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Articles

4 KATHLEEN BARTZEN CULVER & FRANK LOMONTE

Clinical Journalism Education: Legal and Ethical Implications of Faculty-Led Reporting Laboratories

30 CHRISTOPHER TERRY & SARAH K. WILEY

How Bad Is It? Prior Restraint Bad: Judicial Election Advertising After *Citizens United v. FEC*

37 CHRISTOPHER PHIRI

Criminal Defamation Put to the Test: A Law and Economics Perspective

64 SWAPNIL TRIPATHI

Cinema and Censorship in India: A Political Restriction on Freedom of Speech

Clinical Journalism Education: Legal and Ethical Implications of Faculty-Led Reporting Laboratories

Kathleen Bartzen Culver* & Frank LoMonte**

More U.S. journalism schools are launching, or becoming partners in, sophisticated news-gathering operations. Operating a news outlet within the confines of an educational institution presents unique challenges and unanswered questions. This research explores how journalism educators who lead courses that publish publicly conceptualize their roles with regard to legal and ethical issues. It explores the issues that most commonly confront these instructors and highlights concerns that educators may be overlooking.

Key words: journalism education, investigative reporting, copyright ownership, liability, censorship

I. Introduction and Summary

Campus-based reporting laboratories are producing increasingly sophisticated journalistic work, compensating in part for downsized professional newsroom staffing. Responding to the challenge to reconceive their educational mission around the “teaching hospital” service model, more U.S. journalism schools are launching, or becoming partners in, sophisticated news-gathering operations whose mission includes in-depth, long-form reporting.

Operating a news outlet within the confines of an educational institution presents unique challenges, including maintaining continuity in a “newsroom” that turns over its “staff” at least once a year, as well as external and internal pressures that may discourage pursuing sensitive subjects. Because this model is relatively new, unanswered legal questions await clarification, including ownership of jointly produced work and legal liability for its consequences, as well as questions about the freedom of students and instructors to pursue their chosen projects while under university oversight. Tensions over in-depth investigative reporting in the campus setting have provoked occasional confrontations, as occurred in 2019 at the University of Illinois, where administrators told university-salaried radio journalists that they could not promise confidentiality to student sources who report sexual misconduct.¹

As digital technologies have transformed news industries, they’ve also transformed journalism classrooms. As a result, educators like Boston University’s Michelle Johnson – whose students unexpectedly found themselves covering the biggest story in America, when lethal homemade bombs detonated along the route of the Boston Marathon in 2013 – increasingly find themselves leading reporting and production teams at work on news coverage for public

¹ Mary Hansen & Rachel Otwell, *NPR Illinois Journalists Can’t Report Freely on University of Illinois Sexual Misconduct. These Organizations Want that to Change*, PROPUBLICA (Nov. 8, 2019), <https://www.propublica.org/article/npr-illinois-journalists-cant-report-freely-on-university-of-illinois-sexual-misconduct-these-organizations-want-that-to-change>.

audiences.² Yet little scholarly attention has been paid to the legal and ethical implications of this transformation from “professor” to “publisher.”³

This research seeks to explore how journalism educators who lead courses that publish publicly conceptualize their roles with regard to legal and ethical issues. It covers the issues that most commonly confront these instructors, as well as the strategies and tactics they employ in addressing such issues, and highlights concerns that educators may be overlooking.

II. How We Got Here: The Transformation of Journalism Education

Traditionally, students seeking hands-on experience as journalists had two alternatives: accept a summer internship at a professional news organization or work on the college newspaper.⁴ Campus newspapers still very much exist – a few even operate as separately incorporated business entities with full autonomy from their host schools – but they no longer represent the exclusive (or perhaps even the primary) opportunity for students to obtain a published portfolio of work samples under professional-style working conditions. The advent of online publishing – *The New York Times* debuted its first web edition in January 1996 – eliminated cost and distribution barriers that once made it impractical for journalism schools to operate their own “newspapers.”⁵ The ease and affordability of web publishing enabled instructors to publicly share student work that formerly – unless picked up by the campus newspaper – reached only the professor’s eyes.

The University of Missouri is credited with its “Missouri Method” of training young journalists by putting them to work in a full-fledged community newspaper, *The Missourian*, which for over a century has been edited by experienced professionals.⁶ Northwestern University and Columbia University began their own student-staffed news services during the 1960s and ‘70s, furnishing reports to professional print and broadcast outlets in their respective markets.⁷ One of the most sophisticated and enduringly successful operations, Capital News Service at the University of Maryland, has served since 1990 as the statehouse bureau for more than 40 professional media clients, with student reporters holding down full-time workday schedules in exchange for course credit.⁸ As technology diminished the transactional friction of publishing, clinical news labs proliferated rapidly. Virginia Commonwealth University opened a news bureau to cover the nearby state Capitol in 1994, providing coverage to small news outlets throughout the state without a full-time statehouse presence.⁹ Comparable news-service models followed during the 2000s at the City University of New York, Florida International University, Columbia College-Chicago, Youngstown State University and elsewhere.¹⁰ Founded in 2007, Arizona State

² Kathleen Bartzen Culver, *The Accidental Publisher*, EDITOR & PUBLISHER (Sept. 15, 2015), <https://www.editorandpublisher.com/stories/the-accidental-publisher.97982?>

³ *Id.*

⁴ Eric Freedman & David Poulson, *Real-World Learning of Public Affairs and Environmental Journalism: Two Models*, 70 JOUR. & MASS COMM. EDUCATOR 187 (2015).

⁵ Joseph Lichterman, *20 years ago today, NYTimes.com debuted ‘on-line’ on the web*, NIEMAN LAB (Jan. 22, 2016), <https://www.niemanlab.org/2016/01/20-years-ago-today-nytimes-com-debuted-on-line-on-the-web/>.

⁶ Pat Louise, *J-schools in transition*, GATEWAY JOURNALISM REV. (Dec. 14, 2016), <http://gatewayjr.org/j-schools-in-transition/>.

⁷ Tim Francisco, Alyssa Lenhoff & Michael Schudson, *The Classroom as Newsroom: Leveraging University Resources for Public Affairs Reporting*, 6 INT’L J. OF COMM. 2677 (2012).

⁸ *Id.*

⁹ Freedman & Poulson, *supra* note 4.

¹⁰ Francisco *et al.*, *supra* note 7.

University's Cronkite News Service has more reporters covering state government than any other Arizona outlet, and is the only Arizona news organization with a presence in Washington, D.C.¹¹

Clinical-style programs exist in many styles and permutations. Some universities simply provide hosting for separately incorporated nonprofit journalism outlets, which may benefit from the assistance of faculty and students but are otherwise independent business entities (examples include the Wisconsin Center for Investigative Journalism at the University of Wisconsin-Madison and the Iowa Center for Public Affairs Journalism at the University of Iowa).¹² Others have been structured as (or have evolved into) primarily extracurricular activities unmoored to a single course, including FIU's South Florida News Service and CUNY's NYCity News Service.¹³

The degree of university financial support varies with the structure; a 2013 survey found direct subsidies ranging from \$150,000 annually for a hyperlocal news site ("Neon Tommy") at the University of Southern California to just a few thousand dollars elsewhere.¹⁴ Few news sites enjoy "full rides" from their institutions, and most supplement their university funding with philanthropic grants or subscriber revenue.¹⁵ Staffing at the sites also varies. Some rely primarily, or exclusively, on class-generated curricular work, others supplement curricular work with more advanced students working for pay, and others distribute primarily the work of in-residence professionals assisted by student researchers.¹⁶

Whether they are the product of students or of professionals-in-residence (or some combination), campus-based journalism laboratories regularly produce work rivaling that of traditional professional outlets. The University of Maryland's Howard Center for Investigative Journalism, just launched in 2019, won a string of national awards for its collaboration with NPR on an in-depth series about how climate change-driven heat disproportionately affects the urban poor in Baltimore,¹⁷ The New England Center for Investigative Reporting ("NECIR") at Boston University was recognized with a 2019 Edward R. Murrow Award for a radio series about massage parlors that serve as fronts for human trafficking. In collaboration with a Boston public radio station, NECIR reporters reopened the 30-year-old case of a convicted murderer, Darrell Jones, leading to a new trial and his exoneration. An investigation by the Schuster Institute for Investigative Journalism at Brandeis University led to the 2016 release of a convicted rapist who had spent three decades in prison, after a judge reexamining the case found the key physical evidence flawed.¹⁸ In a recent example of a student investigative reporting lab turning scrutiny on its own institution, a reporter from the University of Southern California's "Beacon Project" broke a story, published in partnership with BuzzFeed News, alleging that USC turned a blind eye

¹¹ Leonard Downie Jr., *Big Journalism on Campus*, AMER. JOURNALISM REV. (Dec. 2011/Jan. 2012), <https://ajrarchive.org/Article.asp?id=5200>.

¹² See WISCONSIN WATCH, FUNDING, <https://www.wisconsinwatch.org/about/funding/>; IOWAWATCH.ORG, ABOUT, <https://www.iowawatch.org/about/>.

¹³ Francisco *et al.*, *supra* note 7.

¹⁴ Schaffer, *supra* note 23.

¹⁵ *Id.*

¹⁶ Freedman & Poulson, *supra* note 4.

¹⁷ Barbara Allen, *A great newsletter for college journalism, lessons on transparency and a student media project wins big*, POYNTER.ORG (May 1, 2020), <https://www.poynter.org/educators-students/2020/a-great-newsletter-for-college-journalism-lessons-on-transparency-and-a-student-media-project-wins-big/>.

¹⁸ Bruce Gellerman, *Springfield Man Incarcerated For 30 Years Is Set Free After Judge Overturns Rape Conviction*, WBUR.COM (Feb. 11, 2016), <https://www.wbur.org/morningedition/2016/02/11/george-perrot-set-free>.

toward decades' worth of reports from patients that a doctor at the student health center sexually molested them.¹⁹

The move toward more sophisticated content creation has been fueled, in large part, by the influx of talent with recent, high-level newsroom experience into the teaching ranks, as experienced journalists take buyouts or seek employment more financially stable than corporate newsrooms.²⁰ For instance, Arizona State's acclaimed News21 project has benefited from an all-star lineup of faculty advisers including Leonard Downie Jr., former executive editor of *The Washington Post*; Jacquee Petchel, former senior editor for investigations and enterprise at *The Houston Chronicle*; and Steve Doig, former research editor for *The Miami Herald*.²¹ At Northeastern University, *Boston Globe* Pulitzer Prize winner Walter Robinson of "Spotlight" fame started an investigative reporting course in 2007 that has produced a dozen front-page stories for the *Globe*.²²

News labs benefit their host educational institutions in a variety of ways, including by offering students "experiential" learning opportunities, meeting objectives for "service learning," and promoting community engagement that fosters the university's relationship with its stakeholders as a "good neighbor."²³ A collateral benefit of involving educators as co-creators with their students is that the instructors keep their skills sharp and current.²⁴

The success of college journalism labs depends largely on willing professional partners, and recent changes in the news industry have diminished resistance to publishing student work.²⁵ News executives are increasingly amenable to collaboration and resource-sharing, even with perceived competitors, and increasingly receptive to offers of free or low-cost material to augment their diminished coverage capacity.²⁶ Francisco and his co-authors quote a former *Philadelphia Inquirer* editor – who left to run an investigative reporting lab at the University of California, Berkeley – saying that, during his newsroom career, collaborations were disfavored both for competitive reasons and because of perceived management challenges.²⁷ Downie describes the News21 project as part of a larger nationwide phenomenon of for-profit legacy media acceding to collaborate with nonprofit, donor-supported local news sites "to publish and broadcast stories they can no longer afford to produce on their own."²⁸

The move toward more experiential, public-facing journalism education is in no way unique to the United States. In Spain, the Pompeu Fabra University (UPF) in Barcelona operates an ambitious network of partnerships with both private and public media outlets, including the English-language Catalan News Agency (Agència Catalana de Notícies, or ACN), founded in

¹⁹ Sasha Urban, *48 Male Patients Say A USC Doctor Sexually Abused Them – And The University Was Warned*, BUZZFEED NEWS (Aug. 8, 2019), <https://www.buzzfeednews.com/article/sashaurban/usc-doctor-sexual-abuse-dennis-kelly>.

²⁰ Freedman & Poulson, *supra* note 4.

²¹ NEWS21.COM, ABOUT NEWS21, <https://news21.com/about/>.

²² Francisco *et al.*, *supra* note 7.

²³ Jan Schaffer, *Innovations in the Delivery of Local Online News*, 8 I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY 543 (2013).

²⁴ Freedman & Poulson, *supra* note 4.

²⁵ Schaffer, *supra* note 23.

²⁶ *Id.*

²⁷ Francisco *et al.*, *supra* note 7.

²⁸ Downie, *supra* note 11.

1999.²⁹ Journalism schools in Denmark, France, Romania and Sweden have joined with UPF to form the Integrated Journalism in Europe (IJIE) consortium, with financial support from the European Commission, which describes itself as a “lifelong learning program.”³⁰ Student-produced coverage is disseminated to CNA subscribers along a wire-service business model. Students compete for slots in the program by producing stories under simulated conditions. Those chosen to work for CNA generate an average of 300 published articles a year, and the program reports high levels of satisfaction both from student participants and from subscribers. This represents just one of dozens of professional-student collaborative models that have arisen during the digital generation, facilitated by the ease of online distribution and given urgency by the decline in professional newspaper employment.

While a minority of U.S. clinical programs overtly describe their focus as “investigative,” the authors of this article identified investigative journalism as an area worthy of special attention because investigative reporting amplifies both the legal needs and the legal risks associated with news production. Journalists working on investigative projects are likely to encounter a need to obtain records from recalcitrant government agencies through freedom-of-information laws. Investigative stories require careful vetting because they may point an accusatory finger at litigious institutions and individuals. Educational institutions – and their in-house counsel – may be especially sensitive to pressure from influential targets of journalists’ scrutiny. For all of these reasons, the legal climate for laboratory-based investigative reporting is a subject that merits study and consideration.

III. Research Questions, Method and Typology

Researchers in the current study contacted U.S. journalism educators to address five research questions:

1. How do these educators conceptualize their role as leaders of projects?
2. How do they frame legal and ethical questions and concerns and their influence within them?
3. What legal principles and doctrines affect educators in their role as publishers?
4. What ethical issues most commonly arise when educators serve as publishers?
5. What guidance and resources can best help educators when they serve as publishers?

This research employed in-depth interviews with 10 educators who lead a variety of efforts to publish student work publicly. Interview requests were sent to a panel of 37 people identified through education groups, academic and trade publications, and social media as participating in class-based journalistic publishing in the United States. The panel represented a purposive sample designed to identify educators in a variety of program sizes and approaches – from sole journalism courses in a liberal arts college setting to capstone courses in large university journalism schools and colleges. Of this panel, 10 consented to an interview, five declined and the rest did not respond to three requests. The respondents included six women and four men. The set of respondents mirrored the diversity of program size and approach in the originally identified panel. Phone interviews using a standardized in-depth interview questionnaire explored the

²⁹ Christopher David Tulloch & Lluís Mas i Manchon, *The Classroom Is the Newsroom: CNA: A Wire Service Journalism Training Model to Bridge the Theory Versus Practice Dichotomy*, 73 JOURNALISM & MASS COMM. EDUCATOR 37 (2018).

³⁰ *Id.*

respondents' experiences, practices, and values. Interview transcripts were coded and categorized³¹ to examine themes related to legal issues and ethical issues.

The interviewees' experiences covered a wide range of approaches to clinical journalism education. Content published in their courses includes text, images, audio, video, and social media. Interviews revealed the following typology for publishing student work developed in a classroom setting:

- Publish on a news site run by a journalism program.
- Publish special projects on a platform run by a journalism program.
- Publish on local news organizations' site (both optional and required).
- Publish with a fully independent student news organization.
- Publish with a student news organization that is financially supported by the journalism program but editorially independent.

Subjects discussed how they conceptualized their roles in leading these publishing efforts and whether their work classified them as "publishers." The term "publisher" was defined liberally in interviews, involving any journalistic work made available to the public, rather than the narrow conception of legacy print publishers. It included, for instance, a nightly newscast or student podcast.

Most respondents said they do not consider themselves publishers. One of the primary reasons mentioned was fiscal issues. The interviewees saw publishers as ultimately responsible for the financial viability of a publication, but because they were operating within a larger institution and with free student labor, they were not similarly responsible. For instance, one interviewee said: "No, I do not (consider myself a publisher), and I don't have to because I have the infrastructure of a university behind me to handle all of the existential questions about whether or not this news outlet would exist."

Those who did see themselves as publishers universally defined the concept in terms of their power or right to decide what student work was or was not released publicly. They each reported using that power carefully and trying to "stay out of students' way." One instructor commented about the importance of avoiding "micro-managing" matters of style and taste, to give students a sense of a professional workplace experience.

Others who worked with local media organizations to publish student work identified those organizations as the publishers and ultimate "deciders" when it came to student work. Asked how they would define themselves if they were not publishers, respondents provided a variety of conceptions: editor, executive producer, coach, facilitator, news director, and middleman. Every respondent who avoided the publisher title instead used some form of the term "gatekeeper."

A lone respondent defined the job in terms of a novel "hybrid" that exists only in clinical journalism education, not in professional publishing:

We don't try to exert editorial control, but we do provide what an editor would, which is you sit next to them and you work through that script or you would through a difficult caption or whatever. But at the same time, we're casting large structural,

³¹ Thomas R. Lindlof & Brian C. Taylor, *Sensemaking: Qualitative Data Analysis and Interpretation*, 3 QUALITATIVE COMM. RES. METHODS 241–281 (2011).

institutional things like Stylebooks, like how to make a good digital product, and we're building into them that way and we're providing the infrastructure that they can, then, publish. So, I think it's strange in-between.

It is noteworthy that educators largely avoid describing or thinking of themselves as publishers, even though as a practical matter, their roles entail exercising at least some of the traditional authority and responsibility of a publisher. By eschewing the mantle of "publisher," educators may avoid facing up to some of the legal and ethical issues associated with publishing.

IV. The Classroom as Newsroom: Legal and Ethical Concerns

Ample legal reference resources exist for journalists working in traditional newsroom settings, but few address the additional overlay of complexities that exist within the educational setting. Students and educators in campus news labs face all of the same legal and ethical issues as professionals (enforcing the right of access to records and meetings, defending against claims of libel), but additionally face challenges unique to the educational setting. Some of these include: Who is legally liable for injury caused by a student journalist's negligence? To what extent is the instructor answerable to university administrators and at risk of reprisal for noncompliance (for instance, if ordered to abandon a politically sensitive story or divulge confidential news sources)?

Prof. Geanne Rosenberg Belton of the City University of New York-Baruch College undertook the most ambitious attempt to date to create legal protocols for college journalism educators supervising news labs.³² Belton convened a task force of 19 lawyers and journalism educators from across the United States to identify the recurring legal issues arising in the learning-lab setting, and to recommend some "best practices" for consideration. Among many issues that the J-School Legal task force flagged for focus were:

- Protocols to protect the physical safety of students reporting in the field, with attention to the unique legal exposure that non-U.S. citizen students may face if arrested.
- Access to legal counsel with media-law expertise that may not exist in-house within university counsel's offices.
- Familiarity with protective statutes, including state reporter's privilege laws and federal immunity protections (*i.e.*, the Communications Decency Act, 47 U.S.C. § 230, and Digital Millennium Copyright Act, 17 U.S.C. §§ 512 *et seq.*) as well as the limits of those protections.
- Liability defense, including making sure that students remain available to participate in the defense of any legal claims that may arise after graduation.³³

A. Ownership of Intellectual Property

The U.S. Copyright Act begins with the default understanding that the "author" of a piece of original, creative work owns the work.³⁴ Ownership confers a bundle of rights that include the right to control how the work is distributed, reproduced or exhibited.³⁵ The Copyright Act

³² Geanne R. Belton, *J-School Legal: A Guide for journalism schools working as news providers* (2011), <https://jschoollegal.wordpress.com/>.

³³ *Id.*

³⁴ 17 U.S.C. § 201.

³⁵ 17 U.S.C. § 106.

contemplates only two ways in which a creator can surrender ownership: through a signed agreement or by way of a “work made for hire” employment relationship.³⁶

“Work made for hire” is generally interpreted to mean a salaried employment relationship; token financial compensation is not enough to cause the creator to surrender ownership rights. In an illustrative case, a federal district court decided that ownership of an article submitted to the Harvard Law School student newspaper belonged to the author and not the publication.³⁷ The court was influenced by factors including: whether the writer was paid, where the story idea came from, whether the writer was free to accept other assignments from other employers or was obligated exclusively to the Harvard newspaper, whether the writer kept regular working hours, and whether the work took place on the putative employer’s premises.

There is no indication that U.S. courts have been asked to determine whether academic credit in a laboratory setting would qualify as the type of compensation Congress envisioned to create a “work made for hire” relationship, but in the absence of payment flowing to the student, that seems unlikely. Moreover, universities may be uninterested in claiming student journalists as “employees,” for fear of the accompanying obligations and liabilities. In an analogous context – the Fair Labor Standards Act, which dictates federal wage-and-hour requirements – the law is clear that a student is not a statutory “employee” of the educational institution when working in a capacity, such as a journalism trainee, in which the primary benefit from the relationship accrues to the trainee.³⁸ An educational institution is unlikely to risk jeopardizing that exempt status by classifying student journalists as “employees” to claim ownership of their work.

When interviewed about their practices, U.S. journalism educators did not indicate much concern for issues of ownership; rather, they saw “copyright” as a matter of clarifying their students’ ability to use material found from external sources. One educator was the exception, stating:

Our policy is that work that is created within classes, the copyright is held by the students who create it. We don’t force them to sign over copyright, we don’t take any legal ownership stake in any of the work that they produce. So, if a student produces something and we say we want to publish it and they say no, it’s a copyright issue at that point in time, they can refuse to have something published, and we don’t challenge them.

Establishing clear understandings about the ownership of content can avoid conflict in the event either that the student author experiences belated remorse about past writings and demands that they be “unpublished”³⁹ or that the student’s work becomes economically valuable. An example of the latter occurred in 2012 at the University of Colorado-Boulder, when confusion arose over the ownership of a “viral” photo of a bear being tranquilized by game wardens that a student newspaper photographer shot while on his own time outside of assigned newsroom

³⁶ 17 U.S.C. § 201(d).

³⁷ *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554 (D.D.C. 1981).

³⁸ Garen Dodge, *Trainees And Students Under The Fair Labor Standards Act: Must They Be Provided Overtime?*, CORPORATE COUNSEL BUS. J. (Aug. 1, 2006), <https://cbjournal.com/articles/trainees-and-students-under-fair-labor-standards-act-must-they-be-provided-overtime/>.

³⁹ Corey Conner, *Erasing the narrative: Student journalists face an increasing amount of takedown requests*, STUD. PRESS L. CTR. REPORT (May 26, 2016), <https://splc.org/2016/05/erasing-the-narrative/>.

duties.⁴⁰ Ultimately, it was determined that the photo – and the sale proceeds – belonged to the student and not the newspaper.

The nonprofit Student Press Law Center promulgates a “model” copyright agreement under which rights are allocated among the educational publication and the student creator.⁴¹ The publication receives an irrevocable license to display the content indefinitely, but the student retains residual ownership rights, so that the student may freely display the work on a personal website, enter it in contests, and even re-sell it to external media outlets (after a brief contractual period of exclusivity) without needing the institution’s permission.

B. Structuring Professional Partnerships

If student work will be disseminated in partnership with an established professional news organization, or sold to external clients, those media entities may insist on formalizing the terms of the relationship using their own contract language. Relationships with professional partners raise multiple issues both of law and of structure/process, among them:

- What role, if any, will external partner(s) have in “assigning” work to the students, and how will the flow of assignments be managed and prioritized, especially in a setup involving more than one partner outlet?
- Who will assume legal liability in the event of a legal claim arising out of the students’ coverage, including the question of whose insurance may apply? (If the university is an agency of state government, it may be legally prohibited from guaranteeing public money to indemnify a private business entity.)
- Relatedly, how will decisions be made (and disagreements resolved) as to whether and to what extent a story is incorrect and merits a correction or even a full retraction?

