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UNIVERSITY OF BALTIMORE SCHOOL OF LAW

**JOURNAL OF MEDIA LAW & ETHICS**

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# THE USE AND MANIPULATION OF GRAPHIC, SPOT NEWS IMAGES

## Non-photographers More Tolerant of Digital Manipulation

BRADLEY WILSON\*

*Images from the aftermath of the Boston Marathon bombing fueled an ongoing debate among professionals about the publication of graphic images and whether or not it is acceptable to alter a spot news image digitally. While photojournalists have faced similar discussions since the dawn of the profession—most notably after the publication of graphic images from the Civil War and World War II—professionals and non-photojournalists responding to a 36-question survey after the Boston Marathon agreed that publication of graphic, spot-news images was acceptable as a reflection of what happened at a major news event. Those polled also agreed that manipulation was generally acceptable in photo illustrations but not at all acceptable in hard news images establishing some boundary on when digital manipulation can be used in a photojournalistic setting. Nearly 100 percent agreed that “The highest and strictest standards should be applied to hard-news photographs.” Bringing in concepts such as privacy in regards to the manipulation of specific spot news images, however, professionals disagreed with non-photographers, with non-photographers accepting the blurring of the face of a victim of the bombing and the digital removal of broken bones in a New York Daily News image. In an age of instantaneous publication by anyone, whether they have training in journalistic ethics or not, understanding what media consumers want and need to see will help provide guidance for all media outlets.*

**Keywords:** photojournalism, ethics, photo manipulation, news, social media, spot news

### I. Introduction

By the last quarter of the 19th century, photography was becoming an integral part of society. Photographers carrying bulky cameras documented buildings, still objects and, for those people who could sit still for long exposures, formal portraits. By the time of the Civil War, photographers such as Matthew Brady carried their cameras on to the battlefield to show the battlefields, camps, towns and people touched by the war. When a selection of Antietam photos went on exhibit in Brady’s gallery in New York in 1862, *The New York Times* wrote: “Mr. Brady has done something to bring home to us the terrible reality and earnestness of war. If he has not brought bodies and laid them in our dooryards ... he has done

something very like it.”<sup>1</sup> Naomi Rosemblum said of photography at the time, “The photograph was regarded as an exemplary record because it was thought to provide an objective—that is, unaltered—view of solid fact and achievement.”<sup>2</sup> Yet it was during the Civil War that Alexander Gardner moved a corpse to illustrate a Union and a Confederate soldier, calling into question the accuracy of such early images.<sup>3</sup> Even in these early days, the ethical standards of the photojournalist — and photojournalism — were topics of discussion.

In the decades that followed, photojournalism — and ethical standards — continued to evolve. The portable and easy-to-conceal Leica camera, invented in 1914 and marketed in 1925, changed the approach of visual reporters. No longer official observers beholden to those in power, photojournalists could be the eyes of the public — prying, amused, or watchdog eyes.<sup>4</sup> In the last few decades of the 20<sup>th</sup> century, Ron Haviv photographed the genocidal breakup of Yugoslavia, the ethnic rage and attempt to wipe out, entirely, another group of people. “...[I]t’s amazing to be there in those places, to watch history unfold before you,” he said.<sup>5</sup> Moreover Haviv said he believes photographing war and disaster pushes the international community to confront abuse and end injustice.<sup>6</sup> And as recently as 2003, Chuck Liddy, a photographer with the *Raleigh News & Observer*, stressed the importance of documenting the realities of war with similar ethical debates.<sup>7</sup> Blair Goldstein in an *IndyWeek* article, said Liddy’s image of a dead soldier’s boot captured the tragedy and mayhem of the insurgent war against the U.S.<sup>8</sup> The photo ran on the front page of *The News & Observer* and as a two-page spread in *Time* magazine under the headline “Mission NOT Accomplished.”<sup>9</sup>

Discussion of the ethical standards photographers hold when taking pictures also goes beyond the battlefield, sometimes hitting too close to home for some viewers who do not necessarily want to see such graphic images at their breakfast table, no matter how untarnished and real they may be. In late January of 1987 — an era before cell phones and instantaneous Web access, when editors generally operated under a philosophy of “If it bleeds, it leads” — the State Treasurer of Pennsylvania, R. Budd Dwyer, shot himself to death in front of a

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<sup>1</sup> *Brady’s Photographs.; Pictures of the Dead at Antietam*, N.Y. TIMES, Oct. 20, 1862, <http://www.nytimes.com/1862/10/20/news/brady-s-photographs-pictures-of-the-dead-at-antietam.html?pagewanted=all>.

<sup>2</sup> NAOMI ROSENBLUM, *A WORLD HISTORY OF PHOTOGRAPHY* (Abbeville Press 1984).

<sup>3</sup> WILLIAM A. FRASSANITO, *EARLY PHOTOGRAPHY AT GETTYSBURG* (Thomas Pub. 1995); Michael Ruane, *Alexander Gardner: The Mysteries of the Civil War’s Photographic Giant*, THE WASHINGTON POST, Dec. 23, 2011, [http://www.washingtonpost.com/local/alexander-gardner-the-mysteries-of-the-civil-wars-photographic-giant/2011/12/12/gIQApHhDP\\_story.html](http://www.washingtonpost.com/local/alexander-gardner-the-mysteries-of-the-civil-wars-photographic-giant/2011/12/12/gIQApHhDP_story.html).

<sup>4</sup> ANNE H. HOY, *NATIONAL GEOGRAPHIC HISTORY OF PHOTOGRAPHY* (Nat’l Geographic Soc’y 2005).

<sup>5</sup> Joshua Lipton, *Ron Haviv: Shooting War*, in COLUMBIA JOURNALISM REVIEW (2002).

<sup>6</sup> *Id.*

<sup>7</sup> Blair Goldstein, *How I Got the Picture*, INDYWEEK, Dec. 10, 2003, <http://www.indyweek.com/indyweek/how-i-got-the-picture/Content?oid=1190937>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

dozen reporters and camera crews during a news conference in his office.<sup>10</sup> When the story broke around noon, two television stations showed the moment of suicide but revised their story for the evening program.<sup>11</sup> On an Action News Special Report, news editors reasoned that showing the suicide was too gruesome, too graphic, served no purpose, and that the audience did not want to see it.<sup>12</sup> Pittsburgh 2Day, another locally produced show, however, devoted its entire hour to media coverage of the suicide.<sup>13</sup>

A telephone poll of viewers revealed that 46 percent felt the entire suicide should have been shown and 54 percent felt it should not.<sup>14</sup> While television stations carried the conference live or with a short delay, the evening news, print papers, waiting for photographers to develop their film and to make prints, had hours to discuss the situation.<sup>15</sup> Still, editors with *The Miami Herald* initially chose two graphic images for the front page, but, for a later edition based on reader feedback, chose a less graphic image.<sup>16</sup> Researchers studying the situation concluded, “Any ethical dilemmas faced by journalists during decision making were put aside for later consideration. The material was edited quickly and according to similar patterns, or conventions,...”<sup>17</sup> The day after the event, the story became the media coverage after headlines in newspapers nationwide read “Cameras Record Deadly Farewell,” “Pennsylvania Treasurer Horrifies Reporters, Aides,” “Disgraced Pa. Pol Blows Brains Out at News Conference,” and “Suicide a Dilemma for Media.”<sup>18</sup>

Paul Vathis, an Associated Press photographer, said his initial reactions were “Keep your cool. Go single frame...just take your time and see what he’s going to...,” and after the suicide, he said he thought, “I gotta get out of here fast and get back to the darkroom and get these pictures onto the wire immediately.”<sup>19</sup> The first AP photo went out on the network 43 minutes after the shooting.<sup>20</sup> Similarly, Gary Miller, also covering the press conference for the Associated Press, said, “All I can recall thinking is that this really isn’t happening. This guy isn’t for real. He’s not going to do what he’s about to do.”<sup>21</sup> As Dwyer shot himself, Miller said he just kept shooting pictures later transmitting them for both the Associated Press and Sygma.<sup>22</sup> In an internal survey of Gannett publications, more than half chose the least graphic of the images transmitted, one by Gary Miller of Dwyer holding the gun. Yet about 13 percent of Gannett papers used at least one image, including

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<sup>10</sup> John Matviko, *How Far Do You Go and How Much Do You Show: Pittsburgh Television News Media and the R. Budd Dwyer Suicide* (1988) (paper presented at the 79<sup>th</sup> Annual Meeting of the Eastern Communication Association in Balt., Md).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Patrick R. Parson & William E. Smith, *R. Budd Dwyer: A Case Study in Newsroom Decision Media Morality*, 3(1) *JOURNAL OF MASS MEDIA ETHICS* 84–94 (1988).

<sup>18</sup> *Id.*

<sup>19</sup> *Bearer of Bad News Reexamine Roles*, *NEWS PHOTOGRAPHER* (May 1987).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Dwyer with the gun in his mouth.<sup>23</sup> And for months, photojournalists, both still and video, debated the use of the images and video. “[A] photographer, who is trained to shoot first and ask questions later, must not shy away from his journalistic responsibility to ask those questions later...and to make his personal answers—his journalistic judgment—known to the reporter and the news manager. While driving back to the newsroom or setting up the live shot, a photographer with grisly or emotion-charged video must get his journalistic act together to be ready to argue how and even if the video should air.”<sup>24</sup>

After the photos began running on the wire services, the decision of whether or not to publish the images was in the hands of the editors. Some afternoon papers delayed final editions to publish photos of the morning event. In an Associated Press Managing Editors’ survey of some 85 newspapers, 18 percent of morning papers ran a photo of Dwyer with the gun in his mouth, of the shooting or the aftermath.<sup>25</sup> Marty Petty of *The Hartford Courant* concluded, “Some common considerations many editors had in selecting which photos to include: the impact of the Dwyer photos on readers with suicidal tendencies...; as the distance from the event increased, the significance of the story decreased; and the public nature of the event heightened its newsworthiness.”<sup>26</sup> And in the same report, David Boardman of the *Seattle Times* concluded, “Every day, every edition, we face challenging judgments. Not all are as tough as a suicide photo, but we know that each is important to some segment of our audience. We know that many of the calls we make in a few minutes on deadline can have a lifelong effect for someone, particularly a subject of a story. We consider it an awesome responsibility.”<sup>27</sup>

Similarly, in the days following the Sept. 11 attacks, editors continued to show restraint in displaying graphic images. In those attacks, about 3,000 people died in New York City, Washington, D.C. and Shanksville, Penn. Of those 3,000, the first official casualty of the Sept. 11 attacks was Mychal Judge, chaplain of the Fire Department of New York.<sup>28</sup> Shannon Stapleton’s photo of firefighters carrying his body out of the rubble became one of the symbols of the attacks. Yet it is hardly as graphic as other images taken that day. For photographer Richard Drew, an Associated Press photographer in New York City, his images—much more disturbing to viewers worldwide—allowed him to humanize the attacks.<sup>29</sup> As he stood on West Street with EMS crews and police officers, he began noticing people coming out of the building, falling or jumping. One image in particular, an image that the *New York Times* published on page 7 in the Sept. 12 edition, of a man

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<sup>23</sup> *Id.*

<sup>24</sup> Kent Collins, *Photographers—Assert Yourselves*, NEWS PHOTOGRAPHER (May 1987).

<sup>25</sup> Marty Petty, *Press-conference Suicide Presents Newspapers with Complex Judgments*, A PUBLIC SUICIDE: PAPERS DIFFER ON EDITING GRAPHIC IMAGES: AN ASSOC. PRESS MANAGING EDITORS REPORT 3–4 (1987).

<sup>26</sup> *Id.*

<sup>27</sup> David Boardman, *Press-conference Suicide Presents Newspapers with Complex Judgments*, A PUBLIC SUICIDE: PAPERS DIFFER ON EDITING GRAPHIC IMAGES: AN ASSOC. PRESS MANAGING EDITORS REPORT 9 (1987).

<sup>28</sup> Commentary, *Slain Priest: 'Bury His Heart, But Not His Love'*, NPR, Sept. 11, 2011, <http://www.npr.org/2011/09/09/140293993/slain-priest-bury-his-heart-but-not-his-love>.

<sup>29</sup> Peter Howe, *Richard Drew*, THE DIGITAL JOURNALIST, 2001, <http://digitaljournalist.org/issue0110/drew.htm>.

falling head first before the buildings fell, has caused the biggest stir.<sup>30</sup> “He was trapped in the fire,” Drew said, “and decided to jump and take his own life, rather than being burned.”<sup>31</sup> Frankly, readers said this wasn’t the kind of picture they wanted to see over their morning corn flakes, as David House said in a Sept. 13, 2001 column in the Fort Worth *Star-Telegram*.<sup>32</sup> Drew disagreed. “It wasn’t just a building falling down, there were people involved in this. This is how it affected people’s lives at that time, and I think that is why it’s an important picture. I didn’t capture this person’s death, I captured part of his life,” Drew said.<sup>33</sup> Disturbing as they are, images of 9/11’s falling bodies have emerged as a significant concern in art and literature, fiction and nonfiction, from poetry to prose and from documentary film to sculpture.<sup>34</sup> And Kratzer’s and Kratzer’s study of the images used after the attacks revealed that the debate publishing the images centered around three fundamental issues: reader response, victims’ privacy and the ability of the photographs to communicate the story of the day.<sup>35</sup> “Although many editors found the images disturbing, the overwhelming reason for publishing them was that they added to the visual storytelling about what happened during and after the terrorist attacks. Many editors believed that readers needed to be exposed to the disturbing images in order to fully comprehend the story of the day.”<sup>36</sup>

Throughout the years, these cases, and dozens of others, have formed a foundation for the ethics of the photojournalism profession centered on the concepts of accuracy, fairness and reality. However, even today, not everyone outside the profession agrees with what those concepts mean when it comes to publication of graphic, spot news images, images that a reasonable person may find disturbing, taken at a news event for which there was no preparation or warning. Therefore, the purpose of this paper is to examine how professional photojournalists differ from non-photographers in the coverage of a spot news event that, to some, appeared more like a scene from a battlefield than the running of the 117th Boston Marathon at which a bomb killed three and injured nearly 300.

## II. Digital Manipulation Tests Standards

As John Laurence said in his book on the Vietnam War, photojournalism during the era of Civil War, the Vietnam War and, indeed, the 20<sup>th</sup> Century, was a depiction of reality: “Of all media, perhaps still photography came closest to showing the truth.”<sup>37</sup> However, as photojournalism moved into the digital era, the ethics of photojournalists and editors would continue to be tested and ethical standards continue to evolve.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> David House, *Photo of Falling Man Upsets Many Readers*, FORT WORTH STAR-TELEGRAM, Sept. 13, 2001.

<sup>33</sup> Howe, *supra* note 29.

<sup>34</sup> Laura Frost, *Still Life: 9/11’s Falling Bodies*, in LITERATURE AFTER 9/11 (Ann Keniston & Jeanne Follansbee Quinn, eds., Routledge 2008).

<sup>35</sup> Renee Martin Kratzer & Brian Kratzer, *How Newspapers Decided to Run Disturbing 9/11 Photos*, NEWSPAPER RESEARCH J. 24 (2003).

<sup>36</sup> *Id.*

<sup>37</sup> JOHN LAURENCE, THE CAT FROM HUÉ: A VIETNAM WAR STORY 405 (PublicAffairs, New Ed ed. 2002).

While most discussion around the ethics of photojournalism centers around digital manipulation tools such as Adobe Photoshop, manipulation of photographic images goes back to photography's earliest days. When its photographers were barred from taking pictures of a sensational courtroom drama in 1924, the *Evening Graphic* decided to piece together a photographic representation in the darkroom. The trial centered on a woman whose husband sued her to annul their marriage because he had not known her race prior to the wedding. The woman's lawyer asked her to strip to the waist to prove that her race should have been obvious. Using 20 different images, the *Evening Graphic's* art director created a composite picture that depicted what the scene might have looked like. He called his creation a "composograph," and the image ran on the newspaper's front page. The public reaction was immediate. Though the image would be considered ethically heinous by journalists today, readers loved it, and circulation soared from around 60,000 to several hundred thousand readers.<sup>38</sup>

It wasn't long after the invention of the digital camera in 1975 and ImagePro editing software, created by University of Michigan students, in 1987 that photojournalists began realizing the impact digital photography could have on the profession. In 1987, according to National Press Photographers Association (NPPA) President John Cornell, Jr., Tim Lasker, editorial systems manager for *Newsday*, the first newspaper to go completely electronic, tried to calm the fears of working photojournalists at the time talking about the integration of the art (page layout) and photo department and the new digital imaging system Scitex: "It will also mean that the photograph will appear in the paper as the photographer saw it. It will mean better quality images in the paper."<sup>39</sup> But as Michael Okoniewski said in 1987, "Maybe a little [manipulation] is acceptable. My friend Jim Sully at the Staten Island *Advance* told me, '...When it (manipulation) is obvious, people know it. Right or wrong, they know it. But with Scitex, you just don't know.'"<sup>40</sup> Early on, photojournalists realized that the new technology meant their images could be manipulated to portray the surreal and the unreal as well as reality.

Given the potential damage for credibility to the profession, photojournalists began developing guidelines for digital manipulation. In 1995, only four years after the NPPA adopted its first statement of principle stating it is "wrong to alter the content of a photograph in any way that deceives the public," Tom Wheeler and Tim Gleason recommended four tests to help provide guidelines for photojournalists.<sup>41</sup> First, they recommended a Viewfinder Test: Does the photograph show more than what the photographer saw through the viewfinder? Second, a photo-processing test: Do things go beyond what is routinely done in the darkroom to improve image quality-cropping, color corrections, lightening or darkening? Third, a technical credibility test: Is the proposed alteration not technically obvious to the readers? And finally, a clear-implausibility test: Is the altered image not obviously false to readers? And, most strongly, they stated, "Our

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<sup>38</sup> Ken Kobre, *Positive/Negative: The Long Tradition of Doctoring Photos*, 2(2) VISUAL COMM'C'N QUARTERLY 14-15 (1995).

<sup>39</sup> John H. Cornell, Jr., *Future Arriving Quickly at Newsday*, NEWS PHOTOGRAPHER (Nov. 1987).

<sup>40</sup> Michael Okoniewski, *Hands of God*, NEWS PHOTOGRAPHER (Aug. 1987).

<sup>41</sup> Tom Wheeler & Tim Gleason, *Photography or Photofiction: An Ethical Protocol for the Digital Age*, 2(1) VISUAL COMM'C'N QUARTERLY 8-12 (1995).

ultimate test is one of honesty and perception? When in doubt, let us err in favor of the public trust.”<sup>42</sup>

Wheeler and Gleason concluded: “Readers have a ‘qualified expectation of reality’ that gives editorial photography its credibility and power. Readers believe that editorial photographs retain a strong link to the external world and that when an editorial photograph is manipulated in ways that deviate from that tradition ... the publisher should make appropriate disclosure to the reader.”<sup>43</sup>

Similarly, Edgar Shaohua Huang reported on reader’s perceptions of digital manipulation, finding that readers are concerned that “once editors start making alterations, it is hard for anyone to know where they will draw the line.”<sup>44</sup> And that readers are “much less accepting of alternations of hard news photographs.”<sup>45</sup> Readers said they believed documentary photos should not be altered. As one respondent said, “I would like to be able to pick up a newspaper or magazine or whatever, and know what I am looking at really is what took place at that point.”<sup>46</sup> He also made five other conclusions based on his survey: readers should know if an image was altered, media outlets need to consider context when using an altered image, alterations should be kept to a technical minimum, media professionals should put themselves in the subject’s shoes to see how they would feel about an altered picture of themselves, and, finally, media should consider moral-ethical guidelines and not be guided by what is strictly legal.<sup>47</sup>

Huang’s study was published in 2001, and it was less than two years later when digital manipulation of a spot news image, this time an image transmitted via satellite from the battlefield, again made the national news. While on the Iraqi battlefield with British soldiers, *Los Angeles Times* photographer Brian Walski acknowledged that he used his computer to combine elements of two photographs, taken moments apart, to improve the composition.<sup>48</sup> In a statement issued days after the front-page publication of the image, editors published a statement that read, in part, “*Times* policy forbids altering the content of news photographs. Because of the violation, Walski, a *Times* photographer since 1998, has been dismissed from the staff.”<sup>49</sup> Later Walski, now a commercial and wedding photographer in Colorado, said, “I f—ed up, and now no one will touch me. I went from the front line for the greatest newspaper in the world, and now I have nothing. No cameras, no car, nothing.”<sup>50</sup>

Two years later, the North Carolina Professional Photographers

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Edgar Shaohua Huang, *Readers’ Perceptions of Digital Alteration in Photojournalism*, 3(3) JOURNALISM AND COMM’N MONOGRAPHS 147–182 (2001).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Editor’s Note*, L.A. TIMES, Apr. 2, 2003, <http://articles.latimes.com/2003/apr/02/news/war-1walski2>.

<sup>49</sup> *Id.*

<sup>50</sup> Kenneth Irby, *L.A. Times Photographer Fired Over Altered Image*, POYNTER, Apr. 2, 2003, <http://www.poynter.org/how-tos/newsgathering-storytelling/9289/1-a-times-photographer-fired-over-altered-image/>.

Association (NCPA) rescinded awards given to *Charlotte Observer* photojournalist Patrick Schneider after Board members determined that he removed background information from certain images — including some spot news images — through excessive adjustments in Adobe Photoshop.<sup>51</sup> After looking at thousands of images published by Schneider, *Observer* editors concluded that Schneider did not intend to deceive readers or contest judges, but that “he went over the line in the use of some techniques, which altered the backgrounds in ways that left us uncomfortable.”<sup>52</sup> It was clear that Schneider used the digital equivalent of the “hand of god” technique popular among photographers working in the darkroom in the 1970s and 1980s to darken a background, emphasizing the subject, perhaps to excess.<sup>53</sup> Even those who objected to the rescinding of Schneider’s awards conceded that, “photojournalists of integrity must accept that they have a responsibility to be truthful in the information they provide, but that is no more or less than what is expected of any journalist, whether they are photographers or writers.”<sup>54</sup>

Despite the outcry of leaders in the profession as well as working photojournalists, the credibility of even the world’s top photojournalists comes into question the minute someone makes an allegation of digital over-manipulation. In 2013, the World Press Photo of the Year by Paul Hansen of Dagens Nyheter, a photograph of two dead children being carried by extended family members after an Israeli missile strike, came under scrutiny after allegations of over-manipulation and compositing of multiple images.<sup>55</sup> After a “forensic analysis” of the image, World Press Photo determined, “It is clear that the published photo was retouched with respect to both global and local color and tone. Beyond this, however, we find no evidence of significant photo manipulation or compositing.”<sup>56</sup>

Throughout the years, these cases, and dozens of others, have formed a foundation for the digital ethics of the photojournalism profession centered on the phrase in the NPPA Statement of Principle: “We believe photojournalistic guidelines for fair and accurate reporting should be the criteria for judging what may be done electronically to a photograph. Altering the editorial content...is a breach of the ethical standards recognized by the NPPA.”<sup>57</sup> However, even as digital photography has evolved to include images published almost instantaneously from digital cameras and cell phones, not everyone outside the profession agrees with what the standards actually are in any given situation, expecting photojournalists to do what they think is right.

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<sup>51</sup> Pedro Meyer, *In Defense of Photographer Patrick Schneider and the Fictions of a ‘Code of Ethics’*, ZONEZERO, Oct. 2003, <http://www.zonezero.com/editorial/octubre03/october.html>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Digital Photography Experts Confirm the Integrity of Paul Hansen’s Image Files*, WORLD PRESS PHOTO, May 14, 2013, <http://www.worldpressphoto.org/news/digital-photography-experts-confirm-integrity-paul-hansen-image-files>.

<sup>56</sup> *Id.*

<sup>57</sup> *NPPA Statement of Principle*, NAT’L PRESS PHOTOGRAPHERS ASSOC., <https://nppa.org/page/5167> (last visited Mar. 7, 2016).

### III. Research Questions

What Michael Okoniewski said in 1987 still rings true today: “We are probably going to debate this question of digital imaging for a long time. But then again, we’ve been playing with our photos for a long time also.”<sup>58</sup> And after the discussion of Hansen’s winning image, World Press Photo stated, “Only retouching which conforms to currently accepted standards in the industry is allowed.”<sup>59</sup> This brings to light four research questions based on the historical imperatives of what photojournalists could and should cover and how much they can manipulate images after-the-fact.

**PUBLICATION:** How do professional photographers differ from non-photographers when it comes to the publication of graphic, spot news images?

**CROPPING:** How do professional photographers differ from non-photographers when it comes to the cropping of graphic, spot news images?

**WARNING:** How do professional photographers differ from non-photographers when it comes to the publication of a warning with graphic, spot news images?

**MANIPULATION:** How do professional photographers differ from non-photographers when it comes to the digital manipulation of graphic, spot news images?

### IV. Methodology

To gain insight into how self-identified professional photographers differ from non-photographers, this research used a 36-question, university IRB-approved survey partially built upon existing studies of professional photojournalists focusing on their ethical standards in spot news situations and digital manipulation of hard news images. Following the bombing at the Boston Marathon in the spring of 2013, the link to the SurveyMonkey survey was distributed via social media and on multiple email distribution lists, including those of the Journalism Education Association (JEA), the Radio Television News Directors Association (RTNDA) and the National Press Photographers Association (NPPA). It also featured a SurveyMonkey survey allowing a broad distribution of the survey link to individuals not associated with mass media. Of the 1,068 people responding, participants included 126 non-photographers and 288 individuals who identified themselves as photojournalists or professional photo editors. Of the respondents, 343 skipped this question and were eliminated from the survey and 311 fit into other categories not used in this study. Not knowing the true sample size from which the respondents came poses problems in terms of generalizability but the trade off was a smaller sample size.

Of the respondents who viewed the images as they were published online or in print and who then responded to a series of questions about them, 62 percent were male. However, of the professionals, 81 percent were male, possibly indicative

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<sup>58</sup> Okoniewski, *supra* note 40.

<sup>59</sup> *Digital Photography Experts Confirm the Integrity of Paul Hansen’s Image Files*, *supra* note 55.

of a still male-dominated profession. Of the professionals, nearly 75 percent said they had 11 or more years of experience. Nearly 40 percent of the professionals said they worked in newspaper, 27 percent in magazine, 26 percent in online media and seven percent in television.

Table 1

**Professionals and Non-photographers  
Regarding Acceptability of Digital Manipulation**  
(n=110 non-photographers, n=273 professional)

<b>Krupa photo</b>	<i>Pros</i>	<i>Non</i>	<i>Difference</i>	<i>t</i>	<i>p</i>
No manipulation (Q13)	87.1%	87.1%	0.01%	0.04	0.972
Cropped (Q15)	86.1%	87.9%	-1.79%	0.69	0.484
Face blurred (Q17)	35.9%	59.1%	-23.20%	4.24	p<0.001***
Warning (Q19)	68.5%	77.3%	-8.80%	1.71	0.087
<b>Tulmacki photo</b>	<i>Pros</i>	<i>Non</i>	<i>Difference</i>	<i>t</i>	<i>p</i>
No manipulation (Q21)	92.0%	87.9%	4.06%	0.89	0.376
Manipulation (Q23)	18.2%	34.2%	-16.04%	3.65	p<0.001***

## V. Findings

In general, photojournalists and non-photographers agreed that it was acceptable to publish the graphic images regardless of whether or not they were cropped or a warning was included.<sup>60</sup> However, they disagreed significantly in one key area – the digital manipulation of the images after-the-fact.

### A. General ethics

*Q1: How do professional photographers differ from non-photographers when it comes to the publication of graphic, spot news images?*

In terms of graphic images, of the 285 individuals who identified themselves as professional photographer editors or photographers, 87 percent of the respondents indicated it was acceptable to run a graphic image by Charles Krupa of Jeff Bauman, Jr., who ultimately had both of his legs amputated as a result of the Boston Marathon bombing.<sup>61</sup> A similar number of non-professionals agreed, acknowledging overwhelmingly that the original image depicted the truth.<sup>62</sup> Following each closed question, respondents could choose to leave comments. One survey respondent, whose view is representative of many others, said, “Although difficult to look at it, represents the truth of what happened. It was a tragic event and this is in line with its tragedy.”<sup>63</sup> In comments reminiscent of

<sup>60</sup> See *supra* Table 1.

<sup>61</sup> Based on responses from Q5 of survey. See *infra* App. A, at Image 1.

<sup>62</sup> See *supra* Table 1.

<sup>63</sup> Survey response.

those by viewers who viewed Brady's Civil War images, another said, "It's as it happened. Reality is always best."<sup>64</sup> A third said, "Americans need to see everything when it comes to a major news event. Softening the blow only serves to dehumanize them to tragedy and reinforces the shallow news consumption that has been fostered here."

Similarly, huffingtonpost.com ran an image by John Tlumacki of the *Boston Globe* of a woman lying in a pool of blood with distracting injuries to her legs with a clearly dazed woman sitting nearby.<sup>65</sup> The professionals and non-photographers responding to the survey again agreed that publishing this image with no manipulation was acceptable, and largely for the same reasons. "The image is a powerful reflection of a major event. No alteration is needed nor acceptable," said one respondent.<sup>66</sup> Another said, "It is what happened. A NEWS event. Really awful images happen in war/terrorist bombings/natural destructive events like tsunamis and tornados. Show the truth should always be the guide to be followed."<sup>67</sup> The image was published in many news media outlets and 88 percent of non-photographers said it was acceptable to run this image with no alteration, slightly less than the 92 percent of professionals who found it to be acceptable.

*Q2: How do professional photographers differ from non-photographers when it comes to the cropping of graphic, spot news images?*

Using the same image, editors at the *Philadelphia Inquirer* chose to crop the image. In the same pool of professionals, 88 percent— again a percentage statistically similar to that of non-photographers — deemed this acceptable, but not without more discussion. "Sure it's acceptable, but cowardly," said one respondent.<sup>68</sup> Another viewed cropping the image as a form of censorship: "Their decision was acceptable, but still a clear case of censoring the news."<sup>69</sup> And a third said, "Lack of courage is no reason to sanitize the news. People should be upset about what happened, the urgency of this image is substantially reduced because of the crop. There are plenty of situations when we should play gatekeeper and protect the dignity of a photographic subject, or not publish because it is sensationalization. This event was not one of these, however. Americans are being coddled by media, protected from explicit images because of the 'cornflakes' test. The result is a populace with flabby minds and a propensity for navel gazing."<sup>70</sup> Most respondents agreed with a fourth respondent who said, "A crop like this is entirely within the bounds of editorial discretion and entirely understandable for a broad-circulation daily newspaper."<sup>71</sup> Most of those polled acknowledged that while cropping out the graphic portions of the image might shelter viewers from the graphic content, it was within the established norms for any news photo. Again, the non-photographers agreed with the professionals.

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<sup>64</sup> Survey response.

<sup>65</sup> See *infra* App. A, at Image 5–6.

<sup>66</sup> Based on responses from Q13 of survey. See *supra* Table 1.

<sup>67</sup> Survey response.

<sup>68</sup> Survey response.

<sup>69</sup> Based on responses from Q7 of survey.

<sup>70</sup> Survey response.

<sup>71</sup> Survey response.

*Q3: How do professional photographers differ from non-photographers when it comes to the publication of a warning with graphic, spot news images?*

Not all professionals agreed with the decision to run the photo or to run it without a graphic warning, but the difference of opinion between non-photographers and photographers was still not statistically significant. Said one respondent, “Viewers should not have to also suffer PTSD because a photographer was in the right place to capture some poor bastard being carted away without his extremities.”<sup>72</sup> Said another, “As long as the viewer was warned that they would be seeing graphic content before seeing the photo, I think it's fine. Such injuries were a big part of the news story.”<sup>73</sup> Although some publications ran the images without any warning initially, *theatlantic.com* and others later added a disclaimer: “[Warning, very graphic]...” in the caption and “Warning: This image may contain graphic or objectionable content” on screen in a black box covering the image and requiring the viewer to “click to view image.”<sup>74</sup> The 121 non-photographers who responded to the survey agreed with the professionals polled, with 88 percent saying it was acceptable to run the image unaltered.

## **B. Digital Ethics**

Initially, the groups seemed to agree on the boundaries of when digital manipulation is acceptable, agreeing that the alteration of colors of the jerseys of football players in *Sports Illustrated* was clearly acceptable in photographic illustrations, though not in hard news photographs.

About 15 minutes after posting the image of Bauman unaltered, *theatlantic.com* chose to blur the face of the victim.<sup>75</sup> Bob Cohn, digital editor for *The Atlantic*, said they chose to publish an original photograph over the cropped version other outlets published because it seemed more authentic.<sup>76</sup> Yet the website stated, “(Note: An earlier version of this gallery featured this photo with the graphic warning but without the image blurred. We have since decided to blur the subject's face out of respect for privacy.)”<sup>77</sup> The majority of professional photojournalists in the survey, 64 percent, disagreed with this decision.<sup>78</sup> “I don't see the point of blurring the face at all. If you're going to show the carnage, just show it,” said one respondent.<sup>79</sup> Another respondent said, “Run it without alteration or not at all. This was a public event and nobody, including the victims, had a reasonable expectation of privacy.”<sup>80</sup> Yet another echoed the sentiments of the respondents in saying, “Public event, public explosion, public problem, the photo is way better with the man's face.”<sup>81</sup>

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<sup>72</sup> Survey response.

