner Disqualified Over Elephant's Ears*, PETAPIXEL (June 8, 2019), https://petapixel.com/2019/06/08/wildlife-photo-contest-winner-disqualified-for-editing-elephant-ears/.
[31] Michael Zhang, *NYTimes Correction: Photo Scene Had Item Removed To Kill Glare*, PETAPIXEL (Dec. 15, 2016), https://petapixel.com/2016/12/15/nytimes-correction-photo-scene-item-removed-kill-glare/.
[32] Laura Mallonee, *Infamously Altered Photos, Before and After Their Edits*, WIRED (JULY 29, 2015), https://www.wired.com/2015/07/bronx-documentary-center-infamously-altered-photos-edits/.
[33] Justin McCurry, *Did North Korea Photoshop Its Hovercreaft?*, THE GUARDIAN (March 27, 2013), https://www.theguardian.com/world/2013/mar/27/north-korea-photoshop-hovercraft.
[34] Pete Souza, Obama White House (May 1, 2011), https://www.flickr.com/photos/obamawhitehouse/.
[35] Roy Greenslade, *Exposed — The Economist's Image of Lonely President Who Was Not Alone*, THE GUARDIAN (2010). https://www.theguardian.com/media/greenslade/2010/jul/06/the-economist-news-photography.
[36] David Dunlap, *Behind the Scenes: Altered and Out*, N.Y. TIMES (March 3, 2010), https://lens.blogs.nytimes.com/2010/03/03/behind-35/.
[37] Mike Nizza and Patrick Lyons, *In an Iranian Image, A Missile Too Many*, THE LEDE (July 10, 2008), https://thelede.blogs.nytimes.com/2008/07/10/in-an-iranian-image-a-missile-too-many/.

Tompkins' textbook, *Aim for the Heart: Write, Shoot, Report and Produce for TV and Multimedia,*[38] has a chapter on "Ethics and broadcast journalism: Seek truth and report it as fully as possible" — as do many other broadcast journalism textbooks — it spends pages discussing how to cover violence, bomb threats and rapes and no time discussing manipulation of visual images either in camera or digitally. That leads to four hypotheses to test.

- H1 Broadcast and print photojournalists will differ in the amount of formal education they have received.
- H2 Photographers with more experience will be less willing to publish manipulated images.
- H3 Broadcast journalists will be more tolerant of digital manipulation than will print photojournalists.
- H4 Broadcast journalists will be more tolerant of publishing graphic spot news images than will be print photographers.

IV. Methodology

Modeled after a survey on ethical decision-making in photojournalism used in 2013, and including some of the same questions, a 56-question online survey that took about 18 minutes to complete (including open-ended questions) was distributed to professional photojournalists, both print and video, via social media and email lists of several associations including the Radio Television Digital News Association, the Broadcast Education Association, and the National Press Photographers Association. RTDNA is a membership association of radio, television and online news directors, video reporters, multimedia journalists, and others. With about 1,400 members,[39] RTDNA provides training, workshops, and other resources for its members, including a Code of Ethics that includes the guiding principle: "Truth and accuracy above all."[40] NPPA is a similar nonprofit organization that also provides a Code of Ethics that advises photojournalists—both print and video—to be accurate and comprehensive.[41] NPPA also has a "Statement of Principle" first approved in November 1990 regarding digital ethics.[42] The Broadcast Education Association[43] is the newest group, founded in 1955. More than 2,500 professors, students, and media professionals are individual members, and approximately 275 college and university departments and schools are institutional members, according to the association's website, beaweb.org.

In all, 243 people responded in the fall semester of 2019, including 160 individuals who considered themselves primarily print photographers and 42 who considered themselves primarily video photographers. Nine of the respondents said they consider themselves both print and video photographers. In terms of gender, 56 percent identified as male and 44 percent as female. The median age of the group was between 35 and 54, with 11 percent identifying as younger than 25 and 16 percent identifying as older than 65.

Questions were generally based around showing an image that had been manipulated or

[38] AL TOMPKINS, AIM FOR THE HEART: WRITE, SHOOT, REPORT AND PRODUCE FOR TV AND MULTIMEDIA, CQ Press (2017).
[39] Karen Hansen, personal communication (Dec. 16, 2020). RTDNA has about 1,400 members.
[40] Radio Television Digital News Ass'n, Code of Ethics, (2015), https://www.rtdna.org/content/rtdna_code_of_ethics.
[41] Nat'l Press Photog. Ass'n. Code of Ethics. https://nppa.org/code-ethics.
[42] Rhonda Roland Shearer, *NPPA Has Specific Ethics Code for Digital Photography*, IMEDIAETHICS, (June 4, 2009), https://www.imediaethics.org/nppa-has-specific-ethics-code-for-digital-photography/.
[43] Broadcast Education Association, *About Us*, https://www.beaweb.org/wp/?page_id=82.

that posed an ethical dilemma and asked the respondents whether they would publish the image and under what circumstances. The survey also included several general questions about the associations and their codes of ethics and whether the respondent accepted the principles in the codes.

Statistical analyses were performed using StatPlus and Microsoft Excel.

V. Findings

Before examining any of the specific images and the photographers' responses to them, it was useful to know where the respondents stood generally (Tables 1 and 2). For example, all of the photographers, both still and video, who responded to the survey, accepted the NPPA Code of Ethics. Much like the Code of Ethics of the Society for Professional Journalists and the RTDNA Code of Ethics, the NPPA Code of Ethics focuses on concepts such as accuracy; treating all subjects with respect and dignity; and reporting the truth fairly. The respondents also nearly unanimously accepted the NPPA Statement of Principle, which basically says that digital manipulation of images will not be used to deceive the public—again, a focus on the truth. They also agree collectively with statements such as "documentary news and feature photos should not be manipulated" and "altered images should be obviously false," although agreement is less strong in this area and even less strong among video photographers.

They did, collectively, agree that the standards should basically be the same for both video and still photography. Video photographers thought this was even more true than print photographers did. Some of the respondents made comments such as these:

- "[V]ideo actually has more obligations because unreality is harder to detect."
- "Video journalists 're-stage' many an event. The good one don't but the 'lazy' ones do."
- "The goal is (to) inform and accurately (to) preserve history."
- "Each photojournalist and video journalist may have their own standards. Covering all of them in a Yes-No statement is dangerous."
- "They shouldn't have different standards but I'm afraid they do. I see too many video photojournalists setting up scenes and staging situations."

While the statistics may show no difference between the two groups, the comments sometimes shed light on the difference in ideals.

Table 1: Adherence to code of ethics: still vs. video photographers

Question	*Still*	*Video*	*Difference*	X^2	*p*	*df*
Accept NPPA Code of Ethics (Q34)	1.00	1.00	0			
Accept NPPA Principle (Q35)	1.01	1.03	0.02	0.94	0.33	1
"Documentary news and feature photos should not be manipulated" (Q37)	1.04	1.06	0.02	0.44	0.51	1
"Altered images should be obviously false" (Q38)	1.15	1.24	0.11	1.58	0.21	1

n=152

In this table 1=yes and 2=no. Therefore, a higher number means more disagreement with the statement.

Table 2: Adherence to code of ethics: still vs. video photographers

Question	*Still*	*Video*	*Difference*	X^2	*p*	*df*
"Print photojournalists have different standards than those of video photojournalists." (Q41)	1.30	1.23	-0.07	0.66	0.42	1

In this table 1=true and 2=false. Therefore, a higher number means more disagreement with the statement.
A negative difference indicates that video photographers found it more of a true statement than still photographers.

H1 Broadcast and print photojournalists will differ in the amount of formal education they've received.

A chi-square test of independence was performed to examine the relation between education and type of photographer (Table 3). The relation between these variables was significant, X2 (2, N = 190) = 13.45, p < 0.01. Still photographers had more formal education than video photographers. Those without a bachelor's degree programs also lacked the media law and media ethics required as part of the core curriculum for accredited programs.[44] Half of the print photographers reported having a master's degree meaning they probably explored media law and ethics even more. The results might have been stronger except one-fifth of the video photographers reported having a doctorate degree, indicating the bias of the same toward individuals working in academia simply based on where the link to the survey was distributed. Nevertheless the data support the hypothesis that broadcast journalists have less formal education than print journalists. One out of five video photographers reported having only a high school degree or associate's degree.

Table 3: What is the highest academic degree you hold?

Education	*Overall*	*Print*	*Video*
None	0%	0%	0%
High school	6.2%	5.0%	14.3%
Associate's	3.1%	2.5%	4.8%
Bachelor's	31.9%	31.3%	33.3%
Master's	42.5%	46.9%	23.8%
Doctorate	12.9%	10.0%	21.4%
Other	4.2%	4.4%	2.4%
Mean	4.65	4.68	4.40
N=	193	160	42

H2 More-experienced photographers will be less willing to publish manipulated images.

The average video photojournalist answering the survey had 5.2 years' less experience than the print photojournalists (Table 4). However, this difference didn't reflect the complete picture. More than four in 10 (44 percent) print photojournalists had more than 20 years of

[44] ACEJMC, *Nine Accrediting Standards*. Accrediting Council on Education in Journalism and Mass Communication, http://www.acejmc.org/policies-process/nine-standards/.

experience. The same was true for only 31 percent of video photojournalists. Only 7 percent of print photographers had less than two years' experience, showing that fewer people are entering that profession than video, where 14 percent of respondents had less than two years' experience.

It was generally true that more-experienced photographers tolerated less manipulation but more willingly accepted the various ethical statements, including the NPPA Code of Ethics (Tables 5 and 6). Almost two-thirds of the respondents (63 percent) thought it was always or usually acceptable to crop out the grisly parts, even of a spot news image, an image from the Boston Marathon in this case. And more-experienced photojournalists were less willing to publish the grisly spot news images. Almost everyone in every age group thought it was rarely/never acceptable to flop a photo, although younger photographers were more willing than experienced photographers to do so.

A chi-square test of independence was performed to examine the relation between experience and type of photographer. The relation between these variables was not significant, $X2$ (2, N = 191) = 3.41, p = 0.49.

Table 4: How many years' experience do you have in photojournalism?