These issues have legal, as well as professional and practical, dimensions. For instance, some state libel statutes enable publishers to minimize financial exposure by promptly and prominently retracting erroneous stories.⁴² Thus, the decision to retract goes beyond just the reputation of the journalist or the publication, and often involves an element of litigation strategy. Because the interests of the participants may not align – the professional news organization may be getting legal advice to immediately retract a story that the student writer stands behind as accurate – the participants in a multi-party publishing arrangement would be prudent to contemplate and document a decision-making process before the need arises.

C. Privacy Issues

Newsgathering implicates a bundle of privacy issues – both real and at times imagined ones – and the overlay of the educational setting can add an additional layer of complexity because of the special sensitivity toward protecting student privacy under U.S. law. While their understanding of the metes-and-bounds of privacy law was not always precise, interviewees were attuned to their dual roles working with newsgatherers with an interest in maximizing access and disclosure versus their rule as educators in working with privacy-sensitive students: “I have a legal [duty] not to expose my students who do not wish to be exposed. So I’m very conscious about that.

⁴⁰ Brittany Anas, *CU-Boulder: Student photographer owns copyright to ‘falling bear’ photo*, THE DAILY CAMERA (Apr. 30, 2012), <https://www.dailycamera.com/2012/04/30/cu-boulder-student-photographer-owns-copyright-to-falling-bear-photo/>.

⁴¹ A copy of this model is available online at <https://splc.org/2014/08/splc-model-copyright-agreement/>.

⁴² John C. Martin, *The Role of Retraction in Defamation Suits*, 1 UNIV. OF CHI. LEGAL F. 16 (1993), <https://chicagounbound.uchicago.edu/uclf/vol1993/iss1/16>.

If I have students who do not want to be outward-facing, there's always an alternative to make sure that work is not disseminated in public.”

Illustrating the privacy issues that all journalists, students and professionals, must anticipate and be prepared to navigate, one faculty interviewee recounted the experience of students working on a relatively benign story about free and reduced-cost school lunches. After completing and posting the story, the journalists were contacted by the school principal demanding that photos and videos be taken down from the website because of privacy concerns. It did not occur to the journalists, because they were not experienced education reporters, that schools sometimes promise parents that their children will not be photographed, and to take precautions such as obtaining waivers or obscuring faces.

A legal issue yet-unexplored by the courts is whether news outlets on the campuses of state universities are subject to freedom-of-information laws to the same extent as their host universities are. State open-records statutes entitle requesters to inspect and copy many of the records of public universities, including employee correspondence when official state business is being transacted. Although certain categories of records are exempt from disclosure laws and may be withheld – including student academic records, as well as (under many state laws) preliminary draft documents – at least some subset of documents relating to the operation of student news labs may be publicly accessible.

The Texas attorney general's office confronted this question in a 2001 advisory ruling, involving records requested from the student newspaper at the University of Texas-Tyler.⁴³ The Attorney General concluded that editors of *The Patriot* did not have to honor a freedom-of-information request for material compiled in the course of an investigation because the newsroom operated independently from the university so that its records did not represent the records of a “governmental body.”⁴⁴ While favorable to the UT-Tyler journalists, the analysis portends risk for news operations that, unlike *The Patriot*, are actively overseen by university faculty in the course of their state employment. Assuming records maintained by instructors pertaining to the operation of student news labs meet the threshold definition of “governmental” records, the question would then become whether a reporter's privilege law (discussed in more detail *infra*) might override the open-records law and protect the confidentiality of some or all newsroom records, such as records of interviews with confidential sources. (The question of whether to argue for privilege or exemption raises issues of both ethical judgment and legal strategy as well, as journalists generally are the beneficiaries when public-records statutes are interpreted broadly.)

While the safety of confidential news sources is an issue of real and serious concern, educators must also be prepared to deal with the fanciful issues that risk-averse institutions and their lawyers might imagine. Chief among these is the federal student privacy statute, the Family Educational Rights and Privacy Act (“FERPA”).⁴⁵ FERPA is a narrow privacy statute that college attorneys widely misapply,⁴⁶ but if properly understood, it should present no impediment to effective laboratory journalism.

For FERPA confidentiality to apply, the disclosure must compromise the contents of centrally maintained “education records.”⁴⁷ The Department of Education, which has sole

⁴³ Tex. A.G. Op. No. OR2001-2594 (Jun. 19, 2001).

⁴⁴ *Id.*

⁴⁵ 20 U.S.C. § 1232g.

⁴⁶ Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide their Scandals*, 33 CARDOZO L. REV. 1555 (2011-12).

⁴⁷ *Owasso Indep. School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

enforcement authority over FERPA, has emphasized that there is a decisive difference between the release of “records” versus the release of “facts,” and that FERPA applies only to the former.⁴⁸ In other words, FERPA penalizes only an educational institution that maintains a “policy or practice” of failing to secure centrally maintained records identifiably pertaining to a particular student. Because student reporters will not have been entrusted with access to any confidential school-maintained education records, whatever disclosures they make do not represent the release of FERPA-protected records. Indeed, the Department explicitly said as much in discarding a complaint from the aggrieved subject of a news article in which student journalists at the University of New Mexico published unflattering information about him.⁴⁹ As long as the instructor refrains from breaching the confidentiality of FERPA records – for example, telling student reporters the names of football players who are failing his course – privacy laws should present no impediment to publishing journalistic work. But because FERPA is so poorly understood, instructors should be prepared for the need to educate stakeholders, including their own supervisors, about what it does and does not cover.

D. Considerations Intrinsic to the Educational Setting

In trying to build a professional news operation staffed largely by college students, the academic calendar presents formidable challenges. Particularly if student-generated coverage is being marketed to external clients in a “wire service” model, the program must be designed to maximize continuity and minimize interruptions. A former editor from the City University of New York said semester breaks were “disastrous” for the organization’s publishing momentum.⁵⁰ The inability to fully staff a news operation around-the-clock may argue in favor of a project-based model producing intermittent stories. In addition to breaks in the academic calendar, working with students presents significant practical and managerial issues. These include sustaining continuity in long-range projects with a staff built to turn over at least annually, as well as compensating students fairly for time and expenses they incur.

Finally, there may be “institutional culture” issues requiring institutional buy-in. For instance, in establishing their laboratory program in 2009, Youngstown State University faculty initially worried that faculty members who put traditional academic research aside to devote time to overseeing a newsroom might sacrifice professional advancement – a concern that turned out to be unfounded.⁵¹ Similarly, it may be necessary to reassure the institution that student journalists are not engaged in federally regulated “human subjects research,” which is broadly understood to encompass all manner of social science research. Human subjects research falls within the oversight of Institutional Review Boards (“IRB”), which can impose months of delay and enforce requirements irreconcilable with the practice of journalism (for example, reading standard-form warnings to survey participants about the health risks of being interviewed). Federal law was unclear on the subject until 2017, when the U.S. Department of Health and Human Services promulgated new regulations, 82 Fed. Reg. 7261, categorically removing the practice of journalism (or other types of oral-history research) from the purview of IRB regulation. Since the change is relatively recent and not well-publicized, instructors may need to educate their

⁴⁸ U.S. Dept. of Educ., Ofc. of Family Pol’y Compliance, *Ltr. of Dr. LeRoy S. Rooker to Montgomery County, Md., Public Schools* (Feb. 15, 2006), <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/montcounty0215.html>.

⁴⁹ U.S. Dept. of Educ., Ofc. of Family Pol’y Compliance, *Ltr. of Dr. LeRoy Rooker to Melanie P. Baise, Associate University Counsel, The University of New Mexico* (Nov. 29, 2004), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.

⁵⁰ Schaffer, *supra* note 23.

⁵¹ Francisco *et al.*, *supra* note 7.

institution's reviewers that, even if students are surveying interviewees, their newsgathering requires no IRB approval.

V. Tiptoeing Through the Investigative Reporting Minefield

The preceding section described legal issues that educational institutions, instructors and students will face whenever work is distributed outside the confines of the classroom, particularly when the work has economic value and is disseminated with the participation of professional partners. A focus on investigative reporting adds a new overlay of legal and ethical considerations, because of the heightened risk of provoking adverse reaction, both within the institution and beyond.

A. Press Freedom and Ability to Pursue Sensitive Topics

One of the trickiest legal – and diplomatic – issues for campus journalists and their faculty advisers to navigate is the relationship with the institution's administrators. Under U.S. law, students attending public educational institutions are presumed to have significant First Amendment freedoms although the scope of those freedoms is uncertain because of the scarcity of applicable U.S. Supreme Court rulings. In the handful of cases the Court has entertained, student speakers have fared well in confrontations with their institutions. For instance, in *Papish v. Board of Curators of University of Missouri*, the Supreme Court overturned disciplinary action against the editor of a student-produced “underground” magazine at the University of Missouri.⁵² The Court held that even grossly offensive speech is constitutionally protected when it addresses matters of public concern, and thus cannot be grounds for punishment at a public university.⁵³

However, producing news as part of graded coursework may diminish students' claim to freedom of expression. In a 2004 ruling, *Axson-Flynn v. Johnson*, a federal appeals court concluded that college students have no greater degree of constitutional protection than K-12 students when their speech takes place in the setting of a curricular exercise.⁵⁴ In the *Axson-Flynn* case, the court determined that the Supreme Court's 1988 ruling in *Hazelwood School District v. Kuhlmeier*,⁵⁵ which divested high school journalists of First Amendment protection when working on school-assigned news stories, applied equally to a Colorado college student challenging the propriety of an instructor's assignment.⁵⁶

Hazelwood has been vigorously criticized by legal scholars because the threshold the Supreme Court established for legitimizing school censorship – any justification “reasonably related to legitimate pedagogical concerns” will suffice – amounts to, in practice, a total abdication of judicial oversight. As Prof. Dan Kozlowski has written:

[W]hen a court rules that *Hazelwood* controls a case, almost always the First Amendment claimant is about to lose because the ‘legitimate pedagogical concerns’ standard is applied so deferentially. *Hazelwood* has been stretched far from its factual moorings, and the ‘legitimate pedagogical concerns’ standard is often interpreted so loosely that courts have rendered it effectively meaningless.⁵⁷

⁵² 410 U.S. 667 (1973).

⁵³ *Id.*

⁵⁴ 356 F. 3d 1277 (10th Cir. 2004).

⁵⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 84 U.S. 260 (1988).

⁵⁶ *Axson-Flynn*, 356 F.3d at 1289.

⁵⁷ Dan Kozlowski, *Unchecked Deference: Hazelwood's Too Broad and Too Loose Application in the Circuit Courts*, 3 U. BALT. J. MEDIA L. & ETHICS 1, 6 (2012).

If *Hazelwood* applies to work done by college journalists, then they have no meaningful legal recourse should college administrators attempt to alter or withhold their work on the grounds that it might associate the institution with a divisive position on a matter of controversy.⁵⁸

Only twice have federal courts confronted whether the near-total institutional control recognized by the Supreme Court in *Hazelwood* applies in newsrooms beyond the K-12 context – and those courts came out with diverging views. The Seventh Circuit determined that *Hazelwood* was the “starting point” by which to analyze a college’s decision to refuse to distribute a student newspaper,⁵⁹ while a sister appeals court, the Sixth Circuit, declined to apply *Hazelwood* to a First Amendment challenge brought by editors of a censored college yearbook and applied a more speech-protective standard.⁶⁰ Because of the uncertain legal conditions under which student journalism operates, a growing number of states are enacting statutes that fortify the unreliable federal level of protection, though as of 2019, laws are on the books in just 14 states, and not all of them extend beyond the K-12 educational level.⁶¹

Instructors, too, must consider their own safety in associating themselves with coverage of volatile subjects, particularly when taking a hands-on role in assigning and revising stories. When state employees are on the job performing assigned duties, they receive essentially no free-speech protection, as the Supreme Court regards their speech as “government speech” belonging to the employer.⁶² A handful of federal courts have found the *Garcetti* standard inapplicable to college-level educators because the doctrine of academic freedom gives them an extra measure of protection to explore unconventional ideas.⁶³ But there is no established consensus, and the Supreme Court has yet to weigh in.

If it is contemplated that students in a journalism lab will be undertaking investigative reporting projects likely to provoke substantial controversy, all participants should go into the undertaking informed about the limitations of their legal rights. As one interviewee said: “I don’t have any rights that are more important or supersede the rights of students, so that is an assumption that frames a lot of my work. I do feel like I do have the basic First Amendment rights that anyone publishing has and that I should expect those basic First Amendment rights.”

In 2019, a former college newspaper editor from Virginia’s Liberty University, a conservative Christian academy founded by televangelist Jerry Falwell, took to the *Washington Post* op-ed pages to share his account of the climate of heavy-handed, image-motivated censorship he experienced.⁶⁴ In the column, the former editor of *The Champion*, Will E. Young, recounts escalating tensions with the office of (since-departed) President Jerry Falwell, Jr., which reviewed every article before publication and allowed any professor or administrator mentioned in an article to “edit” the piece.⁶⁵ In Young’s account, the university eventually stripped students

⁵⁸ Frank LoMonte, *The Key Word Is Student: Hazelwood Censorship Crashes the Ivy-Covered Gates*. 11 FIRST AMEND. L. REV. 305 (2011).

⁵⁹ *Hosty v. Carter*, 412 F. 3d 731 (7th Cir. 2005).

⁶⁰ *Kincaid v. Gibson*, 236 F. 3d 342 (6th Cir. 2001) (*en banc*).

⁶¹ Jennifer Karchmer, *Student press freedom laws gain momentum*, QUILL MAG. (Apr. 18, 2018), <https://www.quillmag.com/2018/04/16/new-voices-legislation-student-press-freedom/>.

⁶² *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁶³ *Demers v. Austin*, 746 F. 3d 402 (9th Cir. 2014).

⁶⁴ Will E. Young, *Inside Liberty University’s ‘culture of fear,’* WASH. POST (Jul 24, 2019), <https://www.washingtonpost.com/outlook/2019/07/24/inside-liberty-universitys-culture-fear-how-jerry-falwell-jr-silences-students-professors-who-reject-his-pro-trump-politics/>.

⁶⁵ *Id.*

of all control over *The Champion*, putting college employees in charge of selecting and editing the stories, making it a house organ of Falwell's administration – and even making the student journalists sign nondisclosure agreements so they would not publicly challenge editorial decisions.⁶⁶ While Young's experience is a thankfully extreme one, those working in private institutions should be mindful both that First Amendment protections will not apply, and that a free press may be regarded as an adversary rather than an educational and civic asset.

Feelings of pressure can arise even when an institution is not overtly censorial. An interviewee from a conservative religious private school reported that students self-censor with no pressure from the institution itself: "That is just part of the culture here, when it doesn't have to be. And they're afraid to question. They've never been given the freedom to question, to think critically, to move forward and challenge something. They don't know how to do it respectfully, and so that's part of our challenge really in this department, is to teach them how to do that."

As part of a graduate research project at the University of North Carolina-Chapel Hill, law student Lindsie Trego surveyed the editors of college newspapers at four-year public institutions across the country to gather their experiences with institutional censorship pressure.⁶⁷ More than 60% of editors who took the survey reported experiencing at least one instance of direct or indirect censorship from campus authorities over the preceding year. The survey found that 51.9% reported that administrators had pressured a newspaper staff member not to publish something, 23.3% had faced threats to their publication's funding because of editorial content, 7.4% reported that a newspaper staff member or faculty adviser was threatened with the loss of employment, and 7.2% reported that a staff member faced disciplinary action.⁶⁸ If anything, the Trego findings understate the amount of institutional censorship because her pool of survey recipients excluded those at private institutions or two-year public institutions, places that may be even more image-sensitive and where adherence to First Amendment principles may be scrutinized less vigilantly. These findings pertain to student-run news operations rather than to curricular news laboratories, which may be differently situated for two reasons: first, relatively few curricular laboratories report that they focus on campus news as student newspapers do, and second, respect for academic freedom may curb administrators' willingness to dictate how instructors teach, if journalism is created in a faculty-supervised curricular setting.

Several interviewees referenced their belief that academic freedom would protect journalism educators' autonomy to choose coverage topics and to assist students in preparing news up to the standards and expectations of the profession, even if that means publishing provocative work. One said: "Academic freedom to me means the freedom to teach and learn and to be challenged and to express one's ideas and views in a space of equal exchange where there's no threat of overt censorship or exploited power and balance between the individual and the institution." Another specifically defined academic freedom to include "that ability to do journalism focused on university activities." None of the interviewees mentioned concern for job security, suggesting a degree of confidence in academic freedom that may be misplaced.

Even if educational news labs do not focus on campus issues, they still may provoke controversy that result in blowback, particularly when covering political figures with influence over higher education. At the University of Florida, a laboratory-style statehouse coverage project, "Fresh Take Florida," encountered controversy soon after its January 2018 launch, when student reporters ventured into the story of a legislator criticized for having worn blackface while in

⁶⁶ *Id.*

⁶⁷ Lindsie Trego, *When a Student's Speech Belongs to the University: Keefe, Hazelwood, and the Expanding Role of the Government Speech Doctrine on Campus*, 16 FIRST AMEND. L. REV. 98 (2017).

⁶⁸ *Id.*

college. To gauge whether the lawmaker, Rep. Anthony Sabatini, faced eroding political support as a result of the controversy, student journalists examined his campaign finance filings and called his largest donors to gauge their level of support.⁶⁹ When Sabatini learned what the reporters were doing, he called the faculty member responsible for reviewing the article and threatened to launch an investigation of partisanship in the reporting project – a call echoed by a right-wing blogger, who claimed that the journalism lab had been “weaponized, with extreme bias” to target conservatives.⁷⁰

Although no state investigation materialized and the Fresh Take program continues unharmed, not every university may be as supportive when facing pressure from political figures and the risk of adverse publicity. At Atlanta’s Emory University – a private institution where, unlike at Florida, First Amendment guarantees do not apply – the journalism program was dissolved and the director of its student-led investigative reporting news lab was let go shortly after a student-produced investigation into the finances of a high-ranking Republican state legislator who, under a pseudonym, helped run a sports odds-making operation.⁷¹

The experience of the Wisconsin Center for Investigative Journalism stands as an object lesson in both the vulnerability of reporting labs based at state universities, as well as their ability to withstand a political onslaught when well-supported by their institutions and the public. The Wisconsin Center is a nonprofit news organization founded in 2009 that, while housed within the School of Journalism and Mass Communication at the University of Wisconsin-Madison, maintains a separate corporate existence with its own philanthropic funding. During 2011, reporters with the Center published several articles spotlighting questionable practices in the Wisconsin legislature, including the refusal to make legislators’ correspondence with lobbyists public under the state open-records act.⁷² In what was widely seen as a retaliatory maneuver, state legislators inserted a rider into the 2013 state budget prohibiting the university from sharing office space with the Wisconsin Center and forbidding university employees from doing any work in support of the Center.⁷³ After widespread public outcry, Gov. Scott Walker ultimately vetoed the budget proviso and preserved the relationship, a reversal that the Center’s director attributed to the adverse national publicity and the inability of opponents to provide any plausible non-retaliatory explanation.⁷⁴

No interview respondent reported experiencing direct attempts by administrators – within the journalism program or the institution overall – to thwart reporting efforts or interfere with an instructor’s course design or chosen reporting focus. One commented: “I can’t even come up with a narrative in where there was overreach or there was top-down kind of ‘This needs to

⁶⁹ Katherine Campione, *Donors Sticking By Florida Lawmaker Despite Blackface Photo*, WUFT.ORG (Feb. 19, 2019), <https://www.wuft.org/news/2019/02/19/donors-sticking-by-florida-lawmaker-despite-blackface-photo/>.

⁷⁰ *Id.*

⁷¹ Laura Diamond, *Emory University to eliminate programs*, ATLANTA JOURNAL-CONSTITUTION (Sept. 14, 2012), <https://www.ajc.com/news/local/emory-university-eliminate-programs/GY3SRMQxRDxs2TG5726yyL/>; David Michaels, *Playing the odds: The rise of Sen. Chip Rogers*, ATLANTA UNFILTERED (May 5, 2012), <https://atlantaunfiltered.com/2012/12/04/playing-the-odds-the-rise-of-sen-chip-rogers/#.XVMb8ZNXhBw>.

⁷² Lauren Ingenu, *Journalism Center a Target*, INSIDE HIGHER ED (Jun. 6, 2013), <https://www.insidehighered.com/news/2013/06/06/legislators-target-uw-madison-and-investigative-journalism-center>.

⁷³ *Id.*

⁷⁴ Jack Craver, *How the Wisconsin Center for Investigative Journalism won*, THE CAPITAL TIMES (Jul. 2, 2013), https://madison.com/ct/news/local/writers/jack_craver/how-the-wisconsin-center-for-investigative-journalism-won/article_a99961b8-5434-5422-91fo-e996dab67495.html.

happen.’ It is closest to in-house independence as you can get, for at least the framework that I work in.”

One educator whose students had previously done investigative journalism reporting about their own university has since declined to do that kind of work. The instructor reported no direct exertion of influence or pressure from the institution, but anticipated facing such adversity, and thus gave up on the idea of future projects. Another instructor, whose students have undertaken sensitive stories in the past, said it has proven valuable to ascertain in advance whether a story will have supervisors’ support:

One of the things that I do right up-front when I do these projects is that I make sure that I have, number one, that I have the cooperation of my chair and the cooperation of my dean. And they kind of know what I’m doing. I’m very up-front with what I’m doing and I ask for their support right off the bat so that if any legal issues arise that they’ll have my back ... I have that discussion up-front, and if I don’t get their support, then I don’t do the project.

B. Defamation

Stories that uncover wrongdoing by identifiable people, businesses or organizations present a heightened concern for defamation claims, whether well-founded or unfounded. A successful claim of defamation, under U.S. common law, requires proof of a false statement of fact, made with some degree of negligence or greater fault, that causes reputational injury to identifiable people or entities.⁷⁵ Investigative reporting, by its nature, calls attention to harms caused by malfeasance or nonperformance, which is why professional news organizations engage counsel to review investigative stories pre-publication.

Lawsuits against student journalists are mercifully uncommon, and suits naming their instructors or educational institutions are rarer still. U.S. defamation law is purposefully publisher-friendly and forgiving of innocent mistakes, making a lawsuit challenging to win. Nonetheless, when one happens, the consequences can be profound.

In 2015, a Chicago man, Alstory Simon, sued Northwestern University and the former director of its (since-restructured) investigative journalism lab, the Medill Innocence Project, alleging that the Project’s investigators framed him for murder in an attempt to validate their theory that an innocent man was wrongfully convicted.⁷⁶ The lawsuit alleged that a professor and private investigator working for the Innocence Project concocted evidence that freed convicted killer Anthony Porter from death row, but led to the conviction of Simon, who spent 15 years in prison for murder before he, too, was exonerated and released. The university spent three years defending against the lawsuit, which demanded \$40 million in compensation, before settling it for an undisclosed sum in 2018.⁷⁷ The case is an outlier in many respects – the wrongs alleged in the lawsuit were attributed not to students but to experienced professionals who were accused of

⁷⁵ Marc A. Franklin & Daniel J. Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity Defamation and the First Amendment: New Perspectives*, 25 WM. & MARY L. REV. 825, 826-27 (1983-84).

⁷⁶ Stefano Esposito, *Man alleging he was framed in murder case settles with Northwestern*, CHICAGO SUN-TIMES (Jun. 1, 2018), <https://chicago.suntimes.com/2018/6/1/18469955/man-alleging-he-was-framed-in-murder-case-settles-with-northwestern-ex-prof>.

⁷⁷ Jason Meisner, *Settlement reached in wrongful conviction lawsuit against Northwestern and former professor*, CHICAGO TRIB. (Jun. 1, 2018), <https://www.chicagotribune.com/news/breaking/ct-met-alstory-simon-lawsuit-settlement-20180601-story.html>.

working in cahoots with criminal defense counsel – but the case stands as a reminder of the legal exposure associated with high-stakes journalism.