<sup>73</sup> Survey response.

<sup>74</sup> See App. A, at Image 3.

<sup>75</sup> Christine Haughney, *News Media Weight Use of Photos of Carnage*, N.Y. TIMES, Apr. 17, 2013, [http://www.nytimes.com/2013/04/18/business/media/news-media-weight-use-of-photos-of-carnage.html?\\_r=0](http://www.nytimes.com/2013/04/18/business/media/news-media-weight-use-of-photos-of-carnage.html?_r=0).

<sup>76</sup> *Id.*

<sup>77</sup> See App. A, at Image 4.

<sup>78</sup> Based on responses from Q9 of survey.

<sup>79</sup> Survey response.

<sup>80</sup> Survey response.

<sup>81</sup> Survey response.

*Q4: How do professional photographers differ from non-photographers when it comes to the digital manipulation of graphic, spot news images?*

While 36 percent of professionals agreed with the decision to run the image with Bauman's face blurred, 59 percent of non-photographers said this was acceptable, a statistically significant difference ( $p < 0.01$ ) of 23 percent.<sup>82</sup> Why non-photographers were more tolerant of blatant digital manipulation — manipulation that was clear to the viewer — is worthy of further exploration, especially when a higher percentage (67 percent) indicated such manipulation is acceptable but it “should be obviously false to the reader”<sup>83</sup> and 92 percent of non-photographers said, “Any manipulations should simply include routine cropping, color correction...or dodging/burning to improve reproduction quality.”<sup>84</sup> Clearly blurring Bauman's face did not meet those criteria, even the criteria the vast majority non-photographers said they accept in principle, if not in actuality.

Although many of the non-photographers defended publication of the unaltered image as a depiction of reality, “Until the editors know the family has been notified, they need not find out through the internet that something this horrible has happened to their loved one. It's not who he is specifically that is important, it's that it happened that is important.”<sup>85</sup> “This doesn't lie to the viewer. It edits for concerns of privacy for Bauman. In the earliest moments of the incident, this is acceptable because his family may not know he was hurt. He may not survive his injuries, and the family may not know,” said one respondent.<sup>86</sup> “Mr. Bauman's privacy can be preserved with this blurred area,” said yet another. “Protecting the privacy of someone who has not by their own choice become a significant part of such a complicated story seems a fair choice until that person can be spoken with.”<sup>87</sup> A fourth posited, “It preserves his privacy during a moment of extreme duress,”<sup>88</sup> and a fifth said, “The blurring to protect the privacy of the victim, I understand.”<sup>89</sup>

When the *New York Daily News* published Tlumacki's image, similar to when the huffingtonpost.com published Krupa's image, the *News* digitally manipulated the image so the broken bones were no longer visible. “The *Daily News* edited that photo out of sensitivity to the victims, the families and the survivors,” spokesperson Ken Frydman said. “There were far more gory photos that the paper chose not to run, and frankly I think the rest of the media should have been as sensitive as the *Daily News*.”<sup>90</sup> Only 18 percent of professionals

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<sup>82</sup> Based on response from Q9 of survey. *See supra* Table 1.

<sup>83</sup> Based on responses from Q24 of survey.

<sup>84</sup> *Id.*

<sup>85</sup> Survey response.

<sup>86</sup> Survey response.

<sup>87</sup> Survey response.

<sup>88</sup> Survey response.

<sup>89</sup> Survey response.

<sup>90</sup> Rebecca Shapiro, *NY Daily News Edited Front Page Photo of Boston Tragedy*, HUFFINGTON POST, Apr. 17, 2013, [http://www.huffingtonpost.com/2013/04/17/ny-daily-news-front-page-boston-photo\\_n\\_3100347.html](http://www.huffingtonpost.com/2013/04/17/ny-daily-news-front-page-boston-photo_n_3100347.html).

deemed the manipulation acceptable.<sup>91</sup> “Alteration is a falsehood!” said one respondent.<sup>92</sup> “Run it or don’t, but Photoshopping like that is unacceptable in my book. It isn’t the truth anymore,” said another, echoing the sentiments of many of the other respondents.<sup>93</sup> The survey respondents vehemently disagreed with Frydman’s statement. “If you want to be sensitive to the families. You don’t run any of the photos. That’s the only way I would believe Frydman’s statement. The moral high horse can not be ridden after you ring the bell,” said one respondent.<sup>94</sup> Another said, “The sensitivity train left the station long ago. I believe the choice is to run the photo or not, especially in these hard-news situations.”<sup>95</sup> And yet another said, “He’s a self-serving weasel.”<sup>96</sup>

Clearly the manipulation of a spot news image struck a nerve. More than 34 percent of non-photographers responding, said it was acceptable to run the altered image at a significantly ( $p < 0.001$ ) higher percentage than professional photojournalists and many of the respondents acknowledged the manipulation was subtle.<sup>97</sup> “The blood on the street and the person being attended to on the ground are the main focus of the image. Obscuring her leg does not lessen the visual impact of the image,” said one respondent.<sup>98</sup> “Far too graphic for a cover photo. Everyone knows it was a horrible scene; to display the ‘horror’ this prominently is done to promote the publication without regard for its readership, much less the news stand passers-by,” said another.<sup>99</sup> While non-photographer respondents found the blatant manipulation of the Jeff Bauman image acceptable, they found the subtle manipulation of the lady’s broken legs even more acceptable.

### C. Ethical Codes

While these insights begin to draw some boundaries for what is seen as acceptable, they do little to establish the wording of a potential code of ethics. Only 40 percent of professional photographers said they had a company policy that would limit the amount of alteration in an image, and as a starting point, 95 percent of them accepted the wording of the NPPA Code of Ethics originally written in 1946.<sup>100</sup> As one respondent put it, “Our commitment to accuracy is our credibility, [and] that includes undoctored pictures. What’s the point of covering the news if you’re going to make stuff up?”<sup>101</sup> The professionals were willing to add even more stringent qualifications. For example, 95 percent said they accepted the statement, “Documentary news and feature photos should not be manipulated,” as a guiding principle.<sup>102</sup> 83 percent accepted “Altered images should be obviously false to the reader” as a principle while 90 percent said “Readers should know that

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<sup>91</sup> Based on responses from Q15 of survey.

<sup>92</sup> Survey response.

<sup>93</sup> Survey response.

<sup>94</sup> Survey response.

<sup>95</sup> Survey response.

<sup>96</sup> Survey response.

<sup>97</sup> See *supra* Table 1.

<sup>98</sup> Survey response.

<sup>99</sup> Survey response.

<sup>100</sup> Joseph Nistler, *Ethical Issues*, 2012, [https://mywebspace.wisc.edu/jnistler/web/2photo\\_site/ethics.html](https://mywebspace.wisc.edu/jnistler/web/2photo_site/ethics.html).

<sup>101</sup> Based on responses from Q29 of survey.

<sup>102</sup> Based on responses of survey.

an image was altered.”<sup>103</sup> 96 percent agreed, “Any manipulations should simply include routine cropping, color correction to restore the color balance to what appeared in the actual scene, or dodging/burning to improve reproduction quality.” Just shy of 100 percent said, “The highest and strictest standards should be applied to hard-news photographs.”<sup>104</sup> As one respondent said, “The use of photographs as news is dependent on such principles.”<sup>105</sup> Still, only 42 percent of respondents said they had any company policies that would limit the amount of alteration in an image.<sup>106</sup>

Beyond the discussion of digital manipulation of spot news images, non-photographers and photojournalists even disagreed significantly on three of the following guidelines: “Accurate representation is the benchmark of our profession. We believe photojournalistic guidelines for fair and accurate reporting should be the criteria for judging what may be done electronically to a photograph. Altering the editorial content ... is a breach of the ethical standards recognized by the NPPA,”<sup>107</sup> “Adhere to the principle of reproducing photos that represent reality. Documentary news and feature photos should not be manipulated,”<sup>108</sup> and “Altered images should be obviously false to the reader.”<sup>109</sup> While professionals and non-photographers disagreed on the first statement, the key statement of principle, by only 3.05 percent, they disagreed on the second by a difference of more than nine percent and by nearly 18 percent on the third.<sup>110</sup>

Of course, non-photographers may not understand what “obviously false” means from a journalistic standpoint, meaning the wording of this statement needs to be more clear before being included in a code of ethics. Still, even the non-photographers realized when commenting on the general statement, “If you don't accept this news photography will become a meaningless pursuit,” as one respondent stated in substantiating Huang's 2001 findings.<sup>111</sup> However, when discussing the more specific statements, they acknowledged that the photojournalist's individual judgment is a significant factor before taking or publishing such images. “Generally I accept, but judgment needs to come in play,” one respondent said.<sup>112</sup> “The question is in the application of the principles to any particular image,” said another.<sup>113</sup> And yet another returned to the importance of the individual judgment of the photojournalist: “I prefer to exercise individual judgment in individual cases.”<sup>114</sup>

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<sup>103</sup> Based on responses of survey.

<sup>104</sup> Based on responses of survey.

<sup>105</sup> Survey response.

<sup>106</sup> Based on responses of survey.

<sup>107</sup> Based on responses from Q21 of survey ( $p < 0.05$ ).

<sup>108</sup> Based on responses from Q23 of survey ( $p < 0.001$ ).

<sup>109</sup> Based on responses from Q24 of survey ( $p < 0.001$ ).

<sup>110</sup> Based on responses of survey.

<sup>111</sup> Based on responses of survey.

<sup>112</sup> Survey response.

<sup>113</sup> Survey response.

<sup>114</sup> Survey response.

## VI. Conclusions

As one scholar has put it, “You can’t set ethical guidelines. Ethics, like morals and standards, are personal. Everybody has his or her own. Fine. Except for one small catch: Journalists serve the public. If we aren’t perceived as credible, we can’t be of much service. Ethics are more than a personal matter in photojournalism, because what we do affects a large number of people.”<sup>115</sup> Yet, based on the statements from the photojournalists surveyed, it seems that setting guidelines for the manipulation of spot news images is exactly what is wanted. In terms of digital manipulation, this study validated many common statements used in codes of ethics, pointing towards increased exploration into items like making manipulation “obviously false” to the reader/viewer.

However, the research also revealed that non-photographers are much more tolerant of digital-image manipulation when it comes to protecting an individual’s privacy, avoiding the publication of upsetting images in spot news situations, and even when they expressed that images should reflect reality. While the Boston Marathon bombing was clearly a public event with little expectation for privacy, in response to the first photo, numerous non-photographer respondents mentioned the need for privacy, including the first person who said, “Photos of a graphic, traumatizing nature should not be published without permission of the subject. I seriously doubt that this gentleman had time to sign a release within hours of having his leg blown off.”<sup>116</sup>

Clearly the balancing between a person’s perception of privacy and the need to honor the public interest is something that warrants more exploration in spot news situations, particularly when it comes to legal precedent set forth in *New York Times Co. v. Sullivan* and *Time, Inc. v. Hill*.<sup>117</sup> The decision-making process regarding the publication of visual images also deserves further analysis, especially considering how the process has evolved in an era of instantaneous mass media communication where high tech phones and drones are more readily accessible to the common person. The difference in ethical standards attached to ordinary citizens and non-photographers also merits a closer look, particularly when they work through the process of taking, manipulating, and publishing pictures, because they oftentimes do not possess the same foundational understanding as their professional counterparts.

In terms of digital manipulation, the guidelines may delineate, as the Webster University Journal policy does,<sup>118</sup> from what is generally allowed, including brightness/contrast control, burning and dodging to control tonal range, color correction, cropping a frame to fit the layout and retouching of dust spots, and what is never allowed, including adding, moving, or removing objects within the frame, color change other than to restore what the subject looked like, cropping a frame to alter its meaning, flopping a photograph (left/right reversal), and printing a photograph in other than “true” orientation. But clearly, staffs need

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<sup>115</sup> Ben Brink, *Question of Ethics: Where Does Honesty in Photojournalism Begin? ‘The Foundation is Basic, Simple Honesty,’ an Editor Says*, NEWS PHOTOGRAPHER (1988).

<sup>116</sup> Survey response.

<sup>117</sup> *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>118</sup> Bill Barrett, *Policy for the Ethical Use of Photographs*, WEBSTER UNIV., 1999, [http://www2.webster.edu/~barrettb/journal\\_ethics.htm](http://www2.webster.edu/~barrettb/journal_ethics.htm).

guidelines written into their codes of ethics and training regarding the ideals and standards of the media outlet before they are faced with difficult situations that give them only minutes or seconds to react.

The guidelines may be as simple as reminding staff members of their obligations to reporting the truth and maintaining the credibility of their news publication. Quoting a 1994 article by David Johns in *News Photographer* (the magazine of the NPPA), Brink said, “The photojournalist cannot escape responsibility for unethical shots. He is the first gatekeeper. The photographer makes the initial decision.’ And since our work is often done in a split second with no time to think, our ethical standards have to be considered before they are tested.”<sup>119</sup> Likewise, updates to the guidelines, which haven’t changed much in nearly 200 years, may be as simple as reminding photojournalists to be honest. “The majority of students tended to list honesty as the best guidelines for ethics.... While specific ethics changes from professional profession, their foundation does not. The foundation is basic, simple honesty, the kind you learn in kindergarten: Don’t tell us stories about things that didn’t happen. Don’t show us things that don’t exist.”<sup>120</sup>

Whether it is in regards to the content of an image and whether or not it should be published based on community standards or how far digital manipulation should go, as one photographer has stated, “We should not be allowed to ‘bend the truth’ without telling the public exactly what we did.”<sup>121</sup> No single code of ethics or policy can dictate what is right, or wrong, in any situation as the respondents to this survey indicated. Just as firefighters spend time pre-planning how they will react to a building fire, photojournalists and their editors should plan how they will react at spot news events so that mishaps like Brian Walski’s digital alteration of an image transmitted from a battlefield in Iraq and published in the *Los Angeles Times* in 2003 become less and less likely.<sup>122</sup> As the next generation of cameras and current tools like Eye-Fi allow for nearly instantaneous publication of photographs from high-end digital cameras, the editor as a gatekeeper might be extracted from the process altogether. Photojournalists, who continue to be passionate about their need to document the realities and sometimes horrors of the human condition, need to be made aware of the community standards and the expectations placed upon them and held accountable to those standards. As Vincent LaForet once said, “What really differentiates us from other photographers and media is our credibility. We have a history of getting it right, accurately.... Our credibility is all that we have.”<sup>123</sup>

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<sup>119</sup> Brink, *supra* note 115.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See *supra* notes 48–50 and accompanying text.

<sup>123</sup> Irby, *supra* note 50.

**APPENDIX A**



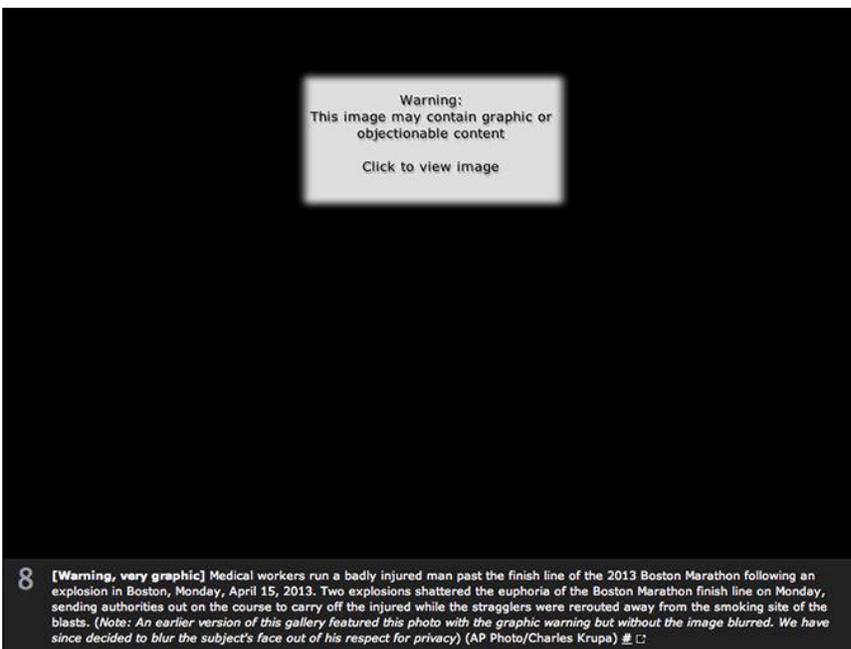
**IMAGE 1: No manipulation. Photo by Charles Krupa/AP**



**IMAGE 2: Cropped image on concordmonitor.com. Photo by Charles Krupa/AP**



**IMAGE 3: Face blurred in theatlantic.com. Photo by Charles Krupa/AP**



**IMAGE 4: Warning from theatlantic.com.**



**IMAGE 5: No manipulation. Photo by John Tulmacki, Boston Globe/Getty Images**



**IMAGE 6: Front cover of the New York Daily News with manipulated image. Photo by John Tulmacki, Boston Globe/Getty Images**

PRACTITIONERS AS PUBLISHERS:  
EXAMINING PUBLIC RELATIONS PRACTITIONERS' CLAIMS FOR LEGAL  
PROTECTIONS TRADITIONALLY ASSOCIATED WITH THE INSTITUTIONAL PRESS

JARED SCHROEDER\*  
ADAM SAFFER\*\*

*This article explores when or if public relations practitioners can receive legal protections that have traditionally been associated with the institutional press under the press clause of the First Amendment. The emergence of network-based communication technologies has changed the way public relations practitioners communicate and access information and has limited their reliance upon journalism gatekeepers for access to the means of reaching audiences.*

*This article analyzes three cases in which lower-court judges articulated conceptual rationales regarding claims made by public relations practitioners for protections historically more associated with journalism. The dominant themes and meanings conveyed by the judges are examined through the theoretical lens of the four principal models of public relations, as well as the dialogic approach, in an effort to discover under which model or models of public relations, if any, the courts would grant public relations practitioners privileges traditionally reserved for journalists. The themes that emerged from the narrative communicated by the judges were that the intent of the messenger, and how the firm or practitioner defines his or her work, were central to the decisions in the three cases.*

*This article concludes that elements from a combination of the public information and the two-way symmetric models of public relations, as well as aspects of the dialogic approach to public relations, could provide the best opportunity for practitioners to qualify for communication protections that have been traditionally reserved for journalists.*

**Keywords:** public relations, First Amendment, technology

## I. Introduction

Few public relations scholars or practitioners would argue with the assertion that network-based communication technologies have changed the way practitioners communicate and access information. Contemporary scholars have begun to address specific issues associated with public relations practitioners' uses of new technologies, yet researchers have not considered the

concomitant legal issues of communication in a network society.<sup>1</sup> Sociology scholars Manuel Castells and Jan van Dijk have described the network society as the dynamic, open, and innovative social structures that have emerged in recent decades.<sup>2</sup> Such shifts have decentralized the flows of communication and, therefore, upset traditional models of information dissemination.<sup>3</sup> The network-society era accounts for the technological and social changes that have, in many ways, acted to rewrite and reinvent the once clear roles held by journalists, public relations practitioners, and audience members within the communication spectrum.<sup>4</sup> The shift is changing journalistic roles and opening the doors for public relations practitioners and citizen publishers to reach audiences in new ways. It is also creating uncertainty about First Amendment protections that have been traditionally reserved for journalists, but are now being called upon by others.<sup>5</sup>

This article embarks on an area of legal and public relations scholarship that has received limited attention.<sup>6</sup> Few studies have examined legal questions as they relate to public relations. Within those studies, most have focused on the boundaries of commercial speech, rather than examining when or if public relations practitioners can receive protections that have traditionally been associated with the institutional press under the press clause of the First Amendment.<sup>7</sup> Furthermore, the Supreme Court has not specifically considered the boundaries of the press clause during the network-society era. Only one decision, *Elonis v. United States*, has addressed the rights of a citizen publisher utilizing network technology, and it primarily focused on threatening language shared via Facebook, shedding little light on the central question posed by this article.<sup>8</sup> Furthermore, the Court has never specifically mentioned “public relations” in any of its rulings, leaving questions regarding the rights associated with this field of communication.<sup>9</sup> The changing media landscape, with more and more communicators who are not affiliated with traditional media entities clamoring for media-like protections, makes it reasonable to anticipate

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<sup>1</sup> Michael Kent, *Using Social Media Dialogically: Public Relations Role in Reviving Democracy*, 39 PUB. REL. REV. 337, 338 (2013); Michael Kent & Adam Saffer, *A Delphia Study of the Future of New Technology Research in Public Relations*, 40 PUB. REL. REV. 568, 568 (2014).

<sup>2</sup> MANUEL CASTELLS, COMMUNICATION POWER 55 (Oxford Univ. Press, 2009) (hereinafter *Communication Power*); JAN VAN DIJK, THE NETWORK SOCIETY 172 (SAGE Pub., 3d ed. 2012).

<sup>3</sup> MANUEL CASTELLS, RISE OF THE NETWORK SOCIETY 1 (Wiley Blackwell, 2000) (hereinafter *Rise of the Network Society*); CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 71 (Penguin Books, 2008).

<sup>4</sup> BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 18–21 (2007); SHIRKY, *supra* note 3, at 73–74; Jane Singer, *Journalism and Digital Technologies*, in CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES 213, 214–215 (Wilson Lowrey & Peter J. Gade eds., 2011); Jane Singer, *The Political J-Blogger: ‘Normalizing’ a New Media Form to Fit Old Norms and Practices*, 6 JOURNALISM 173, 177–179 (2005)..

<sup>5</sup> SCOTT GANT, WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE 201 (Simon & Schuster, 2007); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalists*, 39 HOUS. L. REV. 1371, 1373–1374 (2002)..

<sup>6</sup> Glen M. Broom, Mark S. Cox, Elizabeth A. Krueger & Carol M. Liebler, *The Gap Between Professional and Research Agendas in Public Relations Journals*, 1 PUB. REL. RES. ANN. 141, 147 (1989); Catherine A. Pratt, *First Amendment Protection for Public Relations Expression: The Applicability and Limitations of the Commercial and Corporate Speech Models*, 2 PUB. REL. RES. ANN. 205, 205 (1990).

<sup>7</sup> See Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue not Decided in Nike v. Kasky*, 54 CASE W. RES. 1143, 1148 (2004); Eyun-Jung Ki, *Nike v. Kasky: Reconsideration of Noncommercial v. Commercial Speech*, 30 PUB. REL. REV. 419, 421–422 (2004); Pratt, *supra* note 6, at 205–206.

<sup>8</sup> *Elonis v. United States*, 135 S. Ct. 2001 (2015).

<sup>9</sup> Pratt, *supra* note 6, at 206.

that the Court will address the press clause, and possibly public relations, more extensively in the future.<sup>10</sup>

In the absence of specific direction from the Supreme Court, this article examines three lower-court cases in which judges articulated conceptual rationales regarding claims made by public relations practitioners for protections that have historically been more associated with the institutional press. The dominant themes and meanings conveyed by the judges in the cases are examined through the conceptual lens of the four principal models of public relations, as well as the dialogic approach, in an effort to discover under which model or models of public relations, if any, the courts might understand public relations practitioners as qualifying for privileges that have traditionally been reserved for journalists. Receiving such journalism-like protections carries the potential to allow public relations firms to offer greater privacy to their clients, because they could, in many instances, shield themselves from being compelled to release documents in court cases. Furthermore, successfully arguing for such protections could lead to greater freedoms to communicate because news and information messages have traditionally received greater legal protections than those that have been classified as commercial speech.<sup>11</sup>

To address this article's central question, this article considers how the emergence of the network society has changed the way information is communicated and outlines the central ideas regarding the models of public relations. The article also examines the Supreme Court's central precedents regarding press-related protections, as well as the foundational legal concepts surrounding commercial speech. With the models and the influences of the network society on public relations and communication overall in mind, as well as the legal precedents regarding protections for the press and the limitations of commercial speech rights, this article goes on to analyze three lower-court decisions, all of which involve public relations practitioners. The cases were selected because each includes a different legal question and, therefore, contributes a different angle for how the courts are defining journalistic privileges in the network era and how public relations practitioners' actions were framed in comparison to those guidelines. The cases were also chosen because they come from different states and, therefore, were determined on the basis of differing statutory considerations. Finally, the cases all emerged during the network era, which started to take form in the late 1990s.<sup>12</sup> *Bailey v. State*, decided in 2012, involved a public relations practitioner working as a political consultant who claimed his political campaign-oriented website was exempt from state election laws because it was a news source.<sup>13</sup> *Yeager v. Cingular Wireless*, decided in 2009, considered a public relations firm's argument that its use of a celebrity's name in a news release posted on its website was newsworthy and not solely commercial.<sup>14</sup> *In re Napp Technologies*, decided in 2000, involves a public relations firm that claimed its work in spreading information for a client regarding a plant explosion made it the equivalent of a news organization and, therefore, eligible for protection from the state's news reporter's shield law.<sup>15</sup>

## II. Change and Network Society

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<sup>10</sup> Robert W. McChesney, *Freedom of the Press for Whom – The Question to Be Answered in Our Critical Juncture*, 35 HOFSTRA L. REV. 1433, 1434 (2006-07); Pratt, *supra* note 6, at 206.

<sup>11</sup> Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1153–1156 (2012); Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 465 (1970)..

<sup>12</sup> *Rise of the Network Society*, *supra* note 3, at 1.

<sup>13</sup> *Bailey v. State*, 900 F. Supp. 2d 75 (D. Me. 2012).

<sup>14</sup> *Yeager v. Cingular Wireless*, 673 F. Supp. 2d 1089 (E.D. Cal. 2009).

<sup>15</sup> *In re Napp Tech.*, 338 N.J. Super. 176 (2000).

The paradigmatic shift brought about by the emergence of what scholars such as Castells have termed the “network society” has placed the power to publish in the hands of many, increasingly obscuring in many contexts the once clear line between the press and its audience.<sup>16</sup> Importantly, Castells and media scholar Henry Jenkins view the network society as more than a technological change. They conceptualized the network society as a social structure that emerged as a result of the formation of global digital networks.<sup>17</sup> Castells emphasized that the social structure is constructed around digital communication networks, it is not determined by them.<sup>18</sup> The network society is fundamentally related to an information revolution and, as a result, an emerging global social structure that is influencing the way people live on every level.<sup>19</sup>

Central to the network society are changes in who can publish. The emergent technologies of the network society era have placed the ability to publish and disseminate information to audiences in the hands of anyone with a computer or smart phone and an Internet connection.<sup>20</sup> The once-dominant mass media model, which emphasized a one-to-many communication dynamic and was premised on clearly definable senders and receivers has been replaced by decentralized, interactive communication.<sup>21</sup> As journalism scholar John Merrill explained, the Internet empowers “vast numbers of formerly silent citizens to get their voices heard.”<sup>22</sup> The paradigm shift from the mass media model to the network society era has made the line between a journalist and others who communicate messages to audiences more opaque.<sup>23</sup> Journalism scholar Jane Singer explained, “Technological developments and their accompanying social transformations have pushed journalists to ask the sort of existential questions they did not have to face before: Who is a journalist? What, exactly, does a journalist do that other people do not?”<sup>24</sup> The shift has altered some of the traditional roles of journalism, such as gatekeeping and access to sources of data.<sup>25</sup> The Internet provides virtual libraries of information and it provides the ability for users to choose messages from a torrent of sources.<sup>26</sup> This blurring of the

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<sup>16</sup>*Communication Power*, *supra* note 2, at 55; *see also* HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 3–4 (NYU Press, 2006). Jenkins emphasized that people can no longer be viewed as producers and consumers, but are rather “participants who interact with each other according to a new set of rules that none of us fully understands.”

<sup>17</sup>*Rise of the Network Society*, *supra* note 3, at 14–15; JENKINS, *supra* note 16, at 3–4.

<sup>18</sup>*Communication Power*, *supra* note 2, at 4.

<sup>19</sup>*Rise of the Network Society*, *supra* note 3, at 1; *see also* BRIAN MCNAIR, *CULTURAL CHAOS: JOURNALISM, NEWS AND POWER IN A GLOBALISED WORLD* 1–3 (Routledge, 2006). McNair posits that the development of the worldwide social structure that is facilitated by networked technology will lead to a global public sphere.

<sup>20</sup> Michael Schudson & Susan E. Tifft, *American Journalism in Historical Perspective*, in *THE PRESS* 17, 40 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005); Peter J. Gade & Wilson Lowrey, *Reshaping the Journalistic Culture*, in *CHANGING THE NEWS: THE FORCES RESHAPING JOURNALISM IN UNCERTAIN TIMES* 22–23 (Wilson Lowrey & Peter J. Gade, eds., 2011); KOVACH & ROSENSTIEL, *supra* note 4, at 18–19.

<sup>21</sup> WERNER J. SEVERIN & JAMES W. TANKARD, *COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA* 55–56 (Addison Wesley Longman, 5th ed. rev’d 2001); *Communication Power*, *supra* note 2, at 54–56; Gade & Lowery, *supra* note 20, at 22–23.

<sup>22</sup> John C. Merrill, *Journalism and Democracy*, in *CHANGING THE NEWS: THE FORCES RESHAPING JOURNALISM IN UNCERTAIN TIMES* 53 (Wilson Lowrey & Peter J. Gade, eds., 2011).

<sup>23</sup> Arthur S. Hayes, Jane B. Singer & Jerry Ceppos, *Shifting Roles, Enduring Values: The Credible Journalist in a Digital Age*, 22 *J. MASS MEDIA ETHICS* 262, 262–263 (2007); Singer, *supra* note 4, at 214–215.

<sup>24</sup> Singer, *supra* note 4, at 214.

<sup>25</sup>*Id.* at 215; KOVACH & ROSENSTIEL, *supra* note 4, at 18–19.

<sup>26</sup> Steven H. Chaffee & Miriam J. Metzger, *The End of Mass Communication*, 4 *MASS COMM. & SOC’Y* 365, 369–370 (2001); CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* 3–6 (Princeton Univ. Press, 2007); David Tewksbury, *The Seeds of Audience Fragmentation: Specialization in the Use of Online News Sites*, 49 *J. OF BROADCASTING & ELECTRONIC MEDIA* 332, 332–333 (2005); Wilson Lowrey & Peter J. Gade,

journalistic role, aside from the soul-searching it has caused for traditional media, has created opportunities for other communication fields to lay claim to similar public service orientations – orientations once held exclusively by journalists.<sup>27</sup>

Through the Internet, public relations practitioners are provided with the ability to move past the once-vigilant journalistic gatekeepers and reach audiences directly with their messages.<sup>28</sup> Public relations practitioners can also execute other journalistic functions, such as facilitating forums for various publics to discuss issues and informing people about news and events in their communities, whether they are physical or virtual.<sup>29</sup> Public relations scholar Michael Kent explained, “As public relations slowly evolved out of our roles as World War II and corporate propagandists, professionals used the mass media to share information with stakeholders and publics. New technology has altered 70 years of democratic public relations practices.”<sup>30</sup> New online communication technologies allow public relations practitioners to publish content and interact with publics in ways that were not possible when modern public relations emerged at the dawn of the twentieth century, and when media shield laws and other protections were written. More importantly, and applicable to this article, such changes and theorizing of public relations practitioners’ roles raises substantial questions about the extent to which public relations practitioners can claim privileges that have been traditionally reserved for journalists.

### III. Models of Public Relations Practice

Many scholars point to the models of public relations as the foundation of the initial theory building in the field. Originating from public relations theorist James Grunig’s analysis of common public relations tactics,<sup>31</sup> Grunig and fellow theorist Todd Hunt proposed four models of how public relations is practiced: press agency/publicity, public information, two-way asymmetric, and two-way symmetric.<sup>32</sup> The models follow the chronological development of public relations.<sup>33</sup> As organizations started to identify a need to garner representation in the newspapers, practitioners were predominately press agents. Today, with the ability and need to maintain relationships with various publics, practitioners enact variations of the four models. Often the two-way symmetric model is characterized as the optimized model of public relations

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*Complexity, Uncertainty, and Journalistic Change*, in *CHANGING THE NEWS: THE FORCES RESHAPING JOURNALISM IN UNCERTAIN TIMES 3* (Wilson Lowrey & Peter J. Gade, eds., 2011).

<sup>27</sup> Lance Vardaman Porter, Lynn M. Sallot, Glen T. Cameron & Scott Shamp, *New Technologies and Public Relations: Exploring Practitioners’ Use of Online Resources to Earn a Seat at the Management Table*, 78 *JOURNALISM & MASS COMM. Q.* 172, 175–176 (2001); Singer, *supra* note 4, at 215.

<sup>28</sup> Alfonso Gonzalez-Herrero & Suzanne Smith, *Crisis Communications Management on the Web: How Internet-Based Technologies are Changing the Way Public Relations Professionals Handle Business Crises*, 3 *J. OF CONTINGENCIES AND CRISIS MGMT.* 143, 145 (2008); Porter et al., *supra* note 27, at 176; Candace White & Niranjana Raman, *The World Wide Web as a Public Relations Medium: The Use of Research, Planning, and Evaluation in Web Site Development*, 25 *PUB. REL. REV.* 405, 406 (1999).

