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JOURNAL OF MEDIA LAW & ETHICS

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WHY AND HOW TO REGULATE NATIVE ADVERTISING IN ONLINE NEWS PUBLICATIONS

AMAR C. BAKSHI

Native advertisements online are the latest incarnation of the long-running practice of blurring the lines between paid advertisement and independently created publisher content. This practice benefits advertisers by allowing them to leach credibility from news publications in exchange for payment. However, readers, as both consumers and citizens, lose out in this deal. Readers find it harder to accurately assess product claims and lose faith in the media as a vehicle for democratic discourse.

The U.S. government has played an important role in limiting this practice in the past, and it can do so again. It can use the current powers of the Federal Trade Commission more aggressively to regulate commercial native advertising and it can resurrect neglected FTC powers. Native ads deemed noncommercial, however, pose a tougher challenge. Even though these ads pose severe harms to citizens, the FTC cannot regulate them under the current commercial speech doctrine.

Part I of this paper defines native ads in the online news context, explains why they are uniquely harmful, and makes the case for government regulation. Part II examines how the government can protect consumers from the harms of native ads using FTC precedent, and then explains why the government has limited ability to protect citizens from such harms. Finally, the paper looks at potential government action beyond the FTC.

Keywords: advertising, online, Federal Trade Commission

PART ONE: WHY REGULATE NATIVE ADVERTISING?

I. Understanding Native Advertising

On Monday, January 14, 2013, thousands of readers on *The Atlantic Monthly*'s website came across what appeared to be a blog post by the magazine's staff. The article looked like every other *Atlantic* article online, using the same typeface, page layout, and serious, "newsy" tone – just the tone one would expect from the venerable publication founded in 1857 by literary greats including Ralph Waldo Emerson and Oliver Wendell

Holmes.[1] However, there was something new near the article – a small yellow badge at the top of the page with the words "Sponsor Content," followed by a mouse-over link answering the question, "What's This?"[2] For those who missed the small disclosure, it was the highly peculiar content of the article that ultimately gave its purpose away.

The headline, "David Miscavige Leads Scientology to Milestone Year" was followed by the subhead, "Under ecclesiastical leader David Miscavige, the Scientology religion expanded more in 2012 than in any 12 months of its 60-year history." The text of the piece characterized Miscavige as "unrelenting in his work for millions of parishioners" and offered up a dozen images of new churches of Scientology opening from Tel Aviv to San Jose. Most surprisingly, given the controversy surrounding the church and the vituperative nature of online comment threads, the thread under this article carried nary a negative word.[3] In fact, comments like the following from "Kiwi Boy" were typical: "Seems like David Miscavige and Scientology are on a roll. Also it appears the media have been missing the real story."[4]

The article was posted just one day before the release of a new tell-all book about Scientology by investigative journalist Lawrence Wright. The book documented Church violations of labor law, mistreatment of children, evasion of tax law, and numerous embarrassing stories about famous Scientologists such as founder L. Ron Hubbard, actor Tom Cruise, and church leader David Miscavige.[5]

In a matter of hours, other blogs began posting complaints about the strange content on *The Atlantic*. Outrage mounted overnight and by the following morning, *The Atlantic*'s Scientology post became the poster child for the perils of the new online practice known as "native advertising."*The Atlantic* quickly took the ad down and explained that the Church of Scientology had paid for and written the article. *The Atlantic*'s marketing team – and not its editorial team – had moderated the comment thread,

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[1] ELLERY SEDGWICK, A HISTORY OF THE ATLANTIC MONTHLY, 1857-1909: YANKEE HUMANISM AT HIGH TIDE AND EBB (Univ. of Mass. Press, 2009).

[2] The link read: "Sponsor Content is created by The Atlantic's Promotions Department in partnership with our advertisers. The Atlantic editorial team is not involved in the creation of this content. Email advertising@theatlantic.com to learn more."

[3]Erik Wemple, *The Atlantic's Scientology Problem, Start to Finish*, WASH. POST, Jan. 15, 2013, http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/01/15/the-atlantics-scientology-problem-start-to-finish/.

[4] To see the original Atlantic post, see the following PDF: http://poynter.org/extra/AtlanticScientology.pdf.

[5] Paul Ellie, *Articles of Faith,* WALL ST. J., 2013, http://online.wsj.com/news/articles/SB10001424127887324581504578231630053455 01.

removing critical remarks.[6] The august publication then issued a statement that began succinctly: "We screwed up."[7]

This was one of the earliest, most well publicized scandals of the native advertising age, but many more have followed. Some have directly misled consumers about the characteristics of products in the marketplace. Others have pushed public debate in manners helpful to the advertiser's bottom line. And some have simply guided coverage of public issues in a way pleasing to the advertiser's leadership. All of these native ads, from those that affect readers as consumers to those that affect readers as citizens, raise serious concerns about journalistic integrity and advertiser influence in 21st century online news publications.

A. A New Definition

"Native advertising" is a new term whose definition has changed substantially since its introduction less than five years ago.[8] In the context of online news publications, it refers to the practice of online publishers accepting payment from particular advertisers to publish customized content that looks very similar – in terms of tone, presentation, and functionality – to the independently produced news, editorial, and entertainment content on the site.[9] Over the past five years, new, online-only publishers such as the *Huffington Post*, *BuzzFeed*, and *Gawker* have

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[6] WEMPLE, *supra* note 3.

[7] *Statement from The Atlantic Regarding an Advertisement from the Church of Scientology*, THE ATLANTIC, (Jan. 13, 2013).

[8] According to *Google Trends*, the first few Google searches for this term occurred in March 2010, and the term first appeared in a newspaper headline in May 2013.

[9] From 2010 to 2013, the definition of "native advertising" swiftly evolved. In 2010 and 2011, "native advertising" was used to describe monetization strategies unique to new, online-only platforms, including social networks, micro-blogging sites, search engines, and user-review portals (e.g., Facebook, Twitter, Google, and Yelp). Such strategies included sponsored search results on Google and promoted "likes" and tweets, through which positive consumer reviews appear prominently in the information feeds of their networked peers.

In 2011, the CEO and founder of Sharethrough, an online advertising consultancy and early advocate of native advertising, offered an early definition of native advertising as "a form of media that's built into the actual visual design and where the ads are part of the user experience." By 2012, the term "native advertising" had expanded to include the advertising strategies of online news publishers who created, for particular advertisers, customized content designed to complement the look and feel of the platform, in this case a news website. In 2012, the Sharethrough CEO updated the definition of native advertising to include advertisements on online news sites by replacing "user experience" with "content" – an important definitional choice. For more information *see* Todd Wasserman, *What Is Native Advertising? Depends Who You Ask*, MASHABLE (Sept. 25, 2012), http://mashable.com/2012/09/25/native-advertising/. *See also* Paige Cooperstein, *Native Advertising: How It Works at the Huffington Post*, MEDIASHIFT (Oct. 8, 2013), http://www.pbs.org/mediashift/2013/10/native-advertising-how-it-works-at-the-huffington-post/.

led the way in providing native ad offerings. Over the past two years, a majority of American legacy news publications have followed suit. Unlike online-only publishers, these legacy news brands carry decades – and in some cases centuries – of institutional history, with attendant ethical and journalistic norms.

The practice of native advertising is rapidly spreading throughout online news media. The Online Publishers Association, a not-for-profit trade organization representing online content providers, found that 73% of its members offered native advertising opportunities in 2013. It estimates that an additional 17% will have joined them by the end of 2014.[10] The members of the Online Publishers Association comprise the largest online publishers in the world, including leading newspapers such as the *Washington Post*, *New York Times*, *Financial Times*, *Wall Street Journal* and *USA Today*; newsgathering networks and organizations such as the *AP*, *Thomson Reuters*, *Scripps* and *Gannet*; TV organizations with digital platforms such as *Fox News*, *NBC*, *CNBC*, *ESPN* and *BBC*; magazines such as *National Geographic*, *Time*, *New York*, and *Forbes*; media conglomerates such as *Condé Nast*, *Viacom*, *Discovery*, *Hearst* and *Disney*; and other online properties including *WebMD*, *About.com*, *AOL News*, *Gawker Media* and *Consumer Reports*. Notably, the Online Publishers Association did not even ask its members about the practice of native advertising before 2013.

B. Why Native Advertising Is Taking Off

1. Advertisers Want It

One reason native advertising is booming is that advertisers want it. Native ads appeal to advertisers for at least three reasons. The first reason, though never baldly stated, is that native ads can confuse consumers into thinking the copy was actually written by the independent publisher displaying rather than by an advertiser. Such third-party valuation, especially in the case of a publisher considered relatively trustworthy, can make consumers more likely to read, share, and believe content. As *AdAge* media reporter Michael Sebastian put it, consumers' "confusion is inherent in the appeal."[11]

Ad executives are much more willing to discuss the second reason for the appeal of native advertising, which is that advertisers want to present content in a way that is likely to interest, entertain, and engage consumers. If an advertiser offers ads that match the tone, content, and functionality of other articles in a publication, those ads presumably will be more appealing to consumers who have opted to visit a particular site to

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[10] Radar Research, *Premium Content Brands Are Native Naturals,* ONLINE PUBLISHERS ASS'N (July 10, 2013), http://onlinepubs.ehclients.com/images/pdf/OPA_Member_Native _Advertising_Public_MASTER.pdf.

[11]Michael Sebastian, *News Organizations Face Tricky Trade-Off with 'Sponsored Content,'* ADAGE, (Sept. 23, 2013), http://adage.com/article/media/publishers-sponsored-content-cash-fear-backlash/244276/.

receive content with that particular tone, content, and functionality. Advertisers and publishers both know that consumers familiar with traditional online advertising are annoyed by pop-up ads and are conditioned to ignore static banners.[12] Publishers hope that intriguing, helpful, or entertaining ad content will enliven consumers' web presence while creating positive brand impressions in their minds. According to this rationale, confusing the consumer about the source of the ad is simply an unintended consequence of presenting more engaging ads.

The third reason advertisers prefer native ads is that they allow advertisers to influence the topics and themes that are covered by a publication. Advertisers may want to raise awareness about a particular issue and, they may or may not want to be explicitly mentioned in relation to that issue. For example, a health food chain may want to sponsor sections on unhealthy eating habits without being named, or a car manufacturer might want to draw attention to the joys of driving convertibles without mentioning that it has just released a new convertible. For example, the aforementioned car manufacturer might create a listicle– defined by *Wikipedia* as "a short-form of writing that uses a list as its thematic structure, but is fleshed out with sufficient copy to be published as an article"[13] –featuring "Fifteen Cool Convertibles from the Past Fifty Years."[14] The advertiser behind that content may not name its new convertible on that particular page; instead, it could place a cookie[15] – or small data packet – on the browsers of visitors to that page and then target banner ads at them as they continue to traverse the web. In the days after reading the convertible listicle, these consumers might conveniently find that, while daydreaming of convertibles of old, the websites they visit feature banner ads about the advertiser's brand new convertible. Through a sponsored Facebook post, they might even find that their friend just test-drove one at the dealer down the street.

A native advertiser might not want to promote a particular product, service or brand. The advertiser may instead want to shape issues in public debate that do not affect the company's bottom. For example, the company's founder or CEO may decide she wishes to promote animal rights or abstinence-only education, and fund content consonant with that aim.

2. Evidence Suggests Native Ads Work

a. Consumers Are Confused

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[12] *Global Trust in Advertising and Brand Messages*, NIELSEN (Sept. 17, 2013), http://www.nielsen.com/us/en/reports/2013/global-trust-in-advertising-and-brand-messages.html.

[13] *Listicle*, *WIKIPEDIA* (last visited July 17, 2014), http://en.wikipedia.org/wiki/listicle.

[14] United Television, Inc., Licensee of Television Station KMSP-TV, Minneapolis, Minnesota, 40 F.C.C. 181 (1963), *available at* http://transition.fcc.gov/eb/Orders/2011/DA-11-1170A1.html.

[15] *Cookie*, TECHTERMS.COM (last visited July 21, 2014) http://www.techterms.com/definition/cookie.

Research suggests that native advertisements are successful in achieving all three of the advertiser goals listed above. First, they do confuse consumers. A number of studies on human visual perception and online behavior have found that consumers rarely notice disclosures. Human visual attention focuses on only 1% of our visual field and is "active, goal-directed and attention-limited."[16] When users search for news articles on a trusted publishers' platform, they are likely to discount visual cues signaling that the content they are looking at is actually an advertisement. Trusted context can lull the hurried mind, and today's widely used cues are usually insufficient to jolt it awake.

There are no published, empirical studies on the association between native advertising and consumer deception, but some in-progress research supports the intuitive notion that consumers often mistake native advertisements for independently created editorial content. On December 4, 2013, researchers from the Universities of San Francisco and Berkeley presented their ongoing work. Preliminary findings presented by Professor David Franklyn of USF law school revealed that two thirds of the 10,000 subjects in his study could not distinguish paid from unpaid search results, even though the paid results were set apart using text disclosures and color boxes similar to those used by major search engines Google and Bing.[17] Another of Franklyn's studies found that 35% of consumers were unable to identify advertisements in publications even when the word "advertisement" appeared before the text. Furthermore, half of Franklyn's respondents said that they did not know what "sponsored by" meant.[18]

Chris Jay Hoofnagle, a Lecturer in Residence at Berkeley's Law and Technology Center, conducted experiments directly on consumer perception of sponsored content in the online publishing context. In his study, a sponsored article about diet pills was set apart from independently produced content on a health blog through a standard gradated text-box and a "sponsored by" text disclosure before the article. Despite these commonly used cues, 27% of respondents thought a journalist had written the piece, and 29% said that they were not sure whether a journalist or "someone else" had written it.[19] These figures likely underestimate

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[16] Jeff Johnson, Human Visual Perception: Impacts Our Ability to Distinguish Online Content from Advertising, Blurred Lines: Advertising or Content? – An FTC Workshop on Native Advertising, FED. TRADE COMM'N, (July 17, 2014) http://www.ftc.gov/sites/default/ files/documents/public_events/blurred-lines-advertising-or-content-ftc-workshop-native-advertising/part_2.pptx, at 26-41.

[17] Rebecca Tushnet, *Blurred Lines: Part 2,* 43(B)LOG (Dec. 4 2013) http://tushnet.blogspot.com/ 2013/12/blurred-lines-really-part-2-this-time.html.

[18] Edward Wyatt, *As Online Ads Look More Like News Articles, F.T.C. Warns Against Deception*, N.Y. TIMES (Washington), Dec. 14, 2013, http://www.nytimes.com/ 2013/12/05/business/ftc-says-sponsored-online-ads-can-be-misleading.html.

[19] Chris J. Hoofnagle, Native Advertising and the Berkeley Study, Blurred Lines: Advertising or Content?, FED. TRADE COMM'N, (Dec. 5, 2013), http://www.ftc.gov/sites/ default/files/documents/public_events/blurred-lines-advertising-or-content-ftc-workshop-native-advertising/part_2.pptx, at 4-14.

consumer confusion in the real world, because Hoofnagle's subjects were specifically instructed to focus on and evaluate the source of a given article, alerting them to the possibility that it had not been written by the health blog reporter. Absent such an explicit instruction, in the rush of normal web behavior, many readers would likely overlook these visual and textual cues entirely.

b. That Confusion Helps Advertisers

Such source-based confusion usually leads consumers to trust the subject of the advertisement more than they otherwise would. Numerous studies show that consumers act more positively toward a given piece of content when they believe that an independent publisher rather than an advertiser created it. A split-run test conducted more than five decades ago by *Reader's Digest* found that advertisements written to look like news copy – also known as "advertorials"[20] – worked extraordinarily well. In that case, *Reader's Digest* ran two mail-order ads for Adolph's Salt Substitute, a low-sodium alternative to regular salt meant to reduce the risk of cardiovascular disease. One ad was presented as a normal *Reader's Digest* advertisement, while the other, containing the same text material, was formatted to look like a *Reader's Digest* magazine article. The advertorial resulted in 81% more orders than the identical text set in the style of a normal ad.[21]

The relatively new practice of native advertising has yielded few complete studies by independent researchers on its efficacy in promoting sales. The preponderance of published research has been created by parties with commercial interests in demonstrating its potential. A 2012 study paid for by *BuzzFeed*and conducted by *Vizu,* a media technology company owned by Nielsen that measures online advertising campaigns, examined a one-year *BuzzFeed* native advertising campaign for *Virgin Mobile*. *BuzzFeed* dedicated five of its employees, including two creative leads and a data scientist, to the creation of daily content for a blog called "VirginMobileLive." That content ranged from listicles such as "Ten Other Things Shia LaBeouf Needs to Fake Apologize For" to "Fifteen Signs You Broke Your Cat."[22] After a year, the *Vizu* study looked at three groups of *BuzzFeed* readers – those who had never encountered the Virgin Mobile sponsored site; those who had arrived at the site directly through a paid link placement elsewhere on the *BuzzFeed* site; and those who had discovered the Virgin Mobile site laterally through links shared on social media channels like *Twitter* and *Facebook*. *Vizu* found that *BuzzFeed*

[20] The term "advertorial" was coined in 1946 by blending "advertisement" and "editorial" to describe print ads made to look like newspaper content; *see Advertorial*, MERRIAM-WEBSTER (last visited Dec. 22 2013), http://www.merriam-webster.com/dictionary/ advertorial.

[21] JOHN CAPLES, TESTED ADVERTISING METHODS (Englewood Cliffs, N.J.: Prentice-Hall, 1974)

[22] *Virgin Mobile Live*, BUZZFEED (last visited July 17, 2014), http://www.buzzfeed.com/ virginmobilelive.

readers who had seen the *Virgin Mobile* site that year were 24.1% more likely to view *Virgin Mobile* positively than those who had never encountered the site. It also found that readers who came to the *Virgin Mobile* site through an online social network such as *Facebook* were 44% more likely than those who never encountered the site to view the *Virgin Mobile* positively.[23]

In a similar study on *BuzzFeed*'s native advertising arrangement with *General Electric*, *Vizu* found a 138% increase in brand affinity for the company when its sponsored content on *BuzzFeed*was discovered via social media.[24] There are a number of possible explanations for the increase in brand affinity, which the *Vizu* studies unfortunately do not tease out. The most likely explanation is that by arriving at the sponsored content laterally through social media, readers perceived the content through the filter of an implicit endorsement from the referring friend or acquaintance and therefore developed a more positive association with the brand than they would otherwise.[25] More research is needed on the mechanisms at work in this phenomenon, but common sense and the flow of advertiser dollars support the notion that native advertising does indeed result in a better impression in the minds of consumers. Indeed, advertisers are generally willing to pay two to four times as much for a native advertisement impression as for a banner ad.[26] This willingness to pay helps to explain why legacy news media is willing to risk its reputation to get in on the action.

3. News Publishers are Willing to Take Risks

a. Publishers are Desperate for Revenue

Because its existence is in danger, the current news media is willing to take risks to stay afloat. The *Washington Post* took a hit to its reputation for independence in 2009 when *Politico*, an online news site focused on U.S. politics founded by former *Washington Post* reporters, disclosed that *Washington Post* publisher Katherine Weymouth had been hosting "salons" at her home and charging lobbyists anywhere from $25,000 to

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[23] *BuzzFeed Virgin Mobile Case Study*, BUZZFEED (last visited July 17, 2014), http:// brandlift.vizu.com/knowledge-resources/case-studies/documents/ BuzzFeed_Vizu_Virgin_Mobile_Case_Study.pdf .

[24] *BuzzFeed General Electric Case Study*, BUZZFEED (last visited July 17, 2014), http://brandlift.vizu.com/knowledge-resources/case-studies/documents/BuzzFeed_Vizu_ GE.pdf.

[25] For example, it may be the case that those who already like *Virgin Mobile* click on links related to it on social media. However, this explanation is not wholly satisfying, because most of the link headlines and text make no mention of *Virgin Mobile*. Similarly, it is possible that those who shared links to the *Virgin Mobile* site already liked *Virgin Mobile* and were in social networks that liked it also; again, however, this seems unlikely given that the content rarely referenced *Virgin Mobile* directly.

[26] Rebecca Tushnet, *Blurred Lines: Part 1*, 43(B)LOG. (Dec. 4, 2013), http://tushnet.blogspot.com/2013/12/blurred-lines-advertising-or-content_7819.html.

$250,000 to dine with reporters, editors, and editorial writers at the paper. The flier soliciting sponsors was particularly jarring, with text such as, "Underwriting Opportunity: An evening with the right people can alter the debate."[27] Similarly, the *New York Times* offers cruises hosted by its premier journalists,[28] and the *Times of London* sells its own brand of gin.[29]

Times are tough for the current news media for a number of reasons. First, subscription revenues for newspapers and magazines have plummeted. Online consumers have more free options than ever for acquiring content. Often, these free sites, especially blogs, legally or illegally offer virtually the same content as paid news sites within moments of its original posting. In 1990, daily circulation of U.S. papers stood at 62.3 million. By 2010, that figure had fallen 30%, to 43.4 million.[30] Digital subscriptions have a long way to go to make up the difference.

Second, newspapers are swiftly losing advertising revenue. In 2005, total advertising revenue for U.S. newspapers was $49 billion per year. By 2012, that figure was $22 billion per year – a 55% drop.[31] Advertising revenue is decreasing because there is much greater competition for advertising dollars overall. The democratization of publishing platforms has led to more potential platforms on which publishers can advertise, including individual blogs, discussion boards, and niche publications. In addition, new online publishers without the fixed costs of legacy media have arisen and are generally more willing than legacy media to take reputational risks to compete for advertiser dollars. For this reason, new publishers like *BuzzFeed* and the *Huffington Post* have led the way in embracing native advertising.

The Internet has also led to more competition for advertising dollars between publishers and other platforms. Classified advertisements, once an important revenue source for newspapers, have migrated to Craigslist and eBay. Also, advertisers now allocate more of their budgets to reaching consumers through social networks like Facebook, Twitter, and LinkedIn, and via paid search results on engines such as Google and Bing.

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[27] Mike Allen & Michael Calderone, *Washington Post Cancels Lobbyist Event Amid Uproar*, POLITICO (Washington) (July 29, 2009), http://dyn.politico.com/printstory.cfm?uuid=3B5502AA-18FE-70B2-A8FD90B34E41BF57.

[28] *Times Journeys*, N.Y. TIMES, (July 17 2014), http://www.insightcruises.com/top_g/ny01_top.html.

[29] The referenced *New York Times* article was originally published online on December 19, 2013. For more information on the brand of gin described, visit: *Times of London Dry Gin*, THE WHISKY CLUB (last visited July 17, 2014), http://www.timeswhiskyclub.com/gin/the-whisky-club/the-times-london-dry-gin/.

[30] Rick Edmonds, Emily Guskin, Tom Rosenstiel, & Amy Mitchell, *Newspapers: By the Numbers*, The State of the News Media 2012, PEW RES. CENTER (last visited July 17, 2014), http://stateofthemedia.org/2012/newspapers-building-digital-revenues-proves-painfully -slow/newspapers-by-the-numbers/>.

[31] *Newspaper Media Revenue 2013: Dollars Grow in Several Categories*, NEWSPAPER ASS'N OF AM. (July 17, 2014), http://www.naa.org/Trends-and-Numbers/Newspaper-Revenue.aspx.

In addition to having more options for platforms on which to advertise, advertisers also have more measurement tools at their disposal with which to judge the returns on their advertising spending and direct future spending. Ad network intermediaries capitalize on this aggregation of data to target ads toward consumers who are likely to click on them. These networks also use sophisticated data mining and machine learning techniques to improve click-through rates on ads placed across their networks.

For these reasons, advertisers are losing interest in the old banner ads offered by online publishers. Instead, they are buying "platform-agnostic"[32] visual and text ads through ad networks that offer real-time cross-platform ad placement. Numerous data inputs are continuously analyzed across all network participants, allowing advertisers to bid in real-time for particular demographics wherever they appear within the online network. This means that an advertiser's decision of whether to place an ad on a news publisher's website, on a blog, on Facebook, or on a movie ticket site like *Fandango* depends far more on algorithms determining the likelihood of users clicking on an ad than on the associational value of being presented on the platform of a particular online property.[33]

For all these reasons, newspapers are feeling the pinch. Newsroom staffs have shrunk by a third since 2000. For the first time since 1978, there are fewer than 40,000 full-time newspaper employees in America.[34] The *Boston Globe* and the *Washington Post* recently sold at a fraction of their 1990s valuations. Indeed, the *Washington Post* sold for just a bit more than the valuation of its office building in the heart of the nation's capital.[35]

b. Native Ad Revenues Help Keep Publications Afloat

Native advertising offers a lifeline to legacy news publications by providing them with more revenue per online visitor with less volatility. Advertisers traditionally value online ads in one of two ways. One way is based on "click-throughs." Click-throughs refer to an online viewer's act of manually clicking on an ad to navigate from the publisher's page to the page chosen by the advertiser. Each click is usually valued relatively highly, because it indicates that the advertiser has fully captured the attention of the consumer. However, very few readers generally choose to interrupt their reading experience by clicking on an ad. Furthermore, the number of

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[32] Through the network, ads are placed based on availability across a wide range of publishers. The advertiser does not create the ad with a particular publisher in mind, nor does the publisher know exactly which ad will be served up on its site.

[33] Michael Sebastian, *Sponsored-Content Spending Growing Faster Than Predicted*, ADAGE (Nov. 21, 2013) http://adage.com/article/media/emarketer-revises-sponsored-content-forecast-upward/245367/.

[34] *The State of the News Media 2013*, PEW RES. CENTER (Dec. 23, 2013), http://stateofthemedia.org/2013/overview-5/.

[35] Terence P. Jeffrey, *Newspaper Ad Revenue Down 55% Since Historic Peak in 2005*, CNS NEWS (Aug. 5, 2013), http://www.cnsnews.com/news/article/newspaper-ad-revenue-down-55-historic-peak-2005.

users who choose to do so is highly variable based on the nature and location of the ad. The second way advertisers traditionally value online ads is based on the number of "impressions" the ad receives. An ad impression just refers to a reader visiting a page on which an ad is present. Because the advertiser does not know whether the consumer actually noticed a given ad, let alone clicked on it, the advertiser generally pays very little per impression.

Native advertisements allow publishers to earn more per impression than they could under the traditional advertising model while helping them avoid the higher volatility in revenue of the click-through model. Because native advertisements are almost always the only ad on a given page, or are by design guaranteed a great deal of user attention per page, advertisers value impressions of them at about two to four times more than that of traditional ads.[36] To illustrate this, imagine that a given page receives 100,000 page views. On this page, a traditional ad valued on a click-through basis may be worth $1 per click. There could be high fluctuation in click-throughs, however, with 50 clicks one day and 200 the next. Publishers can earn more this way, but the reward comes with high volatility. A traditional ad valued per impression may offer one dollar for 1,000 visits to the page hosting the ad, regardless of click-throughs. The publisher can be certain it will earn a $100 per 100,000 visitors, but that is a relatively low valuation. The native advertiser, in contrast, will generally pay $200 to $400 for the same number of impressions, also regardless of click-through rate, thereby increasing revenue while minimizing volatility.