In the small handful of cases that have made it as far as a publicly available judicial decision, public universities have successfully avoided liability for material published by student journalists working for college newspapers. A decisive fact in each case has been that the colleges lack the authority to control the students' editorial decisions. Because (*Hazelwood* notwithstanding) the First Amendment is widely understood to circumscribe a public university's authority to tell students what they cannot publish, courts have refused to hold the institutions liable for student journalistic work, following the foundational common-law premise that there can be no liability for something that one is powerless to control.

One instructive case, *Lewis v. St. Cloud State University*, occurred in 2003 at Minnesota's St. Cloud State University, part of the state university system.⁷⁸ A faculty member claimed that he was defamed in news articles covering his age-discrimination lawsuit against the university, which appeared in the biweekly student-run newspaper, *The University Chronicle*. The defamation suit named St. Cloud State as "publisher" of the newspaper, seeking to hold the university responsible on the basis that the university provided financial support and office space for the *Chronicle*, selected each year's editor, allowed the paper to use university logos, and otherwise associated itself with the editorial process. Two state appellate courts, however, rejected the claim, relying on a university-system policy that prohibited administrators from controlling the content of the newspaper. Siding with St. Cloud State, a unanimous Minnesota Court of Appeals cited "the firmly established policy of giving students on college campus as many First Amendment rights protections as the community at large."⁷⁹

The court in the *Lewis* case cited the Louisiana Court of Appeals' similar resolution of a libel case against a public university in the 1983 case of *Milliner v. Turner*.⁸⁰ There, two faculty members sued Southern University for libel after one was called a "racist" and another a "proven fool," in articles published by student editors of *The Observer*. In a unanimous opinion, the appellate court wrote: "[T]he First Amendment of the United States Constitution would bar [the university] from exercising anything but advisory control over the paper, therefore, exempting the university from any liability or responsibility."⁸¹

At a private institution that is not governed by the First Amendment, there is no constitutional barrier to an institution stepping in and overruling the decisions of student editors. However, the outcome in the *Lewis* case suggests that even an institutional policy of non-involvement may suffice to insulate against liability for what students publish, so long as the policy is faithfully followed. That was the result when a former employee sued Princeton University alleging that he was libeled by coverage of his departure in the *Daily Princetonian* newspaper, which implicated him in the misuse of university equipment. In *Gallo v. Princeton University*, a New Jersey appellate court declined to hold the university responsible for the work of student reporters in the editorially independent *Princetonian*: "[T]he alleged defamatory statements that appeared in the independent University publications are not attributable to Princeton and its administrators."⁸²

⁷⁸ *Lewis v. St. Cloud State Univ.*, 693 NW 2d 466 (Minn. App. 2005).

⁷⁹ *Id.* at 471.

⁸⁰ 436 So. 2d 1300 (La. Ct. App. 1983).

⁸¹ *Id.* at 1303.

⁸² 656 A.2d. 1267 (N.J. Super. A.D. 1995).

Helpful as they are, these legal precedents involve news operations with a degree of autonomy from their host universities. If university employees actively engage in assigning, editing or even co-authoring editorial content – and have the ultimate decision as to what does and does not get published, all of which was the case with the Medill Innocence Project – it will be far more difficult for the institution to disclaim liability.

If student writing is published in tandem with a professional partner, the apportionment of legal responsibility will be a threshold issue that should be anticipated contractually. One instructor interviewed about handling sensitive topics specifically mentioned that working with a professional news outlet afforded the added benefit of access to experienced media counsel for pre-publication libel review: “One of the things about the [article] is that it was heavily lawyered before we published it.”

One of the main takeaways from Prof. Belton’s 2012 study was that journalism faculty members hesitated to broach conversations about liability with university administrators and counsel, for fear that risk-averse attorneys might seek to curb news reporting or insist on involvement in it. While perhaps understandable, this hesitation makes it difficult to gauge to what extent the university “has the backs” of student journalists and journalism educators (for instance, whether university insurance coverage will apply to legal claims, and whether the university will provide defense counsel in the event that a student, rather than an employee, is the defendant in a liability suit). The philosophy of “better to ask forgiveness than permission” may apply when sneaking a cookie, but it is a risky approach to structuring a news operation.

C. Confidentiality

Whether to rely on an unnamed source as the basis for an article is a professional judgment with which even the most acclaimed news organizations regularly struggle. “The biggest ethical issue we encounter,” one instructor commented, “is helping students understand when there is a valid need for either anonymity or quasi-anonymity among sources versus just granting a source anonymity because they ask for it, and try to negotiate that.” As a threshold matter before promising to grant anonymity, journalists must determine whether they can effectively maintain confidentiality. In the educational setting, the ability to keep secrets is not always a sure thing.

The reporter’s privilege enables journalists to make effective assurances of confidentiality to their sources. Where the privilege applies, a journalist may safely defy an otherwise-lawful demand to surrender evidence or answer questions under oath in connection with a legal proceeding.⁸³ Without a legally effective privilege, a journalist may face the choice of exposing confidential information, including the identities of sources, or incurring contempt sanctions that can include fines and imprisonment.⁸⁴

⁸³ See Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 131 (2002) (explaining that “[t]he privilege that excuses journalists from testifying or bringing forth evidence exists to protect news gatherers and producers from breaking confidential agreements with sources or divulging information that newsmen would rather not divulge under threat of sanctions”).

⁸⁴ See Daxton R. “Chip” Stewart & Anthony L. Fargo, *Challenging Civil Contempt: The Limits of Judicial Power in Cases Involving Journalists*, 16 COMM. L. & POL’Y 425, 425 (2011) (citing “a string of high-profile instances in which journalists who refused to testify in civil or criminal proceedings were held in contempt and threatened with jail time or heavy fines”).

Every state except Wyoming has recognized a privilege either by way of a legislatively enacted statute, a judicially created common-law privilege, or a combination of the two.⁸⁵ Privilege may be narrow (applying only to information identifying confidential sources) or broad (covering all unpublished news-gathering material, such as photos on a memory card or recordings of interviews).⁸⁶ There is no universally recognized privilege in federal legal proceedings – Congress has resisted enacting one for decades, and the Supreme Court has hesitated to conclude that one exists⁸⁷ – but some federal judges have inferred the existence of a limited privilege rooted in the First Amendment or in common law, including courts in the Second and Third Circuits.⁸⁸

Only two states (Maryland and West Virginia) explicitly mention student journalists within the scope of their privilege statutes.⁸⁹ In the overwhelming majority of states, privilege statutes are “functional” in nature, meaning that their coverage extends to anyone regularly engaged in gathering and distributing news for public consumption. Several states, however, condition eligibility for the statutory privilege on earning gain from “professional” journalistic work, including Florida, New York and Texas (the latter of which requires proof of “substantial financial gain”).⁹⁰ Even in those states with narrow statutes, it should not be conceded that unpaid students and their sources are ineligible for the protection of the privilege, because a judicially recognized privilege might also come into play, supplementing the statutorily created right.

On occasion, students have had success asserting the reporter’s privilege even when working in nontraditional settings. A court in Illinois recognized that student researchers working for the Medill Innocence Project – a journalism course focused on re-investigating questionable murder convictions – could qualify for the reporter’s privilege, although ultimately in that 2011 case, the privilege had been waived.⁹¹

As a practical matter, the greater confidentiality risk may come from demands made by an instructor’s supervisors, rather than by police or prosecutors. State privilege statutes come into play when a demand for information is made in connection with a legal or regulatory case or proceeding, such as a police investigation or a civil lawsuit. If the demand for disclosure comes from a workplace supervisor such as a dean or provost rather than from a police officer or a judge, the privilege almost certainly is not broad enough to enable a faculty member to safely refuse without consequence (and it certainly will not apply when the demand comes from a *non*-governmental authority, such as an administrator at a private university). Because an instructor may be faced with the choice of violating the confidentiality of the newsgathering process or incurring employment sanctions, the safest course may be ignorance – insulating the instructor from knowing the identities of confidential sources, and keeping any identifying documents off university computer drives or other places of storage accessible to campus authorities.

⁸⁵ See Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL OF RTS. J. 1277, 1295, n.75 (2012) (“49 states and the District of Columbia have extended some form of newsgathering privilege to citizens”).

⁸⁶ See *generally id.* (contrasting various state statutes’ scope of protection, including what confidences are covered and in which proceedings privilege may be invoked).

⁸⁷ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁸⁸ *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993).

⁸⁹ Jonathan Peters, Geanne Belmas & Piotr Bobkowski, *A Paper Shield: Whether State Privilege Protections Apply to Student Journalists*, 27 FORDHAM INTEL. PROP., MEDIA & ENT’MT L. J. 763, 782 (2016).

⁹⁰ *Id.* at 790.

⁹¹ Jason Meisner, *Judge rules Northwestern students must turn over emails in murder case*, CHICAGO TRIB. (Sept. 7, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-09-07-chi-judge-rules-northwestern-students-must-turn-over-emails-in-murder-case-20110907-story.html>.

This is not an abstract or remote concern. Campus-based journalists are facing intensified pressure to divulge confidential communications when their sources relate experiences with sexual misconduct. At the University of Illinois, an investigative reporting partnership between the campus-based NPR affiliate and nonprofit news giant ProPublica was upended when the university issued a directive to employees of the radio station that they were required to notify U of I administrators whenever they learned of sexual misconduct against students, even if the information came in the form of a journalistic interview with a confidential source.⁹² Advocates for journalists' rights protested the directive and urged the university to recognize an exception for confidences obtained in the reporting process, but no relief was granted.⁹³ In response, ProPublica decided to restructure the partnership to, in effect, wall off the radio journalists from knowledge of confidential student sources, filtering incoming tips and sending only those that would not violate Illinois' policy to the reporting team.⁹⁴

In Texas, university administrators have interpreted a state "mandatory reporting" directive to require all employees, even faculty journalism advisers, to give immediate notice to Title IX investigators if they learn of sexual misconduct toward students, even if a confidential interview by student journalists is the source of the knowledge.⁹⁵ A college journalism instructor, Dan Malone, who shared the 1992 Pulitzer Prize for investigative reporting while at the *Dallas Morning News*, was reprimanded and threatened with firing after his students reported on allegations of sexual harassment lodged against a Tarleton State University history professor, without first reporting the identities of the story's sources to the university Title IX office.⁹⁶

Federal law gives higher-educational institutions some latitude as to which employees are regarded as "responsible employees," who are obligated to make sure that a complaint of sexual misconduct is reported to those in a position to take responsive measures. The U.S. Department of Education has long interpreted Title IX to obligate "responsible employees" to report gender-based discrimination or harassment they become aware of, defining "responsible employee" to mean any employee "who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."⁹⁷ In other words, federal law does not require that a university designate everyone who draws a paycheck as a responsible employee, but once a university decides that every employee has a "duty to report," that decision reflexively appears to trigger federal responsibilities.

For faculty advising student reporters, this legal status presents an array of unappetizing choices. Faculty can instruct students not to accept information about campus sexual misconduct under assurances of confidentiality that they may not be able to keep. Alternatively, faculty can attempt to insulate themselves from becoming aware that students are receiving confidential

⁹² Hansen & Otwell, *supra* note 1.

⁹³ Vivian McCall, *News Outlets Call University Of Illinois Policy A Reporter Gag Order*, NPR.ORG (Nov. 15, 2019), <https://www.npr.org/local/309/2019/11/15/779680431/news-outlets-call-university-of-illinois-policy-a-reporter-gag-order>.

⁹⁴ Hansen & Otwell, *supra* note 1.

⁹⁵ Steve Miller, *New Texas law on Title IX reporting leaves college journalists and advisors in a tough spot*, TEXAS MONITOR (Sept. 18, 2019), <https://texasmonitor.org/new-texas-law-on-title-ix-reporting-leaves-college-journalists-and-advisors-in-a-tough-spot/>.

⁹⁶ *Id.*

⁹⁷ U.S. DEPT. OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

information from sexual harassment victims until after publication, or (as Tarleton State's Malone did) can simply run the risk of being considered violators and attempt to challenge any personnel sanctions they incur. Plainly, none of these is a satisfying option, pointing toward the need for federal Title IX clarification to insulate the practice of campus journalism.

D. Access to Information

Every state has a freedom-of-information statute, often called an open-records or public-records act, entitling members of the public to inspect documents created or maintained by government agencies in the course of official business.⁹⁸ Similarly, every state has an open-meetings statute that requires public bodies involved in governmental policymaking to open their meetings to the public after providing adequate advance notice.⁹⁹ Most journalism programs train students to be aware of their statutorily protected access rights – and some go further and involve students in filing requests for records – but enforcing those rights when impediments arise is especially challenging in the educational setting.

Journalists at traditional news organizations are not-infrequently forced to sue, or at least threaten suit, to obtain access when dealing with recalcitrant government agencies. Whether journalists working in a student reporting lab have the capacity to wage legal battles for access is an unsettled question. In one illustrative case, a student news lab at Virginia's Washington and Lee University was forced to appear in court to argue for access to a plea agreement in a high-profile criminal case, which the trial judge had ordered sealed.¹⁰⁰ The news site's faculty adviser, department chair Brian Richardson, was named as the party seeking access to the sealed document and represented in court by volunteer counsel obtained through the nonprofit Student Press Law Center. Not every university may be so open-minded about its faculty members involving themselves in legal controversies – particularly if the controversy involves information withheld by a sister governmental agency, which was not the case at Washington and Lee. Further, the question of “who is the requester” presents issues of legal significance, as courts may not recognize a journalism class as being a legal entity with the “personhood” to be a party to a court case.

Students not infrequently report that their requests are taken less seriously because of the impression that their work is not “real,” or that the right of access is the province of credentialed professionals only. One instructor reported: “We've had a couple instances where our students were kicked out of public meetings and the local paper stepped in and made a statement on our students' behalf because they had every right to be in that meeting.”

Journalists' access issues go beyond documents and data. Not infrequently, newsgatherers come into conflict with law enforcement when trying to shoot photographs or record video in public places, particularly in heavily policed scenes of crime or civil unrest.¹⁰¹ While the law is increasingly protective of journalists' First Amendment right to record the activities of police

⁹⁸ Charles N. Davis, Milagros Rivera-Sanchez & Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 42 (1996).

⁹⁹ Charles N. Davis, Sandra F. Chance & Bill F. Chamberlin, *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. L. & POL'Y 35, 36 (1998).

¹⁰⁰ Mark Keierleber, *Va. judge delays release of rejected plea deal in Washington and Lee U. manslaughter case*, STUD. PRESS L. CTR. REPORT (Dec. 12, 2014), <https://splc.org/2014/12/va-judge-delays-release-of-rejected-plea-deal-in-washington-and-lee-u-manslaughter-case/>.

¹⁰¹ See Jessica Jerreat, *At Least 117 Journalists Detained, Arrested Covering US Protests This Year*, VOICE OF AMERICA (Dec. 14, 2020), <https://www.voanews.com/press-freedom/least-117-journalists-detained-arrested-covering-us-protests-year>.

doing official business in public,¹⁰² there is no recognized over-arching First Amendment right to be in places where news is happening.¹⁰³ (One educator interviewee reported that overzealous students, misinformed about the limits of their rights, insisted on trespassing into private property in pursuit of news.)

Where the right of access is uncertain, or where the law is not on the journalists' side, educators can help students learn the diplomatic skills to negotiate for greater access than they might be legally entitled to. Said one instructor at a private institution: "There's a difference between censoring and self-censoring. And our students self-censor because they anticipate that they will be turned down, especially here on campus, when it comes to interviews and records requests. I help them navigate what they are allowed to access, and I'm allowed to access on their behalf."

VI. Ethical Considerations: When the Professor is the Editor

Law speaks in terms of "musts" while ethics speaks in terms of "shoulds," and at times, what journalists are legally permitted to do may be disfavored as a matter of best ethical and professional practices. Perhaps the best illustration is publishing, without consent, the names of sex-crime victims gleaned from police reports, a decision that the Supreme Court has declared to be constitutionally protected,¹⁰⁴ even though it contravenes the ethical standards widely observed across the mainstream U.S. media. Teaching about the right to gather and publish brings with it the accompanying duty to also teach sound professional judgment (for instance, to avoid publishing a gratuitously violent photograph of no great public importance, while defending the right to take the photograph in the first place).

When interview exchanges focused on ethical concerns, respondents universally mentioned codes of ethics as their guiding principles, including those crafted by the Society of Professional Journalists, the Radio Television Digital News Association, the National Press Photographers Association, and the Online News Association. Such principles as seeking and reporting truth, minimizing harm, and remaining independent and accountable were repeatedly mentioned.

A. Minimizing Harm

One element of teaching truthfulness is emphasizing the importance of verification and fact-checking. One instructor reported being told by a colleague of a student story that turned out to contain serious undetected errors: "Whether you're a practicing reporter, editor, you're always paranoid, and you're double-checking. You want to make sure you're getting it right. I think when you're doing this type of stuff with students, that type of intensity is ratcheting it up even more." Another aspect of truthfulness that is increasingly challenging to teach in the era of Photoshop and Instagram-filtered images is the importance of maintaining the authenticity of news photos. The NPPA Code of Ethics instructs: "Do not manipulate images or add or alter sound in any way

¹⁰² Turner v. Lieutenant Driver, 848 F. 3d 678 (5th Cir. 2017); Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017); Glik v. Cunniffe, 655 F.3d 78 (1st Cir 2011).

¹⁰³ See Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 WASH. & LEE L. REV. 1103, 1105 (2008) (observing that that "reporters enjoy no 'special' right of access to government places or information that are (and have traditionally remained) closed to all members of the public and the press") (parentheses in original).

¹⁰⁴ Florida Star v. B.J.F., 491 U.S. 524 (1989).

that can mislead viewers or misrepresent subjects.”¹⁰⁵ Students who have not studied photojournalism may not have internalized these principles.

A concern common to the campus setting is miscommunication about whether student-produced work will be publicly accessible. Multiple instructors gave accounts of misunderstandings in which interview subjects assumed that student work prepared “just for class” would not end up online. One educator stated: “I want to make sure that when the student asks for the interview, they made it 100 percent clear that this was going to be published not for a class, but this has the potential to be published in a broader context. They didn’t get the interview with the sense that it was just going to be an assignment.”

Another educator framed ethical obligations in terms of “integrity” and said representation was the most important element, especially when harm can arise from misrepresenting someone. “Well, I think, first and foremost, ‘integrity’ as it relates to how subjects are represented. So I think that there are issues that relate to things like immigration or minors or mental health where someone that’s the subject of a story may not be cognizant of the potential jeopardy they could place themselves in by doing an interview. And so I think as a publisher, we have a responsibility to make sure that we’re looking out for minors, looking out for certain populations.”

“Minimizing harm” is one of the foundational tenets of the SPJ Code of Ethics. SPJ explains that ethical journalism means balancing “the public’s need for information against potential harm or discomfort,” and that journalists should apply “heightened sensitivity when dealing with juveniles, victims of sex crimes, and sources or subjects who are inexperienced or unable to give consent.”¹⁰⁶ One instructor commented: “I think the biggest ethical issue we come across is what do we do when it comes to sourcing when we’re dealing with vulnerable people. By vulnerable folks, I mean anyone who’s experiencing homelessness, anyone who is experiencing an identity transition, anyone who is perhaps an undocumented person, anyone for whom having their identity out there puts them at risk.”

B. Issues of Equity and Representation

Educators identified a specific set of ethical concerns arising from their responsibilities to students that adds a layer to the obligations traditional news supervisors face. They often identified these as entangled with journalistic ethics, but they are a separate set of concerns. All respondents identified at least one issue involving their relationships with students that they framed in terms of ethics. These included (1) ensuring that students beyond the “alpha students” who are always the first to volunteer have access to opportunities, and (2) making training and travel opportunities affordable for students of modest financial means.

Multiple respondents said they felt an obligation to help students understand the power of framing and representations in society, particularly when it came to matters of gender, race, class, sexual orientation, religion, and physical or intellectual abilities. One discussed a difficult situation that arose with a story on race within a community. A source for the story made a negative, race-based comment that sent the story viral. The educator reported feeling the need to defend the reporting while also helping the student reporter build the courage to do the same. Another educator whose students did work on poverty in predominantly white rural areas said they felt consistent pressure to help students question their own biases and break through

¹⁰⁵ Nat’l Press Photog. Ass’n, Code of Ethics, <https://nppa.org/code-ethics>.

¹⁰⁶ Soc’y of Prof. Journalists, SPJ Code of Ethics, <https://www.spj.org/ethicscode.asp>.

stereotypes. This was important, they said, for good journalism but more important for the students to grow as people.

C. Issues of Student Welfare

Educators felt obligations to students when their work met with negative reactions, especially given the reach, immediacy and anonymity of social media that emboldens critics to vent hostility toward all journalists, even the youngest: “From time to time, we’ll get our ‘fake news’ type of chatter on our social feeds, but nothing specifically directed at the quality of the content as much as just general dislike of what we’re doing and who we are.”

While ensuring the journalistic integrity of articles is paramount for any editor or publisher, the educators saw an added dimension when dealing with inexperienced students who may be defined in the eyes of prospective employers by a single misjudgment. One interviewee remarked: “I think we also have a responsibility to the students to make sure that the work that we are putting out into the public is work that they can be proud of, that it’s not going to be damaging to their careers. They’re young, they don’t necessarily know what’s right and what’s wrong when it comes to some journalistic pieces. And so I think I have a responsibility to protect them and to be able to pull them aside and say, ‘Hey, this is not ready to go. This is not going to look good for you, this is not going to look good for the college. Let’s hold this until it’s ready.’”

Concern for the welfare of students enters into, and at times complicates, judgments that professional publishers make routinely. Professional news outlets, for instance, will not remove articles from their websites just because the authors regret what they wrote. But educators are inclined to be less rigid, recognizing a dual obligation to their students as well as to the publication and its audience. One instructor acceded to an author’s “takedown” request after a student, who had written about misbehavior by a powerful person in the community, reported harassment and threats from the person’s supporters that continued even post-graduation.

D. Integrity of the Curriculum and Student Learning

Educators working in the clinical setting must consider all of the same journalistic issues as editors/publishers in more orthodox newsrooms, but must also balance the curricular needs of students. At times, the imperatives of operating a deadline-sensitive news operation and producing content for external clients may come into tension with pedagogical objectives. One educator said: “That’s really what a lot of my time is spent on administratively is thinking about editorial direction and instructional needs, and try to bridge that gap between what our curricular demands are and what our audience demands are.” Similarly, another commented: “I think my responsibilities are ... torn between a public and the instructional needs of the student. I think I’m responsible for publishing accurate, timely information that serves an underserved community ... but I’m also responsible for making sure that student’s interaction with this publication is an instructional interaction first and foremost.” In a similar vein, a third instructor explained: “I also feel like there’s a responsibility to put those instructional needs above the publishing needs of the website, and, what I mean by that is that instead of pushing a deadline if there’s actually value in slowing down a story so that a student better understands the craft or reporting skills, that’s the need that ultimately gets served.”

The imperative to provide students with a beneficial educational experience must be contemplated when entering into agreements with professional partners. Issues such as editorial control, scheduling and expectations should be anticipated by way of up-front agreement with

external clients, to minimize conflict and enable instructors to design workflow around the needs of each stakeholder.

VII. Conclusion

The erosion of established media business models makes the shift toward laboratory-based journalism both inevitable and necessary, in two respects. First, while journalism graduates will face increased competition for scarce newsroom jobs, media outlets are recognizing investigative reporting as a draw for audiences that makes good business sense; students with mastery of investigative skills and a portfolio of investigative work samples will be more marketable candidates.¹⁰⁷ Second, the diminished capacity of local and regional news outlets to devote resources to long-range projects opens up opportunities for campus news labs to step up as their communities' primary watchdogs. As Arizona State's Leonard Downie Jr. observed, recounting a nationwide food-safety investigation coordinated by ASU's News21, almost no professional news organization in America could have devoted the staffing – 27 reporters and six editors – needed to complete the year-long multimedia project, which ran in *The Washington Post* and on MSNBC.¹⁰⁸

For the educational objectives of the university, clinical journalism education offers advantages beyond those of traditional internship placements. Instructor supervision promotes accountability to the institution's learning objectives. Moreover, learning labs open up participation opportunities to students who cannot meet the demands of professional internship placements (*i.e.*, relocating to a new city, delaying progress toward degree completion).