<sup>29</sup> Laura Newland Hill & Candace White, *Public Relations Practitioners’ Perception of the World Wide Web as a Communications Tool*, 26 *PUB. REL. REV.* 31, 37 (2000); Wilson Lowrey and William Anderson, *The Journalist Behind the Curtain: Participatory Functions on the Internet and Their Impact on Perceptions of the Work of Journalism*, 10 *J. OF COMPUTER-MEDIATED COMM.* n.p. (2005); Maureen Taylor, Michael L. Kent & William J. White, *How Activist Organizations are Using the Internet to Build Relationships*, 27 *PUB. REL. REV.* 263, 280 (2001).

<sup>30</sup> Kent, *supra* note 1, at 339.

<sup>31</sup> James E. Grunig, *Organizations and Public Relations: Testing a Communication Theory*, 46 *JOURNALISM MONOGRAPHS* 64 (1976).

<sup>32</sup> JAMES E. GRUNIG & TODD HUNT, *MANAGING PUB. REL.* 25–26 (Wadsworth Publ’g, 1984).

<sup>33</sup> Alexander V. Laskin, *The Evolution of Models of Public Relations: An Outsider’s Perspective*, 13 *J. COMM. MGMT.* 37, 37–40 (2009).

practice. As the examination of the lower-court cases in this article illustrates, characteristics of the models of public relations can be seen in judges' descriptions of public relations practitioners, and how they rationalized their conclusions in cases in which public relations practitioners claimed traditionally journalism-related protections. The four models act as the theoretical lenses through which the courts' rationales in the three cases are analyzed. For this reason, the central conceptual aspects of the models are examined below.

*Press Agency/Publicity.* The first model of public relations, as described by Grunig and Hunt, was derived from Phineas T. Barnum's work as the press agent for the Barnum and Bailey Circus.<sup>34</sup> Barnum utilized deceptive public relations tactics to garner media coverage on events with little news value that were often fabricated. Propaganda falls within this model where truth is not a goal of the communication. Traditionally, the press agency model has been conceptualized as one-way communication via the media to publics in order to attract attention or "buzz." Product promoters, sports teams, and theaters are types of organizations that exemplify the press agency/publicity model today.<sup>35</sup> Within this model, the media fully mediate the relationships between an organization and its publics. Traditionally, the challenge for practitioners operating within this model has been to surpass the gatekeepers' fact checking or to find an outlet willing to overlook practitioners' disregard for truth in messages. However, new technologies have created a system where the media only partially mediates the information exchange. Organizations are now able to reach publics directly with their side of a news story. Practitioners are free to use information as they see necessary.

*Public Information.* The second model of public relations—public information—is conceptually similar to press agency in that the understanding of communication remains one-way. The importance of truth, however, is elevated in the public information model. Ivy Ledbetter Lee, a founder of modern public relations, asserted that public relations practitioners and agencies should provide the public and the media with prompt and *accurate* information.<sup>36</sup> Advocacy and social cause organizations often use this mediated strategy to inform target publics with factual information.<sup>37</sup> Grunig and Hunt stated that the practitioner "function[s] essentially as a journalist in residence, whose job it is to report objectively information about his [or her] organization to the public."<sup>38</sup> Practitioners' use of information with this model focuses more on the public benefit, not the commercial benefits, of disseminating accurate information.

In the network-society era, this model of public relations has become less dependent on the media's willingness to convey information received from public relations practitioners to media audiences. Organizations and agencies can now communicate factual information to publics directly utilizing websites, blogs, social media, and other tools. However, what makes the model distinct from the other three is the nature of information being shared. Journalistic media have traditionally been considered the source of what is understood as verified, accurate information.<sup>39</sup> Under the conceptual basis of the public information model, organizations in the network era can inform their publics with similarly truthful, if not objectively obtained and communicated, information.

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<sup>34</sup>GRUNIG & HUNT, *supra* note 32, at 25–26.

<sup>35</sup>Laskin, *supra* note 33, at 41.

<sup>36</sup> Karen Miller Russell & Carl O. Bishop, *Understanding Ivy Lee's Declaration of Principles: U.S. Newspaper and Magazine Coverage of Publicity and Press Agency, 1865-1904*, 35 PUB. REL. REV. 91, 95 (2009).

<sup>37</sup> Michael L. Kent, PUBLIC RELATIONS WRITING: A RHETORICAL APPROACH 35 (2011).

<sup>38</sup>GRUNIG & HUNT, *supra* note 32, at 22.

<sup>39</sup> MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 5–6 (Basic Books, 1978); KOVACH & ROSENSTIEL, *supra* note 4, at 79–80.

*Two-way Asymmetric.* Attempting to infuse public relations practice with social scientific theory, Edward Bernays, another founder of modern public relations, suggested the field utilize research to persuade publics to adopt opinions favorable to an organization's objectives.<sup>40</sup> In this model, communication is conceptualized as being two-way between the organization and a public, but the information exchange is asymmetrical in that the organization is only interested in garnering information from the public to help formulate persuasive messages.<sup>41</sup> Businesses apply this model today by gathering research on target publics that is utilized to construct communication campaigns that seek to alter individuals' opinions.<sup>42</sup> Fundamental to this model is that the purpose of the two-way communication is to garner commercial benefit for the organization. In the network era, this type of model is utilized when organizations buy data about individuals' online behaviors, such as the websites they visit, and use the information to market the organization's products or services.

*Two-way Symmetric.* The final and most idealized model of public relations utilizes two-way communication to balance the effects between the organization and publics, and is a vehicle for reaching a mutual understanding between parties. Laskin suggested: "The end result is often viewed as a compromise, a solution that would benefit both the organization and its publics."<sup>43</sup> Scholars have criticized the model, calling it a utopian approach that organizations will not and do not use. Researchers Shirley Leitch and David Neilson questioned whether organizations—especially corporations—having an inherent advantage in the resources at their disposal in comparison to publics or activist groups can create a "balanced" communication environment where mutual understanding could emerge.<sup>44</sup>

Within this model, organizations and publics exchange information without having to pass information through traditional journalistic gatekeepers.<sup>45</sup> In short, organizations create two-way-capable communication dynamics, but selectively communicate information that they send through the two-way channels. Such a dynamic, despite the ideals of a more equally footed dialogic form of communication that is enabled by networked technologies, is unlike traditional understandings of journalism because the information that is presented is not intended to fully present objectively obtained information within interactions with publics.

In a broad sense, the traditional models of public relations represent ways in which professionals—and individuals observing the profession—understand how public relations functions. To date, none of the models have been found to fully and accurately account for how public relations practitioners disseminate information directly to publics much like the media. Indeed, there has been extensive scholarly discussion on how technologies influence the practice of public relations; however, a general model to account for these new tools has not been presented.

*The Dialogic Approach to Public Relations.* Considering the changes online communication has brought to public relations practice, scholars in the field have conceptualized

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<sup>40</sup>Laskin, *supra* note 33, at 38.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 39.

<sup>43</sup>*Id.* at 40.

<sup>44</sup> Shirley Leitch & David Neilson, *Bringing Publics Into Public Relations: New Theoretical Frameworks for Practice*, in *THE HANDBOOK OF PUBLIC RELATIONS* 127, 129 (Robert L. Heath, ed., 2001).

<sup>45</sup> Mark Deuze, *The Changing Context of News Work: Liquid Journalism and Monitorial Citizenship*, 2 *INT'L J. COMM.* 848, 857 (2008); Jane B. Singer, *The Journalist in the Network: A Shifting Rationale for the Gatekeeping Role and the Objectivity Norm*, 23 *TRIPODOS* 61, 62–63 (2008).

the Internet as a space for publics and organizations to engage in dialogue. The dialogic approach to public relations has emerged as a perspective used to study public relations in the network era.<sup>46</sup> In many ways, the dialogic approach is the antithesis to the traditional models of public relations because of its public-centric and managerial focus. Unlike the two-way symmetric model, which focuses on practitioners' use of information to achieve mutual understanding, the dialogic approach goes a step further to assert that practitioners must be able and willing to enact organizational changes based on the dialogue. The two-way symmetrical model is concerned with the organization enacting an exchange, whereas dialogue is concerned with enacting organizational changes. Dialogue, as a process of changing and being changed, requires that practitioners have the capacity to enact changes within the organization. To achieve this, the dialogic approach conceives of public relations as a communicative and managerial practice where practitioners can direct changes within an organization. Indeed, researchers have found practitioners do not use online communication to this full dialogic potential.<sup>47</sup> However, with this contemporary view, we can see practitioners' use and dissemination of information to inform the publics as well as the organization. The fundamental question in this literature is whether effective public relations is and can be practiced when information is used merely for commercial purposes or to inform the public in an ongoing dialogue.

In the absence of a unified model of public relations, or an evolving network era model, the four models and the dialogic approach outlined in this section provide the basis for how the field is understood by scholars and practitioners. For this reason, the central conceptual ideas within these models will form the primary lens through which the case analysis examines under which circumstances, if any, public relations practitioners are likely to receive protections that have traditionally been reserved for journalists.

#### **IV. The Press Clause and Reporter Privilege**

The First Amendment, as it reads today, was the result of extensive revisions and committee work during the First Congress. James Madison proposed two amendments that protected press freedoms.<sup>48</sup> Ultimately, one was cast aside and the other was combined with the freedoms found in the version of the First Amendment that was ultimately made a part of the Bill of Rights. Madison and other authors who contributed to the Bill of Rights clearly understood press protections as crucial to the functioning of a democratic society.<sup>49</sup> No record exists, however, regarding a debate by the First Congress regarding the intended meaning of the press clause. Official and personal documents from the time period also do not indicate a clear intent regarding whom or what actions the clause was meant to protect.<sup>50</sup> Furthermore, in the ensuing decades, the Supreme Court has never explicitly outlined a meaning for the clause, especially one that separates it from the speech clause.<sup>51</sup> Absent clear intent from those who penned and debated the

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<sup>46</sup> Michael L. Kent & Maureen Taylor, *Building Dialogic Relationships Through the World Wide Web*, 24 PUB. REL. REV. 321 (1998).

<sup>47</sup> Sheila M. McAllister-Spooner, *Fulfilling the Dialogic Promise: A Ten-Year Reflective Survey on Dialogic Internet Principles*, 35 PUB. REL. REV. 320, 321 (2009).

<sup>48</sup> David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 478 (1982–83).

<sup>49</sup> *Id.* at 484–485.

<sup>50</sup> *Id.* at 486.

<sup>51</sup> *Id.* at 456; Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093, 1097 (2009); Melville B. Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech*, 26 HASTINGS L.J. 639, 639–641 (1975); Katherine W. Pownell, *Defamation and the Nonmedia Speaker*, 41 FED. COMM. L.J. 195, 202 (1988–89); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–634 (1975).

press clause, and from the Court, legal scholars and others have been left to construct a variety of interpretations regarding the meaning of the press clause, a challenge which has only been exacerbated by the proliferation of new technologies that have allowed anyone with a computer and an Internet to publish messages.<sup>52</sup>

*Difficulties in Defining the Press.* Justice Potter Stewart, who was on the Court for most of the central press-clause-related cases in the 1970s and early 1980s, interpreted the clause as protecting the press as an institution in democratic society.<sup>53</sup> Within this understanding, the clause protects the press from governmental limitations and provides it the security to act as a check on the three branches of government.<sup>54</sup> Similarly, legal scholar Melville Nimmer contended that the speech clause was intended to protect self-fulfillment and to provide a safety-valve function, allowing individuals to express their views, while the press clause was created to protect the media's role in providing information to citizens, allowing them to take part in democratic deliberation.<sup>55</sup> Much of the criticism of these perspectives that posit the press clause was created to protect the media as an institution stems from the problems that come with defining which individuals or organizations would receive such protections. The Supreme Court in *Branzburg v. Hayes* substantially discussed this concern in 1972, when it rejected a newspaper reporter's claim that the press clause of the First Amendment protected him from having to reveal the names of his sources before a grand jury.<sup>56</sup> In the Court's opinion, Justice Byron White highlighted problems that could arise if the government sought to define who is or is not a journalist for the purposes of extending protections such as those claimed by Paul Branzburg. He wrote:

Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.<sup>57</sup>

Instead, Justice White concluded that the press clause applies to any kind of publication that carries information. He listed lecturers, novelists, scholars, and dramatists as people who contribute to public debate and knowledge and therefore are protected.<sup>58</sup> Justice Hugo Black came to a similar conclusion years before, highlighting in *Mills v. Alabama* in 1966 that protection of the press "includes not only newspapers, books, and magazines, but also humble leaflets and circulars."<sup>59</sup> Legal scholar David Anderson, who has done extensive research into the origins of the press clause, similarly contended that much of what new and traditional media outlets communicate to audiences was actually gathered and communicated to them by others, federal agencies, researchers, and industry and trade groups.<sup>60</sup> While Anderson's understanding of the wealth of contributors to what is known in society aligns with the broader conceptualizations offered by the Court in *Mills* and *Branzburg*, he contends press-clause protection should be reserved for traditional media, not all communicators. He reasoned that while many contribute

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<sup>52</sup> David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. 331, 332 (2012–13).

<sup>53</sup> Stewart, *supra* note 51, at 631.

<sup>54</sup> *Id.* at 633.

<sup>55</sup> Nimmer, *supra* note 51, at 653–654.

<sup>56</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>57</sup> *Id.* at 704.

<sup>58</sup> *Id.* at 705.

<sup>59</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

<sup>60</sup> Anderson, *supra* note 52, at 331.

to what is known, the media have a unique ability to “engage an audience” and to create “communities in which democratic dialogue can occur.”<sup>61</sup>

*No More and No Fewer Rights Than Others.* Starting with *Branzburg*, the Court concluded in a series of decisions that journalists should have no more and no fewer rights than those afforded to other citizens. In three cases in the mid-1970s, for example, the Court upheld directives at corrections facilities that limited reporters’ access to inmates and jail properties.<sup>62</sup> In *Saxbe v. Washington Post* and *Pell v. Procunier*, journalists contested the constitutionality of prison policies that stopped members of the media from conducting interviews with specific inmates.<sup>63</sup> Justice Stewart, who wrote the Court’s opinion in both cases, concluded that “The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.”<sup>64</sup> Similarly, four years after *Saxbe* and *Pell*, in *Zurcher v. Stanford Daily*, the Court ruled five-to-three that newspapers should not receive special protections from legally executed searches by law enforcement officials.<sup>65</sup> The case arose after police acquired a search warrant for the *Stanford Daily* newspaper’s office after the publication ran photographs from a hospital protest in which officers were injured. The vantage point from which the photographs in the newspaper were taken indicated to law enforcement officials that the newspaper might have unpublished images that would identify the attackers.<sup>66</sup> The newspaper staff argued that newsroom searches would interrupt timely news production, endanger relationships with confidential sources, deter journalists from saving their notebooks and negatives, disrupt internal editorial decision-making, and push the press toward self-censorship.<sup>67</sup> The Court concluded that the owner of a property should not be a factor in a decision to issue a search warrant and that there was no reason a newspaper office should have different protections than other places.<sup>68</sup>

*Press-specific Rights.* While the Supreme Court has declined to extend explicit privileges for journalists, some privileges, nonetheless, exist in different forms. In particular, legislative acts, on the federal and state levels, have woven exemptions and protections for journalists and media outlets into a variety of areas of law, such as trademark, shield laws, and open-records statutes.<sup>69</sup> Florida, for example, requires those who intend to file a defamation action against a news organization to provide the organization at least five days to respond to their concerns.<sup>70</sup> Texas law does not allow a news organization’s appeal in a defamation case to be dismissed.<sup>71</sup> The federal

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<sup>61</sup> *Id.* at 332.

<sup>62</sup> See *Houchins v. KQED*, 438 U.S. 1 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post*, 417 U.S. 843 (1974).

<sup>63</sup> *Pell*, 417 U.S. at 819; *Saxbe*, 417 U.S. at 844.

<sup>64</sup> *Pell*, 417 U.S. at 834.

<sup>65</sup> *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978).

<sup>66</sup> *Id.* at 551.

<sup>67</sup> *Id.* at 564–565.

<sup>68</sup> *Id.* at 563–566.

<sup>69</sup> John E. Bonine, *Public-Interest Fee Waivers Under the Freedom of Information Act*, 1981 DUKE L. J. 213, 244 (1981); Alison P. Howard, *A Fistful of Lawsuits: The Press, the First Amendment, and Section 43(a) of the Lanham Act*, 88 CAL. L. REV. 127, 128 (2000); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 545–548 (2007).

<sup>70</sup> FLA. STAT. § 770.01 (2008). The law requires prior notification for “publication or broadcast, in a newspaper, periodical, or other medium.”

<sup>71</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (2008). The statute reads, in part: “(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that: . . . denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication

Freedom of Information Act allows members of the news media to pay lower processing fees, if any, than other members of the public and it permits them to at times receive information more quickly.<sup>72</sup> In all of these instances, those recognized as members of the media or media organizations are provided with additional privileges that go beyond those available to others.

Reporters often claim the protections of shield laws, which commonly protect them from being compelled by legal means to reveal confidential sources of information.<sup>73</sup> Media outlets have also claimed, and at times received, protection from providing non-confidential information when subpoenaed by courts.<sup>74</sup> Despite repeated efforts by journalism groups, however, no federal shield law for reporters exists.<sup>75</sup> Forty states and the District of Columbia have shield laws and other states that do not have laws recognize shield-law-like protections for reporters as part of their state constitutions.<sup>76</sup>

Whether the privileges take the form of shield laws or other types of exemptions or protections, federal and state laws have traditionally afforded journalists or news organizations privileges that are to some extent not available to others. The three cases in the analysis that follows, in particular, were selected because they represent examples of such differing ways in which journalists have received protections that go beyond those of others; and at the same time emerged during a time in which the changes brought about by the network era have made determining whether other communicators, such as public relations practitioners, should be eligible for those protections as well.

## V. Limited Protection for Commercial Speech

Public relations messages are generally understood by the courts to be a form of commercial speech, not because the Supreme Court has explicitly designated them as so, but rather because they possess the characteristics courts generally identify as being related to commercial, rather than non-commercial, messages.<sup>77</sup> In *Bolger v. Young Drug Products*, in

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appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73.”

<sup>72</sup> Michael Russo, *Are Bloggers Representatives of the News Media Under the Freedom of Information Act*, 40 COLUM. J.L. & SOC. PROBS. 225, 227 (2006). For the Freedom of Information Act’s wording in these areas, see 5 U.S.C. § 552(a)(4)(A)(ii)(II) in regard to the fees and U.S.C. § 552(a)(6)(E)(v)(II) in regard to expedited processing.

<sup>73</sup> DON. R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW* 380 (McGraw Hill, 17th ed. 2011).

<sup>74</sup> Anthony L. Fargo, *Reconsidering the Federal Journalist’s Privilege for Non-Confidential Information: Gonzales v. NBC*, 19 CARDOZO ARTS & ENT. L.J. 355, 370–372 (2001).

<sup>75</sup> William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. 27, 27–30 (2012); Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress*, 31 HASTINGS COMM. & ENT. 395, 410–413 (2009). The current federal shield-law bill, the Free Flow of Information Act of 2013 (S. 987, 113<sup>th</sup> Cong. (2013)), moved past the Senate Judiciary Committee in September of 2013, but has not reached the Senate floor. See Rem Rider, *Media Shield Law Moves Forward*, USA TODAY, Sept. 12, 2013. In close relation to the central concerns of this paper, much of the debate regarding the bill has related to who is not a journalist for the purposes of the bill’s proposed protections.

<sup>76</sup> Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 HOFSTRA L. REV. 39, 42 (2005); *Number of States with Shield Law Climbs to 40*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/number-states-shield-law-climbs> (last visited Oct. 18, 2013).

<sup>77</sup> TERENCE SHIMP & J. CRAIG ANDREWS, *ADVERTISING PROMOTION AND OTHER ASPECTS OF INTEGRATED MARKETING COMMUNICATION* 601–604 (South-Western College Pub, 2005); Tamara R. Piety, *Free*

1983, the Supreme Court evaluated fliers created by a pharmaceutical company that included information about venereal disease and the benefits of using contraceptives regarding whether they were commercial or non-commercial messages.<sup>78</sup> The fliers included information about the company's products. If the fliers were found to be commercial messages, the Postal Service had the legal right to halt their distribution through the mail.<sup>79</sup> If they were found to be non-commercial messages, the Postal Service would not have the power to make a content-based decision regarding what could and could not be sent through the mail. The Court evaluated the fliers based on three considerations: (1) whether or not the fliers were advertisements, (2) whether they referred to specific products offered by the sender, and (3) whether the sender had an economic motivation for communicating the message.<sup>80</sup> The Court found that all three of the considerations did not have to be answered in the affirmative for the message to be deemed commercial, but in that case "The combination of *all* these characteristics, however, provides strong support . . . that the informational pamphlets are properly characterized as commercial speech."<sup>81</sup> Justice Thurgood Marshall, writing for the Court, explained that all advertisements do not automatically fall to the lower standard of commercial-speech protection.<sup>82</sup> He cited the "Heed Their Rising Voices" advertisement that led to the *New York Times v. Sullivan* ruling as an example of a non-editorial message that could receive the highest-level of First Amendment protection.

The *Bolger* case represents the differing First Amendment protections offered to commercial and non-commercial speech. Before the mid 1970s, commercial speech received no First Amendment protection.<sup>83</sup> The tides began to change after *Sullivan* in 1964 and *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations* in 1973. Neither case focused on commercial speech rights, but questions surrounding advertising were in the background of both.<sup>84</sup> The cases were cited prominently in *Bigelow v. Virginia* in 1975, where, for the first time, the Court reasoned that advertisements can convey valuable information to the public and therefore should be eligible for at least some level of First Amendment protection.<sup>85</sup> A year later, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, the Court struck down a state law that limited advertising prescription drug prices by concluding that commercial speech is protected by the First Amendment. The Court, however, emphasized that "some forms of commercial speech regulation are surely permissible."<sup>86</sup> Ultimately, the Court mapped out the commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission* in 1980. The Court overturned New York regulations that banned promotional advertising for electric companies.<sup>87</sup> In its decision, the Court outlined a four-step test for when speech can be limited: (1) Is the message truthful and does it concern a legal activity, (2) is there a substantial government interest in limiting the commercial speech, (3) will the regulation

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*Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 390 (2006).

<sup>78</sup> *Bolger v. Young Drug Prods.*, 463 U.S. 60 (1983).

<sup>79</sup> *Id.* at 61.

<sup>80</sup> *Id.* at 66–67.

<sup>81</sup> *Id.* at 67.

<sup>82</sup> *Id.* at 66. The Court made the same determination in *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975).

<sup>83</sup> See *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>84</sup> *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 375 (1973). The case considered a law that forbade newspapers from running help-wanted classified advertisements in gender-specific sections. The Court upheld the law, concluding that the law in no way limited the freedom of the press.

<sup>85</sup> *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975).

<sup>86</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 (1976).

<sup>87</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv., Comm'n*, 447 U.S. 557 (1980).

advance the substantial government interest, (4) is the regulation narrowly tailored enough to only limit the speech the government seeks to halt?<sup>88</sup>

The limitations on commercial speech messages, versus those that are found to be non-commercial, mean that cases can hinge, as the determination did in *Bolger*, upon a court's conclusion regarding the type of speech communicated by the messenger. The conclusion that a message is controlled by the press clause or by commercial speech doctrine can substantially influence the amount of protection and freedom it receives.

## VI. Practitioners as Publishers

This section focuses on the narrative represented within three lower-court cases in which judges communicated conceptual rationales regarding claims made by public relations practitioners for protections that have traditionally been associated with the institutional press. The details behind each of the three cases, *In re Napp Technologies*, *Yeager v. Cingular Wireless*, and *Bailey v. State*, are outlined in this section. Discussed in the order in which they reached the courts, each case description is organized to provide the facts, central questions, details regarding the wording of relevant state laws, and key ideas that were a part of the ruling.

### A. In re Napp Technologies

Four people were killed in an early morning explosion at a Napp Technologies chemical plant in Lodi, New Jersey, in April 1995.<sup>89</sup> Many others were injured and a fifth person died days after the explosion. The blast and fire damaged local businesses and forced hundreds of people to evacuate their homes. In the weeks that followed the explosion, Napp employees and people who were near the plant when it exploded filed hundreds of lawsuits.<sup>90</sup> Napp's problems worsened when Occupational Safety and Health Administration (OSHA) and Labor Department investigations determined the explosion was the result of incompetence, mistakes, and mismanagement by the company.<sup>91</sup> Napp hired Holt & Ross, a public relations firm, to help manage the image crisis that occurred as a result of the plant explosion. As part of its work, the firm distributed two news releases that responded to OSHA citations against its client. The releases faulted Technic, one of Napp's component suppliers, for the accident. The first release was titled "Napp Technologies, Inc. Responds to OSHA Citations."<sup>92</sup> The second release was titled "Status Report Regarding Napp Technologies' April 21, 1995 Explosion."<sup>93</sup> Technic responded with lawsuits against Napp regarding who was at fault in the explosion. Technic subpoenaed the public relations firm that had written and issued the news releases for Napp, seeking all of its records relating to its interactions with the company. Holt & Ross declined to comply with the subpoena. The firm argued that under the New Jersey shield law, it qualified as a news media organization, and therefore, as a non-party in the lawsuit, did not have to provide the

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<sup>88</sup> *Id.* at 564-565.

<sup>89</sup> Robert Hanley, *Chemical Plant Explosion Kills 4 in New Jersey Town*, N.Y. TIMES (April 22, 1995); EPA/OSHA Joint Chemical Accident Investigation Report: *Napp Technologies, Inc.*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/osweroe1/docs/chem/napp.pdf> (last visited Oct. 18, 2013).

<sup>90</sup> *In re Napp Techs.*, 768 A.2d 274, 276 (N.J. Super. Ct. Law Div. 2000).

<sup>91</sup> Robert Hanley, *State Rules Out Manslaughter in Lodi Chemical Plant Blast*, N.Y. TIMES (March 15, 1996); EPA/OSHA Joint Chemical Accident Investigation Report, *supra* note 89, at ii-iii.

<sup>92</sup> *In re Napp*, 768 A.2d at 276.

<sup>93</sup> *Id.* at 277.

information.<sup>94</sup> The firm contended that it qualified for protection under the law “because it regularly disseminates information to the public regarding newsworthy events.”<sup>95</sup>

New Jersey’s shield law requires that the communicator be somehow related to a news organization and that he or she gather and convey the information “for the general public or on whose behalf the news is so gathered.”<sup>96</sup> The law further specifically defines “news media” as “newspapers, magazines press associations, news agencies, wire services, radio, television, or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.”<sup>97</sup> Those who meet the law’s requirements for classification as a newsperson are protected from being compelled to disclose source names, information obtained during work on the news story, regardless of whether it was published.<sup>98</sup> Such protections would have allowed the public relations firm to avoid turning over its documents and communications with its client.

In claiming protection under the state shield law, the public relations firm sought a privilege traditionally reserved for news media. It sought to elevate its claim from a commercial-speech matter, to a press-clause issue. The New Jersey Superior Court, while recognizing the state courts’ generally broad interpretation of the law, found the public relations firm did not qualify for the law’s protections. The court recognized that the shield law requires individuals to communicate information via one of a series of listed media types.<sup>99</sup> The court, in reviewing the wording of the law, concluded the statute’s intent was “protecting entities generally viewed as part of the news gathering apparatus.”<sup>100</sup> The judge found that the public relations firm did not meet this standard and it was compelled to release its documents.

Significantly, at the heart of the judge’s opinion was the argument that the firm’s intent when gathering information was fundamentally different from a news organization’s intent and that “as a representative for the client, the public relations firm is in effect its spokesperson. As such, the public relations firm really is part of the news rather than a member of the media reporting it.”<sup>101</sup> The judge also emphasized that the public relations firm’s plan, from the outset, was not to release the information it gathered to the public. The firm might have chosen not to disseminate certain pieces of information, or been advised by its client to not release information.<sup>102</sup> Broadly, the judge focused on the goal-oriented nature of public relations firm’s communication process.

## **B. Yeager v. Cingular Wireless**

Six years after *Napp*, in May 2006, Cingular Wireless distributed a news release through its website and PR Newswire regarding its efforts to assist in emergency preparedness in light of

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<sup>94</sup> *Id.* See also N.J. STAT. ANN. § 2A:84A-21 (West 2015). The statute reads, in part, that the shield law protects: “a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.”

<sup>95</sup> *In re Napp*, 768 A.2d at 277.

<sup>96</sup> N.J. STAT. ANN. § 2A:84A-21 (West 2015).

<sup>97</sup> *Id.* § 2A:84A-21a.

<sup>98</sup> *Id.* § 2A:84A-21.

<sup>99</sup> *In re Napp*, 768 A.2d at 280.; see also N.J. STAT. ANN. § 2A:84A-21a (West 2015).

<sup>100</sup> *Id.*

<sup>101</sup> *In re Napp*, 768 A.2d at 280.

<sup>102</sup> *Id.*

the approaching hurricane season.<sup>103</sup> The release highlighted that Cingular Wireless equipment included MACH1 and MACH2 mobile command centers. The fifth paragraph of the 755-word release compared the speed of Cingular’s emergency response centers to retired Air Force Major General Chuck Yeager’s famed efforts to break the sound barrier and travel at the speed of Mach 1 sixty years earlier.<sup>104</sup> Yeager had no affiliation with Cingular. He argued the company sought to use his name, reputation, and fame for breaking the sound barrier for economic gain.<sup>105</sup> The news release’s author contended that he wrote about Yeager to make the connection between “breaking the sound barrier and breaking new barriers of disaster preparedness.”<sup>106</sup> Yeager claimed the use of his name was a violation of his right of publicity. The right of publicity protects a person’s ability to capitalize on his or her fame in regard to commercial or advertising purposes.<sup>107</sup> Yeager also claimed the use of his name was a violation of the Lanham Act because it created a false impression that he endorsed the product.<sup>108</sup> The Lanham Act was created to protect against unfair competition in business.<sup>109</sup> The act prohibits using symbols that can lead consumers to believe a person sponsors certain products or goods. Celebrities such as Tom Waits, Vanna White, and Kareem Abdul-Jabbar have found some measure of success suing companies for using their names in commercial messages without their permission.<sup>110</sup> The act, however, exempts “all forms of news reporting and news commentary,” as well as “any noncommercial use of a mark.”<sup>111</sup>

As a result of the press exemption, the central question before the court in both the right to publicity and trademark claims was whether Cingular’s message was fundamentally commercial or informational in nature. In both claims, the First Amendment protects speech that is of public interest and intended to inform. Commercial speech, however, can be limited and is not exempted under publicity law or the Lanham Act. Cingular claimed the message in its news release was informational because it did not “propose any commercial transactions and does not offer any services and products.”<sup>112</sup> The judge determined, however, that Cingular’s news release was a commercial message, and therefore found for Yeager in both claims. How the judge determined the message was commercial, rather than informational, is central to this analysis.

In regard to the right of publicity claim, the judge indicated that the absence of any explicit commercial message, or even a minimal one, was not enough to make a message noncommercial.<sup>113</sup> The judge highlighted the numerous times the company’s name was listed in the news release and how the message lacked information about emergency preparedness in general. He wrote the message focused on “how defendant’s wireless service specifically had been

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<sup>103</sup> *Yeager v. Cingular Wireless*, 673 F. Supp. 2d 1089, 1094 (E.D. Cal. 2009).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1095.

<sup>107</sup> PEMBER& CALVERT, *supra* note 73, at 247.

<sup>108</sup> *Yeager*, 673 F. Supp. 2d at 1094.

<sup>109</sup> PEMBER& CALVERT, *supra* note 73, at 561-562. *See also* 15 U.S.C. § 1125(a), which reads, in part, “Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which — (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.” 15 U.S.C. § 1125(a) (2015).

<sup>110</sup> *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (1996); *Waits v. Frito-Lay*, 978 F.2d 1093 (9<sup>th</sup> Cir. 1992); *White v. Samsung Elecs. Am.*, 971 F.2d 1395 (9<sup>th</sup> Cir. 1992).

<sup>111</sup> 15 U.S.C. § 1125(c).

<sup>112</sup> *Yeager*, 673 F. Supp 2d at 1097.

<sup>113</sup> *Id.*

improved to handle such emergencies.”<sup>114</sup> Similarly, the judge dispatched Cingular’s newsworthiness claims. The company argued the news release focused on disaster preparedness, which is of substantial interest to public safety. The judge concluded the informational value in the news release was “window dressing” for a message that was “aimed to positively market defendant’s services by linking them to that public concern.”<sup>115</sup>

The judge focused on similar characteristics of the news release when deciding Yeager’s claim under the Lanham Act was valid and not eligible for dismissal.<sup>116</sup> He found the news release’s fundamental nature was commercial. The judge disagreed with Cingular’s argument that the reference to Yeager appeared in a news release and not in an advertisement. He wrote, “While not featured in a television commercial, the deliberate, closely-tied analogy in a press release directed to create positive associations with the defendant’s product is sufficient to raise a triable issue of fact regarding implied endorsement.” Therefore, the judge centered his argument in both the privacy and Lanham Act claims on the intent of the communicator and the nature of the message.