Experience	*Overall*	*Print*	*Video*
Up to 2 years	8.8%	6.9%	12.2%
2-5 years	18.1%	18.2%	24.4%
6-10 years	12.4%	13.2%	12.2%
11-20 years	18.1%	18.2%	19.5%
>20 years	42.5%	43.4%	31.7%
Mean	22.8 years	23.4 years	18.2 years

Table 5: Experience vs. percentage that finds statements acceptable

Question	*<2 years*	*2-5 years*	*6-10 years*	*11-10 years*	*>20 years*	*n*	*t*	*p*
Accept NPPA Code of Ethics (Q34)	10.0 %	15.3%	30.0%	26.0%	18.7%	150	16.5	0.00***
Accept NPPA Principle (Q35)	9.5%	14.9%	30.6%	25.9%	19.0%	147	16.6	0.00***
"Documentary news and feature photos should not be manipulated" (Q37)	9.3%	15.0%	30.7%	25.7%	19.3%	140	16.9	0.00***
"Altered images should be obviously false" (Q38)	9.9%	14.0%	31.4%	27.3%	17.4%	121	21.5	0.00***

* = *significant p<0.05*

Table 6: Experience vs. percentage that finds image/image manipulation rarely/never acceptable

Question	*<2 years*	*2-5 years*	*6-10 years*	*11-10 years*	*>20 years*	*n*	*t*	*p*
Color change (Q10)	7.8%	10.8%	36.3%	29.4%	15.7%	102	.032	0.75
New head (Q12)	11.5%	14.8%	36.9%	22.1%	14.8%	122	2.66	0.01**
Move pyramids (Q14)	6.9%	13.9%	39.5%	25.6%	13.9%	129	3.88	0.00***
Flop image (Q16)	9.1%	14.7%	36.4%	23.1%	16.8%	143	5.24	0.00***
Excessive burning (Q18)	10.6%	14.4%	34.6%	25.9%	14.4%	104	0.49	0.63
Cropping out grisly parts (Q20)	14.29 %	0%	28.6%	28.6%	28.6%	14	11.10	0.00***
Blurring face in grisly spot news (Q23)	9.6%	12.3%	31.5%	24.7%	21.9%	73	2.95	0.00***
Blurring face of minor in spot news (Q26)	5.7%	14.3%	37.1%	20.0%	22.9%	35	8.41	0.00***
Publishing grisly spot news (Q28)	12.5%	8.3%	20.8%	29.2%	29.2%	24	12.01	0.00***
Digitally altering grisly spot news image to make it less grisly (Q30)	8.3%	18.8%	34.4%	26.0%	12.5%	96	1.95	0.05

* = *significant p<0.05*
***=significant p<0.01*
****=significant p<0.001*

H3 Broadcast journalists will be more tolerant of digital manipulation than will print photojournalists.

With this sample, video photojournalists and print photographers pretty much agree that digital manipulation is unacceptable at least for news photographs (Table 7). However, the two groups didn't always agree. Although both groups found color manipulation more acceptable than moving parts of images, still photographers thought the least acceptable manipulation in this study was flopping an image. Video photographers also found it the least acceptable, but significantly more acceptable than the still photographers did.

Table 7: Digital manipulation: still vs. video photographers

Question	*Still*	*Video*	*Difference*	X^2	*p*	*df*	*n*
Color change (Q10)	1.87	2.12	0.25	3.05	0.55	4	170
New head (Q12)	1.74	1.69	-0.05	2.81	0.59	4	172
Move pyramids (Q14)	1.52	1.76	0.25	6.52	0.16	4	172
Flop image (Q16)	1.35	1.67	0.32	11.20	0.02*	4	171
Excessive burning (Q18)	1.87	1.78	-0.09	0.89	0.93	4	168

** = significant p<0.05*

In this table 1=never acceptable, 2=rarely acceptable, 3=sometimes acceptable, 4=usually acceptable, 5=always acceptable. So, a higher average ranking means the group was more tolerant of manipulation.

A negative difference indicates that video photographers found it more acceptable than still photographers.

H4 Broadcast journalists will be more tolerant of publishing graphic spot news images than print photographers will.

In short, this proved not to be true. Both groups generally agreed (Table 8) not only on the publication of graphic images (sometimes/usually acceptable) but also on blurring of faces of minors (sometimes/usually acceptable) and on digitally altering spot news images (rarely/never acceptable). The one area where the groups disagreed was on the blurring of a face in a graphic spot news photo, in one case a photo of Jeff Bauman, who was severely injured in the Boston Marathon bombing. Print photographers did not support blurring the face. "Blurring the image is not an option. The options are to run it without blurring or don't run it," said one. "If you have to blur the face, don't use the photo. That is an obvious photo manipulation and is not OK," said another. Video photographers, however, were more tolerant of blurring faces in such spot news situations, something that is now routinely seen on the evening news. Respondents mentioned terms such as privacy or anonymity as an excuse to blur a victim's face. "We often try to spare a victim further misery by keeping them anonymous." Still others fell back on the law rather than ethics. "The subject was voluntarily participating in a public event. While his situation was certainly tragic, I do not see a reason to 'protect' his identity by blurring his face in this scenario." Or "News value outweighs any need for blurring the face. This was a public event in a public place. No expectation of privacy was expected."

Table 8: Publication of graphic spot news pictures: still vs. video photographers

Question	*Still*	*Video*	*Difference*	X^2	*p*	*df*	*n*
Cropping out grisly parts (Q20)	3.29	2.93	-0.36	4.66	0.33	4	167
Blurring face in grisly spot news (Q23)	2.12	2.64	0.52	14.61	0.01**	4	166
Blurring face of minor in spot news (Q26)	2.93	3.07	0.14	1.62	0.80	4	166
Publishing grisly spot news (Q28)	3.11	2.86	-0.26	2.67	0.61	4	155
Digitally altering grisly spot news image to make it less grisly (Q30)	1.69	1.52	-0.16	3.55	0.47	7	150

** = significant p<0.05*

In this table 1=never acceptable, 2=rarely acceptable, 3=sometimes acceptable, 4=usually acceptable, 5=always acceptable. So, a higher average ranking means the group was more tolerant of publication.

A negative difference indicates that video photographers found it more acceptable than still photographers.

VI. Limitations

The first limitation that became apparent while examining the first hypothesis is that few working video journalists responded despite assistance from the BEA, NPPA and RTDNA in distribution of links to the survey. Four times as many print photographers answered the survey as did video photographers.

A second limitation of the survey was the number of academics that answered it as opposed to working professional photojournalists. Overall, 25 of the respondents reported having doctoral degrees, about 10 percent. According to the U.S. Census Bureau, only 4.5 percent of the population has a doctoral degree (up from 2.0 percent in 2000).[45]

VII. Discussion

The discussion regarding photo ethics in this setting begins with the first hypothesis and why it matters. As part of the formal college education in journalism, at least in accredited programs, students should "demonstrate an understanding of professional ethical principles and work ethically in pursuit of truth, accuracy, fairness and diversity."[46] Regardless of whether students discuss ethical scenarios regarding picture-taking or digital manipulation, at least they gain a framework for thinking about journalistic activities in light of the ideals of truth, accuracy, fairness, and diversity. While taking pictures of a person committing suicide may be truthful and accurate, showing those pictures may not be fair to the individual involved or to the

[45] America Counts Staff, *About 13.1 Percent Have a Master's, Professional Degree or Doctorate, U.S. Census Bureau* (Feb. 21, 2019), https://www.census.gov/library/stories/2019/02/number-of-people-with-masters-and-phd-degrees-double-since-2000.html.
[46] ACEJMC, *supra* note 41.

individual's family and friends. While removing a foot from a picture may make the picture more aesthetically pleasing, the image is neither truthful nor accurate. In a well-taught ethics class, students learn to balance the needs and desires of readers, listeners, and viewers with the needs and desires of the people involved, including the management of the media outlet. Students learn various paradigms for dealing with situations when their ethical standards are called into question. Because video photojournalists had a mean education level that was significantly less than that of print photojournalists, they have less of a formal foundation in how to deal with situations in which right and wrong are called into question.

Despite any formal educational differences, it is clear that the photojournalists who participated in this study agree that the various codes of ethics including those of SPJ, RTDNA and NPPA are ideals worth upholding. As in Wilson,[47] the vast majority accepted the codes, including one survey respondent who said, "Our commitment to accuracy is our credibility, [and] that includes undoctored pictures. What's the point of covering the news if you're going to make stuff up?" As with so many discussions of ethics, however, the devil is in the details.

In print circles, while manipulation is widely condemned, it continues to happen and results in a loss of credibility for the media outlets and the individuals involved.

In 1982, fully six years before Adobe Photoshop became a reality, a *National Geographic* magazine cover demonstrated one of the earliest high-profile cases of digital photo manipulation. Cover designers altered a horizontal image of the Pyramids of Giza to fit the vertical cover, shifting the two pyramids closer together. When the issue was publicly released, the photographer, Gordon Gahan, saw the cover and complained. In a 1984 article in the *New York Times*, Fred Ritchin wrote, "Wilbur E. Garrett, the *Geographic*'s editor, defends the modification, seeing it not as a falsification but merely the establishment of a new point of view, as if the photographer had been retroactively moved a few feet to one side."[48] Regardless, the manipulation damaged the magazine's credibility. Tom Kennedy, who became *National Geographic*'s director of photography after the incident, said, "We no longer use that technology to manipulate elements in a photo simply to achieve a more compelling graphic effect. We regarded that afterwards as a mistake, and we wouldn't repeat that mistake today."[49]

In the case of Texas Gov. Ann Richards' head being put on the body of a model for the cover of *Texas Monthly* in July 1992, the editors explained that their credit page disclosed this fact: "Cover Photograph by Jim Myers ... Stock photograph (head shot) By Kevin Vandivier/Texastock." *Texas Monthly* became the first recipient of NPPA's Jackalope Award for the most digitally manipulated photo of the year. "We wanted to point out the error of people's ways, but we wanted to do it in a gentle way," recalls John Long, former NPPA president and ethics committee chair.[50]

A decade later, back in 2003, as Pedro Meyer reported, the North Carolina Press Photographers Association board voted 4-0, with one abstention, to strip Patrick Schneider's awards after determining that he had removed background information from certain images through excessive adjustments in Photoshop. Chuck Liddy, a board member and photographer

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[47] Bradley Wilson, *The Use and Manipulation of Graphic, Spot News Images*, J. MEDIA LAW & ETHICS 5(1/2) (2016).
[48] Fred Ritchin, *Photography's New Bag of Tricks*, N.Y. TIMES (Nov. 4, 1984), https://www.nytimes.com/1984/11/04/magazine/photography-s-new-bag-of-tricks.html.
[49] Pyramids of Giza, Egypt, ALTERED IMAGES: 150 YEARS OF POSED AND MANIPULATED DOCUMENTARY PHOTOGRAPHY, Bronx Documentary Center, http://www.alteredimagesbdc.org/national-geographic.
[50] Long, *supra* note 17.

at the Raleigh *News & Observer*, said Schneider had violated the rules, the Code of Ethics outlined by NPPA, which states in part: "In documentary photojournalism, it is wrong to alter the content of a photograph in any way (electronically, or in the darkroom) that deceives the public."[51] A minority voice in the overall discussion, Meyer defended Schneider. "The changes introduced by Mr. Patrick Schneider did not alter the fundamental information in the photographs," he said. "Mr. Schneider used the computer in order to enhance and make a better picture."[52]

Of the eight photographers with fewer than five years' experience who thought this was usually or always acceptable, one said, "Removal of background noise strengthens the photo's storytelling capacity." Another said, "It is just getting rid of a distracting background to make the subject clear." They acknowledged that the manipulation changed the reality of the image but still found it acceptable.