Educators involved in structuring learning-lab programs should anticipate and, to the extent possible, adopt preventive policies around the types of legal issues realistically likely to arise based on the type of reporting in which students are engaged. Recurring issues common to all types of publishing operations include ownership of content, and supervisory authority over – and legal responsibility for – the actions of student reporters.

As the work product and working environment on college campuses increasingly resembles that of traditional news operations, the journalists working in those clinical settings will need legal resources equal to the professional-level risks they are being asked to take. As one educator observed: "It's a larger question about our responsibilities as educators. We ask students to assume a certain amount of risk when they do this work as student journalists, but then one thing we keep coming up against is, what resources do we actually have at our disposal to support them when they get in trouble? The reality is we don't have the same resources that even a poorly staffed news organization would have to support them."

Similarly, educators had difficulty identifying external sources of expertise on which they would rely when facing challenging ethical judgment calls. Every respondent first identified trusted colleagues, mentors, or friends in other journalism programs as their go-to consultants in these matters. The next most-common answer was an administrator in the journalism program, followed by industry contacts. No respondent identified someone outside academia or journalism as a person they would consult, reflecting the often-critiqued closed nature of journalism ethics.

Because clinical journalism labs will increasingly represent an indispensable part of both the educational experience and of the informational infrastructure of their communities, the

¹⁰⁷ Jason Abbruzzese, *As the Trump era dawns, the media is doubling down on investigative journalism*, MASHABLE.COM (Jan. 24, 2017), <https://mashable.com/2017/01/24/trump-investigative-journalism/>.

¹⁰⁸ Downie, *supra* note 11.

health of those programs is a matter of larger public importance. Greater legal resources should be devoted to both the threshold structural decisions in creating clinical programs, as well as to meeting the ongoing daily legal needs of instructors and students as judgment calls arise. A significant element of fortifying the infrastructure supporting campus journalism is continuing-education training for instructors in evolving legal issues, a need that several survey participants identified as unmet. The widespread public accessibility of student work raises the legal stakes for making sure that the work is legally defensible, and that students go into the field well-prepared to make critical legal and ethical judgments.

* Kathleen Bartzen Culver is an associate professor of journalism at the University of Wisconsin, Madison, the James E. Burgess Chair in Journalism Ethics, and director of the Center for Journalism Ethics; kbculver@wisc.edu.

**Frank LoMonte is a professor of media law at the University of Florida and director of the Joseph L. Brechner Center for Freedom of Information; flomonte@ufl.edu.

How Bad Is It? Prior Restraint Bad: Judicial Election Advertising After *Citizens United v. FEC*

Christopher Terry* & Sarah K. Wiley**

The nature of election advertising was altered by the Supreme Court's decision in Citizens United v. FEC. Although significant attention has been directed at the changes to the non-candidate political advertising by outside groups in federal elections, one area where issue advertising unleashed by Citizens United has dramatically altered the traditional election process has been in state level judicial elections. Statewide judicial races, especially in states that hold nominally "non-partisan" judicial elections, have been attracting increasing attention since 2011 and have included campaigns where a single outside group has outspent both of the legally qualified candidates combined. Recently, in Arkansas, advertising by the Judicial Crisis Network resulted in a First Amendment legal dispute over a prior restraint placed on ads the group was running that required the entire state court to recuse themselves. This paper explores judicial advertising in six states in 2016 against the backdrop of a potentially unresolvable constitutional issue caused by the content of political advertising and suggests that even the U.S Supreme Court would have been unable to resolve the case.

Key words: election advertising, First Amendment, Citizens United, judicial elections

I. Introduction

Significant changes to election campaigns, including statewide judicial elections, have been brought about by a series of legal decisions which began with *Citizens United v. FEC*.¹ The changes to rules governing third party political advertising that followed the *Citizens United* decision quickly filtered down to the statewide judicial elections. In 2011, the judicial election in Wisconsin, the first after *Citizens United*, was marked by a new level of vitriol and direct attack advertising. It would provide a sign of things to come.

Since the U.S. Supreme Court handed down *Citizens United*, Arkansas's, like Wisconsin's, experience with outside interest group issue advertising in statewide Supreme Court elections has been marked with controversy.² Arkansas's election experiences in both 2014 and 2016 were dominated by negative non-candidate political advertising run by issue groups based outside of the state.³ As a result, a group of interested individuals created a "Rapid Response Team," in the form of a non-profit organization known as Arkansas Judicial Campaign Conduct & Education Committee, Inc. with the objective to promote clean judicial elections by providing a mechanism to respond to negative outside advertising.⁴

¹ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 330 (2010).

² Christopher Terry & Mitchell T. Bard, *Judicial Elections and Issue Advertising: A Two State Study*, 39 UALR L. REV. 579 (2017).

³ *Id.*

⁴ <http://www.arkansasjudges.org/>.

On May 21, 2018, Judge Christopher Piazza of the Pulaski County Circuit Court issued a preliminary injunction in a case brought by incumbent Arkansas Supreme Court candidate Courtney Goodson against issue group Judicial Crisis Network.⁵ The injunction, took the form of a prior restraint and prevented television stations from carrying the political advertising paid for by JCN because the content of the group's attack ads was deemed to be false.⁶ The Response Team's declaration that the claims in ads run during the 2018 campaign by JCN were false contributed to Judge Piazza's decision to impose the restraint on the ads.⁷

Notably, JCN had been the primary non-candidate advertiser two years prior during the 2016 Arkansas State Supreme Court election, with the group outspending the combined efforts of both candidates on television.⁸ The Arkansas judicial election in 2018 was dominated by negative advertising attacking candidate Judge Goodson that was paid for JCN.⁹ By the time Judge Piazza's prior restraint was appealed to the Arkansas Supreme Court, a grim realization had set in. Every single judge then on the Arkansas Supreme Court was either a plaintiff in the case, had been supported or opposed in an election by JCN advertising, or both. As a result, the entire panel recused themselves from hearing the challenge to the prior restraint placed on the political advertising by JCN.¹⁰ Arkansas Governor Asa Hutchinson was placed in a position of having to appoint a special full court panel to hear a case nominally about an election which Hutchinson, as Governor, had significant interests invested in the outcome of.¹¹

Although the case was never heard by the "appointed" Arkansas State Supreme Court, had a decision been issued, either party could have sought a grant of certiorari from the U.S. Supreme Court. In practical terms though, a U.S. Supreme Court review of the dispute may not have been able to provide an unbiased venue or a resolution any more than the Arkansas Supreme Court. Had the case continued, the dispute over a judicially imposed prior restraint of core political speech, the high court would have faced the same issue which arose in Arkansas. JCN's judicial advertising advocacy machine, has been very active at both the state and federal levels.¹² By 2019,

⁵ Courtney Goodson & Courtney Goodson Campaign v Katz LLC, Nextstar Broadcasting, Mission Broadcasting, Tenga Inc, Comcast of Arkansas and Cox Media, 60CV-18-321, Pulaski County Circuit Court. May 21, 2018.

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Washington group begins ad blitz in Arkansas chief justice race*, ASSOCIATED PRESS, Feb. 6, 2016, <https://www.arkansasonline.com/news/2016/feb/08/washington-group-begins-ad-blitz-arkansas-chief-ju/>, see also: Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption: Issue Advertising in Wisconsin Judicial Races before and after Citizens United*, 16 J. APP. PRAC. & PROCESS 305 (2015); Christopher Terry & Mitchell T. Bard, *Judicial Elections and Issue Advertising: A Two State Study*, 39 UALR L. REV. 579 (2017).

⁹ Spencer Williams, *Outside cash adds fuel to cry for judicial change*, ARK. DEMOCRAT-GAZETTE, Feb. 28, 2016, <https://www.arkansasonline.com/news/2016/feb/28/outside-cash-adds-fuel-to-cry-for-judic/>; see also Brennan Center Reports: <https://www.brennancenter.org/our-work/research-reports/buying-time-2016-arkansas>.

¹⁰ Letter from Karen Baker, Associate Justice, to Governor Asa Hutchinson, re: CV-18-522, Comcast of Arkansas, Inc.; and Tegna, Inc. v. Courtney Goodson and Courtney Goodson Campaign, Sept. 26, 2018.

¹¹ Michael R Wickline and Spencer Willems, *Hutchinson backs judicial races' end: Raising concerns on outside money, he seeks new system to pick judges*, ARK. DEMOCRAT-GAZETTE, March 3, 2016, <https://www.arkansasonline.com/news/2016/mar/03/hutchinson-backs-judicial-races-end-201/>.

¹² A targeted search of the political advertising database FCC public files for documents relating to Judicial Crisis Network advertising on broadcast stations in the United States yielded documents reflecting advertising in 100 media markets. A test conducted in the database on Feb. 23, 2021, returned 305,607 entries, [https://publicfiles.fcc.gov/find/judicial%20crisis%20network/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/judicial%20crisis%20network/page-offset-0/order-best-match/filter-[]/#files).

JCN had run advertising related to the nomination and Senate consent of six of the current members of the Supreme Court, including support for Chief Justice Roberts and Justices Alito, Kavanaugh, and Gorsuch while actively opposing the nominations of both Justices Kagan and Sotomayor. It is arguable that one outcome of the decision in *Citizens United v. FEC*, namely the unrestrained advertising by non-candidate groups, was on track to create an unresolvable constitutional crisis in a dispute over a prior restraint of protected political speech about candidates in the context of a non-partisan judicial election.

In order to explore the climate of advertising in judicial elections, this essay uses data on candidate and issue advertising collected from the public files of television stations in six of the states that held a statewide judicial election in 2016 to assess whether or not issue advertising is dominating the debate in judicial elections. Part II of this paper explores the contemporary environment for political advertising and the concerns raised by Justice Kennedy about the possibility of undue outside influence in judicial campaigns. Part III focuses on campaign regulation in judicial elections. Part IV discusses a range of empirical literature that has examined campaign advertising, including previous studies that used station public file data. Part V explores the methodology of this empirical research. Part VI presents an analysis of the data collected that strongly suggests that in states that select judges through election, even the non-partisan elections have been contaminated by partisanship of outside groups trying to influence the elections. Part VII proposes some solutions to the increasing problems associated with outside advertising in non-partisan judicial races.

II. Election Advertising Regulation

Before delving into the details surrounding judicial campaign regulation, it is important to understand the framework and underlying justifications for analyzing campaign regulation generally. Although the framework has since been refined, the Supreme Court established the basic standards of judicial review regarding campaign finance regulation in *Buckley v. Valeo*.¹³

At issue in *Buckley* were amendments to the Federal Election Campaign Act of 1971¹⁴ that limited individual and group contributions to candidate campaigns as well as expenditures on communications “relative to a clearly identified candidate.” The amendments also required disclosures for contributions above certain levels and established a public financing option for presidential campaigns.¹⁵

The *Buckley* Court reversed the D.C. Circuit’s decision that the amendments regulated conduct rather than speech, reasoning that “a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression.”¹⁶ In applying the “extracting scrutiny required by the First Amendment,”¹⁷ the *Buckley* Court proceeded to distinguish contribution limits from limits on expenditures, finding that the latter enjoy a greater degree of constitutional protection. The Court gave two main reasons for this finding. First, the Court illustrated that contributions to a candidate carried less expressive value than expenditures.¹⁸ In the Court’s view, limits on expenditures directly prevented individuals from communicating their opinions regarding a candidate, whereas

¹³ 424 U.S. 1 (1976).

¹⁴ 52 U.S.C. §§30101 et seq. 2 U.S.C. §§431–455.

¹⁵ *Id.*

¹⁶ 424 U.S. at 19.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 13 – 59.

contributions to a candidate's campaign serve as a general expression of support and are more similar to a "symbolic act" than conveying a specific message.¹⁹

Second, the Court found that contributions pose a greater risk of "real or apparent corruption" than expenditures.²⁰ The Court focused on *quid pro quo* corruption and reasoned that an independent expenditure without coordination from the candidate's campaign proved no threat of exchange of money for political favors.²¹ Although the Court also held that the appearance of corruption was a permissible government interest, the Court found that the present expenditure limit was not sufficiently tailored.²² The *Buckley* Court also held that disclosure requirements are constitutional as long as they are substantially related to a sufficiently important government interest, unless there is a reasonable probability of threats or harassment stemming from the association with a candidate or cause.²³

Since the *Buckley* decision, courts have continued to utilize the two-tier contribution/expenditure review process and require limits on expenditures to be narrowly tailored to a compelling government interest. In order for a contribution limit to succeed, however, it need only be "closely drawn" to a "sufficiently important interest," and the dollar amount need not be "fine tun[ed]."²⁴ The major issues that have arisen after *Buckley* surround expenditures by political parties, corporations, labor unions, and other groups, as well as aggregate contribution limits.

In 1978, the Court struck down a state statute prohibiting banks and corporations from making contributions or expenditures in connection with ballot measures, concluding that, in contrast to elections for political office, there existed no genuine risk of corruption.²⁵ Justice Powell's majority opinion for the Court emphasized that the source of the speech should not determine constitutional protection, reasoning that the First Amendment "afford[s] the public access to discussion, debate, and the dissemination of information and ideas." The Court rejected the argument that restrictions on corporate speech were needed to promote viewpoint equality. "Restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," Powell wrote.²⁶

However, twelve years later, in *Austin v. Michigan State Chamber of Commerce*, the Court acknowledged that corporate wealth could unfairly influence elections. The *Austin* Court upheld regulations on corporate expenditures in elections for political office.²⁷ The Court found the state had a compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."²⁸ Although the Court described this rationale as an anti-corruption interest, legal scholars noted the Court's

¹⁹ *Id.* at 21.

²⁰ *Id.* at 52.

²¹ *Id.* at 39-60.

²² *Id.* at 45.

²³ *Id.* at 62-75.

²⁴ See *Nixon v. Shrink Missouri Gov. PAC*, 528 U.S. 377 (2000).

²⁵ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The court also rejected the argument that regulation was needed to provide equality to voices – "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

²⁶ *Id.* at 791 (quoting *Buckley*, 424 U.S. at 48-49).

²⁷ 494 U.S. 652 (1990).

²⁸ *Id.* at 660.

expanded reasoning and concern over the distortion of viewpoints and messaging.²⁹ The Court continued to apply *Austin*'s broader reasoning and determination of what constitutes corruption until the controversial *Citizens United* decision.³⁰

At issue in *Citizens United* was the Bipartisan Campaign Reform Act's prohibition on corporate funded electioneering communications that prevented advertisements from identifying candidates in commercials within thirty days of a primary contest or sixty days of a general election.³¹ In striking down the BCRA's prohibition, Justice Kennedy's opinion for the five-justice majority concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."³²

The Court rejected the concerns over distortion highlighted in *Austin* and limited the anti-corruption rationale to a narrower area of *quid pro quo* arrangements or the appearance thereof. Therefore, unless a donor receives an agreed-upon benefit in exchange for a contribution, the donation may not rise to the level of being a corruptive influence sufficient to justify congressional regulation. Justice Kennedy further emphasized that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."³³

The *Citizens United* decision immediately spurred debates over whether money would become a corrupting force in elections for political office as well as the judiciary.³⁴ In his dissent, Justice Stevens warned that "[a]t a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races."³⁵ In fact, the Court had dealt with concerns arising from judicial campaign contributions just one year prior to the *Citizens United* decision in *Caperton v. A.T. Massey Coal Co.*³⁶

Four years after the *Citizens United* decision, the Court continued its line of reasoning in striking down the BCRA's aggregate limits on campaign contributions.³⁷ In *McCutcheon v. Federal Election Commission*, the Court relied upon *Buckley's* and *Citizens United's* narrow definition of corruption as a *quid pro quo* exchange and held that the government's only sufficient interest should be prohibiting such an exchange or the appearance thereof.³⁸

III. Campaign Regulation in Judicial Elections

Judges for state supreme court are chosen in one of three primary methods: appointment, election and, in more recent times, appointment followed by retention elections. In each method, politics and partisanship can play a role, but twenty-one states elect judges in officially non-partisan elections. Likewise, times have changed from when judicial campaigns were described as

²⁹ See e.g., Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 71 GA. ST. U. L. REV. 887 (2011); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997).

³⁰ See *McConnell v. Fed. Election Comm'n.*, 540 U.S. 93 (2003) (upholding ban on corporate and union funded electioneering communications).

³¹ *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010); 52 U.S.C. § 30104(f)(3).

³² 558 U.S. at 357.

³³ *Id.* at 360.

³⁴ See *supra* note 3.

³⁵ 558 U.S. at 460 (Stevens, J., dissenting).

³⁶ 556 U.S. 868 (2009).

³⁷ *McCutcheon v. Fed. Election Comm'n.*, 134 S. Ct. 1434 (2014).

³⁸ *Id.* at 1451.

boring and uneventful as today's judicial campaigns are often reported as being "nosier, nastier, and costlier."³⁹

Mirroring the general political election trend since the Court's 2010 decision in *Citizens United*,⁴⁰ campaign spending in judicial races has risen to record highs.⁴¹ According to the Brennan Center for Justice, political action committees, social welfare organizations, and other non-party groups spent a record \$27.8 million during the 2015-16 state supreme court election cycle.⁴² In fact, spending by outside groups accounted for an unprecedented 40 percent of overall state supreme court election spending.⁴³ Increased campaign spending and political activity in judicial races has added to concerns over judicial legitimacy, with many fearing the public perception that the courts are for sale and judicial candidates themselves have become little more than, "[p]oliticians in robes."⁴⁴

Nevertheless, the Court's jurisprudence has emphasized how the election of judges necessarily differs from the election of candidates for political office. The Court has found a compelling interest in protecting public confidence in the integrity of the judiciary and has stressed that "[j]udges are not politicians, even when they come to the bench by way of the ballot."⁴⁵

To further analyze the constitutional framework surrounding the regulation of judicial campaigns, this section explores the Supreme Court's treatment of modern campaign finance regulation and takes a closer look into a trilogy of cases, decided between 2002 and 2015, that directly address judicial campaigns – *Republican Party of Minnesota v. White*,⁴⁶ *Caperton v. A.T. Massey Coal Co.*,⁴⁷ and *Williams-Yulee v. Florida Bar*.⁴⁸

The Supreme Court first addressed regulation of judicial election campaigns in 2002 in *Republican Party of Minnesota v. White*.⁴⁹ At issue in *White* was the Minnesota Code of Judicial Conduct's announce clause that prohibited a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues" in their campaign.⁵⁰ In a 5-4 decision, the Court applied a traditional First Amendment analysis and treated the announce clause as a content-based restriction that burdened speech "at the core of our First Amendment freedoms"—speech

³⁹ Roy A. Schotland, *Comment*, 61 LAW AND CONTEMPORARY PROBLEMS 149, 150 (1998).

⁴⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010).

⁴¹ Alicia Bannon, *Judicial Elections After Citizens United*, 67 DEPAUL L. REV. 169 (2017); Chris W. Bonneau and Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. OF POL. 1267 (2011).

⁴² Alicia Bannon, Cathleen Lisk, and Peter Hardin, *Who Pays for Judicial Races?* Report by Brennan Center for Justice and National Institute on Money and State Politics, available at https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf.

⁴³ *Id.* Compare with only 29 percent outside spending in 2013-14.

⁴⁴ James L. Gibson, Jeffrey A. Gottfried, Michael X. Delli Carpini, and Kathleen Hall Jamieson, *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-based Experiment*, 64 POL. RES. Q. 545 (2011).

⁴⁵ *Williams-Yulee v. Florida Bar* 135 S. Ct. 1656, 1662 (2015).

⁴⁶ 536 U.S. 765 (2002).

⁴⁷ 556 U.S. 868 (2009).

⁴⁸ 135 S. Ct. 1656 (2015).

⁴⁹ *Republican Party of Minnesota v. White* 536 U.S. 765 (2002).

⁵⁰ *Id.* at 770.

about the qualifications of candidates for public office.”⁵¹ Thus, the government had to prove the clause was narrowly tailored to serve a compelling state interest.⁵²

Writing for the majority, Justice Scalia found that the state interest in preserving the impartiality (or appearance thereof) of the state judiciary was sufficient if “impartiality” was understood as the avoidance of bias to a party in a legal proceeding.⁵³ However, the Court found that the announce clause was both overbroad and under-inclusive to achieve such an interest.⁵⁴

In their dissents, both Justice Stevens and Justice Ginsburg contended that campaigns for judicial office should be held to a higher principle of impartiality and are markedly different from campaigns for political office.⁵⁵ “[J]udges perform a function fundamentally different from that of the people’s elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; ‘judges represent the Law,’”⁵⁶ Ginsburg wrote, quoting a previous dissenting opinion by Justice Scalia in *Chisom v. Roemer*.⁵⁷ Nonetheless, the majority and Justice Scalia emphasized the announce clause’s burden on electoral speech and responded that Justice Ginsburg’s dissent “greatly exaggerates the difference between judicial and legislative elections.”⁵⁸

However, the Court did not hold that judicial elections should *always* be seen as identical to elections for other political office. In fact, Justice Scalia was prudent to state that the Court “neither assert[s] nor impl[ies] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”⁵⁹ In the next two cases directly addressing judicial campaigns that the Court would hear, the Court does hold judicial elections to a different standard.

In *Caperton v. A.T. Massey Coal Co.*, Justice Kennedy wrote the majority opinion which held that the plaintiff’s due process rights were violated when a state supreme court justice failed to recuse himself from hearing a case after receiving more than \$3 million in campaign donations from the defendant.⁶⁰ The defendant, Don Blankenship, was chairman, chief executive officer, and president of A.T. Massey Company and contributed \$1,000 to then-attorney Brent Benjamin’s judicial campaign challenging incumbent Justice Warren McGraw for a seat on the West Virginia Supreme Court of Appeals.⁶¹ Blankenship gave another \$2.5 million to “And for the Sake of the Kids,” a political action committee that made independent expenditures in support of Benjamin. Blankenship also spent \$500,000 on his own independent expenditures in support of Benjamin. Blankenship’s contributions amounted to more than three times the amount spent by Benjamin’s own campaign committee.⁶²

⁵¹ *Id.* at 774.

⁵² *Id.* at 774–75.

⁵³ *Id.* at 775–81. Justice Scalia noted that the State’s interest in impartiality was “rather vague” and went on to highlight differing definitions of “impartiality.” See also Richard Briffault, *The Supreme Court, Judicial Elections, and Dark Money*, 67 DEPAUL L. REV. 281 (2018).

⁵⁴ *Id.* at 775–81.

⁵⁵ Justice Steven’s dissent was joined by Justices Souter, Ginsburg and Breyer. Justice Ginsburg authored her own dissent, which was joined by Justices Stevens, Souter, and Breyer. 536 U.S. at 797–821.

⁵⁶ 536 U.S. at 803.

⁵⁷ 501 U.S. 380, 411 (1991).

⁵⁸ 536 U.S. at 784.

⁵⁹ *Id.* at 783.

⁶⁰ 556 U.S. at 873–74.

⁶¹ *Id.*

⁶² *Id.*

During the election, a lawsuit against Massey Coal was underway in the West Virginia courts. In 2002, a West Virginia jury found Massey liable for fraudulent misrepresentation, concealment, and tortious interference with contractual relations and awarded the plaintiffs \$50 million in damages. Massey moved for an appeal in 2006 and in 2007 the West Virginia Supreme Court of Appeals reversed the verdict in a 3-2 decision that included Justice Benjamin.