### C. Bailey v. State

Dennis Bailey owned a public relations firm and was a former reporter, press secretary, and campaign manager.<sup>117</sup> He worked for two gubernatorial candidates’ campaigns, taking work with one campaign after the first candidate lost in the Democratic primary during the 2010 Maine gubernatorial race. Bailey collected information about another gubernatorial candidate, Eliot Cutler, and created an anonymous website called “the Cutler Files.”<sup>118</sup> The site became public in late August and was closed four days before the November election. It included only negative, slanted information about Cutler. The Maine Commission on Governmental Ethics and Election Practices fined Bailey for failing to include his name and contact information on the website.<sup>119</sup> Maine law requires political messages that advocate for the defeat of a “clearly identifiable candidate” to include information about the author and contact information.<sup>120</sup> The law exempts news organizations, indicating that “any news story, commentary or editorial distributed through the facilities of any broadcasting station, cable television system, newspaper, magazine or other periodical publication” are not required to comply.<sup>121</sup> As with the previous cases, the law’s media exemption made the court’s determination regarding the status of the messenger, whether it was commercial or informational, a crucial turning point in how the case was decided.

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1099.

<sup>116</sup> *Id.* at 1103-1104.

<sup>117</sup> *Bailey v. State*, 900 F. Supp. 2d 75, 78 (D. Me. 2012).

<sup>118</sup> *Id.* at 79.

<sup>119</sup> *Id.* at 80.

<sup>120</sup> ME. REV. STAT. ANN. 21-A, §1014(1) (2015). The statute states, “Whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political . . . the communication, if authorized by a candidate, a candidate’s authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication.” If the candidate does not authorize the message, the law states the communication “must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication.”

<sup>121</sup> *Id.* § 1012.

Bailey posited he was a citizen journalist and an online news provider and was eligible for the exemption from the law. He also argued the election law's requirement that he put his name and contact information on the website violated his First Amendment rights.<sup>122</sup> The election commission argued the website was not a periodical publication and that it advocated only for a single candidate's defeat. The judge found the site and messages were not eligible for the news exemption outlined in the law and that the law did not harm his First Amendment rights.<sup>123</sup> The judge emphasized the intent of the author, the nature of the communication vehicle, and the type information being distributed were central in the case.

The judge emphasized that the commission's decision to deny Bailey protection under the law's media exemption was not based on the *vehicle* of communication, which in this case was a website, but because of the *nature* of the site. The site was created to advocate the defeat of a political candidate. It was created during the final months of the election and taken down just before Election Day.<sup>124</sup> The limited scope of information the site contained, only information about a single candidate, and its short life span disqualified it from being considered a "periodical publication" as described by the law's exemption.<sup>125</sup> The judge wrote, "The undisputed facts of this case establish that the Cutler Files was more like a negative campaign flyer than a periodical publication."<sup>126</sup> In other words, the judge found the nature of the site to mimic more of a pamphlet than the type of product a news outlet would produce. It is noteworthy that the case makes limited mention regarding the content of the messages, other than to recognize that the site was aimed at advocating for the defeat of a single candidate.

## VII. Discussion

While the public relations practitioners were unsuccessful in their claims for protections that have historically been reserved for traditional journalists in all three cases, two closely tied themes emerged from the conceptual rationales communicated by the lower-court judges: (1) concern with the intent of the messenger and (2) concern with how the messenger identifies his or her work in communicating with others. Broadly, the themes focused on the *who* and the *why* as they relate to messages communicated by public relations practitioners, and for these reasons, they offer considerable insights into the central question of this paper: Under which model or models of public relations, if any, would the courts understand public relations practitioners as qualifying for privileges that have traditionally been reserved for journalists? These insights are made more relevant by the broadening opportunities public relations practitioners, and other communicators, have to reach audiences and to avoid traditional journalistic gate-keeping practices in the network era.

### A. Concern with the Intent of the Messenger

The judges' narrative consistently contributed to the construction of a theme that public relations practitioners' claims for protections more historically associated with journalists were to be decided based on the intent of the messenger. More specifically, in all three cases, the judges' conceptualizations of what the public relations practitioners sought to accomplish with their messages was framed as of central importance to the ultimate ruling. Perhaps the New Jersey state-court judge most succinctly conveyed this theme in the *Napp* case, when he wrote, "Simply stated, when a public relations firm such as H&R gathers information in connection with events

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<sup>122</sup>*Bailey*, 900 F. Supp. 2d 75, 87 (D. Me. 2012).

<sup>123</sup> *Id.* at 91.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 90.

<sup>126</sup> *Id.* at 91.

like the explosion at Napp's plant facility, its intent at the time of gathering is not necessarily to distribute it."<sup>127</sup> In this sense, the judge articulated an understanding of the public relations firm's messages as falling in neither traditional nor nontraditional news categories. Instead, he conceptualized the firm's work as being "part of the news, rather than a member of the news media reporting it."<sup>128</sup> The judge's narrative, without articulating it in exact terms, carried an understanding of public relations that closely resembled the press agency/publicity and two-way asymmetric models because he focused on the intent of the firm's messages as being primarily to convince or persuade.<sup>129</sup>

Interestingly, the court's discourse in *Yeager*, in a substantially different situation than *Napp*, conveyed a similar understanding. The court found "the publication's sole purpose was to promote defendant's services."<sup>130</sup> Later in the ruling, the court wrote that the news release "aimed to positively market defendant's services by linking them to public concern."<sup>131</sup> Turning to the ruling in *Bailey*, the judge's rationale placed the practitioner's intent as a supporting concern to a broader focus on how the messages were communicated. The judge wrote "The State's interest in an informed electorate is near its zenith where a widely-viewed website falsely claiming to be written by journalists unaffiliated with any campaign expressly advocates the defeat of an opposing candidate shortly before state-wide election."<sup>132</sup> The judge's narrative in *Bailey* communicated an understanding that the central concern was that the intent of the public relations practitioner to use a website to disparage the opponent in the Maine governor's race, rather than to more objectively inform the public about an upcoming election.

The fact that the intent of the communicator was represented as of central importance within the broader discourse in these three cases indicates that the theory of public relations that informs the practitioner's practice could indeed influence future claims for protections that have traditionally been associated with journalism. If the narrative's thematic focus was on the profession of public relations or the vehicle through which the message was communicated, such as a political website or news release posted on a website or distributed electronically, the likelihood of public relations practitioners succeeding in future claims for protections would appear to be less likely. By focusing on intent, the discourse in these cases carried an understanding that a public relations practitioner who operates using the central tenant from the public information model to provide *accurate* information to inform the public could succeed in claims of intent similar to a journalist.

In *Bailey*, for example, the judge emphasized that the practitioner's status as a non-journalist and his use of a website to communicate his message in no way influenced the decision to decline his claim for the news exemption under the Maine election law. She wrote, "The press exemption on its face does not categorically exclude Internet publications from its protection. Nor does the exemption require that the disseminator of the communication be a paid professional journalist."<sup>133</sup> However, if there was intent to use a website in a manner that informs the public, the outcome might have changed. The dialogic approach to public relations directs practitioners to use online spaces for public ends, not organizational ends. As Michael Kent stated, "Public relations professionals need to put a stop to the practice of using stakeholders and publics to satisfy our organizational ends, and work to rebuild democratic ideals and public awareness. The

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<sup>127</sup> *In re Napp Techs.*, 768 A.2d 274, 280 (N.J. Super. Ct. Law Div. 2000).

<sup>128</sup> *Id.*

<sup>129</sup> Laskin, *supra* note 33, at 38-40.

<sup>130</sup> *Yeager v. Cingular Wireless*, 673 F. Supp. 2d 1089, 1098 (E.D. Cal. 2009).

<sup>131</sup> *Id.* at 1099.

<sup>132</sup> *Bailey v. State*, 900 F. Supp. 2d 75, 86 (D. Me. 2012).

<sup>133</sup> *Id.* at 88.

key to how to do this lies in thinking about our technological spaces dialogically.”<sup>134</sup> One method for practitioners to demonstrate their intent to inform the public would be to use websites and the like as a space for dialogic exchanges by all parties.

The focus on intent, rather than on the communicator was further seen in *Yeager*, where the court conceptualized the question before it as not dealing with online communication, a news release, or a public relations practitioner. Rather, the court framed the central determining factor as “the nature of the precise information conveyed and the context of the communication.”<sup>135</sup> Similarly in *Napp*, the judge referred to a variety of cases in which nontraditional media outlets had qualified for protections under the New Jersey shield law.<sup>136</sup> The judge wrote, “H&R has failed to establish that at the outset of its information gathering it intended to disseminate it to the public. Since H&R has not established a community ‘with the goals and concerns that underlie the journalist’s privilege,’ it may not successfully invoke it.”<sup>137</sup> In this sense, the discourse left the door open for protections for messages that originate from public relations practitioners, regardless of the communication vehicle, that, from the outset, are intended to primarily provide information to the public about a matter of public concern. As indicated earlier, such an approach overlaps with primary conceptual components of the public information model, two-symmetrical model and dialogic approach.

## **B. Concern with How Public Relations Practitioners Define Their Work**

The discourse within the three cases consistently identified the way in which public relations practitioners defined their work or their role in communicating with others as a central factor in their determinations regarding claims for protections traditionally reserved for journalists. In each of the three decisions, the judges communicated an understanding that the way the practitioner or firm involved defined their own work or role should contribute to how their messages are interpreted. In *Napp*, the judge outlined the contents of the public relations firm’s website, highlighting that the firm billed itself as being “in the business of ‘reputation management, public acceptance of controversial facilities, relationship building, crisis communication and conflict management.’”<sup>138</sup> Similarly, in *Bailey*, the judge devoted a substantial portion of the first part of the decision to outlining Bailey’s ownership of a public relations firm. She highlighted that the firm “describes itself as ‘Maine’s premier public relations firm offering professional expertise in media and public relations, crisis communications, political campaign management, speech writing, and more.’”<sup>139</sup> In both of these instances, the narrative conveyed by the judges communicated an understanding that how a practitioner or firm identifies itself plays a role in how the courts should rule regarding claims for protections that have been more historically associated with traditional journalism.

Furthermore, after examining the public relations firm’s website in *Napp*, the judge indicated that services such as “reputation management” and “public acceptance of controversial facilities” do not align with traditionally conceptualizations of journalism or the work that journalists do. The judge wrote, “Plainly, these are not the tasks generally engaged in by traditional members of the media.”<sup>140</sup> Therefore, much as was discussed regarding the preceding theme in relation to the intent of the messenger, a thematic and decision-influencing focus by the

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<sup>134</sup> Kent, *supra* note 1, at 342.

<sup>135</sup> *Yeager*, 673 F. Supp. 2d at 1096.

<sup>136</sup> *In re Napp Techs.*, 768 A.2d 274, 279-281 (N.J. Super. Ct. Law Div. 2000).

<sup>137</sup> *Id.* at 191.

<sup>138</sup> *Id.* at 278.

<sup>139</sup> *Bailey v. State*, 900 F. Supp. 2d 75, 78 (D. Me. 2012).

<sup>140</sup> *In re Napp*, 768 A.2d at 278.

judges regarding how firms and practitioners identified their roles indicated that public relations models that align more closely with judicial understandings of journalism will likely provide practitioners a greater chance of receiving protections that have traditionally been reserved for journalists. Ivy Lee's focus on a journalist-in-residence approach to public relations in the public information model, for example, and the two-way symmetric model's balanced, mutual benefits of information between the audience and the organization, both appear to provide a closer affiliation to journalism-like approaches than the press agency/publicity and two-way asymmetric models.<sup>141</sup> The dialogic approach is unique to this thematic area in that the approach places little emphasis on journalistic principles. However, the approach would define practitioners' work as being facilitators of discussion, information and meaning, which has some overlap with tenets of journalism.

As was indicated in the previous section regarding the courts' concern regarding the intent of the message, the expectation that the public relations practitioners and firms define themselves in ways that align with tenets of journalism leaves the door open for the protections the parties desired in each of these cases to be obtained in future instances. The rationales communicated by the judges never indicate that public relations practitioners cannot receive protections traditionally associated with journalists simply as a result of their profession. Nor does the narrative indicate they must be exactly like journalists in their work. Rather, the expectation that is communicated by the judges in the discourse found in these cases is that public relations practitioners must define themselves as information providers to the public and they must intend to communicate messages of public concern to audiences from the outset of their work. The judge's interpretation of the New Jersey shield law communicated this idea, writing that, "the reportage of news is what triggers the protection of the New Jersey shield law."<sup>142</sup> He did not write that a journalist must communicate the news. The judge did, however, indicate a relationship between how the firm defined its role with its actions in its work after the Napp plant explosion. He wrote that, "the public relations firm really is part of the news, rather than a member reporting it."<sup>143</sup> An opposite conclusion, based on this analysis, would be that a firm that defines itself as helping organizations and publics communicate and that provides "prompt and accurate" information to those publics, as outlined in the public information and two-way symmetric models and the dialogic approach, could be viewed as more like a member of the media and less like a part of the news itself.<sup>144</sup>

## VIII. Conclusion

Network-based communication technologies have changed the way public relations practitioners, as well as many others, communicate and access information. They have provided the opportunity for public relations practitioners to avoid traditional journalistic gate-keeping practices to communicate directly to audiences, such as the messages found in the *Bailey* and *Yeager* cases. They have also provided a basis for practitioners, as information providers to audiences, to claim that protections traditionally reserved for journalists should be extended to members of their profession. However, practitioners must begin to enact behaviors using network-based communication technologies that inform the public, not merely promote an organization or client.

Two themes emerged through analyzing the three unique cases in this article: (1) concern with the intent of the messenger and (2) concern with how the messenger identifies his or her

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<sup>141</sup>Russell & Bishop, *supra* note 36, at 95.

<sup>142</sup>*In re Napp*, 768 A.2d at 279.

<sup>143</sup>*Id.* at 187.

<sup>144</sup>Russell & Bishop, *supra* note 36, at 91, 95.

work in communicating with others. These themes indicate that public relations practitioners can potentially succeed in their claims for journalism-like protections in the future, but that the models of public relations, on their own, do not present a lens through which judicial expectations for such protections can be met.

More specifically, the cases provide evidence that greater emphasis on the characteristics of a combination of the more journalistic principles found in the public information model, the emphasis on mutual benefit in the two-way symmetric model, and the willingness to enact an ongoing discussion as articulated in the dialogic approach, could result in public relations practitioners receiving media protections. Identifying these ideas could have substantial influence on whether public relations practitioners receive journalism-like protections in the future. In *Bailey*, for example, the judge noted that the court's outcome might have been different if the political site the practitioner published had shown that its purpose went beyond smearing a candidate. She wrote "this case could well have come out differently if the Cutler Files had any sort of track record before it appeared on August 30, 2010, or if it had extended beyond its two-month run."<sup>145</sup> To the judge, the *intent* of the site, not the messenger, was the key determining factor. In *Napp*, part of the judge's narrative considered H&R's promotional materials, indicating the way in which a public relations organization identifies itself can influence the way a court understands it.<sup>146</sup>

A remaining problem with the existing models, however, is that both implicitly suggest for the strategic selection and communication of information, rather than a more objective and comprehensive approach, as is traditionally found in journalism. In *Yeager*, the news release included publicly valuable information, but was found to be commercial speech because the intent of the author was to create a more favorable understanding of the company. Informing the audience was a secondary concern. The court wrote, "The publication did not seek to inform the reader about emergency preparedness in general."<sup>147</sup> Similarly, in *Napp*, the judge recognized the selective nature of the information-gathering process utilized by the public relations firm. He wrote, "When a public relations firm . . . gathers information in connection with events like the explosion at Napp's plant facility, its intent at the time of gathering is not necessarily to distribute it."<sup>148</sup> Implicit in the judges' words in both decisions was that the information process' goal must be to inform the audience generally, rather than strategically. This does not mean public relations practitioners cannot be biased or unbalanced toward a communication goal; indeed it could be argued Fox News and MSNBC have the same challenges. Importantly, the judge in *Bailey* emphasized as much when she highlighted that the website argued for the defeat of only one candidate and was updated only a few times.<sup>149</sup> Similarly, in *Yeager*, if the intent of the news release was primarily to inform people about disaster preparedness, but mentioned Cingular and other firms, the outcome might have been different. The judge emphasized that, "The writer of the Publication testified that the purpose of the Publication was, in part, to create positive associations with the AT&T brand."<sup>150</sup> This does not mean public relations messages must become the same as journalistic messages. Their intent must, however, be geared toward the public's good.

To this end, the combination of elements from the models and emerging approaches to public relations appear to carry greatest potential to public relations practitioners with regard to their claims for journalist-like protections. A focus on benefits to the public, the relationship and

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<sup>145</sup> *Bailey v. State*, 900 F. Supp. 2d 75, 91 (D. Me. 2012).

<sup>146</sup> *In re Napp*, 768 A.2d at 278.

<sup>147</sup> *Yeager v. Cingular Wireless*, 673 F. Supp. 2d 1089, 1097 (E.D. Cal. 2009).

<sup>148</sup> *In re Napp*, 768 A.2d at 280.

<sup>149</sup> *Bailey*, 900 F. Supp. 2d at 91.

<sup>150</sup> *Yeager*, 673 F. Supp. 2d at 1097.

information, needs to become a necessity in public relations practice.<sup>151</sup>In the instance of the Napp plant explosion, if the public relations firm had created a series of online tools through which members of the public could gather information about health concerns created by the explosion and to interact with Napp about their concerns – an approach that closely resembles the two-way symmetric model and dialogic approach – it would be reasonable to conclude, from the narratives in the three cases, that the public relations firm might then have been able to succeed in a claim of protection under the New Jersey shield law. Similarly, in *Yeager*, if Cingular had announced it was hosting a disaster preparedness information website that provided a forum, invited disaster preparation experts to take answer people’s questions, and offered news releases like the one in the case, the judge’s concerns about the commercial nature of the message might have been alleviated.

Finally, this article posits that a hybrid of the public relations models and approaches would provide the best opportunity for practitioners to qualify for communication protections that have been traditionally reserved for journalists. The public information model provides the concept of public relations practitioners conveying truthful information to publics, but failed to cross the threshold, to judges, of providing information that was enough about matters of public concern. The two-way symmetric model, despite broader concerns that it is unachievable, adds avenues through which public relations messages can be conveyed that could make them more community-based, and therefore more likely to help public relations practitioners qualify for protections that have traditionally been reserved for journalists. In sum, the dialogic approach, with its conception of practitioners as curators of ongoing exchanges among publics and organizations where practitioners and organizations are willing to be changed by dialogic exchanges, holds considerable potential for practitioners to demonstrate an intent to inform the public and be informed by the public.

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<sup>151</sup>Laskin, *supra* note 33, at 40.

# PUBLIC RECORDS PROFESSIONALS' PERCEPTIONS OF NUISANCE REQUESTS FOR ACCESS

MICHELE BUSH KIMBALL\*

*It is no secret that the interactions between information access professionals and records requesters can be adversarial. On the surface, these interactions may seem like simple disagreements over paperwork; in reality, they play a more important role in the democratic process. Transparency allows oversight into government function and a stronger, more effective citizenry.*

*The interface between access professionals and records requesters is a practical illustration of democracy in action. Previous research has shown that nuisance requests prompt some of the most contentious interactions. This study uses mixed methods to explore how access professionals define nuisance requests and how they respond to requests they do not want to fill: requests they consider to be ridiculous, burdensome, inconvenient, unreasonable, unwarranted, vague, or frivolous. Legal analysis shows that no state allows denials on those bases. A handful of states allow extra time for responses, but these requests must still be filled.*

*This study is framed in terms of the concept of street-level bureaucrats, and posits that government workers such as access professionals will adjust the way they carry out policies to suit their needs. The results explain what frustrates access professionals the most and provides guidance for both sides of the request process on ways to improve their interactions so as to strengthen citizen participation in democracy.*

**Keywords:** public records, access, freedom of information

## I. Introduction

It is no secret that the interactions between access professionals and records requesters can be adversarial.<sup>1</sup> In one such case, *The Chicago Tribune*

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<sup>1</sup>*E.g.*, DAVID CUILLIER & CHARLES DAVIS, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS* 114–36 (CQ Press 2010); David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws*, 15 COMM. L. & POL'Y 203, 204 (2010); Melissa Davenport & Margaret B. Kwoka, *Good, But Not Great: Improving Access to Public Records Under the D.C. Freedom of Information Act*, 13 UDC-DCSL L. REV. 359, 367 (2010); Michele Bush Kimball, *Shining the Light from the Inside: Access Professionals' Perceptions of Government Transparency*, 17 COMM. L. & POL'Y 299–328 (2012) [hereinafter *Shining the Light*]; Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313 (2003) [hereinafter *Florida's Public Records Law*]; Daxton

asked for access to Mayor Rahm Emanuel's e-mails, and was denied because it "would be too much work to cross out" redactable information.<sup>2</sup> After protracted negotiations, the newspaper was told that the e-mails in question had been deleted.<sup>3</sup> In another instance, a Pennsylvania access professional refused to give a prison inmate a copy of the state constitution, saying it was not a public record.<sup>4</sup> A city manager also charged a reporter \$182 to provide copies of a week of his e-mails, but he redacted almost everything out of them except for his signature line.<sup>5</sup> A Florida man has even filed more than 100 lawsuits against municipalities and counties in an effort to document lack of compliance with the public records law.<sup>6</sup>

Although, on the surface, these interactions may seem like simple disagreements over paperwork, in reality, they play a more important role in defining the democratic process. Transparency allows oversight into government function and a stronger, more effective citizenry. However, citizens are routinely blocked from accessing public records.<sup>7</sup> Legal scholar Alexander Meiklejohn contended in his theory of self-governance that access to government information enables the citizenry to use the power of knowledge of the inner workings of government to better instruct elected officials in how to better represent their constituents.<sup>8</sup> Meiklejohn described this as a social compact for citizens to remain vigilant over their government.<sup>9</sup> Scholar Vincent Blasi also recognized the importance of the ability to oversee the performance of government officials' duties to ensure they are in the best interests of the citizenry.<sup>10</sup> He said the public needs

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R. "Chip" Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, 1 U. BALT. J. MEDIA L. AND ETHICS 49 (2009); Yunjuan Luo & Anthony L. Fargo, *Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study*, NFOIC (2008), <http://www.nfoic.org/sites/default/files/ICOG-IU-2008-Survey.pdf>; The National Freedom of Information Coalition, *FOI Audits*, <http://www.nfoic.org/foi-audits>.

<sup>2</sup> David Kidwell, *Emanuel Public Records Requests*, CHI. TRIB. (Nov. 8, 2011), [http://articles.chicagotribune.com/2011-11-08/news/ct-met-emanuel-transparency-20111108\\_1\\_mayor-rahm-emanuel-requests-speed-cameras](http://articles.chicagotribune.com/2011-11-08/news/ct-met-emanuel-transparency-20111108_1_mayor-rahm-emanuel-requests-speed-cameras).

<sup>3</sup>*Id.*

<sup>4</sup> Jan Murphy, *Copy of Constitution Denied Pa. Inmate*, HARRISBURG PATRIOT NEWS (Sept. 18, 2011), [http://triblive.com/x/pittsburghtrib/news/s\\_757433.html#axzz2ehlLXCtv](http://triblive.com/x/pittsburghtrib/news/s_757433.html#axzz2ehlLXCtv).

<sup>5</sup> Aly Van Dyke, *City: Information Requests too Broad, a "Waste" of Resources*, TOPEKA CAPITAL J. (Feb. 11, 2013), <http://m.cjonline.com/news/2013-02-11/city-information-requests-too-broad-waste-resources> and [http://m.cjonline.com/sites/default/files/Example%20redacted\\_0.pdf](http://m.cjonline.com/sites/default/files/Example%20redacted_0.pdf).

<sup>6</sup> Steve Miller, *Florida Records Gadfly Takes on Volusia County*, FLA. CTR. FOR INVESTIGATIVE REPORTING (June 3, 2015), <http://fcir.org/2013/06/05/florida-records-gadfly-takes-on-volusia-county/>.

<sup>7</sup> Michele Bush Kimball, *Mandated State-Level Open Government Training Programs*, 28 GOV'T INFO. Q. 481-482 (2011) (referencing Appendix A, which showed that in more than 15 years of public records audits in all 50 states, not one government agency had complete, lawful compliance; see also Caitlin Ginley, *50 States and No Winners*, THE CTR. FOR PUB. INTEGRITY (2012), [http://www.stateintegrity.org/state\\_integrity\\_investigation\\_overview\\_story](http://www.stateintegrity.org/state_integrity_investigation_overview_story); The National Freedom of Information Coalition, *Protecting the Public's Right to Oversee its Government* (2007), <http://www.nfoic.org/bga>.

<sup>8</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 107 (The Lawbook Exchange, Ltd. 1948).

<sup>9</sup> *Id.* at 105.

<sup>10</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. R.J. 521, 632 (1977).

to know everything there is about public officials because that acts as a checking power on government corruption.<sup>11</sup> In this context, having access to government information affords citizens the power to hold the government accountable and encourage a strong, healthy democracy that functions in their best interests.

The interface between access professionals and records requesters is a practical illustration of democracy in action. This study will explore one of the more contentious areas of the interaction – how access professionals define and respond to requests they do not want to fill: requests they consider to be ridiculous, burdensome, inconvenient, unreasonable, unwarranted, vague, or frivolous;<sup>12</sup> requests that are such a nuisance that access professionals wish they had the statutory authority to deny them on the basis of frustration alone.<sup>13</sup> For example, the Association of Washington Cities recommended in 2013 that the best way to strengthen open government was to curb requesters’ abuses of public records laws by putting a cap on the number of hours its staff could spend responding to records requests, charging more for commercial entities asking for records, and allowing government agencies to seek civil injunctions to block “financially motivated, punitive or retributive requests.”<sup>14</sup> One scholar went as far as to encourage statutory change in response to the burdens of nuisance requests, suggesting that courts must recognize that clever citizens playing “gotcha” with the government will bury the agency with burdensome requests, evade their duty to pay for the costs of asking for public records, sue for every type of error, no matter how petty, and then demand attorney’s fees as a reward for manufacturing the problem.<sup>15</sup>

Previous research has shown that access professionals are especially averse to responding to public records requests they consider annoying.<sup>16</sup> Nuisance requests occupy the highest level of annoyance. These requests are not merely frustrating; they are the kinds of requests access professionals wish they could ignore altogether or outlaw completely.<sup>17</sup> As such, this study will address what access professionals consider nuisance requests and how they typically respond to them.

This study will also explore the concept of nuisance requests from access professionals’ perspectives framed by the public administration theory of street-level bureaucracy. It will provide a legal overview of state-level open government

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<sup>11</sup> *Id.* at 632, 637.

<sup>12</sup> *Shining the Light*, *supra* note 1, at 319–20; Michele Bush Kimball, *Mandated State-Level Open Government Training Programs*, 28 GOV’T INFO. Q. 479–483 (2011) [hereinafter *Training Programs*].

<sup>13</sup> *Id.*

<sup>14</sup> Ass’n of Wash. Cities, *Strengthening the Public Records Act by Curbing Abuses*, AWCNET.ORG (Feb. 2013), <https://www.awcnet.org/portals/o/documents/legislative/PublicRecords0213.pdf>.

<sup>15</sup> Keith Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates and Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 428 (2015).

<sup>16</sup> CULLIER & DAVIS, *supra* note 1, at 159–76.

<sup>17</sup> *Id.* at 167–173; see Editorial, *Blame the Government, Not the Activist*, ROANOKE TIMES (JULY 29, 2010), <http://www.roanoke.com/editorials/wb/255154>; *Shining the Light*, *supra* note 1, at 320; *Training Programs*, *supra* note 12, at 483–84; *Florida’s Public Records Law*, *supra* note 1, at 333–36.

statutes with regard to the concept of nuisance requests and the amount of autonomy access professionals have to legally deny requests on those grounds. The results section will describe the kinds of requests access professionals find annoying and frustrating. All of this will culminate by offering suggestions on how to improve the adversarial interactions between access professionals and records requesters.

## II. Foundation in Previous Research

Access professionals believe they are an important part of the democratic process.<sup>18</sup> On the other hand, they consider records requesters obstacles to carrying out their duties efficiently.<sup>19</sup> The process by which agencies respond to requests for public information can be elucidated with a theory that shows that there is a disconnect between a specifically prescriptive policy intended to yield expected outcomes that serve the citizenry and the actual outcomes that result of the intents of those charged with carrying out the policy.<sup>20</sup> Additionally, previous research has analyzed state-level access provisions, but rarely has it explored the decision-making interaction between access professionals and requesters.

### A. Street-level bureaucracy

According to the concept of street-level bureaucracy, workers who find themselves at the “street level,” or on the front lines of a policy, can manipulate and implement it to suit their own needs.<sup>21</sup> Scholar Michael Lipsky, who developed the concept, defined street-level bureaucrats as workers in public offices who interact directly with citizens and have discretion over the allocation of benefits or services.<sup>22</sup> Because they use their discretion in determining how the policy is ultimately implemented, the true policy exists not in the adopted prescriptive language, but in how it is actually used in response to citizens’ requests for services.<sup>23</sup> The street-level bureaucrats end up becoming the true policy makers because they are the ones who ultimately determine how policies will be carried out.<sup>24</sup>

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<sup>18</sup> *Shining the Light*, *supra* note 1, at 308–09.

<sup>19</sup> *Id.* at 313; accord SUZANNE PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 90 (SUNY Press 2007); Rizzardi, *supra* note 15, at 433.

<sup>20</sup> *E.g.*, Chris Demchak, Christian Friis, & Todd La Porte, *Webbing Governance: National Differences in Constructing the Face of Public Organizations*, HANDBOOK OF PUB. INFO. SYS. 179 (Christopher M. Shea, ed., 2000); David Lansbergen, *Screen-Level Bureaucracy: Databases as Public Records*, 21 GOV’T INFO. Q. 24 (2004); Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836 (2015); Charis Wilson, *In the Beginning was the Request: A Street-Level Perspective on the FOIA Process* (2015) (unpublished Ph.D. dissertation, Emporia State University) (on file with Special Collections and Archives, Emporia State University).

<sup>21</sup> MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES, 30TH ANNIVERSARY EDITION xi (preface) (Russell Sage Found., 2010); Steven Maynard-Moody, Michael Musheno & Dennis Palumbo, *Street-Wise Social Policy: Resolving the Dilemma of Street-Level Influence and Successful Implementation*, 43 W. POL. Q. 833 (1990).

<sup>22</sup> LIPSKY, *supra* note 21, at 3.

<sup>23</sup> *Id.* at xiii.

<sup>24</sup> *Id.* at xi.

Policies cannot be implemented as accurately as intended because front-line workers rarely have enough time or resources to respond to the individual needs of their clientele, which causes them to find ways to streamline or “mass process” requests for services.<sup>25</sup> Policy application can be manipulated in both positive and negative ways – some workers may change policy to make their work easier or more efficient, while others may choose to modify policy with which they do not agree.<sup>26</sup> Street-level bureaucrats engender controversy in their interactions with citizens because of the immediacy of the results of their policy interpretations and the impact they have on peoples’ lives.<sup>27</sup>

In the open government arena, access professionals are the street-level bureaucrats. They are on the front lines providing access to government information, and therefore, are the ones responsible for determining how open government policies are ultimately carried out. This assertion is specifically supported by the results of public records audits across the country, which show that not once has an audit had completely lawful compliance.<sup>28</sup> Obstacles to compliance may stem from the overwhelming number of requests that are impossible to respond to in the statutorily required timeframe.<sup>29</sup> Therefore, a primary issue becomes how to ensure policy adherence among autonomous street-level bureaucrats.

Scholars agree that engaging street-level bureaucrats in determining how policy should be implemented – from the bottom up instead of from the top down – encourages a more positive application to the citizenry.<sup>30</sup> Adaptive administration, or the idea of incorporating the reality of how a policy is experienced into the implementation of the policy, is the most effective way to improve policy delivery.<sup>31</sup> Rather than a top-down authoritative response to how policies should be carried out,<sup>32</sup> adjusting the institutional culture to reflect the realities of street-level bureaucrats’ work in responding to requests has a more positive effect on accurate policy implementation.<sup>33</sup>

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<sup>25</sup> *Id.* at xii; accord Evelyn Brodtkin, *Accountability in Street-Level Organizations*, 31 INT’L J. OF PUB. ADMIN. 322, 326 (2008) (Bureaucrats “do not do what they want or just what they are told to want. They do what they can.”).

<sup>26</sup> Maynard-Moody, Musheno & Palumbo, *supra* note 21, at 833.

<sup>27</sup> LIPSKY, *supra* note 21, at 8.

<sup>28</sup> *Training Programs*, *supra* note 1, at 483. In Appendix A, the author lists public records audits in almost all 50 states since 1998, showing that none of them have complete compliance with open government statutes.

<sup>29</sup> Rizzardi, *supra* note 15, at 437.

<sup>30</sup> LIPSKY, *supra* note 21, at 8.; Brodtkin, *supra* note 25, at 322.; Peter Hupe & Michael Hill, *Street-Level Bureaucracy and Public Accountability*, 85 PUB. ADMIN. 279–299 (2007); Maynard-Moody, Musheno & Palumbo, *supra* note 21, at 835.