In addition, publishers can often capture even more revenue by helping to conceptualize, create, update, and operate the online content. Publishers including *BuzzFeed*, the *Huffington Post*, *Forbes*, *The Atlantic*, the *Washington Post*, and the *New York Times* have built their own in-house creative agencies for this purpose. *Digiday*, an online community for digital marketing and advertising professionals, reported in June 2013 that advertisers paid *BuzzFeed* about $20,000 to create and post a native ad to its site.[37] Another way for publishers to earn extra revenue through native advertising is to charge for social media promotion. The *Huffington Post* does this, charging $40,000 per article posted while promising advertisers four days of website and social media promotion from the *Huffington Post's* marketing team. This can net each post up to 20 million impressions, meaning advertisers pay at least $200 per 100,000 impressions.[38] Another means of earning extra revenue is allowing the advertiser to "rent" a portion of the publisher's website to publish advertiser content at will, with minimal publisher supervision. For example, *Forbes* allows advertisers to

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[36] Tushnet, *supra* note 26.

[37] Jack Marshall, *What Online Ads Really Cost*, DIGIDAY (Feb. 22 2013), http://digiday.com/publishers/what-online-ads-really-cost/.

[38] Josh Sternberg, *How Top Publishers Handle 'Sponsored Content,* DIGIDAY (Sept. 10, 2013), http://digiday.com/publishers/how-top-publishers-handle-sponsored-content/.

post an unlimited amount of content to its site for $50,000 to $70,000 per month, with a minimum commitment of three months.[39]

Legacy media such as *The Atlantic*, the *Washington Post* and the *New York Times* have followed *BuzzFeed's* lead but have tried to maintain slightly more distance between their in-house agencies and the actual process of content creation. They call their in-house units "branding consultancies." The director of Atlantic Media Strategies sees their goal as "help[ing] clients create their own media brand and content marketing strategies."[40] Yet, unsurprisingly, nearly all of Atlantic Media Strategies' clients end up placing their customized advertising content on *TheAtlantic.com*. The *Washington Post* launched a similar service in March 2013 called BrandConnect, with the goal of "connecting advertisers with the *Washington Post* audience."[41]And the *New York Times* followed suit in early 2014 with *Times* Brand Studios. The prices charged by *Washington Post* BrandConnect, *Atlantic* Media Strategies, and *Times* Brand Studios are currently not public knowledge.

II. WHY NATIVE ADVERTISING IS HARMFUL

Native advertising properly disclosed is not harmful; but properly disclosed native advertising is very often a contradiction in terms. The native ad is by definition meant to look like news copy, and in practice the disclosure is frequently all but invisible. There are some native advertising examples where disclosure is clear and corporate involvement evident. In these cases, when the corporate sponsor is disclosed clearly, the harms of native ads are largely mitigated, and consumers can obtain benefits associated with new content that would not otherwise be available. There are some examples of native ads working this way, such as Netflix's sponsorship of a multimedia package on *nytimes.com* about female incarceration in America timed to the release of the second season of its show on that topic, *Orange Is the New Black*.[42]But to date, there are far more examples of native ads not working out so well.

A. A History of Harm

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[39] *BrandVoice*, FORBES MEDIA (Dec. 23, 2013), http://www.forbesmedia.com/brandvoice-2/.

[40] Josh Sternberg, *Inside the Atlantic Media's Agency Arm*, DIGIDAY (Jan. 28 2013), http://digiday.com/publishers/the-atlantics-in-house-digital-consultancy>.

[41] *BrandConnect*, WASH. POST (Dec. 21 2013), http://www.washingtonpost.com/sf/brand-connect.

[42] This native ad was created for Netflix by the *New York Times* T Brand Studio in June 2014. The ad was focused on female incarceration in America and relayed personal narratives and data on the subject. The words "Paid Post" appear at the top of the page, along with the Netflix logo and *Times* Brand Studio. The URL begins with paidpost.nytimes and the search engine tags included "Paid Post by Netflix." See the native ad here: Melanie Deziel, *Women Inmates Separate But Not Equal*, paid post by Netflix, N.Y. TIMES N.p. 13 (June 13, 2014) http://paidpost.nytimes.com/netflix/women-inmates-separate-but-not-equal.html.

The practice of trying to capture consumer attention and trust by blurring the lines between advertisements and editorials was established long ago in the U.S. news industry. In the late 19th century, advertisers paid publishers to place "reading notices" in their newspapers. These notices looked like regular editorials or articles about products or companies, but they were written by the companies themselves and then presented independently created news stories. Advertisers paid a premium for reading notices, offering at least two times the going rate for traditional advertising clearly set apart from newsprint.[43] Advertising gurus of the age banked on consumer confusion. In 1909, author Albert Edgar published a book titled *How to Advertise a Retail Store* in which he claimed that reading notices were worth the premium precisely because the "public reads them as matters of news and not as items of advertising."[44] A guidebook for advertisers from the period, *Fowler's Publicity*, recommended that the writers of reading notices employ "modesty" in writing them so that the material would be "carefully disguised to appear as news."[45] According to Linda Lawson, a historian and author of the book, *Truth in Publishing: Federal Regulation of the Press's Business Practices, 1880-1920*, the practice of publishing reading notices was widespread by the turn of the 20th century.

Ever since their introduction, reading notices have been decried. In his memoir, a leading member of the Progressive Movement, Washington Gladden, claimed that he quit his job as a reporter at the *New York Independent* in 1874 because his editor insisted on printing reading notices. "They seem to be essentially evil, and a weakness to the paper," Gladden wrote. "My scruple may be a foolish one, but I cannot overcome it." In 1895, journalist Charles Dana lambasted reading notices, succinctly demanding that "every advertisement appear as an advertisement; no sailing under false colors."[46]Even at their introduction one hundred and fifty years ago, reading notices raised two primary concerns: that they deceived consumers and undermined the credibility of the press.

B. Harms to Consumers

Native ads deceive consumers in five ways. First, a consumer who thinks an advertisement is actually an editorial is more likely to trust the content and subject its claims to a less critical eye. Second, readers are less likely to wonder whether material facts were omitted if he or she assumes the author of the piece was not financially incentivized to promote sales. Information omissions concerning a given product are particularly harmful

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[43] LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880-1920 (Carbondale: S. Ill. Univ. Press, 1993).

[44] ALBERT E. EDGAR, HOW TO ADVERTISE A RETAIL STORE, INCLUDING MAIL ORDER ADVERTISING AND GENERAL ADVERTISING; A COMPLETE AND COMPREHENSIVE MANUAL FOR PROMOTING PUBLICITY (Columbus, Oh: Advertising World, 1913).

[45] Jack Shafer, *What's Worse than Sponsored Content? The FTC Regulating It*, REUTERS (Dec. 6, 2013), http://blogs.reuters.com/jackshafer/2013/12/06/whats-worse-than-sponsored-content-the-ftc-regulating-it.

[46] Shafer, *supra* note 45.

in the news media because readers reasonably assume that the author had hunted for unsavory truths but had not found any. In contrast, readers generally expect advertisers to hide blemishes unless forced to disclose them in the "fine print." Third, even a native ad presenting solely opinions, with no factual claims, deceives consumers by suggesting that a reputable, independent, or expert source held an authentic preference for it. Fourth, by packaging an ad so as to appear as an editorial, the publisher and advertiser may be fraudulently inducing readers to pay attention to an ad even if that reader would rather focus only on independently created content. This is related to a fifth form of deception, which is the consumer deception perpetrated by the news media, which holds itself out as providing independent information and opinion yet populates its publications with content created by or for advertisers. Readers purchase news publications to get information from a particular point of view – that of the editor and the writers. By instead receiving disguised corporate advertisements, these readers are being deceived twice over.

Then there is a consumer deception that does not pertain to a particular product, service, or brand, but rather to the interests of consumers writ large debating issues of public import. Corporate attempts to shape public opinion to help their bottom lines – possibly at the expense of consumers – span back more than a century. In 1908, for example, AT&T embarked on a massive advertising campaign to convince voters to support granting it a regulated but monopolistic right to build a national telephone network.[47] More recently, Chrysler Corporation started an advertising campaign against pollution regulations; Bethlehem Steel fought for steel import restriction; and Mobile Oil argued against an excess profits tax directed at oil companies.[48] When these advertising campaigns are presented as native ads, they can acquire the patina or independence and respectability of the host publication. Consumers may assume that the editors and journalists at a publication sincerely believe a given policy position, and therefore be more willing to accept that the position best serves the interest of consumers.

C. Harms to Citizens

The line between consumer and citizen is exceedingly thin. Just as native ads can deceive consumers, they can undermine citizens in a democracy. The news media plays an important role in American public discourse. It forges cultural and political affiliations across distance and difference. It highlights abuses of corporate, political, and religious power. It enables a heterogeneous populace to mobilize itself and to make government responsive to its needs. The media is able to fill these roles in large part because the public believes that what it publishes is the authentic opinion of the reporters and editors working there. At best, readers believe that those reporters and editors are publishing news they believe is of

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[47] Bob D. Cutler & Darrel D. Muehling, *Advocacy advertising and the boundaries of commercial speech*, 18 J. ADVER. 3, 40-50 (1989).
[48] Cutler, *supra* note 47, at 40-50.

public interest. At the very least, they believe that those editors are pandering to the public, posting content they think will grab reader attention of grow audience share, in turn increasing their publication's influence and profit. In either case, the harm of undermining these assumptions is substantial.

In her 2006 essay, "Stealth Marketing and Editorial Integrity," information policy scholar Ellen Goodman used the communicative theory of philosopher Jürgen Habermas to help explain exactly why practices such as native advertising are so damaging to both to public trust in the media and to democratic discourse.[49]According to Habermas, we engage in two types of speech acts: communicative and strategic. Communicative speech acts attemptto persuade others through two types of validity claims: the first is that what we say is objectively true; the second is that we genuinely believe what we say. People engage in communicative action to reach understanding with others and exert influence by approaching agreement on these two claims. Strategic action, in contrast, does not rely on validity claims. It simply seeks to influence others. Ellen Goodman offers a simple illustration: If a college student tells his friends he likes a song, the student implicitly promises to defend both validity claims –that the song is good and that he sincerely likes it. But if the student has been paid to endorse that song, the student cannot justify one or both of those claims if pressed.[50]

As legal scholar Hugh Baxter puts it, the strategic use of language is "parasitic on communicative action."[51]In order for strategic action like stealth marketing to work, we must assume the preconditions for communicative action – that people can speak authentically about the world as they believe it to be. In drawing on those assumptions, however, strategic action undermines them, for if we suspect our friends are paid to make music suggestions, we are less likely to trust their claims and engage with them through communicative action. In this way, strategic action can over time erode the basis of communicative action. And without the preconditions of communicative action, democratic discourse is impossible. As Goodman notes, "If communicative action is compromised in the media, public discourse necessarily suffers."[52] To the extent we lose faith in the independence of mediated communication and the sincerity of speakers, we lose faith in these channels as institutions through which we can engage in democratic life, shape public dialogue, and make government responsive to us.This is a significant loss, for as First Amendment scholar Robert Post

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[49] For an extended discussion of Robert Post, Jürgen Habermas and stealth marketing, *see* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006). This section draws largely from this article.

[50] Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 116 (2006).

[51] HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY 14 (Stanford Univ. Press, 2011), *noting* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006).

[52] Goodman, *supra* note 50, at 116.

explains, the media forms the "structural skeleton" for public discourse in a democracy.[53]

D. These Harms Are Particularly Acute Today

1. Native Ads Exploit Residual Public Trust in Media

Because Americans are encountering native advertising from a position of relatively high expectations for, or at least fond memories of, journalistic objectivity, neutrality, and independence, the harms of native advertising are particularly acute.[54] From 1950 to 1985, the press played a critical and largely independent role in many of the major events of the time, including the Watergate scandal and the Vietnam War. Media figures such as Edward R. Murrow and Walter Cronkite were widely trusted and admired.[55]For much of the 1970s and 1980s, Americans' confidence in the news media was as high as it was for the most respected institutions in the country, including the military and the church. [56]

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[53] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995).

[54] The idea of an "objective" and "independent" press as an institution checking the powerful had its roots in the technology, business incentives, and philosophies of the mid-1800s. The telegraph, invented in 1845 and deployed widely in the Civil War, generated new communicative norms based on brevity. Conveying type through telegraph way was expensive, but important. Battle casualties needed to be relayed. So short, clear, factual statements became the way of the medium. An emphasis on fact was buttressed by the growth of positivist philosophy and realist movements in art. The telegraph helped usher in the "inverted pyramid" method of relaying information, which replaced standard narratives with beginning, middles, and ends, with a structure that placed the most newsworthy information at the top of the article and then progressed toward the least important information at the bottom.

By the time of World War I, telegraph fees had all but evaporated, leaving new norms of information conveyance as residue. Transportation costs fell as well, enabling larger corporations like Proctor and Gamble and Sears Roebuck to sell their goods across ever-wider geographic swathes of America. With an expanded market, these corporations had an appetite for advertising in venues that could provide them with ever-larger audiences. Over time, market pressures, and some larger-than-life media moguls, consolidated the news industry and led to fewer media companies achieving greater and greater scale. This in turn led to larger and steadier economic returns, with benefitted those companies and large corporate advertisers. A full discussion of this transformation can be found in Lawson, *supra* note 43.

[55] Jim Poniewozik, *Walter Cronkite: The Man With America's Trust*, TIME. INC. (July 17, 2009) http://content.time.com/time/nation/article/0%2C8599%2C1911501%2C00.html.

[56] In the 1970s and 80s, 80% and 90% expressed trust in the news media. That confidence has plummeted since the late 1980s to 23%. Today, even fewer people trust news media than trust banks (26%), which are widely disparaged for helping to precipitate the 2008 financial crisis. For a look at changing public trust in news media, see *Confidence in Institutions*, GALLUP (last visited July 18, 2014), http://www.gallup.com/poll/1597/ confidence-institutions.aspx.

Americans' trust in the news media has plummeted since the mid-1980s.[57] In his book, *Why Americans Hate the News Media and Why It Matters*, Jonathan Ladd explains that much of this decay in trust has come from increasing political polarization, resulting in "elite partisan media criticism" from all sides. This, in turn, has led to a feedback loop in which partisan criticism undermines the press and exacerbates hyper-partisanship by eroding shared understandings of facts and willingness to listen to opinions that differ from one's own.[58]

However, even though polls show that much of the public's trust in media's coverage of political matters has evaporated, it does not necessarily follow that the public has lost trust in the product reviews of such publications, or in its coverage of issues that are not closely linked to the partisan debates of the day. In fact, when it comes to product reviews and other areas like travel, technology, sports, and health, the media is likely still considered trustworthy as a third party. This would certainly explain why advertisers are still willing to pay so much for positive reviews in the press. A 2013 Nielsen's global advertising study shows that 67% of respondents from around the world completely or partially trust "editorial content such as newspaper articles" when making determinations about products or brands. In contrast, only 42% trust banner ads clearly identified with the brand behind the product or service.[59]

There are several reasons why readers likely retain trust in newspapers' product reviews and nonpolitical coverage even as they have lost faith in their political independence. First, newspapers have never sustained criticism from the business community for their product reviews. Companies that have received negative reviews generally do not want to draw more attention to those reviews by attacking them vociferously. In addition, competitors are likely to offset any company's complaint about a negative review by citing that review as validation of the relative strength of their product or service offering. Second, businesses that receive positive reviews are eager to promote the legitimacy and independence of the reviewer. Finally, for years, the political attacks made against newspapers were based on the idea that the media was ideologically biased toward one party or another. As such, the complaints did not suggest that the media was incompetent but rather that it was so competent as to be conspiratorially advancing a partisan political agenda.When clear partisan

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[57] *See supra* note 56 and accompanying text.

[58] JONATHAN M. LADD, WHY AMERICANS HATE THE MEDIA AND HOW IT MATTERS (Princeton Univ. Press, 2011).

[59] The Nielsen study did not break down trust by country, unfortunately. Also, the study does not precisely define what it means to "trust" a statement about a product according to its methodology. However, it is certain that trust involves believing in the accuracy of facts stated in an ad, and it probably also includes a general impression that the ads' subjective implications are reasonable. See the study here: *Global Trust in Advertising and Brand Messages,* NIELSEN (Sept. 2013), http://www.nielsen.com/us/en/insights/reports/2013/global-trust-in-advertising-and-brand-messages.html.

stakes are stripped from coverage, whether in product reviews or lifestyle pieces, the newspaper seems to retain significantly more reader trust.

2. Native Ads are Especially Hard to Identify

The online world is comprised of many different platforms and service offerings,[60] and when native ad content moves between them – from e-readers to social networks – disclosure language can be inadvertently or deliberately peeled off so the content looks like it was written by the publisher hosting it. A common example occurs on the publisher's websites themselves. Some publishers allow native advertisements to appear on their "most read" or "most emailed" tabs, which consumers may reasonably assume only promote articles written independently by the staff of that publisher.[61]

Google's PageRank algorithm and others like it generally treat native advertisements the same way as articles for the purposes of returning search results to users. According to Google, its PageRank system "works by counting the number and quality of links to a page to determine a rough estimate of how important the website is."[62] Native advertisements with online publishers are usually impossible to distinguish from independently produced articles based on their web addresses, or URLs. Keywords such as "sponsored by" or "advertisement" are often presented in image graphics so that they elude search engine crawlers, which means that for the purposes of returning and ranking Google search results, native advertisements and genuine articles can appear identical.

For example, a banner advertisement for Samsung's new phone would likely appear very, very low, if at all, in the Google search results for "new cell phone." However, if Samsung instead bought a native advertisement with the *Huffington Post* or the *New York Times*, its advertisement would enjoy the page ranking advantage conferred on all *New York Times* articles. From the perspective of Google's crawlers that help determine rank, the Samsung native ad on *Huffington Post* and the article written by its independent tech reviewer would look identical and would be distinguished only by which article was more often linked to by other sources. If the sponsored article was particularly witty or entertaining, it might very well outrank the in-house *Huffington Post* review, potentially creating the impression in the mind of the reader that the native advertisement was in fact the independent review of the site. For many of today's advertising executives, content that is "Search Engine Optimized" to appear high on Google's search result rankings is the holy grail of native advertising. As an added bonus, some native ads are introduced by a "disclosure gateway" page that informs the reader he or she

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[60] For example, advertisers, especially those targeting younger viewers, are creating their own "advergames" – a recent portmanteau of "advertisements" and "games" that describes games created to promote a commercial product or message.

[61] Rebecca Tushnet, *Blurred Lines: Part 3*, 43(B)LOG (Dec. 5, 2013), http://tushnet.blogspot.com/2013/12/blurred-lines-part-3.html.

[62] *Page Rank*, *WIKIPEDIA* (last visited July 17, 2014), http://en.wikipedia.org/wiki/PageRank.

is about to see an ad. When reached via a link from Google or a social network rather than directly through the site of the publisher, this gateway page may well disappear, making the article indistinguishable from regular content.

3. Native Ads Disproportionately Harm Marginalized Groups

A related problem is that online native advertising disproportionately harms marginalized groups such as the very young, the very old, new immigrants and the poor. These groups often have smaller devices with which to see disclosures, worse eyesight, and less knowledge of what a disclosure signifies. Those for whom English is not their native language are also more likely to receive information through translated aggregator sites that often leave out disclosure information, especially when it is originally presented in image and not text form. This is particularly dangerous because studies have shown that underserved communities are at high risk of becoming victims of online fraud.[63]

III. WHY THE GOVERNMENT SHOULD REGULATE NATIVE ADVERTISING

A. Publishers Are Unlikely to Check One Another

Online news publishers are not likely to police themselves. The economic free-fall of the newspaper industry has created a world where the vast majority of major online news publishers provide native advertisement offerings. Over the past year, individuals, progressive publications, and smaller blogs have generally called out the most egregious abuses of the practice, such as *TheAtlantic*'s Scientology native ad. But most criticisms of various native advertising media practices come from smaller blogs that rarely obtain high Google rankings. In addition, news media often alter their sites many times a day; thus, if a particular advertisement gets too much negative press, they can pull it from the website without even posting a retraction in its place.

Online media publishers have done little to standardize their disclosure language to help consumers separate ads from editorial content. Indeed, commonly used terms such as "sponsored by," "created in partnership with," "presented by" and so forth have no industry-standard definitions.[64]

A. PRECEDENT SHOWS GOVERNMENT CAN HELP

Government curbed the worst excesses of reading notices in the early 1900s, to the benefit of publishers, advertisers, and readers. Congress passed the Newspaper Publicity Actin 1912 as an additional provision tacked onto a regular postal service appropriations bill. This Act mandated

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[63] Tushnet, *supra* note 17.

[64] Josh Sternberg, *Time To Define Native Advertising*, DIGIDAY (Apr. 18, 2013) http://digiday.com/publishers/time-to-define-native-advertising/.

that all publishers seeking subsidized postage clearly label as advertising all pieces for which valuable consideration was paid. Over the preceding decades, the U.S. postal service had struggled to distinguish "publications designed primarily for advertising purposes," which were ineligible for subsidized second-class postage rates, from those that were eligible. By 1905, the post office employed 40 full-time clerks to review publications seeking subsidized postage, yet the Third Assistant Postmaster General felt his office was coming up short. In 1906, he estimated that "more than 60 percent of the newspapers and up to 80 percent of the magazines receiving the subsidy were not entitled to it."[65] Without disclosure requirements, however, determining what was a reading notice and what was not created an impossible task for the clerks.

The disclosure provision of the Newspaper Publicity Act, which passed with little discussion, helped those clerks immensely.[66] After the passage of the Newspaper Publicity Act, advertisers and some publishers complained and challenged the law. In 1913, the U.S. Supreme Court upheld the law on the grounds that Congress could set parameters on the provision of a government subsidy without contravening First Amendment rights. Reading notices quickly declined in the years after the passing of the Newspaper Publicity Act, preventing a race to the bottom, and setting the stage for the growth of a mass-market newspaper embracing ideals of objectivity and independence.[67]

B. The Benefits Outweigh the Costs

There are several plausible arguments against government regulation of native advertising, most of which contend that the risks of such regulation outweigh the potential benefits. One argument is that consumers enjoy native advertisements more than regular advertisements and that, therefore, the potential increase in confusion is mitigated by the overall improvement in consumer experience. However, this argument does not explain why the confusion itself would be part of the enjoyment or why it cannot be mitigated by more sophisticated disclosure requirements.

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[65] LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880-1920 109-10 (Carbondale: S. Ill. Univ. Press, 1993).

[66] Ross D. Petty, *From Puffery to Penalties: A Historical Analysis of US Masked Marketing Public Policy Concerns*, 5 J. HISTORICAL RESEARCH IN MRKG. 1, 10-26 (2013) (quoting Kielbowicz, Richard, and Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L. J. 329 (2003).

[67] In 1880, newspapers' advertising revenue amounted to an estimated $30 million, accounting for 44% of newspaper revenue. By 1920, it was $850 million, accounting for two thirds of newspaper income. Economic success among media entities, in turn, created journalism as a profession. For a more detailed discussion of this evolution see: LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880-1920 (Carbondale: S. Ill. Univ. Press, 1993)

A second argument against regulation considers it unnecessary and paternalistic. If native advertising continues unabated, the argument maintains, consumers will change their expectations of online news media on their own and continue to lose trust in its editorial independence. While that may be true, it does not address the current harm of native advertising deceiving consumers. Government actions against deceptive advertising practices can raise consumer awareness and help them make better-informed decisions. Furthermore, this argument does not address the harms associated with the wholesale erosion of public trust in news media.

A third argument against regulation is that it will lead to even more subversive advertising practices. However, this argument could be made against almost all form of government regulation. The challenge here is to craft smart regulations; unless it is shown that this is not possible, it does not make sense to jump to the conclusion that only market forces or nothing can address the harms of native advertising.

A fourth argument against FTC regulation is that it will actually hasten the death of credible news media. Regulatory action will dissuade legacy publishers from embracing native advertising, costing them revenue that they need to survive. That revenue would instead migrate to upstarts willing to take reputational risks, such as *BuzzFeed*. The converse of this, however, is equally if not more likely. By regulating native advertising more aggressively, the government could level the playing field between legacy and startup publications, and help both resist a race to the bottom.

PART TWO: HOW TO REGULATE NATIVE ADVERTISING

Native ads can be categorized along two continuums: 1) the commercial nexus of the native ad, or how closely the ad is tied to the sale of a particular product, service or brand; and 2) the locus of editorial control, or to what extent the advertiser or publisher has final say over the creation and deployment of the ad. In the following section on how to protect consumers, I argue that the Federal Trade Commission has adequate authority to regulate native ads closely tied to the sale of a particular product, service, or brand regardless of the locus of editorial control. In Section II, on how to protect citizens, I demonstrate why the FTC cannot regulate native ads that are less closely tied to promoting the sale of a particular product, service, or brand. I argue that these native ads can still be dangerous, however, because they undermine public faith in the institutional media, and in turn erode public discourse. I conclude by offering alternate ways of curbing the most problematic noncommercial native advertising practices.

I. HOW TO PROTECT CONSUMERS

The Federal Trade Commission has substantial powers to regulate "commercial speech," which the Supreme Court defines as speech that "solely proposes a commercial transaction" or is "made in order to make a

profit."While this definition is very fuzzy at the edges, the present section focuses on speech that almost certainly falls under the Supreme Court's definition of commercial speech.[68] This definition includes native ads oriented directly toward boosting sales of a particular item or service or toward improving consumer associations with a particular brand. It may or may not include native ads that aim to shape public opinion in a direction that is likely to advance the commercial interests of the advertiser (the determination is made by the courts on a case-by-case basis). And this definition certainly excludes native ads aimed at shaping public opinion on issues with no discernable connection to the sale of goods or services or to boosting brand image.

A. Use Existing FTC Authority to Regulate Commercial Native Ads

The FTC has substantial powers to protect consumers under the Federal Trade Commission Act (FTCA) of 1914, which declares "unfair or deceptive acts or practices in or affecting commerce" to be unlawful and charges the FTC with preventing them. Section 5 of the FTCA authorizes the FTC to halt such acts by initiating administrative or judicial proceedings against alleged violators.[69] It also grants the FTC authority to prevent illegal acts by promulgating industry-wide, binding regulations and issuing non-binding administrative guidelines.[70]

Over the past century, the FTC has brought thousands of cases against advertising that it deems to be "deceptive." In that time, administrative and federal case law have developed a test for a finding of deception. To be deceptive, an ad must be likely to mislead consumers

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[68] There are no bright line rules distinguishing commercial from noncommercial speech. Academics have convincingly demonstrated that Supreme Court jurisprudence in this area over the last three decades largely advances the views on individual justices on the desirability of government regulation of various sectors. For more on the problems with the commercial speech doctrine and its susceptibility to rulings based on policy preferences, see: Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

[69] The FTC can issue complaints against individuals or entities in administrative or judicial proceedings if the FTC has "reason to believe" a law has been broken. The defendant can then either settle before going to proceedings or contest the charges. Often defendants settle by signing a consent decree where they agree to stop the offending practice and waive the right to judicial review but without admitting liability. In cases where the defendant goes to court, any administrative decisions can be appealed through the U.S. federal court systems up to the U.S. Supreme Court.

[70] As the FTC notes on its site, its guidelines are "administrative interpretations of the law intended to help advertisers comply with the Federal Trade Commission Act; they are not binding law themselves." To determine whether a guideline is in fact the law, an offender would have to challenge any FTC action against it in court. Rarely do companies feel so inclined. Thus, the Commission can issue guidelines for entire industries in the hopes that the threat of its actions will curb practices it think are deceptive.

acting reasonably under the circumstances in a manner material to a consumer's purchase decision.[71] This test and court interpretations of it grant the FTC substantial latitude to regulate native ads for three reasons. First, for a finding of deception, proof of "actual deception" is not necessary. All that is required is to show a "capacity or tendency to deceive."[72] Second, in determining whether an advertisement is deceptive, the FTC examines "the entire mosaic, rather than each tile separately."[73] Even if every component of an ad is factually accurate, if taken together they convey a false or misleading impression, the whole ad may be deceptive. As the Court of Appeals for the Third Circuit maintained in *Beneficial Corp. v. FTC*, the "impression created by the advertising, not its literal truth or falsity, is the desideratum."[74]This also means that a factually accurate native ad can be deceptive if it confuses viewers as to its source. Finally, because deceptiveness is determined from the perspective of a reasonable consumer, even if a disclosure alerts savvy readers to the presence of a native ad, the ad could still be deceptive if a "substantial minority" of viewers reasonably misses that disclosure.[75]

The FTC has already used these powers to bring charges against native advertisers promoting false product claims. It has the power to bring similar charges against native ads masquerading as expert endorsements and subjective testimonials, although it has not yet taken steps to do so.