Justice Benjamin argued he did not need to recuse himself absent a showing of objective evidence that he was biased.⁶³ Justice Kennedy rejected that argument and found, based on two prior Court decisions, that recusal is necessary when “the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.”⁶⁴

In noting that the defendant made \$3 million in donations with the knowledge that Justice Benjamin would eventually preside over his case, the Court reasoned that “there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”⁶⁵ Central to Justice Kennedy’s analysis in *Caperton* was his certainty that “Justice Benjamin would. . . feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”⁶⁶ Although Justice Kennedy emphasized that the facts in *Caperton* were “an extraordinary situation where the Constitution requires recusal,”⁶⁷ the decision established that bias or the appearance thereof could be created by campaign contributions to a judicial election.⁶⁸ The *Caperton* Court emphasized that judicial elections are simply different (based on the need for and appearance of impartiality) from elections for political office – a rationale the Court shied away from years earlier in *White*, but would be extended in *Williams-Yulee v. Florida Bar*.

Six years later, by a 5-4 vote with Chief Justice Roberts writing for the majority, the Court upheld a Florida rule prohibiting judicial candidates from personally soliciting campaign funds.⁶⁹ Although the Court held that any restriction on judicial campaign speech be subject to strict scrutiny, as they did in *White*, the Court found that the state had demonstrated the rule was narrowly tailored to serve a compelling state interest of protecting public confidence in the integrity of the state judiciary.⁷⁰

Chief Justice Roberts emphasized that judicial elections differ from elections for political offices. “Judges are not politicians, even when they come to the bench by way of the ballot,”⁷¹ wrote Chief Justice Roberts. “And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.”⁷² Unlike other elected officials, Chief Justice Roberts contended that an elected judge “is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors.”⁷³ Therefore the Court reasoned that

⁶³ *Id.* at 884.

⁶⁴ *Id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

⁶⁵ *Id.* at 884.

⁶⁶ *Id.* at 882.

⁶⁷ *Id.* at 884.

⁶⁸ Lower courts have determined that, after *Caperton*, the “appearance of impartiality” is a compelling justification for restrictions on the political activities of judges. *See e.g.*, *Wersal v. Sexton*, 674 F. 3d 1010, 1022 (8th Cir. 2012).

⁶⁹ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

⁷⁰ *See e.g.*, Noah B. Lindell, *Williams-Yulee and the Anomaly of Campaign Finance Law*, 126 YALE L.J. 1577, 1577 (2017).

⁷¹ 135 S. Ct. at 1662.

⁷² *Id.*

⁷³ *Id.* at 1667.

“Florida ha[d] reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary.”⁷⁴

Importantly, recusal was also seen as an insufficient alternative to a complete ban on personal solicitations.⁷⁵ The majority found that “a rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could ‘erode public confidence in judicial impartiality’ and thereby exacerbate the very appearance problem the State is trying to solve.”⁷⁶

The decisions in *Williams-Yulee* and *Caperton* make clear that judicial elections are indeed different, and that state regulation of judicial elections can go beyond the prevention and appearance of *quid pro quo* corruption – the sole justifications sufficient to require regulation in political elections after *Citizens*. In fact, lower courts have utilized the rationale and state interest in public confidence in the judiciary put forth in *Williams-Yulee* to uphold restrictions on judicial candidate behavior.⁷⁷

IV. Literature Review

Multiple studies have explored the effects of campaign and issue ads on voters, but in terms of judicial elections, scholarship has been primarily focused on attempts to measure or identify a causal relationship between donations and decisions.⁷⁸ While important, the focus of this scholarship, trying to assess a direct effect on judges, is missing the increased potential for corruption caused by a judicial candidate’s need to compete with issue advertising funded by an outside group. Rather than direct donations to the campaign organization of the judge, freed by the decision in *Citizens United*, outside groups can now leverage more electoral power through external spending on issue advertising in the campaign. Studies that have examined the quantity or content of judicial advertising have often failed to account for the changes brought about by

⁷⁴ *Id.* at 1671.

⁷⁵ Several legal experts, as well as the dissenting justices leveled concerns about the Court’s application of strict scrutiny. For example, Justice Alito’s dissent asserted that the Florida rule “is about as narrowly tailored as a burlap bag.” 135 S. Ct. at 1685. *See, e.g.*, Clay Hansen, J. Joshua Wheeler, *Free Speech, Elections, and Judicial Integrity in an Age of Exceptionalism*, 31 J. L. & POL. 457 (2016); Michael Linton Wright, Comment, *Williams-Yulee v. Florida Bar: Judicial Elections, Impartiality and the Threat to Free Speech*, 93 DEV. L. REV. 551, 569-72 (2016).

⁷⁶ 135 S. Ct. at 1672 (quoting *Caperton*, 556 U.S. at 891) (Roberts, C.J., dissenting).

Justice Roberts also acknowledged that “[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record.” 135 S. Ct. at 1667.

⁷⁷ *See, e.g.*, *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016) (upholding restrictions on judicial candidates from soliciting funds for other candidates or political organizations, from publicly endorsing candidates for public offices, from making speeches on behalf of other candidates or political organizations or from taking an active part in any political campaign); *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016) (upheld a number of restrictions on judicial conduct, including prohibiting knowingly or with reckless disregard for the truth making false statements on matters material to a campaign during a campaign. The court reasoned that the false statement ban was justified because “preserving public confidence in the honesty and integrity of its judiciary is . . . more compelling than . . . interest in protecting voters in other elected races from misinformation.”) *Myers v. Thompson*, 192 F.Supp.3d 1129 (D. Mont. 2016)(upholding a prohibition on false statements by or about judicial candidates); *O’Toole v. O’Connor*, 802 F.3d 783 (6th Cir. 2015) (upholding limits on time periods of when judicial candidates may solicit contributions).

⁷⁸ HERBERT M. KRITZER, JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS (2015).

Citizens United. Data used in recent studies has predated or was generated for time periods very shortly after the decision in *Citizens United*, before the effects of that decision could be implemented, measured or understood.⁷⁹ Based on this timeline, Hall suggested that judicial advertising was historically limited,⁸⁰ at the same time recognizing that the potential for influence in judicial elections by outside groups had become a significant concern.⁸¹

In practical terms, political advertising in broadcasting can be divided into two categories: campaign advertising and “issue advertising.” Campaign advertising, or advertising that originates with the official campaign of a legally qualified candidate for office that appears on a broadcast station or through programming at a local cable franchise, is governed by longstanding rules contained within sections 312 and 315 of the Communications Act of 1934.⁸² Provisions require that broadcasters to carry campaign advertisements from candidates for federal office, provide equal access to advertising by opposing candidates, and make advertisements available at the lowest unit rate.⁸³ Campaign ads in judicial races were limited in many states prior to *Republican Party of Minnesota v. White*, which declared judicial announce clauses to be unconstitutional.⁸⁴ The removal of these provisions, which had restricted a judicial candidate’s ability to speak out on their positions on legal and political issues, changed the environment for judicial campaign advertising significantly.

The second category of political advertising, officially non-candidate political advertising, but commonly referred to as “issue ads,” covers any advertising that discusses a political issue that does not originate with the official campaign of a candidate for office. Issue advertising is the generic term that applies to political ads run by outside groups, such as unions, political action committees and political parties. Although less common, in some cases issue advertising is even run and funded by individual. Non-candidate political advertising is not provided the same protections under federal law as campaign advertising. Access mandates and lowest unit rate provisions do not apply and in practical terms, issue advertising is functionally treated more like a traditional commercial or promotional message. Licensed broadcast stations are not required to sell these advertisements, and a broadcast station that sells issue advertising assumes legal responsibility for the content of any issue ads the station transmits.⁸⁵

Assuming a broadcast radio, television station or cable franchise is willing to sell issue advertising, the outlet will often carry issue ads at a pre-specified rate, and will then publish a political advertising rate card that identifies the pricing options.⁸⁶ This information is public

⁷⁹ Michael F. Salamone, Orion A. Yoesle & Travis N. Ridout, *Judicial Norms and Campaigns: The Content of Televised Advertisements in State Supreme Court Races*, JUSTICE SYSTEM J. (2017).

⁸⁰ MELINDA GAHN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015).

⁸¹ *Id.*

⁸² 47 U.S.C. § 151 et seq.

⁸³ 47 U.S.C. § 315. See also FCC Statutes and Rules on Candidate Appearances & Advertising, <https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising>.

⁸⁴ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

⁸⁵ In practical terms, issue advertising operates closer to traditional commercial speech. The political component of the paid for speech changes the dynamic slightly and makes a station that carries issue advertising liable for its content. 47 CFR §73.1212.

⁸⁶ Rate cards are a media outlet’s “menu” of purchasing for advertising. A broadcast station will typically maintain a special rate card for issue advertisers during election cycles. Rate cards may include the price of advertisements at different times of day, and for different days of the week, as well as any discounts for frequency and the rules for pre-emption. The rate card will also specify if a station will accept issue advertisements, as well as the guidelines the station uses when accepting non-candidate advertising.

record, and thus available, along with a list of advertisers buying issue ads from a media outlet's online public file.

Licensed broadcast stations are required to keep information on all political campaign or issue advertising for a period of two years.⁸⁷ Political advertising data has always been available to the public. Interested parties traditionally were required to access the information from paper records that were held at the physical location for the broadcast station but after 2012 are now available online as part of a publicly accessible Federal Communications Commission database.⁸⁸ As public file data on political advertising includes pricing information, traditionally stations have removed these materials on a periodic basis, to keep competitive information in line with this two-year requirement.

To test the outcomes of *Citizens United*, a pilot study,⁸⁹ and a second expanded project,⁹⁰ each used public file data collected from Milwaukee, Wisconsin, radio stations to empirically examine whether any changes to non-candidate political advertising were identifiable during time periods including pre-BCRA, during the BCRA and shortly after the *Citizens United* decision. The results demonstrated close correlations between the changes in the law and the number of entities buying issue advertisements, the amount of money spent and the number of candidate mentions occurring in the advertisements, all of which were changed, facilitated by *Citizens United*.⁹¹

However, if corruption is limited to a narrower definition of *quid pro quo*, the spending examined in those two studies would not seem to be persuasive to the *Citizens United* majority. By looking at the broad range of issue advertisements in a wide range of elections, including for president, governor, U.S. senator and U.S. representative, this early research examined issue advertisements in elections in which, generally, the candidates themselves raised substantial amounts of money. Since the federal limits on contributions directly to candidates were unaffected by *Citizens United*, the issue advertisement spending made up only part of the larger pool of money allocated to advertising in an election.

Judicial elections, however, are historically low turnout affairs with a limited electorate largely consisting of under or uninformed voters.⁹² Even moderate spending by outside groups on issue advertising to influence a low turnout, low information judicial race, can easily result in spending which exceeds that of the judicial candidates themselves. Outside groups, many of which are effectively shell organizations created solely to run advertising, have opportunities to purchase attack ads to deliver content judicial candidates themselves cannot or will not match in terms of rhetoric or spending.⁹³

Unlike partisan political candidates, judicial candidates are potentially more susceptible to citizen concerns about outside influence.⁹⁴ Legal scholars, practitioners and judicial reform

⁸⁷ 47 CFR 73.1943

⁸⁸ FCC Public Inspection Files Database, available at <https://publicfiles.fcc.gov/>.

⁸⁹ Christopher Terry & Mitchell T. Bard, *Citizens United, Issue Ads and Radio: An Empirical Analysis*, 20 COMMLAW CONSPPECTUS 307 (2012).

⁹⁰ Christopher Terry & Mitchell Bard, *Milwaukee Radio Public File Data, 1998-2011: An Empirical Analysis of Issue Advertising after the BCRA and Citizens United*, 24 U. FLA. J.L. & PUB. POL'Y 157 (2013).

⁹¹ *Id.*

⁹² Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43, 80 (2003).

⁹³ Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. APP. PRAC. & PROCESS 47, 132 (2015).

⁹⁴ Clive S. Thomas, Michael L. Boyer & Ronald J. Hrebendar, *Interest Groups and State Court Elections – A New Era and Its Challenges*, 87 JUDICATURE (2003).

advocates agree that televised attack campaigns could have significant consequences in judicial elections in which integrity, impartiality and wisdom of judges are being impugned.⁹⁵ Even further, some have raised questions about the downward spiral of the rhetoric in judicial campaigns as traditional norms are being replaced by aggressive advertising campaigns undertaken by organizations with a preexisting social or legal agenda.

For example, in Michigan in 2009, a network of conservative-leaning issue groups were able to swing the court from 3-4 to 4-3 in favor of conservatives by outspending the judicial candidates 3 to 1 by running television ads that had limited disclosure requirements.⁹⁶ Likewise, in Iowa's 2010 judicial elections, an incumbent judge who had participated in striking down the state's ban on same sex marriage was targeted by advertising run by social issue groups opposed to the decision.⁹⁷

The relatively lower financial costs to outside groups to influence a traditionally low turnout judicial election in favor of a friendly judicial candidate increases the potential for corruption substantially. Spending on behalf of (friendly) judicial candidates, in lower-turnout elections, logically has the potential to have more influence on a voter than similar spending in larger political campaigns where campaign purses are more robust. Often the interest in controlling the outcome of a judicial campaign can be tied to economic or social incentives to "stack the bench." Industry groups opposed to environmental or workplace regulations can support anti-regulation candidates, and in the wake of the changes to campaign finance brought about by *Citizens United* and *McCutcheon*, have the potential to spend unlimited amounts of money to advertise on their behalf. As was demonstrated clearly in the events that led to the *Caperton* decision, corporations, lobbies and other groups facing pending legislation, legal liabilities or regulations that are likely to ultimately end up under judicial review could view spending money on issue advertising as a practical, effective investment in influencing a candidate to rule in their favor.

In a third study employing archival public file data to track political advertising focused on a series of judicial races in Wisconsin, the analysis focused on the relationship between outside groups and judicial candidates – a relationship that existing data suggested should not be taken lightly. Independent research had already documented a correlation between donations to justices in Wisconsin and favorable rulings in favor of campaign supporters in more than 50 percent of cases, and in reality, Wisconsin State Supreme Court justices had failed to recuse themselves in at least 98 percent of cases in which one or more of the participants had donated to one or more of the justices' election campaigns.⁹⁸ Returning to the multi-year public file archive assembled during the first two projects, a new analysis of the records demonstrated that the only non-candidate political ads mentioning a judicial candidate between 1998 and 2009 were a series of issue ads that were run in 2006 encouraging people to contact their legislators and voice support

⁹⁵ Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003). See also Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

⁹⁶ Adam Skaggs and Maria da Silva, NEW POLITICS OF JUDICIAL 2009-10 HOW SPECIAL INTEREST SUPER SPENDERS THREATENED JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ON AMERICA'S COURTS, Brennan Center for Justice. (2011), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/NewPolitics2010.pdf>.

⁹⁷ *Id.*

⁹⁸ "In instances where a contribution came in before a case was decided, justices favored those attorneys' clients 59 percent of the time." *Wisconsin Supreme Court Justices Tend to Favor Attorney Donors*, Wisconsin Center for Investigative Journalism, available at <http://www.wisconsinwatch.org/2013/10/20/Wisconsin-supreme-court-justices-tend-to-favor-attorney-donors/>.

for the confirmation of Justice Samuel Alito's nomination to the U.S. Supreme Court.⁹⁹ The study concluded that issue advertising in judicial elections had been limited prior to *Citizen's United* but that advertising in judicial elections existed as the archive did contain entries for candidate advertising in several local and state level judicial elections. The public file advertising data suggested that issue groups had only become involved in judicial elections after the changes to the electioneering communication standards in the *Citizens United* decision.¹⁰⁰ The removal of the existing controls on when during a campaign issue advertising could be aired and, more importantly, the removal of the limitations related to candidate mentions correlated directly to the introduction of third-party issue advertising to the statewide judicial races in Wisconsin.

Opening the door for third-party groups to make significant purchases of advertisements that attacked or supported candidates resulted in a flood of election activity by issue groups. There was a metaphorical explosion in the quantity of issue advertising in the 2011 Wisconsin Supreme Court race, a campaign that occurred shortly after the decision in *Citizens United*. Notably, issue groups spent an estimated \$3.6 million on electioneering in the race between incumbent David Prosser and challenger Joanne Kloppenburg, in a race which had become a proxy campaign for then Wisconsin Governor Scott Walker's controversial Act 10 legislation. The archival data indicated that no issue advertising related to a judicial election had aired in at least a decade prior to *Citizens United*.¹⁰¹ Conversely, during the 2011 statewide judicial election, all of the judicial ads which identified a candidate within 30 days of a primary or 60 days of a general election run would not have been permissible under federal law and/or the station's political advertising policy.¹⁰²

Then, just two years later, in 2013, during the next statewide judicial race in Wisconsin, outside groups outspent the combined efforts of the candidates.¹⁰³ As such, the media debate responsible for shaping the environment of a judicial election was not primarily defined by the candidates, but was in the hands of handful of outside groups, each of whom had spent heavily to influence the outcome. And, in most cases, the issue groups that were advertising in these two Wisconsin elections had, or directly represented, interests that ultimately came before the state's supreme court.¹⁰⁴ The potential for *quid pro quo* corruption in this arrangement is clear, especially as Wisconsin justices have a documented history of failing to recuse themselves on cases when donors come before them to rule on a case in which they have an interest.¹⁰⁵

As such, questions continue to linger about the intentions of the various organizations spending large sums of money, presumably to influence policy in the state and ultimately impose their intent upon the electorate. By some measure, negative ads have become a form of judicial election currency since *Citizens United*, and that currency is being spent with increasing frequency. There is a moral imperative to examine these changes to judicial elections. Given the standard Kennedy proposed in *Caperton*, employing empirical data about advertising in judicial

⁹⁹ Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption: Issue Advertising in Wisconsin Judicial Races before and after Citizens United*, 16 J. APP. PRAC. & PROCESS 305 (2015).

¹⁰⁰ A check of the data for other in-market stations in a study of issue advertising changes between 2006 and 2010 also supports the finding that outside groups were not purchasing issue ads for judicial elections prior to *Citizens United*. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Billy Corriher and Maya Efrati, *Can You Buy Justice? In Wisconsin, It Appears You Can*, NEWSWEEK, July 28, 2015.

¹⁰⁵ *Wisconsin Supreme Court Justices Tend to Favor Attorney Donors*, Wisconsin Center for Investigative Journalism, available at <http://www.wisconsinwatch.org/2013/10/20/wisconsin-supreme-court-justices-tend-to-favor-attorney-donors/>, last viewed February 19, 2015.

elections provides an opportunity to look past the ideological and political divides that surround campaign finance.

V. Methodology

States use one of three traditional models to seat judges on the bench of their respective supreme courts.¹⁰⁶ The first, purely appointive systems, allow the executive of the state to appoint judges to the bench for limited terms. Although issue advertising is not unheard of in appointive systems, the process of appointment limits outside group influence, including advertising by issue groups.¹⁰⁷

In the second system, purely elective, judges can be selected in either non-partisan or partisan judicial electoral contests. Some states, like Ohio, have a mixed system involving a partisan primary but then follow with a non-partisan general election.¹⁰⁸ Purely electoral judicial campaigns have attracted significant outside issue advertising and spending, especially since the *Citizens United* decision. While at least nominally non-partisan, judicial races in many states have attracted criticism for essentially being partisan races because candidates are associated with either conservative or liberal political viewpoints.¹⁰⁹

The third system, sometimes referred to as a compromise, is a hybrid system, where judicial appointments are followed by retention elections. Retention elections are essentially a yes or no referendum on a judge. While issue advertising is more common in purely elective judicial races, retention elections have attracted some issue group influence as well, especially from conservative leaning groups over social issues.¹¹⁰

This project used the information contained in the FCC's online public files of broadcast television stations in six states to develop a data set on advertising related to statewide judicial elections during 2016. Wisconsin, West Virginia and Arkansas have non-partisan judicial elections. Ohio has non-partisan judicial elections but uses a partisan primary system. Missouri is a retention election state, and in 2016 Minnesota, while having a non-partisan election, the incumbent, Justice Natalie Hudson, had been appointed to the bench and was standing election for a full term.

Every commercial broadcast television station in Arkansas, West Virginia, Missouri, Wisconsin, Ohio, and Minnesota was identified by call letter, and then the FCC Public File database for each station was searched for judicial election advertising entries, including advertising by the candidates and by issue groups running ads related to the judicial campaign.¹¹¹ Entries in a station's "political file" related to the 2016 statewide judicial elections were collected,

¹⁰⁶ Patrick M McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, AM. JUDICATURE SOC., JUDICIAL ELECTIONS SERIES (1990).

¹⁰⁷ ADAM SKAGGS, MARIA DA SILVA, LINDA CASEY & CHARLES HALL, NEW POLITICS OF JUDICIAL ELECTIONS, 2009–10 (Charles Hall, ed. 2011), http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf.

¹⁰⁸ *Ohio Judicial Elections*, BALLOTPEDIA, https://ballotpedia.org/Ohio_judicial_elections.

¹⁰⁹ Chris Dickerson. "Judicial Elections in West Virginia will now be non-partisan." Legal Newline. June 11, 2015. <https://legalnewline.com/stories/510550806-judicial-elections-in-west-virginia-will-now-be-nonpartisan>.

¹¹⁰ Skaggs et al. (2011), *supra* note 108.

¹¹¹ Every station's online public file has a section dedicated to a "political file." Although some variation exists, the political file is arranged by year, and typically includes categories for Federal, State, and Local Elections. Stations will also have a category for "Non-Candidate Political Advertising." See <https://publicfiles.fcc.gov/about-station-profiles/>.

and a data set was compiled that assessed the number of ads aired by candidates, the number of ads by outside groups, and the total spending on judicial election ads.

State	Election Model	Total Spending	Issue Spending	%	Total Issue Ads	Total Ads
AR	NP Election	\$1,069,369	\$585,268	54.4%	2627	1386
MN	Appointment/Election	\$0	\$0	-	-	-
MO	Retention	\$0	\$0	-	-	-
OH	NP Election ¹¹²	\$1,813,799.50	\$550,550	30.4%	3878	667
WI	NP Election	\$2,454,164.65	\$1,685,370	68%	9725	4004
WV	NP Election	\$2,351,443.50	\$1,729,960	73.6%	8528	3886

In Arkansas, public file entries identified a total of 2627 television ads that were run related to the 2016 statewide judicial election, representing a total spending of \$1,069,369. Of these totals, issue advertising represented 1386 Spots (52.8% of the total ads run) and \$585,268 (54.4% of the total spending). Notably, while outside advertising exceeded the spending of all of the official candidates combined, the data demonstrated only one issue advertiser that was active during the election cycle, the Judicial Crisis Network, an advocacy group based in Washington, D.C. that was supporting Dan Kemp by running a series of attack ads against his opponent.

In Wisconsin, 2016 represented another active cycle of issue advertising related to the statewide judicial race. In total, 9725 ads were run representing \$2,454,164.65 in spending. Of these findings, 4004 (41% of the total number of judicial election related ads run) constituting \$1,685,370 (68% of the total spending on the judicial election) was for issue advertising. In Wisconsin, there were just two advertisers. The Wisconsin Alliance for Reform organization ran 3339 ads (83% of issue advertising and 34% of all of the ads run related to the election) spending \$1,326,220.65 (78% of issue spending/ 54% of total of the total spending) to support the conservative incumbent Rebecca Bradley. The Greater Wisconsin Committee ran 665 ads (17% of issue advertising/ 7% of all advertising) spending \$359,150 (22% of issue spending/14% of all spending) to support the challenger Joanne Kloppenburg.

West Virginia also saw aggressive spending on issue advertising in the 2016 statewide judicial election. Issue spending of \$1,729,960 (73.6% of the \$2,351,443.50 in total spending) represented 3,886 (45.6% of the total number of 8,528) judicial election ads. Within the issue ads, the Republican State Leadership Council was responsible for \$1,269,750 (54% of issue spending) for 2,512 ads (29.5% of all issue ads). The West Virginia Chamber of Commerce ran 581 issue ads related to the judicial election (7%) representing \$187,115 (8%) of spending. A third issue group, Just Courts, accounted for 707 ads (8.2%) and \$273,095 (11.6%) of spending on issue ads.