<sup>31</sup> Brodtkin, *supra* note 25, at 326; Maynard-Moody, Musheno & Palumbo, *supra* note 21, at 845.

<sup>32</sup> Researchers note that doing so engenders more policy abuse, and sets an institutional culture in which street-level bureaucrats hide their discretionary policy response, which worsens accountability. Maynard-Moody, Musheno & Palumbo, *supra* note 21, at 835; DAVID E. AARONSON, C. THOMAS DIENES, & MICHAEL C. MUSHENO, PUBLIC POLICY AND POLICE DISCRETION: PROCESSES OF DECRIMINALIZATION 377–490 (Clark Boardman Callaghan, 1984).

<sup>33</sup> Brodtkin, *supra* note 25, at 326; Hupe & Hill, *supra* note 30, at 282; R.A.W. RHODES, UNDERSTANDING GOVERNANCE 47 (1997).

In order to ensure accountability, one must understand the ways that street-level bureaucracy is adjusting policy to meet its needs and what types of situations stimulate bureaucrats' discretion.<sup>34</sup> In context of this study, this requires knowing how access professionals respond to public records requests and the decision-making it entails, while specifically understanding the common catalysts for negative policy adjustment.

## **B. Decision-making Interactions at the State Level**

Existing research offers insights into the many facets of the decision-making interaction between access professionals and requesters. Street-level bureaucrats often perceive their interactions driven less by the rules set out in a policy and more about the relationships with the citizens with whom they are interacting.<sup>35</sup> This concept has been illustrated in previous research that has showed that access professionals who felt sympathetic toward requesters were more likely to provide access to information.<sup>36</sup> If access professionals did not believe the requester's purposes passed muster, then they were less inclined to release the documents.<sup>37</sup>

Generally, research on state-level access provisions focus on the legal structure of open government provisions,<sup>38</sup> not on how the law is applied in reality. Some researchers have previously delved into how best to mitigate the conflicts between access professionals through the use of experimental techniques to evaluate the human dynamics of the interactions,<sup>39</sup> and how best to apply conflict theory to understand the state-level freedom of information dispute resolution systems.<sup>40</sup>

A few studies have explored how access professionals implement freedom of information policies. The participants in Dr. Suzanne Piotrowski's study of those who carry out the federal Freedom of Information Act said that while they believe

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<sup>34</sup> Hupe & Hill, *supra* note 30, at 281.

<sup>35</sup> STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, *COPS, TEACHERS, COUNSELORS 20* (Univ. of Mich. Press 2003).

<sup>36</sup> *Florida's Public Records Law*, *supra* note 1, at 342-44.

<sup>37</sup> *Id.* at 348.

<sup>38</sup> *E.g.*, Paul Aker, *Towards Darkness: Ohio's Presumption of Openness Under the Public Records Act*, 41 CAP. U. L. REV. 361 (2013); Sarah Bradley, *Public Records Under the Nevada Public Records Act*, 20 NEV. LAWYER 14 (2012); Scott Cockerham, *Arizona Case Note: Lake v. City of Phoenix: Is Metadata a Public Record?*, 51 ARIZ. L. REV. 517 (2009); Susan P. Elgin, *What Happens in Iowa Stays in Iowa: A Framework for Implementing Changes to State Open Records Laws*, 98 IOWA L. REV. 1677 (2013); Leanne Holcomb & James Isaac, *Wisconsin's Public Records Law: The Presumption of Complete Public Access in the Age of Electronic Records*, 2008 WIS. L. REV. 515 (2008); David Jackson, Comment: *Privacy and Ohio's Public Records Act*, 26 CAP. U. L. REV. 107 (1997); Thomas Moore, Comment: *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law*, 72 N.C. L. REV. 1527 (1994); Breanne Parcels, *Bring Back the Bite: Restoring Teeth to Ohio's Public Records Law*, 38 DAYTON L. REV. 225 (2012); Daxton R. Stewart, *Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265 (2010).

<sup>39</sup> Cuillier, *supra* note 1, at 203.

<sup>40</sup> Stewart, *supra* note 1, at 49.

in the philosophies of government transparency, they face obstacles in providing information to requesters.<sup>41</sup> They indicated that more political support from within and more funding might increase their effectiveness.<sup>42</sup>

Another study showed that some freedom of information training programs exacerbated the adversarial stance between requesters and access professionals.<sup>43</sup> Those who trained the access professionals on how to perform their duties in accordance with the law included negative descriptions and stereotypes of records requesters, such as how to respond to “nosy” requests and provided a list of the most “inconvenient” requests.<sup>44</sup>

However, research has not yet explored what access professionals consider to be nuisances and how they respond to them: this study fills that void.

### III. Methodology

Both quantitative and qualitative methods of research were applied in understanding the research questions for purposes of both expansion and triangulation.<sup>45</sup> Content analysis of state statutes provided a context for the legal aspects of the topic. Mixed research methods can allow a researcher to gain a more universal understanding of phenomena under study because the facets of each method provide a view into multiple views and standpoints.<sup>46</sup> Analyzing these varying standpoints and taking a multiplistic approach can enhance the validity and credibility of the resulting findings.<sup>47</sup>

Quantitative research methods, specifically the process of surveying large numbers of respondents, allow the researcher the added benefit of a large number of varying perspectives and opinions on a particular topic.<sup>48</sup> However, because surveys can not give a full view of social phenomena, triangulating by way of other methods helps fill this gap.<sup>49</sup> The qualitative methods used in this case supplemented and expanded the results procured from the quantitative methods.<sup>50</sup>

Research began with the distribution of an online survey to access professionals around the country. A purposive, snowball sampling method was used to locate access professionals who respond to public records requests in the

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<sup>41</sup> PIOTROWSKI, *supra* 19, at 90–91.

<sup>42</sup> *Id.*

<sup>43</sup> *Training Programs*, *supra* note 1, at 483.

<sup>44</sup> *Id.* at 479.

<sup>45</sup> JENNIFER GREENE, *MIXED METHODS IN SOCIAL INQUIRY* 100 (Jossey-Bass 2007).

<sup>46</sup> *Id.* at 20.

<sup>47</sup> T.D. COOK, *POSTPOSITIVIST CRITICAL MULTIPLISM* 38 (1985).

<sup>48</sup> EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH* 272 (Wadsworth Publ'g 2d ed. 2002).

<sup>49</sup> *Id.* at 272; accord Jennifer Greene, V. Caracelli & W.F. Graham, *Toward a Conceptual Framework for Mixed-method Evaluation Designs*, 11 *EDUC. EVALUATION AND POL'Y ANALYSIS* 255 (1989); SHARLENE NAGY HESSE-BIBER & PATRICIA LEAVY, *THE PRACTICE OF QUALITATIVE RESEARCH* 51 (SAGE Pub. 3d ed. 2011).

<sup>50</sup> GREENE, *supra* note 45, at 39; HESSE-BIBER & LEAVY, *supra* note 49, at 3–4; THOMAS LINDLOF & BRYAN TAYLOR, *QUALITATIVE COMMUNICATION RESEARCH METHODS* 83–84 (SAGE Pub. 4th ed. 2011).

course of their duties.<sup>51</sup> Invitations to participate were sent to members of the American Society of Access Professionals (ASAP), the National Information Officers Association (NIOA), the International Institute of Municipal Clerks (IIMC), and the National Association of County Recorders, Election Officials and Clerks (NACRC), who were encouraged to forward them to other access professionals. In all, 154 people participated in the survey.

The survey was structured as liberally as possible to allow participants to share their experiences and opinions in their own words.<sup>52</sup> Only three questions in the survey were mandatory: a consent agreement, a question that ensured that the access professional responded to records requests in the course of their duties, and a question ensuring the participant was above the age of majority. Most of the questions were open-ended to allow a more diverse set of responses.<sup>53</sup> At the end of the survey was an option to participate in a long interview. Thirty-six access professionals took part. Because the responses in both the interviews and surveys could reveal potentially unlawful behavior, identities of participants were kept confidential throughout data collection and in reporting the results.<sup>54</sup>

Interviews are one of the strongest weapons in the qualitative armory, as they provide social and cultural context to the phenomena under study.<sup>55</sup> The interviews for this study took place by telephone at the participants' convenience, and the researcher recorded and transcribed them within 48 hours to ensure that the meanings and details were clear and richly described.<sup>56</sup>

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<sup>51</sup> Purposive sampling allows the researcher to specify the participants who have a particular knowledge base for responses, and snowball sampling takes place when those participants are asked to help the researcher find others with a similar knowledge base. BABBIE, *supra* note 48, at 178–179; JOHN CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN*, 125–127 (2007); LINDLOF & TAYLOR, *supra* note 50, at 114–115; VALERIE M. SUE & LOIS A. RITTER, *CONDUCTING ONLINE SURVEYS* 33 (SAGE Pub. 2007).

<sup>52</sup> *See infra* App. A.

<sup>53</sup> SUE & RITTER, *supra* note 51, at 44.

<sup>54</sup> THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *THE BELMONT REPORT: ETHICAL PRINCIPLES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH*, App. Vol. 2, 12/14 (1979). This was also a condition of the Institutional Review Board that approved this research.

<sup>55</sup> GRANT MCCrackEN, *THE LONG INTERVIEW* 9 (SAGE Pub. 1988).

<sup>56</sup> JAMES A. HOLSTEIN & JABER F. GUBRIUM, *THE ACTIVE INTERVIEW* 3, 9 (SAGE Pub. 1995). The researcher employed a question guide (App. B) to use as a starting point in the interviews, but the discussions were not limited to what was on the list. Interviews need not remain strictly neutral territory in which the same questions are asked in the same order to every participant. Instead, they are occasions to immerse in each participant's personal perspectives and experiences, yielding rich individual experiential realities that edify the triangulated data.

The data from the survey responses and the interview transcripts were analyzed using a two-part coding method: descriptive coding<sup>57</sup> followed by axial coding.<sup>58</sup> Both data sets also lent themselves to moments of in vivo coding.<sup>59</sup>

#### IV. Legal Overview of Nuisance Requests

Before attempting to understand how access professionals are interpreting nuisance requests, it is important to first understand the open government laws directing the concept. Very few states provide statutory guidance regarding nuisance requests, and no state allows access professionals to deny requests solely based on frustration or annoyance.

Most states, 43, structure their access provisions to allow access to all records unless they are specifically exempted by statute.<sup>60</sup> However, a few states structure their exemptions vaguely enough that records custodians, as street-level bureaucrats, could deny access based on their personal perspectives of the request. In six states, Arizona, Maryland, Montana, New Hampshire, Wisconsin and Wyoming, access professionals may use a balancing test to determine whether disclosure would be appropriate. For example, Arizona has no specific statutory exemptions, but allows denials if disclosure would be “detrimental to the interests of the state.”<sup>61</sup> Similarly, Maryland allows access professionals to deny requests if

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<sup>57</sup> JOHNNY SALDANA, *THE CODING MANUAL FOR QUALITATIVE RESEARCHERS* 70–73, 79 (SAGE Pub. 2009). Within each question, the researcher first analyzed the answers using descriptive coding. Descriptive coding requires that the data be analyzed at the most basic level and assigned a topic or word or phrase to describe the content.

<sup>58</sup> KATHY CHARMAZ, *CONSTRUCTING GROUNDED THEORY: A PRACTICAL GUIDE THROUGH QUALITATIVE ANALYSIS* 60 (SAGE Pub. 2006); JOHN W. CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN* 237 (SAGE Pub. 2007). Axial coding, a method by which the fractured topics are rebuilt into larger, more complex themes, was then employed to build the meaning back together in a holistic view of the phenomena.

<sup>59</sup> *Id.*; ANSELM STRAUSS, *QUALITATIVE ANALYSIS FOR SOCIAL SCIENTISTS* 33 (Cambridge Univ. Press 1987). In vivo coding is a way of extracting the indigenous terms the participants used themselves to describe the phenomena.

<sup>60</sup> ALA. CODE § 36-12-40 (SUPP. 2005); ALASKA STAT. § 40.25.120 (2014); ARK. CODE ANN. § 25-19-101 (2014); CAL. CONST. ART. I, § 3(B) (2014); COLO. REV. STAT. § 24-72-201 (2013); CONN. GEN. STAT. § 1-200(5) (2014); 29 DEL. C. § 10001 (2014); FLA. STAT. § 119.01(1) (2013); GA. CODE ANN. § 50-18-70(A) (2013); HAW. REV. STAT. § 92F-11(A) (2013); IDAHO CODE § 9-337 (2014); 5 ILL. COMP. STAT. ANN. 140/9 (2014); BURNS IND. CODE ANN. § 5-14-3-4 (2013); IOWA CODE § 22.1 (2013); KY. REV. STAT. 61.870 (2013); LA. CONST. ART. XII, § 3 (2013); 1 ME. REV. STAT. ANN. § 402(3) (2014); MASS. GEN. LAWS CH. 66, § 10 (2013); MICH. COMP. LAWS ANN. § 15.243 (2013); MINN. STAT. § 13.03 (2013); MISS. CODE ANN. § 25-61-11 (2014); MO. REV. STAT. § 610.011(1) (2014); NEB. REV. STAT. § 84-712.01(1) (2013); NEV. REV. STAT. ANN. § 239.010 (2013); N.J. STAT. ANN. 47:1A-1 (2013); N.M. STAT. ANN. § 14-2-5 (2013); N.Y. PUB. OFF. LAW § 87 (2014); N.C. GEN. STAT. § 132-6 (2013); N.D. CENT. CODE § 44-04-17.1(5) (2013); OHIO REV. CODE ANN. 149.011(G) (2013); 51 OKLA. STAT. § 24A.5(1) (2013); OR. REV. STAT. § 192.501 (2012); 65 P. STAT. ANN. § 67.305 (2014); R.I. GEN. LAWS § 38-2-2 (4) (2013); S.C. CODE ANN. § 30-4-40 (2013); S.D. CODIFIED LAWS § 1-27-1 (2014); TENN. CODE ANN. § 10-7-504 (2013); TEX. GOV'T CODE § 552.006 (2013); UTAH CODE ANN. § 63G-2-201(2) (2013); 1 VT. STAT. ANN. § 317 (2013); VA. CODE ANN. § 2.2-3700 (2014); WASH. REV. CODE 42.56.070 (2013); W. VA. CODE § 29B-1-4 (2013).

<sup>61</sup> ARIZ. REV. STAT. ANN. § 39-121 (2015); *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broadcasting Co.*, 955 P.2d 534 (Ariz. 1998); *Carlson v. Pima County*, 687 P.2d 1242, 1245 (Ariz. 1984).

inspection of the record would be “contrary to the public interest.”<sup>62</sup> Montana’s state constitution allows denial of access if the “demand of individual privacy exceeds the merits of public disclosure.”<sup>63</sup> New Hampshire’s balancing test weighs whether the public interest outweighs the private, confidential, commercial or financial interests.<sup>64</sup> In Wisconsin, because the open government provisions are less statutory and more reliant on common law, records custodians are tasked with balancing the public interest in disclosure with the harm that may result from disclosure.<sup>65</sup> Wyoming has a list of statutory exemptions, but if records custodians think that a particular record, even a nonconfidential one, would injure the public interest if released, then they can petition the court for closure.<sup>66</sup> These statutes are examples of greater leeway for access professionals to deny requests, but they do not specifically address frustrating and annoying requests.

That is not to say that the nuisance factor never appears in statutes. Four states – New Mexico, Illinois, Kansas and Michigan – recognize the existence of burdensome requests, but still require responses to them. New Mexico allows access professionals additional time to respond to “burdensome or broad” requests, but they must notify requesters within 15 days that they will be using the extra time.<sup>67</sup> Illinois has specifically acknowledged “recurrent requesters” by defining who they are and still requiring that their requests be filled within 21 days.<sup>68</sup> Kansas allows records custodians to deny access if a request “places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency,” and that any refusal must be proven by a preponderance of the evidence.<sup>69</sup> Michigan requires that records exemptions must adhere to a specific statutory list,<sup>70</sup> but the law also provides that “a public body can make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions.”<sup>71</sup>

Although there is a dearth of statutory guidance on responding to frustrating or burdensome requests, these are the kinds of requests access

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<sup>62</sup> MD. CODE ANN. § 4-343 (2015).

<sup>63</sup> MONT. CONST., ART II, § 9 (2015).

<sup>64</sup> N.H. REV. STAT. ANN. § 91-A:5 (2015); *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 705 A.2d 725 (N.H. 1997).

<sup>65</sup> *State ex rel. Youmans v. Owens*, 137 N.W.2d 470, 474 (Wis.1965), *reh'g granted*, 139 N.W.2d 241 (Wis. 1966) (“Thus the right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular public records or documents. Thus, the one must be balanced against the other in determining whether to permit inspection.”)

<sup>66</sup> WYO. STAT. ANN. § 16-4-203(g) (2015).

<sup>67</sup> N.M. STAT. ANN. § 14-2-10 (2015).

<sup>68</sup> 5 ILL. COMP. STAT. 140/2(g) (2015); 5 ILL. COMP. STAT. 140/3.2 (2015) (A recurrent requester is one who, “has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period.”).

<sup>69</sup> KAN.STAT. ANN. § 45-218(e) (2015).

<sup>70</sup> MICH. COMP. LAWS SERV. § 15.243 (West 2015).

<sup>71</sup> MICH. COMP. LAWS SERV. § 15.233(3) (West 2015).

professionals wish they could avoid filing.<sup>72</sup> As such, access professionals acknowledging and describing what does not exist legally is an ultimate example of street-level bureaucracy, making this theory a useful contextual framework for understanding how and why access professionals want to be able to adjust statutes to avoid responding.

## **V. Results**

Both the structure of the survey and interviews as well as the themes that emerged during the coding process influenced the five categories of results presented in this section. The description of requests provides a baseline for understanding the common kinds of requests that participants are tasked with responding to. That provides a foil for understanding how the participants defined nuisance requests, and within that category, nine definitional themes emerged. The section that follows the explanation of the nine themes outlines how access professionals respond to the requests they find frustrating. After that is a list of the advice access professionals wish they could give to requesters to ease these adversarial interactions. The results section concludes with the kinds of changes participants said they would like to see to improve the transparency processes within their workplaces.

### **A. Description of requests**

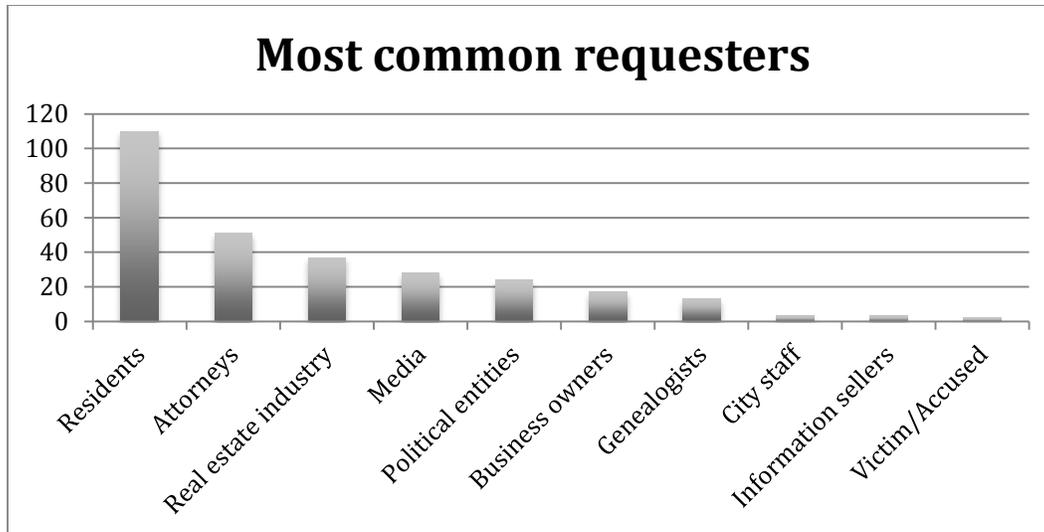
To give context to the results, the participants were asked to describe some of the most common records and requesters they come into contact with on a daily basis. The force-logic of the survey required that every participant respond to public records requests as part of their occupational duties. The 154 respondents comprised of city clerks, county clerks, public information officers and court clerks.<sup>73</sup>

The five most common requesters for these records are city residents, followed by attorneys, members of the real estate industry (such as agents, brokers, and title searchers), members of the media, and political entities (such as candidates and activists).

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<sup>72</sup> *Shining the Light*, *supra* note 1, at 319–20; Ass’n of Wash. Cities, *supra* note 14; Rizzardi, *supra* note 15, at 428.

<sup>73</sup> City clerks made up the majority, followed by county clerks, public information officers and court clerks.

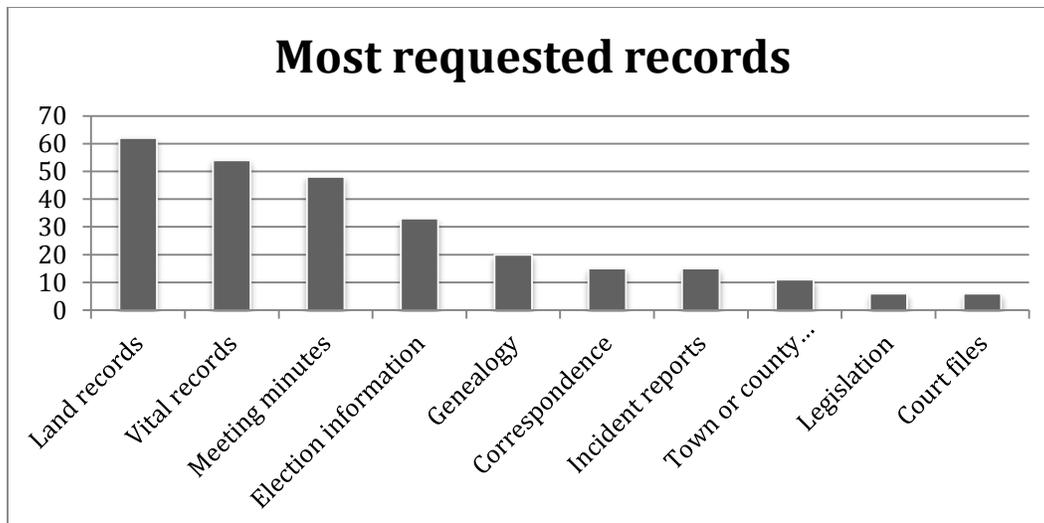


The most common types of records requested, according to the participants, are land records, vital statistics, meeting minutes, election information, genealogical records, correspondence, incident reports, town or county financial records, legislation, and court files. Participants said they most enjoyed responding to requests that are easy to locate and copy, are specific in nature, are records that they are personally interested in, or are requests that can have a positive outcome. For example, a city clerk said his favorite requests are for “historic minutes of the community, as we had them all scanned and they are fascinating reading.”<sup>74</sup> A public information officer for a law enforcement agency said, “I don’t know that I have a favorite, but investigative records, particularly cold cases, are fascinating. I would imagine I like these requests more because they have actual news value.”<sup>75</sup> Another access professional summed it up by saying, “That’s easy. The records that are easily accessible with little research time.”<sup>76</sup>

<sup>74</sup> Interview with a deputy city clerk in a Northeastern state (July 22, 2014).

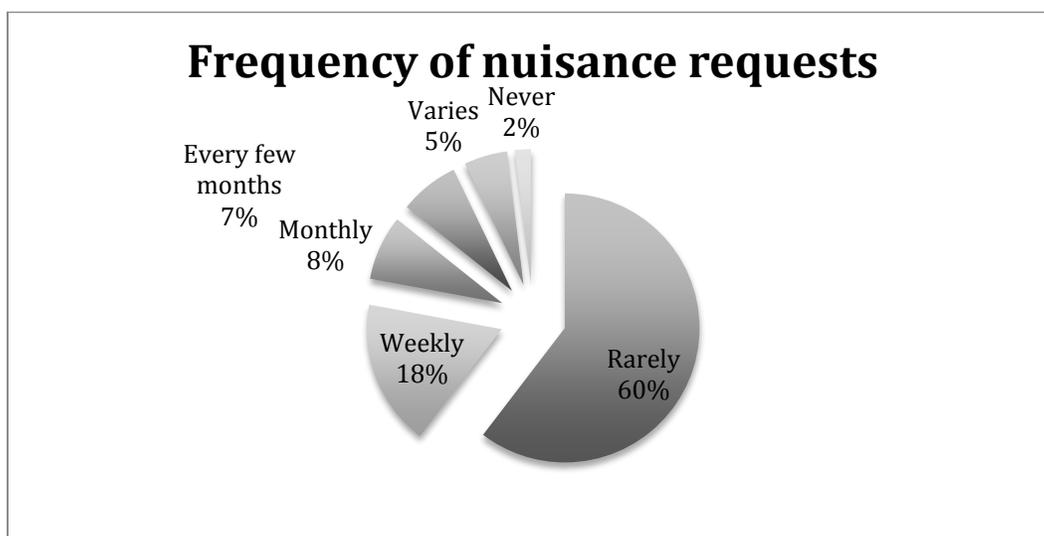
<sup>75</sup> Interview with a public information officer for a law enforcement agency in a Southwestern state (Mar. 5, 2014).

<sup>76</sup> Interview with a town clerk/tax collector in a Northeastern state (Sept. 4, 2014).



## B. Nuisance requests defined

When asked to describe requesters who bring nuisance requests, the access professionals polled said 42 percent were from disgruntled citizens or political activists. Members of the general public were next with 17 percent. Attorneys and law offices followed closely with 15 percent. Marketing firms were reported at 12 percent. Both members of the media and real estate employees came in at five percent each. The rest, four percent, were miscellaneous groups, such as inmates, genealogists and Native American tribes. Access professionals who participated in this study said nuisance requests are much less common than average requests.



Participants described 173 conditions that would lead them to define a request as a nuisance. For example, one participant said, “A request might be viewed as a nuisance by a clerk if it comes at an extremely busy time in the workload and it just adds to the stress of the office, so I would recommend setting reasonable time limits for providing the information. A nuisance might be from

someone who does not have all their marbles and is not able to communicate their needs for information in a succinct and intelligible way, often repeatedly.”<sup>77</sup>

When all descriptions were coded, nine distinct categories emerged. Because respondents described examples that could fit in more than one code, the total does not equal 100 percent. The categories, in order of most common response, follow, and are then described in more detail.

1. Inappropriate intent: 25 percent
2. Fishing expedition: 20 percent
3. Too voluminous: 17 percent
4. Recurring requests: 16 percent
5. Vague: 16 percent
6. Inept: 13 percent
7. Broad: eight percent
8. None are nuisances: six percent
9. Time-consuming / inconvenient: five percent

### **1. Inappropriate Intent:**

Access professionals most commonly said that their definitions of nuisance requests were determined by the perceived intent of the requester and whether the access professionals considered it a viable reason for access. All of the examples of “inappropriate intent” that follow could be grounds for denial in the states that had vague exemptions for allowing access professionals perceptions of intent to determine access to a document.<sup>78</sup>

Requesting documents for political purposes is an inappropriate intent and therefore a nuisance request, according to the participants surveyed. A municipal clerk said he is frustrated by one particular resident who does this regularly, and it ties up his response time for other requests: “The same person [is] constantly requesting documents because he has a bone to pick with the town. He is holding us hostage to his public records requests.”<sup>79</sup> Another city clerk in a Northwestern town said, “The person who is just making a request to be a pain in the butt. They aren’t really interested in the best interest of the city, they just want to create havoc and waste resources because they feel they are entitled. These people usually have their own agenda or a vendetta against a particular councilmember, mayor or staff.”<sup>80</sup>

Requesters who asked for records for reasons the access professionals perceived as frivolous were also considered nuisance requests. A city clerk/treasurer in a Northeastern state said, “Those that are intended to frustrate the custodian of records rather than to actually seek information [are nuisances]. When people have a genuine interest in the documents or data they request, they

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<sup>77</sup> Interview with a manager in a land and property assessment office in the Northwest (Nov. 4, 2014).

<sup>78</sup> Those states were Arizona, Maryland, Montana, New Hampshire, Wisconsin, and Wyoming. See *supra* notes 61–66 and accompanying text.

<sup>79</sup> Interview with a municipal clerk in a Northeastern state (Aug. 6, 2014).

<sup>80</sup> Interview with a city clerk in a Northwestern state (May 23, 2014).

focus on the material. They are easy to work with and understanding of the process and any time that might be required.”<sup>81</sup>

Other intentions that were considered nuisances, though less commonly reported, were any requests from those intending to use the information for marketing purposes,<sup>82</sup> requests used to audit the public records responses, and requests that yielded what those polled determined as having no community benefit, meaning the only one benefiting from access to the records was the requester. An example that illustrates this context comes from an access professional who works in environmental protection. He said in an interview the he considers nuisance requests “the ones that you know are those that your information will be sold. You know because you can Google the requestor and learn their exact business.”<sup>83</sup>

## **2. Fishing Expedition**

After intent, the second most common reason access professionals consider a request a nuisance is if it is a fishing expedition.<sup>84</sup> If requesters are unclear about what they are looking for and ask in a vague or broad manner, then access professionals call it a fishing expedition. Responses were coded in this category if the participants mentioned the words “fishing expedition” or described requests that were intended to capture an unknown record among several being requested. The greatest frustration, according to access professionals, is the inability to understand exactly what the requester wants, and then being required to provide a great number of documents in response to the requests. For example, an assistant town clerk said he considers nuisances “broad requests with no focus that cast their net too wide. Just tell me what you're looking for. I can't give you what I don't have.”<sup>85</sup> A town clerk said nuisance requests are, “any request that is too broadly defined, where the requester is on a fishing expedition and doesn't really know what is being asked. Something like ‘all your correspondence from January 2013 to June 2013,’ without identifying the subject matter.”<sup>86</sup>

## **3. Voluminous**

Voluminous requests are closely tied to time-consuming requests, which appear at the end of the list. The access professionals asked said that requests of large amounts of information, especially when they take a lot of time to fill, are nuisances. These differentiate themselves from fishing expeditions in that they are more precise requests for a lot of information with no assumed intent to capture the unknown record within. The records custodians said they don't think they should have to manage voluminous requests because their time can be better used elsewhere, as explained by a county clerk in the Northwest. “To me, a nuisance request is a request for a large amount of otherwise easily obtainable information,”

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<sup>81</sup> Interview with a municipal clerk in a Northeastern state (July. 25, 2014).

<sup>82</sup> Survey response (“Commercial requests that you know the information you provide will be sold, and yet you provide it at no cost to the requester.”).

<sup>83</sup> Interview (Oct. 7, 2014).

<sup>84</sup> This is an example of in vivo coding results. The participants routinely talked about “fishing expeditions” to describe a particular kind of request.

<sup>85</sup> Interview with an assistant town clerk in the Southeast (June 26, 2014).

<sup>86</sup> Survey response.

the clerk wrote.<sup>87</sup> A public information officer said, “I would define a nuisance request as a request that takes a lot of our time without being any or very little benefit to our county, our taxpayers and surrounding community. We are a small office. I am unable to hire extra staff or to authorize [overtime pay].”<sup>88</sup>

#### **4. Recurring**

Recurring requests are repeated requests for the same information. One access professional said he would define as nuisances, “requesting the same records over and over, or ones that I would define as ‘witch hunts.’”<sup>89</sup> Another complained of the repetitiveness of the requests tying up their time in the office, describing “the same person constantly requesting documents because he has a bone to pick with the town. He is holding us hostage to his public records requests.”<sup>90</sup>

#### **5. Vague**

When requesters are not specific about the documents to which they would like access they are defined as vague requests. These differ from fishing expeditions in that the requesters don’t have ulterior motives of capturing records, but they are unclear about the specific record they need. One access professional said vague nuisance requests are from “a person who doesn’t really know what they are looking for.”<sup>91</sup> Another said they are “vague &/or all encompassing requests – mining for information without knowing exactly what they want/need.”<sup>92</sup> And another said vague records requested have “no legal description, or very little information on the request. Some people don’t really know what they are looking for, or even if it’s in the right county.”<sup>93</sup>

#### **6. Inept**

Access professionals said inept requests were nuisances. Inept requests come from people who are not familiar with the most efficient ways to ask for records, or they ask for records and then change their minds about what they want. They are unfamiliar with the structure of the open government laws in their states. The requesters are looking for records in the wrong offices, they are asking for records that are not open to the public, or they are asking for records they do not need to request formally.

Some of the descriptions of inept records requests were:

- “People who come to us with no idea of where to start their search (years of birth, death, marriage, etc.)”<sup>94</sup>

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<sup>87</sup> Survey response from a county clerk in the Northwest.

<sup>88</sup> Interview with a deputy sheriff and public information officer in the Midwest (Apr. 4, 2014).

<sup>89</sup> Survey response from a town clerk.

<sup>90</sup> Interview with a town clerk in the Southwest (Mar. 20, 2014).

<sup>91</sup> Survey response from a town clerk in the Northeast.

<sup>92</sup> Survey response from a deputy city clerk.

<sup>93</sup> Interview with an access professional who specializes in certification and training in the Northeast (Sept. 25, 2014).

<sup>94</sup> Survey response from a town clerk.