Similarly, there was no correlation between age and publication of the *Sports Illustrated* image that changed the colors of the football players' jerseys from black to green. Wrote one respondent who identified as having five or fewer years of experience, "It doesn't change the meaning behind the picture whatsoever. It's just minor alterations to brighten a photo and make it more readable." In fact, the situation may not have been clear to the people taking the survey. Indeed, the colors were changed. Indeed, Baylor's jerseys are usually green. However, that night they were, as people who went to the game or watched it on television know, either a very, very, very dark green or black.[53] However, in *Sports Illustrated*, they were bright Baylor green.

Finally, the one manipulation on which the two groups, video and still photographers, did significantly disagree was flopping a photo. This was more acceptable to video photographers, but they still found it "rarely" acceptable. Still, just based on a reading of various photo policies the practice is almost universally condemned for documentary photography. "We do not flop photos," says the *Newsday* policy. "[W]e do not alter backgrounds, add color, create photo montage, flop or mortise (documentary photographs)," says the *St. Petersburg Times*. "We do not add color, create photomontages, remove objects or flop images," says the *Los Angeles Times*. "Removing or adding an object in an editorial photograph is not permitted. Nor is flopping a photograph to reverse the image," says the *Lincoln (Nebraska), Journal Star*. The list goes on.[54]

While education seemed only a small factor in acceptance of the codes of ethics and lack of acceptance of publication of graphic spot news images or digital manipulation, experience seemed to play a bigger role in the acceptance of the fundamentals of truth and accuracy. One-fourth of those with five or fewer years' experience accepted the NPPA code, the rules at the heart of a deontological study. However, 44 percent of those with 11 or more years' experience accepted it, and print photographers had significantly more overall experience. More than 40 percent of print photographers had more than 20 years' experience. Only about 32 percent of video photographers had more than 20 years' experience.

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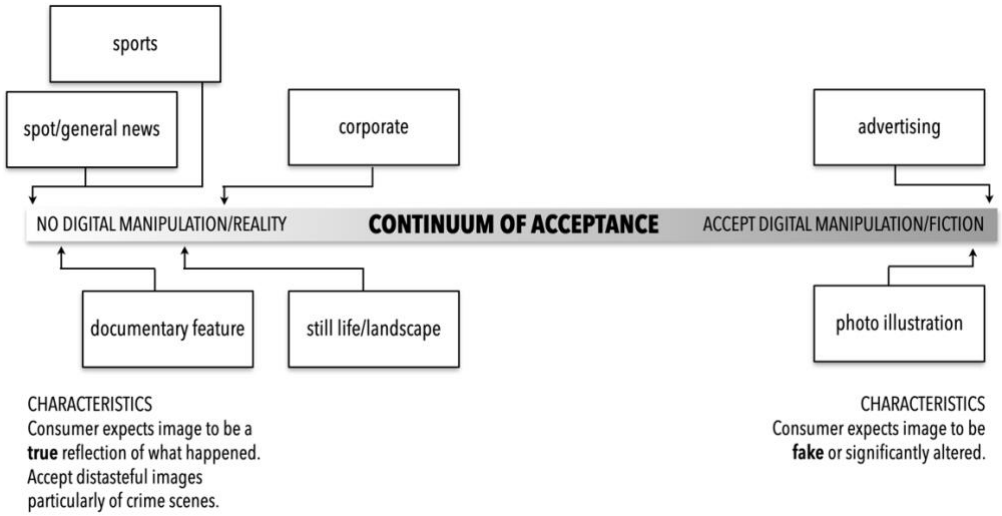
[51] Pedro Meyer, *In Defense of Photographer Patrick Schneider,* THE WASHINGTON POST, (October 2003), http://www.washingtonpost.com/wp-srv/photo/essays/zonezero/2003/october/october.htm.
[52] Meyer, *supra* note 48.
[53] Donald Winslow, *Sports Illustrated Changes Color of Baylor Football Jerseys* (Nov. 29, 2019), https://nppa.org/news/26123.
[54] Chuck Bell, Photo Manipulation Policies, CONSUMER REPORTS (Jan. 27, 2009), https://advocacy.consumerreports.org/research/photo-manipulation-policies/.

While almost everyone was willing to publish the photo of Jeff Bauman at the Boston Marathon, more-experienced individuals were less willing. This warrants more exploration. Indeed, it turns out that in almost every situation presented, there was somewhat of a bell curve with individuals with 6-10 years' experience being the least willing to accept manipulation or publication. Why are people with more than 20 years of experience more tolerant than those with 6-10 years of experience? Do community standards play a role in publication of grisly images for more-experienced individuals? Have more-experienced individuals simply become more complacent?

VIII. Conclusion

The first conclusion that should be drawn from any discussion of photojournalistic ethics is that what is right in one set of circumstances may be wrong under a different set of circumstances. For example, a photograph used for spot news coverage should reflect reality, unaltered reality. However, the same photo used on the cover of a book or magazine might be granted a little more latitude. And the same photo used as part of a photo illustration would be altered so it no longer represented reality. This is best viewed as a continuum (Fig. 1). In almost every case of the individual photos used here and whether the discussion was about whether the photo should be published at all given its content or whether the digital manipulation was acceptable, at least one respondent said, "It depends."

Figure 1: The Continuum



Senior yearbook portraits are documentary images of what those individuals looked like their senior year in high school. However, photo studios have been cleaning off blemishes and stray strands of hair in those images since yearbooks were born. Some studios do more. Some do less. *Time* magazine took a mug shot of O.J. Simpson and digitally altered it for the cover of the magazine. While photojournalists consider what *Time* did to be too much because of the spot news nature of the publication, that opinion is not universal.[55] The debate about whether the cover of a magazine is a sample of the journalistic content or an advertisement for the magazine rages on with publications from *Texas Monthly* to *National Geographic* providing samples for discussion. It's easy to judge these situations as wrong with the hindsight of history. But something in the mind of the editor, the designer, and even the photographer made it right at the time.

[55] OJ Simpson, ALTERED IMAGES, June 27, 1994, http://www.alteredimagesbdc.org/oj-simpson.

Working photojournalists push the limits in other ways too. For example, the *Dallas Morning News* photographer Tom Fox had to make a decision: shoot or flee when he encountered a man in a mask with gun. "[H]e was waiting right in front of the building when the gunman, whom authorities identified as former Army infantryman Brian Isaack Clyde, showed up and opened fire. Instead of running, Fox's first instinct was to take photos," wrote the *Washington Post* reporter Eli Rosenberg.[56] Some photographers would have fled. Some would keep shooting. What works for one photographer in this situation might not work for another photographer in the same situation. Fox was recognized as a finalist for the Pulitzer Prize for the images, showing that those in the profession recognize the chances Fox took and how society benefited from the coverage.[57] As historians get to look back on situations that photojournalists faced, time serves to judge the actions and the outcome. Chris Hondros was twice a finalist for the Pulitzer Prize. Yet the war photographer died in Libya, a victim of a mortar attack by pro-Gaddafi government forces. Between November 24, 1945, and April 30, 1975, 135 photojournalists died in Vietnam, Laos, and Cambodia. "It is for their photographs, not their dying, that the world remembers them."[58] Whether they would go in to war the same way again is, again, a question for philosophers. Society is stronger for having the images, but at a tremendous cost. Photographer Kevin Carter received the 1994 Pulitzer Prize for his photograph of the famine in Sudan. Four months after receiving the coveted prize, he committed suicide. He brought the horrors of the famine into living rooms all across the world. He made it real. Again, at what cost?

This continuum is worthy of more exploration. There's little doubt researchers have been exploring it for decades *after* a controversial photo is published or the manipulation a photographer made comes to light. The tricky part isn't asking the question *after* the fact. It's getting photographers to think about the consequences of their actions *before* they take or publish the picture, before they reach for that Content Aware option in Adobe Photoshop, or before operating under such stressful conditions that they are in real danger, mental or physical.

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*Bradley Wilson is an associate professor in the department of mass communication at Midwestern State University; bradleywilson08@gmail.com.

[56] Eli Rosenberg, *When a Man Opened Fire at a Courthouse, This Photographer Didn't Run. He Pulled Out His Camera*, THE WASHINGTON POST (June 18, 2019), https://www.washingtonpost.com/nation/2019/06/17/dallas-shooting-photographer-tom-fox/.
[57] Tom Steele, *Dallas Morning News' Tom Fox named Pulitzer Prize Finalist for Photographs of Courthouse Gunman*, THE DALLAS MORNING NEWS (May 4, 2020), https://www.dallasnews.com/business/local-companies/2020/05/04/dallas-morning-news-tom-fox-named-pulitzer-prize-finalist-for-photographs-of-courthouse-gunman/.
[58] Tad Bartimus, A Homage to the Photojournalists Lost to Decades of War in Vietnam, GLOBE: LINES OF THOUGHT ACROSS SOUTHEAST ASIA (April 29, 2020), https://southeastasiaglobe.com/vietnam-war-photographers/.

Reevaluating the Politics of Media Access and the Public Forum Doctrine in the Digital Age

Benjamin Medeiros*

Typically, the First Amendment is understood to protect speech from restriction only in cases of "state action." Since the 1960s, however, some progressive free speech theorists have suggested that the democratic goals that underlie the First Amendment require a more robust public right to access private expressive spaces, whether in the physical world or in more figurative media spaces. This paper analyzes how two such cases both recapitulate and re-cast older debates about the First Amendment and private property in novel digital contexts. These are: Prager University v. Google and Manhattan Community Access Corp. v. Halleck. First, the author traces how each case grapples with more expansive formulations of the "public function" test that courts have used to determine whether the administrator of a speech forum should be considered a "state actor." This analysis then provides a foundation for exploring a contemporary divergence on the political right with regard to communications policy and free speech jurisprudence. Building on legal scholar Wayne Batchas' account of the transformation starting in the 1970s from a largely "moralistic" conservative perspective on free speech to a more libertarian perspective, the author ultimately suggests that we are in the midst of a further transformation in which those of the emergent populist right have become amenable to arguments about "fairness" in media policy and First Amendment doctrine because they fear being shut out by large private tech platforms, and in the process have become surprising bedfellows with the traditionally liberal advocates of reform around access to private platforms.