1. Promoting False Product Claims

When native ads advance false factual claims about products or services, the FTC has unquestioned authority to intervene and it has already exercised that authority.[76] For example, in 2010, the FTC filed a major complaint against beverage manufacturer POM Wonderful, which claimed that two of its products were capable of preventing or treating diseases including "heart disease, prostate cancer, and erectile dysfunction."[77]POM sought to advance these claims through traditional ads at bus stops and on billboards, and through native advertising. The claims,

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[71] *FTC Policy Statement on Deception*, FTC (June 28 1983), http://www.ftc.gov/ftc-policy-statement-on-deception.

[72] F.T.C. v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963).

[73]Beneficial Corp. v. F.T.C., 542 F.2d 611 (3d Cir. 1976).

[74]American Home Products Corp. v. F.T.C., 695 F.2d 681 (3d Cir. 1982).

[75]Charles of the Ritz Distribs. Corp. v. F.T.C., 143 F.2d 676 (2d Cir. 1944).

[76] Since 2000, the FTC brought challenges against fake health websites boosting products from anti-aging and weightless pills to shady debt reduction plans. In these cases, the companies or their advertising agents created and hosted content that looked like independently created newspaper copy. They did not, however, pay a major publisher to place the copy in their publications. For a representative case of the FTC regulating a fake news websites, see: Fake News Sites Promote Acai Supplements, FTC (July 18, 2014), http://www.consumer.ftc.gov/articles/0299-fake-news-sites-promote-acai-supplements.

[77] *FTC Complaint Charges Deceptive Advertising by POM Wonderful*, FTC (Sept. 27, 2010), http://www.ftc.gov/news-events/press-releases/2010/09/ftc-complaint-charges-deceptive-advertising-pom-wonderful.

however, were drawn entirely from deeply flawed research that POM itself had funded.

POM promoted its false health claims through native ads in magazines including *Parade*, *Fitness*, *Prevention*, and the weekend magazines of the *Washington Post* and the *New York Times*.[78] In the words of the administrative court, these native advertisements "employed an advertorial format" and adopted a "serious" and "objective" tone in support of its scientific claims.[79] POM's native advertising strategy was troublingly sophisticated. Whenever confused independent publishers mistakenly quoted POM's native advertisements as if they had originated from other independent press, POM quoted those publishers as the source of their claims. In this way, POM updated its native ad campaign so that subsequent ads quoted not its own research but the independent newspaper articles that quoted POM's prior native ads. This made POM's claims appear as though its claims were issuing from reputable media rather than from POM itself. In effect, POM capitalized on journalistic laziness to launder its health claims through the legitimizing wash cycle of a self-referencing news media.

The FTC issued a complaint in 2010 and won 5-0 on appeal in 2013. The final administrative order banned POM marketers from making any claim that its products were "effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease"[80] unless the claim was supported by "two randomized, well-controlled, human clinical trials."[81] The final order did not address restitution to consumers, but the FTC's original order left open that possibility.[82]

2. Masquerading as Independent Expert Endorsements

The FTC has not yet filed any complaints against native ads presenting themselves as independent endorsements, though it has ample authority to do so. Even if a native ad does not advance a false claim, it can still be considered deceptive if it can be mistaken for an independent endorsement by the publication in which it appears. Especially in the

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[78] POM Wonderful, et al., F.T.C. No. 9344 (Sept. 27, 2010).

[79] *Administrative Law Judge Upholds FTC's Complaint That POM Deceptively Advertised Its Products as Treating, Preventing, or Reducing the Risk of Heart Disease, Prostate Cancer, and Erectile Dysfunction*, FTC (May 21, 2012), http://www.ftc.gov/news-events/press-releases/2012/05/administrative-law-judge-upholds-ftcs-complaint-pom-deceptively.

[80] POM, *supra* note 78.

[81] *FTC Commissioners Uphold Trial Judge Decision That POM Wonderful, LLC; Stewart and Lynda Resnick; Others Deceptively Advertised Pomegranate Products by Making Unsupported Health Claims*, FTC (Jan. 16, 2013), http://www.ftc.gov/news-events/press-releases/2013/01/ftc-commissioners-uphold-trial-judge-decision-pom-wonderful-llc.

[82] John R. Fleder & Riëtte Van Laack, *FTC Hammers POM Wonderful: Now On to the World Series*, FDA L. BLOG (Jan. 17 2013), http://www.fdalawblog.net/fda_law_ blog_ hyman_phelps/2013/01/ftc-hammers-pom-wonderful-now-on-to-the-world-series.html.

context of expert assessments, the FTC has long pursued endorsers that claim to be independent while in fact receiving some form of consideration for the endorsement of particular products.

One of the first complaints ever filed by the FTC concerned this practice. In 1917, the FTC filed a complaint against Vacuum Cleaner Specialty Co. Inc., a New York-based company that sold vacuums across the United States. As part of its outreach to customers, this company created a ranking of vacuum cleaners that it presented in an editorial voice and style. Vacuum Cleaner Specialty Co. Inc. claimed to be offering independent assessments of the cleaners when, in fact, it had a special financial interest in one brand in particular called Imperial. Imperial vacuum cleaners were manufactured especially for sale by Specialty. Nearly all profits from the sale of these cleaners went to Specialty, whereas in the case of all the other brands, Specialty had to share a substantial portion of profits from sales with the manufacturers. As one might expect, Specialty consistently ranked the Imperial brand ahead of all its rivals. An FTC administrative judge ordered Specialty to "cease and desist" the circulation of such ratings sheets immediately. Specialty complied.[83]

In December 2009, the FTC released *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, which unpacked the implications of its Section 5 authority to prevent deceptive advertising across radio, TV, print, and online media. The FTC claimed authority to hold both the advertiser and the publisher liable for failure to disclose material connections that might influence an endorsement.[84] Of particular relevance to online news publications, the guidelines hold "expert organizations" to an "elevated standard when it comes to endorsements" because they "typically are seen as a collective group of people whose knowledge and experience outweighs that of an individual endorser, and are viewed as being void of subjective elements that could distort professional endorsement opinions as compared to an individual." [85] Therefore, a news organization explicitly or implicitly claiming expertise and issuing an endorsement must ensure that "a legitimate process exists" to demonstrate than its endorsement is an "accurate reflection" of the organization's judgment.[86] Native advertisements that appear to originate from the organization but in fact come from advertisers are very likely run afoul of this provision.

3. Masquerading as Sincere Testimonials

The FTC also has a long history of policing paid testimonials, brokered content, and payola. Paid testimonials are preferences for a given

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[83] Federal Trade Commission v. Vacuum Specialty Cleaner Co. Inc., 3 F.T.C. 377-86 1(921).

[84] Revised Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2009), http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf.

[85] Revised Guides, *supra* note 84.

[86] Revised Guides, *supra* note 84.

product, service, or brand as expressed by an ordinary consumer, celebrity, or organization that is paid by an advertiser. Brokered content refers to content created by an advertiser and given, either for free or for some consideration, to a broadcaster or publisher who then uses the material as part of an editorial package. Payola refers to the practice of an advertiser paying a radio or TV broadcaster to feature their products.

The FTC has wide authority to police these practices, primarily under Section 317 of the Communications Act of 1934, as amended in 1960 and again in 1996. Section 317 requires radio and TV broadcasters to disclose to their listeners or viewers whether "matter has been aired in exchange for money, services or other valuable consideration."[87] This provision, along with Section 5 of the FTCA, has been used to police payola on the radio, along with infomercials on TV. In the 1980s, the FTC issued complaints against infomercials, such as the case against a sunglasses manufacturer that tried to pass off a thirty-minute infomercial it had created as if it were an independent talk show with "spontaneous" street trials where new wearers responded with enthusiasm to the product.[88] More recently, Fox Television in Minneapolis was fined $4,000 for airing a General Motors "Video News Release" featuring its new convertible without disclosing the fact that it had received the footage from General Motors.[89]

In 2003, the FTC issued the first iteration of its *Dot Com Disclosure* guidelines, which are readily applicable to native ads.[90] These guidelines instruct online entities of all kinds – from social networks to news publishers – to "ensure that any disclosures fit into the context in which the advertising appears and are placed in close proximity to the ad."[91] Since 2000, the FTC has sent targeted letters to industry leaders, warning them that certain industry-wide practices may violate Section 5. It has also updated the guidelines to track online developments. For example, after numerous reports of celebrities being paid thousands of dollars to send tweets to their followers boosting particular products, it issued recommendations specifically for disclosures on Twitter.[92] Further, in 2013

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[87] *Payola and Sponsorship Identification*, FCC (last visited July 20, 2014), http://transition.fcc.gov/eb/broadcast/sponsid.html.

[88] Fernando A. Bohorquex Jr., *A Guide to Native Advertising's Legal Issues*, *Media Connection*, (Dec. 2, 2013), http://www.imediaconnection.com/content/35490.asp#311KFBakBvOHlw8f.99.

[89] Liab. of United Television, Inc., Licensee of Television Station KMSP-TV, Minneapolis, Minnesota, F.C.C. (2011), *available at* http://www.fcc.gov/document/fox-television-stations-inc-licensee-station-kmsp-tv-minneapolis-minnesota.

[90] For a history of Section 317 of the Communications Act and its application to payola in the radio industry, *see*: Ronald H. Coase, *Payola in radio and television broadcasting*, 22 J.L. & ECON. 269-328 (1979).

[91] *Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FTC (Mar. 2013), http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

[92] Patrick Coffee, *FTC Threatens to Give Bieber a Spanking*, PRNEWSER, (June 19, 2013), http://www.mediabistro.com/prnewser/ftc-threatens-to-give-bieber-a-

the chairperson of the FTC warned search engines to make greater efforts to clearly indicate disclosures of sponsored search results. In a number of cases, the FTC has called for particular methods of disclosure, such as shading sponsored search results or placing borders around them. It has also issued guides on where to place disclosure language, how prominent to make such language, and when to repeat it.[93]

Because the types of disclosure requirements that work best for search engines may not readily apply to native ads, the FTC should consider drafting tailored guidelines for online news media. By drawing on behavioral science and online user experience research, the FTC could work to craft disclosure requirements that effectively inform users about the source of the content without unduly impairing their browsing experience.

II. HOW TO PROTECT CITIZENS

A. How the Supreme Court Tied the FTC's Hands

While the FTC has substantial power to protect consumers by regulating commercial speech under Section 5 of the FTCA, noncommercial speech almost entirely eludes its grasp. The line between these two categories of speech – both in everyday life and in legal doctrine – is blurry, with significant consequences for native ads.[94] The Supreme Court created

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spanking_b66388; For more examples, *see*: Jo Piazza, *How Much Can a Celebrity Make for Tweeting?*, VULTURE (Jan. 28, 2012), http://www.vulture.com/2012/01/how-much-can-a-celebrity-make-for-tweeting.html.

[93] Disclosure policy and strategy is itself a vast field with new innovations matching new mediums. Ultimately, determining the efficacy of various disclosure requirements and crafting them so they effectively inform users about the source of the content without unduly impairing their browsing experience is an ongoing expert task requiring expert input far beyond the capabilities of lawyers and regulators—it requires insights from behavioral scientists, user design experts, and more.

[94] To see the difficulty in drawing the line, imagine *Reebok* wants to engage in a native advertising arrangement with the *Washington Post*. If *Reebok* created a post called "Ten awesome things you can run on with the new *Reebok* cleats," the FTC would have clear authority to review and regulate this as commercial speech. Similarly, if *Reebok* paid the *Washington Post* to have a *Washington Post* reporter write his or her own, independent product review of a new line of *Reebok* sneakers, the FTC could address this as it runs afoul of FTC guidelines on expert endorsements.

But imagine instead that *Reebok* paid the *Washington Post* to create a blog on *washingtonpost.com* entitled "Why Team Sports is Good for You." The posts on the site would be provided by *Reebok* and would feature pieces summarizing and citing numerous studies showing the psychological and physiological benefits of playing team sports. Here, the advertiser is using the platform to get its particular message out to the readers of a publication, but that message is not about its product or brand. It does not seem to be created to advance the company's direct financial interests. Or imagine a case in which *Reebok* pays the *Washington Post* to create an online "Soccer" section on its website. Because of *Reebok*'s money, allocated specifically and exclusively to the creation of the *Soccer Section*, the

the category of commercial speech in order to provide it with less protection than fully protected speech (e.g., individual expression on issues of public import) but more protection than unprotected speech (e.g., incitements to imminent lawless action).In practice, this means that if courts consider a native ad to be "commercial speech," the government has broad authority to regulate it. On the other hand, if a native ad is deemed to be "noncommercial speech," it is exceedingly difficult if not impossible for the government to regulate it.[95]

Over the past twenty years, the Supreme Court has been shrinking the category of commercial speech and according full First Amendment protection to more and more speech by corporate speakers.[96] This trend has diminished the regulatory purview of a number of federal agencies, including the FTC. In the context of native advertising, it has diminished the range of native ads subject to FTC oversight.

The FTC's purview may shrink even further still in the years ahead as the Supreme Court has important commercial speech decisions on the horizon. It was faced with one such decision in *Nike v. Kasky*, which presented the question of whether the sporting goods company Nike could be sued under a Californian false advertising law for, among other things, ads it placed in newspapers defending itself against consumer advocates' accusations that it was "mistreating and underpaying" its workers in

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Washington Post is able to hire three new reporters who can travel the world covering soccer matches along with famous soccer players, coaches, team owners, and fans. The reporters are selected by and operate entirely under the *Washington Post*'s editorial control just as any other independently hired staff reporter for the paper would be. The advertiser is not conveying a particularized message but rather supporting a field of content that is individually and independently populated by the publication.

The lines between what is commercial and noncommercial speech, already blurry, get even more complicated swiftly. For example, imagine *Reebok* insists as a condition of its "Sponsorship" of the *Soccer Section* that all articles in the section focus exclusively on the successes of the American soccer team. What if it so happened that the American soccer team was also sponsored by *Reebok*? And what if all those team members now only wore *Reebok*'s new line of cleats?

[95] If a native ad is considered "commercial speech," the government can regulate it under intermediate scrutiny, which means that to survive a challenge, government regulation need only be substantially related to an important government interest. If the speech is deemed unprotected speech – such as false commercial speech – the government can regulate it under rational basis review, which means the regulation must be rationally related to a permissible government interest. If, however, the speech is categorized as fully protected speech, government regulation must survive strict scrutiny, meaning it must advance a compelling government interest in a narrowly tailored manner while be the least restrictive means of doing so.

[96] For an extensive discussion the Supreme Court extending greater First Amendment protection to corporate speakers, see: Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000). And for a discussion of the effects of recent Supreme Court commercial speech decisions and their role in eroding regulatory bodies, see: Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010).

developing-world factories.[97] Nike argued that its statements, including the advertisements, constituted noncommercial speech. Because Nike had become the poster company for anti-globalization protests, Nike argued that it had to use its own brand as a way of engaging in a broader public debate. Nike emphasized that the individual ads did not attempt to sell particular shoes. As a result, Nike argued that any speech it made in this context was speech on a public issue and could not be subject to false advertising laws.[98] The Supreme Court dismissed the case, saying that the writ of certiorari had been improvidently granted, and the parties ended up settling without a finding of fact on the accuracy of Nike's ads. The First Amendment question therefore remains open, with enormous consequences for the regulation of native advertising.

B. The Harms of Noncommercial Native Ads

1. From Diffuse to Specific Advertiser Influence

Publishers have long relied on advertisers for money, but the relationship between advertisers and publishers today is uniquely harmful for three reasons. First, the collaboration between advertisers and publishers is closer than ever. Over the past three years, online news publications have started in-house marketing teams that draft native ad content for advertisers in the tone and style of the publisher. Second, advertisers have more direct control over the content created than ever before. In many cases, the advertiser funds a specific topic or article. In some cases, it even creates the content and places it directly on the publisher's site.[99] Third, there is great confusion both in the public and within the media industry about what types of relationships exist between various advertisers and publishers. Commonly used disclosure terms, for example, are unclear even to advertising executives.[100]

In a prescient 1998 essay, media scholar Wendy Williams predicted an online world in which advertisers usurped editors. "Advertisers have traditionally influenced news more in the deselection of things covered than in blatant and unbalanced coverage in a single article or newspaper," she wrote. For example, advertisers may have preferred their ad to be featured in the travel section of local papers, which may have skewed the publisher's allocation of resources between sections, but one company did not dictate the entire real estate section of a major newspaper.[101]Similarly, automakers releasing new convertibles did not sponsor particular stories

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[97] Nike, Inc. v. Kasky, 539 U.S. 654 (2003).
[98] Kasky v. Nike, Inc., 45 P.3d 243 (2002).
[99] *BrandVoice*, FORBES MEDIA (Dec. 23, 2013), http://www.forbesmedia.com/brandvoice-2/>.
[100] Josh Sternberg, *Time To Define Native Advertising*, DIGIDAY (Apr. 18, 2013), http://digiday.com/publishers/time-to-define-native-advertising/.
[101] Even when marketing divisions of newspapers created special real-estate print sections in the 1980s and 1990s that looked remarkably similar to the rest of the paper, they rarely, if ever, were sponsored by a particular advertiser. Rather, they served as posting boards for the listings from many realtors.

on the joys of driving a convertible before releasing their own. And military contractors did not pay publishers to feature the analysis of favored writers alongside their world coverage. As Williams predicted, the scale of native advertising, the ability of advertisers to specify particular content, and advertiser control over editorial perspective have all become uniquely problematic.

2. Quid-Pro-Quo Corruption or its Appearance

Another way of understanding the unique dangers posed by noncommercial native ads is to consider laws governing bribery in political campaigns.[102] Like editors, politicians are buffeted by numerous forces. While politicians face voters, donors, and their own conscience, editors face readers, advertisers, and their own judgments of newsworthiness. Voters expect numerous factors to affect a politician's decision on how to vote; likewise, readers expect numerous factors to influence an editor's decision of what to publish. Nonetheless, voters do not expect a politician to sell a particular vote for a given sum of money; in the same way, readers do not expect an editor to sell an individual article or editorial to the highest bidder.

Even if a given exchange of money between donor and politician does not lead to such quid-pro-quo corruption, the mere appearance of such corruption is deeply corrosive to the institution. The Supreme Court has ruled that, in the context of political campaigns, the risk of such quid-pro-quo corruption is so damaging to public faith in democracy that the government has a compelling interest in prohibiting such exchanges. Similarly, the potential for a direct exchange of money for an editorial slant on a particular article so corrodes public faith in media institutions that, even if a particular exchange is not corrupt, the prevalence of the practice undermines the overall institution. This is especially true if the relationship between publisher and advertiser is unclear to the reader. In this case, even the most innocuous advertiser-publisher relationships could reasonably be perceived to be corrupt. If this practice is allowed to continue, readers will cease to give publishers any benefit of any doubt, as was the case when journalist Rick Perlstein encountered a national security blog sponsored by defense contractor Northrop Grumman on the website of the *New Republic*.

3. A Native Ad Without the Benefit of the Doubt

Just eight months after *The Atlantic*'s Scientology native ad provoked outrage, the *New Republic* launched a new blog called *Security States*, which republished posts from the independent group blog *Lawfare*.[103] On September 30, 2013, a *Lawfare* author and Brookings Institution Senior Fellow posted on *Lawfare*, "Coming Tomorrow:

[102] For an extended comparison, *see* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. LAW REV. 85 (2006).

[103] *Security States* is available at http://www.newrepublic.com/tags/security-states. *Lawfare* can be found at http://www.lawfareblog.com/.

Teaming Up with the New Republic." In the post, he mentioned that the collaboration was "being sponsored by Northrop Grumman Corp."[104]On October 1, 2013, the *New Republic* announced the *Lawfare* partnership in a press release, which included the following sentence: "This partnership is made possible by Northrop Grumman, a leading global security company." These were the only disclosures provided. In the following month, the *New Republic* carried dozens of blog posts from *Lawfare* on *newrepublic.com*, none of which mentioned the involvement of Northrop Grumman anywhere on the page. The banner over the *Security States* blog simply introduced the content as a "national security partnership between the *New Republic* & *Lawfare*."

Journalist Rick Perlstein, who has written for *The Nation*, *Mother Jones*,and the *New Republic* among other publications, spotted the troubling conflicts of interest in this arrangement. In two in-depth posts on *TheNation.com*, Perlstein highlighted numerous posts on *Security States* that strongly supported the National Security Agency, just as President Obama's independent review board was considering greater oversight of that agency. Perlstein noted that Northrop Grumman is a major NSA contractor, which had been awarded hundreds of millions of dollars in government contracts over the past decade.[105] The NSA Twitter feed published nearly a dozen tweets promoting content cross-posted between *Security States* and *Lawfare*.[106]

Perlstein also noted how posts on *Security States* strongly defended drone use, both abroad and in America. One article by legal scholars Matthew Waxman and Kenneth Anderson, titled "Don't Ban Armed Robots in the U.S.," explained how autonomous weapons systems, or armed drones, "can be made to serve the ends of law on the battlefield."[107] Another article by Wittes criticized two Amnesty International reports on civilian deaths from U.S. drone strikes in an article titled, "Three Deep Flaws in Two New Human-Rights Reports on U.S. Drone Strikes." Perlsteinalso noted that Northrop Grumman is a major drone manufacturer with numerous contracts with the U.S. government, one of which was awarded in September 2013 after more than $20 million in Northrop lobbying.[108]

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[104] Benjamin Wittes, *Coming Tomorrow: Teaming Up with the New Republic*, LAWFARE: HARD NAT'L SECURITY CHOICES (Sept. 30, 2013), http://www.lawfareblog.com/2013/09/coming-tomorrow-teaming-up-with-the-new-republic/.

[105] David Hubler, *Northrop Wins $220M NSA Storage Deal*, WASH. TECH (Oct.16, 2007), http://washingtontechnology.com/articles/2007/10/16/northrop-wins-220m-nsa-storage-deal.aspx.

[106] The National Security Agency's official Twitter feed can be found at https://twitter.com/NSA_PAO.

[107] Matthew Waxman & Kenneth Anderson, *Don't Ban Armed Robots in the U.S.*, THE NEW REPUBLIC (Oct. 17, 2013), http://www.newrepublic.com/article/115229/armed-robots-banning-autonomous-weapon-systems-isnt-answer.

[108] *Northrop Grumman Wins $114 Mln Deal for More Global Hawk Drones*, REUTERS, (Sept. 25 2013), http://www.reuters.com/article/2013/09/27/northropgrumman-unmanned-idUSL2N0HN28Z20130927. For more on Northrop's drone campaign, *see also* Brandon Conradis, *Northrop Grumman's*

Wittes called Perlstein's reporting "slimy," and emphasized that neither he nor other *Lawfare* writers received any money from Northrop Grumman for providing their content.[109] In an email that he subsequently shared online, Wittes wrote the following message to Perlstein: "[Northrop Grumman] had no oversight over content with respect to *Security States* and was not promised pieces on drones or NSA matters either. Editorial content was the province of *Lawfare* and [the *New Republic*] alone."[110] This arrangement never erupted into a blogosphere scandal. Perlstein did not write any more posts on the topic after December 23, 2013, nor did any other writers follow up. However, even assuming all of Wittes' claims were accurate, the relationship between Northrop Grumman and the *New Republic* still highlights to the dangers of similar, opaque publisher-advertiser relationships.

The *New Republic* received money from Northrop Grumman and free content from *Lawfare*. Whether it was content the *New Republic* would have wanted to run in the absence of such incentives is an open question. It remains unknown whether Northrop Grumman approached the *New Republic* with the idea for the partnership or vice versa. Given this lack of transparency, Rick Perlstein's concerns do not appear to be unreasonable. The broader point to be made is that even if Northrop Grumman had no commercial interest in drones and NSA contracts, its virtually undisclosed influence over the particular coverage choices of a reputable publication in Washington, D.C. was still potentially harmful. Such influence could severely undermine the credibility of the magazine and broader democratic discourse, to the extent that readers come to doubt whether the content represents the views of writers and editors or of corporate sponsors.

C. Empower the FTC

1. Shift the Locus of Regulatory Attention

Although the government cannot regulate noncommercial native advertising through the traditional strategies of the FTC, there are other ways the FTC could potentially assert its authority. Rather than focus on the nature of the content being advertised, the FTC could instead focus its attention on the locus of editorial control. In particular, the FTC could seek to determine whether the publisher or advertiser controlled (a) the selection of topics covered, (b) the editorial point of view, (c) the drafting of

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Drone Campaign, OPENSECRETS (Nov. 8, 2013), https://www.opensecrets.org/news/2013/11/northrop-grummans-lobbying-campaign/.

[109] Benjamin Wittes, *Rick Perlstein Slimes Lawfare*, LAWFARE: HARD NATIONAL SECURITY CHOICES (Dec. 23, 2013), http://www.lawfareblog.com/2013/12/rick-perlstein-slimes-lawfare/.

[110] Benjamin Wittes, *My Correspondence with Rick Perlstein: You Decide*, LAWFARE: HARD NATIONAL SECURITY CHOICES (Dec. 23, 2013), http://www.lawfareblog.com/2013/12/my-correspondence-with-rick-perlstein-you-decide/.

the article, (d) the placement on the site, (e) the moderation of related comment threads, and (f) the dissemination of the content through social media channels. Traditionally, the publisher has controlled most, if not all, of these decisions. Conversely, in many of today's native advertising arrangements, the advertiser retains control of many more of these elements. Sometimes, as is the case on sections of *Forbes.com*, the advertiser independently controls all of these elements and simply uses the online publication as a host for its content.[111]

In situations in which the advertiser retains the preponderance of editorial control and uses the online publisher to host the content without clearly disclosing the relationship, the FTC should consider filing complaints against the online publication under both the "deception" and "unfairness" prongs of Section 5 of the FTCA. Such complaints would turn not on whether the ad itself was commercial or noncommercial, or on whether the ad was misleading or false, but rather on the advertiser-publisher relationship and on how the publisher represented itself to its readers.

2. Regulate Publications as Deceptive

Online news publications are themselves articles in commerce. Their product is their speech. In many online news publications –especially legacy media publications –that speech is presented to the reader as issuing exclusively from the journalist, editor, or publisher, without direct interference by third parties. If news publications represent themselves as producing purely independent editorial content but instead offer a substantial amount of undisclosed sponsored content, those publications' representations themselves could be deceptive. The publications would have made (i) a "representation, omission, or practice that is likely to mislead the consumers" (i.e., that their content is all fully independent), where that (ii) interpretation among consumers is a reasonable one (i.e., consumers reasonably trust publishers' claims to be producing independent content), and (iii) the "representation, omission, or practice is material" to a purchase decision (i.e., consumers purchased the publication in part because they believed they would receive independently produced content from the perspective of the staff of the publication itself).[112]

In order to satisfy the first prong, the FTC must find that the publication presented itself to potential consumers as independent. Given that such claims constitute the bedrock of most modern news organizations, especially legacy brands, finding such assertions within its pages and in its advertising messages elsewhere would likely not prove too challenging for the FTC. Most news publications assert independence in their titles and slogans. The *New York Times*, for example, regularly quotes

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[111] *BrandVoice*, FORBES MEDIA (Dec. 23, 2013), http://www.forbesmedia.com/brandvoice-2/.