Ohio also saw spending by the Republican State Leadership Council on issue advertising related to the 2016 statewide judicial election. Notably, the group was not competing for television airtime against other groups, but still spent \$550,550 to run 667 ads. These numbers reflect 17.2% of the total number of judicial election ads and 30.4% of the total spending.

¹¹² Ohio has a partisan primary and a non partisan general statewide judicial election. See https://ballotpedia.org/Ohio_judicial_elections.

Minnesota television station public file data did not indicate any issue spending tied to the statewide judicial election in Minnesota. Likewise, television stations in Missouri did not have any records to suggest issue advertising existed for the statewide retention election in 2016. However, television stations in Minnesota did carry issue advertising related to the Wisconsin judicial race. Several stations based in television markets in Minnesota that include viewing areas inside of Western Wisconsin carried issue advertising for the judicial race across the state line, and at least in one case, a campaign ad related to the statewide judicial election occurring across the state line.

In practical terms, the four states with non-partisan statewide judicial elections were the ones with the most issue spending about the campaigns. Minnesota, with appointment and then election and Missouri, with a retention election system, demonstrated no activity by outside groups on television. Meanwhile, in Wisconsin, Arkansas and West Virginia, issue groups dramatically outspent the candidates.

VI. Results & Discussion

The data examined in this study empirically establishes a pattern for the electoral mode judicial races in 2016. In Arkansas, West Virginia and Wisconsin, the overwhelming majority of advertisements and money spent on advertising came from outside groups rather than the campaigns themselves. Further, knowledge of the motives, support and membership of the groups purchasing advertising was limited. While press reports have tied outside groups like the RSLC, the Wisconsin Club for Growth, and Judicial Crisis Network to a donor network of common business and corporate interests,¹¹³ these groups, as well as their agendas, based and operating from outside the states where elections are occurring, can be difficult to pin down. Yet with relatively anonymous groups opting to spend hundreds of thousands of dollars on these state judicial races, it is not a logical stretch to suggest that a rational actor would do so only if these groups (or the individuals backing them financially) expected some kind of return on that investment.

Importantly, none of the data collected and examined for this project suggested that social issues, like abortion, were the dominant themes of the advertising or could be easily identified as the motivation of those groups purchasing the advertising time. In fact, quite the opposite was true. For example, in Arkansas during the 2016 campaign, Courtney Goodson was considered to be the more liberal of the two candidates despite a strong endorsement by the National Rifle Association and the dominant theme in a large quantity of the issue ads being run by the Judicial Crisis Network included a suggestion that Goodson was too cozy with trial lawyers in the state, a group which included her husband.¹¹⁴ In fact, Goodson's decision overturning the state's tort reform law appeared to be the most significant difference between her record and that of her opponent Dan Kemp, generating suggestions that she was targeted by moneyed interests who funded JCN issue ads as a proxy for sensitive electioneering practices.¹¹⁵

Groups seeking to play an outsized role in placing or keeping a judge in a position to positively rule in the group's favor on actual controversies in front of the court, have edged close to—if not firmly within—Justice Kennedy's "probability of actual bias on the part of the judge or

¹¹³ Viveca Novak, Robert Maguire and Peter Overby, *Wellspring's Flow: Dark Money Outfit Helped Fuel Groups on Political Front Lines*, NPR, Nov. 5, 2013.

¹¹⁴ You can see a sample of JCN's ads at this link: <https://www.arktimes.com/ArkansasBlog/archives/2016/02/09/in-supreme-court-race-336000-in-dark-money-advertising-fuels-attack-on-goodsons-insider-connections>.

¹¹⁵ Benjamin Hardy, *In Supreme Court Race, \$336,000 in Dark Money Advertising fuels attack on Goodson's "insider" Connections*, ARK. TIMES, Feb. 9, 2016.

decision-maker” that “is too high to be constitutionally tolerable.” The impartiality of the nation's judges lies at the heart of our legal system and our democracy. The data in this study indicates that this impartiality is under threat by the kind of unlimited issue advertising legalized by *Citizens United*.

Meanwhile, the judicial elections in Missouri and Minnesota were not subject to any demonstrable outside influence via television advertising during the 2016 election cycle. As outside groups try to influence the outcomes in non-partisan judicial elections those races have increasingly resembled the elections of traditional political office. While no longer bound by announce clauses after the *White* decision, judicial candidates themselves may choose to limit the rhetoric they engage in out of respect for the judiciary, outside groups with a legal or fiscal agenda are not bound by such conventions, ethical or otherwise. We are witnessing, with increasing frequency, a no-holds-barred approach to advertising by outside groups in statewide judicial elections.

Ultimately, if the critics of *Citizens United* are correct, the decision raises the prospect of, as Justice Stevens puts it, "threaten to undermine the integrity of elected institutions across the Nation." This study, like the ones that have preceded it, continues to empirically support the position that the critics are correct, especially as the decision relates to advertising in judicial elections.

VII. Conclusion

Returning to the dispute which arose in Arkansas over JCN's advertising in 2018, it is important to make one distinction. Even after *White*, 38 states still have statutes on the books which prohibit false political advertising. For example, WI 12.05 states “No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.”¹¹⁶ Often used as the basis for campaign's legal threat to a broadcast station over advertising candidates object to, WI 12.05 did lead to a prior restraint of an advocacy group's political advertising on radio in a 2008 Wisconsin State Assembly election.¹¹⁷

Yet in Arkansas, no similar legal provision preventing false political advertising exists. Arkansas's experiences in 2014, 2016 and 2018 with outside advertising in the statewide judicial elections led the creation of the rapid response team, ironically an outside group itself, having its own say in the arbitration of truth. The response team represents an arguably legitimate response within the context of the marketplace of ideas that remains absent from formal legal controls. However, collectively we should take a pause to consider the state of current affairs in political advertising. A dispute over the prior restraint of political speech generated an unreviewable restriction, that if followed to its legal conclusion, would have tarnished the image of independence of the majority of the current members of Supreme Court of the United States.

While one can find access to nearly unlimited amounts of political opinion during campaign season, Justice Kennedy, the author of *Citizens United*, pointed out just one year earlier in *Caperton* that judicial elections should be different than traditional political elections. Protecting the integrity of the judicial branch means that different rules and standards should

¹¹⁶ Wis. Stat. § 12.05, accessible at <https://docs.legis.wisconsin.gov/statutes/statutes/12/05>.

¹¹⁷ The court of appeals lifted the restraint just two days later, stating that 12.05 did not provide prior restraints as a remedy, allowing the ads to return to the air before election day. *State v. Knodl*, No. 2008-CM-1572 (Washington Cnty. Cir. Ct.).

apply, and this includes the issue advertising by outside parties which intends to influence voters in a judicial campaign.

While Kennedy's no undue influence standard from *Caperton* remains subjective and without a clearly applicable test, the intent of the standard is well reasoned. Although the authors are reluctant to propose this, we believe the situation in Arkansas, as well as the quantity of issue advertising now occurring in nominally non-partisan judicial elections, illustrates the need for some form of advertising regulation. As the data from the 2016 races indicate, issue groups are routinely outspending the judicial candidates, which in turn, is putting pressure on both incumbent judges and their challengers to raise additional funding to compete for the hearts and minds of voters.

In every situation in which this occurs, the existing situation creates an opportunity cost. Judges who are forced to do additional fundraising to compete with an outside group face questions, legitimate or otherwise, about where that additional money comes from. Even absent any bad intentions, with a need to seek out new sources of funding to back their campaigns, judges are increasing the likelihood they will be forced to recuse themselves from a case they are being elected to adjudicate. We suggest that this reality, independent of the many other issues outside advertising in judicial elections creates, provides a compelling justification for regulation of issue advertising in the context of judicial elections.

Our simple ethical suggestion is that broadcast, cable and internet outlets only carry campaign advertising in judicial elections. While an FCC rulemaking process to promulgate rules to regulate protected political speech would be problematic, the selling and clearance of issue advertising for any race is always an optional choice for a broadcast outlet. We recognize that stations will be reluctant to forego any opportunities to sell additional advertising and that a legal mandate imposing content restrictions across different media types would require significant regulatory revisions at the federal level, but private, rather than government interests, will act as the functional gatekeeper in this proposal.

Our second proposal is tied to location. We propose that state regulators impose limits on advertising in state judicial races by entities based beyond the borders of that state. This solution obviously raises immediate issues when applied to local broadcasters operating under federal licensing and regulation, but the empirical data on issue advertising suggests that a large portion of issue advertising spending in statewide judicial elections originates from nationally focused advocacy groups who are not regularly required to disclose sources of funding or supporting membership. Operating from a simple objective of transparency, immediate questions about the intent of advocacy groups and issue advertisers who are based outside of a state where a judicial election is occurring can be raised. Relying on the suggestions posed in both the *Caperton* and *Williams-Yulee* decisions, these questions are tantamount to a compelling interest in favor of restriction. By forcing outside groups to operate from inside of the borders of the state where they are trying to influence an election, there is an additional level of review of those groups provided by the state level campaign regulators. We believe this solution will offer some needed transparency and could provide additional accountability by the groups engaged in judicial election advertising at the state level.

To be clear, we are not proposing overturning *Citizens United* or suggesting that issue advertising related to traditional political campaigns be restrained. Both authors are dedicated First Amendment advocates and we recognize that the *Citizens United* decision dramatically expanded the environment for political speech about elections. We maintain some concerns about the different tiers of protections that are given to campaign and issue ads under existing law,

especially the selective access that can be given to issue groups by stations and how this gatekeeper mechanism interacts with the intent for more speech inherent in the *Citizens United* decision. Yet, we also recognize that elections for judicial candidates should be different than those of a traditional campaign for elected office.

While influence on an elected official can affect whether or not someone chooses to vote for or against that candidate, in judicial elections even the suggestion of influence or a tie between an outside group and a judge can undermine faith in the judiciary's independence, raising a range of ethical compliance issues for judges. Over the last ten years these questions have now ensnared all levels of the judiciary including the majority of the justices of the U.S. Supreme Court. While the facts of the Arkansas case are, at least so far, unique, it is clear that in terms of judicial election advertising we are staring at a metaphorical canary in a First Amendment coal mine when entire state courts must recuse themselves rather than rule on a prior restraint of political speech.

Something must be done.

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

** Sarah K. Wiley is a Ph.D candidate at the Hubbard School of Journalism and Mass Communication, University of Minnesota.

Criminal Defamation Put to the Test: A Law and Economics Perspective

Christopher Phiri*

Should defamation be decriminalized? If so, why? These policy questions have been a subject of extensive scholarly and political discourse for decades. On their part, key stakeholders such as human rights organizations, press freedom groups and media organizations at both national and international level have virtually been unanimous in their calls for the decriminalization of defamation. Whilst acknowledging the need to protect the fundamental right to reputation, their argument is that criminal defamation is a disproportionate restriction on freedom of expression in general and freedom of the media in particular. They accordingly advocate for civil defamation to the exclusion of criminal defamation. The proponents of criminal defamation on the other hand believe that criminal defamation laws are needed to ensure the protection of the right to reputation. As the debate lingers on, this article restates the case for the decriminalization of defamation by drawing on law and economics scholarship. The article argues that criminal defamation is a policy mistake which cannot be justified in terms of the property-liability rules framework.

Key words: Criminal defamation, freedom of expression, liability rules, property rules, right to reputation

I. Introduction

Everyone has the right to the protection of the law against unwarranted attacks upon reputation. This right is recognized as a fundamental human right by both article 12 of the Universal Declaration of Human Rights (UDHR) 1948 and article 17 of the International Covenant on Civil and Political Rights (ICCPR) 1966.¹ Although the legal terminology used to describe attacks upon reputation varies across jurisdictions, almost all countries provide some form of protection against unwarranted attacks upon reputation through some form of defamation laws.² At least insofar as they seek to protect *individuals* from *false statements of a factual nature that cause damage to reputation*,³ defamation laws therefore serve an indispensable purpose which is recognized globally as a valid reason for restricting freedom of expression. Even staunch free speech advocates, such as John Stuart Mill, who believed that there ought to be the “fullest liberty”

¹ See note 55 *infra*.

² Global Campaign for Free Expression, *Civil Defamation: Undermining Free Expression*, ARTICLE 19, at 2 (2009).

³ It is interesting to note, though, that communicating a “true” statement can also constitute defamation in some countries. See, e.g., Matt J. Duffy & Mariam Alkazemi, *Arab Defamation Laws: A Comparative Analysis of Libel and Slander in the Middle East*, 22 COMM. L. & POL’Y 189 (2017) (showing that in six Middle East countries—Egypt, Jordan, Kuwait, Lebanon, Libya and the United Arab Emirates—truth cannot be a defense to a criminal defamation charge).

of expression,⁴ recognize the need to limit freedom of expression “to prevent harm to others.”⁵ Thus, this article does not countenance any theory which suggests that freedom of expression “is a holy of holies which should be exempt from the normal tradeoffs that guide the formation of legal policy.”⁶

There are currently three main regulatory approaches to defamation around the world. First, a number of countries protect reputation through both civil defamation laws and criminal defamation laws.⁷ Second, there are those countries, some of which have only recently decriminalized defamation, that treat defamation as purely a civil wrong regulated by civil law.⁸ And third, a considerable number of jurisdictions (most notably, in the Arab world) treat defamation as a crime rather than as a civil wrong.⁹ In the last two decades or so, there has been a growing global movement towards the decriminalization of defamation. The case against criminal defamation has been well-stated: it is simply that criminal defamation is a disproportionate restriction on freedom of expression in a democratic society.¹⁰ This abolitionist view favors civil defamation, arguing that civil defamation laws can adequately and more appropriately protect reputation. Although some progress towards the decriminalization of defamation has been recorded in the recent past, many States continue to retain criminal defamation provisions on the statute books.¹¹ The decriminalization debate is therefore unlikely to go away any time soon.

This article contributes to this ongoing debate by drawing on law and economics scholarship. The article uses the “Calabresi-Melamed property-liability rules framework” to assess the propriety of criminal defamation laws relative to civil defamation laws. Within that framework, the three extant regulatory approaches are viewed as a choice between property rules and liability rules, with criminal defamation offering a property-based protection of reputation

⁴ John Stuart Mill, ON LIBERTY 34 (1909).

⁵ *Id.* at 23. According to Mill, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”

⁶ Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 6 (1986).

⁷ SCOTT GRIFFEN, DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY (2017).

⁸ *Id.*

⁹ See Duffy & Alkazemi, *supra* note 3 (showing that Egypt, Jordan, Kuwait, Lebanon, Libya and the United Arab Emirates use criminal prosecutions instead of civil lawsuits to protect reputation).

¹⁰ See, e.g., UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media & OAS Special Rapporteur on Freedom of Expression, *Joint Declaration: Current Challenges To Media Freedom* (London, Nov. 30, 2000); UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media & OAS Special Rapporteur on Freedom of Expression, *Joint Declaration: International Mechanisms For Promoting Freedom Of Expression* (London, Dec. 10, 2002); World Association of Newspapers & News Publishers, *Declaration Of Table Mountain: Abolishing "Insult Laws" And Criminal Defamation In Africa And Setting A Free Press Higher On The Agenda* (Cape Town, June 6, 2007); African Commission on Human and Peoples' Rights, *ACHPR/Res. 169: Resolution On Repealing Criminal Defamation Laws In Africa* (Banjul, Nov. 24, 2010); UN Human rights Committee, *General Comment No 34 –: Freedoms Of Opinion And Expression*, ¶ 47, ARTICLE 19 (Geneva, July 29, 2011); UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration On Freedom Of Expression And "Fake News", Disinformation And Propaganda*, ¶ 2(b), (Vienna, March 3, 2017).

¹¹ See GRIFFEN, *supra* note 7; PEN INTERNATIONAL & PEN CENTRES, STIFLING DISSENT, IMPEDING ACCOUNTABILITY CRIMINAL DEFAMATION LAWS IN AFRICA (2017); ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS, UNSHACKLING EXPRESSION: A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA (2017).

and civil defamation providing a liability-based protection.¹² Unlike existing law and economics scholarship, which focuses either on analyzing liability rules of civil defamation¹³ or conducting a more general cost-benefit analysis of speech regulation,¹⁴ this article is only concerned with the policy choice between criminal defamation and civil defamation. The specific question to be considered is whether the protection of reputation should be secured by criminal defamation laws (property rules), or civil defamation laws (liability rules), or both (property rules and liability rules). To provide context, the next section gives an overview of the property-liability rules framework. Section III applies the framework to defamation laws. Based on the findings in Section III, Section IV restates the case for the decriminalization of defamation in the context of a democratic society. And Section V concludes.

II. Protecting Entitlements Generally: Property Rules vs. Liability Rules

About five decades ago, Calabresi and Melamed published a seminal article in the field of law and economics. That article puts forward a framework which attempts to treat various areas of the law through a uniform approach. It goes without saying that such an ambitious framework will always have its critics.¹⁵ But the practical applicability of the framework, as further developed by subsequent scholarship, remains unscathed. This article draws on the normative value of that framework in a bid to explain two policy choices which the law in general and defamation laws in particular reflect: the “policy of prohibition or sanctions” and the “policy of internalization or pricing.”¹⁶

The policy of prohibition or sanctions seeks to prohibit certain acts or types of conduct. According to the Calabresi-Melamed framework, a rule that protects an “entitlement” (i.e., a right established and protected by law) by prohibiting potential takers or injurers from taking or damaging it without the consent of the owner is classified as a “property rule.” As the name suggests, property rules “secure entitlements as property. To secure something as property, the rules must effectively prohibit others from taking or damaging the entitlement without first

¹² Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹³ See, e.g., Nuno Garoupa, *Dishonesty and Libel Law: The Economics of the "Chilling" Effect*, 155 J. INSTITUTIONAL & THEORETICAL ECON. 284 (1999); Nuno Garoupa, *The Economics of Political Dishonesty and Defamation*, 19 INT'L REV. L. & ECON. 167 (1999); Oren Bar-Gill & Assaf Hamdani, *Optimal Liability for Libel*, 2 CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y 1 (2003); Manoj Dalvi & James F. Refalo, *An Economic Analysis of Libel Law*, 34 E. ECON. J. 74 (2008); David J. Acheson & Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335 (2018); Nathan Berg & Jeong-Yoo Kim, *Free Expression and Defamation*, 17 LAW, PROBABILITY & RISK 201 (2018); Yonathan A. Arbel & Murat Mungan, *The Case Against Expanding Defamation Law*, 71 ALA. L. REV. 100 (2019); Daniel Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. L. ANALYSIS 46 (2019).

¹⁴ See Posner, *Free Speech in an Economic Perspective*, *supra* note 6. For a detailed literature review, see Daniel Hemel, *Economic Perspectives on Free Speech*, in OXFORD HANDBOOK OF FREEDOM OF SPEECH (Frederick Schauer & Adrienne Stone eds., forthcoming), <https://ssrn.com/abstract=3492827> (last visited Oct. 20, 2020).

¹⁵ See, e.g., Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); Louis Kaplow and Steven Shavell, *Property Rules and Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Ian Ayres & Jack M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149 (1997).

¹⁶ Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984); Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137, 137(2006).

gaining the consent of the owner.”¹⁷ An entitlement protected by a property rule may only be transferred from the owner in a *voluntary* transaction in which the value placed on the entitlement is agreed upon by the owner and the buyer. Whilst the initial entitlement-holder is decided by the State, the value placed on the entitlement is a subjective private matter to be agreed upon by the owner and the interested buyer. If the parties cannot agree, then no transfer should take place. To protect holders from forced transfers or destructions of entitlements, property rules are often supported by such remedies as injunctions and specific performance.¹⁸ Criminal sanctions could also be imposed as a means of deterring attempts at non-consensual transfers or destructions of entitlements.¹⁹ Criminal law can, therefore, “be described as a set of property rules. The law aims to prohibit offensive activity altogether rather than regulate it to some optimal level. In other words, criminal law assumes that there is no “optimal level” of offensive activities such as fraud, rape, and robbery.”²⁰

The policy of internalization or pricing, on the other hand, requires takers or injurers to pay *objective compensation* to the entitlement-holder, if the entitlement is taken or destroyed. This policy does not seek to prohibit or deter the underlying activity altogether. Instead, the policy objective is to protect entitlements by requiring the taker or injurer to pay the entitlement holder a sum of money determined by a third party, typically a judge or other judicial officer, recognized by the State.²¹ Legal rules designed to achieve this policy objective are termed “liability rules.” Unlike property rules, which leave the power to determine the value of entitlements in private hands, hence minimizing State intervention, when a liability rule is adopted, the State must not only enforce the entitlement but must also determine its value if it is taken or destroyed. “Liability rules are the domain of tort law.”²² Tort law seeks “to reallocate to the injurer some objective estimate of the victim’s loss *after the loss has occurred*.”²³

The policy choice between property rules and liability rules is informed by various considerations the relative weighting of which varies from society to society and according to the nature of the entitlement at issue. According to the Calabresi-Melamed framework, as modified by Hylton, the choice depends largely on the distribution of *transaction costs* and the *subjective valuations* of entitlements by holders and takers or injurers.²⁴ Transaction costs include all the costs of arranging and completing a transaction to transfer or modify an entitlement, and a distinction can be drawn between *high*, *intermediate*, and *low* transaction cost settings.²⁵ Moreover, transaction costs can be split into two: the *costs of meeting* and the *costs of reaching an agreement*.²⁶

A low transaction cost setting is one where *both* the costs of meeting and the costs of

¹⁷ Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 138.

¹⁸ Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1941 (2011).

¹⁹ Calabresi & Melamed, *supra* note 12, at 1126.

²⁰ Keith N. Hylton, *Some Notes on Property Rules, Liability Rules, and Criminal Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Alon Harel & Keith N. Hylton eds., 2012).

²¹ Markovits & Schwartz, *supra* note 18, at 1941.

²² Claus Ott & Hans-Bernd Schäfer, *The Dichotomy between Property Rules and Liability Rules: Experiences from German Law*, 1 ERASMUS L. REV. 41, 44 (2008).

²³ Keith N. Hylton, *Property Rules, Liability Rules, and Immunity: An Application to Cyberspace*, 87 B.U. L. REV. 1, 6 (2007) [emphasis added].

²⁴ Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 140–41.

²⁵ *Id.* at 141–42; Hylton, *Property Rules, Liability Rules, and Immunity*, *supra* note 23, at 6.

²⁶ Hylton, *Property Rules, Liability Rules, and Immunity*, *supra* note 23, at 8–9.

reaching an agreement are low.²⁷ Since bargaining is feasible and an agreement for a consensual transfer or modification of entitlements is likely to be reached, property rules are preferable when transaction costs are low.²⁸ This proposition holds true irrespective of the distribution of the transacting parties' subjective valuations of the entitlement at issue.²⁹ Property rules are preferred here because they protect subjective valuations, thereby avoiding the inefficiencies of enforcement (or administrative or adjudication) costs³⁰ and denormalization costs³¹ that would otherwise be incurred under a liability rule regime. Indeed, when transaction costs are low, "the market is a more efficient method of allocating resources than forced exchange."³² Bypassing the market in such situations tends to be inefficient irrespective of how much utility the taker or injurer might derive from doing so.³³

An intermediate transaction cost setting is one where the costs of meeting are low but the costs of reaching an agreement are high. This occurs when bargaining is feasible but, due to imperfect information, the hold-out problem, the free-rider problem, or difficulties in defining the entitlement,³⁴ bargaining is unlikely to result in an agreement to transfer or modify the entitlement. The choice between property rules and liability rules in such a setting should be informed by weighing the costs that would be occasioned by a failure to protect subjective valuations against the costs of bargaining failure. Property rules protecting the entitlement holder are socially preferable if the costs of bargaining failure are lower than those that are likely to be occasioned by failure to protect subjective valuations.³⁵ Conversely, liability rules are preferable to property rules if the costs of bargaining failure are higher than those that are likely to be occasioned by failure to protect subjective valuations, for example, where almost all bargains including socially beneficial ones would fail.³⁶

Finally, a high transaction cost setting is one where the costs of meeting are prohibitive, rendering transactions impossible.³⁷ When bargaining is generally infeasible due to high transaction costs, liability rules are preferable to property rules *if* some takers have subjective valuations that exceed those of all potential victims. Liability rules are preferred here because they facilitate welfare-enhancing, non-consensual transfers or modifications of entitlements which would be hindered by a property rule regime. However, when the victim's subjective valuation exceeds those of all potential takers in a high transaction cost setting, then property rules favoring the victim would deliver the same benefits to society as liability rules since no takings would occur

²⁷ *Id.*

²⁸ Calabresi & Melamed, *supra* note 12 at 1106–09.