Key words: First Amendment, public forum, conservatism, judicial politics, YouTube, public access

I. Introduction

In response to two 2018 cases in which conservative legal advocates brought successful First Amendment challenges (one regarding a regulation involving anti-abortion health clinics and one regarding the terms on which public sector unions could collect dues), Justice Elena Kagan was quoted in the *New York Times* accusing conservatives of "weaponizing the First Amendment."[1] While Kagan's characterization suggests something illicit about interpreting the First Amendment in a manner that advances some particular ideological cause, political ideology has long been intertwined with debates over First Amendment doctrine. Perhaps the most striking evolution in this historical narrative involves the way that American conservatives[2]

[1] Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES, June 30, 2018, A1.
[2] The term "conservative" in this paper reflects the manner in which it is used in central secondary literature that the piece draws from, concerning the convergence of political ideology and free speech. It encompasses the political ideology in the United States that privileges individual liberty and seeks to minimize the involvement of the federal government in economic and social life, and which has been largely, but not exclusively, represented by the Republican Party in the last 50 years of American political

went from favoring a relatively restrictive vision of First Amendment protection (especially in terms of areas like obscenity and symbolic speech perceived to be offensive),[3] to largely embracing a more expansive vision of First Amendment protection as a means of undermining various forms of government regulation. The work of political scientists like Wayne Batchis and legal scholars like Steven Shiffrin and Tim Wu demonstrates thoroughly that conservative legal thinkers and politicians are now much more likely to see the First Amendment as a reliable tool for resisting government intrusion into a variety of economic, political, and religious activities – or what Wu bluntly labels as a formulation in which the First Amendment provides "the right to evade regulation."[4]

Since the 1960s, a faction of legal and media critics has contended that in order to achieve the democratic goals that the First Amendment promotes, a more robust public right to access private expressive spaces is needed (even though the First Amendment is typically understood to protect speech from restriction only in cases of "state action"). Such a subordination of the private property rights of media companies would of course be traditionally anathema to the libertarian conservative approach to the First Amendment. Given the market dominance of some of the most widely used digital technology platforms like YouTube (owned by Google) and Facebook and concerns that the accessibility of truly public spaces for expression is dwindling,[5] it is perhaps not surprising that recent cases would have rekindled this debate over the circumstances in which a privately-owned communications platform is (or should be) required to provide access to citizens who wish to speak. In the process, they have brought out new arguments about the proper scope of the First Amendment's public forum doctrine from different factions of the political spectrum.

I argue that we are in the midst of a further evolution in the politics of First Amendment jurisprudence, and that it can be viewed through two recent cases concerning this question of compelled access to private media platforms.[6] Specifically, in the case of *PragerU* v. Google, plaintiff PragerU (helmed by longtime conservative talk radio personality Dennis Prager) has taken up the argument for a more expansive "right of access" that is similar in spirit to the one advanced by progressive public-media activists in the 60s and 70s. The line of reasoning advanced in the case and voiced by Prager in publicity materials is at odds logically with the libertarian deregulatory agenda sketched above as well as the minimalistic tradition exemplified by earlier conservative advocates like Robert Bork. In fact, the position staked out by PragerU strongly parallels the arguments put forward by the plaintiffs in the second case, *Manhattan Community Access Corp. v. Halleck*, in which a community media activist sought redress when banned from a New York public access television station owned by a private company.

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history.

[3] The ardently conservative legal scholar and judge Robert Bork, for instance, argued in a 1971 law review article that "the protection of the First Amendment must be cut off when it reaches the outer limits of political speech." Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L. J. 1 (1971), 27. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2720&context=ilj.

[4] Tim Wu, The Right to Evade Regulation How corporations hijacked the First Amendment, THE NEW REPUBLIC, June 3, 2013. https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation.

[5] Dominance of the major tech platforms is illustrated, for instance, by the fact that the "big five" companies (Google, Apple, Microsoft, Facebook, and Amazon) accounted for over 40% of the value traded on the NASDAQ stock exchange, as of 2017. Conor Sen, *The 'Big Five' Could Destroy the Tech Ecosystem*, BLOOMBERG OPINION (Nov., 15, 2017). https://www.bloomberg.com/opinion/articles/2017-11-15/the-big-five-could-destroy-the-tech-ecosystem

[6] Wayne Batchis, THE RIGHT'S FIRST AMENDMENT: THE POLITICS OF FREE SPEECH & THE RETURN OF CONSERVATIVE LIBERTARIANISM (2016), 2.

To demonstrate the significance of these cases, the paper first offers a literature review section that outlines in more depth the historical evolution of the state action doctrine as traditionally formulated in public forum jurisprudence, as well as central ways in which the Court *has* nonetheless countenanced limited exceptions where the editorial prerogatives of private media companies can be overridden: the Fairness Doctrine and "must-carry" provisions for cable operators. It then situates these doctrinal strains within the evolution in the politics of First Amendment interpretation described above. Such discussion outlines both the critiques from the left that have traditionally focused on the insufficiency of public access to media as well as the conservative critiques casting even these limited intrusions on editorial prerogatives as instances of government overreach. Finally, the section shows how these arguments are positioned in relation to the broader sweep of evolving conservative investments in the First Amendment as detailed by Batchis, Shiffrin, and Wu (and introduced above).

The judicial analysis section of the article then provides a detailed account of how each contemporary case hinges on novel formulations of the "public function" test that courts have used to determine whether the administrator of a speech forum should be considered a state actor for First Amendment purposes.[7] I conclude with an assessment of what these novel formulations reflect about the evolving ideological investments in free speech jurisprudence from different segments of the political spectrum. Specifically, the way in which the Halleck and PragerU plaintiffs each employ a "positive liberty" conception of the First Amendment's public forum doctrine – in which the doctrine should confer a right of access to use privately owned media properties as a means of combating the erosion of public space for expression – suggests a nascent convergence of left and right-wing opposition to the judicial status quo of libertarian deference to property holders in the contemporary digital marketplace of ideas. While these cases do not appear to indicate that the courts are inclined to reconsider the tenets of the doctrine, the confluence of arguments from otherwise distant political actors indicates potential to pursue the ostensibly shared goal of expanding access to significant forums of public deliberation by other means – for instance, through antitrust or other competition-enhancing policies.

II. The Public Forum Doctrine and the Editorial Prerogatives of Media Companies

Starting with *Hague v. CIO*, the Court demarcated different categories of public forums and the extent to which the government may regulate them.[8] Public streets, for instance, are the quintessential "traditional public forum" because they are publicly owned and operated and "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[9] As was also seminally recognized in the *Hague* case, however, speech rights in public forums are not absolute, as they "must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order."[10] Typically, this means that while reasonable time, place, and manner restrictions are permissible assuming that ample alternative channels of communication are available, any restriction on the content of speech must be a narrowly tailored means of achieving a compelling

[7] It should be noted at the outset that while the paper discusses issues of "public forum" status involving online intermediaries, the recent debate over whether public officials who use such privately owned platforms can exclude other users from interaction with their accounts – as has been on display in the Knight Institute v. Trump (and later Biden) litigation – represents a distinct issue of public forum jurisprudence. *See* Knight First Amendment Institute v. Trump, 953 F.3d 216 (2nd Cir. 2020).
[8] Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).
[9] *Hague*, 307 U.S. at 515.
[10] *Id.* at 516.

state interest.[11] The Court would later more finely demarcate different categories of public forums and the corresponding levels of speech protection that apply to each.

This forum-based framework for assessing restrictions on speech has also been applied to private (i.e., to non-governmentally owned) space in some circumstances. Even though the First Amendment in principle only protects citizens against speech restriction by state actors, a line of cases (starting with the 1946 case of *Marsh v. Alabama*)[12] has established that there are circumstances in which private actors must follow the First Amendment because they have assumed state-like functions. In *Marsh*, for instance, the operators of a "company town" could not prohibit (and punish) Jehovah's Witnesses who wanted to distribute literature in the common areas of the town. While not technically confined to "company towns," the "public function" test inaugurated in *Marsh* requires that the operator of an otherwise private forum be exercising "powers traditionally exclusively reserved to the State" in order to qualify as a state actor.[13]

In physical space, the line between public forum and private property has been perhaps most hotly contested with regard to speech in shopping malls. When union members were served with an injunction preventing them from picketing a supermarket chain located in a shopping mall, the Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* temporarily extended the public forum framework to the private space of the shopping mall.[14] It reasoned that since the "similarities between the business block in *Marsh* and the shopping center in the present case are striking," therefore "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises."[15] Yet the Court would walk back this analogy between the company town in *Marsh* and shopping malls just four years later in *Lloyd Corp. v. Tanner* (1972)[16] and further in *Hudgens v. NLRB* (1976).[17] Private shopping malls do not have "all the attributes of a municipality" like the town in *Marsh*, and therefore Justice Powell's majority opinion in *Lloyd* held that the "property did not lose its private character [and thus the property owners' right to exclude picketers] merely because the public is generally invited to use it for the purpose of doing business."[18]

State constitutions, however, may still provide some recourse for protesters in such situations. As the Court ruled in *Pruneyard Shopping Center v. Robins*, if states want to interpret their own constitutional language as conferring *greater* free speech rights on private property, they are not precluded from doing so.[19] Scholars like Jennifer Coffin have applauded

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[11] *See, e.g.,* Ward v. Rock against Racism, 491 U.S. 781 (1989), 791 ("even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'").
[12] Marsh v. Alabama, 326 U.S. 501 (1946).
[13] Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), 352.
[14] Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
[15] *Id.* at 319.
[16] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
[17] Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976).
[18] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), 551.
[19] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), 101. The California Constitution, for instance, contains a free speech provision that is phrased differently – and arguably more expansively – than the "Congress shall make no law…" mandate of the U.S. Constitution: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." See Joseph C. Groden, Freedom of

this denial of an absolute exclusive property right for shopping malls as a necessary bulwark against "the cultural evolution in which our public spaces have become private fortresses, 'protected' from political speech in the interests of providing 'safe' and unmolested shopping experiences for consumers."[20]

In the shopping mall cases that culminated in *Pruneyard*, David Steinglass notes, the Court "easily dismissed the mall owners' claim that allowing a right of access on the part of unwanted speakers to the mall represented an infringement of the owners' own First Amendment right to editorial control," as they are not really "speakers" themselves in any significant sense.[21] When considering the private property of media and technology operators, however, the Court has recognized that compelled access implicates the operators' own free speech rights in a much clearer way because they are dedicated to speech by their very nature.[22] The Court has nonetheless recognized limited circumstances in which the prerogatives of private media owners must sometimes be subordinated to some overriding public access mandate in order to serve the public interest. Typically, the analysis hinges not on the level to which media "property" (e.g., a newspaper's column space) is analogous to the company town of the *Marsh* case (i.e., when it performs a "public function"), but rather on the rules that the Supreme Court has recognized for the regulation of different media according to their technical and market properties.