[112] FTC Policy Statement on Deception, FED. TRADE COMM'N, (June 28,1983) http://www.ftc.gov/ftc-policy-statement-on-deception.

its founder Adolph S. Ochs, boasting that the *Times* gives "the news impartially, without fear or favor, regardless of party, sect, or interests involved."[113] Innumerable local papers have "Independent" in their title, from the *New Haven Independent* to the *Santa Barbara Independent*, with taglines similarly claiming fair, neutral, independent, unbiased, or objective coverage. Put differently, online news publications do not achieve competitive advantage in the market by presenting themselves as repositories for concealed copy paid for by anonymous sources.

The second requirement of the deception test asks whether consumers would reasonably believe representations from online news organizations that they are in fact independent. The FTC should again not have difficulty demonstrating that such an interpretation is reasonable for three reasons. First, according to the FTC's *Deception Policy Statement*, "To be considered reasonable, the interpretation or reaction does not have to be the only one" possible; as long as a sizeable number of consumers believed the claim, the court would find it reasonable. Second, according to the same FTC statement, "An interpretation will be presumed reasonable if it is the one the respondent intended to convey."[114] Clearly, newspapers intend to represent themselves as independent as one way they distinguish themselves from their competitors. Third, to determine whether a reasonable consumer would rely on a given representation, the court can look at extrinsic evidence. In the case of native advertising, there is mounting empirical evidence that many readers take publications at their word and assume that independent journalists created the publication's content. As discussed in Part One of this paper, even in cases where there are disclosures, consumers are so conditioned to attribute articles to a publisher's staff that they tend to ignore the disclosure and assume journalists wrote the content independently.[115]

The third requirement for a finding of deception is "materiality." This means that a given representation affected a consumer's choice about whether to buy a particular product. According to the *Deception Policy Statement*, evidence that a claim is material can come from several sources. First, survey data can be invoked; this data already exists and is growing in scale and reliability. Second, differences in pricing between competitors can be used as evidence of materiality. For example, if online publications that claim independence are able to better sell their content or obtain higher prices this could constitute evidence of materiality. [116] Legacy news organizations such as the *New York Times* and *Wall Street Journal*are among the few news outlets that are charging for online content through subscriber pay-walls and doing so successfully. This adds further support for the notion that readers value representations of independence and are willing to pay a premium for it. But most importantly for a finding of materiality in the context of noncommercial native advertising, according

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[113] Michael Schudson, *The Objectivity Norm in American Journalism*, 2 *Journalism* 149-170 (2001).
[114] FTC Policy Statement on Deception, *supra* note 112.
[115] Hoofnagle, *supra* note 19
[116] FTC Policy Statement on Deception, *supra* note 112.

to the *Deception Policy Statement* an interpretation is presumptively reasonable if it was one of the meanings the seller intended to convey. Many online news publishers certainly intend to convey the impression of their independence as discussed under the first prong. For these reasons, the FTC has a strong case that the representations of independence made by online news publications are material to a purchase decision.

The FTC's broader argument would then be that publishers who sell their publication to consumers with a promise of independence, but instead provide readers a substantial amount of undisclosed paid copy, deceive those who purchase their publications. To find that publications advance deceptive claims in their advertisements, the FTC would need to identify commercial advertisements by the publications making such express claims. These could be on the publications' own pages or in other media such as TV, radio, or online. Implied claims would be harder to support because the news format has an implied claim of objectivity from a history of associations, but the FTC cannot regulate the use of a style. But upon finding an express claim, the FTC would then need proof of undisclosed native advertisements, or, more easily at first, very poorly disclosed native advertisements. With these elements, the FTC could file a deception complaint.

Cases brought against publishers would serve several functions. They would embarrass the publisher and put others publishers on alert. If the publisher settled pre-trial, the FTC could mandate as a condition of settlement that the publication disclose all future noncommercial native ads or cease making public claims of independence. If, instead, the publisher decides to contest the charges in administrative proceedings, discovery could root out the exact nature of the undisclosed advertising relationships, increasing readers' awareness. In addition to the FTC bringing such charges on its own, concerned citizens could file complaints with the FTC when they suspect publishers of incorporating undisclosed native ads into their publications.

Seeking to curb undisclosed noncommercial native advertising through Section 5 of the FTCA would likely run into a number of challenges. First, news publications would resist being categorized as just another article in commerce. They may claim that disclosure requirements infringe on their First Amendment freedoms, citing cases such as *Hoffman v. Capital Cities/ABC, Inc.*, in which *L.A. Magazine* successfully defended itself against a lawsuit brought by actor Dustin Hoffman claiming that his image had been misappropriated in a cover image that the magazine made for a fashion article spoofing iconic movie scenes.[117] The Court of Appeals for the 9th Circuit held that although the photo on the cover was used to induce the sale of copies of the magazine, it was not commercial speech. It reasoned that "as a whole" the image was a "combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors" and was, as such, protected. But failing to distinguish it purely on objective criteria, the court ultimately said,

[117] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

"[c]ommon sense tells us this is not a simple advertisement."[118] This line of defense, however, is unlikely to be availing for publications. Unlike a cover image that serves an expressive and commercial function, assertions of editorial independence are claims about the nature of a particular product. Ads that do nothing other than attempt to sell those publications by giving them a competitive edge based on a false impression fall under the FTC's authority.

A second likely challenge to FTC actions against undisclosed noncommercial native ads would come from free online publications. Here, the FTC would likely come up short in its attempt to regulate the practice. The FTC would find it exceedingly difficult to satisfy the materiality prong of Section 5's deception analysis in the case of free online publications because consumers would not have purchased anything and, as such, any harm to consumers would be *de minimis*, such as confusion and annoyance. The court would likely let market forces help consumers decide where to turn on the web to get truly independent content.

Furthermore, any FTC attempt to regulate noncommercial native ads in free online news publications would be very susceptible to First Amendment over-breadth challenges. For example, because such regulation could conceivably extend to corporations creating anonymous websites on noncommercial issues, it would threaten to chill the First Amendment speech rights of citizens and corporate entities, as advanced in cases such as *Citizens United*. Similarly, bloggers and small groups of activists would be susceptible to FTC regulation. If they had to disclose all sponsors, this too would potentially violate basic First Amendment protections of anonymous speech. Any FTC assertion of Section 5 authority over noncommercial native ads in online news publications therefore would only apply to those publications offered for sale under the express promise of independent content and it would only apply if those publications posted noncommercial native ads without clearly disclosing them. The FTC would not be preventing corporations from posting their speech anonymously online through their own sites.

3. Resurrect "Unfairness" Analysis

The FTC has another tool in its Section 5 toolkit that it could use to address noncommercial native ads. The FTCA prohibits "*unfair* and deceptive acts and practices in or affecting commerce" (italics mine). The "unfairness" prong of this mandate is relatively underdeveloped, for reasons to be discussed in the following sections. The FTC should seek to resurrect Section 5's unfairness prong and apply it to noncommercial native advertising practices.

Up until 1980, the FTC considered as "unfair" all practices that were "immoral, unethical, oppressive, or unscrupulous." In response to a Congressional letter expressing concern over the breadth of that interpretation, in 1980 the FTC dropped it and instead created a three-prong test distinct from "deception." According to the 1980 FTC statement,

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[118] Hoffman, *supra* note 117.

which remains the FTC's operative interpretation, an "act or practice affecting commerce" is "unfair" if: (1) "it causes or is likely to cause substantial consumer injury"; (2) that "is not reasonably avoidable by consumers themselves"; and (3) that "is not outweighed by countervailing benefits to consumers or competition." [119] Unlike deception analysis, unfairness analysis urges courts to also consider whether the industry practice "violates public policy as it has been established by statute, common law, industry practice, or otherwise." If the court finds a practice does violate such public policy, that finding can be used as evidence of consumer injury. Congress codified the "unfairness" test in the 1994 FTCA update. Today, unfairness serves as an FTC cause of action, of which deception is a part. Unfairness analysis, however, is far less concerned with potential product-based harms from representations than deception analysis, and far more concerned with protecting consumers from misleading and harmful commercial practices.

Since 1980, the court has held that substantial consumer injury, the first requirement, can be found both from a very slight chance of an immense harm, and a very high chance of widespread but small harms. The harms of noncommercial native ads would fall in the latter category. Substantial consumer harm is the toughest part of this test to satisfy, but recent FTC actions suggest its willingness to apply it even to practices that are broad nuisances to a large swathe of people, such as aggressive pop-up windows[120] and undisclosed, difficult-to-dislodge adware.[121]

The second prong of the test for unfairness – that injury not be reasonably avoided – is more easily satisfied in the case of undisclosed noncommercial native ads. As the court stated in its first major post-1980 unfairness proceeding, *International Harvester*, if consumers have no way to learn about a practice on their own, they cannot reasonably avoid any injury from it.[122]

To satisfy the third prong – that the practice is not "outweighed by countervailing benefits to consumers or competition" – the FTC must argue that sponsorship disclosure is a *de minimis* harm to sponsors and publications with substantial benefits to consumers. This is another potentially challenging argument to make. The FTC would have to emphasize the low cost of disclosure to publishers and sponsors, and the significant benefit it brings to consumers by improving trust in media and enabling such consumers of online news publications to make informed decisions as consumers and citizens. The FTC would also have to make the larger argument that demanding disclosure does not abridge core First Amendment rights.

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[119] FTC Policy Statement on Unfairness, FED. TRADE COMM'N. (Dec. 17 1980), http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.
[120] *Pop-up Ad Spammers Settle FTC Charges*, FED. TRADE COMM'N (Apr. 9, 2004) http://www.ftc.gov/news-events/press-releases/2004/08/pop-ad-spammers-settle-ftc-charges.
[121] Direct Revenue LLC., FTC File No. 0523131 (Feb. 16, 2007) (consent order).
[122] *In re* Int'l Harvester Co., 104 F.T.C 949 (1984).

The broader unfairness case is based on a public policy concern that consumers are misled into paying attention to, and trusting, content that they would have likely glazed over had they known it was sponsored and not from the publication's staff. Just as a pop-up window forces a user's attention unfairly while he or she peruses the web, undisclosed native ads similarly capture attention even when, had he or she known its true identity, the user would have skipped it.[123]The harm to consumers is that, like pop-up ads, it interferes with their decision-making sovereignty. The second harm of such native ads is that they deny users access to information important to their reading experience. By looking at laws governing disclosure in TV and radio broadcasting, the FTC can make a strong case that undisclosed noncommercial native advertising violates longstanding public policy preferences articulated over the past fifty years. To make the public policy argument, and further strengthen the case for findings of unfairness against noncommercial native ads, it is helpful to look at the history of the use and disuse of the "unfairness" prong over time.

Unfairness claims in the context of sponsored communication peaked in 1959 and then dropped off suddenly with the passage in 1960 of an amendment to Communications Act of 1934. That amendment, Section 317, required radio and TV broadcasters to disclose the identities of all those who paid from programming –both commercial and noncommercial programming. Section 317 made failing to do so a criminal offense for both broadcasters and sponsors and it made Section 5 of the FTCA irrelevant for policing undisclosed sponsorship on broadcast and TV.[124]

Congress introduced Section 317 in the late 1950s amidst conservative outcry over the allegedly pernicious influence of rock-and-roll music. At the time, rock music was picking up steam and challenging traditional mores. As conservative journalist Vance Packard put it in typical fashion, there was great concern among conservatives about young "whining guitarists" blasting "obscene lyrics." Toward the end of the 1950s, conservative ire focused in on radio disk jockeys who were accepting payment from record labels to play songs by their artists, which in turn boosted record sales. Conservative voices seized on this as evidence that sinister forces, not changing public tastes, were driving the growth of rock music. This was an especially powerful argument in the 1950s and 60s when concerns over Soviet propaganda and subliminal messaging were acute. As Vance Packard put it, something *had* to be driving the spread of something as distasteful as rock music – "something more than artistic judgment…"[125] In response to such complaints the FTC set up a full investigation into the practice in 1959 and Congress launched a committee

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[123] Similarly, Congress has passed *the Telemarketing and the Telephone Consumer Protection Act* in 1991 mandating disclosure at the beginning of a telemarketing calls so that, among other reasons, listeners could make an informed decision about whether to stay on the phone.

[124] Goodman, *supra* note 50, at 83.

[125] Ronald H. Coase, *Payola in radio and television broadcasting*, 22 J.L. & ECON. 269-328 (1979).

investigation. The FTC stepped up complaints against record labels under §5 of the FTCA in 1959, accusing them of "unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records." The FTC swiftly won "cease and desist" orders.[126] These cases were short-lived, however, because Section 5's unfairness authority was rendered irrelevant by Section 317. Not only did Section 317 grant the government greater power to force disclosure in these mediums, it also gave the FTC enforcement authority, such that the agency no longer needed Section 5 authority against may "unfair" practices. In the following decades, the FTC filed and won many cases relying exclusively the text of Section 317. Section 5's "unfairness" prong fell out of use. The "unfairness" prong was used primarily to address commercial practices preying on the weak – the very old, young, or infirm. It was not applied to issues of advertising or sponsorship, so that for those looking at FTC power to regulate native advertising after 2010, "unfairness" barely registers as relevant, even though it could and should be.

Section 5's "unfairness" prong is even more important today because Section 317 is thoroughly out of date, still applying only to broadcast TV and radio. Congress needs to update Section 317 to cover all mediums. Failing that, the FTC should resurrect Section 5. Some may argue that broadcast-specific disclosure requirements were a reaction to a scarcity of the medium and that technology-neutral disclosure requirements would cast too broad a net. But this is an inaccurate reading of Congressional intent. The rationale for the disclosure laws in the 1950s and 60s was very much about making listeners and viewers aware of who was trying to influence them. The 1960s Congress argued that the pervasiveness and power of TV and radio justified the disclosure requirements, not its limited bandwidth. The law was about raising citizen awareness, not pushing for a particular kind of programming.

D. First Amendment Arguments for Disclosure Requirements

The preceding discussion turns on challenging questions about who is and is not a member of the media. Enforce disclosure requirements on whom? And under what circumstances? These challenges bedevil state media laws and proposed federal media laws. As with commercial speech, courts have struggled in vain to find objective criteria to use. Another way of addressing the problem of defining the "media," however, would be to think of it as an institutional framework that carries with it a basket of state-granted privileges and responsibilities. For example, those outlets that seek protection under state anti-SLAPP laws against frivolous defamation claims, or seek reporter's privilege against having to disclose sources, could also be required to abide by the updated Section 317 disclosure requirements as well, or by similar state laws. Whether such protections and responsibilities apply to bloggers would then be largely based on their own self-identification. If they are engaged in fact-finding

[126] Bernard Lowe Enterprises, Inc., et al., 56 F.T.C. 1115 (1960).

and newsgathering and seek state law defenses for these activities, they could not then avail themselves of a First Amendment defense against the FTC if the agency demanded disclosure of sponsors.

The broader justification for a federal disclosure requirement and more FTC action against noncommercial native advertisement is that Americans have developed a reasonable reliance on the independence of the news media. The maintenance of that reasonable reliance is in the public's interest. For better or worse, that reasonable reliance depends on the very legal interventions that it in turn justifies.

Some may argue that the government should not be getting in the business of policing whom to trust. But, in fact, that is exactly what the government has always done in order to advance one of two First Amendment functions. As Robert Post notes, the government frequently makes normative determinations about those situations where there is a fiduciary responsibility between speaker and listener – or a position of reasonable reliance – and those where there is not. And it does so on the basis of the type of First Amendment value the courts seek to protect. To see that the government frequently regulates speech based on the nature of the relationship in question, one need look no further than the local doctor. A physician cannot claim a First Amendment defense against malpractice for telling a patient to go under the knife when that patient only had a common cold. Similarly, the publisher of a flight map cannot claim a First Amendment defense if, due to a typographical error, two planes collide in midair. The question therefore is not whether the government has the power to enforce conditions of reliance through regulation of speech, but rather when and where can it do so. And should it do so in the context of online news media where the highest of First Amendment concerns are at stake? To answer this question, we must look at underlying First Amendment values.

As Post explains, one First Amendment value is in providing accurate information to the public to inform its decision-making as consumers and citizens. The other value is enabling citizens to participate in public discourse where autonomous speakers seek to hold their government to account. Under Post's theory, if we value certain speech for the function of providing accurate information to the public, the government can reasonably place disclosure requirements on that speech to better inform the public. If speech is valued as a feature of public discourse, however, then it deserves full First Amendment protection because we seek to protect the autonomy of the speaker. In this case, any disclosure requirements would have to survive strict scrutiny, a difficult bar to pass.

This theory helps explains why the court may vehemently protect the right of anonymous political speech in some contexts but not in others. The government cannot require the disclosure of the authors of protest pamphlets distributed on the street, for example.[127] But this is largely because individuals have strong liberty and autonomy interests in engaging in democratic public discourse. "People are intelligent enough," the

[127]McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

Supreme Court majority said in *McIntyre v. Ohio Elections Commission*, "to evaluate the source of an anonymous writing….They can evaluate its anonymity along with its message…."

In the case of noncommercial native ads, this justification does not hold up. In the case of native ads, the public does not know that the message it is receiving is from an anonymous speaker. Rather, the public thinks it was written by the publication itself. Anonymous noncommercial native ads do not even allow "intelligent enough" people to make their own assessments of its trustworthiness.

To advance core First Amendment interests in providing the public with information while also protecting the speech of individuals, therefore, the government should be able to require that online news publications identify when content comes from a sponsor. Those publications could always call that sponsor "Anonymous" if the sponsor does not want to be named. Any reluctance to do so would be based on the online publication's fear of reputational harm or embarrassment. Tagging a post "Anonymous Sponsor Content" would adequately alert "intelligent enough" readers so that those readers could decide how best to scrutinize it. Meanwhile, this disclosure would preserve the First Amendment rights of whoever wants to pay to have that content placed. The First Amendment protects the right to speak, but not the right to undisclosed ventriloquism. The requirement of accurate disclosure does not mean that papers are any more liable for what they independently write. It simply means that certain information cannot be withheld.

E. States Should Create a Basket of Media Privileges with Responsibilities

The Newspaper Publicity Act reduced the appeal of advertorials by altering the incentives of news publications and advertisers. To receive reduced postal rates, these publications needed to clearly label advertisements. Similarly, concerned citizens and state officials should seek to incentivize disclosure, especially if the FTC and Congress cannot address this problem on their own. Various state tort law regimes determine the conditions of liability for product harms. Publishers are currently immune from the consequences of ads they run except in severe cases of negligence where they recklessly disregarded damning evidence or advocated lawless behavior. In *Amman v. Clear Channel Communications Inc.*, the Court of Appeals for the Third Circuit held that publishers "do not have a duty of care to verify the accuracy of advertisements broadcast" because the burden of doing so would draw their attention away from their own speech.[128] However, when the staff of the publication or its marketing team produces content for the advertiser, the publication's duty of care may be elevated and it may find itself jointly liable with the advertiser. Whether or not that would happen, and at what point, depends on the various state tort law and

[128]Amann v. Clear Channel Communications, 2006-Ohio-714, 165 Ohio App. 3d 291, 846 N.E.2d 95.

media law regimes, and would be a fruitful area of exploration for activists and lawyers in each state.

Tax law scholars at the state level should also look at their corporate and income tax regimes. Currently, businesses can deduct the costs of advertising and promotions when they are ordinary and necessary. Advertising must therefore have a clear relationship to the business – its brand or product. Anonymous sponsorships are not promotional because they do not represent the business to the consumer and are therefore ineligible for deductions. It is not clear whether native ads at the cusp of commercial and noncommercial – for example, promoting a business interest without necessarily naming a particular brand; or advocating for an industry-wide cause such as *Nike* urging the playing of more sports– would be eligible for such deductions. Federal tax laws do not specify what corporate advertising should be considered deductible.[129] State tax officials could require as a condition of seeking an advertising deduction that the advertiser always disclose their particular brand alongside their sponsored message. Businesses would be subject to sanction if they were caught through an audit for disobeying this provision. This type of arrangement would stitch the rights and privileges of media together.

The most important privileges extended to media are from state law. So in looking at media shield laws, legal scholars and activists in each state should examine at what point along the locus of editorial control a publication loses media privileges granted under its state laws, such as protection from prior restraints, defamation claims, and government access demands. For example, in the 1999 case of *Rancho Publications v. Superior Court*, the Fourth Circuit held that, under California's media shield law, an advertorial "could not claim the newsgatherer's shield where there was no evidence that the publisher had done anything more than sell space on its pages to the anonymous originators of an allegedly tortious publication." The Court further stated that the publisher had the burden of demonstrating that "it acquired the information sought while engaged in activities related to newsgathering."[130] State law could make media shield laws available only for content created independently by a publication; it could also allow courts to tease out the cases where a noncommercial native ad, even if it involves some investigative reporting, may be ineligible for various state protections because of the direct role of an external sponsor.

F. Look Beyond Law

In addition to pursuing legal remedies, civil society and private industry should assess other ways to address problems associated with native advertising. Consumer advocacy groups should create native-ad-watch websites, highlighting, tagging, and categorizing the most disturbing native ads and sending letters to the editors of publications containing such content. Consumer advocacy groups should also craft standard disclosure

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[129] Cutler, *supra* note 47, at 40-50.

[130] Rancho Publications v. Superior Court, 81 Cal. Rptr. 2d 274, 68 Cal. App. 4th 1538, 68 Cal. 4th 1538 (Ct. App. 1999).

language for all publications to use in disclosing native ads. This disclosure language should be based on the locus of control between advertiser and publisher. For example, all content created by the advertiser, such as *The Atlantic*'s Scientology article, could be labeled "Advertisement," whereas all content created at the request of the advertiser but under the editorial control of the publication, such as the *Security States* blog posts issued in October 2013, could be labeled as "Advertiser Sponsored."

In addition, private Internet companies such as Google, Bing, and Facebook can play an important role in curbing native ad abuses. The algorithms these sites use to return content in search results or on news feeds are enormously influential. These sites collectively send major publishers such as the *New York Times* well over a third of their daily readers.[131] These Internet companies could demand that publishers use specific codes to differentiate ads from their independent content – either through top-level URL tags or through HTML language visible to search engine crawlers. These Internet companies would then help to de-privilege native ads when surfacing content for users, while continuing to promote independently created content.[132] If major publishers failed to comply, they could find their search rankings fall against competitors who clearly distinguished ads from independent copy.

These actions could then build on each other. For example, consumer advocates could police publications that failed to clearly identify native ads. They could file complaints with the FTC, notify search engines of offending articles and publishers, and work to raise reader awareness of deceptive practices.

III. CONCLUSION

Native ads today are the latest incarnation of the long-running practice of blurring the lines between paid advertisement and independently created publisher content. This practice benefits advertisers by allowing them to leach credibility from news publications in exchange for payment. However, readers, as both consumers and citizens, lose out in this deal. Readers find it harder to accurately assess product claims and lose faith in the media as a vehicle for democratic discourse.

The government has played an important role in limiting this practice in the past, and it can do so again. It can use the powers of the FTC more aggressively to regulate commercial native advertising. By filing complaints and issuing binding and nonbinding guidelines, the FTC can force publishers and advertisers to clearly disclose native ads.

Noncommercial native ads, however, pose a tougher challenge. Even though these ads pose severe harms to citizens, the FTC cannot

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[131] Adam Lella, *Google Most Popular Incoming Traffic Source Worldwide for The New York Times*, COMSCORE, INC. (Mar. 25, 2011), http://www.comscore.com/Insights/Data-Mine/Google-Most-Popular-Incoming-Traffic-Source-Worldwide-for-The-New-York-Times.

[132] STEVE RUBEL, 1 SPONSORED CONTENT: A BROADER RELATIONSHIP WITH THE U.S. MEDIA. (Washington: Edelman Public Relations 2013).

regulate them. To ensure full disclosure of noncommercial native ads, the government, private sector, and civil society need to each undertake what actions they can in order to curb the worst excesses of native advertising. Together, these efforts can help to ensure the continued existence of the relatively independent news media on which we have come to rely.

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PUBLICITY RIGHTS AND POLITICAL MERCHANDISE

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The existence of enforceable publicity rights for politicians is problematic because those rights can be asserted not only for proprietary reasons but as an attempt to control political debate in violation of the First Amendment right of free speech. This article looks at the policy rationales for limiting publicity rights for politicians in general and examines the problem specifically with regard to political merchandise, such as buttons, bumper stickers and bobbleheads, that use a politician's name or likeness without permission. Given its role in expressing a person's political viewpoint, political merchandise of all types warrants heightened protection under the First Amendment. To protect this form of political speech and ensure a robust marketplace of ideas, political merchandise – products that use the name or image of a political figure to convey a political message – should receive categorical immunity from misappropriation lawsuits.

Keywords: politician, right of publicity, commercial speech, political merchandise, First Amendment

I. INTRODUCTION

Political campaigns produce a wide array of merchandise extolling the merits of a candidate or expressing disapproval of the opposition, and increasingly the types of products produced go beyond the ordinary examples of campaign buttons or bumper stickers. From President Barack Obama's image on a roll of toilet paper to a Hillary Clinton-shaped nutcracker, non-traditional means of making one's political views known are becoming more popular:

> Outside of the official campaign stores filled with stately buttons and clean, professional T-shirts, there's an entire online netherworld of unauthorized political merchandise, which can be twice as entertaining as the official stuff and

> just as effective in marketing's ultimate goal – convincing consumers to consider a product (in this case, the President of the United States).[1]

A politician seeking to control the dissemination of such unauthorized merchandise can assert his right of publicity, which protects against the unauthorized use of a person's name or image for commercial purposes, including for advertising, as a product name, or on merchandise. Asserting this right can be tricky for politicians, however, who must tread carefully so as not to suppress public enthusiasm or trample on First Amendment rights. One politician who sued – former California Governor Arnold Schwarzenegger, over a bobblehead doll made in his image in 2004 – may have regretted his action, given the negative publicity the lawsuit brought. Still, the right of publicity remains a viable legal claim for politicians, even if suing may not be advisable as a matter of public relations.

As a matter of public policy, however, the existence of such a right for politicians is problematic. The need for uninhibited and robust discussion of political matters makes political figures a special class of plaintiff when it comes to enforcing publicity rights. Scholars have therefore debated whether politicians should forfeit their publicity rights or be treated the same as any other plaintiff. In arguing for or against this special status, commentators have addressed publicity rights as a whole, without distinguishing between the different types of commercial uses. This article will instead limit its scope to the right of publicity as it applies to political merchandise – products that use a politician's name or likeness to convey a political message. Because such merchandise is inherently a form of political speech, it requires greater First Amendment protection than advertising uses or product names, and should be given categorical immunity from misappropriation lawsuits.

II. THE RIGHT OF PUBLICITY

The right of publicity protects the use of an individual's name, image, or other aspect of his persona for commercial purposes. Misappropriation occurs when someone "appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."[2] The right is a fairly new one and is based on two different legal concepts: privacy and property-based theories of unjust enrichment akin to intellectual property rights such as copyright and trademark. Today the right of publicity is

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[1] Victor Luckerson, *Political Merchandise Extends Far Beyond Official Campaign*, TIME, Oct. 9, 2012, http://business.time.com/2012/ 10/09/political-merchandise-extends-far-beyond-official-ampaigns/print/

[2] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2004).

recognized in a majority of the states by statute or in common law, or in some states, both.[3] Suits for misappropriation have included the use of a name, likeness, voice, signature, photograph, nickname and other aspects of a person's identity or persona.[4]

In its early development, the right of publicity was an extension of Warren and Brandeis's concept of privacy as "the right to be let alone."[5] A right of publicity provided legal recourse for a private individual whose name or likeness was appropriated for commercial purposes not agreed to; as with the private facts tort, some part of a person's life was publicized without permission.