- “Someone who knows nothing about what I do or how to go about looking up the information on their own.”<sup>95</sup>
- “A nuisance request is a request from a citizen that is unsure about what records they are requesting, so they request an inordinate number of records.”<sup>96</sup>
- “I would also define a nuisance request as one where the requestor has unrealistic goals or expectations of what the office can actually provide for them with the request they have made.”<sup>97</sup>
- “Asking for something that really isn't available to the public or should not be made available to the public.”<sup>98</sup>

## **7. Broad**

Broad requests include a wide spectrum of possible records. Broad requests, as opposed to vague requests, have a wide coverage of a focused area. An example would be, "Any and all vital records under the name Davis. No dates provided, no first names, no idea if we even have the record."<sup>99</sup> Or, “a request where there are no real parameters,”<sup>100</sup> that is “too broad a request area to serve any particular use.”<sup>101</sup>

## **8. None**

For some participants, every request is valid, and no requests are nuisances. “There is no such thing in my office.”<sup>102</sup> Another said, “I do not consider any of my request nuisance requests. The people that need these documents need them for a reason, or they wouldn't ask for them.”<sup>103</sup>

## **9. Time-consuming /Inconvenient**

Time-consuming and inconvenient requests take up an inordinate amount of time, leaving less time for access professionals to respond to other requests or to complete their other duties. The time at which the request is made also contributes to the characterization of a nuisance. The most inconvenient times were during election seasons when access professionals are very busy responding to requests and at the end of the day when they don't have time to respond. For example, one deputy sheriff said that statutory response time requirements have meant that he stays after hours to complete records requests. “Anything not done at the end of the day becomes my responsibility after normal work hours. I worked an extra 410 hours last year,” he said.<sup>104</sup>

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<sup>95</sup> Interview with a town clerk on the West Coast (Jan. 17, 2014).

<sup>96</sup> Survey response from a county clerk.

<sup>97</sup> Survey response from a deputy sheriff/public information officer.

<sup>98</sup> Survey response from a village clerk.

<sup>99</sup> Interview with a town clerk/treasurer in the Northeast (Mar. 17, 2014).

<sup>100</sup> Survey response from a city clerk.

<sup>101</sup> Survey response from a municipal clerk.

<sup>102</sup> Survey response from an assistant town clerk.

<sup>103</sup> Survey response from a police lieutenant/public information officer.

<sup>104</sup> Interview with a deputy sheriff and public information officer in the Midwest (Apr. 4, 2014).

His response is illustrative of many access professionals who are concerned with the time they have to fill requests. Time constraints are an underlying theme in many of the preceding descriptions of nuisance requests. The requests that fall in this category are the ones that require access professionals to go above and beyond the norm to fill. A town clerk said they spend “countless hours of research with documents provided to the requestor in the format that they are maintained only to find the requestor wants the documents in a different format (electronic vs. paper).”<sup>105</sup> Another town clerk explained:

The Internet has made us vulnerable to casual requests that we email minutes or other records to people who used to come in to town hall to read our records. In order to fill their request we have to collect the record, scan it (sometimes photocopying first), put the record back and email it. It takes time we do not have.<sup>106</sup>

### **C. Responses**

No state allows records custodians the ability to deny access simply because they are annoyed or frustrated. The results in this section show that access professionals comply accordingly. By a majority, 58 percent, access professionals said they respond to nuisance requests like any other because statutes require them to do so. However, some also said they find some ways to make the request and response more manageable. They bill requesters for the time it takes to respond, 17 percent; ask requesters for more information, 16 percent; forward the request on to an attorney, five percent; ask that the requester come in person to request the record, two percent; tell the requester to consult an attorney, one percent; or send the requester to a subscription site for records, one percent.

The participants were clear in their reliance on state law in responding to requests, and most – 78 percent – said the laws in their states gave specific guidance on how to respond to nuisance requests. Of that group, 43 percent said they rely on the time constraints in their laws to influence their responses. Slightly fewer, 42 percent, said they generally follow the law, but they did not report specifically what language they use. For example, a public information officer said, “Well, the law is very specific in what citizens’ are entitled to get under the Sunshine Law. We make all efforts to follow the law, no matter how ridiculous. So, we follow through with all requests.”<sup>107</sup> Eleven percent said their laws allow them to charge for excessive time needed to respond to nuisance requests, and four percent said their statutes allow them to ask requesters to clarify their requests. Twenty-one percent said their state laws do not give any guidance about how they should or may respond to nuisance requests, and two participants in that group said they go to their peers for guidance. For example, a city clerk said, “We are in Washington State so our laws really screw over the cities in my opinion. I believe we should have good transparency, but our laws make it next to impossible to do anything about nuisance or abusive requestors.”<sup>108</sup>

### **D. Advice**

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<sup>105</sup> Survey response from a town clerk.

<sup>106</sup> Interview (Apr. 10, 2014).

<sup>107</sup> Survey response.

<sup>108</sup> Survey response.

Throughout the data collection process, it was clear that access professionals felt that the way requestors ask for records could help eliminate the frustration factor in their interactions. They wanted requesters to come in person ready to provide a written, specific request about only the information they need. They want requesters to be aware that access professionals are people who have other work to do, and they are trying their best to respond in an efficient way. Participants' advice is consolidated into one list, presented from most common to least common response.

1. Be as specific as possible in your request.
2. Research before you ask. Look up what you need online and know the terminology.
3. Allow time for a response.
4. Explain what you are trying to find.
5. Be polite and empathetic.
6. Put your request in writing.
7. Be realistic about what you are trying to get.
8. Request a manageable amount of information.
9. Make your request in person.
10. Anticipate fees for making copies or responding to large requests.

#### **E. Access Professionals' Wish Lists**

Other than educating requesters, if the access professionals could change a few things about their jobs, they would ask for specific assistance in the workplace. They would not necessarily change their state laws. Access professionals would like: better software to handle requests, 20 percent; more records available online, 12 percent; more staff to respond to requests, 10 percent; better records management in their offices, 10 percent; more time to respond to requests, nine percent; and more specific requests, nine percent, from polite requesters, five percent. Just nine percent said they do not need anything to make their jobs easier.<sup>109</sup>

Given the chance, the majority said they would not make changes to their state statutes. The majority, 61 percent, said they would leave their open government laws as is. A quarter of respondents, 25 percent, said they would change their statutes to exclude more records from public access. Of that group of respondents, most of them wanted to exclude anything that could be construed as "personal," and a few wanted to exclude 911 emergency information, and anything that would cause a hardship if released. The rest of the respondents were relatively fragmented, asking for clarified fee structures, the ability to reject broad requests, the ability to require specificity in requests, or to require government offices to provide electronic records.<sup>110</sup>

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<sup>109</sup> The remainder of the list was fragmented with small response rates. At four percent each: more training, more privacy for citizens, and more statewide conformity of records laws. At one percent each: the ability to block frivolous requests, new legislation, less legislation, and the ability to provide bulk requests online.

<sup>110</sup> The complete list was: clarify fee structures, six percent; reject broad requests, six percent; require specificity, five percent; require electronic records, five percent; provide language to legislate responses to nuisance requests, four percent; deny requests from

## VI. Proposed Solutions

The goal of this study was to understand how access professionals perceive nuisance requests, and in doing so, to learn some of the common catalysts for potential negative policy adjustment in the context of street-level bureaucracy. It is not the language in a policy that determines its application but those on the front lines who apply it.<sup>111</sup> Therefore, understanding that access professionals perceive nuisance requests as obstacles can potentially help mitigate the adversarial relationships seen between requesters and records custodians. In a nutshell, participants described nuisance requests as broad, voluminous, vague, inept, time-consuming requests that emanate from a requester's inappropriate intent for the information or a fishing expedition. Public records laws will never be implemented accurately with complete compliance as long as access professionals perceive that any request is bothersome or an obstacle, or any requester is disgruntled and purposely frustrating the process. For these reasons, the barriers must be broken down.

### A. Avoid Statutory Change

Statutory change may not be the best solution. In previous research, access professionals have asked for more statutory authority to deny access to nuisance requests.<sup>112</sup> The participants in this study did not want to make substantial changes to their open government statutes. According to the theory of street-level bureaucracy, increased statutory exemptions and hierarchal control does not seem to be the answer to ensuring accurate compliance by access professionals.

Allowing access professionals the statutory authority to deny records requests based on their own discretion of whether disclosure is appropriate also has the potential to reduce citizens' rights to self-governance. Years of history of noncompliance in public records audits,<sup>113</sup> coupled with the conceivable negative policy application in the face of street-level bureaucrats' frustration or time constraints,<sup>114</sup> could tip the scales in favor of closure. In fact, results showed that the prime condition of a nuisance request hinges on the access professionals' perception of the requester's intent. Allowing access professionals the power to deny requests based on their determinations of whether the request will be used appropriately, like the statutes in Arizona,<sup>115</sup> Maryland,<sup>116</sup> Montana,<sup>117</sup> New

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those who sell bulk information, three percent; deny if a request seems like a witch hunt, one percent; archive more records, one percent; grant a time limit on searches for records, one percent; do not require a format for responses, one percent; allow for a longer response time, one percent; provide rules for recurring requests, one percent; and generally update the state law, one percent.

<sup>111</sup> LIPSKY, *supra* note 21, at xiii.

<sup>112</sup> *Shining the Light*, *supra* note 1, at 319–20; *Training Programs*, *supra* note 12, at 479–483.

<sup>113</sup> *Training Programs*, *supra* note 1, at App. A.

<sup>114</sup> LIPSKY, *supra* note 21, at xii.

<sup>115</sup> ARIZ. REV. STAT. ANN. § 39-121 (2015).

<sup>116</sup> MD. CODE ANN § 4-343 (2015).

<sup>117</sup> MONT. CONST., ART II. § 9 (2015).

Hampshire,<sup>118</sup> Wisconsin,<sup>119</sup> and Wyoming,<sup>120</sup> could pave the way to more denials of requests for information.

## **B. Realign the Institutional Culture**

Instead, readjusting the institutional culture within government agencies to acknowledge the frustrations and limitations access professionals are facing could remove the obstacles they perceive to policy adherence. Adaptive administration<sup>121</sup> is a more effective way to incorporate the reality of access professionals' experiences with the needs for access to government information. In fact, if statutory change were a state's chosen avenue for reform, then adopting legislation that recognizes the triggers that may lead access professionals to unlawful response to requests might be a positive approach. Some models could be the kinds of statutes in New Mexico, which allow access professionals additional prescribed time to respond to "burdensome or broad" requests,<sup>122</sup> or in Illinois, which has defined "recurrent requesters" and still requires that their requests be filled within 21 days.<sup>123</sup>

## **C. More Staff and Online Records Means More Time**

More than one study has shown that time is an obstacle for access professionals to respond to requests while also completing their other work duties.<sup>124</sup> Many of the participants in this study also said they do not have enough time. Lack of time is a critical junction in the theory of street-level bureaucracy. The moment the front-line workers feel they do not have the time or resources to respond to the needs of their clientele, it triggers a survival instinct to mass process or streamline requests for services.<sup>125</sup>

In the context of this study, that means finding a way to streamline the records transaction that does not deny access to records in the interests of time. Participants said bringing in more staff to help or improving the records management process in their offices could ease their burdens. They want agencies to install software that makes it easier to search records.

Perhaps most important, though, is the idea that access professionals want more records posted online. This not only removes the proverbial middle man, allowing requesters to search for exactly what they want, but it also frees up access

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<sup>118</sup> N.H. REV. STAT. ANN. § 91-A:5 (2015).

<sup>119</sup> State ex. rel Youmans v. Owens, 137 N.W. 2d 470, 474 (Wis. 2d 1965).

<sup>120</sup> WYO. STAT. ANN. § 16-4-203(g) (2015).

<sup>121</sup> Brodtkin, *supra* note 25, at 326; Maynard-Moody, Mushen & Palumbo, *supra* note 21, at 845.

<sup>122</sup> N.M. STAT. ANN. § 14-2-10 (2015).

<sup>123</sup> A recurrent requester is one who, "has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period." 5 ILL. COMP. STAT. 140/2(g) (2015); 5 ILL. COMP. STAT. 140/3.2 (2015).

<sup>124</sup> *Shining the Light*, *supra* note 1, at 313; *Training Programs*, *supra* note 1, at 479-83; PIOTROWSKI, *supra* note 19, at 90; Rizzard, *supra* note 15, at 433;

<sup>125</sup> Lipsky, *supra* note 21, at xii; Brodtkin, *supra* note 25, at 326 ("[B]ureaucrats do not do what they want or just what they are told to want. They do what they can.").

professionals' time to assist with more complicated requests. Access professionals can enumerate the records that are most often requested in their offices, and those should be the documents posted first. This research did not focus on the reasons why online records are not being provided more regularly, and a further study aimed at understanding the kinds of obstacles that are blocking online postings of public records would help move this effort forward.

#### **D. Educate Requesters to Make More Effective Requests**

A guiding objective in access to government information is how to ensure policy adherence among autonomous street-level bureaucrats who may implement policy to meet their own needs, or who would allow their perceptions of or relationships with citizen requesters to guide the way they respond to requests. While participants said nuisance requests are a small fraction of their daily records transactions, when they do respond to them, it interferes with their other responsibilities until the request is resolved. Their list of recommendations to requesters so as to alleviate adversarial interactions were to be polite and empathetic, to know what they are asking for and to focus their requests to their needs. Access professionals want requesters to be specific about the records they need while still being realistic about how long it would take to find, copy and provide the documents. To that end, efforts could be put forth to educate requesters on the best way to find and locate records and the offices that hold them, either by government access watchdog groups, state's attorneys offices, or by the government agencies themselves. The solution could be as simple as providing written brochures with the list of recommendations developed here or include a troubleshooting section of frequently asked questions. It could be as sophisticated as online instruction modules or in-person training events.

No matter the avenue for mitigating the contentious relationship between access professionals and records requesters, the priority should remain including in the conversation those who implement open government laws. The solutions offered here come directly from the access professionals who face these interactions every day, and as such should be included as part of the change. If access professionals' voices are heard, they are more likely to champion the process and use their discretion as street-level bureaucrats to provide consistent, lawful access to documents.

#### **Appendix A:**

##### **Survey Questions**

*(Participants had to answer affirmatively to the Consent Agreement to open the survey.)*

1. Do you respond to public records requests through the course of your duties? (If no, survey ended.)
2. Are you older than 19? (If no, survey ended.)
3. What is the typical public records request that you fill?
4. Who is the typical records requester?
5. What kinds of public records requests, if any, frustrate you?
6. In previous research, access professionals have said they are frustrated by nuisance requests. How would you define a nuisance request?
7. How often do you experience these kinds of requests?

8. Who most commonly brings nuisance requests?
9. How do you respond?
10. How does your state's public records law affect the way you respond?
11. What changes, if any, would you make to your state's public records law?
12. What advice would you give to people requesting public records?
13. What would make your job as an access professional easier?
14. What else should this researcher know about this topic?

## **Appendix B:**

### **Interview Questions**

*(Participants had to answer affirmatively to the Consent Agreement to begin the interview.)*

1. How often do you respond to public records requests?
2. What is the average request like?
3. In previous research I have conducted, access professionals have complained of what they call nuisance requests, or requests that are frustrating to fill. Have you experienced anything like that?  
Probe: Tell me about your experiences.  
How do you respond when you get requests like that?  
Does your public records law help you or hinder you in these situations?
4. What advice would you give to someone requesting public records? How can they make your job easier?
5. What changes, if any, would you make to the public records law in your state?
6. Is there anything I'm missing here? What else do I need to know?

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# FREEDOM OF EXPRESSION AND THE MEDIA LANDSCAPE IN ETHIOPIA: CONTEMPORARY CHALLENGES

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*Freedom of expression is one of the founding principles of international human rights law. Its significance in ensuring the vitality of democratic self-government is unparalleled. Freedom of expression provides the most important means by which individuals can fully participate in the political life of a community. In fledgling democracies like Ethiopia, ensuring free expression is ever more important as it pacifies tension in society and reduces risks of violence. Freedom of expression is also a powerful means of addressing deep rooted structural problems in society like corruption and embezzlement. Nevertheless, in recent times, rights groups have accused Ethiopia of engaging in continuing repressive measures against the press and the media that undermine the continued vitality of the democratic process. In particular, since the contested national election in 2005, the state has continued to take measures which drastically affect political speech and harshly narrow the political space. These include the adoption of the 2009 Anti-Terrorism Proclamation, the 2009 Charities and Societies Proclamation, and the 2008 Mass Media and Access to Information Proclamation. The purpose of this article is to analyze the current state of press and media freedom in Ethiopia, in particular the normative problems related with the regulation of freedom of expression and the media in light of both the general theory of freedom of expression and international human rights law.*

**Key Words:** Ethiopia, freedom of expression, democracy

“The first is freedom of speech and expression – everywhere in the world.”

– Franklin Delano

Roosevelt

## I. Introduction

For any democratic society, the case for open democratic discourse begins with an elevated status and protection of freedom of expression.<sup>1</sup> A society that aims at integrating openness as its overarching constitutional value

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<sup>1</sup> MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 276 (Michie Co. 1984)[hereinafter *Freedom of Expression*].

will not merely uphold the individual right to free expression, but also open up the deliberative process of government to public scrutiny.<sup>2</sup> In a democratic society, public scrutiny of the conduct of the government including the legislative, administrative and judicial proceedings form an integral part of the *body politic*.<sup>3</sup>

It is often argued that freedom of expression has a multiplier effect forming an essential component for the realization of other human rights including freedom of religion, the right to participate in public life, rights of women, rights of children and many other protected rights of individuals and groups.<sup>4</sup> As Michael O’Flaherty noted “freedom of expression is essential to the good working of the entire human rights system.”<sup>5</sup> Because of this, it is often referred to as a *meta right* that serves as the foundation for the enjoyment of other human rights.<sup>6</sup>

Freedom of expression also has significant socio-economic dimensions that serve an important component of the economic development of states. In a recent thought provoking contribution, Professor Baron Parker convincingly argues that one of the principal reasons that defined the rise and fall of nations over the past two centuries has been the degree of protection afforded to freedom of expression in their societies.<sup>7</sup> In articulating his premise, Parker argues that the three essential social technologies for the flourishing of any organized political society – democracy, scientific inquiry, and the free market – can be better advanced if the right to freedom of expression is better protected.<sup>8</sup>

Nevertheless, despite its wide-ranging significance, in recent times one observes a declining trend in the protection of freedom of expression worldwide.<sup>9</sup> The use of national security and anti-terrorism laws, censorship and surveillance, and a resort to the use of other speech related offences continue to have a chilling effect on the exercise of the right to freedom of

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<sup>2</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 3 (David Kretzmer & Francine Kershman Hazan eds., Kluwer Law Int’l 1992).

<sup>3</sup> FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 297–339, 369–409 (Univ. of Chi. 1981).

<sup>4</sup> H.R.C. Res. 23/2, U.N. Doc. A/HRC/RES/23/2 (June 13, 2013).

<sup>5</sup> Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34*, 12 Hum. Rts. L. Rev. 627 (2012).

<sup>6</sup> Michael O’Flaherty, *Article 19 UDHR: Contemporary Challenges and Opportunities for Freedom of Expression*, *Lecture at the Carr Centre for Human Rights Policy*, KENNEDY SCH. OF GOV., HARVARD UNIV. (Mar. 4, 2009), available at: <http://www.hks.harvard.edu/cchrp/events/2009/month03/article19.pdf>.

<sup>7</sup> Richard Baron Parker, *Free Speech and the Social Technologies of Democracy, Scientific Inquiry and the Free Market*, in *FREEDOM OF EXPRESSION IN A DIVERSE WORLD* 3–11 (Deirdre Golash ed., Springer 2010).

<sup>8</sup> *Id.*

<sup>9</sup> U.N. HRC Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/14/23/Add.2. (Mar. 25, 2010); OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *HUMAN RIGHTS, TERRORISM AND COUNTER-TERRORISM: FACT SHEET NO. 32* (July 2008); Agnes Callamard, *Is it Possible to Move the Debate on Freedom of Expression out of the Cultural and Religious Spheres to the Spheres of Law and Politics?*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS (Nov. 10, 2008), [http://www.regjeringen.no/en/dep/ud/kampanjer/refleks/innsjill/menneskerettigheter/debate\\_freed\\_mhtml?id=535398](http://www.regjeringen.no/en/dep/ud/kampanjer/refleks/innsjill/menneskerettigheter/debate_freed_mhtml?id=535398).

expression in many countries.<sup>10</sup> Legal reforms in relation to the regulation of the right to freedom of expression over the past decade have also been regressive and reflect the global trend of what has been characterized as “legal deterioration by limitation.”<sup>11</sup> While this is a general trend in many countries, Ethiopia is one of the few countries where serious questions continue to be raised with regard to the right to freedom of expression.<sup>12</sup>

The study of the current state of freedom of expression in Ethiopia can shed light to understand the contemporary challenges faced by illiberal polities in entrenching constitutional norms such as freedom of expression.<sup>13</sup> Furthermore, the study also helps to demonstrate how high politics and broader socio-political factors significantly influence the state of free expression in societies, there by contributing to the broader discussions in the discipline of comparative constitutional law.

In this regard, Mark Tushnet notes that a more nuanced understanding of constitutional norms such as freedom of expression can be best achieved by studying how high politics influences the conception of constitutional norms in states.<sup>14</sup> Much of the legal and political framework shaping the constitutional discourse including freedom of expression in Ethiopia is implicitly, but crucially influenced by the overarching political programs and policies of the government.<sup>15</sup> Thus, the study of freedom of expression in Ethiopia has important contributions to the discipline of comparative constitutional law. It demonstrates the continued vitality of looking at normative as well as political and ideological factors that significantly influence rights discourse in illiberal polities.

This article will first shed light on the various theoretical justifications for freedom of expression. In the second section, it will discuss the international human rights framework on the right to freedom of expression. Lastly, it will look into both the legal challenges and the broader political factors that affect the current state of freedom of expression in Ethiopia.

## **II. Overview of the Theoretical Justifications of Freedom of Expression**

Joseph Raz points out that “freedom of expression is a liberal puzzle.”<sup>16</sup> Although most scholars agree on the significance of freedom of expression,

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<sup>10</sup> U.N. HRC Rep. of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression, *Ten Key Challenges to Freedom of Expression in the Next Decade*, A/HRC/14/23/Add.2 (Mar. 25, 2010).

<sup>11</sup> U.N. EDUC., SCI. & CULTURAL ORG., *WORLD TRENDS IN FREEDOM OF EXPRESSION AND MEDIA DEVELOPMENT* 28 (2014).

<sup>12</sup> See *10 Most Censored Countries*, COMMITTEE TO PROTECT JOURNALISTS (Apr. 4, 2015), <https://cpj.org/2015/04/10-most-censored-countries.php>. The Committee reported in 2015 that Ethiopia was the fourth most censored country in the world.

<sup>13</sup> See Salih O. Nur, *The Rise of Illiberal Democracy in Africa: an Exploration of Semi Authoritarianism in Post 1991 Ethiopia* (Nov. 2013) (M.A. thesis, Faculty of Social Scis., Univ. of Osnabrueck, Ger.).

<sup>14</sup> Mark Tushnet, *Comparative Constitutional Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1230 (Mathias Reiman & Reinhard Zimmermann eds., Oxford Univ. Press 2006).

<sup>15</sup> MESERET CHEKOL RETA, *THE QUEST FOR PRESS FREEDOM IN ETHIOPIA: ONE HUNDRED YEARS OF HISTORY OF THE MEDIA IN ETHIOPIA*, at XIII (Univ. Press of Am. 2013).

<sup>16</sup> Joseph Raz, *Free Expression and Personal Identification*, 11(3) *OXFORD JOURNAL OF LEGAL STUDIES* 303 (1991).

they have not convincingly argued why it deserves a special place in a democratic society.<sup>17</sup> Many scholars who have tried to articulate the theoretical justifications for freedom of expression have also usually adopted a single approach by undermining the possibility of coming up with a broader framework for validating the values served by freedom of expression.<sup>18</sup>

More broadly, the theoretical justification of freedom of expression can be categorized into four major areas: those that emphasize the autonomy of the human person, those who see the significance of freedom of expression in ensuring the search for truth, those who consider the checking value of freedom of expression as more paramount, and a more broader argument that emphasizes the central importance of freedom of expression in ensuring open democratic discourse. As such, a brief overview of the different justifications of freedom of expression is in order.

### A. Autonomy

Individual autonomy has been considered one of the basic foundations for freedom of expression by some of the most prominent scholars including David Richards, C. Edwin Baker and Ronald Dworkin.<sup>19</sup> In outlining the significance of autonomy, Dworkin notes that restricting expression because people have a different style of life or have a different understanding of a certain issue violates their autonomy and moral independence.<sup>20</sup> In arguing the significance of autonomy, he contends that the political equality of individuals requires a government to not discriminate among citizens by permitting some views and denying other views. Such conduct, he argues, is discriminatory not only to the speaker but also to the society as a whole as it violates their autonomy.<sup>21</sup> C. Edwin Baker extends the argument further, noting that the legitimacy of any state should be measured by the level of respect that it affords to the autonomy of the individual. Because of this, he argues autonomy should be the core justification for the protection of freedom of expression.<sup>22</sup>

The basic assumption of the autonomy justification is based on rationality of individuals and the belief that creating an open environment for public discussion will help them reach a rational decision.<sup>23</sup> The emphasis of

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<sup>17</sup> Id.

<sup>18</sup> See *Freedom of Expression*, supra note 1; see also Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) [hereinafter *The Value of Free Speech*] (arguing that the core value advanced by freedom of expression is autonomy and self realization).

<sup>19</sup> C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 37–46 (Oxford Univ. Press 1989) [hereinafter *Human Liberty and Freedom of Speech*]; RONALD DWORIN, *A MATTER OF PRINCIPLE* (Harv. Univ. Press 1985) [hereinafter *A Matter of Principle*]; D.A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 85, 167–69, 183 (Oxford Univ. Press 1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 991–992, 998 (1977) [Hereinafter *Scope of the First Amendment*].

<sup>20</sup> *A Matter of Principle*, supra note 19, at 353 and note 112.

<sup>21</sup> RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (Oxford Univ. Press 1999) [hereinafter *Freedom's Law*]; RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 277–78 (Harv. Univ. Press 1978) [hereinafter *Taking Rights Seriously*].

<sup>22</sup> Edwin C. Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011) [hereinafter *Autonomy and Free Speech*].

<sup>23</sup> Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204, 216 (1972)

the justification from autonomy is thus, on the recipient of the information rather than the speaker.<sup>24</sup> In this regard, Larry Alexander provides a good illustration. He gives a hypothetical example where a posthumous book is banned for publication by a government. In this case, the government's prohibition cannot be said to violate the author's right as he is dead. Nevertheless, since underlying the principle of autonomy is the right of the audience, then the government's act constitutes a violation of the right to freedom of expression.<sup>25</sup>

Nevertheless, questions are raised on the autonomy justification for its emphasis on the rationality of human conduct as the basis of its assumption. It has been argued that the manipulation of information can lead individuals to react irrationally.<sup>26</sup> These irrational behaviours may ultimately lead to social harms which may compel the state to intervene.

### **B. The Search for Truth and the Market Place of Ideas**

One of the most common arguments and a "siren song" for the theoretical justification of freedom of expression is the notion of the marketplace of ideas and the search for truth.<sup>27</sup> Proponents of the marketplace of ideas argue that similar to the marketplace for goods where competition between different business entities enhances pricing and helps in the growth of national economies, freedom of expression also affords individuals the opportunity to contribute different ideas in the economic, social and political life of a community.<sup>28</sup> The underlying assumption emphasizes the importance of providing the opportunity for entertaining a wide variety of competing views which can ultimately support in the search for truth or more generally some public good. The search for truth and the marketplace of ideas are the strongest justifications for some of the early prominent libertarians including John Milton, John Stuart Mill and John Locke.<sup>29</sup>

In the early 20<sup>th</sup> century, Milton's and Mill's ideas were echoed in an eloquent opinion by Justice Oliver Wendell Holmes when he wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and you want a certain result with all your hurt, you naturally express your wishes in law and swipe away all opposition...But when men have come to realize that time has upset many fighting faiths, they may come to believe even more than the foundations of their own conduct that the ultimate good desired is better reached by

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<sup>24</sup> Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV., note 150 (1989).

<sup>25</sup> LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 8 (Cambridge Univ. Press 2005).

<sup>26</sup> Greenawalt, *supra* note 24, at 151.

<sup>27</sup> *Freedom of Expression in a Diverse World*, (Deirdre Golash ed., Springer, 2010).

<sup>28</sup> See Ronald Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974) (arguing that unlike the market for goods where government has the appropriate motivation to regulate markets in order to avoid monopolies, it lacks the same motivations in case of regulation of speech and hence government regulation is undesirable).

<sup>29</sup> John Milton, *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England*, in *THE WORKS OF JOHN MILTON* (Frank A. Patterson & Frank A. Allen eds., Colum. Univ. Press 1931).

free trade in ideas-that the best test of truth is the power of the thought to get itself acted in the competition of the market...<sup>30</sup>

Although the search for truth and the marketplace of ideas serve as one of the most convincing grounds for the protection of freedom of expression, questions have been raised about their theoretical validity. Scholars question whether there is objective truth and even if there is one, the conditions by which it is discovered cannot readily lead to the discovery of truth.<sup>31</sup> Kent Greenawalt contends that truth discovery is much more difficult to ascertain in domains involving value judgments than the physical sciences.<sup>32</sup>

### **C. Deterrence of Abuse of Authority**

Freedom of expression plays an important role in fostering government accountability by serving as a check on abuse of authority. According to Greenawalt, while this justification is closely linked with the truth discovery, it is separately treated because of its “historic and central importance” to freedom of expression.<sup>33</sup> Originally developed by Vincent Blasi, this justification argues that the scrutiny of government by journalists, the media and the larger public can be a powerful tool for exposing the abuses and wrongs of government officials which can compel them to take corrective action and deterring future abuses.<sup>34</sup>

The argument based on deterrence of abusive of authority posits that critical press and public scrutiny of government not only helps to unveil truth, but also even when claims are inaccurate, it influences the understanding about the nature of exercise of government power by reminding leaders that the exercise of authority is a responsibility rather than an opportunity for personal gain. This justification not only works in liberal democracies but more importantly in the context of illiberal polities. The opportunity for freedom of expression and the ability to present critical views can be used as powerful tools to fight corrupt practices which remain a huge challenge in many of these polities.<sup>35</sup>

### **D. A Democracy-Based Justification of Freedom of Expression**

Democracy, which can be defined as rule by the people, has two integral concepts which have important implications for our understanding of freedom of expression from democracy.<sup>36</sup> These are popular sovereignty and the right of citizens to participate.<sup>37</sup> James Weinstein argues that these two essential elements of democracy cannot function if there is no right to freedom of

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<sup>30</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>31</sup> Greenawalt, *supra* note 24, at 131–140.

<sup>32</sup> *Id.* at 137.

<sup>33</sup> *Id.* at 142.

<sup>34</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B FOUND. RES. J. 521 (1977).

<sup>35</sup> Greenawalt, *supra* note 24, at 143.

<sup>36</sup> The term was first used in the fifth century BC by Greek historian Herodotus and combines the Greek words *demos* (the people) and *kratein* (to rule). See BARRY HOLDEN, UNDERSTANDING LIBERAL DEMOCRACY 7 (Prentice-Hall, 2d. ed. 1993); IVAN HARE & JAMES WEINSTEIN, EXTREME SPEECH AND DEMOCRACY 25 (Oxford Univ. Press 2009).

<sup>37</sup> James Weinstein, *Extreme Speech, Public Order and Democracy: Lessons from The Masses*, in EXTREME SPEECH AND DEMOCRACY 25 (Ivan Hare & James Weinstein eds., Oxford Univ. Press 2010).

expression.<sup>38</sup> He further notes that the opportunity for free and equal participation in the political process which forms an integral part of freedom of expression is vital to the legitimacy of the entire legal system.<sup>39</sup>

The democracy-based justification of freedom of expression has been considered “the most influential in the development of free speech law.”<sup>40</sup> The leading scholar and a staunch advocate of freedom of expression as integral part of democratic self-government is Alexander Meiklejohn. His groundbreaking work, *Free Speech and its Relation to Self Government*, demonstrates the central value of freedom of expression as being open public discussion in a democratic society.<sup>41</sup> Given his significant and original contribution to our understanding of the arguments of freedom of expression from democracy, a brief discussion will be useful to look into his underlying arguments and their overall validity.<sup>42</sup>

Meiklejohn’s starting point is his conception of constitutions as a reflection of the self governed in that “they are a reflection of our own self-control.”<sup>43</sup> As such, the underlying basis of his argument is that the legitimacy of governments is established through a democratic process by the explicit consent of the governed. He extends this argument to say that the foundation of the principle of freedom of expression is “the necessities of the program of self-government. It is not a law of nature or of reason in the abstract. It is a deduction from the basic ... agreement that public issues shall be decided by universal suffrage.”<sup>44</sup>

In this regard, Meiklejohn underscores the importance of the distinction between private rights of expression and freedom of public discussion. He notes that since private expressions do not provide support for the public exposition of ideas that can contribute to the discussion of the general welfare of the state, they are not protected under the right to freedom of expression.<sup>45</sup> On the other hand, expressions made in the context of public discourse should be considered as having a higher threshold for their protection. He argues that there is an unlimited guarantee of freedom of public discussion which is delivered in the context of forwarding views meant to serve the general welfare of society. This, he contends, is beyond the reach of any legislative limitation.<sup>46</sup> In his later work, he has wittily described the importance of political speech in

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> ERIC BARENDT, *FREEDOM OF SPEECH* 23 (Clarendon Press 1985).