Broadcasting, in particular, was singled out for different treatment by the FCC given its role in administering broadcast licensing and ensuring that licensees were operating in the "public interest." To this end, the Fairness Doctrine was codified by the late-1950s (though versions of its provisions had been operational in the preceding decades). Generally speaking, the Fairness Doctrine "mandated that a broadcast station which presents one viewpoint on a controversial public issue must afford reasonable opportunity for the presentation of opposing viewpoints."[23] The 1969 *Red Lion* case generally upheld the Fairness Doctrine under a "spectrum scarcity" rationale, meaning that it was reasonable for the FCC to exercise some control over content in fulfilling its mandate to advance the "public interest" due to the limited availability of broadcast channels.[24]

In the early 1970s, law professor Jerome Barron led the push to apply an expanded right of access to print media as well. Barron sought to "call attention to the ways in which technology and media concentration have turned the possibility of private barriers to expression into a formidable reality" by creating a precedent by which "law [would] respond to the reality of private censorship by affording opportunities for access and reply."[25] Barron's central critique was echoed in the broader media reform movement that has long criticized the way in which concentration in media markets can limit the range of voices that are represented in the media if unchecked.[26] As C. Edwin Baker observed, for instance, "because of oligopolistic control of the

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Expression under the California Constitution, 6 CAL. L. HIST. 187, 189 (2011).

[20] Jennifer Coffin, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J. L. REFORM 615, 615.

[21] David Steinglass, *Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels*, 71 NYU L. REV. 1113, 1128 (1996).

[22] *See, e.g.*, Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622 (1994).

[23] Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L. J. 51, 52 (1994).

[24] *Id.* at 61.

[25] Jerome Barron, *Access to the Media - A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 938 (2006).

[26] Concerning the fight against consolidation in broadcast station ownership, *see* FCC v. Prometheus Radio Project, 939 F. 3d 567 (2021), in which the Supreme Court ruled that the FCC's decision to relax station cross-ownership limitations in response to changes in the 1996 Telecommunications Act was

media [and] lack of access for disempowered or disfavored groups…the marketplace of ideas fails to achieve optimal results."[27] This critique resonated with the more general line of thought that would emerge regarding the "market failure" produced by libertarian First Amendment jurisprudence. Owen Fiss would subsequently argue in *Liberalism Divided*, for instance, that "placing a zone of non-interference around the individual, or certain institutions, is likely to produce a public debate that is dominated…by the same forces that dominate our social structure."[28]

The Court, however, rejected Barron's more expansive vision for media access in a series of decisions starting in the 1970s. First, it declined to hold that the First Amendment requires broadcast licensees to accept paid editorial advertisements (unless they so choose) in the 1973 *CBS v. Democratic National Committee* case.[29] A year later, it rejected the Florida "right of reply" statute that Barron had undertaken to defend from constitutional challenge in *Miami Herald v. Tornillo* (1974).[30] The majority argued in *Tornillo* that applying right of reply mandates for newspapers simply leads them to eschew controversial or critical coverage of public affairs, thus meaning that such a policy would actually detract from the public's exposure to diverse viewpoints rather than enhancing it.[31] Just as it had reasoned in *Tornillo*, finally, the Court would later explain in *Reno v. ACLU* (the seminal case applying the First Amendment to the internet) that while it had previously "recognized special justifications for regulation of the broadcast media that are not applicable to other speakers" (the "scarcity rationale") in cases like *Red Lion*, "[t]hose factors are not present in cyberspace."[32]

The eventual demise of even the limited provisions of the Fairness Doctrine came in the late 1980s with the *Syracuse Peace Council* case, in which the FCC was essentially given permission to stop enforcing the policy if it saw fit to. Conservatives, who had long vehemently opposed the rule, largely cheered the decision. Generally speaking, as Juanita Clogston noted in 2016, "[w]ithin the last decade," the "moves to revive the doctrine" have come from Democrats, and they are summarily "followed by Republican reactionary clamor."[33] Writing in 1989, the conservative law professor and deregulation advocate Thomas Hazlett captured an essential right-wing perspective in characterizing the Doctrine as a substitution of government judgment for the outcomes produced by market forces: "[r]egulation moves the 'fairness' programming decision away from those who compete for audiences to those who have secured bureaucratic power within a federal agency."[34] Reviewing the numerous instances in which the power to grant or revoke licenses was used to advance particular political interests (by both Democrats and Republicans) and the shortcomings of the "spectrum scarcity" rationale on which *Red Lion* was predicated, Hazlett concluded that "[t]he historic *Red Lion* decision was simply the successful end of a concerted campaign to silence a political viewpoint unpopular with those who held the power to regulate the press in the mid-sixties."[35] In Hazlett's formulation, government efforts to legislate "fairness" in licensing and content were simply a pretext for viewpoint discrimination.

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within its discretion as an agency under the standard set forth in the Administrative Procedure Act. This decision was the latest in a series of challenges that Prometheus and other public interest broadcasting groups have brought beginning in 2002, when the Commission had first sought the change its cross-ownership rules.

[27] C. Edwin Baker, Human liberty and freedom of speech 4 (1992).

[28] Owen Fiss, Liberalism Divided (1996), 38.

[29] CBS v. Democratic Nat'l Committee, 412 U.S. 94 (1973), 101.

[30] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[31] Tornillo, 418 U.S. 241, at 257.

[32] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), 868.

[33] Clogston, *supra* note 23, at 375.

[34] Thomas Hazlett, *The Fairness Doctrine and the First Amendment*, The Public Interest 106 (1989).

[35] *Id.* at 111.

Indeed, the repeal of the policy is often credited with enabling the explosion of conservative talk radio in the 1990s.[36]

Beyond the Fairness Doctrine, the Court also upheld a set of provisions in the 1992 Cable Act that required cable operators to carry local broadcast channels, or what became known as the "must-carry" provisions. In drafting the legislation, Congress was essentially attempting to secure the economic viability of broadcast stations in the marketplace given what it determined to be their critical role as an accessible (i.e., free) purveyor of current events programming. This was because in drafting the legislation, it found that "[t]here is a substantial likelihood that . . . additional broadcast signals will be deleted, repositioned or not carried" by cable operators to make room for other channels, and thus "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized" without a mandate of carriage.[37]

In the first iteration of the *Turner* case, the Court subjected the regulation to intermediate scrutiny analysis, distinguishing its interference with the "editorial discretion" of cable system operators to choose which stations to carry from outright content regulation that would have triggered strict scrutiny.[38] Yet it remanded the case to the trial court for a more precise determination of their empirical necessity.[39] After additional empirical demonstration of the threat to the viability of local broadcasters, the Court eventually upheld the rule, agreeing after the additional fact-finding at the district court that "[c]ongress could conclude from the substantial body of evidence before it that 'absent legislative action, the free local off-air broadcast system is endangered.'"[40] While it noted the First Amendment concerns implicated by any restriction of media companies' editorial discretion, it nonetheless recognized a compelling interest in the continued viability of local broadcast stations. In particular, as Yochai Benkler points out, the Court in *Turner* specifically gave credence to the notion that even the regulation of private media entities can in a limited sense fall within the purview of the First Amendment's ultimate aims: "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[41]

As Matthew Bunker and Charles Davis wrote following the Court's decision not to simply declare the regulation unconstitutional in *Turner I*, moreover, the kind of reasoning characterized by Benkler's quotation above represents a notion of the First Amendment grounded in "positive" rather than "negative" liberty. Rather than simply acting as "a defense against government intrusion into free speech," upholding compelled carriage evinces a framework in which "[c]oncern for the speaker is subordinated in favor of broad 'First Amendment values' that government must actively promote through regulation."[42] As such, it resonates in spirit with the kind of arguments advanced by Barron and company: in order for the First Amendment to actually achieve the underlying objective of a truly pluralistic and

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[36] Juanita Clogston, *The Repeal of the Fairness Doctrine and the Irony of Talk Radio: A Story of Political Entrepreneurship, Risk, and Cover*, 28 J. Pol'y Hist. 375 (2016).
[37] Matthew Bunker and Charles Davis, *The First Amendment as a Sword: The Positive Liberty Doctrine and Cable Must-Carry Provisions*, 40 J. Broad. & Elec. Media 77, 82 (1995).
[38] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I"), 643-44.
[39] *Id.* at 668.
[40] Turner Broadcasting v. Federal Communications Commission, 520 U.S. 180 (1997) ("Turner II"), 209.
[41] Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 Fed. comm. l. j. 561, 567.
[42] Bunker and Davis, *supra* note 37 at 2, 14.

diverse public discourse, it must act as a guarantor of certain speakers' representation in the marketplace of ideas, not simply a bulwark against government regulation of speech.

As was the case with the Fairness Doctrine, Thomas Hazlett's characterization of the flaws in the *Turner* majority's reasoning is instructive in establishing the view from the conservative legal community. Writing from his position as resident scholar at the flagship conservative think tank, the American Enterprise Institute, Hazlett criticized the Court's *Turner* decision on two grounds. First, he argued that they failed to recognize the true beneficiaries of must carry rules. According to Hazlett, while the Court majority saw the protection of broadcasters' "general contribution to public affairs and local news" as the substantial government interest in the case, Hazlett argued that market analysis suggested that it would be more marginal stations such as home shopping channels that would mostly benefit from compelled carriage.[43] Further, by applying intermediate scrutiny to the review of the must-carry rules' interference with cable operators' "editorial discretion," Hazlett argued that the Court "opened the door for extensive content regulation…although the Court denied it was permitting content regulation at all."[44]

How do these positions fit in with the general orientation toward the First Amendment in conservative thought during the last half century? In one sense, conservatives have been historically suspicious of doctrines of expansive First Amendment protection. As Wayne Batchis has comprehensively illustrated, "In the recent past, a robust freedom of speech has been understood to be a core value of contemporary liberalism – and seen as antithetical to modern conservatism."[45] Employing legal scholar Jack Balkin's notion of "ideological drift," or the idea that "legal ideas and symbols will change their political valence as they are used over and over again in new contexts,"[46] Batchis has shown that in the fifty years since the retirement of Justice Earl Warren, however, there has been a "changing of the guard when it comes to the conservative political perspective on the First Amendment — one that runs parallel with changes taking place among the conservative wing of the Supreme Court."[47] In areas such as campaign finance, commercial speech regulation, and the rejection of regulations for so-called "hate speech," Batchis shows, the Court's conservatives have gradually embraced the kind of expansion vision of First Amendment protections that one might have previously associated with the liberal Warren Court and progressive champions of civil liberties and anti-capitalist dissent.