The Second Circuit was the first to explicitly recognize a right based not in dignitary harm but proprietary interest.[6] In a case involving the use of baseball players' photographs on baseball cards, the court ruled that New York precedents supported a right, in addition to and independent of the state's statutory privacy right, in the publicity value of their photographs:

> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[7]

This conception of the right gives celebrities or any others who have an economic interest in their persona the right to exploit their persona and receive compensation for its commercial use. Types of commercial use include the use of the person's name or image in an advertisement or other type of commercial endorsement, use of the person's name as a product name, and use of the person's name or image as part of a commercial product, such as the person's image on a T-shirt or other type of merchandise.

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[3] In California, for example, the statute was enacted to complement the common law. See CAL. CIV. CODE§ 3344.

[4] See J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY§§ 4:46-4:88 (2008).

[5] See Samuel D. Warren and Louis Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1890).

[6] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

[7] Id. at 868.

The right of publicity, like other intellectual property rights, can come into conflict with speech rights under the First Amendment. The Supreme Court addressed the issue in its only right of publicity case, *Zacchini v. Scripps-Howard Broadcasting Co*.[8] The 1977 case involved the broadcasting of Hugo Zacchini's 15-second human cannonball act on the nightly news as part of a story about the county fair in Geauga County, Ohio. The Court rejected the claim by the television station that the First Amendment privileged its use of the video, with its holding based primarily on the fact that the newscast had shown Zacchini's entire performance.

The Court's reasoning, while ostensibly based on its interpretation of the common-law theory of the right of publicity, owed more to concepts of copyright and did little to direct lower courts on the proper limits of the right of publicity. The case remains important, however, because the Court recognized the need to balance the right of publicity against what was a straightforward example of First Amendment rights – the right of a news organization to report on a newsworthy story. In addition, the Court offered some guidance to the lower courts by outlining the basic functions of the right of publicity.

First, the Court noted that the publicity right is meant to prevent free-riding on the market value of a person's persona:

> The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.[9]

The Court found that the right of publicity may be necessary to protect a performer's ability to earn a living as an entertainer, especially where, as here, the performance itself was appropriated.

In addition, the Court drew a clear parallel between the right of publicity and intellectual property laws that seek to create incentives for authors and inventors to create and disseminate their works. The right of publicity, the Court said, "provides an economic incentive for [a performer] to make the investment required to produce a performance of interest to the public," just as the Constitution's copyright clause giving Congress the power to grant patents and copyrights is based on "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[10]

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[8]Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
[9]*Id.* at 576.
[10] *Id.*

The Court did not directly address the First Amendment issue other than to admit that the newscast in question would generally enjoy First Amendment protection. It did not, therefore, provide any real guidance to lower courts on how to properly balance the right of publicity and free expression rights in the future. As a result, right of publicity cases since *Zacchini* have been inconsistent, with courts devising a variety of tests to determine the balance between a celebrity's publicity right and the First Amendment right of others to appropriate his name or likeness in the name of free speech. One of the tests courts use is the "transformative use" test, developed by the California Supreme Court in a case involving T-shirts and prints depicting the Three Stooges. Borrowing from a U.S. Supreme Court case regarding copyright fair use, the court ruled that a First Amendment defense is available only to defendants whose use of the plaintiff's name or likeness is transformative – that is, it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message" so that it "is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."[11] This test has proven difficult to interpret and apply in a consistent matter, given its vagueness and the fact that determining whether something is sufficiently transformative requires making subjective judgments about creativity and artistic expression.

Other tests, such as the Missouri Supreme Court's "predominant use" test and the Second Circuit Court of Appeals' "artistic relevance" test, look to whether the use of the celebrity's name or likeness is integral to the expression or whether its use is a mere ploy to exploit the commercial value of the celebrity's identity.[12] These tests, as well as others that rely on copyright's fair use doctrine, suffer from a lack of definite guidelines that would allow their application to all types of cases. As a result, no clear standard has emerged to determine the extent of First Amendment protection against a claim of misappropriation.[13]

A definitive test is needed because vagueness produces a chilling effect on those whose appropriation would serve expressive purposes protected by the First Amendment. This danger is particularly significant when the expressive purpose falls in the category of political speech, given the importance of that type of expression and the heightened protection it is generally afforded by the courts.[14] When someone who is the focus of political debate seeks to control that debate by asserting a claim of

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[11] Comedy III Prods., Inc. v. Saderup, Inc., 21 P. 3d 797, 808-09 (Cal. 2001).

[12] *See* Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003); Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

[13] For a detailed discussion of the different tests and their shortcomings, see Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOYOLA LOS ANGELES ENT. L. REV.471 (2003).

[14] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); New York Times v. Sullivan, 376 U.S. 254 (1964).

misappropriation, a significant chilling effect on political discourse may occur.

The Second Restatement of Torts recognized the right of politicians to assert their publicity rights,[15] but actual litigation is hard to find. The few cases in which politicians have asserted their rights involved efforts to stop the commercial use of their name or likeness because it was unflattering. In the early 1970s, for example, then-Vice President Spiro Agnew objected to – but did not file suit over – his likeness on a dartboard and a Mickey Mouse-type watch.[16] In 1999, a greeting card company complied with a cease-and-desist letter from then-Minnesota Governor Jesse Ventura over a Valentine's Day card that depicted him wrapped in a pink feather boa.[17]

Perhaps the most famous case is the Schwarzenegger misappropriation suit in 2004 over a bobblehead doll made in his image. The eight-inch-high bobblehead depicted the actor-turned-politician in a business suit and tie with an ammunition belt over his shoulder and an assault rifle in his hands. Although neither the product nor its packaging contained any overt political message, the manufacturer claimed First Amendment protection for its actions. The parties in the Schwarzenegger case settled the dispute, but it remains instructive because it exemplifies the difficulties in balancing a politician's right to control his image and the rights of others to use that image to discuss public affairs or engage in political debate.

It also illustrates the danger in affording public officials the full protection of publicity rights –Schwarzenegger action was seen by some not as a property dispute but as an attempt to squelch an unflattering depiction of him during a political campaign.[18] David S. Wellkowitz and Tyler T. Ochoa decried Schwarzenegger's use of his publicity rights as a "stealth" alternative to a libel suit, given the significant constitutional hurdles he would have faced in such a suit: "[W]hat Schwarzenegger objected to was not really the use of his image; it was the use of his image in a particular way that was the problem."[19] The power to control one's image in the political arena through publicity rights threatens to give politicians too much power over the content of political debate.

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[15] The Restatement used as one of its illustrations of misappropriation the example of an insurance company using as its corporate name the name of the president of the United States. RESTATEMENT (SECOND) OF TORTS§ 652C (1977).

[16] McCarthy, *supra* note 4, at § 4:26.

[17] Patricia Lopez Baden, *Ventura Takes Image to Heart*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 12, 1999, at A1; Erin Skold, Note, *Title Match: Jesse Ventura and the Right of Publicity vs. the Public and the First Amendment*, 1 MINN. INTELL. PROP. REV. 101, 102 (2000).

[18] David S. Wellkowitz and Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-defamatory Political Speech*, 45 SANTA CLARA L. REV. 651, 654 (2005).

[19] *Id.*

III. ARGUMENTS AGAINST PUBLICITY RIGHTS FOR POLITICIANS

Given the conflict that can occur between publicity rights and political speech under the First Amendment, some have argued that politicians should be accorded no rights of publicity at all. Legal scholar Shubha Ghosh offered what he called a "simple solution" to the conflict, calling for absolute immunity from misappropriation claims for anytype of use of a public official's name or likeness, whether in merchandise such as the bobblehead, for product names, or for commercial endorsements.[20] Other commentators have called for similarly broad bans or limitations on the publicity rights of politicians.[21] When discussing the publicity rights of politicians, the arguments tend to focus on one of two things: the constitutional importance of protecting political speech, even if it may intrude on a politician's traditional publicity rights, and the unique status of political figures within the public sphere.

A. Favoring Political Speech

The first rationale for limiting politicians' publicity rights focuses on the importance of protecting political speech, given the greater level of First Amendment protection it has traditionally been afforded. Erin Skold criticized a policy that would allow a politician to use his time in office to stimulate economic rewards or stifle the marketplace of ideas: "Publicity rights defeat firmly established First Amendment rights when enforced in favor of a politician, even politicians who were formerly celebrities in the entertainment business."[22] Skold would apply a balancing test that would heavily favor the First Amendment rights of the public over the publicity rights of a political figure:

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[20] Shubha Ghosh, *On Bobbling Heads, Paparazzi and Justice Hugo Black*, 45 SANTA CLARA L. REV.617 (2005). Ghosh called on courts to adopt Justice Hugo Black's First Amendment absolutism where the discussion of public affairs or public officials is involved, leaving public officials with no publicity rights at all. He would not leave public officials completely defenseless against false claims or endorsements, however. Public officials could still make claims based on false light, copyright, false advertising, or false association, legal concepts that generally include built-in safeguards to protect the First Amendment. *Id*. at 617-19.

[21] *See, e.g.,* Michael G. Bennett, *Celebrity Politicians and Publicity Rights in the Age of Obama*, 36 HASTINGS COMM. & ENT. L.J. 339 (2014) (arguing that celebrity political figures should have no publicity rights); Erin Skold, supra note 16 (proposing a balancing test that favors the First Amendment rights of political speech in publicity rights cases involving public officials); Donna J. Cunningham, *Political Parody Collides with the Right of Publicity: The Case of the Bobblehead Governor,* 21 MIDWEST L.J. 119 (arguing that constitutional speech rights should supersede state law property rights such as right of publicity).

[22] Skold, *supra* note 17, at 135.

> A celebrity who has decided to become a public servant by holding political office must give up any publicity rights that hamper the exchange in the marketplace of ideas. An unchecked right of publicity, when applied to political figures, seriously threatens the First Amendment. Thus, the right to engage in political commentary must be protected from an overreaching right of publicity.[23]

When it comes to political merchandise, what constitutes political commentary is subject to some debate. In an article written after the Schwarzenegger case was settled, for example, the governor's attorneys used a somewhat narrow interpretation of California's "public affairs" exception to publicity rights to argue that the bobblehead contained no political expression of any kind.[24] Because the doll and its packaging contained no political slogans, either for or against Schwarzenegger, and because there was no other "discernable [sic] political message," the attorneys argued that the manufacturer could not hide behind the exception, which exempts from misappropriation claims a use of someone's name or likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign."[25]

Writing after the settlement, William T. Gallagher, counsel for the bobblehead manufacturer, called the plaintiff's theory of the case simplistic as well as "overbroad and legally unsupportable because it presumed that plaintiff had an almost absolute right to control the use of the Schwarzenegger image, at least when that image is used on any product."[26] He decried the plaintiff's "aggressive legal strategy" that allowed "a powerful owner of rights of publicity to over-enforce and over-protect those rights through strategic litigation," especially when a politician was involved.[27] The question here, he contended, was whether a sitting politician had the right, under California's statutory and common law rights of publicity, to control the use of his image when used in a political context "to create a playful caricature, parody, or satire."[28]

Gallagher remarked that the traditional reluctance of politicians to make publicity claims may have been less about public relations and more "that politicians are aware that the sale of such products is likely fully

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[23] *Id.*
[24] Charles J. Harder and Henry L. Self III, *Schwarzenegger vs. Bobbleheads: The Case for Schwarzenegger*, 45 SANTA CLARA L. REV. 557, 563-65 (2005).
[25] CAL. CIVIL CODE§ 3344(d) (West 2005).
[26] William T. Gallagher, *Strategic Intellectual Property Litigation, the Right of Publicity, and the Attenuation of Free Speech: Lessons from the Schwarzenegger Bobblehead Doll War (and Peace),* 45 SANTA CLARA L. REV.581, 583 (2005).
[27] *Id.* at 584.
[28] *Id.* at 582.

protected by the First Amendment, particularly when the subject being depicted is a political figure."[29]

B. Politicians' Special Status

Another view would limit publicity rights for politicians based on their unique status within the public sphere. According to Ghosh, to allow political figures to sue for misappropriation is inconsistent with the purposes of the right of publicity and ignores "the special public status that a political persona has for the purposes of commentary, criticism, and the political process."[30]

Ghosh argued that the justifications that are generally put forward for the right of publicity don't exist in the case of politicians. The publicity right serves two goals:

The first is to protect intrusions into one's private sphere through the commercial appropriation of one's personality. This protection safeguards the private person from being made public without his or her consent. The second goal is to protect the investment that a public person has made in one's persona, from which he or she obtains economic value[,] from misappropriation without consent.[31]

Neither of these goals is served by protecting the publicity rights of politicians. Any privacy-based rationale for publicity rights – that is, the idea that the right can protect non-celebrities from being made public people without their consent – is inapposite in the case of political figures:

> The first goal is irrelevant since a public figure is by definition in the public sphere. ... Furthermore, while the public official often creates a public persona, much like an actor or other celebrity, the public persona of a public official must be held up to public scrutiny and examination and is hence not a tradable commodity like the public persona of a celebrity.[32]

Courts have recognized that those who are elected to public office may give up some measure of control over their personal lives, including the right to sue for invasion of privacy.[33] Politicians forfeit other privacy rights when they run for office – there is little about a candidate's life that cannot be considered relevant to his fitness for public office and therefore properly the subject of public commentary. Giving up one's privacy is, in

[29] *Id.* at 583.
[30] Ghosh, *supra* note 20, at 620.
[31] *Id.* at 619.
[32] *Id.* at 620.
[33] McCarthy, *supra* note 4, at § 4:24.

effect, "the price of admission" to political life,[34] and as far as publicity rights exist to guard a person from the dignitary harm of public exposure, they should not be allowed.

Equally unsatisfying is viewing the right under the property-based rationale, which aims to protect the commercial value of a celebrity's public persona using either an incentive rationale or a "fruit of one's labors" rationale. The incentive rationale is based on the right of publicity's kinship with other intellectual property rights, such as copyright, whose purpose is in part to provide economic incentives for the creation and dissemination of creative works.[35] The right of publicity encourages individuals to expend the effort needed to undertake socially beneficial activities and become known in their field of endeavor, the result of which is that their identity or persona gains economic value.

California Chief Justice Rose Bird described it this way:

> [P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition. … While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally.[36]

The incentive rationale was endorsed by the Supreme Court in *Zacchini*[37] and has found favor in much of the case law.[38] It has been critiqued, however, both in general and as applied to politicians. Michael Madow argued that it was generally unnecessary because "the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than 'adequate' supply of creative effort and achievement" absent a right of publicity.[39] When applied to public officials, it may be particularly inapposite due to "the inconsistency of public service and private aggrandizement."[40] That is, the popular view is that people run for office in order to serve the public good, not to profit from the celebrity

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[34] *Id.*

[35] Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984) (copyrights and patents are "intended to motivate the creative activity of authors and inventors").

[36] Guglielmi v. Spelling-Goldberg Productions, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting).

[37] 433 U.S. 562, 576 (1977).

[38] McCarthy, *supra* note 4, at § 2:6 (incentive rationale is the one most given in the case law).

[39] Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 210 (1993).

[40] Ghosh, *supra* note 20, at 621.

and public good will they will cultivate in office. The incentive of publicity rights are therefore not needed for people to become politicians.

Similarly, the "fruits of their labors" argument does not apply to political figures, since "[i]t seems inconsistent with the values of politics to allow a public official to profit from his or her political persona."[41] As Skold argued, the fruits of a public official's labor deal with public service, not work motivated by profit.[42] Any loss of economic value from their public persona is beside the point for civic-minded politicians and, except in limited circumstances,[43] the public interest is not undermined by the free use of their name or likeness.[44]

Some politicians have accrued substantial economic value in their name and likeness independent of their involvement in politics – Schwarzenegger was of course well-known as a movie star before he ran for office. Sean T. Masson has argued that politicians who have established a valuable persona outside of the political arena, like Schwarzenegger and Ventura, should not forfeit their rights simply because they enter office. [45] Schwarzenegger's attorneys made a more general argument, rejecting the idea that any politician is "part of the public domain."[46] They argued that political figures should be treated exactly the same as any other celebrity:

> A person who runs for, or holds, political office does not forfeit his property rights. His house is not suddenly taken away, his bank accounts are not seized, and his right to control the commercial use of his identity – also a property right – does not disappear. … Arnold Schwarzenegger, and for that matter any politician, has the same right to control the commercial use of his name, image and identity as does any other person, whether a motion picture or television star, recording artist, sports figure, celebrity by some other means, or even a non-celebrity.[47]

The attorneys argued that politicians, because they spend as much time and effort as others to create a public image that has commercial value, deserve the same protection as other celebrities.[48]

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[41] *Id.* at 620.
[42] Skold, *supra* note 17, at 131.
[43] *See infra* at 22-24.
[44] Ghosh, *supra* note 20, at 640.
[45] Sean T. Masson, *The Presidential Right of Publicity*, 2010 B.C. INTELL. PROP. & TECH. F. 12001, 5 (2010).
[46] Harder & Self, *supra* note 24, at 566.
[47] *Id.* at 557-58.
[48] *Id.* at 566-67.

IV. CASE LAW REGARDING MERCHANDISE

Courts faced with misappropriation claims involving political figures tend not to rely on the various First Amendment tests that have been devised; instead, they look at the medium of expression and attempt to distinguish the political nature of the expression from its commercial characteristics. In doing so, they are guided by the Supreme Court's commercial speech jurisprudence. Commercial speech, which is defined as speech which does "no more than propose a commercial transaction,"[49] is afforded a lesser amount of constitutional protection than other types of speech. However, when commercial and noncommercial speech are "inextricably intertwined," the expression is generally treated as noncommercial speech with regard to the level of constitutional protection it is afforded.[50]

In cases involving non-political types of merchandise, courts weigh the commercial nature of the product against whatever non-commercial message it may convey. In doing so, they have routinely denied First Amendment immunity from right of publicity liability based on the medium of expression, even when the use of a name or likeness was used in "messages" on T-shirts, dishes, ashtrays, drinking mugs, and the like. This result has usually been reached on the basis that these products are not the usual media for social or political messages.[51] As the District Court for the Southern District of New York said in *Hicks v. Casablanca Records*, "more so than posters, bubble gum cards, or some other such 'merchandise,' books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded 'merchandise.'"[52]

The California Supreme Court also made a distinction between merchandise that lacks expressive content and other types of uses in *Guglielmi v. Spelling-Goldberg Productions*, [53] a case involving a television movie offering a fictionalized version of actor Rudolph Valentino's life. The court contrasted the movie with the uses at issue in a companion case involving merchandise depicting actor Bela Lugosi as Count Dracula. In the Valentino case, at issue was the use of the celebrity's identity in a constitutionally protected medium of expression, a television movie. On the other hand, the use of Lugosi's likeness for products such as "plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods" differed significantly from that use

[49]Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).
[50]Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781, 796 (1988).
[51] McCarthy, *supra* note4, at § 7:22 (citations omitted).
[52]464 F. Supp. 426, 430 (S.D.N.Y. 1978).
[53]603 P.2d 454 (1979).

because those objects, "unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated."[54]

According to McCarthy:

> When a defendant is making unpermitted use of the name of a famous sports figure on a product like a coffee mug, a claim of First Amendment immunity for conveying the "message" – expressing admiration for that person and his or her accomplishments – rings somewhat hollow. A coffee mug is not the normal medium for "speech" on public issues, and it all it took for a defendant to wrap itself in the First Amendment was to add an appropriate "Express Your Support for _____" slogan on all celebrity merchandise, then the right of a celebrity to control the commercial property value in his or her identity would be destroyed. The First Amendment would be the vehicle for legalizing commercial theft."[55]

When discussing political speech, however, McCarthy recognized the tension between the right of political speech and the right of publicity, and drew the line based on the context of the speech, be it primarily political or commercial. He drew a distinction between the use of a politician's image to sell coffee, for example, and the use of his image on a political poster calling for his impeachment.[56] Context is the all-important factor: "[I]s the context (1) one in which the expression or conveying of politically relevant information is the primary message; or (2) one in which the primary message is 'buy' – the hallmark of the 'advertisement'?"[57]

This view finds support in the holding of the District Court of Arizona in *Frazier v. Boomsma* in 2008. In that case, the court found that the political message in anti-war T-shirts that included the names of dead soldiers warranted protection under the First Amendment against a misappropriation claim because the political speech was "inextricably intertwined" with the commercial use. At issue were three T-shirts sold by Dan Frazier, a peace activist in Arizona. The shirts contained the words "Bush Lied" and "They Died" printed over a background that was made up of the names of 3,461 soldiers who had died in Iraq. The shirts were sold on a website that advertised the T-shirts with a picture that included some of the names, and which sold other T-shirts, buttons, bumper stickers and other merchandise with anti-war messages.

At issue was the applicability of a recently passed state law that provided for civil and criminal penalties for the unauthorized use of the

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[54]*Id.* at 463.
[55] McCarthy, *supra* note 4, at § 7:22.
[56]*Id.* at § 4:24.
[57]*Id.* at § 4:25.

name of an American soldier, a "soldiers' right of publicity" law that was passed in response to complaints about Frazier's business. Frazier challenged the statute in federal court, and in 2008 the Arizona District Court granted summary judgment in his favor, ruling that the shirts were "core political speech fully protected by the First Amendment," notwithstanding the fact that he offered them for sale.[58]

In granting a preliminary injunction against state prosecution in an earlier proceeding, the court had applied the "inextricably intertwined" test, finding that Frazier was "at least substantially motivated by political considerations" in producing the T-shirts and that the message on the shirt was a political one.[59] The soldiers' right of publicity, the court concluded, was not a compelling state interest that overrode Frazier's fundamental right of political speech:

> [T]he right of publicity cannot justify content-based restrictions on political or artistic expression where the identity of the holder of the right bears a reasonable relationship to the message. The rationale for this rule is that right-of-publicity limitations on political and other core forms of protected speech would block important avenues of self-expression and unduly restrict the marketplace of ideas.[60]

Here, the identities of the individual soldiers were integral to his message, which had as a focal point the magnitude of personal loss produced by the war in Iraq. Without the names of real soldiers, the effect of his message would be diminished.[61] Thus in *Frazier*, the court weighed the economic interests of the soldiers against the need for free and robust speech on political matters, finding that the political speech must be favored, even when it took the form of merchandise.

In one of the few cases to be litigated involving a politician's right of publicity, the court agreed. In *Paulsen v. Personality Posters, Inc.,* comedian Pat Paulsen sued to enjoin the defendant, Personality Posters, Inc., from making and selling a poster that consisted of an enlarged photograph of Paulsen with the words "FOR PRESIDENT" at the bottom.[62] The posters were marketed in July 1968 during Paulsen's foray into presidential politics as part of his comedy career.

The court rejected Paulsen's apparent argument that his presidential activities were merely a publicity stunt and therefore fell outside the scope of constitutionally protected matters of public interest.

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[58]Frazier v. Boomsma, 2008 WL 3982985 (D. Ariz.).
[59]*Id.* at *12.
[60]*Id.* at *15 (citations omitted).
[61]*Id.* at *16.
[62]Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501 (Sup. Ct. 1968).

"Satirical or otherwise," the court said, Paulsen's aspirations and comments on various political issues had been aired with regularity on television and were covered by the press. He engaged in activities associated with political campaigns and had even received votes in the recent primary elections.[63] "Limitations upon the permissible in political expression are almost non-existent," the court said, and whether the poster was considered social criticism or pure entertainment, it was "sufficiently relevant to a matter of public interest" to be constitutionally protected and "deserving of substantial freedom."[64]

The court protected the poster as political speech even where it was unclear whether Paulsen was a legitimate political candidate. The importance of the political context of the case can be seen by comparing it to another case involving critical commentary about someone who was a public figure but not a politician – the reclusive tycoon Howard Hughes. Three years after the Paulsen case,the New York trial court rejected the claim that social commentary was protected speech and granted summary judgment to Hughes, permanently enjoining the production and sale of T-shirts, sweatshirts and buttons with his name, likeness and signature.[65] The court rejected the defendants' argument that the products were constitutionally protected because they "offer[ed] comical and satirical comment" on the billionaire.[66]

While the case law on political merchandise is limited, then, it seems clear that context does matter, at least to the extent that it is political in nature. In both *Paulsen* and *Frazier*, the court looked to the political content of the merchandise as the key to their holdings, not the traditional medium-based rule used for T-shirts and posters.

The courts' reliance on context shows that political merchandise, because of its inherent political message, should be treated differently than T-shirts and posters of non-political celebrities. After all, what is the normal vehicle through which political opinions are disseminated? The answer must include political merchandise such as posters, buttons and T-shirts. A T-shirt with the name or image of a political candidate should be regarded as speech as much as a sign that says "I like Obama." These objects are a common way for ordinary citizens to participate in political debate; rather than write a letter to the editor or make a speech on behalf of an official, a citizen may wear an Obama T-shirt or put a Schwarzenegger bumper sticker on his car. Even without an explicitly political message, they are physical manifestations of a person's political beliefs and represent an statement of support for (or opposition to) the public official. As such, they

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[63] *Id.* at 504.
[64] *Id.* at 508.
[65] Rosemont Enterprises, Inc. v. Choppy Productions, Inc., 347 N.Y.S.2d 83 (Sup. Ct. 1972).
[66] *Id.* at 84.

should be considered political speech and be protected against misappropriation claims.

Typical political merchandise – buttons, posters, T-shirts and the like – should be categorically protected against misappropriation suits because they are themselves political messages. This view is supported by McCarthy, who differentiates between items that are "a traditional or normal context in which to express one's political views,"[67] which he calls political memorabilia, and those that are not. He would set aside in a favored category the kind of political speech that is expressed in items such as posters, buttons, and T-shirts. And Ghosh argued that any use of the name or likeness of a public official –"whether on a T-shirt, a coffee mug, or in the form of a bust" – implicates the First Amendment because the purchaser buys the product either to express approval or to show contempt by desecrating it.[68]

As described earlier, however, the communicative nature of political merchandise today goes beyond these typical campaign artifacts. Therefore, protection is warranted for any product that incorporates a politician's name or likeness to convey a political message – of support, in the case of the typical campaign poster or button, or of opposition or derision, as in the 1970s-era products that featured Spiro Agnew's likeness on a dartboard. Certainly something like a bobblehead is political speech as much as a poster or a T-shirt, especially when the likeness on the product can be seen, as in the Schwarzenegger case, as a parody of the politician. As McCarthy put it, "When the identity of a political figure is used in a context of a product which enables the buyer to express his or her own political views, the 'free speech' speaker [is] the buyer."[69]

To be categorized as political merchandise and therefore be protected, the object must be capable of conveying a political message, broadly conceived. Some objects that are in part utilitarian, such as a watch or a dartboard, are meant to be seen as a means of communication about the public official that is depicted. It is harder to find a political message on something that is strictly utilitarian – no message is conveyed by an image of Obama on something like spark plugs or insurance, for example, and any use of his image on that kind of product begins to look less like a means of the buyer expressing his opinion about the politician and more like exploitation by the seller in order to sell a particular product.[70]According to McCarthy:

> Somewhere on the spectrum of types of medium there is a critical line. Beyond that line, conveying a

[67] McCarthy, *supra* note 4, at § 4:27.
[68] Ghosh, *supra* note 20, at 635.
[69] McCarthy, *supra* note 4, at § 4:27.
[70] *See id.* at § 7:24 for more on using the copyright term "useful article" to differentiate between traditional "media" objects and merchandise with intrinsic utilitarian functions.