<sup>41</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (The Lawbook Exchange, Ltd. 1948).

<sup>42</sup> In this regard, we can draw the definition of political speech from James Weinstein: “Public discourse consists of speech on matters of public concern, or, largely without respect to its subject matter, of expression in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the internet, or in public forums such as the speaker’s corner of the park.” See James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 493 (2011). A similar definition is provided by Robert Post: “Public discourse includes all communicative processes deemed necessary for the formation of public opinion.” See Robert Post, *Participatory Democracy and Free Speech* 97 Va. L. Rev. 477, 486 (2011).

<sup>43</sup> MEIKLEJOHN, *supra* note 41.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 94.

<sup>46</sup> *Id.*

one of his most-quoted aphorisms: “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>47</sup>

Although more recent literature has criticized Meiklejohn’s narrower approach,<sup>48</sup> he nevertheless continues to inspire contemporary scholarship on freedom of expression.<sup>49</sup> In the words of Robert Post, “there is little dispute that one of the most important themes of the right to freedom of expression is its function as the guardian of democracy.”<sup>50</sup> This is buttressed by Cass Sunstein’s assertion that the touchstone of constitutional analysis on freedom of expression should be what “best promotes the right to democratic deliberation.”<sup>51</sup> Similarly, James Weinstein argues that the argument for democracy is central and no other theory of speech can provide a full account of its underlying theoretical assumptions as evidenced by the pattern of the jurisprudence of the U.S. Supreme Court.<sup>52</sup>

Looking at the arguments forwarded by Meiklejohn and other contemporary free speech scholars, one can draw a resounding consensus that the core value of the justification for the protection of freedom of expression is the promotion of democratic deliberation and public discussion. While it can be contended that freedom of expression can be supported by multiple justifications, its central importance lies in serving as a life blood of democracy in a political community.<sup>53</sup> This is not only limited to legal scholarship in the U.S., but also the legal traditions of many other countries. Observing the free speech traditions of many countries, Ronald Rotzyski notes that the Meiklejohnian vision of a democracy-based justification of free speech has a clear transnational resonance. There is a remarkable unanimity of legal scholarship which underscores that open public discussion and democratic deliberation are the core normative values to be served by freedom of expression.<sup>54</sup> Accordingly, states should give high regard for political speech and the utmost scrutiny for any measure aimed at restricting political expressions. This is particularly true in fledgling democracies such as Ethiopia where freedom of expression can have tremendous utility in addressing

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<sup>47</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (Oxford Univ. Press 1966). Cf. Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

<sup>48</sup> Post, *supra* note 47. While Meiklejohn acknowledged the significance of other values served by freedom of expression, he nevertheless emphasized that the core value served by freedom of expression is the furtherance public discourse. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255–57.

<sup>49</sup> Post, *supra* note 47, at 1111. Despite Meiklejohn’s narrower approach, the author concedes that “[b]ecause of its candid and unflinching exploration of the theory’s assumptions and implications, Meiklejohn’s work offers an especially clear revelation of the theory’s essential constitutional structure.”

<sup>50</sup> *Id.* at 1114–15; *Brown v. Hartlage*, 456 U.S. 45, 60 (1982); see also *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *Stromberg v. California*, 283 U.S. 359 (1931).

<sup>51</sup> Cass R. Sunstein, *Preferences and Politics*, 20(1) PHIL. & PUB. AFFAIRS 3, 28 (1991) [hereinafter *Preferences and Politics*].

<sup>52</sup> James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97(3) VA. L. REV. 491 (2011).

<sup>53</sup> *Regina v. Sec. of State for the Home Dept., ex parte Simms*, [1999] 3 ALL ER 400 (H.L.) 408 (appeal taken from Eng.).

<sup>54</sup> R. KROTOSZYNSKI, *THE FIRST AMENDMENT IN CROSS CULTURAL PERSPECTIVE: A COMPARATIVE ANALYSIS OF THE FREEDOM OF SPEECH* 222 (2009).

lingering conflicts of political ideologies and contested national identities in the political spectrum.

### III. International Legal Framework

Freedom of expression is one of the founding principles of international human rights law.<sup>55</sup> The Universal Declaration of Human Rights,<sup>56</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>57</sup> the Convention on the Elimination of All forms of Racial Discrimination<sup>58</sup> and Convention on the Rights of the Child<sup>59</sup> explicitly guarantee the right to freedom of expression. Regional human rights conventions including the African Charter on Human and Peoples' Rights (ACHPR),<sup>60</sup> the European Convention for Human Rights and Fundamental Freedoms (ECHR),<sup>61</sup> and the Inter-American Convention on Human Rights (IACHR)<sup>62</sup> also explicitly guarantee the right to freedom of expression. In 1993 the U.N. established the mandate of Special Rapporteur on the Right to Freedom of Opinion and Expression to enhance the protection afforded by states.<sup>63</sup> Similar developments can also be seen in regional human rights mechanisms.<sup>64</sup> This article will focus on discussions related with Article 19 of the ICCPR. However, to some extent the jurisprudence of the regional human rights systems including the European Court of Human rights is discussed briefly.

Article 19 of the ICCPR, which provides for the protection of freedom of expression, reads as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The protection afforded of freedom of expression, however, is limited. Accordingly, states have the right to place legitimate restrictions in accordance with Article 19(3) of

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<sup>55</sup> "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the U.N. is consecrated." Preamble, G.A. Res. 59/1, U.N. Doc. A/RES/59(I) (Dec. 14, 1946).

<sup>56</sup> Art. 19 states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>57</sup> International Covenant on Civil and Political Rights [ICCPR] art. 19, 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>58</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 5, 7 Mar. 1966, 660 U.N.T.S. 195.

<sup>59</sup> The Convention on the Rights of the Child art. 13, 20 Nov. 1989, 1577 U.N.T.S. 3.

<sup>60</sup> African Charter on Human and Peoples' Rights art. 9, June 27, 1981, 21 I.L.M. 58.

<sup>61</sup> European Convention for Human Rights and Fundamental Freedoms [ECHR] art.10, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR].

<sup>62</sup> Inter-Am. Comm'n H.R. art. 13.

<sup>63</sup> U.N. Comm'n on Human Rights, G.A. Res. 45, U.N. Doc. E/CN.4/RES/1993/45 (1993).

<sup>64</sup> African Comm'n on Human and Peoples' Rights, **Res. 71 On The Mandate And Appointment Of A Special Rapporteur On Freedom Of Expression In Africa** (2004), available at <http://www1.umn.edu/humanrts/africa/resolutions/rec76.html> (The 36<sup>th</sup> Ordinary Session held in Dakar, Senegal from Nov. 23 to Dec. 7, 2004; The Inter-American Commission on Human Rights also established the Office of the Special Rapporteur for Freedom of Expression during its 97<sup>th</sup> period of sessions held in Oct. 1997 by the unanimous decision of its members).

the ICCPR. Article 19(3), which provides for the limitation clause of the right to freedom of expression, reads as follows:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

As can be seen from sub-article 3 of Article 19, three kinds of limitations are provided. These include limitations that are imposed in order to protect national security, public order and public health or morals. The fact that these substantive limits to the right to freedom of expression are permissible does not mean that states have complete discretion to put limits at their own whim. They are subject to the strict requirements of principles of international human rights law, including:

1. That restrictions be expressly stated by law and sufficiently be precise to enable an individual to regulate his conduct accordingly;
2. They must be necessary, i.e. the prescribed limits must be able to address a certain pressing social need based on the substantive grounds listed in paragraph 3; and
3. The limitations must conform to the strict test of proportionality and every consideration should be made to impose less restrictive means that does not undermine the essence of the right.<sup>65</sup>

Compared to the other supranational human rights instruments, Article 19 provides for a limited range of restrictions.<sup>66</sup> This is particularly apparent if one looks at the ECHR. Article 10 of the ECHR provides for a broad range of restrictions which are not found in Article 19. These include restrictions based on grounds of territorial integrity, public safety, prevention of crime and disorder, for the preventing the disclosure of information received in confidence and for maintaining the authority and impartiality of the judiciary: none of which are explicitly provided under Article 19.<sup>67</sup>

#### **A. The Protection of the Rights or Reputation of Others**

The first ground of restriction on the right to freedom of expression as laid down in Article 19(3) is to respect the rights and freedom of other individuals and groups, particularly those who are defined by their religious faith or ethnic origin. These “rights of others” include those limitations imposed to respect other human rights recognized in the covenant and other international human rights. These usually include legitimate restrictions to respect privacy, freedom of religion and the protection of minorities. A similar

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<sup>65</sup> See International Covenant on Civil and Political Rights [ICCPR], U.N. Human Rights Comm. [HRC] Gen. Comment No. 34, art. 19, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment No.34].

<sup>66</sup> See *id.* at art. 19; ECHR, *supra* note 61, at art. 10.

<sup>67</sup> ECHR, *supra* note 61, at art. 10(2).

limitation ground is also provided in Article 10(2) of the ECHR and Article 13(2) of the IACHR and exemplifies one of the classic conflicts of rights between freedom of expression and the dignity and personality of individuals.<sup>68</sup> Particular forms of restrictions which are common in this context are defamation, derision, slander and other forms of civil suit such as copyright claims and civil claims of individuals whose honour or reputation has been violated. Limitation on freedom of expression in order to protect the rights of others is one of the most problematic grounds because of the very difficulty in the balancing exercise that courts grapple with.<sup>69</sup> In this regard, it is important to highlight some of the key indicators that can support state compliance with regard to the protection of the right to freedom of expression.

The Human Rights Committee has reiterated that criminal sanctions in the context of defamation should be avoided and in any event imprisonment is incompatible with the right to freedom of expression.<sup>70</sup> In particular, when defamation suits involve political speech made in the context of public interest, the presumption is that this “high value speech” should have the highest considerations.<sup>71</sup> The European Court of Human Rights has also held that when a public official is involved, critical opinion can involve exaggeration and the proof of truth should not be scrutinized closely. Moreover, the ECHR has held that value judgments should be differentiated from factual statements, implying that while there is no requirement of proof for the former in the later case there might be a requirement that the concerned individual who made the defamatory statement should have made efforts to reach at the truth.<sup>72</sup>

The restrictions in Article 19(3) of the ICCPR in order to protect the rights of others can extend to religious groups. However, prohibitions against displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the requirements of Article 19(3) and can only be justified if they constitute incident to racial hatred in the context of Article 20(2).<sup>73</sup> The criticism of religious leaders or commentary on religious doctrine and tenets of faith is a legitimate exercise of the right to freedom of expression and, as such, limitations should not be used to undermine a legitimate exercise of the right to freedom of religion. In the context of holocaust denial and other forms of memory laws, the Human Rights Committee, although initially upholding these kinds of limitations as legitimate,<sup>74</sup> has stated later that these kinds of memory laws are incompatible with Article 19(3).<sup>75</sup>

## **B. National Security**

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<sup>68</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 462 (NP Engel 2d. rev. ed. 2005); *see also* Von Hannover v. Germany, 40 Eur. Ct. H.R. at 1 [2004].

<sup>69</sup> ERIC BARENDT, BALANCING FREEDOM OF EXPRESSION AND PRIVACY: THE JURISPRUDENCE OF THE STRASBOURG COURT, 1 J. MEDIA L. 49 (2009).

<sup>70</sup> General Comment No. 34, *supra* note 65, at ¶ 47.

<sup>71</sup> Cass Sunstein, *Free Speech Now*, 59 UNIV. CHI. L. REV. 304 (1992) [hereinafter *Free Speech Now*].

<sup>72</sup> *Lingens v. Austria*, Eur. Ct. H.R. 7 at ¶ 46 [1986].

<sup>73</sup> General Comment 34, *supra* note 65, at ¶ 50–52.

<sup>74</sup> *Id.* at ¶ 49.

<sup>75</sup> *Id.*

Article 19(3) of the ICCPR, Article 10(2) of the ECHR and Article 13(2)(b) provide for limitations on the right to freedom of expression based on national security grounds. National security has been the most commonly used ground of restriction, particularly in fledgling democracies that seek to undermine genuine political dissent. Although evidences show that more open democratic dialogue and a robust protection of the right to freedom of expression can significantly pacify tensions in society and ensure national security of states, many governments consider critical opinions as a threat to the national security of the state.<sup>76</sup>

It is difficult to provide a complete definition of what national security involves. It can be inferred, however, that it indicates serious and genuine measures to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.<sup>77</sup> Simply put, it implies the right of the state to take restrictive measures in order to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.<sup>78</sup> Accordingly, restrictions can be imposed on the procurement or dissemination of military secrets; expressions which make a direct call for violent overthrow of the government or propaganda for war, in particular when made in the context of a volatile political unrest.<sup>79</sup>

Thus, restrictions on the right to freedom of expression should only be allowed in serious threats of political and military nature that threaten the entire state.<sup>80</sup> What flows from this conclusion is that restrictions intended to prohibit the criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government agencies or public officials is incompatible with Article 19(3) and cannot be used for restricting the right to freedom of expression on national security grounds.<sup>81</sup>

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<sup>76</sup> Sandra Coliver, *Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 20(1) HUM. RTS. Q. 12–80 (1998); see, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (discussing Daniel Ellsberg's disclosure of a 47-volume governmental study entitled "History of Decision-Making Process on Vietnam Policy," more widely known as the "Pentagon Papers").

<sup>77</sup> ARTICLE 19 GLOBAL CAMPAIGN FOR FREE EXPRESSION, THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION, Principle 2(a) (1996) [hereinafter JOHANNESBURG PRINCIPLES].

<sup>78</sup> U.N., Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at <https://www1.umn.edu/humanrts/instree/siracusaprinciples.html>.

<sup>79</sup> NOWAK, *supra* note 68.

<sup>80</sup> *Id.*

<sup>81</sup> JOHANNESBURG PRINCIPLES, *supra* note 77, at Principle 7(a)(ii). In many countries, however, these kinds of restrictions are common. See, e.g., Criminal Code of the Fed. Democratic Republic of Eth. art. 244, 245, 261, 264, 265, 9 May 2005, available at <http://www.wipo.int/wipolex/en/details.jsp?id=11359>.

Moreover, vaguely defined accusations such as subversive or dangerous activities cannot be justified under national security laws or any of the other grounds listed in Article 19(3).<sup>82</sup> The Human Rights Committee has consistently rejected obscurely defined grounds for restrictions on freedom of expression such as subversive activities on many occasions despite many states trying to justify restrictions on national security grounds.<sup>83</sup> In this regard, states should be guided by such instruments as the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,<sup>84</sup> the Global Principles on National Security and the Right to Information<sup>85</sup> and other international instruments that have been adopted to guide states to ensure the exercise of freedom of expression while countering serious threats to national security.<sup>86</sup>

One of the most common and recent challenges to the exercise of the right to freedom of expression has been the use of counter-terrorism laws such as the prohibition of the glorification, incitement and advocacy of terrorism.<sup>87</sup> The lack of clarity in the definition of terrorism at the international level and its conceptual fluidity has prompted authoritarian states to use anti-terror laws as typical ways of suppressing legitimate political dissent and freedom of expression. More rigorous recent attempts in trying to come up with the definition of terrorism have also showed that the prospects of coming up with a comprehensive definition of terrorism is impossible due to the conceptual fluidity of the subject.<sup>88</sup>

In this regard, it is important that measures aimed at restricting freedom of expression through anti-terrorism laws should comply with international human rights standards.<sup>89</sup> International law requires that “incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”<sup>90</sup> Attempts should also be made to draw on best

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> OPEN SOCIETY FOUND., THE GLOBAL PRINCIPLES ON NATIONAL SECURITY AND ACCESS TO INFORMATION (TSHWANE PRINCIPLES) (Open Society Found. 2013).

<sup>86</sup> These, among others, include the reports of the Special Rapporteur on Counter-Terrorism and Human Rights and the E.U. Human Rights Guidelines on Freedom of Expression Online and Offline (2014), available at

[http://eeas.europa.eu/delegations/documents/eu\\_human\\_rights\\_guidelines\\_on\\_freedom\\_of\\_expression\\_online\\_and\\_offline\\_en.pdf](http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf).

<sup>87</sup> See Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression: Ten Key Challenges to Freedom of Expression in the Next Decade, U.N. Doc. A/HRC/14/23/Add.2 (Mar. 25, 2010); see also IAN CRAM, TERROR AND THE WAR ON DISSENT: FREEDOM OF EXPRESSION IN THE AGE OF AL-QAEDA (2009); Helen Keller & Maya Sigron, *State Security v Freedom of Expression: Legitimate Fight against Terrorism or Suppression of Political Opposition?*, 10 HUM. RTS. L. REV. 151 (2010).

<sup>88</sup> Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM. L. REV. 494 (2013).

<sup>89</sup> See General Comment No. 34, *supra* note 65, at ¶ 46.

<sup>90</sup> International Mechanisms for Promoting Freedom of Expression, Joint declaration of the U.N.

practices of legislative frameworks that provide for increased clarity on the definition of terrorism and suppression of expression. States can look into good legislative practices such as the Council of Europe Convention on Anti-Terrorism as well as the standards set by the U.N. Special Rapporteur on Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>91</sup>

### **C. Public Order (*Ordre Public*)**

Public order (*ordre public*) as a limitation ground is one of the most fluid and difficult concepts to articulate its meaning and scope. The notion of public order has been described as a dangerous legal concept which has its roots in the civil law tradition. It includes various public policy and other grounds in the context of limitation of rights. The *travaux préparatoires* of Article 19 show that a British proposal to replace the term “public order” with “prevention of disorder or crime” narrowly failed to pass.<sup>92</sup>

The term public order can, thus, include measures intended to prevent crime or disorder, as well as those “universally accepted fundamental principles, consistent with respect for human rights on which a democratic society is based.”<sup>93</sup> It also includes restrictions to prevent the dissemination of confidential information and endangering the impartiality of the judiciary. Given the danger that the public order grounds can open a Pandora’s Box in which many other grounds of limitations can be invoked, it is important that any justifying ground be construed narrowly.<sup>94</sup> For example, it has been held that restrictions on freedom of expression of prisoners should be protected unless there is a law explicitly stating the grounds of restrictions and when absolutely necessary to prevent crime or disorder in prison.<sup>95</sup> In a similar vein, vague accusations of “subversive” and “dangerous activities” are not justified grounds to restrict the right to freedom of expression under Article 19(3).<sup>96</sup>

### **D. The Privileged Position of Political Speech**

Article 19 of the ICCPR extends a wide range of protected expressions under the right to freedom of expression including political, artistic, commercial and expression of general interest to the public.<sup>97</sup> While some have questioned the appropriateness of elevating a specific category of expressions, most scholars agree that political speech forms the most essential aspect of freedom of expression.<sup>98</sup> This is buttressed by both the jurisprudence of the

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Special Rapporteur on Freedom of Opinion and Expression, the O.S.C.E. Representative on Freedom of the Media, and the O.A.S. Special Rapporteur on Freedom of Expression (Dec. 21, 2005), available at <https://www.article19.org/data/files/pdfs/standards/three-mandates-dec-2005.pdf>.

<sup>91</sup> Council of Europe, *Council of Europe Convention on the Prevention of Terrorism*, 16 May 2005, ETS No. 196, available at <http://www.refworld.org/docid/47fdafod.html>; see also Council of Europe, *Guidelines on Human Rights and the Fight against Terrorism*, 11 July 2002, available at <https://www1.umn.edu/humanrts/instate/HR%20and%20the%20fight%20against%20terrorism.pdf>.

<sup>92</sup> NOWAK, *supra* note 68.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See General Comment No. 34, *supra* note 65.

<sup>98</sup> See VINCENZO ZENO-ZENCOVICH, *FREEDOM OF EXPRESSION: A CRITICAL AND COMPARATIVE ANALYSIS 13* (Routledge-Cavendish 2008) (where the author argues that distinctions made based on what is expressed are undesirable since it can lead to excessive discretion and abuse).

Human Rights Committee, the various supervisory bodies of regional human rights systems and decisions of domestic courts.

The Human Rights Committee has an established jurisprudence that clearly recognizes the special position of political speech. In the case of *Aduayom et al v. Togo*, the applicants who were charged with “political” offenses by violating the *les majeste* law<sup>99</sup> were arbitrarily arrested and expelled from their jobs. In finding violations of Article 19, the Committee observed that:

[T]he freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3.<sup>100</sup>

Similarly, in the case of *Bodrozic v. Serbia* the Human Rights Committee succinctly put forth the central importance of political speech when it held that “the Committee observes, ... that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.”<sup>101</sup>

The jurisprudence of the Human Rights Committee shows that individuals exercising the highest political authority including heads of governments are subject to legitimate criticism including expressions considered to be insulting.<sup>102</sup> This emanates from the underlying assumption that criticisms of public officials form the central tenets of a democratic society where public officials are expected to be the subject of public criticism.<sup>103</sup> The Committee also expressed its concern and stated that laws such as *les majeste*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of public officials and heads of states are incompatible with Article 19(3).<sup>104</sup> In particular, the Committee has clearly stated that the criticism of public institutions including the army and the administration should not be subject to the limitations provided under Article 19(3).<sup>105</sup>

Similarly, the ECHR has repeatedly reiterated the special position of political speech in its case law. In *Feldek v. Slovakia*, which concerned a

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<sup>99</sup> “Lese majeste” is a French term that refers to laws that prohibit insult to a monarch or a leader of a nation.

<sup>100</sup> *Aduayom et. al. v. Togo*, Communication Nos. 422/1990, 423/1990 & 424/1990, U.N. Doc. CCPR/C/57/D/424/1990, at ¶ 7.4 (19 Aug. 1996).

<sup>101</sup> *See Bodrozic v. Serbia and Montenegro*, Communication No. 1180/2003, U.N. Doc. CCPR/C/85/D/1180/2003 at ¶ 7.2 (31 Oct. 2005).

<sup>102</sup> General Comment No. 34, *supra* note 65, at ¶ 38.

<sup>103</sup> *See Bodrozic*, *supra* note 101.

<sup>104</sup> General Comment No. 34, *supra* note 65, at ¶ 38.

<sup>105</sup> *Id.*

defamation case by a public official, the Committee found a violation of freedom of expression and held that:

The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.<sup>106</sup>

The court has also made it clear that Article 10 of the ECHR does not only guarantee comfortable, inoffensive or politically correct expressions, but also to ideas that “offend, shock and disturb.”<sup>107</sup> In brief, as can be seen from the preceding discussions, international human rights law clearly attaches the highest importance to political speech than any other form of speech because of its central importance to the democratic process.

#### **IV. Contemporary Challenges to Freedom of Expression in Illiberal Polities**

Just as Bruce Ackerman wrote about the rise of constitutional democracies in the world,<sup>108</sup> Fareed Zakaria outlined a chilling aspect of it, in the name of the parallel *rise of illiberal democracy*.<sup>109</sup> According to Zakaria, the recurrent problem of many emerging democracies such as Ethiopia has been the lack of entrenchment of liberal democratic constitutionalism. He points out that maintaining sustainable constitutional democracy in any polity requires not only democracy as understood in the sense of conducting regular elections, or the formal recognition of fundamental rights, but also entrenching constitutional liberalism<sup>110</sup> – democracy in substance.<sup>111</sup> In these states, apart from conducting regular elections, the fundamental cornerstones of a constitutional democracy such as rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property are significantly lacking.<sup>112</sup>

The most recent account of such taxonomy of illiberal polities is Mark Tushnet’s idea of authoritarian constitutionalism.<sup>113</sup> Tushnet posits that “authoritarian constitutionalism may best be defined by attributing moderately strong normative commitments to constitutionalism—not strategic

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<sup>106</sup> Feldek v. Slovakia, Eur. Ct. H.R. Rep. 2001-VIII at ¶ 83 [2001].

<sup>107</sup> Handyside v. The United Kingdom, Eur. Ct. H.R. 5 at ¶ 48 [1976].

<sup>108</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 1 VA. L. REV. 771 (1997).

<sup>109</sup> Fareed Zakaria, *The Rise of Illiberal Democracy*, 76(6) FOREIGN AFFAIRS 22 (1997).

<sup>110</sup> *Id.*

<sup>111</sup> President Barack Obama, Remarks by President Obama to the People of Africa at the African Union Headquarters in Addis Ababa, Ethiopia (July 28, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/28/remarks-president-obama-people-africa>.

<sup>112</sup> Zakaria, *supra* note 109, at FN4.

<sup>113</sup> Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015) [hereinafter *Authoritarian Constructionalism*].

calculations—to those controlling these nations.”<sup>114</sup> According to Tushnet, what typically characterizes illiberal polities is the inability of these states in observing the values of constitutional democracy and the prospects of ensuring a limited government in its exercise of power.<sup>115</sup> Although illiberal polities have a moderate normative commitment to ensure liberal constitutional values including freedom of expression, they continue to face structural constitutional problems that significantly constrain the full observance of fundamental freedoms including freedom of expression.<sup>116</sup>

The decline in constitutional liberal democratic practices and the rise of illiberal constitutional impulses is particularly demonstrated if one looks at the decline in the protection of freedom of expression in these polities. The use of national security and anti-terrorism laws, censorship and surveillance, and a resort to the use of other speech related offences continue to have a chilling effect on the exercise of the right to freedom of expression in many countries.<sup>117</sup> Legal reforms in relation to the regulation of the right to freedom of expression over the past decade have also been regressive and reflect the global trend of what has been characterized as “legal deterioration by limitation.”<sup>118</sup>

While this reflects the global challenge to ensure the right to freedom of expression, in few emerging democracies such as Ethiopia the restrictions placed on freedom of expression, in particular on political speech, have constituted one of the most draconian in recent decades.<sup>119</sup> The subsequent sections of the article will discuss the constitutional framework, the legal, political and other elements of liberalism observed in the context of freedom of expression in the contemporary constitutional dispensation of Ethiopia.

## **V. Overview of the Constitutional Framework on Freedom of Expression in Ethiopia**

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE), which has extensive coverage of human rights provisions, explicitly guarantees the right to freedom of expression.<sup>120</sup> Article 29, which provides for the right of thought, opinion and expression, reads:

1. *Everyone has the right to hold opinions without interference.*
2. *Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers,*

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<sup>114</sup> *Id.* at 397. Tushnet also classifies his theory of authoritarian constitutionalism into two sub-categories: “Absolutist constitutionalism,” which has no constitutional limits to what the government can do but is not despotic; and “mere rule of law constitutionalism,” characterized by observance of core rule of law publicity, prospectivity, and generality but is not fully normatively constitutionalist. *See id.* at 415–21.

<sup>115</sup> *Id.* at 394; *see also* CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 20–21 (Cornell Univ. Press 1947).

<sup>116</sup> *Id.*

<sup>117</sup> La Rue, *supra* note 87.

<sup>118</sup> WORLD TRENDS IN FREEDOM OF EXPRESSION & MEDIA DEVELOPMENT, UNESCO 28 (UNESCO Publ’g 2014).

<sup>119</sup> *See Ethiopia*, HUMAN RIGHTS WATCH, <https://www.hrw.org/africa/ethiopia>.

<sup>120</sup> About 1/3 of the constitution extensively deals with human rights provisions.

*either orally, in writing or in print, in the form of art, or through any media of his choice. Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:*

- a. Prohibition of any form of censorship.*
- b. Access to information of public interest. ...*<sup>121</sup>

Nevertheless, the right to freedom of expression as provided under Article 29 is not absolute. Article 29(6) clearly shows that restrictions can be placed on the exercise of freedom of expression aimed at protecting the well-being of the youth, the honour and reputation of individuals. Moreover, Article 19(6) prohibits any propaganda for war as well as the public expression of opinion intended to injure human dignity.

Apart from the constitutional guarantee provided above, Ethiopia is also one of the 48 signatory states that adopted the UDHR in 1948. It is a state party to most of the major international human rights treaties including the ICCPR,<sup>122</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>123</sup> the Convention Against Torture (CAT)<sup>124</sup> and the Convention on the Rights of the Child (CRC).<sup>125</sup> Moreover, it is important to highlight that Article 13(2) of the constitution allows the applications of international human rights instruments in interpreting the meaning of the human rights provisions included in the constitution.

Despite the above international commitments and the constitutional guarantee of freedom of expression, however, Ethiopia continues to be one of the most repressive states with regard to freedom of expression. In particular, subsequent to the political crackdown following the contested 2005 national elections, there is a general state of shrinking political space which significantly limits political speech.<sup>126</sup>

The state justifies the limitations on freedom of expression on the basis of national security (in particular preventing or countering terrorism) and maintaining the *ordre public*. Nevertheless, international human rights supervisory bodies and rights groups have accused the state of manipulating domestic laws as an excuse to silence political dissent.<sup>127</sup> According to Freedom House, the Mass Media and Freedom of Information Proclamation<sup>128</sup> has, among others introduced crippling fines, licensing restrictions for establishing

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<sup>121</sup> FED. DEMOCRATIC REPUBLIC OF ETH. CONST. art. 29.

<sup>122</sup> ICCPR, *supra* note 57.

<sup>123</sup> International Covenant on Economic, Social and Cultural Rights [ICESCR], 16 Dec. 1966, 993 U.N.T.S. 3.

<sup>124</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 26 June 1987, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>125</sup> The Convention on the Rights of the Child [CRC], Nov. 2, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>126</sup> AMNESTY INT'L, DISMANTLING DISSENT: INTENSIFIED CRACKDOWN ON FREE SPEECH IN ETHIOPIA (2011), <http://www.amnestyusa.org/research/reports/ethiopia-dismantling-dissent-intensified-crackdown-on-free-speech-in-ethiopia?page=show>.

<sup>127</sup> African Commission on Human and Peoples' Rights, Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, 12 May 2012, ACHPR/RES. 218 (EXT. OS/XI) 2012, available at <http://www.refworld.org/docid/502doedc2.html>.

<sup>128</sup> ETHIOPIA: PROCLAMATION NO. 590/2008, FREEDOM OF THE MASS MEDIA & ACCESS TO INFORMATION PROCLAMATION, 4 Dec. 2008, available at <http://www.refworld.org/docid/4ba7a6bf2.html> [hereinafter MASS MEDIA PROCLAMATION].

a media outlet, proscribing the right to establish mass media outlets to foreign nationals, and powers allowing the government to control periodical publications.<sup>129</sup>

Similarly, the 2009 Anti-Terrorism Proclamation includes a broad definition of terrorism, which gives the government wide discretion to suppress nonviolent political dissent. Under Article 6 of the proclamation, any publication of a statement that is likely to be understood as a direct or indirect encouragement of terrorism is punishable by up to 20 years in prison.<sup>130</sup> Currently, internationally recognized journalists and some of the leading opposition figures have been imprisoned in relation to the terror charges brought by the government.<sup>131</sup>

## **VI. The Shrinking Political Space and Media Freedom Post 2005**

Since the contested 2005 national election, the government of Ethiopia (GoE) continues to suppress political dissidents and independent media outlet which have led to a shrinking political space in the country.<sup>132</sup> In particular, rights groups argue that the series of measures taken after the contested 2005 election, including the adoption of the anti-terrorism proclamation, the Charities & Societies Law and the Mass Media & Access to Information Proclamation have decimated political dissent in the country.

### **A. Persecution of Journalists and Members of the Political Opposition**

Ethiopia currently has the highest number of journalists in exile, next to only Iran.<sup>133</sup> Since 2010, more than 60 journalists have left the country because of continued persecution from the government. More than 20 journalists are currently in jail for speech related offences, making Ethiopia Africa's second jailor of journalists behind only Eritrea.<sup>134</sup> Since the muted 2010 national elections alone, the GoE has charged at least 38 journalists with various crimes under the Anti-Terrorism Proclamation and the Criminal Code.<sup>135</sup>

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<sup>129</sup> *Ethiopia*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-net/2012/ethiopia>.

<sup>130</sup> ETHIOPIA: PROCLAMATION NO. 652/2009, ANTI-TERRORISM PROCLAMATION, 7 July 2009, available at <http://www.refworld.org/docid/4ba799d32.html> [hereinafter ANTI-TERRORISM PROCLAMATION].

<sup>131</sup> *Centres News: Czech PEN open letter to President Zeman on his response to refugee crisis*, PEN INT'L, <http://www.pen-international.org/pen-world/centres-news/>.

<sup>132</sup> See *supra* note 127; *One Hundred Ways of Putting Pressure: Violations of Freedom of Expression and Association in Ethiopia*, HUMAN RIGHTS WATCH (Mar. 2010), <http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure>.

<sup>133</sup> *Journalism is Not a Crime: Violations of Media Freedoms in Ethiopia*, HUMAN RIGHTS WATCH (Jan. 21, 2015), <https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia>; *The Noose Tightens: Bloggers and Journalists who Criticise Government are Under the Cosh*, ECONOMIST (Aug. 7, 2014), <http://www.economist.com/news/middle-east-and-africa/21611119-bloggers-and-journalists-who-criticise-government-are-under-cosh-noose>.