Of particular relevance to the subsequent analysis of contemporary media and tech cases, he also shows how conservative intellectual leaders like William F. Buckley and a critical mass of justices in the 1970s united in "com[ing] around and eventually see[ing] the profound deregulatory power of robust commercial speech protection and, by extension, protection for so-called corporate speech."[48] In 1994, in fact, law professor Stephen Shiffrin described the First Amendment's affordance of "a banner for media corporations to resist access" and "for shopping centers to exclude demonstrators" as two of the ways in which "Conservatives [had] recently discovered the First Amendment, and [were] beginning to like what they [saw]."[49] Columbia law

[43] Thomas Hazlett, *Digitizing "Must-Carry" Under Turner Broadcasting v. FCC* (1997), SUP. CT. ECONOMIC REV. https://www.journals.uchicago.edu/doi/abs/10.1086/scer.8.1147074.
[44] *Id.* at 203.
[45] Batchis, *supra* note 3 at ix.
[46] *Id.*
[47] *Id.* at 31.
[48] *Id.* at 139.
[49] Stephen Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 INDIANA L. J. 689 (1994).

professor Tim Wu has carried this line of analysis into the more recent past, demonstrating how First Amendment arguments have been successfully deployed by corporations to nullify regulations by reframing them as attacks on expression. He cites the use of this strategy by tobacco companies to strike down compelled graphic warnings on cigarette packs, for instance, and by credit rating agencies to strike down punishments for erroneous ratings.[50] While conservatives have thus in one sense embraced a more expansive conception of First Amendment protection in their "discovery" of its deregulatory potential, this orientation is nonetheless still also consistent with the opposition on display in the Fairness Doctrine and must-carry debates to the kind of "positive liberty" approach that envisions the First Amendment as a means of affording opportunity to particular speakers rather than simply guarding against excessive government intrusion.

Moving to the discussion of the contemporary cases in the next section, the discussion will first demonstrate an embrace of this kind of "positive liberty" rationale for an expansive notion of the public forum in *PragerU* that is, of course, anathema to the prevailing libertarian conservative free speech doctrine sketched in this section. Further, as the second recent case, *Manhattan Community Access Corp. v. Halleck* demonstrates, while other pillars of the conservative legal and business community (such as the Chamber of Commerce) seemed to reliably rally to the defense of private media property rights, the Barron-eque "positive liberty" argument is also being revived in a somewhat new context by progressive media activists, thus creating a surprising vector of ideological confluence around the issue.

III. Compelled Access Redux: New Arguments In the Digital Age

The following two sections examine the arguments advanced in two recent cases that have interrogated the extent of privately owned media and technology companies' right to exercise discretion over what appears on their platform. The cases are analyzed in the first section in terms of the legal doctrines outlined above: how do they engage with past case law and established lines of analysis regarding the public forum doctrine and media access? In the second section, they are analyzed in terms of ideological resonance: how do the litigants, judges, and other stakeholders rhetorically frame the role of private media platforms (and their regulation) in society, and how does this align with or depart from the political inflection of past judicial framings? It is important to note from the outset that neither of the plaintiffs' newfangled arguments for limiting the editorial discretion of private media companies has ultimately succeeded at the appellate level. Their importance here, however, comes from unpacking where they sit in relation to the doctrines outlined above and what this reflects about the evolving status of free speech in judicial and cultural politics.

Prager University v. Google[51]

Despite having "university" in its name, Prager University (hereafter PragerU), is actually a nonprofit organization primarily known for its series of YouTube videos covering a variety of politics, culture, and general current events topics from a generally conservative perspective – or what it describes as "a free alternative to the dominant left-wing ideology in culture, media, and education."[52] Dennis Prager, its proprietor, is a longtime conservative radio talk show host and author. Though it is funded through a variety of sources, its most significant

[50] Wu, *supra* note 2.
[51] Prager University v. Google LLC, No. 18-15712 (9th Cir. 2020).
[52] PragerU, *YouTube Channel Homepage* (2022). https://www.youtube.com/c/prageruniversity/about

contributions come from the billionaire fracking magnates Dan and Farris Wilks, though its YouTube channel homepage describes it as "[f]unded by hundreds of thousands of viewers."[53]

The dispute in this case stems from YouTube's treatment of some of PragerU's videos. YouTube offers a feature called restricted mode that users can opt-into in order to filter some the video content that they will be shown. Google describes the content (which is flagged by users and reviewed by human moderators) as belonging to the following categories: "'drugs and alcohol,' 'sexual situations,' 'violence' (including 'natural disasters and tragedies, or even violence in the news'), and 'mature subjects,' such as 'videos that cover specific details about events related to terrorism, war, crime, and political conflicts.'"[54] Restricted mode therefore does not remove anything from YouTube per se, but it restricts the size of its potential audience — though Google estimates that "only approximately 1.5% of YouTube's users have Restricted Mode activated on an average day."[55]

Prager's objects to the inclusion of some of its videos in the "restricted mode" category. Citing several examples, their complaint alleges that YouTube does not include videos on the same topics from more left-leaning channels in restricted mode, which they interpret as an indication that the inclusion of some of PragerU's videos in restricted mode is designed to suppress their potential to reach (and thus persuade) an audience.[56] They thus characterize it as free speech discrimination: censorship based not on the content of the speech but the perceived identity and viewpoint of the speaker.[57]

They instantiate this charge in several legal claims. Primarily, they characterize it as a violation of the First Amendment because they contend that Google may not discriminate against speakers based on viewpoint. The complaint also states several related claims: one for violation of the Lanham Act based on the idea that by presenting YouTube as a platform that is open to diverse viewpoints, Google has engaged in a form of false advertising; a claim under California's Unruh civil rights statute that pertains to discrimination by private businesses; and for violating the implied covenant of good faith and fair dealing based on PragerU's "entr[y] into written contracts by which '[Google] agreed to provide YouTube access, hosting, streaming, and advertising services'" — or, essentially, the terms of service to which users of YouTube agree.[58] District Court Judge Janice Koh declined to exercise supplemental jurisdiction over the state law claims and granted Google's motion to dismiss for the other claims.[59] PragerU appealed this decision to the Ninth Circuit, and in the process further developed its argument regarding Google's putative First Amendment and Lanham Act violations. The Lanham Act claim is certainly related, but it involves a separate area of jurisprudence. The following analysis is therefore confined to PragerU's public forum claim.

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[53] Nadia Prupis, Fracking Titans Bankrolling Right-wing Indoctrination Effort in Schools: Investigation, COMMON DREAMS, https://www.commondreams.org/news/2015/05/01/fracking-titans-bankrolling-right-wing-indoctrination-effort-schools-investigation#; PragerU Channel Homepage, https://www.youtube.com/user/PragerUniversity/videos.
[54] Appellee br. 5.
[55] Appellee br. 4.
[56] In the complaint, PragerU describes the topics of some of the videos put into restricted mode as "trending current events such as foreign affairs, male-female differences, environmental issues and other topics discussed on university campuses." Prager University v. Google, Inc., No. 17-06064-cv (C.D. Cal. Oct. 23, 2017) ,Pl.'s Compl., 4.
[57] Prager University v. Google, Inc., No. 17-06064-cv (C.D. Cal. Oct. 23, 2017), Pl.'s Compl. 10.
[58] Pl.'s Compl. 39.
[59] Order Granting Def. Mot. Dismiss 11, ECF no. 31.

PragerU's First Amendment argument is fundamentally grounded in a novel reading of the line of cases applying First Amendment analysis to private property that began with *Marsh* and was later applied to shopping malls. In its complaint, PragerU presents the idea that in YouTube, Google "maintain[s] a public forum or its functional equivalent for the public to express and exchange views and ideas."[60] Because, they contend, it has "long been the law in California" that "private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks,"[61] therefore, the fact that Google has stepped into this "exclusively and traditionally public function by regulating free speech within a public forum" thus transforms them into state actors who must abide by the First Amendment.[62] And as Google is engaged in content-based restriction, the logic goes, it would be subject to strict scrutiny in the standard public forum analysis (and would presumptively fail given their supposedly malicious ideological motivation to suppress conservative voices on the platform).

The District Court rejected these arguments, however, and both this opinion and Google's brief for the Ninth Circuit appeal articulate how PragerU's framing of the situation misapplied the public forum doctrine and the state action concept. Most fundamentally, both the District Court and Google argue that *Marsh* (and the later shopping mall cases) narrowly construed the range of situations in which private businesses can be treated as state actors for First Amendment purposes. Judge Koh drew a sharp contrast between the *Marsh* scenario and that which precipitated the present case in her decision: "[u]nlike the private corporation in *Marsh*, Defendants do not own all the property and control all aspects and municipal functions of an entire town. Far from it, Defendants merely regulate content that is uploaded on a video-sharing website that they created as part of a private enterprise."[63] If YouTube is not a state actor, then its decisions to restrict or even outright ban speech are not bound by the public forum criteria.

In its appellate brief, PragerU disputes this characterization in several ways. First, it points out that Marsh was not intended to apply to company towns exclusively. More specifically, they draw from a Ninth Circuit case called *Lee v. Katz*[64] to argue that the range of scenarios in which private businesses become state actors is much broader and hinges simply on whether the kind of activity is something that is traditionally done by the government. In the *Lee* case, street preachers in Portland, OR were prohibited from speaking in a public park that was being leased and operated by a private entity. Their argument hinges on the statement in Lee that "functionally exclusive regulation of free speech within . . . a public forum is a traditional and exclusive function of the State."[65] In their analysis, therefore, it is the act of making rules for speech in a public forum that determines the application of the First Amendment, not a preliminary analysis of whether the operator of the forum can be considered a state actor in general. In order to justify the application of this notion to YouTube's actions specifically, they thus refer repeatedly to YouTube as a "public forum" in the sense that it is "a global video sharing platform that Google/YouTube have designated a public forum for 'freedom of expression.'"[66] The brief makes much of the fact that Google explicitly describes YouTube as, for

[60] *Id.* at 32-33.
[61] *Id.* at 10.
[62] *Id.* at 33-34.
[63] Order Granting Def. Mot. Dismiss 11, ECF no. 31.
[64] Lee v. Katz, 276 F.3d 550 (9th Cir. 2002).
[65] Appellant's Br. 35.
[66] *Id.* at 41.

instance, "'a community where everyone's voice can be heard' and 'a place to express yourself and show the world what you love.'"[67]

PragerU's reading of the public forum doctrine and the *Lee* case is idiosyncratic. The phrasing of the preceding statement about Google "having designated" YouTube as a public forum is key. As discussed in the previous section outlining the different types of forums, it is the *government* that has typically "designated" the forum (in the form of public property) in cases where "designated public forum" analysis is germane. Here, however, PragerU frames the situation as one in which a private entity can "designate" itself — despite having no meaningful nexus with public property — as a "public forum." This would appear to substitute a more colloquial understanding of the term "public forum" as simply a forum in which speech occurs that is accessible to some segment of the public in place of the narrower definition based on government ownership in First Amendment jurisprudence.