> "message" in the selling of a commodity will not and should not be permitted to sanction commercial exploitation of public figures by asserting that the product disseminates some "information" about that public figure. At some point along the spectrum ranging from traditional informational media to useful objects, the goals served by the First Amendment become so highly speculative and attenuated that they are outweighed by the publicity and privacy rights of the individual whose identity is used without permission.[71]

Objects that are not meant to be seen by others as carrying a message – either indicating support or nonsupport for a political figure – are not means of political expression and should not be protected from misappropriation suits. For less typical political merchandise, then, a rebuttable presumption of immunity would serve to protect political speech while leaving room for redress for the harm to public officials – and the public – that comes from the use of the public official's name or likeness in a purely commercial, non-political context.

The political speech exception is such that the scope of objects considered protected political merchandise must therefore be fairly extensive. Line drawing can be done by looking at whether the object in question helps to convey the message of support (or non-support), rather than being completely utilitarian. Instituting a rebuttable presumption of immunity would favor political speech and greatly diminish the rights of publicity that a public official enjoys when it comes to merchandise using his name or likeness, allowing for a robust marketplace of ideas in the political arena.

V. JUSTIFICATION FOR CATEGORICAL APPROACH

A categorical approach to political merchandise avoids the use of First Amendment balancing tests that have proven difficult to apply consistently. Limiting the rule to political merchandise also keeps in place the rights of politicians to control uses of their name or image for commercial exploitation in the form of brand names, endorsements or other types of advertising. This is in harmony with a third justification for the right of publicity: the prevention of unjust enrichment by those who seek to use a politician's persona for profit. As set forth by the Supreme Court in the *Zacchini* case, "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant

[71] *Id.* at § 7:22 (citations omitted).

get free some aspect of the plaintiff that would have market value and for which he would normally pay."[72]

This rationale supports the application of the right of publicity to political figures where the purpose of the misappropriation is strictly commercial, such as in a product name or for advertising purposes, and not for political or other noncommercial speech. However unseemly it may be for a politician to profit from his political persona, it also fails to serve the public good for the politician's persona to be commandeered for the sale of commercial products that have no rational relationship to First Amendment-protected speech purposes.

This allows for misappropriation suits for purely utilitarian, non-expressive merchandise, as described, as well as in endorsement cases, in which the politician's name or likeness is used in advertising, as a brand name, or otherwise to sell a product unrelated to political merchandise. When it comes to endorsements and brand names, it is hard to see what public benefit accrues from the free use of a politician's name or likeness, and the potential for harm is great if it leads to the perception that the political figure is less a public servant than a commercial shill. Without a right to sue for misappropriation, it is easy to imagine a proliferation of false endorsements leading to an erosion of the public trust in public officials.

In the bobblehead case, Schwarzenegger's attorneys argued that:

> If the [right of publicity] did not apply to political figures, companies could freely exploit politicians' names and images in advertising for their products, or on the products themselves, with impunity. George W. Bush toothbrushes and Dick Cheney laundry detergent, for example, could pervade our supermarkets and households.[73]

There is a difference, however, between advertising *for* a product, which may be pure commercial exploitation, and inclusion of a public official's name or image *on* a product, which I have argued should generally be considered political speech. My proposal would distinguish between toothbrushes containing George W. Bush's image, on the one hand, and the use of Bush's image in ads for ordinary Oral-B toothbrushes, on the other. A toothbrush with Bush's image on it can be read as a statement of political approval – the person buys the toothbrush, just as he would a T-shirt, to show his support for Bush. Under the proposed test, this would enjoy a rebuttable presumption that it is political speech and thus immune from liability.

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[72]Zacchini, 433 U.S. at 576 (citation omitted.)
[73] Harder & Self, *supra* note 24, at 565.

A toothbrush advertisement using Bush's image to sell ordinary Oral-B toothbrushes has no political message, however, only a commercial one. If the purchase of the Bush toothbrush says, "I love George Bush," the ad says, "George Bush loves Oral-B toothbrushes." This goes from a context in which the expression of politically relevant information is the primary message to one "in which the primary message is 'buy,'"[74]and should not be protected as political speech.

VI. CONCLUSION

Drawing the line between commercial use and free speech is difficult but important, given the First Amendment values at stake. When considering political speech, it is even more important that the courts get it right. Implementing a categorical presumption of immunity from misappropriation suits for political merchandise of all kinds is the best way to provide clear guidelines on these types of uses. The presumption can be rebutted with a showing that the product is strictly utilitarian without any political expression. This proposal leaves politicians able to sue over commercial endorsements and brand names, and allows for creative uses of a politician's name or likeness on political merchandise – for bobbleheads and dartboards, and even for nutcrackers and toilet paper – while leaving the politician with some recourse for uses that trade on the politician's name for purely commercial purposes.

The public interest is served when a public official can prevent the unauthorized use of his name or likeness to sell a commercial product that has nothing to do with him or his political views. On the other hand, no public interest resides in limiting the rights of citizens to speak freely – whether positively or negatively – about public affairs and public officials, even when the form of that speech is merchandise incorporating the name or image of a politician. Distinctions must be made between commercial uses and political speech, but in order to preserve a robust political debate, they must be made with an eye to expanding the marketplace of ideas, not the marketplace of commerce. Those running for office must accept that their public service includes forfeiting control over much of their public persona in the name of free speech. Creating categorical immunity from misappropriation claims for political merchandise provides a clear rule that prevents the chilling of free expression during political debate and discussion.

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[74] McCarthy, *supra* note 4, at § 4:25.

COLLEGIATE STUDENT NEWSPAPER INDEPENDENCE IN PENNSYLVANIA: AN EXPLORATORY SURVEY

MATTHEW BEDDINGFIELD*

Studies surrounding collegiate student newspapers lack an empirical focus regarding their level of independence from host institutions. This article presents the findings of an empirical survey created to balance the independence of student newspapers in the state of Pennsylvania, analyzes the results, and explains their potential implications. This study broke down integral facets of student publication independence, and created a scale of independence regarding collegiate student newspapers and their respective institution. A survey was distributed to a portion of collegiate student newspapers throughout Pennsylvania to distinguish the level of independence of the newspapers, and to also bring to light the legal implications of institutional control over collegiate newspapers.

Keywords: student newspapers, college newspapers, independence

INTRODUCTION

Although it may be easy to believe that staff members of heralded publications such as *The New York Times* or *The Wall Street Journal* have a superior legal interest in the right to a free press based on their publications' circulation and influence in the peak of the nation's print world, these staff members certainly are not alone in their desire for independence. Under the First Amendment, the press enjoys no greater freedom to speech than the rest of the public. Accordingly, newspapers at colleges and universities across the country have attempted to be independent sources of news on their campus. The students involved with these publications have a vested interest in independence and free speech; however, the institutions they are connected to rely on their ability to control the risk that comes with students speaking as affiliates of the institution. Important issues, including institutional liability for collegiate newspapers and censorship of students, arise when studying the level of control an institution has over a collegiate student newspaper.

This article examines the current degree of independence of a select number of collegiate student newspapers in Pennsylvania. The study reported here assesses several factors of independence needed for a collegiate student newspaper to be considered "independent" from its respective college or university. These factors comprise a "scale of independence" through which the subjects surveyed for the study were evaluated. Not only did this allow for a glimpse into the current state of independence regarding these publications for the reader, it is also valuable for the publications surveyed, the college or university where they publish, and lawmakers in the state interested in freedoms of the collegiate press. This note reveals a need to further study this topic in order to promote the passing of new legislation, and also to encourage more open relationships regarding content control between an institution and its newspaper.

Part I of the article provides a historical background, including previous similar studies of collegiate student newspapers, case law on the subject, as well as remaining questions surrounding student newspaper independence. Part II describes the study's purpose, including the differentiation between past studies, as well as why this study is useful for a variety of influential individuals. Part III provides hypotheses for what survey results will show. Part IV provides a description of the study, including the methods used, the population, instrumentation and timing. Part V analyzes the data, describes results, discusses potential implications, and identifies limitations. Part VIII describes the limitations of the study. Part IX concludes with options for both collegiate newspapers and their institutional homes.

I. HISTORICAL BACKGROUND

Previous studies on the independence of collegiate student newspapers have been conducted, although not on a state-by-state basis. Louis Inglehart, a leading scholar in the study of student press, proposed 12 potential operational models for collegiate student newspapers in a 1993 study, including the concept of the independent student newspaper.[1]

Inglehart used 26 factors to determine independence, including whether the publication receives funds from some type of student fee;[2] the institution vets the publication's content; or whether the publication's content is dominated by university-related material. Those factors were

[1] LOUIS E. INGLEHART, FREEDOM FOR THE COLLEGE STUDENT PRESS: COURT CASES AND RELATED DECISIONS DEFINING THE CAMPUS FOURTH ESTATE BOUNDARIES 11 (Greenwood Press 1985); LOUIS E. INGLEHART, STUDENT PUBLICATIONS: LEGALITIES, GOVERNANCE, AND OPERATION 20 (Iowa State Press 1993).

[2] For this study, "student fee" was defined as any fee charged to a student of the host institution beyond the normal tuition and matriculation fees.

place in three categories: financial separation, instructional process, and organizational concerns. These criteria for independence have been at the forefront of discussions regarding the independence of student newspapers since they were first proposed.[3]

Others adopted Inglehart's approach. For example in 1997, John Bodle conducted research to quantify Inglehart's study by categorizing collegiate student newspapers, again using the entire country as a population, as moderately or strongly independent. Bodle used the criteria for independence that Inglehart had set forth, surveying all 101 collegiate student newspapers published daily in 1993.[4]

Commentators have argued that previous surveys of student newspapers conducted in only one state have analyzed just the financial models of those student newspapers, and not the organizational and operational structure, that would be key in determining the publication's dependence on its respective institution.[5] Jacob Rooksby, professor of law at Duquesne University, described that lack of empirical data as crucial because "the bounds of students' free speech rights, and colleges' potential liability for that speech, hinge on facts of newspaper dependence, institutional control, and the state in which the collegiate student newspaper is located." [6] The available empirical data are inadequate because the studies are outdated, do not probe the details of the collegiate student newspapers' organizational and operational make-up, or were not conducted in a concentrated area, such as one particular state.

The supposed independence of collegiate newspapers as a whole has been addressed by multiple entities, including the Student Press Law Center (SPLC). It maintains that "many public college or university student newspapers were founded by students and are completely or largely financially independent of their institution; almost all exist apart from the institution's curriculum and are editorially independent." [7] Those presumptions, although certainly evidenced by particular case law, are still hypotheses without a focused empirical study on the independence of a concentrated group of publications.

Lower courts in the United States consistently have held that censorship of collegiate student newspapers by college officials is rarely permissible, though the current state of collegiate student free press may

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[3] John V. Bodle, *The Instructional Independence of Daily Student Newspapers,* 51 JOURNALISM & MASS COMMUNIC'N EDUCATOR 16 (1997).
[4] *Id.* at 16.
[5] Jacob H. Rooksby, *Collegiate Student Newspaper Independence in Virginia* (Dec. 01, 2010) (ms. at pg. 2, copy on file with author).
[6] Jacob H. Rooksby, *Rethinking Student Press in the "Marketplace of Ideas" After Hosty: The Argument for Encouraging Professional Journalistic Practices,* 33 J. COLL. & UNIV. L. 2 (2007).
[7] STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 59 (3rd ed. 2008).

contradict that statement.[8] Recent court decisions have alluded to the notion that the amount of control institutions have over student newspapers can significantly impact the constitutionality of restricting student speech. Two cases in particular, *Hazelwood v. Kuhlmeier*[9] and *Hosty v. Carter,*[10] have had profound impact on the way in which courts, institutions, and student journalists view collegiate student newspapers within the spectrum of "free press" in our country.

In 1988, the Supreme Court ruling in *Hazelwood* held that a high school principal had the right to censor speech he deemed offensive in a high-school student newspaper because primary and secondary-school educators "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[11] Although the ruling did not directly impact student newspapers at the collegiate level, a footnote in the Court's opinion did mention collegiate student publications, stating, "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[12]

That time came in 2003 in *Hosty*, when the United States Court of Appeals for the Seventh Circuit ruled in favor of the dean of students at Governors State University.[13] The dean had called the printer of the university's student newspaper, *The Innovator,* and requested an advance copy of the newspaper to review prior to printing. A district court judge ruled that an arguable issue of fact remained regarding whether a reasonable person in the dean's position would have known that censoring the newspaper was prohibited.[14]

On appeal, the dean argued that *Hazelwood* rendered unclear whether a person in her position reasonably could have believed she had the authority to make such a request of the printer. The Seventh Circuit agreed with her argument. Citing *Hazelwood* as its starting point, the Court held that "*Hazelwood*'s framework applies to subsidized students newspapers at colleges as well as elementary and secondary schools."[15] The *Hosty* decision implies that the more control a public institution has over a collegiate student newspaper, the more likely the institution is legally responsible for the newspaper's content. While the *Hosty* decision is limited to the 7th Circuit Court of Appeals with the U.S. Supreme Court

[8] *Id.*
[9] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 261 (1988).
[10] Hosty v. Carter, 412 F.3d 731, 732 (7th Cir. 2005).
[11] *Hazelwood*, 484 U.S. at 261.
[12] *Id.* at 273 n.7.
[13] *Hosty*, 412 F.3d at 732.
[14] *Id.* at 733.
[15] *Id.* at 734.

denying certiorari, it may still be used as persuasive authority in states such as Pennsylvania.

The SPLC cites *Hazelwood* and *Hosty* as indicative of the fact that student speech protections are not necessarily absolute, and that limits to a collegiate student newspaper's constitutional freedoms may be drawn at public institutions depending on the type of forum in which the collegiate student newspaper operates.[16] In light of *Hosty*, certain states have passed "anti-*Hosty*" laws that prohibit censorship of collegiate student newspapers at public institutions. Illinois, for example, passed the College Campus Press Act in 2007. This act not only forbids public college officials from conducting prior review of publications, it also declares any public college student media outlet to be a "public forum for expression by the student journalists and editors." [17] Illinois and California, which have these protective laws, are in a good position when it comes to collegiate press. However, several other states without these protective measures, particularly those outside the Seventh Circuit, arguably remain vulnerable.

Because a tortious act such as libel is a risk for any publication, institutions likely are aware of the risk involved in not properly monitoring student publications affiliated with their institution. Similarly, the students involved with these publications have an interest in maintaining distance from their institutions in order to have control of their product. Both of these interests together, and the subsequent actions taken by either the publication or the institution, create the level of independence that the particular collegiate student newspaper enjoys. Several questions arise regarding this fairly understudied aspect of free press. Even if an institution and publication do distance themselves from one another, can a collegiate student newspaper ever be fully independent? How entangled are the two entities, and can either take steps to help enable the freedoms they both desire?

II. STUDY'S PURPOSE

A need to better understand the organizational and operational frameworks of collegiate student newspapers at a state level, as well as the need to clarify the meaning of "independence" regarding collegiate student newspapers, prompted the study reported here. Although the prevalence of collegiate student newspapers might be known, particularly by those associated with the college or university, empirical analyses of these publications on a state-by-state level are few in number, with state-focused

[16] LAW OF THE STUDENT PRESS, *supra* note 7 at 62 (3d ed. 2008).
[17] Student Press Law Center, *College Censorship in Brief*, www.splc.org/wordpress (Winter 2007-2008).

studies regarding the organizational and operational makeup of collegiate student newspapers[18] non-existent.

Along with the lack of empirical data to substantiate any claim of independence regarding a collegiate student newspaper within the confines of one state comes the misconception of what "independence" really means. As Bodle claims, "It is popular in journalism departments to claim that one's own student newspaper is independent from university control."[19] Pre-study research confirms that notion in respect to the participating publications. In analyzing the print editions of those collegiate student newspapers targeted in the study, research indicated several publications include a "Disclaimer of Viewpoints," essentially stating that any material published in the newspaper does not necessarily reflect the views of the institution on whose campus the newspaper is distributed (40%, n = 8). In addition, certain of the participating newspapers claim independence from their institution, as indicated on their mastheads by such phrases as "the independent newspaper on campus" or "the independent voice" (10%, n = 2). One newspaper even claims in the editorial page, "as an organization and the students who staff the note shall not be censored or punished because of the contents of the paper."

Information collected in this study not only allows for the participating publications to assess how entangled they are with their respective institutions, it also provides a basis for making conclusions regarding the level of independence of particular collegiate student newspapers in Pennsylvania. Additional benefits from this data include assisting in the study of free press and potentially aiding administration and legal counsel at these institutions in determining the appropriate relationship between the institution and publication in order to limit their liability. Finally, lawmakers and courts may look to this study when drafting new law or interpreting existing law dealing with collegiate student newspapers in Pennsylvania.

Although the debate over whether curriculum-based laboratory newspapers or publications free of institutional control best serve students has been ongoing for decades, no previous research has collected data using a comprehensive array of characteristics that could classify student newspapers as independent.[20] This study enables colleges and universities in Pennsylvania, as well as the collegiate student newspapers represented in the study, to better understand the continuum of student press independence in the Commonwealth.

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[18] For the purposes of this study, "collegiate student newspaper" is used to mean any regularly occurring news source found at a qualifying institution with a staff and audience primarily comprised of college students. Excluded from this classification are student literary magazines, fashion magazines, or blogs not affiliated with the newspaper studied.

[19] *See* Bodle, *supra* note 3, at 16.

[20] *Id.*

III. HYPOTHESES

To have a point of comparison for the study's initial findings, I compiled a variety of hypotheses regarding where institutions of varying classes would fall on the "scale of independence." First, concerning the public versus private classification of the participants, I predicted that publications existing at private institutions would lean more heavily on the "dependent" side of the scale, whereas publications at public institutions would lean more toward being "independent" student newspapers. This hypothesis was based on the fact that while state law or a particular institution's policy may offer some amount of protection for the collegiate student newspaper's free speech, the First Amendment provides that private institutions are not prohibited from regulating or censoring the content of their institution's student publications.[21]

Second, I believed that religiously affiliated collegiate student newspapers also would lean more toward the "dependent" side of the scale. That hypothesis was based on the fact that subject matter displayed in a publication may not correspond to the mission of the faith in question and, in turn, the institution's mission. Religiously affiliated institutions likely have a heightened urge to ensure their student newspaper reflects those views.

Last, I believed that neither the size of an institution's endowment nor its student population would have any connection to its student newspaper's independence. One may argue that an institution with a larger endowment would inherently be more conservative when it comes to the work-product its students create so as to not jeopardize any donations or funding it receives the following year. In addition, one could rationalize that the larger a student population, the larger the alumni base that a student newspaper could likely reach, again having a potential impact on alumni donations. Nonetheless, I believed that these two identifiers would not result in any connection to a publication's independence.

IV. DESCRIPTION OF STUDY

A. Methods

This study surveyed the organizational and operational framework of collegiate student newspapers at several public and private institutions of higher education in Pennsylvania. An online survey was developed specifically for the study, and was e-mailed to the editor-in-chief or managing editor of each institution's primary student newspaper. For the purposes of this study, the "primary" student newspaper was defined as the foremost student news source on campus according to either the

[21] SPLC, *Legal Guide for the Private School Press* (May 13, 2013), http://www.splc.org/knowyourrights/legalresearch.asp?id=52.

institution's official website or a contacted administrator. An accompanying cover letter explaining the purpose of the study, as well as the instructions for filling out the survey, also were included in the information sent to each targeted participant. The factual nature of the questions posed in the survey meant that potential participant bias was discounted. Therefore, that the participants were staff members of the publication, as opposed to the administration or other professional representative of the institution, should not matter.

B. Population

This study surveyed public and private institutions of higher learning in the Commonwealth of Pennsylvania (N = 87). The study excluded any for-profit institutions, as well as any branch campuses, junior colleges, or two-year institutions to focus the study on the state's primary institutions of higher learning. The institutions were selected by filtering the online results of collegiate student newspapers provided by the Pennsylvania Newspaper Association.[22] A search of the database resulted in 112 collegiate student newspapers in Pennsylvania. After the institutions identified as for-profit, branch campuses, junior colleges, community college, or two-year institutions were eliminated, 87 student publications remained.[23] The contact information for each publication was found by visiting the publication's website. If the publication did not have a website, or did not provide a primary e-mail or telephone number, the dean of students office at each institution was called in order to obtain contact information for the primary student newspaper.

C. Instrumentation

The distributed online survey was created using an online survey software tool, <questionpro.com>. The survey contained 20 questions, excluding applicable follow-up questions. The questions started with general background information about the publication, such as year of inception and average staff size. Subsequent questions were broken into four categories: newspaper oversight, funding, physical resources and intellectual property, and distribution and archiving. Example questions from the survey include: Is the newspaper an officially recognized student group or organization as defined by your institution? Does the newspaper receive funding from administrative or faculty-controlled sources? Does the newspaper maintain dedicated office space in a building owned by your institution? These questions were chosen to help identify elements of a

[22] Pennsylvania Newspaper Association, *Listing of PA College Newspapers,* http://pa-newspaper.org/programs/students/collegepapers (last visited April 22, 2013).
[23] *See* Appendix A for the complete list of solicited newspapers.

collegiate student newspaper's operational and organizational structures that, if provided by the host institution, would indicate the publication's "dependence" on the institution.

I collaborated with a law professor and higher education scholar knowledgeable about the subject matter to create the survey. The aim was to compile questions that would elicit significant information that commentators and judges have deemed important in determining the independence of collegiate student newspapers. The survey questions used helped to illuminate not only the publications' organizational and operational structures, but also whether they relied on one of the 10 factors on the scale of dependence (e.g., "Is your newspaper in any way advertised on your institution's website? Does the newspaper maintain dedicated office space in a building owned by your institution?").

D. Timing

The initial survey was distributed on October 24, 2012, using a standard, non-personalized e-mail to the editor-in-chief or other identified contact person of qualified collegiate student newspapers meeting the study's inclusion criteria. Within one week, 16 participants had completed the survey. After November 1, 2012, a personalized e-mail reminder was sent to those targeted participants who had not completed the survey. Two more responses were generated from that follow-up. Subsequently, on November 28, 2012, a final round of phone calls to newsrooms and personalized e-mails were made to publications that had not yet responded. Those efforts yielded five additional responses, with only two being fully completed, for a total of 20 participants.

V. DATA ANALYSIS

Attributes such as public versus private status, religious affiliation, student population, and institution endowment size were analyzed briefly to find whether any noticeable connection existed between these factors and the independence of the participating collegiate student newspapers. However, citing the purpose of this study, factors over which the individual institutions and publications have greater control were given significantly more attention. A scale of independence/dependence was created to gauge the relationship that each participating collegiate student newspaper had with its respective institution. The concept of this scale was derived using certain principles of independence identified by Inglehart,[24] as well as the classification technique used by Bodle.[25] The scale deployed 10 factors, deemed to be essential based on my readings of previous studies and case law, to quantify the "dependence" of each publication on a scale from 0 to

[24] *See* Bodle, *supra* note 3, at 20.
[25] *Id.*

10. A score of "0" means that the publication is completely independent of the institution, while a score of "10" means that it is completely dependent on the institution.

Each factor (i.e., whether the publication was funded by the institution) answered in the affirmative gave the institution one point toward its final score, pushing it toward being a fully dependent publication. The exception to this rule was when the newspaper gave an affirmative answer to whether the publication was incorporated. That would result in zero points toward the end ranking due to an incorporated entity's independent nature. Each institution was given a final score based on the 10 factors, and analyzed based on answers to particular survey questions. I categorized each institution by score into three groupings that emerged from the data: mildly dependent (0-4), moderately dependent (5-7), and heavily dependent (8-10).

VI. RESULTS

The quantitative results of the study allow for a first glimpse into the status of independence concerning a portion of collegiate student newspapers in Pennsylvania. However, because the full population did not respond, a census of all collegiate student newspapers in Pennsylvania still does not exist. Of the 87 newspapers targeted, 24 participants at least partially responded, with 20 of those publications completing the entire survey (n = 20, 23.2%). The majority of participants completed the survey within the first week of dissemination (n = 16, 80%). Attempts were made via telephone to dean of students offices and newsrooms when the other requested participants were not responsive to e-mail or the initial phone call; however, these efforts only resulted in four more completed surveys.

To answer pre-research questions, the following data collected from the survey are in response to the aforementioned hypotheses. Regarding the public versus private status of an institution, no significant evidence was found either way. For responding publications from public institutions, 67% (4 of 6 participants) of responding newspapers were classified as moderately dependent on their host institution and 33% (2 of 6 participants) were classified as heavily dependent. For responding publications from private institutions, 57% (8 of 14 participants) were heavily dependent on their host institution and 43% (6 of 14 participants) were moderately dependent.

Second, regarding religious affiliation, 60% (6 of 10 publications) of student newspapers classified as heavily dependent were connected to religiously affiliated institutions, whereas 70% (7 of 10 publications) of the moderately dependent participants were not religiously affiliated. This data shows that a majority of religiously affiliated collegiate student newspapers surveyed was more dependent on the institution, whereas the majority of non-religiously affiliated institutions were less dependent. This

is in line with the hypothesis that religiously affiliated participants would tend to be more dependent than non-religiously affiliated publications.

Although the student population and endowment of the institution did not show any particular connection to independence or dependence, a few facts arose from the data. Swarthmore College, the institution with the largest endowment ($1,508,483,000 in 2011)[26] produced one of the least-dependent publications, with a score of 6 on the scale of dependence. On the other hand, Keystone College, the institution with the smallest endowment ($7,122,562 in 2011)[27] produced one of the most heavily dependent publications, with a score of 9 on the scale of dependence. In addition, the institution with the second-largest student population, Duquesne University (10,294 students in 2010),[28] produced the least dependent publication, with a score of 5, and the smallest institution by size, Wilson College (840 students in 2010),[29] produced the most dependent publication, with a score of 10.

The illustration below displays each survey participant, where they fell on the scale of dependence, and the 10 factors used to determine each publication's score.

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[26] U.S. News & World Report, *U.S. News Best Colleges-Swarthmore College* (2012), http://colleges.usnews.rankingsandreviews.com/best-colleges/swarthmore-college-3370.

[27] U.S. News & World Report, *U.S. News Best Colleges-Keystone College* (2012), http://colleges.usnews.rankingsandreviews.com/best-colleges/keystone-college-3280.

[28] Carnegie Foundation for the Advancement of Teaching, *Duquesne University* (2012), http://classifications.carnegiefoundation.org/lookup_listings/view_institution.php?unit_id=212106&start_page=institution.php&clq.