<sup>135</sup> *Journalism is Not a Crime*, *supra* note 133.

The government's crackdown on the media started in 2005. In June 2005, the GoE arrested tens of thousands of individuals, scores of journalist and members of the political opposition. Among those, 120 individuals were charged and prosecuted for "outrages against the constitution" and other crimes, which also included six publishing houses and more than 20 journalists.<sup>136</sup> Most of the individuals were later pardoned and released from prison as part of a political deal between the GoE and the political opposition, but the climate of constant fear and persecution persists to this day.

A full scale onslaught against private and independent media started in November 2005. The GoE considered independent media outlets as well as the Ethiopian Free Press Journalists' Association (EFPJ) as mouth pieces of the opposition political groups and carried extensive propaganda to undermine their credibility.<sup>137</sup> Subsequently, at least eight newspapers were closed through government pressure and intimidation, and many journalists fled the country. The result of the crackdown on the independent media outlets and journalists was devastating as it drastically affected the media landscape and wiped out the few independent voices that were trying to get a foothold in a difficult legal and political environment.

In 2009, the highly acclaimed Ethiopian newspaper *Addis Neger* was closed because of the relentless pressure that the journalists faced from the government.<sup>138</sup> This inflicted a massive blow on the already weak independent media voices in the country. The absence of a level playing field in the democratic space led to a swiping victory for the ruling party in the 2010 national election, winning 99.6% of the 547 seats in the National Parliament, the House of Peoples Representatives (HPR).<sup>139</sup>

Since 2005, the government's crackdown has been particularly drastic on journalists and independent media outlets. The imprisonment of Temesgen Desalegn, Reeyot Alemu, Eskinder Nega,<sup>140</sup> Woubishet Taye, Elias Kifle and Yousuf Getachew has symbolized the plight of many journalists imprisoned in Ethiopia. The crackdown continued in August 2014 when the Ministry of Justice said in a press release that six magazines and newspapers—*Lomi*, *Enku*, *Fact*, *Jano*, *Addis Guday* and *Afro Times*—were charged with "encouraging terrorism, endangering national security, repeated

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<sup>136</sup> AMNESTY INT'L, JUSTICE UNDER FIRE: TRIALS OF OPPOSITION LEADERS, JOURNALISTS AND HUMAN RIGHTS DEFENDERS IN ETHIOPIA (2011), <https://www.amnesty.org/en/documents/AFR25/002/2011/en/>.

<sup>137</sup> The late Prime Minister Meles Zenawi also stated that "Many of the private media and opposition parties are two sides of a coin ...it is difficult to differentiate one from the other." See THE ETHIOPIAN HERALD (July 8, 2005).

<sup>138</sup> *Ethiopia: Closure of independent newspaper Addis Neger and exile of its Chief Editors*, FRONT LINE DEFENDERS (Dec. 10, 2009), <http://www.frontlinedefenders.org/node/2286> (last visited Apr. 6, 2015).

<sup>139</sup> *Ethiopia: Government Repression Undermines Poll*, HUMAN RIGHTS WATCH (May 24, 2010), <http://www.hrw.org/news/2010/05/24/ethiopia-government-repression-undermines-poll>.

<sup>140</sup> In 2011, the U.N. Working Group on Arbitrary Detentions concluded, "The deprivation of liberty of Eskinder Nega is arbitrary in violation of articles 9, 10 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, ... The Working Group requests the Government to take the necessary steps to remedy the situation, which include the immediate release of Mr. Nega and adequate reparation to him." See G.A. Res. 62, U.N. Doc. A/HRC/WGAD/2012/62 (Dec. 28, 2012).

incitement of ethnic and religious hate, and smears against officials and public institutions.”<sup>141</sup>

The government’s onslaught against dissident political groups has also become more pronounced. On July 8, 2014, the GoE arrested four prominent political activists including: Abraha Desta of the Arena Tigray Party, who is also a lecturer at Mekelle University; Habtamu Ayalew and Daniel Shebeshi, members of the Unity for Democracy and Justice (UDJ) party; and Yeshiwas Assefa of the Blue Party. All were charged for alleged involvement in terrorist activities according to the anti-terrorism proclamation. These political activists were deprived of their right to consult their legal representatives and their family during the detention in the notorious Maekelawi prison centre. Their case is still pending in the Federal High Court.

The most recent highlight of the crack down on journalists and independent media outlets involved the Zone 9 Bloggers. The Zone 9 Bloggers were a group of young political activists that blogged on important social and political matters in Ethiopia. In April 2014, six members of the Zone 9 Bloggers were arrested in Addis Ababa, along with three other journalists. The six bloggers included Atnaf Berahane, Befeqadu Hailu, Abel Wabela, Mahlet Fantahun, Natnael Feleke, and Zelalem Kiberet. Soliana Shimeles, a seventh blogger, was charged in absentia. Moreover, the three journalists who were also associated with the Zone 9 Bloggers, Tesfalem Waldyes, Edom Khassay, and Asmamaw Hailegeorgis, an editor at weekly magazine *Addis Guday*, were arrested in April. All of them were charged under the criminal code and anti-terrorism law in July 2014.<sup>142</sup>

Human Rights Watch’s recent report on the state of freedom of expression also shows that the government has often used guerrilla tactics in order to intimidate and harass dissident voices.<sup>143</sup> These measures have effectively decimated the independent media voices and harshly narrowed the political space. The government’s propaganda also portrayed most independent media outlets as having links to terrorist organisations, which drastically affected their credibility in the larger public.<sup>144</sup>

## **B. Surveillance and Internet Filtering**

The opportunity provided by the advent of information technology to ensure greater public participation in the affairs of the government has been undermined by draconian measure such as internet filtering and blocking, and extensive surveillance programs. Although internet penetration in Ethiopia is very low,<sup>145</sup> a recent study of freedom of expression on the internet shows that Ethiopia is the only country in Sub-Saharan Africa to implement nationwide

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<sup>141</sup> *Ethiopian government to bring criminal charges against six weeklies*, REPORTERS WITHOUT BORDERS (Aug. 12, 2014), <http://en.rsf.org/ethiopia-ethiopian-government-to-bring-12-08-2014,46796.html> (last visited Apr. 12, 2015).

<sup>142</sup> *Journalism is Not a Crime*, *supra* note 133.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Current internet penetration is 1.5, which is very low compared to international standards. *See Freedom on the Net: A Global Assessment of Internet and Digital Media*, FREEDOM HOUSE (2013). According to Internet World Stats, 1.9 percent of Ethiopians are connected to the Internet. By comparison, 47 percent have Internet access in Kenya and 38 percent in Nigeria. *Africa*, INTERNET WORLD STATS (Nov. 6, 2014), <http://www.internetworldstats.com/africa.htm#et> (last visited May 15, 2015).

internet filtering.<sup>146</sup> The government's monopoly of ownership makes it difficult to strengthen the telecom infrastructure and imposes very high costs of usage charges on others, which has been one of the major reasons for the poor growth of information and communication technologies in the country.<sup>147</sup>

The government also undertakes extensive surveillance on political dissidents and journalists. On February 12, 2014, Citizen Lab, a research institute based at the Munk School of Global Affairs at the University of Toronto in Canada, reported that the Government of Ethiopia had been able to acquire advanced surveillance technologies including the FinFisher malware from the Italian based IT company Hacking Team to track political dissidents and journalists both inside and outside the country.<sup>148</sup> In that same year, Mr. Kidane, an Ethiopian political dissident living in the U.S., filed a case in the District of Columbia with the assistance of the Electronic Frontier Foundation against GoE for the surveillance program and its infringement on his right to privacy.<sup>149</sup>

### **C. Discursive Ideologies as a Tool to Undermine Political Dissent**

The GoE has used different discursive ideologies and forged new alliances and international partners to consolidate its political legitimacy. Associated with these interests is also an internal conflicting ideology of the regime which professes to embrace liberal constitutional norms on one hand and leftist illiberal elements on the other, all of which has been antithetical to open and democratic discourse. Much of the legal and political framework shaping political discourse and the freedom of expression in Ethiopia is implicitly, but crucially, influenced by the overarching political programs and policies of the ruling party, EPRDF.<sup>150</sup>

Since 2005, the revolutionary democracy doctrine that the GoE officially endorses has adopted new ideological dimensions, notably the developmental state doctrine. Following the success of South East Asian economies and the support garnered by prominent economists including Mushtaq Khan, Dani Rodrik, Howard Stein and Joseph Stiglitz, the developmental state doctrine has dominated the political rhetoric of the party.<sup>151</sup> While, the developmental state doctrine manifests itself as an economic model largely dependent on state driven economic development, it is essentially a political program. Many point out that liberal democratic values such as respect for human rights and freedom of expression as well as open democratic discourse are antithetical to

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<sup>146</sup> *Id.*

<sup>147</sup> See INT'L TELECOMM. UNION, MEASURING THE INFORMATION SOCIETY REPORT 123 (2014).

<sup>148</sup> The Citizen Lab, *Hacking Team and the Targeting of Ethiopian Journalists* (Feb. 12, 2014), <https://citizenlab.org/2014/02/hacking-team-targeting-ethiopian-journalists/> (last visited Apr. 9, 2015).

<sup>149</sup> See *Kidane v. Fed. Democratic Republic of Eth.*, No. 14-cv-372 (D.D.C. 2015), available at <https://www.eff.org/cases/kidane-v-ethiopia>.

<sup>150</sup> MESERET CHEKOL RETA, *supra* note 15, at XIII.

<sup>151</sup> *Id.* at 623.

its political program. Of particular relevance in analyzing the ideology of revolutionary democracy is its petulant stance on media freedom. Tobias Hagmann and Jon Abbink note that:

Among the structural characteristics that define revolutionary democratic Ethiopia is the absence or very marginal role of free media and civil society organisations including human rights organisations and trade unions.<sup>152</sup>

In more recent times, the EPRDF has openly endorsed China's economic model. Over the past 10 years, Sino-Ethiopian relations have significantly increased. Sino-Ethiopian relations are motivated by ideological factors as much as economic ones. Cabestan points out that, unlike many other African countries like Ghana, Senegal and Zambia, the GOE has endorsed the authoritarian model of the Chinese Communist Party. The EPRDF endorses the *authoritarian developmentalism* model inspired by Lee Kuan Yew of Singapore, which focuses on a state led economy and as such considers human rights and political pluralism necessary tradeoffs to achieve economic development.<sup>153</sup>

In brief, the ruling party has merged two inherently contradictory notions. While it professes to be committed to multi-democracy and liberal constitutional norms, its political ideology of revolutionary democracy is markedly intolerant to political pluralism and multi-party democracy. This political reality paints a dark picture of the current state of free expression and democracy in Ethiopia. If the government is committed to democratic values and sustainable development of democratic goals, it needs to reconcile its broader ideological tenets to fit with the demands of an open and democratic society to which the constitution itself explicitly dictates.

## VII. Regulatory Challenges to Freedom of Expression

At the outset, it is worth repeating that the constitutional framework provides for a robust protection of freedom of expression, including a ban on censorship as well as the importance of diversity of views in state-owned media.<sup>154</sup> In the context of press and media freedom, the constitution emphasizes the special position of media in ensuring the vitality of a democratic process and reiterates that special measures should be taken to ensure its operational independence and its ability to entertain diverse opinions.<sup>155</sup> Where the media is controlled by the state, media should also have

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<sup>152</sup> Tobias Hagmann & Jon Abbink, *Twenty Years of Revolutionary Democratic Ethiopia, 1991 to 2011*, 5 J. E. AFR. STUDS. 579, 584 (2011).

<sup>153</sup> Robert Looney, *Ethiopia's Economic Miracle Is Running Out of Steam: Why It's Time for East Africa's Big Success Story to Change the Way it Does Business*, FOREIGN POLICY, Apr. 16, 2015, <https://foreignpolicy.com/2015/04/16/ethiopias-economic-miracle-is-running-out-of-steam-east-africa/>.

<sup>154</sup> See FED. DEMOCRATIC REPUBLIC OF ETH. CONST. art. 29(3)(a) & 29(5).

<sup>155</sup> *Id.* at art. 29(4).

the obligation to entertain diverse views in order to ensure that state media is not used as a political propaganda for the ruling party.<sup>156</sup>

Yet, constitutional guarantees without effective systems of enforcement of human and fundamental rights does not provide for freedom of expression in the media. This is evident not only in Ethiopia but in many other illiberal polities that have a very low record of media freedom.<sup>157</sup> The functionality of basic constitutional values like freedom of expression is ensured if there is an open and democratic political structure including an independent judiciary, monitoring by independent watch dog institutions and national human rights organizations, and participation by a civil society, the media and a multi-party democracy.<sup>158</sup>

### **A. Anti Terror Laws and the Silencing of Political Dissent**

In the wake of the 9/11 attacks and the subsequent adoption of United Nations Security Council Resolution (UNSCR) 1373 in 2001, many states have become increasingly vigilant in adopting different laws aimed at countering terrorism.<sup>159</sup> In particular, since the adoption of UNSCR 1624 banning the glorification and incitement of terrorism, there has been a proliferation of domestic laws that explicitly prohibit incitement to terrorism. The down side of this campaign has been the use of anti-terror laws including offences such as the praising, glorifying or justifying terrorism to stifle political dissent and legitimate criticism of government policy.<sup>160</sup> The lack of clarity in the definition of terrorism at the international level and its conceptual fluidity has prompted authoritarian states to use anti-terror laws as typical ways of suppressing legitimate political dissent and freedom of expression.<sup>161</sup> In constitutional law parlance, this has triggered what some have called the adoption of anti-constitutional ideas with draconic effects on free expression.

Ethiopia adopted the Anti-Terrorism Proclamation in 2009.<sup>162</sup> There are credible arguments that posit that the adoption of the Anti-Terrorism Proclamation was the product of political expediency rather than the demands of public order and security interests of the state.<sup>163</sup> One of the most

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<sup>156</sup> *Id.* at art. 29(5).

<sup>157</sup> Empirical studies show that more than 97% of the constitutions in force since 2006 have formally recognized the right to freedom of expression as a basic human right. See David S. Law & Mila Versteeg, *Evolution and Ideology of Global Constitutionalism*, 99(5) CALIF. L. REV. 1163, 1200 (2011).

<sup>158</sup> MESERET CHEKOL RETA, *supra* note 15, at XIV.

<sup>159</sup> See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>160</sup> CRAM, *supra* note 87.

<sup>161</sup> See Cyrille Begorre-Bret, *Terrorism, Globalization and the Rule of Law: The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1 (1987); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241 (2003); Hodgson & Tadros, *supra* note 88, at 494; Lauren Mellinger, Note, *Illusion of Security: Why the Amended EU Framework Decision Criminalizing "Incitement to Terrorism" on the Internet Fails to Defend Europe from Terrorism*, 37 SYRACUSE J. INT'L L. & COM. 339 (2010).

<sup>162</sup> ANTI-TERRORISM PROCLAMATION, *supra* note 130.

<sup>163</sup> See Wondwossen Demissie Kassa, *Examining some of the Raisons d'être for the Ethiopian Anti-Terrorism Law*, 7 MIZAN L. REV. 49 (2013).

controversial aspects of the law is in regards to the definition of terrorism. Without defining the meaning of terrorism, the Anti-Terrorism Proclamation provides little guidance as to what constitutes as a terrorist act. Under this doctrine, apparent terrorist activity involves any activity that causes serious interference or disruption of any public service. Moreover, Article 3 fails to define which elements of the crime constitute as coercive, intimidating and destabilizing character.<sup>164</sup> This lack of a clear and comprehensive definition of terrorism has been particularly problematic by making it difficult to distinguish legitimate political dissent from unwarranted terrorist activities.

The most draconic provision of the Anti-Terrorism Proclamation that has serious repercussions on freedom of expression is Article 6, which prohibits the encouragement of terrorism. An Article 6 violation can include a broad range of legitimate speech and, as such, bans any speech that directly or indirectly “encourages” or “induces” terrorist acts.<sup>165</sup> Moreover, this provision sets a subjective standard, making it extremely difficult to establish the causal connection between the purported terrorist act and the particular speech at hand. The law does not provide an objective assessment of the form of speech made and the *mens rea* of the speaker but rather shifts the test in favor of the audience.<sup>166</sup> Moreover, unlike the U.S.’s *Brandenburg* test, the law does not clearly require either the imminence of the purported harm or a closer scrutiny of the likelihood of its occurrence.<sup>167</sup>

Thus if a speech made in the context of a public discourse is likely to be understood by some portions of the public as likely to incite violence, it suffices to show a purported violation of the law. What makes incitement to terrorism even more problematic is the fact that, by its nature it is an inchoate crime, in the sense that the commission of the crime is established without the need to show the actual resulting harm. Unless legal rules are crafted more narrowly and carefully, the possibility for abuse including the silencing of political dissent is enormous.

The Anti-Terrorism Proclamation also provides extensive powers to governmental authorities to collect information from any media outlet.<sup>168</sup> The law gives power to the government to conduct covert searches without the possibility to protect confidential information held by the media, religious officials, lawyers and other persons who have a professional responsibility to maintain confidentiality.<sup>169</sup> Moreover, the Anti-Terrorism Proclamation allows a broad range of evidence, including confessions, intelligence reports and

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<sup>164</sup> Hiruy Wubie, *Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective*, 25(2) J. ETH. L. 46, 47 (2012).

<sup>165</sup> See ANTI-TERRORISM PROCLAMATION, *supra* note 130, at art. 6.

<sup>166</sup> ARTICLE 19 GLOBAL CAMPAIGN FOR FREE EXPRESSION, COMMENT ON ANTI-TERRORISM PROCLAMATION OF ETHIOPIA (2010), available at <https://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-anti-terrorism-proclamation-2009.pdf>.

<sup>167</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>168</sup> ANTI-TERRORISM PROCLAMATION, *supra* note 130, at art. 12, 14.

<sup>169</sup> *Id.* at art. 17, 18.

communications gathered through interception or surveillance, to be admissible in a court of law.<sup>170</sup> It is likely that confessions obtained through the use of ill treatment and torture, which is clearly unconstitutional, can be used as evidence in a court of law.<sup>171</sup> This extensive set of powers to collect information and conduct mass surveillance particularly affects the media as it has the potential to erode the protection of journalistic sources.<sup>172</sup> If Ethiopia is to make its laws on par with international standards, the Anti-Terrorism Proclamation should either be scrapped altogether or at least significantly amended to make the law commensurate with international standards.<sup>173</sup>

## **B. Laws Regulating the Mass Communication Media**

On balance there are commendable provisions in the press law that further the cause of free expression and allow for greater transparency in the conduct of government. The 2008 Mass Media and Freedom of Information Proclamation includes some positive aspects, such as a bans on censorship, pre-trial detention of journalists,<sup>174</sup> and the right of access to information.<sup>175</sup> Nevertheless, no significant improvement was made to the prior press law before the new one came into force. To the contrary, the new media law provides for draconian legal provisions that have a chilling effect on freedom of expression.

One of those provisions that drastically affects the right to freedom of expression has been the broad prohibitions on defamation and false accusations.<sup>176</sup> In particular, it allows prosecutions for defamatory or false accusations on constitutionally mandated legislative, executive or judicial authorities. The law also denies the normal protections made available by the Criminal Code to freedom of expression by making defamation cases subject to complaints made by individual victims.<sup>177</sup> Moreover, while the criminal law is limited to cases where defamatory statements were made with intent to injure an individual, the media law extends this to include “false accusations” drastically affecting the protection afforded to political speech.<sup>178</sup> In a similar vein, the criminal law also includes archaic understandings on defamation that do not meet international standards as well as legal developments in other democratic societies. Current developments in international and comparative

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<sup>170</sup> *Id.*

<sup>171</sup> See FED. DEMOCRATIC REPUBLIC OF ETH. CONST. art. 19(5).

<sup>172</sup> *Id.* at art. 19.

<sup>173</sup> See U.N. Human Rights Committee (HRC), *Concluding Observations of the Human Rights Committee: Ethiopia* ¶ 15, 19 Aug. 2011, CCPR/C/ETH/CO/1, available at <http://www.refworld.org/docid/4fb2488d2.html>.

<sup>174</sup> MASS MEDIA PROCLAMATION, *supra* note 128, at art. 4.

<sup>175</sup> *Id.* at art. 11 & 12.

<sup>176</sup> See *id.* art. 43(7).

<sup>177</sup> The Revised Criminal Code of the Federal Democratic Republic of Ethiopia provides that defamation cases should be subject to complaints made by victims of the defamatory statement. See Criminal Code of the Fed. Democratic Republic of Eth. art. 613, 9 May 2005, available at <http://www.wipo.int/wipolex/en/details.jsp?id=11359>.

<sup>178</sup> *Id.* at art. 613; MASS MEDIA PROCLAMATION, *supra* note 128, at art. 43.

law in other countries show the increasing decriminalization of defamation laws. At any rate, imprisonment is never an appropriate penalty for defamation.<sup>179</sup>

The aforementioned broad provisions have had a chilling effect on freedom of expression, in particular on political speech made in the context of public discourse. It instills fear on independent voices including political activists and journalists through self-censorship. The law makes it extremely difficult to criticise governmental officials and their policies as they have they always hinge on the accuracy of the information.<sup>180</sup> It should also be noted that journalistic activity sometimes requires a level of exaggeration and the making of false statements. In this regard, it is also useful to make a distinction between facts and opinions. It might be proper to demonstrate the existence of facts; however, value judgements and opinions cannot readily be susceptible to proof.<sup>181</sup>

The Mass Media Proclamation also indirectly erodes the constitutional guarantee against censorship. It allows the Office of the Public Prosecutor to have the authority to impound and prevent any publications that may cause a clear and present danger on the national security of the state.<sup>182</sup> These broadly defined powers clearly violate the constitutional guarantee against censorship.<sup>183</sup> The Media Proclamation also provides onerous registration and licensing requirements as well as excessive fines for speech related offences. The government has used these provisions to ban legitimate criticisms of government policy and alternative political views as part of its effort to silence political dissent. In many areas of political speech made in the context of public discourse, it is essential that opinions and views made against public officials as well as policies and programs of the government should be tolerated to the widest degree possible.

### **C. The Charities and Societies Law**

The existence of a vibrant civil society is the oxygen of a democratic society.<sup>184</sup> A vibrant civil society provides an important platform for enhancing the democratic process by supporting existing government initiatives in the political, economic and social realms. In the context of freedom of expression, civil society also provides an important platform for dialogue and enhancing the democratic space. In states like Ethiopia, where there are weak democratic

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<sup>179</sup> See General Comment No. 34, *supra* note 65, at ¶ 47.

<sup>180</sup> For example, the U.S. Supreme Court has set the standard that statements made against public officials cannot be compensated for defamation unless the statements were made with *actual malice*, i.e, with knowledge that it was false or reckless disregard of the truth. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>181</sup> See *Lingens v. Austria*, *supra* note 72; *Jerusalem v. Austria*, App. No. 26958/95 [2001]; *Dichand and Others v. Austria*, App. No. 29271/95 [2002].

<sup>182</sup> See MASS MEDIA PROCLAMATION, *supra* note 128, at art. 42.

<sup>183</sup> See FED. DEMOCRATIC REPUBLIC OF ETH. CONST. art. 29(3)(a).

<sup>184</sup> See Ban Ki-moon, *Secretary-General's Message for 2015*, UNITED NATIONS (Sept. 15, 2015), <http://www.un.org/en/events/democracyday/2015/sgmessage.shtml>.

institutions, the role of CSOs is particularly relevant in facilitating dialogue and democratic deliberation.

In the aftermath of the May 2005 election, the government had persistently followed a policy of dismantling independent civil society organisations. The culmination of this crackdown was the adoption of the Charities and Societies Law.<sup>185</sup> The adoption of this law was motivated by the political outcomes that came in the aftermath of the 2005 national elections. The ruling political party, the EPRDF, had the belief that many of the civil society organisations operating in the country had taken sides with the political opposition and unfairly influenced the political outcome.<sup>186</sup> This conclusion forced the government to resort to draconian measures aimed at cracking down on CSOs, particularly those working in the area of governance and human rights.<sup>187</sup>

The harshest aspect of the law provides that local non-governmental organizations operating in Ethiopia on governance and human rights advocacy issues cannot receive more than 10% of their funding from external sources.<sup>188</sup> The Charities and Societies Law also bans anonymous donations thereby indirectly creating an administrative barrier to the already difficult legal regime.<sup>189</sup> Most civil society organisations have limited financial capacity domestically and largely rely on international support. The fact that they will have to raise more than 90% of their income from domestic sources means that they will have to drastically reduce their activities, close their office, or fit with the development rhetoric of the government affiliated organizations.

These legal provisions had a direct impact on human rights defenders and rights based organisations. For example, two of the most successful NGOs working on human rights in Ethiopia, the Ethiopian Human Rights Council (HRC) and the Ethiopian Women Lawyers Association (EWLA), suffered a major blow when the government froze their bank accounts worth millions of dollars by applying the Charities Law retroactively. Subsequent developments clearly showed that these two most prominent human rights organisations had to drastically decrease the range and scope of their activities and close many of their offices.<sup>190</sup>

## D. Laws on Hate Speech

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<sup>185</sup> ETHIOPIA: PROCLAMATION NO. 621/2009, CHARITIES & SOCIETIES PROCLAMATION, 13 Feb. 2009, available at <http://www.refworld.org/docid/4ba7a0cb2.html> [hereinafter CHARITIES & SOCIETIES].

<sup>186</sup> There is a persistent trend of using repressive CSOs laws in many authoritarian states. See *Donors: Keep Out*, ECONOMIST (Sept. 13, 2014), [http://www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations?fsrc=scn/tw\\_ec/donors\\_keep\\_out](http://www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations?fsrc=scn/tw_ec/donors_keep_out).

<sup>188</sup> CHARITIES & SOCIETIES, *supra* note 185, at art. 2(3).

<sup>189</sup> *Id.* at art. 77(3).

<sup>190</sup> See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) *Concluding Observations: Ethiopia*, U.N. Doc. CEDAW/C/ETH/CO/6-7 (July 27, 2011).

Hate speech in Ethiopia continues to be one of the most sensitive forms of expression. In such a multi-ethnic and multi-religious country, the issue of regulating hate speech is important because of the increased use of hate speech in the political discourse of the country.<sup>191</sup> The use of hate speech has also historically been a thorny issue, where many political minority ethnic groups were subjected to discrimination and political ridicule.<sup>192</sup> Because of these factors and the continuing contested national identities of different ethnic groups, defining the limits of hate speech in Ethiopia cannot be overemphasized.

Since the new constitutional order was introduced in Ethiopia in 1995, the use of hate speech has been resuscitated in part because of the ethnic federalism that the very state upholds and the silencing of nationalist sentiments in the political discourse. The incidence and use of hate speech has also increased with the advent of different internet-based social media platforms.<sup>193</sup> Arguably, the use of hate speech in the political discourse of Ethiopia has been used by both sides of the political camp — the ruling party and the opposition political groups.

Nevertheless, the government's control of the media outlets and the suppression of freedom of expression led to the monopoly of the media platform and the democratic space by the government, limiting the possibility of contesting the government's narratives independently. This was particularly evident during the 2005 national election, where then-Prime Minister Meles Zenawi compared opposition political groups, prominently the CUD members, with the "policies of the *interahamwe* when Hutu Militia massacred Tutsis in Rwanda."<sup>194</sup> In a similar vein, the opposition used some inflammatory hate speech in the lead up to the 2005 national election.<sup>195</sup>

One of the challenges in relation to hate speech has been the lack of a clear definition on what the proper limits are under Ethiopian Law. The existence of minority groups that have been marginalized in the political sphere in the country has made it very difficult to strike a balance with the need for adequate protection of political speech.<sup>196</sup> Moreover, the legal framework on hate speech is fragmented whereby provisions in different pieces of legislations

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<sup>191</sup> Ethnic groups in Ethiopia include the Oromo, Amhara, Somali, Tigray, and Sidama, among others.

<sup>192</sup> This is particularly true when it comes to political minority groups like the Oromos and Peoples of the Southern Nations and Nationalities, where successive Ethiopian Kings and political elite have used derogatory terms which had a demeaning effect, thereby undermining their ethnic and national identity.

<sup>193</sup> IGINIO GAGLIARDONE, ALISHA PATEL & MATTI POHJONEN, UNIV. OF OXFORD, MAPPING AND ANALYSING HATE SPEECH ONLINE: OPPORTUNITIES AND CHALLENGES FOR ETHIOPIA 32 (2014).

<sup>194</sup> See *Ethiopia Zenawi Accuses Opposition of Agitating Poll Violence*, SUDAN TRIBUNE, May 6, 2005, [www.sudantribune.com/spip.php?article9432](http://www.sudantribune.com/spip.php?article9432) (last visited May 26, 2015).

<sup>195</sup> *Id.*

<sup>196</sup> Yared Mengistu, *Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 352 (Michael Hearth & Peter Molnar eds., Cambridge Univ. Press 2012).

can be applied to the case of hate speech.<sup>197</sup> The 2005 Revised Criminal Code of Ethiopia provides certain provisions that can be applied to restrict hate speech. Article 486(b) prohibits inciting the public through false rumours, proscribes fomenting dissension, arousing hatred, or stirring up acts of violence or political, racial or religious disturbances.<sup>198</sup> Moreover, Article 816 also prohibits blasphemous expressions against religion.<sup>199</sup>

The government has, at times, used hate speech expressions to silence political expressions as evidenced by the aftermath of the 2005 national election. Members of the CUD, the then-major opposing political party, including the party chairman engineer Hailu Shawel and 130 others, were charged with incitement to genocide.<sup>200</sup> Although the charges were later dropped, hate speech has continued to be one of the major contentious issues to have a chilling effect on political speech. A recent survey on online hate speech in Ethiopia by the University of Oxford has also clearly demonstrated the increase in the use of hate speech in the contemporary political discourse in the country.<sup>201</sup>

While hate speech that constitutes an incitement to violence should be restricted in accordance with law, it can often be the case that these laws can be used to silence political dissent and be repurposed as a tool for politicization. The fact that the EPRDF's political legitimacy and program is founded on the protection of minority rights and the rights of nations, nationalities and peoples also makes it easier to manipulate the political process in order to silence political speech.<sup>202</sup> While some Ethiopian scholars acknowledge the fact that hate speech may be important to "shield" marginalized and historically disadvantaged ethnic groups from verbal abuse,<sup>203</sup> the current legal and political framework drastically affects the ability to make legitimate political expressions which could have significant influence in the vitality of the democratic process.<sup>204</sup>

## VIII. Conclusion

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<sup>197</sup> *Id.* at 363.

<sup>198</sup> See Criminal Code of the Fed. Democratic Republic of Eth. art. 486(b), 9 May 2005, available at <http://www.wipo.int/wipolex/en/details.jsp?id=11359>.

<sup>199</sup> Criminal Code of the Fed. Democratic Republic of Eth., at art. 816.

<sup>200</sup> Fed. Public Prosecutor v. Hailu Shawel, Criminal Charge Number 432/1998 (unpublished).

<sup>201</sup> GAGLIARDONE, PATEL & POHJONEN, *supra* note 193.

<sup>202</sup> Yared, *supra* note 196, at 371.

<sup>203</sup> *Id.* But here, Yared, when using the term "verbal abuse," seems to confuse the notion of "fighting words," which are outside the protection of freedom of expression and hate speech laws. There is a general consensus that fighting words or insulting words that can trigger imminent lawless action fall outside of the protection of freedom of expression. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

<sup>204</sup> Many scholars have contended that hate speech laws should be banned because they perpetuate inequality among different groups that have been disadvantaged and, as such, is antithetical to the democratic process. See CATHARINE MACKINNON, *ONLY WORDS* (Harv. Univ. Press 1993); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990). However, a more dominant argument has been that hate speech should be protected as it enables minority or disadvantaged groups to negotiate their position in a democratic society. See C. Edwin Baker, *Of Course, More than Words*, 61 U. CHI. L. REV. 1181 (1994).

Twenty years after the adoption of the FDRE Constitution, the state of democracy and media freedom in Ethiopia is currently at a crossroads. Since the disputed 2005 national election, there has been a shrinking democratic space and decreased political speech in the country. The government has adopted draconian laws and regulations including the Anti-Terrorism Proclamation which have effectively decimated political pluralism and multi-party democracy, as well as suffocated independent media outlets. If the Constitution promises to establish a political community “founded on the rule of law and capable of ensuring a lasting peace, [and] guaranteeing a democratic order,”<sup>205</sup> the adequate guarantees of freedom of expression and media freedom, and consolidating multi-democracy should also form an integral part of the body politic.

The country’s continuous economic growth should be backed by political reforms that ensure the vitality of multi-party democracy and the freedom of expression of individuals. Decades of hard fought achievements that the country has been able to sustain will be in constant jeopardy, unless all inclusive significant legal and political reforms are made to ensure the protection of freedom of expression and consolidate its democratic trajectory.

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<sup>205</sup> FED. DEMOCRATIC REPUBLIC OF ETH. CONST. Preamble.