PragerU thus correspondingly attempts to distinguish the situation at hand from that in the Supreme Court's shopping mall cases on the grounds that those cases dealt with a scenario in which the private business owner had expressly declined to invite public speech rather than welcoming it. It was "[b]ecause the brick-and-mortar shopping center was not designated by its owners as a place for free speech [that]…the "constitutional guarantee of free expression ha[d] no part to play."[68] Overall, their argument represents an attempt to operationalize the Supreme Court's informal recognition in *Packingham v. North Carolina*[69] that "while, in the past, there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear[,] [i]t is cyberspace—the 'vast democratic forums of the Internet in general' and 'social media in particular.'"[70]

Yet in advancing this line of reasoning, PragerU's argument seems to elide a critical distinction in both the *Lee* case and the shopping mall cases. As Google points out in its own brief, YouTube is not performing a "public function" simply because it has declared that it is a place where people are welcome to make their voices heard. Rather, "a private party performs a 'public function' only when the government has delegated a function to it that otherwise would be exclusively provided by the state."[71] In other words, "[w]hether a private entity is engaged in state action turns not on what it says but on its relationship to the state and the nature of its actions. In the *Lee* case, the private company had undertaken the operation of a public park — a clear public function and perhaps the quintessential traditional public forum. YouTube is simply operating a private video site — a function that is hardly "traditionally provided by the state." Further, they suggest that PragerU's invocation of *Packingham* in characterizing social media as a public forum is fundamentally misapplied to this case, as *Packingham* was ultimately about the *state*'s attempt to restrict access to social media sites for registered sex offenders. Rather than being a state actor that is limited in its ability to moderate speech, Google argues, YouTube is actually more properly thought of as a *beneficiary* of the First Amendment: citing *Tornillo*, Google reinforces that "[t]he First Amendment gives broad freedom to both traditional publishers and online services to exercise 'editorial control and judgment.'"[72]

PragerU thus appears to be essentially redefining the criteria for determining what counts as a "public forum" according to use rather than ownership: rather than asking "is the

[67] *Id.*
[68] Appellant's Br. 45.
[69] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
[70] Appellant's Br. 50.
[71] Appellee br. 17.
[72] Appellant's Br. 12.

operator a state actor?" as the threshold question, it asks "has the public generally been invited to speak here?" Google, naturally, has countered that this is inconsistent with the established conception of the public forum as predicated on state action.

Based on this formulation of the relevant court precedent and doctrinal principles, the Ninth Circuit ultimately affirmed the District Court decision in *PragerU* in February of 2020. In a decision that rested on essentially the same logic as the district court outcome, the Ninth Circuit panel decision also made use of *Halleck* in its rationale, as the case had been decided in the interim. Drawing from Justice Kavanaugh's majority opinion, it noted that "just last year, the Supreme Court held that 'merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.'"[73] It therefore followed logically that "despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment."[74]

Manhattan Community Access Corp v. Halleck[75]

The *Halleck* case involved a public access television station, not a social media platform. Its analysis of when a privately owned platform becomes a public forum, however, has implications that go beyond public access television. The dispute stems from Manhattan Neighborhood Network (MNN), a private company that operates a public access cable station in New York City, having banned content creators Dee Dee Halleck (an influential figure in the world of alternative media) and Jesus Melendez from using the station entirely after they sought to (and temporarily succeeded in) airing content that was critical of the station's purported neglect of its surrounding East Harlem community. The channel exists because of a statutory requirement that cable companies (Time Warner — now Charter — in this case) create public access channels as a condition of receiving a franchise to operate cable systems in a municipality (which is consistent with the ways in which state and municipal law, rather than the FCC, has acted as the main nexus of cable regulation since the late 1970s.[76] The case thus posed the fundamental question of whether MNN, as a private company charged with operating a statutorily mandated public access station, had the power to exercise editorial discretion over the programming that appeared or whether it is a state actor that violates the First Amendment by withholding access from particular speakers.

Melendez and Halleck advanced the argument that public access channels are state actors because they perform a "public function." As they are fundamentally conceived as spaces for public expression created by the government, "the government cannot circumvent the First Amendment's requirements simply by delegating a public function to a private organization."[77] Like PragerU, they construe the relevant "function" at issue in this case broadly: to them, MNN is simply "administering a public forum" (in the form of the statutorily-mandated public access station) that has been fundamentally created by the state, which they contend is a public function.[78] In this construction, we again see "public forum" used in a somewhat colloquial manner to mean "place where people are invited to speak" rather than in reference to a specific

[73] Prager University v. Google LLC, No. 18-15712 (9th Cir. 2020), 2.
[74] *Id.*
[75] Manhattan Community Access Corp. v. Halleck 139 S. Ct. 1921 (2019).
[76] *See* FCC v. Midwest Video Corp., 440 U.S. 689 (1979); Cable Communications Policy Act (1984), 47 USC §§ 521-573.
[77] Lauren Kloss and Nayanthika Ramakrishnan, Manhattan Community Access Corp v. Halleck, Legal Information Institute, https://www.law.cornell.edu/supct/cert/17-1702 (2019).
[78] *Id.*

type of space that either is or is not traditionally administered by the state (e.g., a park, as in the *Lee* case). The Second Circuit accepted this characterization of the station's status as a state actor, with a concurring opinion further asserting that the city "delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels."[79]

Justice Kavanaugh's majority opinion rejected this argument, holding that MNN is not a state actor and thus does not violate the First Amendment in exercising its editorial discretion to ban Melendez and Halleck from the station. The reasoning is reminiscent of Google and Judge Koh's arguments in *PragerU*. Fundamentally, Kavanaugh inverts the formulation of the state actor analysis proposed by Halleck and Melendez and accepted by the Second Circuit: instead of looking generally at the fact that MNN was facilitating a forum for speech, Kavanaugh frames the question as "[whether] operation of public access channels on a cable system [is] a traditional, exclusive public function?"[80] The answer he arrives at is that it is not, as the Court had previously enumerated in *Flagg Bros. v. Brooks*[81] the "very few" functions that meet this description (such as administering elections and the aforementioned "company town" scenario).[82]

More specifically, he notes the myriad scenarios in which a private actor has opened its forum to *some* speech activity, such as grocery stores that host message boards and comedy clubs that host open mic nights. Thus, given the prevalence of such environments, it can hardly be said that "merely hosting speech by others" counts as "a traditional, exclusive public function," and categorizing a platform (like MNN) as providing such a forum thus "does not alone transform private entities into state actors subject to First Amendment constraints."[83] If simply administering a forum were enough to transform the entity into a state actor because its presentation of that speech forum constitutes a public function, he notes in conclusion, these businesses "would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum."[84] The implication is that this is both doctrinally unsound as well as normatively undesirable.

Despite the outcome in each case, both Halleck and Melendez and PragerU's attempt to adapt the public forum doctrine to fit the contemporary media and cultural landscape has significance as a reflection of the evolving relationship between political ideology and First Amendment interpretation. The next section therefore analyzes how the cases discussed above relate to existing historical narratives of ideology and the First Amendment.

IV. The Shifting Ideological Investments in Free Speech and the Public Forum

Fundamentally, Justice Kavanaugh's opinion in *Halleck* rests on recognizably conservative principles in that it prioritizes individual liberty and private property. Placing the discretion to include or exclude speakers seeking a platform in the hand of private entities rather than offering a government-mandated right of access is consistent with the way in which conservatives have typically operationalized the notion of "public interest" in communications regulation: because they are responsive to the market, it is private property owners who are best positioned to determine which content will serve the "public interest." Kavanaugh's opinion also

[79] Halleck, 139 S. Ct. 1921.
[80] MNN v. Halleck, 139 S. Ct. 1921, 1925.
[81] Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).
[82] MNN v. Halleck, 139 S. Ct. 1921, 1925.
[83] Halleck, 139 S. Ct. 1921, 1930.
[84] Halleck, 139 S. Ct. 1921, 1931.

goes out of its way to rhetorically communicate such a priority. Early on, he emphasizes how the objective of the state action doctrine is to "protect a robust sphere of individual liberty." Later, he explains that this "individual liberty" in the speech realm is critical to the broader normative scheme of a laissez-faire system: "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."[85] This is undesirable because "it is sometimes said that the bigger the government, the smaller the individual."[86] Kavanaugh's opinion is consistent with a libertarian conservative approach to free speech in that it assumes that the greatest good will come from "enforc[ing] a critical boundary between the government and the individual, and thereby protect[ing] a robust sphere of individual liberty."[87]

Several organizations filed amicus briefs in support of MNN that echoed this concern about maintaining the sanctity of private property. The Internet Association (a trade group representing major internet companies), for instance, submitted a brief arguing that a loosening of the state actor and public function standard in the *Halleck* case could, by analogy, have catastrophic implications for private internet companies. Unless the Court held that "the regulation of private property that does not in effect function as a 'company town' is not a 'public function,'"[88] they argued, the result would be "an Internet where individual businesses must be *less* responsive to community norms and consumer demands, and where these individual businesses are forced to be *less* safe for children and families" (because their content moderation efforts will be curtailed if they have to comply with the First Amendment).[89] The Cato Institute, likewise, filed a brief arguing (among other things) that "[t]he Second Circuit's holding [in favor of Halleck and Melendez] risks subjecting [internet platforms] to the full force of liability as state actors, undermining their own right to decide which content to provide or how to operate their service."[90] However unsurprising, therefore, it is clear that internet companies and libertarian-leaning organizations favored an understanding of the state action doctrine that accords with Kavanaugh's goal of "protecting a robust sphere of individual liberty."