[29] *Id.*

Table 1: Publications by Independence Ranking

Mildly Dependent (0-4)	*Moderately Dependent (5-7)*	*Heavily Dependent (8-10)*
	Franklin & Marshall College (5)	Alvernia University (8)
	East Stroudsburg University (5)	Eastern University (8)
	Duquesne University (5)	Westminster College (8)
	Washington & Jefferson (6)	Mercyhurst University (8)
	Swarthmore College (6)	Millersville University (8)
	Clarion University (6)	Lehigh University (8)
	Shippensburg University (7)	Cal. University of PA (8)
	Edinboro University (7)	Keystone College (9)
	Villanova University (7)	Cabrini College (9)
	Saint Vincent College (7)	Wilson College (10)

Table 2: Ten Independence-Determining Factors

(1) An institutionally provided office or workspace
(2) The budget, partially or wholly, provided by the institution, or entity within the institution
(3) Administrative or faculty review and editing of content or design
(4) The publication is an official club or organization of the institution
(5) The publication is part of a course-for-credit at the institution
(6) There is a faculty or administrative adviser
(7) Space on the institution's official website is dedicated to the publication
(8) There is the use of any logo, namesake, or other registered or non-registered trademark owned by or affiliated with the institution used in the publication
(9) The publication is incorporated
(10) The publication is printed or distributed using institutionally provided resources

All the student newspapers surveyed had an institutionally provided office or workspace (n = 20, 100%). Almost all the student newspapers surveyed were an official club or organization at their affiliated institution

(*n* = 19, 95%), and almost every publication had a faculty or administrative adviser (*n* = 19, 95%). Almost half the administrative or faculty advisers were paid for their time by the institution (*n* = 7, 37.4%), and none were paid by the publication. Only a handful of publications surveyed had incorporated in some fashion (*n* = 5, 25%). About half of the publications surveyed were a course-for-credit publication (*n* = 11, 55%). A majority of publications surveyed was advertised in some fashion on the host institution's official website (*n* = 16, 80%).

Participants were asked whether they received some or all funding from any entity within their host institution. More than half of the participating student newspapers received some or all of their budget from the respective institutions (*n* = 12, 60%), which leaves only eight self-sustaining student newspapers of the 20 participants (*n* = 8, 40%). However, most responding publications generated revenue on their own (e.g., advertising space) in some fashion (*n* = 18, 90%). Every publication that was granted some type of budget received a portion of the funds from either institutional activities or the general fee (*n* = 12, 100%), with around one-third of those student newspapers receiving some type of funding from the respective student government (*n* = 4, 33.4%). In addition, almost all the publications that received some type of funding from the institution received $5,000 or more toward their budget (*n* = 11, 92.2%).

Finally, participants were asked whether their publications were printed, distributed, or printed and distributed using institutionally provided resources. Almost all participants answered in the affirmative (70%, *n* = 14). More than half of the participating publications' host institutions regulate where the publication can distribute on campus by providing the space (e.g., newsstands) where the newspapers are distributed (65%, *n* = 13). The majority of participants used institutionally provided resources (e.g. printers and computers) for the sole purpose of producing the newspaper (75%, *n* = 14).

VII. DISCUSSION

Both law and policy implications were found in this study. The findings generated from the 20-question survey and the publications' placements on the scale of dependence clearly show that the surveyed student newspapers as a whole are at least moderately reliant on their host institution. However, a low score on the scale of dependence does not necessarily mean the institution cannot apply more control over these newspapers. Bodle states, "While freedom from university control of editorial content is one viable characteristic, the *ability* of university faculty or administrators is a far cry from the *willingness* to exert such dominance."[30] For this reason, publications that wish to err on the side of

[30] *See* Bodle, *supra* note 3, at 22.

caution, and remain in control of their product, should take proactive steps toward doing so. Distancing themselves from the institution by taking into consideration the factors in this study should prove to be a strong first step. Secondly, open communication between the two entities, the institution and publication, would help to solidify the relationship between the two by laying out expectations on behalf of each party.

The data from the study clearly show that each participating student newspaper is in some way affiliated with its institution. Half the publications that participated were categorized as moderately dependent (50%, n = 10) and half were categorized as heavily dependent (50%, n = 10). Inglehart believes that a student newspaper can never be truly "independent," because it always has some connection to the host institution.[31] The mere claim that a publication is the "student newspaper of" any particular institution creates a connection between the newspaper and its host institution and vice versa. While this may be so, the student newspaper, again, can certainly take measures to make the audience, i.e., the students of the institution, the sole connection between the publication and the institution. Publications do not need to identify as "the student newspaper of" their college or university if they wish to remain entirely independent of the institution and in control of their product.

This study shows that where an institution may attempt to legally exhibit either content control or evade liability, the courts will need to look at the level of independence of the publication from its respective institution. This study also shows that where *anti-Hosty* legislation is not enacted, collegiate newspapers can still be censored. The level of independence as presented in this article certainly shows that the institution is likely to have the authority to control content in the student publication, which in effect would render them liable for tortious conduct. Courts and lawmakers need to be cognizant of this information, and implement a similar measuring device to establish relationships of control and liability.

VIII. LIMITATIONS

There were several factors when conducting the survey and analyzing the data that inhibited perfect results. This study is the first to quantify the independence of collegiate student newspapers in one particular state. Although the study and resulting data will be useful to lawmakers, commentators, and courts within the confines of Pennsylvania, it behooves other states to complete their own state-specific studies to better understand the level of independence for collegiate student newspapers in their state. Also, as the response rate was about a quarter of the 87-targeted participants (~23%, n = 20), the results are not indicative of the state of independence of all collegiate student newspapers in the

[31] *Id.*

state of Pennsylvania. It would be useful to continue this research so that a more all-encompassing look at the status of collegiate student newspaper independence in Pennsylvania may be rendered.

Regarding the questions on the survey, and which factors were chosen to analyze independence, it is worth nothing that there can be no absolute characteristics of independence.[32] The factors used arguably can be construed as too absolute. For example, one newspaper could have only a small fraction of its budget supplied by the university, and another could have its entire budget supplied. Although the survey questioning accounted for those discrepancies, the scale of dependence was based on absolutes. If the institution supplied any portion of the newspaper's budget, it received a whole point on the scale.

Last, participants may not have known the correct answer to particular questions posed, resulting in either incorrect information provided or no information provided. Other would-be participants simply did not finish the survey, perhaps because of time constraints or an unwillingness to continue. Regardless, the results of the survey were based on the assumption that each participant's answers were truthful and accurate.

IX. CONCLUSION

This is the first study to empirically analyze the level of dependence that a certain number of collegiate student newspapers in Pennsylvania have in relation to their host institution. The data show that of those newspapers surveyed, all were at least moderately dependent on their institution according to the 10 factors used to define independence. It is clear that these collegiate student newspapers generally rely on their host institutions to operate.

The host institutions can conclude that if their respective student newspaper were to be accused of libel or even copyright infringement by another entity, the institution could be found liable because of the strong connection between the institution and the publication. If these institutions dislike this responsibility, they need to take steps to either distance themselves from the newspaper or eliminate any chance of institutional harm by enforcing more control on the publication.

The student newspapers can conclude that they all are generally reliant on their host institution in some way. If these students are not fond of such control, they can take steps to either further detach themselves from the institution or accept the notion that they are under the control of their institution. As previously stated, almost all the publications generated some type of revenue themselves. Steps could be taken to claim a higher level of independence by accruing additional funds, meeting elsewhere to

[32] *Id.* at 18.

produce the newspaper, or not including any potential insignias or other trademarks of the institution in their paper. Each additional step that a publication takes to distance itself from the host institution increases the likelihood a court would find the student newspaper to be independent enough to have more control over the publication of their newspaper. This study will help courts measure the relationship between an institution and its papers, and in turn conclude whether censorship by the institution is legal, and whether or not liability for torts is a question.

Lawmakers and courts in Pennsylvania also should be aware of the results of this survey. The data show how entangled these publications are with their host institutions. Courts could use these findings to support conclusions that a particular university or college is, in fact, liable for the actions of its primary student newspaper. On the other hand, they could use the data to show that a particular student newspaper is on its own, perhaps because of specific factors such as not having faculty or administrative supervision. After the *Hosty* decision, Pennsylvania lawmakers could benefit from knowing that a significant portion of collegiate student newspapers in their state show heavy signs of dependence and, in turn, affiliation with their host institution. Any state that conducts a similar study that bears like results may see Anti-*Hosty* legislation as more appealing when lawmakers become cognizant of these relationships.

Future research should attempt to analyze the independence of collegiate student newspapers throughout the country using a similar construct as this study. However, researchers could create a more intricate system of analyzing independence, perhaps including more factors such as whether the publication devotes the majority of its issues to news concerning the university. Researchers also could further dissect the amount each publication is budgeted, perhaps awarding half points to those publications that only receive a portion of their budget from their host institution.

Those interested in the state of collegiate student press in Pennsylvania should be cognizant of these results and wary of the fact that of the 20 participants, all were at least partially susceptible to institutional control. Although the newspaper staffs surveyed may be in control of what they produce in a functional, day-to-day sense, the issue remains: when conflict over content ensues, will the institution or publication be in control?

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Appendix A—List of Targeted Participants

Institution	Newspaper
Albright College	**The Albrightian**
Allegheny College	**The Campus**
Bryn Athyn College	**The Bryn Athyn Beacon**
Bucknell University	**The Bucknellian**
Cabrini College	**The Loquitor**
Cairn University	**The Scroll**
Cedar Crest College	**The Crestiad**
Chatham University	**The Communique**
Delaware Valley College	**Rampages**
DeSales University	**The Minstrel**
Dickinson College	**The Dicksonian**
Elizabethtown College	**The Etownian**
Franklin & Marshall College	**The Diplomat**
Geneva College	**The Geneva Cabinet**
Gettysburg College	**The Gettysburgian**
Grove City College	**The Collegian**
Gwynedd-Mercy College	**The Gwynmercian**
Bryn Mawr and Haverford Colleges	**The Bi-College News**
Juniata College	**The Juniatan**

Keystone College	**The Key**
King's College	**The Crown**
La Roche College	**The La Roche Courier**
Lafayette College	**The Lafayette**
Lebanon Valley College	**La Vie Collegienne**
Lycoming College	**The Lycourier**
Mercyhurst College	**The Merciad**
Messiah College	**The Swinging Bridge**
Moravian College	**The Comenian**
Mount Aloysius College	**The Belltower**
Muhlenberg College	**Muhlenberg Weekly or Advocate**
Point Park University	**The Globe**
Rosemont College	**The Rambler**
Saint Vincent College	**The Review**
Seton Hill University	**The Setonian**
Susquehanna University	**The Crusader**
Swarthmore University	**The Phoenix**
Thiel College	**Thielensian**
Ursinus College	**The Grizzly**
Washington & Jefferson College	**Red & Black**
Westminster College	**The Forum *or* The Holcad**

Wilson College	**The Billboard**
York College of PA	**The Spartan**
Alvernia University	**The Alvernian**
Arcadia University	**The Tower**
Carlow University	**The Carlow Chronicle**
Carnegie-Mellon University	**The Tartan**
Chesnut Hill College	**The Griffin**
Drexel University	**The Triangle**
Duquesne University	**The Duquesne Duke**
Eastern University	**The Waltonian**
Gannon University	**The Gannon Knight**
Holy Family University	**The Tri-Lite**
Immaculata University	**The Immaculatan**
La Salle University	**The Collegian**
Lehigh University	**The Brown and White**
Marywood University	**The Wood Word**
Misericordia University	**The Highlander**
Neumann University	**The Joust**
University of Pennsylvania	**The Daily Pennsylvanian**
Philadelphia University	**The Text**
Robert Morris University	**The Eagle *or* The Sentry**
Saint Francis University	**The Troubador**

Saint Joseph's University	**The Hawk**
University of Scranton	**The Aquinas**
University of the Sciences	**The Prescription**
Villanova University	**The Villanovan**
Waynesburg University	**The Yellow Jacket**
Widener University	**The Dome**
Wilkes University	**The Beacon**
Bloomsburg University	**The Voice**
California University of PA	**CalTimes**
Cheyney University of PA	**Cheyney Record**
Clarion University of PA	**The Clarion Call**
East Stroudsburg University	**The Stroud Courier**
Edinboro University	**The Spectator**
Indiana University of PA	**The Penn**
Kutztown University of PA	**The Keystone**
Lock Haven University of PA	**The Eagle Eye**
Mansfield University of PA	**The Flashlight**
Millersville University of PA	**The Snapper**
Shippensburg University of PA	**The Slate**
Slippery Rock University of PA	**The Rocket**
West Chester University of PA	**The Quad**

Lincoln University	**The Lincolnian**
The Pennsylvania State University	**The Daily Collegian**
University of Pittsburgh	**The Pitt News**
Temple University	**The Temple News**

Appendix B—Scale of Independence

0 ←Independent /Dependent→ 10

Institution	*Religious Affiliation*	*Newspaper Name*	*Staff Size*	*School Budget*	*Student Population*				
Answer	Answer	Answer	Answer	Answer	Answer				
On-Campus Office or Provided Work Space?	*Budget Supplied by the Institution?*	*Administrative or Faculty Review of Content/Design?*	*Official Club/Organization of the Institution?*	*Course-for-Credit?*	*Faculty or Administrative Advisor?*	*Space Used on Institution's Official Website?*	*Use of Any Logo/Namesakes Affiliated with the Institution?*	*Incorporated?*	*Printed/ Distributed on Campus Using Institutionally Provided Resources?*
(No/Yes)	(No/Yes)	(No/Yes)	(No/Yes)	(No/Yes)	(No/Yes)	(No/Yes)	(No/Yes)	(Yes/No)	(No/Yes)
(0/1)	(0/1)	(0/1)	(0/1)	(0/1)	(0/1)	(0/1)	(0/1)	(0/1)	(0/1)

Appendix C—Institution Data

Institution	Publication	Average Staff No.	Printed	Non-Profit/For-Profit	Public/Private	Religious Affiliation	Student Population (2008-10)	Endowment (2011)(USD)	Level of Dependence	
Alvernia University	The Alvernian		5 Monthly	Non-Profit	Private	Roman Catholic	2, 856	17,246,377		8
Shippensburg University	The Slate		30 Weekly	Non-Profit	Public	N/A	8,253	27,895,061		7
Edinboro University	The Spectator		25 Weekly	Non-Profit	Public	N/A	8,286	14,183,277		7
Eastern University	The Waltonian		17.5 Bi-Weekly	Non-Profit	Private	American Baptist	4,331	21,574,987		8
Villanova University	The Villanovan		120 Weekly	Non-Profit	Private	Roman Catholic	10,375	375,060,584		7
Franklin & Marshall College	The College Reporter		12 Weekly	Non-Profit	Private	N/A	2,175	303,321,000		5
Washington & Jefferson College	The Red & Black		30 Weekly	Non-Profit	Private	N/A	1,514	105,449,820		6
Swarthmore College	The Phoenix		60 Weekly	Non-Profit	Private	N/A	1,525	1,508,483,000		6
Westminster College	The Forum		15 Bi-Weekly	Non-Profit	Private	Presbyterian Church (USA)	1,543	91,212,410		8
Mercyhurst University	The Merciad		24 Weekly	Non-Profit	Private	Roman Catholic	4,373	28,623,000		8
Wilson College	The Billboard		6 Monthly	Non-Profit	Private (Women's College)	Presbyterian Church (USA)	840	71,439,734		10
Millersville University of PA	The Snapper		20 Weekly	Non-Profit	Public	N/A	8,427	20,469,452		8
East Stroudsburg University of PA	The Stroud Courier		20 Bi-Weekly	Non-Profit	Public	N/A	7,576	N/A		5
Keystone College	The Key		8 2X a Semester	Non-Profit	Private	N/A	1,691	7,122,562		9
Lehigh University	The Brown and White		150 Semi-Weekly	Non-Profit	Private	N/A	6,996	1,077,430,000		8
Duquesne University	The Duquesne Duke		7 Weekly	Non-Profit	Private	Roman Catholic	10,294	171,119,000		5
Clarion University of PA	The Clarion Call		13 Weekly	Non-Profit	Public	N/A	7,346	10,386,829		6
Cabrini College	The Loquitor		35 Weekly	Non-Profit	Private	Roman Catholic	3,547	12,654,739		9
California University of PA	Cal Times		5 Weekly	Non-Profit	Public	N/A	9,017	13,592,407		8
Saint Vincent College	The Review		15 Bi-Weekly	Non-Profit	Private	Roman Catholic	1,984	71,348,256		7

RETHINKING MEDIA JOINT ACTIVITY WITH LAW ENFORCEMENT

Jasmine McNealy

This article considers the claims against journalists for ride-alongs and offers suggestions for journalists and other members of the media as to how to avoid liability for civil rights violations related to their activities with law enforcement. When journalists ride along with members of law enforcement, and are sued for violating an individual's civil rights, the courts will examine whether the journalist violated some established right and whether the journalist was involved in state action. A finding of state action by the courts is predicated on the amount of involvement the news organization had with law enforcement officials. A relevant question for the courts is whether reporters were involved in planning searches, staging sting operations, and assisting with investigations. Courts will also examine whether the news organization violated the rights of the plaintiff during the act of newsgathering. It is critical for journalists, then, to examine their connections and dependence on law enforcement agencies when engaging in the act of gathering information.

Keywords: journalism, ride-along, law enforcement, media, privacy

I. INTRODUCTION

In 2010, the Biography Channel and its parent company A&E Television, like so many news outlets before them, were named parties to a lawsuit related to the filming of an arrest. Sisters Chelsea Frederick and Ferrara Daum claimed that Biography, along with a production company and the City of Naperville, Illinois violated their civil rights when a film crew from the show "Female Forces" recorded the execution of an arrest warrant for Frederick.[1] Of particular concern for Frederick was the filming of her as her pajama pants began to slip off of her hips, and the crew's

[1] Frederick v. The Bio. Chan., 683 F. Supp. 2d. 298 (N.D. Ill. 2010).

persisting with filming in spite of her protests that she did not want to appear on camera.[2]

Biography had entered into an agreement with the City of Naperville, allowing its film crew to record the serving of the warrant on Frederick and others. During the service of the warrant, Frederick alleged that a male police officer detained her and her sister outside of their apartment, making them wait to be arrested by a female officer in front of the cameras. The U.S. District Court for the Northern District of Illinois ruled that the contract between Biography and the Naperville police department was strong evidence that the film crew was acting "under color of law" when it filmed Frederick and Daum without their permission.[3]

Whether Biography was acting under color of law is the first question in a test of the channel's liability for violating the sisters' civil rights. The *Frederick* case is not the first time that the courts have had to consider whether members of the media should be held liable in connection to so-called "ride-alongs" with law enforcement. Well over a decade ago, the U.S. Supreme Court found that media ride-alongs violated the civil rights of those filmed or photographed inside private homes.[4] But the ruling did not mark the end of media ride-along, nor did it usher in a wave of court opinions holding media defendants liable for civil rights violations. In fact, until 2008, the Ninth Circuit was the only court to have held that a ride-along violated the federal civil rights statute.[5]

But ride-along cases in the not too distant past, including one settled out of court between NBC and the family of a man who killed himself rather than appear on the hit show "To Catch a Predator," demonstrate what may be a shift in the way the courts are considering media joint activity with law enforcement. Although the hit NBC show no longer airs, law enforcement reality shows are an entrenched part of the media landscape, starting with "COPS, which set the precedent for all such shows. This article considers the claims against journalists for ride-alongs, as well as offers suggestions for journalists and other members of the media as to how to avoid liability for civil rights violations related to their activities with law enforcement.

More specifically, this article considers the factors necessary for a finding that the media violated a plaintiff's rights while involved in a ride-along. Section II provides a background for the kinds of claims that private plaintiffs have made against the media for joint activities with law enforcement. Following this, Section III describes how the U.S. Supreme Court has ruled in the only ride-along case that is has considered. This section further examines the predictions that scholars made about the impact of the ruling on ride-longs. Section IV considers the ride-along cases

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[2] *Id*. at 799.
[3] *Id*. at 800.
[4] Wilson v. Layne, 526 U.S. 603 (1999).
[5] Berger v. Hanlon, 526 US 808 (1999).

decided after the Court's ruling, and analyzes whether the scholarly predictions proved correct. Section V discusses the landscape of media ride-alongs, and is followed by Section VI, which offers suggestions for media organizations for avoiding liability for conducting newsgathering activity with law enforcement.

II. BACKGROUND

Frederick's claim against the Biography Channel and the City of Naperville for violating her constitutional rights is what is in the U.S. called a *Bivens* action. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[6] the U.S. Supreme Court ruled that the Fourth Amendment demands that officers executing a search warrant stay within the express parameters of that warrant.[7] In ride-along cases, like the one involved in *Frederick*, this may mean that the court will reject the media outlet's claim of qualified immunity, or that they were not liable because there was no clearly established history that the activity in which they were engaged was violative of individual rights. Plaintiffs in these cases usually file suit under 42 U.S.C. § 1983, the federal civil rights statute.

For example, CBS found itself in trouble for civil rights violations when its *Street Stories* camera crew accompanied agents of the United States Treasury on the execution a search warrant on the home of Babatunde Ayeni, who was under investigation for running a credit card fraud operation.[8] At the time of the search, Ayeni was not at home. His wife and four-year-old son, however, were present. Ayeni's wife filed suit against the agents and CBS, claiming the parties had violated her and her son's constitutional right to privacy.[9]

CBS argued that it was immune from suit because its journalists accompanied federal agents in the execution of a search warrant.[10] Government agents are immune from civil suits "unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person should have known.'"[11] According to the court, a person's home is the clearest example of a place were the individual has a reasonable expectation of privacy; if the government wants to enter and search, it must have a search warrant. The government's search must stay within scope of the warrant, and "[i]t is well established by statute that a

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[6] 403 U.S. 388 (1971).
[7] *Id.* at 394 n.7.
[8] Ayeni v. CBS, Inc., 848 F. Supp. 362, 364 (E.D.N.Y. 1994).
[9] *Id.* at 364.
[10] *Id.*
[11] *Id.* at 365 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). See also Stanton v. Sims, 134 S. Ct. 3 (2013); Ortiz v. Jordan, 562 U.S. 180 (2011); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

person not specifically authorized by a search warrant may not participate in a search unless he is aiding the officer authorized by the warrant."[12]

The court ruled that the photos CBS took during the search constituted a seizure under the Fourth Amendment.[13] Ayeni's complaint alleged that the camera crew was not aiding the investigation, but "was filming for their own newsgathering purposes."[14] If this was true, the filming violated the Constitution and federal law, and was therefore, "a seizure beyond the scope of the warrant."[15] CBS, as a private entity, was not entitled to qualified immunity, and "had no greater right than that of a thief to be in the home, to take pictures and to remove the photographic record."[16]

Parker v. Clarke[17] is another example of the federal civil rights statute being used against journalists and law enforcement. Sandra Parker and her daughter sued members of the Board of Police Commissioner of the City of St. Louis, police officers, and Multi-Media KSDK, Inc. pursuant to 42 U.S.C. § 1983 and Missouri tort law, for violating their civil rights and for invasion of privacy.[18] The suit arose after police executed a search warrant for drugs, money and drug transaction records at the Parker residence. A KSDK reporter, unaware that the warrant would be executed, accompanied officers on the raid and filmed during the search.[19] The target of the search warrant, a relative of the Parkers, was detained outside of the home before officers entered. Police seized drugs and firearms, but the relative was ultimately not charged.[20] The police did not limit where the reporters could film, neither did the Parkers request that the reporters not enter their home.[21]

For the Parkers to recover against KSDK under the federal statute, they had to "demonstrate that KSDK violated plaintiffs' constitutional rights under color of state law."[22] Applying the Eighth Circuit U.S. Court of Appeals' requirement of "a mutual understanding, or meeting of the minds, between the private party and the state actor,"[23] the court ruled that the journalists were not state actors for the purposes of 42 U.S.C. § 1983.[24]

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[12] *Ayeni,* 848 F. Supp. at 368 (citing 18 U.S.C. § 3105).
[13] *Ayeni,* 848 F. Supp. at 366.
[14] *Id.* at 368.
[15] *Id.*
[16] *Id.* The Second Circuit U.S. Court of Appeals affirmed the court's ruling on appeal, Ayeni v. Mottola, 35 F.3d 680, 691 (2d Cir. 1994).
[17] 905 F. Supp. 638 (E.D. Mo. 1995).
[18] *Id.* at 640.
[19] *Id.* at 640-641.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 642 (citing *Adickes*, 398 U.S. at 150).
[23] *Id.* (quoting Mershon v. Beasley, 994 F.2d 449, 451 (8th Cir. 1993)).
[24] Parker v. Boyer, 93 F.3d 445, 448 (8th Cir. 1996). The appellate court did, however, reverse the district courts grant of summary judgment to the police

Although the journalists in *Parker* were not liable for civil rights violations, other courts have ruled that journalists were state actors within the meaning of the federal law. In *Barrett v. Outlet Broadcasting, Inc.*,[25] the children of a suicide victim sued police and a television station after reporters entered their mother's home and took pictures of her dead body. The reporters, on a ride-along with the homicide squad, accompanied officers into the woman's home after officers asked permission from someone living inside in the house.[26] Assisted by police, the reporters were able to enter the victim's private bedroom and take pictures of the victim's naked torso.[27] The victim's children sued under 42 U.S.C. § 1983, claiming the reporters had violated their Fourth and Fourteenth Amendment rights, as well as trespass.

The court denied the station's motion for summary judgment on the § 1983 claim. According to the court, if a party is "jointly engaged with state officials in a prohibited action," they are considered to be acting under color of state law.[28] Here, the court found that the reporters had entered into an agreement with police that allowed them access to the crime, which they otherwise would not have been able to view.The police could be viewed as having assisted the media in newsgathering.[29] Additionally, the suicide victim's children had a right to privacy under the Fourth Amendment because the children had a legitimate expectation of privacy in their mother's house. [30] The children kept clothing at the house, visited frequently and had keys.

The court also found that law enforcement officers may exceed their authority to control a crime scene when they allow the reporters, who are not present for any law enforcement purpose, to enter the premises.[31] In this case, the court concluded the reporters did not enter the home for any law enforcement purpose. Further, police actually helped to stage some of the scenes photographed by reenacting the search for the woman's identity and uncovering her body.[32]

On the issue of consent vitiating the plaintiffs' claims, the court found that even if the man residing at the house, a son of the victim, gave consent for the reporters to enter the house, there was no evidence that the police informed him that the reporters were there to film the body.[33] It was

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officers. *Id.* On appeal, the Eighth Circuit affirmed the district court's grant of summary judgment to KSDK.

[25] 22 F. Supp. 2d 726 (S.D. Ohio 1997).

[26] *Id.* at 731-732.

[27] *Id.* at 733.

[28] *Id.* at 735.

[29] *Id.* 736.

[30] *Id.* at 736-737.

[31] *Id.* at 737. *See also* Chesher v. Neyer, 2004 U.S. Dist. LEXIS 32338; Culberson v. Doan, 125 F. supp. 2d 252 (S.D. Ohio 2000).

[32] *Id.* at 738.

[33] *Id.* at 739.

unreasonable for the reporters and police to think that he gave permission for them to go into the woman's bedroom and film her body. As such, the court ruled that the reporters were not entitled to summary judgment for trespass because they entered at the invitation of police who had only a limited invitation resulting from a call to 9-1-1.[34] The police did not show that their limited invitation included permission to bring reporters.[35]

In cases where journalists have been sued for accompanying law enforcement officers while executing warrants, the courts have focused on balancing the individual's right of privacy and the journalists' right to gather news. For the most part, the courts have ruled that when officers and journalists were acting jointly the journalists could be held liable for violating a plaintiff's rights by intrusion or trespass. This was because officers are bound by the scope of the warrant, which did not allow private third parties to enter the property of the individual being investigated. Warrantless searches are no less fraught will peril for journalists. In those cases also, the courts have found members of the press liable for civil rights violations.