²⁹ Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 142.

³⁰ These are costs associated with the process of pursuing and conducting an objective assessment of the value of an entitlement whenever it is taken or destroyed. The process will consume some of society's resources whether it involves public or private enforcement. See Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 156–58.

³¹ These include expenditures made in anticipation of an entitlement taking or destruction, including measures taken to protect one's entitlement from potential takers or injurers as well as measures taken by potential takers or injurers to counter protective measures. Other costs include underinvestment as failure to protect subjective valuations may operate as a disincentive for high-valuing victims to invest in improving the value of their entitlements. See Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 158–59.

³² Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

³³ *Id.*

³⁴ See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. L. STUDIES 13 (1985) (identifying the problem of defining entitlements with reference to nuisance).

³⁵ Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 142.

³⁶ *Id.*

³⁷ Hylton, *Property Rules, Liability Rules, and Immunity*, *supra* note 23, at 8–9.

under either regime.³⁸ Even so, if the underlying activity or conduct is unambiguously socially harmful, property rules are preferred in the following circumstances *whether transaction costs are high or low*. First, to avoid welfare-decreasing takings of entitlements that might occur under a liability rule regime due to misperception or ignorance on the part of the taker, it is preferable to adopt property rules in order to deliver a clear prohibitory message to potential takers.³⁹ Second, property rules of criminal law may be desirable in order to take advantage of a more rigorous public enforcement system to discourage and redress socially harmful takings.⁴⁰ Third, in cases where it is difficult to determine the monetary award under a liability rule regime (e.g., cases involving physical injury), a property rule that simply prohibit unambiguously socially harmful conduct would be more efficient than a liability rule that permits inefficient takings.⁴¹

III. Protecting the Entitlement to Reputation: Property Rules vs. Liability Rules

Consider how defamation laws fit within the foregoing framework. It has already been noted that there are currently three main regulatory approaches in different jurisdictions around the world, that is; the entitlement to reputation is protected by either criminal defamation laws (property rules), or civil defamation laws (liability rules), or both (property rules and liability rules). But to what extent, if at all, could these policy choices be explained or justified in terms of the property-liability rules framework? In other words, what is the economic rationale, if any, for these divergent policy choices within the framework of property-liability rules as encapsulated in the preceding section?

Normatively speaking, the property-liability rules framework generally posits that property rules should be preferred in low-transaction-cost settings and liability rules in high-transaction-cost settings. A notable qualification to this general proposition is that property rules should be preferred to eradicate socially harmful conduct even when transaction costs are high, if the underlying activity is so unambiguously socially harmful that any gain to the taker or injurer would not exceed the social costs arising from the conduct. “Property rules are therefore of two types: (*Type 1*) some aim to prevent offenders from bypassing the market where transaction costs are low, and others (*Type 2*) aim to eradicate socially undesirable activities where transaction costs are high.”⁴² The situation becomes somewhat complicated when it comes to the intermediate setting where transaction costs cannot be neatly described as either low or high. Such a setting calls for the balancing of two conflicting needs: (1) the need to protect subjective valuations, and (2) the need to promote socially beneficial activities or conduct.

That there is an active market for various elements of the right to privacy, including the right to reputation, cannot be gainsaid. Celebrities, for example, often place a price on the use of their *good* public image and reputation for purposes of sales promotion.⁴³ At first blush, this would suggest that a transaction in the entitlement to reputation would fall in the low-transaction-cost category. Indeed, any transaction would typically involve only two parties: the entitlement holder and the person who wants to modify the entitlement, such as a newspaper

³⁸ Hylton, *Property Rules and Liability Rules*, *supra* note 16, at 151.

³⁹ *Id.* at 152.

⁴⁰ *Id.* at 152–53.

⁴¹ *Id.* at 153.

⁴² Keith Hylton, *Economic Theory of Criminal Law*, Boston University School of Law, Law and Economics Research Paper (2019) at 7, https://scholarship.law.bu.edu/faculty_scholarship/604 (last visited Dec. 20, 2019) [emphasis added].

⁴³ Ott & Schäfer, *supra* note 22, at 52.

company or a private individual.⁴⁴ Thus, Hylton asserts that “information torts” such as defamation generally fall in the low-transaction-cost category.⁴⁵ Even without a physical meeting, with modern technology, the party seeking to use or modify the entitlement could easily communicate with the entitlement holder to negotiate the price. Although there may be exceptional cases where the parties could be unable to meet physically or otherwise communicate, it would be safe to conclude that at least the *costs of meeting* in such cases are *generally* not prohibitive.

What about the *costs of reaching an agreement*? Whilst individuals can happily accede to the use of their good public image and reputation for the purpose of sales promotion or other desirable purposes, it seems unlikely that one would willingly permit another to harm their reputation in exchange for money. Granted, it is not out of the ordinary for individuals to allow or even actively participate in the publication of information that harms their public image “as one can witness in certain afternoon television series where often embarrassing details of private life and sometimes even sexual habits are presented by individuals having no sense of shame.”⁴⁶ But it is generally not regarded as honorable to accept harm to one’s good reputation in exchange for money unless one does not have much of such reputation to lose.⁴⁷ In short, a consensual transaction in which a reputable person accepts harm to their reputation in exchange for money is unlikely. This holds true regardless of whether the statement or information in question is true or false.

Defamation laws, in any case, should only apply to those who have a genuine and legitimate reputation to protect. Although the communication of a “true” statement can still constitute defamation in some countries, the concept of truth as a defense in defamation cases has evolved into an internationally accepted norm.⁴⁸ Thus, in the case of *Castells v. Spain*,⁴⁹ the European Court of Human Rights (ECtHR) ruled that the Spanish government’s refusal to allow a defense of truth to a charge of defamation rendered the prosecution and conviction of the applicant an unjustified interference with his right to freedom of expression. In its 2002 Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, the African Commission on Human and Peoples’ Rights (ACHPR) also proclaimed that “no one shall be found liable for true statements.”⁵⁰ The UN Human Rights Committee similarly stated in 2011 that defamation laws “should include such defences as the defence of truth and ... should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.”⁵¹

⁴⁴ *Id.* at 53.

⁴⁵ Hylton, *Property Rules, Liability Rules, and Immunity*, *supra* note 23, at 15.

⁴⁶ Ott & Schäfer, *supra* note 22, at 56.

⁴⁷ In a similar vein, it has been observed that “[a]ccording to the common view it is not regarded as honourable to trade an insult for money; and he who seeks monetary compensation for damage done to his honour has not much of it to lose.” See Ott & Schäfer, *supra* note 22, at 51.

⁴⁸ For details about the history of this defense, see Duffy & Alkazemi, *supra* note 3 at 195–6 (citing Marc A. Franklin, *Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STANFORD L. REV. 789 (1963); Kyu Ho Youm, *The Impact of "People v. Croswell" on Libel Law*, 113 JOURNALISM MONOGRAPHS 1 (1989); Alison Olson, *The Zenger Case Revisited*, 35 EARLY AM. LIT. 223, 223 (2000)).

⁴⁹ 1992, Eur. Ct. H.R., App. No. 11798/85.

⁵⁰ African Commission on Human and Peoples’ Rights, ACHPR /RES 62(XXXII)02: Resolution On The Adoption of the Declaration of Principles on Freedom of Expression in Africa (Banjul, 23 October 2002) at para. XII, <https://www.refworld.org/docid/51949e234.html> (last visited Feb.1, 2020).

⁵¹ UN Human Rights Committee, *supra* note 10, at para. 47 [emphasis added].

Even in the unlikely event that one might be willing to trade their good reputation for money, an agreement is unlikely to be reached for two main reasons. First, the subject matter of the trade itself is difficult to define. Any tradable entitlement, tangible or intangible, must be definable and the proprietor or titleholder must be identifiable. But the right to reputation is difficult to define. As Post puts it, “reputation” is “a mysterious thing.”⁵² Post identifies three different concepts of reputation which the common law of defamation has attempted to protect at various times in its history: *reputation as property*, *reputation as honor*, and *reputation as dignity*.⁵³ According to him, these are not even all but just some of the possible concepts of reputation.⁵⁴ To complicate matters further, international law suggests that there is a distinction between “honor” and “reputation.”⁵⁵ Although this is not a place to take a strong stand on how the term “reputation” should be defined, the ambiguity of the term detracts from the prospects of any voluntary trade. Indeed, if one’s understanding of the right to reputation differs from that of the publisher of information that would harm one’s reputation, it is unlikely that any agreement for the publication of that information would be reached.

More importantly, the various defenses to defamation and qualifications as to what constitutes a “defamatory statement” make it difficult to determine whether and the extent to which one is entitled to legal protection against the publication of any given information which would harm their reputation, however defined. In the U.S., for example, “[t]o establish a valid claim for defamation, the plaintiff generally must prove: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.”⁵⁶ The difficulty to conclusively determine *total falsity*, in particular, is likely to render it impracticable for a publisher of potentially defamatory information to distinguish *ex ante* a false statement from a true statement. The question of falsity, particularly where historical facts are at issue or where a statement of fact is to be distinguished from an expression of opinion, is a question of great difficulty which is often a matter of debate.⁵⁷ This means that even where a publisher is willing to take reasonable steps to verify the information giving rise to a defamation claim or complaint, the cost of establishing complete truth is likely to be prohibitive. It is no wonder then that under both English and U.S. civil defamation law, “substantially true” statements are not actionable.⁵⁸

It must be recalled, further, that the burden of proof in defamation cases varies depending

⁵² Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692 (1986).

⁵³ *Id.* at 693.

⁵⁴ *Id.*

⁵⁵ See UDHR, art. 12; ICCPR, art. 17. The former provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his *honour and reputation*.” And the latter, which is almost identical to the former, provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to *unlawful attacks on his honour and reputation*.” [Emphasis added]. The only notable difference between the two provisions is the word “unlawful” which appears in the latter provision and not in the former.

⁵⁶ Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. 237, 240 (2007) (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

⁵⁷ See the majority judgment, by McLachlin J., in *R v. Zundel*, [1992] 2 S.C.R. 731.

⁵⁸ Defamation Act 2013, c. 26, ss. 2(1) & 2(3) (U.K.); *Nichols v. Moore*, 477 F.3d 396, 399 (6th Cir. 2007); *Fisher v. Detroit Free Press, Inc.* N.W. 2d 765, 767–68 (1987); *Neely v. Wilson*, 418 S.W.3d 52, 63–64 (Tex. 2013).

on the status of the “victim” as a public or private figure.⁵⁹ According to the ECtHR, “the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance.”⁶⁰ The Inter-American Court of Human Rights (IACtHR) likewise considers that “in the context of the public debate, the margin of acceptance and tolerance of criticism by the State itself, and by public officials, politicians and even individuals who carry out activities subject to public scrutiny, must be much greater than that of individuals.”⁶¹ The UN Human Rights Committee is also of the view that article 19 of the International Covenant on Civil and Political Rights (ICCPR) places a particularly high value upon uninhibited expression in cases of public debate concerning public figures in the political domain and public institutions.⁶² In the same vein, the ACHPR states that public figures are “required to tolerate a greater degree of criticism”.⁶³

The net result is that the entitlement to reputation is defined on a case-by-case basis, depending on the circumstances of each case.⁶⁴ Borrowing Merrill’s terminology, the right to reputation can be described as a “judgmental entitlement” rather than a “mechanical entitlement” in the sense that it is generally difficult to define as the law affords very broad discretion to courts in determining the entitlement.⁶⁵ Protecting such an entitlement through property rules gives rise to “entitlement-determination costs” which, within our framework, is a component of transaction costs. Entitlement-determination costs arise from the uncertainty as to who holds the property right between the publisher of information and the person who might bring a defamation complaint or claim in respect thereof.

[I]f the parties differ in their estimate of the probability of who holds the right, or in their preference for risk, then there may be no range of bid and asked prices within which they can agree on an exchange. In these circumstances, if there is to be any exchange or modification of property rights, the parties must expend resources on litigation (or other forms of collective resolution...) to reduce the disparity between their assessments of the assignment of property rights. The very need to expend these resources, however, will mean that certain potentially optimizing agreements will never be reached, because the gains from trade will be less than the costs of litigation (or other forms of collective resolution).⁶⁶

Granted, the lack of certainty about who holds the property right may not *generally* lead to failure of all transactions. The parties may share the same estimate of the probability of who, between them, holds the property right in which event positive entitlement-determination costs would not affect successful bargaining. But as concerns the right to reputation, this is far-fetched

⁵⁹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official cannot recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

⁶⁰ *Dichand & Others v. Austria*, 2002, Eur. Ct. H.R., App. No 29271/95, at ¶ 39. See also *Lingens v. Austria*, 1986, Eur. Ct. H.R., App. No. 9815/82, at para. 42.

⁶¹ *Ricardo Canese v. Paraguay*, 2004, Inter-Am. Ct. H.R. (Sec. C) No. 111, at ¶ 103.

⁶² UN Human Rights Committee, *supra* note 10, at ¶ 38.

⁶³ African Commission on Human and Peoples' Rights, *supra* note 50, at ¶ XII.

⁶⁴ *Ott & Schäfer*, *supra* note 22, at 52.

⁶⁵ *Merrill*, *supra* note 34, at 19.

⁶⁶ *Id.* at 24–25.

because of the inherent tension between defamation laws and the right to freedom of expression. International instruments, including the ICCPR⁶⁷ and the European Convention on Human Rights (ECHR) 1950,⁶⁸ specifically frame the right to reputation as a legitimate restriction on freedom of expression arising from the duties and responsibilities associated with the exercise of that freedom.⁶⁹ However, any restriction on the right to freedom of expression must not only be provided for by law and serve the legitimate objective of protecting reputation, it must also be *necessary* and *proportionate* to the attainment of that objective.⁷⁰ Thus, although publishers of information have a duty to exercise their freedom of expression in a responsible manner, the onus is on those claiming to have been defamed to show that a particular publisher has failed in their duty. Given all the defenses and qualifications associated with defamation, it is unlikely that the parties would come to the same conclusion as to whose property right, between the publisher's right to freedom of expression and the potential victim's right to reputation, should prevail in any given circumstances.

Apart from the difficulties in defining the entitlement to reputation, asymmetric information as to the valuation of the entitlement also renders successful bargaining highly improbable. It is unlikely that market prices for this entitlement would coincide with the holders' subjective valuations. The valuation of the entitlement typically varies from one individual to another. Each individual's willingness to consent to the publication of information that would be harmful to their reputation and to place a high or a low monetary value on such publication depends on how that individual personally estimates and values the consequences for his or her reputation within a given society. Admittedly, third parties or courts may not therefore be ideally placed to assess such subjective valuations. Provided that transaction costs are low, a property rule under such conditions would lead to a more efficient protection by ensuring that modifications of the entitlement take place only at prices that fully internalize subjective valuations.

By the same token, however, there is a substantial likelihood of bargaining failure due to information asymmetry because each party to a bargain will know "his/her own subjective valuations but not those of the other parties. This asymmetry implies strategic behaviour and

⁶⁷Art. 19(3) provides that the exercise of the right to freedom of expression "*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.*" [Emphasis added].

⁶⁸ Art. 10(2) provides that the exercise of the right to freedom of expression, "since it *carries with it duties and responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." [Emphasis added].

⁶⁹ Cf. American Convention on Human Rights (ACHR) 1969, art. 13(2).

⁷⁰ ICCPR, art. 19(3) (as interpreted in *Keun-Tae Kim v. The Republic of Korea*, 1999, UN Hum. Rights Committee, Commun. No. 574/1994, at para. 12.2); ACHR, art. 13(2) (as interpreted in *Herrera-Ulloa v. Costa Rica*, 2004, Inter-Am. Ct. H.R. (Sec. C) No. 107, at para. 120); ECHR, art. 10(2) (as interpreted in *The Sunday Times v. United Kingdom*, 1979, Eur. Ct. H.R. App. No. 6538/74, at ¶ 45; *Barthold v. Germany*, 1983, Eur. Comm. Hum. Rights, App. No. 8734/79, at ¶ 63; African Charter on Human and Peoples' Rights 1981 (African Charter), art. 9(2) (as interpreted in *Kenneth Good v. Republic of Botswana*, 2010, Afr. Comm. Hum. Peoples' Rights, Commun. 313/05, at ¶ 188; *Lohé Issa Konaté v. Burkina Faso*, 2014, Afr. Court Hum. Peoples' Rights, App. No. 004, at ¶ 125).

hold-up positions that impede efficient transactions.”⁷¹ Imperfect information necessarily raises transaction costs. These costs can be particularly prohibitive when it comes to transactions seeking to unfavorably modify an individual’s reputation because, as already noted, entitlement-valuations tend to vary rather dramatically from one individual to another. An ambitious young politician, for example, would not place the same price on her reputation as a famous stripper would. The ambitious young politician would likely demand a fortune to allow the publication of career damaging information irrespective of its veracity. She might seek to impound in the price all expected pecuniary and nonpecuniary losses based on her subjective valuation covering the entire period planned for her political career, even though she might overestimate her popularity or potential. Consensual transactions may not occur here even where both parties would profit from them. Thus, if uncensored publication of socially beneficial information is to be guaranteed, property rules are certainly not an optimal policy choice.

In the final analysis, liability-based protection of reputation should be preferred. A major downside of liability rules, of course, is their failure to protect the victims’ subjective valuations. Nonetheless, liability rules of civil law are the second-best option because property rules of criminal law are ineffective in that successful bargaining would not occur for two main reasons, to wit, due to definitional uncertainties of the entitlement and due to information asymmetry. Neither of the two types of property rules is suitable to protect the entitlement to reputation. First, there is no need to prevent injurers or publishers from bypassing the market through property rules since bargaining is unlikely to result in voluntary trade due to the high costs of reaching an agreement. Because successful bargaining is normally infeasible, less risk-averse media firms and individuals would bypass the entitlement holder, taking the risk of being held civilly or criminally liable much later. Second, the underlying activity giving rise to defamation (i.e., communicating or disseminating information and ideas) is not unequivocally socially undesirable to warrant complete prohibition or eradication by property rules.

The hybrid regulatory approach adopted by some States which combines property rules of criminal law and liability rules of civil law does not lend itself to the property-liability-rules framework. Since defamation falls in the intermediate transaction costs category, this policy choice would only be justified if a clear distinction can be drawn between two forms of defamation: one warranting complete prohibition or eradication through property rules because it is unambiguously socially harmful and the other warranting tolerance because the social benefits of encouraging the underlying activity of disseminating information and ideas exceed the cost that might be occasioned by failure to protect subjective valuations. But such a distinction is impossible to draw because the right to express and impart information and ideas “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”⁷²

IV. Restating the Case for Decriminalization of Defamation

It has been argued in the preceding section of this article that defamation falls in the intermediate transaction cost category of the property-liability-rules framework. This is so because, while the costs of meeting are generally not prohibitive, the costs of obtaining consent to publish information believed to be harmful to a person’s reputation are typically prohibitive

⁷¹ Ott & Schäfer, *supra* note 22, at 53.

⁷² *Handyside v. United Kingdom*, 1976, Eur. Ct. H.R., App. No. 5493/72, at para. 49; *The Sunday Times v. United Kingdom*, *supra* note 70, at ¶ 65.

irrespective of the veracity of the information in question. According to our framework, the choice between property rules and liability rules in such a setting should be informed by weighing the costs that would be occasioned by failure to protect subjective valuations against the costs of bargaining failure. This article contends that liability rules of civil defamation laws should be preferred to property rules of criminal defamation laws because the costs of bargaining failure in the context of a democratic society are likely to be higher than the costs that are likely to be occasioned by failure to protect subjective valuations. It must be acknowledged that both civil and criminal defamation laws can discourage the exercise of freedom of expression, including the dissemination of socially beneficial information and ideas. The imposition of civil liability for the tort of defamation can have a chilling effect on valuable speech as potential speakers seek to avoid the costs of potential litigation and the risk of being held liable in error. Other scholars who have analyzed civil defamation from an economic perspective share this view.⁷³ This also holds true with respect to criminal defamation. However, the argument here is that property rules of criminal law are the more intimidating of the two policy options because they represent the policy of prohibition or sanctions.

By protecting reputation through such rules, the State sends a clear prohibitory message: “Do not publish or otherwise communicate any information or ideas *unless you are a hundred percent sure* that it is not defamatory to do so!” This message does not guarantee freedom, neither *before* nor *after* expression. If one is not confident enough that the information in question will not give rise to a defamation complaint, unless one is daring, they will eschew communicating or publishing that information. The prospects of acquiring an indelible criminal record, let alone serving a prison sentence, is a compelling incentive to play it safe. Even if one were confident that they would ultimately be exonerated and acquitted, the prospects of being arrested and being subjected to criminal prosecution following a defamation complaint should in most cases be enough to disincentivize the dissemination of socially beneficial information and ideas. Since the right to reputation is a highly judgmental entitlement, the risk of being arraigned for, or even wrongly convicted of, defamation cannot be ruled out whenever one communicates or publishes unfavorable information or ideas about another. But any gain to the individual from the resultant failure to disseminate welfare-enhancing information and ideas cannot be greater than the harm that society suffers due to deprivation thereof since the “self-government” that democracy entails is largely dependent on the free flow of such information and ideas.⁷⁴

As Meiklejohn argues in the U.S. context, the purpose of freedom of expression is “to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”⁷⁵ And “there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane

⁷³ Garoupa, *Dishonesty and Libel Law*, *supra* note 13; Garoupa, *The Economics of Political Dishonesty and Defamation*, *supra* note 13; Bar-Gill & Hamdani, *supra* note 13; Acheson & Wohlschlegel, *supra* note 13; Arbel & Mungan, *supra* note 13; Hemel & Porat, *supra* note 13.

⁷⁴ *See, e.g.*, Retail, Wholesale and Department Store Union v. Dolphin Delivery [1986] 2 R.C.S. 573, 583 (holding that “[r]epresentative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends on its maintenance and protection”); Garrison v. Louisiana 379 U.S. 64, 74–75 (1964) (holding that “speech concerning public affairs is more than self-expression; it is the essence of self-government”).

⁷⁵ Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948). *See also* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011) (arguing that contemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which they govern themselves).

and objective judgment which, so far as possible, a ballot should express.”⁷⁶ Meiklejohn’s attempt to distinguish those activities of thought and communication which are utilized for the governing of a nation (which, in his view, are what freedom of expression is concerned with) from “private speech” (which, in his view, freedom of expression is not concerned with) is, however, less convincing because there is no such clear demarcation between various categories of speech.⁷⁷ That notwithstanding, experience has shown that government officials in countries that criminalize defamation tend to use criminal prosecutions or the threat thereof to suppress the component of freedom of expression that is most directly relevant to democracies: “the right to criticize government officials and policies—that is, the right to disseminate information that may affect how people vote in the next election.”⁷⁸ This is so even though, as noted in Section III of this article and in keeping with the spirit of the “self-government” that democracy entails, international human rights standards demand that public officials should be more (not less) tolerant to criticism than private citizens.