The *PragerU* case also attracted amicus briefs calling for the court to reinforce the more narrow construction of state action that prevailed in *Halleck*. Perhaps the most notable of these comes from the U.S. Chamber of Commerce, which describes itself as "the world's largest business federation" that "represents 300,000 direct members and indirectly represents the interests of more than three million businesses of every size."[91] Their reasoning parallels Kavanaugh's in its formulation of both the practical and philosophical issues at stake in the case. The Chamber argues that its members will be affected by any loosening of the state action doctrine if they are forced to follow the First Amendment in policing speech. In this case, they argue, many businesses would "lose their customers, their revenues, and their reputations if the First Amendment restricts them from regulating objectionable content on their own property."[92] On one level, this is simply "unfair," as "any company might be forced to host material that undermines its mission or values."[93] In addition to violating the fundamental tenets of private ownership, however, it would also compromise the very logic of the market system: because "private entities face market forces that naturally push them toward tolerance for a greater

[85] MNN v. Halleck, 139 S. Ct. 1921, 1932.
[86] MNN v. Halleck, 139 S. Ct. 1921, 1934.
[87] *Id.*
[88] Internet Ass'n br. 3.
[89] *Id.* at 19.
[90] Cato Inst. br. 15.
[91] Chamber of Commerce br. 1.
[92] *Id.*
[93] *Id.* at 12.

variety of viewpoints and a wider audience," there is "therefore no need to distort the First Amendment to force companies to facilitate speech against their will,"[94] as "the market will often do precisely what the First Amendment must accomplish with respect to state actors."[95] Finally, it was not even clear to some that PragerU had a real grievance to rectify: the libertarian publication *Reason*, for instance, pointed out the irony of an entity that "boasts 1 billion video views" also "decr[ying] YouTube censorship."[96]

One additional fact further underscores the divergence between Prager's endeavor to treat Google as a state actor and Kavanaugh's formulation in *Halleck*. As professor Michael Dorf discovered, the phrase "it is sometimes said that the larger the government, the smaller the individual" that begins Kavanaugh's concluding paragraph is attributable to Dennis Prager himself.[97] It is not clear that Kavanaugh intended to quote Prager per se. Yet even if Kavanaugh had simply absorbed the phrase through his own reading of conservative media, he nonetheless seems to be suggesting that it is the formulation of the public forum doctrine embodied in his *Halleck* opinion that best represents Prager's own ostensible ideology. If Kavanaugh and Prager are ideological kin to the extent that the former would possibly quote the latter unconsciously in characterizing the ideological orientation of his judicial reasoning, how have they nonetheless reached such different conclusions about the way in which the First Amendment should apply to digital media? In other words, how does the approach on display in the PragerU case and its reception in the conservative media sphere represent the judicial application of an emerging current in right wing thought on free speech?

Perhaps most critically, PragerU's case is fixated on the idea that Google is being disingenuous about its position as an arbiter of speech. This idea is central to both their First Amendment claim as well as the accompanying allegation that Google has violated the Lanham Act. First, PragerU emphasizes the size and power of Google in the digital marketplace of ideas, and highlights how the company has indeed profited quite extensively from this arrangement. In a section of its appellate brief titled "Defendants' Business Model Is To Monetize Free Speech For Profit By Designating YouTube As A Public Forum For Freedom Of Expression," for instance, they contend that "YouTube has indisputably become the most comprehensive forum for individual and collective expression in the history of the world."[98] Further, they underscore the scope of the company's power: "[w]ith a market value that is larger than the Gross Domestic Products of all but the very largest economies of the world, Google/YouTube profit handsomely from YouTube's status as the paradigmatic public square of the twenty-first century."[99] Thus, Google is being rhetorically compared to a state-like entity even if the legal argument to characterize it as a state actor appears strained.

These characterizations then set up the rhetorical charge of hypocrisy that underlies PragerU's ostensible First Amendment and Lanham Act claims. As touched on previously, they enumerate the instances in which Google characterizes YouTube as a "public forum" in the

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[94] *Id.* at 3.
[95] *Id.* at 15.
[96] Billy Binion, *Dennis Prager, Who Boasts 1 Billion Video Views a Year, Decries YouTube 'Censorship,'* REASON, July 18, 2019. https://reason.com/2019/07/18/dennis-prager-who-boasts-1-billion-video-views-a-year-decries-youtube-censorship/.
[97] Cody Fenwick, *Legal Scholar Tracks Down the Bizarre Origins of the Right-wing Phrase Justice Kavanaugh Used in a New Opinion*, ALTERNET, June 17, 2019. https://www.alternet.org/2019/06/legal-scholar-tracks-down-the-bizarre-origins-of-the-right-wing-phrase-justice-kavanaugh-used-in-a-new-opinion/
[98] Appellant's Br. 17.
[99] *Id.*

colloquial sense: for instance, their Lanham Act claim is predicated on the notion that Google has made "multiple specific false representations of fact about YouTube's status as a viewpoint-neutral public forum 'where everyone's voice can be heard' 'no matter where they are from or what their age or point of view.'"[100] Relatedly, they suggest that this misrepresentation is especially problematic because of Google's plenary power to decide which speech to accept or reject: "Despite their control and regulation of one of the largest forums for public speech and expression in California, the United States, and the world, Google/YouTube…believe that they have unfettered, unbridled, and unrestricted power to censor speech or discriminate against public speakers at their whim for any reason."[101] Again, the rhetorical emphasis on the scope of Google's absolute power implicitly likens it to a more state-like entity rather than simply a private company.

Building from this objection to the plenary power of the platform, PragerU actually suggests a possible alternative resolution to the issue in its appellate brief. "If Google/YouTube truly believe that they must utilize unconstitutional restraints, Google/YouTube may do so," PragerU declares, "but only by de-designating and disavowing that YouTube is a public place for "freedom of expression."[102] While this is somewhat nonsensical from a legal perspective (as Google again points out, state actor status does not rest on whether a private entity declares itself open to the public in some capacity), the ultimatum is useful in revealing the rhetorical objective of the lawsuit. As they elaborate, "Google/YouTube need to tell the public the truth: YouTube is **not** [bold sic] a place for freedom of expression and Google/YouTube, and only Google/YouTube, decide who may speak and what they can say."[103] Framing the issue in these terms suggests that the ultimate rhetorical objective is simply to brand Silicon Valley companies as hostile to free speech by wresting a confession that they are "not a place for freedom of expression," thus ostensibly undermining their cultural legitimacy.

How do these judicial arguments resonate with perhaps previously dormant or overlooked elements of conservative ideology One possibility is to view these arguments through the lens of an older right-wing populist trope in which certain strata of "big business" are not really representative of "capitalism" or "the market" at all. Rather, it is seen as essentially an extension of the state. Robert Horwitz has highlighted how the Tea Party movement, for instance, channeled the "feeling of dispossession characteristic of earlier conservative revolts" — a dispossession that, according to *New York Times* columnist David Brooks, they saw as being equally perpetrated by "big government, big business, big media, and the affluent professionals…merging to form a self-serving oligarchy."[104] If Google is arguably emblematic of such an "oligarchy," then perhaps it is in this spirit that PragerU and its supporters have opportunistically embraced a more access-oriented interpretation of the public forum doctrine. Such a genealogical connection thus provides merely one possible thread for further rhetorical and legal study of how the politics of freedom of expression are evolving in the present, and for anticipating how a coalition might coalesce to push for other concrete changes to regulatory status quo.

V. Conclusion

[100] Pl.'s Compl. 62.
[101] *Id.* at 10.
[102] *Id.* at 55.
[103] *Id.* at 55-56.
[104] Robert Horwitz, America's Right: Anti-Establishment Conservatism from Goldwater to the Tea Party, 176 (2013).

Regardless of the ultimate rhetorical aim, it is impossible to ignore the logical similarity between PragerU's argument and the objections voiced by the historical proponents of greater public access to private expressive spaces (whether physical or in the media). The objection to the plenary power of one or a handful of companies to effectively determine who is given a platform to speak is strongly reminiscent of Barron's goal in the *Tornillo* case to "call attention to the ways in which technology and media concentration have turned the possibility of private barriers to expression into a formidable reality." It likewise resonates with the logic of Halleck's own characterization of the stakes in her case. She told *Hudson Valley One* following the Court's decision, for instance, that it represented a "victory for corporate speech" that "empowers the cable companies (and the non-profit orgs that run access) to censor whenever, whomever and whatever they want."[105] This shared concern about the unchecked power of corporations to shape what appears in the public sphere is, ultimately, a revival of the arguments usually marshaled for the application of policies like the Fairness Doctrine and limitations on concentrated ownership in communications. The laissez-faire market will not provide adequate diversity of viewpoints, the logic goes, and thus some policies that subordinate private property to public access rights are necessary in order to expose the public to the breadth of viewpoints that democracy requires.

In both the legal arguments being marshaled and the rhetorical framing of these arguments, therefore, we see both confirmation and complication of the narrative through which scholars such as Batchis have explained the past several decades of ideological investment in the First Amendment. Justice Kavanaugh's perspective in the *Halleck* case fits well within this narrative, as it epitomizes how (regardless of the Justice's personal motivations) First Amendment doctrine can end up complementing a fundamentally deregulatory policy agenda. Yet the undermining of Google's editorial prerogatives that a plaintiff like PragerU advocates would seem to represent a contemporary wrinkle in the narrative. Along with the Halleck plaintiffs, there is now at least some segment of the conservative movement in America that seeks an expansive application of the First Amendment in the "positive liberty" tradition, subordinating the editorial prerogatives of private companies like Google in order to achieve its vision of a robust and inclusive public discourse.

Such a shift itself comes during a time when technology companies face increasing pressure for reform of their content moderation systems from all segments of the political spectrum – or what some in the press have termed the "techlash."[106] While the Court does not appear poised to reconsider its application of the public function test to override the editorial prerogatives of private media and tech companies, the shared sentiment on display here from natural ideological opponents that nondiscriminatory public access to important speech forums is in jeopardy might perhaps be productive of common ground in, say, pursuit of competition-related policy reform to ensure that there are always robust alternative venues for spreading one's message.

*Benjamin Medeiros is an assistant professor in the communication studies department at the State University of New York Plattsburgh; bmede001@plattsburgh.edu.

[105] Paul Smart, Woodstocker Loses Supreme Court First-Amendment Case Over Public-access TV, HUDSON VALLEY ONE, (June 24, 2019), https://hudsonvalleyone.com/2019/06/24/woodstocker-loses-supreme-court-first-amendment-case-over-public-access-tv/.
[106] *See, e.g., Knight Foundation, Techlash? America's Growing Concern with Major Technology Companies*, (March 11, 2020), https://knightfoundation.org/reports/techlash-americas-growing-concern-with-major-technology-companies/.