III. RIDE-ALONGS AT THE U.S. SUPREME COURT

In *Wilson v. Layne*, the Court held that federal law enforcement violated the Fourth Amendment when they allowed a newspaper journalist to ride-along during the execution of a search warrant. Because the law on ride-alongs was not "clearly established," however, the officers were entitled to qualified immunity.[36] Charles and Geraldine Wilson sued federal marshals, who raided their home while executing a warrant for their son, contending that the officers violated the Wilsons' Fourth Amendment rights by "bringing members of the media to observe and record the attempted execution of the arrest warrant."[37]

According to the Court, "it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful."[38] Accurate media coverage of police activities served an important public purpose. Therefore, it may not have been obvious that allowing the media to film a raid violated constitutional principles. Further, there was no precedent

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[34] *Id.* at 746.
[35] *See* Biomedical Innovations, Inc. v. McLaughlin, 103 Ohio App. 3d 122, 658 N.E.2d 1084, 1087 (Ohio Ct. App. 1995).
[36] 526 U.S. 603, 605 (1999). This opinion was published on the same day as the *Berger* opinion.
[37] 526 U.S. at 608. The media never published the pictures they took during the raid, and the Wilsons did not bring suit against the reporters.
[38] 526 U.S. at 615.

holding ride-alongs to be unlawful,[39] and the policy of the U.S. marshals and state law enforcement also allowed media to accompany officers on home entries. This demonstrated that the law on ride-alongs was not developed, and that the officers had qualified immunity.

In spite of recognizing a qualified immunity for the marshals, the Court found that ride-alongs violated the Fourth Amendment; although the arrest warrant allowed officers to enter the Wilson home, this access did not extend to journalists.[40]Although all the actions of officers searching a home do not have to be authorized by a search warrant, the court found that the Fourth Amendment required their actions to "be related to the objectives of the authorized intrusion."[41] Allowing journalists in the Wilson home was not related to the objectives of the search.

While allowing journalists on ride-alongs may further the objectives of law enforcement, this was not the same thing "as furthering the purposes of the search. Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down."[42] The reporters in this case did not serve a quality control purpose while participating in a ride-along.

Even the officers' First Amendment-related argument, that "the presence of third parties could serve the law enforcement purpose of publicizing the government's efforts to combat crime, and facilitate accurate reporting on law enforcement activities," was not persuasive.[43] While recognizing that its previous opinions noted the press' role in informing the public "about the administration of criminal justice," the Court ruled that the First Amendment did not outweigh the rights protected by the Fourth Amendment.[44]

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[39] *Id.* at 616. "The only published decision directly on point was state intermediate court decision which, though it did not engage in an extensive Fourth Amendment analysis, nonetheless held that such conduct was not unreasonable." *Id.* (citing Prahl v. Bromsale, 295 N.W.2d at 782). The Court meant that no cases at the time of the raid in 1992 had found allowing media on the execution of a search warrant to be unconstitutional. In 1998, the Southern District of Texas held that a Drug Enforcement Administration officer, who allowed a camera crew to accompany her as she executed a search warrant to seize records at two drug clinics, violated the clinic owner's constitutional rights. Swate v. Taylor, 12 F. Supp. 2d 591, 593 (S.D. Tex. 1998). *C.f.* Stack v. Killian, 96 F.3d 159 (6th Cir. 1996)(finding no violation of constitutional rights because the search warrant authorized videotaping and photographing).

[40] *Id.* at 611.

[41] *Id.*

[42] *Id.* at 612.

[43] *Id.*

[44] *Id.* at 613.

At the same time the Court decided *Wilson*, it considered *Berger v. Hanlon*,[45] a case arising from the service of a search warrant by federal wildlife service officers, who invited CNN on the execution of the warrant. Mirroring the Wilson ruling, the Court found that the federal officers had violated the plaintiff's rights when they invited the news organization on the property, but that because the law was not clearly established at the time, the agents were entitled to qualified immunity.[46]

The *Wilson* decision elicited responses predicting the death of media ride-alongs with law enforcement.[47] One commentator envisioned the ruling affecting the media in two ways. First, newsgathering would be burdened because journalists would not be able to enter private homes with officers.[48] Second, if members of the media decided to follow officers onto private property, they might face the same liability for violating the property owner's civil rights as would the officers.[49]

Professor Rodney Smolla predicted that the *Wilson* opinion would end media ride-alongs involving the execution of a warrant because these may violate the Fourth Amendment.[50] Nancy Trueblood also predicted the *Wilson* decision would have a chilling effect on newsgathering, as during the time of *Wilson*, the members of the press were involved with many lawsuits based on their newsgathering techniques.[51]

This did not mean that reporters could never again ride along with police. Indeed, Kathy Brown concluded that the press could still ask for

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[45] 526 U.S. 808 (1999).

[46] *Id.* at 310. On remand to the Ninth Circuit, the court found that, unlike the officers, the media did not have qualified immunity, and that the *Bivens* claim could continue. Berger v. Hanlon, 188 F 3d 1155, 1157 (9th Cir. 1999).

[47] *See, e.g.*, Brandon Fox, *The Future of Media Ride-Alongs*, 22 COMM. & L. 31 (2000); Kimberly A. Crawford, *Media Ride-Alongs: Fourth Amendment Constraints*, 69 FBI L. ENFCM'T BULL. 26 (2000); Kurt Wimmer, *Supreme Court ruling in 'ride-along' case may spell doom for practice*, NEWS PHOTOGRAPHER, July 1999, at 12; Mark Sableman, *Rulings mean death knell for media raid ride-along*, ST. LOUIS J. REV. , July/Aug. 1999, at 12.

[48] Fox, *supra* note 47, at 66.

[49] *Id.*

[50] Rodney A. Smolla, Privacy and the First Amendment Right to Gather News, 67 GEO. WASH. L. REV. 1097, 1104 (1999). *See* Nancy L. Trueblood, Comment, *Curbing the Media: Should Reporters Pay When Police Ride-Alongs Violate Privacy?*, 84 MARQ. L. REV. 541 (2000); Ronald B. Kowalczyk, Case Notes and Comments, *Supreme Court Slams the Door on the Press: Media "Ride-Along" Found Unconstitutional in Wilson v. Layne*, 9 DEPAUL-LCA J. ART & ENT. L. 353 (1999). *But see* Kathy Brown, Student Work, *Wilson v. Layne: Bans Press with Police in the Home, but Leaves Media Ride-Alongs Intact*, 102 W. VA. L. REV. 891 (2000) (concluding that the courts would find a Fourth Amendment violation whether or not there was a warrant).

[51] Trueblood, *supra* note 50, at 567. *See* Ashlea Wright, Note, *Wilson v. Layne: Increasing the Scope of the Fourth Amendment right to Privacy*, 28 PEPP. L. REV. 163 (2000).

permission to enter the property from the property owner.[52] More likely, however, reporters would have to prove that their purpose in accompanying police on the ride-along was related to law enforcement objectives.[53] But media aiding government officials would seemingly make the reporters state actors and, therefore, vulnerable to 42 U.S.C § 1983 civil rights claims.

Ashlea Wright argued that media could not be held liable under the federal civil rights statute because, by definition, reporters are not state actors.[54] Smolla, too, contended that journalists that accompany police on ride-alongs do not become state actors.[55] Implying that that reporters were acting under color of law "offends the notion of an independent press."[56] In spite of not being state actors, and therefore, presumably, not being liable for civil rights violations, Smolla urged members of the press to be done with ride-alongs. The closer the press acts with law enforcement, the more it diminishes journalists' traditional First Amendment arguments for a free press.[57] Ride-alongs place journalists in the position "dangerously close to being in a position of joint venture with government."[58] Such joint ventures may hinder journalists' ability to inform citizens with a critical perspective of the police.

Even before *Wilson*, a debate raged over whether journalists were privileged to conduct certain unlawful newsgathering activities. The media defendants' argument that they were informing the public about the workings of government, thereby fulfilling their watchdog role, has perhaps generated one of the most longstanding debates in legal and communications scholarship. Although recognizing that journalists play a valuable role in society by keeping the public informed, commenters have advocated against offering protection for newsgathering behavior based on the value of the information gathered. Walsh, Selby and Schaffer argued that there should be no consideration for the "newsworthiness" of the

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[52] Brown, *supra* note 50, at 909. *See also* Kowalczyk, *supra* note 50, at 394.
[53] Brown, *supra* note 50, at 908. Kowalczyk, *supra* note 50, at 394.
[54] Wright, *supra* note 51, at 189.
[55] Smolla, *supra* note 50, at 1133.
[56] *Id.*
[57] *Id.* at 1131. According to Smolla, arguments for a reporter's privilege hinge upon the contention that law enforcement cannot "annex the media" to get information on crime. *Id.*
[58] *Id.* at 1132.

information.[59] Newsworthiness analysis ignores the principle that the media are responsible for illegal acts they commit while newsgathering.[60]

Professor Randall Bezanson agreed that journalists were not privileged to engage in unlawful activity and suggested that the press should be held liable for the consequences of laws of general applicability.[61] Bezanson based his argument, however, on a goal of the First Amendment: the independence of the press.[62] According to Bezanson, press freedom meant independence: "Freedom of the press rests, at its core, on editorial judgment."[63] Bezanson asserted that this editorial freedom depended on the press being independent from the government.[64] By obtaining immunity from prosecution for crimes or torts committed during newsgathering, the press achieved preferred position, different from the regular citizen.[65] The press then must continually prove itself to be deserving of immunity from prosecution. The press, therefore, becomes beholden to the government, the creator of this immunity.[66]

With respect to ride-along cases, Karen M. Markin argued that the press could not sufficiently perform its "checking" function, as theorized by Professor Vincent Blasi, if given immunity from liability.[67] Blasi insisted that court decisions place a high value on newsgathering and freedom of the press, calling this the "checking value," in that the press can "check the misuse of official power."[68]

According to Markin, because the press is actually working with the government when on a ride-along, it could not serve as a watchdog.[69] Further, the point of the ride-along was to generate ratings, which is very different from informing citizens and participating in the public good.[70] In

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[59] John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1137-1140 (1996). "Whether a published story is within the "public interest" should not be the determinative factor in permitting or precluding compensatory damages arising from publication of wrongfully obtained material." *Id.* at 1138.

[60] *Id.*

[61] Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998).

[62] *Id.* at 901.

[63] *Id.* at 904.

[64] *Id.* at 912.

[65] *Id.* at 917.

[66] *Id.*

[67] *See* Karen M. Markin, *An "Unholy Alliance": The Law of Media Ride-Alongs*, 12 COMMLAW CONSPECTUS 33 (2004).

[68] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977).

[69] Markin, *supra* note 67.

[70] *Id.* at 36.

fact, Markin suggests that ride-alongs affect the opposite of the public good by invading private property. The result is "the press providing contaminated information to the public, in violation of its social responsibility."[71]

IV. POST-*WILSON* RIDE ALONG SUITS

In spite of the scholarly predictions about the impact of U.S. Supreme Court's ruling in *Wilson* that ride-alongs could violate the Fourth Amendment, media liability in ride along cases still depends upon a finding that the reporters were acting under color of state law. Private individuals will be deemed as acting under color of state law if they willfully participate in joint action with government agents.[72]

In *Brunette v. Humane Society of Ventura County*,[73] for example, the U.S. Court of Appeals for the Ninth Circuit discussed three possible tests for finding if newspaper reporters engaged in state action. Glenda Brunette sued the Humane Society and the Ojai Publishing Company, alleging violations of her constitutional rights as well as trespass and invasion of privacy, after the Humane Society invited reporters to accompany it during the execution of a search warrant on Brunette's ranch.[74]

The Ninth Circuit ruled that in order for Brunette to prevail on her claims, she had to demonstrate a significant relationship between the Humane Society and the reporters. The court dismissed Brunette's argument that *Wilson* provides for a § 1983 liability against the media for participating in a search of her ranch. Distinguishing *Wilson*, the court found that case to speak only on the liability of officers and not the reporters.[75] To find the journalists liable, Brunette had to demonstrate that the reporters were "willful participant[s]" with the state.[76] Under the joint action test, Brunette had to prove that the journalists' actions were "inextricably intertwined" with those of the government.[77] The reporters did not contract with the Humane Society to accompany it on the raid. Further, the reporters did not plan the raid. In addition, the court found that the Humane Society "did nothing to facilitate the Media's news

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[71] *Id.*
[72] Erwin Chemerinsky, FEDERAL JURISDICTION § 8.3 (2003) (citing Dennis v. Sparks, 449 U.S. 24, 27 (1980).
[73] 294 F.3d 1205 (9th Cir. 2002). The Humane Society was created by California state and is therefore considered a part of the state government.
[74] *Id.* at 1208.
[75] *Id.* at 1211. "[Wilson] provides no assistance in deciding whether the Media engaged in joint action sufficient to convert it into a state actor." *Id.*
[76] *Id.*
[77] *Id.*

gathering mission."[78] Brunette could not, therefore, prove state action under the joint action test.

The Ninth Circuit U.S. Court of Appeals also dismissed Brunette's argument under the symbiotic relationship test, which requires the plaintiff to prove that "the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity.'"[79] The court ruled that Brunette did not establish a symbiotic relationship between the Humane Society and the media. She did not prove that the groups were financially interdependent, nor that the "Media rendered any service indispensable to the Humane Society's continued financial viability."[80]

Finally, the court rejected Brunette's argument of state action by the media under the public function test, which transforms private activity into state action if "that action has been 'traditionally the exclusive prerogative of the State.'" [81] The Ninth Circuit ruled, "News gathering is the quintessential private activity, jealously guarded from impermissible government influence."[82] Therefore, the court affirmed the dismissal of Brunette's claims.

In contrast to the *Brunette* court's affirming the dismissal of Brunette's civil rights claims against reporters, a federal district court ruled that a reasonable jury could find the broadcaster liable for "creat[ing] a substantial risk of suicide or other harm, and that NBC engaged in conduct [toward the family of Louis Conradt, Jr.,] so outrageous and extreme that no civilized society should tolerate it." The family had accused NBC's Dateline of helping to stage an arrest of Louis Conradt, a prosecutor, in

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[78] *Id.* at 1212. "Although simultaneously present at Brunette's ranch, the Humane Society and the Media acted independently." *Id.*

[79] *Id.* at 1213 (quoting *Burton v. Wilmington Park'g Auth.*, 365 U.S. 715, 725 (1961)).

[80] *Id.* at 1214. The court did acknowledge that a custom and usage allowance existed between the Humane Society and the press:

> What Brunette did allege was a long-standing custom by the Humane Society to allow the Media to observe and photograph the execution of search warrants. This custom, Brunette asserted, ensured that the Humane Society received free publicity and the Media received "a steady source of sensational stories." These allegations, even if true, do not demonstrate that the Humane Society or the Media is indispensable, in any way, to the other's continued business operation or financial success.

Id.

[81] *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

[82] *Id.*

such a dramatic fashion that he committed suicide as a result. The court denied NBC's motion for summary judgment in part.[83]

The court began with the assumption that the first element necessary for proving a § 1983 violation, that NBC acted under color of state law, was met.[84] Instead of acting as passive observers, NBC and Chris Hansen were alleged to have played an integral role in going after Conradt. The court concluded that a reasonable jury could find that the officers were motivated by Dateline.[85] The court likened NBC's involvement with the Conradt investigation to that of CNN in *Berger*, and found that NBC "did not just have a 'passive role, as observers,' but that they were involved in the planning, and that, indeed, they purportedly pushed the police officers into dramatizing their actions for the benefit of the television cameras."[86] Many of the previous courts deciding ride-along cases never got beyond the first prong of the test for a § 1983 civil rights violation because they found that the journalists were not state actors.

Conradt's sister alleged, in relation to the second prong of the test, that NBC violated her brother's Fourth and Fourteenth Amendment rights.[87] On the Fourth Amendment allegation, the district court found that Conradt had a claim because a reasonable jury could find that the broadcaster violated his constitutional rights. The court ruled that that fact that the officers had a warrant to arrest Conradt did not shield NBC from

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[83] Conradt v. NBC, 536 F. Supp. 2d 380, 383. The court dismissed the family's RICO, negligence, unjust enrichment, intrusion, private facts, intentional infliction of emotional distress and negligence (in relation to the family).

[84] *Id.* at 389. Conradt's sister alleged that although the broadcaster was not a state actor, "the actions of the police officer must be imputed to NBC. NBC did not dispute the allegation. *Id.*

[85] *Id.* at 390. The court reasoned that a jury could find the television show's following actions influenced the police officers' decision to go after Conradt:

> •the decision to pursue Conradt at all, given that he never went to the sting house . . . ;
> •the decision to arrest Conradt at his home rather than letting him surrender to the police or arresting him in a more controlled environment, such as his office or even a courthouse;
> •the discision of strategy and execution of the warrants in the presence of the media, on camera;
> caucusing with Dateline personnel in the midst of a police operation in plain view of Conradt's house;
> •the use of more than a dozen officers to arrest a long-time prosecutor not suspected of being violent or having a gun;
> •the use of a SWAT team; and
> •reporting significant developments to Dateline, on camera, as they were happening.

Id.

[86] *Id.* at 391.

[87] 536 F. Supp. 2d at 389.

liability for an unlawful search and seizure.[88] The judges who issued the warrant were unaware that NBC was to film the arrest.[89]

The court also denied NBC's motion for summary judgment on Conradt's Fourteenth Amendment claim. NBC argued that there was no duty under Texas law to prevent a suicide, and that no one knew that Conradt posed the risk of committing suicide.[90] The court rejected NBC's arguments. First, the appearance of a full SWAT team and television cameras in front of the home of a public servant could have placed Conradt in a "frail" emotional state, therefore making the risk or suicide "substantial."[91] Further, a jury could find that there was a "special relationship" between Conradt and the police because of a "state-created danger."[92]

When the government acts in such a way so as to "create or enhance" danger to an individual, courts have found that the government liable for harm done that individual. The district court found that the facts surrounding Conradt's suicide sufficient for a finding that he had a special relationship with police, and by extension, NBC, and therefore, the they could be liable for violating his Fourteenth Amendment rights.[93] The court also concluded that a reasonably jury could find that NBC "persuaded the police officers to engage in tactics principally for dramatic effect and to make a more sensational television show, in a manner that they knew would publicly humiliate a public servant."[94]The court, therefore, rejected NBC's motion to dismiss on Conradt's Fourteenth Amendment claim.

IV. DISCUSSION

Pre-*Wilson* ride-along cases hinged, for the most part, on whether or not the court could find journalists behaved as state actors when they accompanied law enforcement into private homes during the execution of a search warrant or during and investigation. Only three actual ride-along court decisions decided prior to *Wilson* found that journalists could be held liable for their behavior during ride-alongs. In *Ayeni* v. *CBS, Inc.*, the court concluded that CBS could be liable for violating a woman and her child's civil rights for filming them while federal agents executed a search warrant

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[88] *Id.* at 391.
[89] *Id.* Indeed the magistrate that issued the warrant indicated that had he known of NBC's involvement, he would not have issued the warrant. *Id.* at 386.
[90] *Id.* at 393.
[91] *Id.* at. 393-394.
[92] *Id.* at 394. "When in the custody of police, an arrestee has the right to car and protection, including protection from suicide." *Id.* (citing Kelsey v. City of New York, No. 03 civ. 5978 (JFB), 2006 U.S. Dist. LEXIS 91977, 2006 WL 3725543, at *4 (E.D.N.Y. Dec. 18, 2006)).
[93] *Id.* at 394.
[94] *Id.* at 394-395.

in their home.[95] The court found that if the broadcaster was filming for newsgathering purposes and not to help federal agents, then it went beyond the scope of the warrant, and was therefore violated Ayeni's rights.[96]

Likewise, in *Berger v. Hanlon*, the court found that a warrant did not shield CNN from liability for violating a rancher's civil rights when the station colluded with USFWS officials to film a raid.[97] The execution of an agreement between government officials and CNN, the mounting of cameras on official vehicles, and the inclusion of CNN journalists in government briefings on the ranch investigation demonstrated to the court that the broadcaster was more than a passive observer in police business.[98] Finally, in *Barrett v. Outlet Broadcasting, Inc.*, the court also found that the police and broadcasting station had acted jointly in filming a police investigation into an apparent homicide.[99] These cases appear to be the exceptions, however, and not the rule with respect to liability for journalists on ride-alongs. For the most part, journalists were not ruled state actors.

But state action is not the only prong in the test for liability for violating an individual's civil rights. To find liability with respect to journalists participating on ride-alongs, the courts will consider whether the journalists violated an individual's established rights. In *Wilson*, the Supreme Court found that when journalists accompanied law enforcement officers into private homes they violated the homeowner's Fourth Amendment rights. The Court based this ruling on the fact that the journalists' presence inside the home did not relate to the objectives stated in the search warrant, nor did the journalists assist the officers in finding the suspect.

Although *Wilson* appears to be controlling because of its status as a Supreme Court opinion, not all courts have followed it. The court in *Brunette v. Humane Society of Ventura County* distinguished *Wilson*, claiming that *Wilson* only provided guidance as to law enforcement liability for civil rights violations. According to that court, and many others, a plaintiff in a ride-along civil rights case against members of the media must also prove that the journalists were state actors. Plaintiffs must prove that the journalists acted conspiratorially with the officers. The *Brunette* court found no conspiracy.

Both *Wilson* and *Brunette*, however, appear to evoke Professor Bezanson's analysis of whether the press should be held liable for the consequences of laws of general applicability.[100] Bezanson, although

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[95] *See* Ayeni v. CBS, Inc. 848 F. Supp. 362 (E.D.N.Y. 1994).
[96] *Id.* at 368.
[97] 129 F. 3d 505 (9th Cir. 1997).
[98] *Id.* at 515-156.
[99] 22 F. Supp. 2d 726, 739 (S.D. Ohio 1997).
[100] Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998).

acknowledging the press's right to be free of government rule, insisted that in order to be truly free, the press has to be independent. This would mean that the press could seek no immunity from prosecution for engaging in unlawful activity while newsgathering. Indeed the courts have ruled in ride-along cases that when the presence of journalists was not to assist law enforcement, then the journalists could have no immunity from civil rights liability.

On the other hand, it seems as though if the press were to assist officers, they may have some form of immunity. In fact, the courts have noted that journalists were filming or taking pictures solely for private reasons.[101] This idea recalls *Florida Publishing Co. v. Fletcher* in which the Florida Supreme Court ruled that it was common custom for members of the press to enter onto private property, with the invitation of government officials, and that the journalists' presence on the property was helpful to the investigation.[102] In *Fletcher*, a news photographer was invited onto the site of a fatal fire, where the Fire Marshal asked him to take a photograph of the scene; the photograph became a part of the investigation file.[103] Under Bezanson's analysis, such activity by journalists could compromise the independence of the press. At the same time, such assistance to law enforcement appears to preclude media liability for newsgathering activities.

Markin's concern was whether by engaging in ride-alongs, the press was fulfilling its role of serving the public interest.[104] Markin asserted that the press could not be a check on government while working with the government, and that whatever information was gathered was tainted by the press' unlawful activity. The courts have found that although the First Amendment protects newsgathering, it does not provide an unlimited right to gather news. In *Anderson v. WROC-TV* the court ruled that a television station crew that accompanied the Humane Society into a private home was not privileged to do so when the degree of the station's intrusion was balanced against the public interest served. In *Wilson* also, the Court found unpersuasive the journalists' argument that their presence with officers served the public interest by publicizing efforts to combat crime. The public interest did not outweigh the right of private individuals to not be intruded upon in their homes.

Yet, in spite of the rulings demonstrating a lack of privilege for journalists who violate the civil rights of private citizens while acting jointly with law enforcement, the very existence of cases like *Brunette* and *Conradt v. NBC* seem to contradict Fox's predictions for media ride-

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[101] *See infra* notes 27-45 and 64-80 and accompanying text.
[102] 340 So. 2d 914, 918 (Fla. 1976).
[103] *Id.* at 916.
[104] Karen M. Markin, *An "Unholy Alliance": The Law of Media Ride-Alongs*, 12 COMMLAW CONSPECTUS 33 (2004).

alongs.[105] Fox predicted that, after *Wilson*, newsgathering would be slightly burdened, and that in the face of possible lawsuits, journalists would police themselves and not enter private property when on ride-alongs. Newsgathering may be slightly burdened in that it is now well established that the media can be held liable for its newsgathering activities during ride-alongs. *Brunette* and *Conradt* demonstrate, however, that news organizations are not completely self-restraining when it when it comes to ride-alongs with law enforcement. Although the news organization was not held liable for violating the homeowner's civil rights in *Brunette*, *Conradt* is an example of the monetary, and personal, liability the press can have when involved in ride-alongs.

Conradt appears to demonstrate that far from circumscribing their behavior, members of the media are engaging in the extreme newsgathering technique for which they have been found liable in the past. Like CNN in *Berger*, NBC created, at the very least, an implied agreement with law enforcement to go after Conradt at his house. Also similar to *Berger*, as the district court noted, NBC was involved in the planning and procuring of the warrant for Conradt's arrest.

VI. SUGGESTIONS FOR THE NEWS MEDIA

When journalists ride along with members of law enforcement, and are sued for violating an individual's civil rights, the courts will examine whether the journalist violated some established right and whether the journalists was involved in state action. State action is predicated on the amount of involvement the news organization had with law enforcement officials. The relevant questions for the courts then would be whether reporters were involved in planning searches, staging sting operations and assisting with investigations.

The level of involvement is key for media organizations wishing to escape liability for joint activities with law enforcement. The *Brunette* opinion details the multiple tests that courts may use to find if journalists were state actors when accompanying law enforcement during investigations. Although the *Brunette* court did not find state action under any of the three tests, this does not mean that a court could never find that journalists were state actors, as demonstrated by the district court opinion in *Conradt*.

NBC's once popular show, "To Catch a Predator," may have gone beyond the bounds of solely observing. Instead of being a law enforcement sting operation, the show was the network's operation. Although police were involved, they were only involved to make the arrest, and in the *Conradt* case, to procure a warrant. NBC could be viewed as creating news instead of simply reporting it.

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[105] Brandon Fox, *The Future of Media Ride-Alongs*, 22 COMM. & L. 31 (2000).

In the future, media organizations should be careful about how involved they become with law enforcement investigations. Instead, journalists should report on those investigations. This would allow reporters to avoid liability for activities during a ride-along because they would be to acting solely as observers. By doing so, the press will remain independent, which, according to some, is a goal of the First Amendment.

From the cases above a few principles for media covering stories about law enforcement should consider:

1. Reconsider entering into formal agreements with law enforcement or municipalities. In both the *Frederick* and *Conradt* cases, the courts found the fact that the media outlets had entered into agreements with law enforcement was evidence of state action. Such measures evoke the idea of planning and possible manipulation in order for film crews or reporters to obtain certain shots or camera angles.

2. Seek permission before entering private property. According to the *Wilson* Court, the permission granted to officers to enter homes during the execution of a warrant does not extend to journalists who may be with them. The same principle applies in situations, like that in *Barrett*, where law enforcement may be in charge of a crime scene. In all cases, journalists should seek the permission of the property owners before following officers onto private property.

3. Gather news independent of law enforcement. One of the concerns in *Barrett* was that an officer had uncovered a body to assist photographer in obtaining a photo. In *Conradt* also, it appeared that NBC had asked officers to dramatize the arrest. This extended the police's liability for Conradt's death to NBC. Had NBC conducted an independent investigation, there may have been a different outcome.

These suggestions are not a plea for media to discontinue all activities in which law enforcement are involved. Indeed there may be valid reasons for working jointly with police departments. Law enforcement officers or on the scenes of some of the biggest stories, and are sometimes a part of the story. One of the greatest assets of the press, however, is its independence. This independence only remains if members of the media do not rely on law enforcement to gather information. By remaining independent, members of the press may be able to dispense with ride-along related lawsuits while at the same time fulfilling the duty of reporting on the actions of members of government.

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