Thus, Posner doubts whether there is any significant difference between *ex ante* suppression of speech through censorship or injunctions and the threat of criminal punishment which may materialize *ex post*, after a trial.⁷⁹ Indeed, criminal defamation can be equated with censorship because it represents a policy of *ex ante* prohibition. If this is true, then criminal defamation runs counter to provisions which prohibit the use of censorship (or property rules) to protect reputation, in favor of liability rules. For example, article 13(2) of the American Convention on Human Rights 1969 provides that the exercise of the right to freedom of expression “shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure...respect for the rights or reputations of others.”⁸⁰ Although the free-speech clause of the First Amendment has never been interpreted to prohibit *all* censorship, censorship was also the particular concern of the framers.⁸¹ “Indeed, to them freedom of speech and freedom from censorship were virtual synonyms.”⁸²

In any case, “the peculiar evil of silencing the expression of an opinion [through criminal prohibition] is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”⁸³ We must recall that freedom of expression as contained in various international human rights instruments⁸⁴ and national constitutions has two dimensions: an *individual dimension* and a *social dimension*. The individual dimension is not confined to the right to speak and write; it includes freedom to impart information and ideas through any media and regardless of frontiers. “[T]he expression and dissemination of ideas and information [here] are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The importance of the legal rules applicable to the press and to

⁷⁶ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REV. 245, 256 (1961).

⁷⁷ See Posner, *Free Speech in an Economic Perspective*, *supra* note 6, at 10 (highlighting the “serious problems...[of] placing political speech (or any other category of speech, for that matter) at the top of a hierarchy of speech values”).

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 13–16.

⁸⁰ Emphasis added.

⁸¹ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 107 (2006).

⁸² *Id.*

⁸³ Mill, *supra* note 4, at 34.

⁸⁴ See UDHR, art. 19; ECHR, art. 10; ICCPR, art. 19; ACHR, art. 13; African Charter, art. 9; Charter of Fundamental Rights of the European Union 2000, art. 11.

the status of those who dedicate themselves professionally to it derives from this concept.”⁸⁵ The social dimension guarantees “the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”⁸⁶

In short, individuals do “not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, *when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to ‘receive’ information and ideas.*”⁸⁷ The significance of this fundamental right in any modern society cannot be stressed enough. Suffice to say that freedom of expression is not only a cornerstone upon which the very existence of a democratic society rests, “[i]t is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public.”⁸⁸ Thus, although this article does not espouse the view that the protection of speech is not meant for speakers but for audiences and society as a whole,⁸⁹ it is clear that democratic societies place a premium on freedom of expression even when it comes into tension with other fundamental rights such as the right to reputation.

In any case, the right to reputation can be more efficiently protected through civil defamation. Indeed, Berg and Kim have shown empirically that defamation law “*adopting the negligence [liability] rule can lead to the socially optimal level of expression by adjusting the due care standard appropriately.*”⁹⁰ Since they represent the policy of internalization or pricing, liability rules of civil defamation generally send a more tolerant message to the public: “You can publish or otherwise communicate any information or ideas but, in doing so, respect the reputations of others otherwise you may be liable to pay them objective compensation *after such publication or communication* if they decide to sue you!” This message at least guarantees freedom *before* expression and at the same time enjoins everyone to respect other people’s reputations. The prospects of being required to pay compensation can discourage the dissemination of information and ideas but not as much as property rules of criminal law would, especially in cases where the sanction includes imprisonment. Civil suits are, moreover, not as intimidating as criminal prosecution especially where the State gets directly involved. The enforcement costs and any denormalization costs occasioned by liability rules due to their failure to protect subjective valuations of reputation cannot therefore generally exceed the costs to society which are likely to be occasioned by property rules of criminal law because democratic societies place a premium on freedom of expression.

Those States that protect reputation through both property rules of criminal law and

⁸⁵ Advisory Opinion OC-5/85: Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), 1985, Inter-Am. Ct. H.R., at ¶ 31.

⁸⁶ *Id.* at ¶ 32.

⁸⁷ *Id.* at ¶ 30 [emphasis added].

⁸⁸ *Id.* at ¶ 70. See also *Handyside v. United Kingdom*, *supra* note 72, at ¶ 49; *Herrera-Ulloa v. Costa Rica*, *supra* note 70, at ¶ 112; Parliamentary Assembly of the Council of Europe, Resolution 1577 (2007): Towards Decriminalisation of Defamation (Strasbourg, 4 October 2007) at ¶ 1; UN Human Rights Committee, *supra* note 10, at ¶ 2 (expressing the same sentiments).

⁸⁹ See Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767 (2017).

⁹⁰ Berg & Kim, *supra* note 13, at 201 [emphasis added].

liability rules of civil law are even more restrictive on freedom of expression. One must be highly risk-tolerant to publish or communicate information or ideas which could subsequently give rise to both civil and criminal proceedings against them. Those who are risk-averse may not publish or otherwise communicate such information and ideas even if they are entitled to do so, thereby also inadvertently depriving others of their right to receive information and ideas. This could be the case even if the law were to require the alleged victim to choose between filing a civil claim and lodging a criminal complaint because one may not know *ex ante* which of these options would be applicable in any given circumstances. Even in the unlikely event that one could determine *ex ante* whether the potential “victim” would file a civil claim or lodge a criminal complaint, the additional transaction costs of making such a determination should in most cases be a sufficient disincentive for one to exercise their right to freedom of expression.

V. Conclusion

A “society that is not well informed is not a society that is truly free.”⁹¹ Freedom of expression enables society to be sufficiently informed when exercising its options.⁹² Any political society, particularly a democratic society, should therefore place a premium on freedom of expression. This article postulates that the criminalization of peaceful exercise of the right to freedom of expression through defamation laws can significantly deprive society of welfare-enhancing information and ideas. It argues that the dissemination of information and ideas is generally welfare enhancing, thus the underlying activity giving rise to defamation does not warrant complete prohibition or eradication through property rules of criminal law. Reputation can be more appropriately protected by liability rules of civil/tort law. Any costs arising from the failure by liability rules to protect individuals’ subjective valuations of their reputations are generally lower than the costs that society incurs due to the imposition of such rules because democratic societies place a premium on freedom of expression. Moreover, although they do not protect subjective valuations, such rules are more suitable because they are designed to directly restore the victim’s reputation by way of damages unlike property rules which render the victim a mere bystander in criminal proceedings.⁹³ Defamation should therefore be decriminalized.

*Christopher Phiri is a Lecturer, Department of Law, School of Humanities and Social Sciences, The Copperbelt University, Kitwe, Zambia; cdphiri@hotmail.com.

⁹¹ Advisory Opinion OC-5/85, *supra* note 85, at ¶ 70.

⁹² *Id.*

⁹³ Clive Walker, *Reforming the Crime of Libel*, 50 N.Y. LAW SCHOOL L. REV. 169, 179 (2005-06).

Cinema and Censorship in India: A Political Restriction on Freedom of Speech

Swapnil Tripathi*

In 2015, when James Bond's Spectre was slated to release in India, the Indian Censor Board infamously ordered cuts in the kisses in the movie. Bond is not the only victim to the Censor Board of India, as the Board has been criticized for its archaic mindset when it comes to certification of movies. Whenever a movie has been made on a political, religious or social issue, the Board is known to adopt its own moral compass and order unnecessary cuts in the movie. In situations where the Board has in fact cleared such a movie for public exhibition, the governments have failed to keep a check on fringe elements who try tooth and nail to ensure that the movie does not see the light of the day in the theatres. All of this continues to happen despite the Indian Constitution guaranteeing the Right to Freedom of Speech (including artistic freedom), to every citizen. Fortunately, in such cases the Courts have come to the rescue of filmmakers and ensured that their constitutional rights are protected. This article aims to provide an overview of the censorship laws in India with regard to cinema and discuss the grounds for censorship in particular, with reference to the Constitution of India. The paper shall argue that the hurdles in the release of movies in India are more often on political, religious and moral grounds rather than valid legal grounds. In such cases, the role played by the Indian courts should be lauded as they have been the protector of the freedom of speech of the moviemakers in such situations.

Key words: CBFC, Censorship, Freedom of Speech, Indian Cinema, Reasonable Restrictions

I. Introduction

Cinema¹ is an extraordinary form of art. Unlike other mediums of art, it not only has the ability of providing the audience with entertainment but also the ability of influencing them, their behaviour and mindset. Mr. Justice Clark in the decision of *Joseph Burstyn v. Wilson*, succinctly summarised the power of cinema as a medium of expression. He observed,

*"It cannot be doubted that motion pictures are significant medium for the communication of ideas. They may affect public attitudes and behaviour in a variety of ways, ranging from direct espousal of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."*²

Artistic imagination has no limit, and cinema is no exception. Cinema as a tool has been used to highlight difficult social realities, social evils, and also present ideas that might not have been comfortable to the masses. Movies on such genres always carry the risk of hurting sentiments

¹ Cinema is also referred to as Motion Picture or Movies. The words are used interchangeably in this article.

² *Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952).

of people and hence, creating law and order situations. In order to prevent this from happening, cinema has been regulated by the government in every nation. This practice of regulating the medium of cinema is commonly referred to as censorship.³

In addition to artistic expression, cinema has also been used by governments worldwide to indoctrinate the masses with their beliefs and ideologies and to restrict the spread of contrary beliefs and opinions. For instance, during the Nazi Germany era, movies and documentaries in favour of the National Socialist Party were shown to the public. These movies showed Hitler as a messianic prophet, who would restore German culture and politics.⁴ Similarly, during the Emergency era in India,⁵ the government screened popular movies on television to distract the public from attending rallies that were critical of the government.⁶

In light of the above, it can be said that censorship of movies depends upon the social, political and legal climate of the country. In this article, the author argues the primary ground for censorship in India is political and social rather than legal.⁷ Part II of the paper discusses the constitutional provisions concerning freedom of speech in India and their restriction. Part III provides an overview of the Central Board of Film Certification (CBFC), which is the body entrusted with censorship of movies in India. Part IV discusses instances wherein cinema suffered due to unnecessary hurdles by the CBFC and the governments, and Part V discusses how the courts came to the rescue, while Part VI offers some suggestions going forward.

II. Constitutional Protection for Freedom of Speech in India

Article 19(1)(a) of the Constitution of India guarantees to every citizen the right to freedom of speech and expression.⁸ It is a settled position of law, that the freedom of speech under the Article also includes artistic freedom.⁹ While Article 19(1)(a) guarantees free speech, Article 19(2) allows the government to restrict this right reasonably on certain enumerated grounds which include interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or, in relation to contempt of court, defamation or incitement to an offence.

It should be noted that when the provision for reasonable restrictions of the right to speech was introduced in the Constituent Assembly of India, it met with stiff opposition from the members. The reason behind the opposition was the trauma of the British Rule in India wherein

³ SOMESWAR BHOWMIK, *CINEMA AND CENSORSHIP -THE POLITICS OF CONTROL IN INDIA* 54 (2009).

The term is derived from the Latin term 'censere' meaning to give one's opinion or assess. Its origin can be traced to the Romans where magisterial officers conducted census, regulated the morals and conduct of the citizens, and classified them. However, with the passing of time especially in the medieval age, the meaning of the term acquired an oppressive connotation.

⁴ IAN AITKEN, *ENCYCLOPEDIA OF THE DOCUMENTARY FILM* 568 (2006).

⁵ In 1975, India's former Prime Minister Smt. Indira Gandhi had imposed a National Emergency in India wherein even the Fundamental Rights of the citizens were suspended.

⁶ The Government of India screened the movie 'Bobby' (a love story), to distract the general public from attending the rallies organised by the opposition parties against the government.

When Indira Gandhi tried to Bobby Trap Indians during Emergency, INDIA TODAY, (April 4, 2020, 5:55 PM), <https://www.indiatimes.com/news/india/when-indira-gandhi-tried-to-bobby-trap-indians-during-emergency-348257.html>.

⁷ *Understanding India's dangerous history of film censorship and its implications*, HOMEGROWN, (April 2, 2018, 7:35 p.m.) <https://homegrown.co.in/article/25265/understanding-indias-dangerous-history-of-film-censorship-and-its-implications>.

⁸ INDIA CONST. art. 19 cl. 1(a).

⁹ *Union of India vs K. M. Shankarappa* (2001) 1 SCC 582 (India).

free speech and any form of dissent were stifled excessively through draconian laws. Therefore, when the provision was introduced in the Constituent Assembly, one member, Mr. Mahmood Ali Baig, compared it to Nazi Germany and stated that if the clause were incorporated, citizens would be able to enjoy only those rights that the legislature would allow.¹⁰ Others argued that fundamental rights should be absolute and not subject to any restriction whatsoever.

These objections however, were put to rest by Dr. B.R. Ambedkar who was the principal drafter of the Indian Constitution. Dr. Ambedkar stated that even in United States, fundamental rights are not supreme and the Supreme Court has defined the permissible restrictions. In India, this power is exercised by Parliament.¹¹

Within years of adopting the Constitution, the Supreme Court of India delivered a landmark verdict which acted as a check on the misuse of Article 19(2). In the case of *State of Madras v. VG Row*,¹² the Court held that while imposing restrictions under Article 19(2), the state (central government or state/provincial government) has to ensure that: (a) the restriction is imposed by a valid law; (b) the restriction is reasonable; and (c) the restriction is proximately related to purposes mentioned in the respective sub-clauses of Article 19. In subsequent decisions, the Supreme Court has also held that the restrictions under Article 19(2) have to be interpreted strictly and narrowly.¹³ These restrictions are in the nature of limitations on the exercise of free speech and hence they are bound to be viewed with suspicion, thereby putting a heavy burden on the authorities who seek to impose them.¹⁴

If a law restricting free speech does not comply with the requirements of Article 19(2), a citizen has the right to challenge that law before either the Supreme Court of India¹⁵ or the relevant state High Court.¹⁶

III. CBFC: The Certification Authority for Movies in India

On attaining independence in 1947, India adopted the same censorship laws which were in place during the British Rule. As stated above, these laws were extremely draconian given the fact that the intent behind them was to stifle dissent. In response, there were serious protests from the filmmakers in India. In order to address the concerns, the Government of India constituted an Enquiry Committee on Film Censorship.¹⁷ The goal of the committee was to study the legal regime around film censorship in India and suggest reforms. The deliberations within the committee resulted in the Cinematograph Act, 1952 [Act].

The Act established the Central Board of Film Censorship of India, a body that was the primary decision maker on censorship of cinema in India.¹⁸ Later, the nomenclature of the Board was changed to Central Board of Film Certification [CBFC]. The CBFC is responsible for providing

¹⁰ Constituent Assembly Debate, vol. VII, p.30 (Nov. 8, 1948).

¹¹ Constituent Assembly Debates, vol. VII, p. 41 (Nov. 4, 1948).

¹² *State of Madras v. VG Row*, (1952) S.C.R. 597 (India).

¹³ *Life Insurance Corporation of India v. Prof. Manubhai D. Shah* (1992) 3 S.C.C. 637 (India) [hereinafter 'Manubhai'].

¹⁴ *Id.*

¹⁵ INDIA CONST. art. 32.

¹⁶ INDIA CONST. art. 226.

¹⁷ REPORT OF THE ENQUIRY COMMITTEE ON FILM CENSORSHIP (1949) (GOVT. OF INDIA), https://archive.org/stream/in.ernet.dli.2015.51593/2015.51593.Report-Of-The-Film-Enquiry-Committee-1951_djvu.txt.

¹⁸ Cinematograph Act, 1952 (India).

certification to the movies for public exhibition in India, based on the movie's compliance with the censorship rules.¹⁹ The CBFC comprises a Chairperson and members, all of which are appointed by the Union Government. The Union government is entitled to appoint minimum of twelve and maximum of twenty-five members.²⁰ As per Section 5(d) of the Act, a decision of the CBFC may be challenged before the Film Certificate Appellate Tribunal [FCAT], which acts as a dispute resolution body between film makers and CBFC.²¹

A. Certification Procedure under the Act

The Act empowers the Union Government to frame rules and regulations regarding the terms, conditions and restrictions on exhibition of cinema.²² Accordingly, the government has promulgated the Cinematograph (Certification) Rules 1983 [Rules] which list the certification procedure and guidelines for movies in India.²³ According to the Rules, the task of certifying movies is performed by the Examining Committee [EC], the composition of which is decided by the Regional Officer (head of the CBFC Regional Office).²⁴ Where the movie is a long film (a traditional feature film),²⁵ the EC must possess a quorum of four persons (two of which must be Advisory Panel members).²⁶ A movie may be certified into four categories, i.e., "U" (unrestricted viewing), "U/A" (parental guidance for children under age 12),²⁷ "A" (restricted to adults), and "S" (restricted to special audience having regard to the nature, content and theme of the film of the film).²⁸

A decision of the EC can be appealed to the Revising Committee [RC].²⁹ The RC must consist of five to nine censors. If a filmmaker is unhappy with the decision of the RC, it can appeal to the FCAT³⁰ and ultimately to the courts.

B. Grounds for Review/Grant of Certificate

Section 5B of the Act, lays down the principles governing the certification of movies. The Section replicates Article 19(2) of the Indian Constitution in terms of the grounds on which certification of a movie can be refused. The grounds are interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence using which the Board may deny certification to a movie.³¹ The Section also empowers the central government to issue further guidelines stipulating the grounds for the purposes of certification of movies.

¹⁹ Cinematograph Act, 1952, Preamble (India).

²⁰ Cinematograph Act, 1952, § 3 (India).

²¹ Cinematograph Act, 1952, § 5(d) (India).

²² Cinematograph Act, 1952, § 16 (India).

²³ The Cinematograph (Certification) Rules, 1983 (India).

²⁴ The Cinematograph (Certification) Rules, 1983, rule 22 (India).

²⁵ As per Rule 2(ix) of the Cinematograph (Certification) Rules, 1983, "long film" is a film with a length exceeding 2000 metres in 35mm or corresponding length in other gauges or on video.

²⁶ Under Rule 7 of the Cinematograph (Certification) Rules, 1983 the Union Government is empowered to appoint an Advisory Panel for the purposes of the Act and appoint any person whom it thinks fit to be a member of the said Panel. There is no cap on the number of members the Union Government can appoint.

²⁷ Cinematograph (Certification) Rules, 1983, Rule 22(9)(ii).

²⁸ Cinematograph (Certification) Rules, 1983, Rule 22(9)(iv).

²⁹ The Cinematograph (Certification) Rules, 1983, rule 24 (India).

³⁰ Cinematograph Act, 1952, § 5(c) (India).

³¹ Cinematograph Act, 1952, § 5(C) (India).

In furtherance of this power, the central government issued additional guidelines which are to guide the CBFC while taking a decision on the certification of movies. These guidelines are to be adhered to by the CBFC over and above Section 5B.³² According to the guidelines,

- (a) Medium of films remains responsible and sensitive to the values and standards of the society.
- (b) Artistic expression and creative freedom are not unduly curbed.
- (c) Certification is responsible to social changes.
- (d) The medium of film provides clean and healthy entertainment.
- (e) As far as possible, the film is of aesthetic value and cinematically of a good standard.

A perusal of the guidelines would show that they are extremely vague and vest immense discretion and power on the CBFC to interpret them any way they deem fit.³³

IV. Politics and an Outmoded Mindset – Extra-Constitutional Tools To Restrict Cinema

Despite the law clearly laying down the limited grounds on which movies can be censored in India, more often than not the reasons for censoring/refusing certification of movies are extra-constitutional, i.e., *dehors* the law. This section lists the instances wherein the government (central and/or state) and the CBFC have denied certification to a movie guided by extremely subjective political, religious or moral considerations.

A. Political Considerations

Very often a movie is denied certifications or the makers are directed to incorporate significant changes to it, due to political considerations. This may be because the movie deals with a topic that criticises the policies of the government or its ideologies or shows government or its leaders in bad light. Instances wherein movies were victims of these political considerations are discussed below.

The period of 1975-1977 was the darkest period of the Indian democracy.³⁴ Former Prime Minister Smt. Indira Gandhi had imposed a National Emergency in India [Emergency] wherein the Fundamental Rights of the citizens were suspended.³⁵ During the Emergency, government officials indulged in widespread corruption. At the forefront of this was Mr. Sanjay Gandhi (the elder son of Smt. Indira Gandhi) who was known for his abuse of power and malpractice.³⁶

In 1975, a movie titled *Kissa Kursi Ka (Tale of the Throne)* was directed by a sitting Member of Parliament. The movie was a political spoof on the power of Mr. Sanjay Gandhi during the Prime Ministerial reign of his mother. The Censor Board refused to certify the movie and the

³² GUIDELINES (CBFC), <https://www.cbfcindia.gov.in/main/guidelines.html>.

³³ Someswar Bhowmik, *Politics of Film Censorship: Limits of Tolerance*, 37.35 E.P.W. 3574 (2002).

³⁴ M.V. KAMATH, NANI A. PALKHIVALA: A LIFE, 120 (2007). Mr. Nani Palkhivala, was a prominent advocate/lawyer in India who argued several cases of fundamental right violations against the central government during the dark times of the Emergency.

³⁵ *CBFC should learn from history: Kissa Kursi Ka*, FIRSTPOST, (April 4, 2018, 4:32 p.m.), <https://www.firstpost.com/entertainment/cbfc-should-learn-from-history-kissa-kursi-ka-holds-lessons-for-udta-punjab-row-2825608.html>.

³⁶ KATHERINE FRANK, *INDIRA: THE LIFE OF INDIRA NEHRU GANDHI* 189 (2007).

central government banned it, making it illegal for anybody to watch the movie.³⁷ The movie did not implicate any of the grounds mentioned in Article 19(2), but it was still denied release only because it did not bode well with the ruling government. Interestingly, when the government of Smt. Gandhi was voted out of power, the ban on the movie was revoked and it was released for public exhibition.

The Board has also put several obstacles to the certification of movies which deal with lives of political leaders and incidents. For instance, the Board ordered inordinate cuts in a movie which depicted the assassination of former Prime Minister Shri Rajiv Gandhi.³⁸ Both of these episodes are a testament to the fact that political forces play a significant role in the process of censorship.

B. Religious Considerations

The filmmakers who make movies that might even minutely touch upon an aspect of religion have to be extra cautious in India. India is an extremely religious country, and religion is a force to be reckoned with. The Censor Board also maintains an extra-cautious approach when it comes to such movies. The trend shows that the Board censors or orders numerous cuts in a movie that criticises or allegedly distorts religion or religious characters.

For instance, the Board denied certification to the famous American movie *Indiana Jones and the Temple of Doom*,³⁹ only because it depicted the Indian Goddess Kali as a representative of underworld. Similarly, *The Da Vinci Code*, starring Tom Hanks, was denied certification and later banned in the states/provinces of Andhra Pradesh, Goa, Nagaland, Punjab and Tamil Nadu on the mere apprehension that it might hurt religious sentiments of the Christians there.⁴⁰ The hackneyed phrase “hurting religious sentiments” has been overstretched to censor generic words like “Cow,” “Gujarat,” “Hindutva,” etc., in movies as well.⁴¹

C. Moral Considerations

India is often criticised for having an ancient outlook when it comes to the functioning of the society or the relationships portrayed therein. Homosexual relationships are considered immoral even today, despite the Supreme Court of India recognising them as valid and protected under Article 21 of the Constitution, i.e., the Fundamental Right to Life.⁴² This obsolete mindset also plays a role when the Censor Board decides to certify a movie for release in India. A foreign

³⁷ *Banned during emergency, controversial Kissa Kursi ka movie to make a return*, SCROLL, (April 4, 2018, 9:46 p.m.), <https://scroll.in/article/702429/banned-during-the-emergency-controversial-kissaa-kurseeka-movie-to-make-a-return>.

³⁸ *Censor board cuts dialogue on Rajiv Gandhi assassination*, FIRSTPOST, (April 4, 2018, 10:46 p.m.) <https://www.firstpost.com/entertainment/censor-board-cuts-dialogue-on-rajiv-gandhis-assassination-in-rgvs-veerappan-2796432.html>.

³⁹ Mr. Satyam Rathore, *A Critical Overview of Censorship in Indian Cinema in light of the Role of CBFC*, 4 B.L.R. 218 (2016).

⁴⁰ *Indian state bans Da Vinci Code*, THE GUARDIAN, (April 5, 2018, 8:32 a.m.) <https://www.theguardian.com/world/2006/may/24/books.india>.

⁴¹ *With its censorship of the Amartya Sen film*, HUFFINGTONPOST, (April 5, 2018, 9:05 a.m.) <https://www.huffingtonpost.in/2017/07/13/with-its-censorship-of-the-amartya-sen-film-cbfc-has-made-a-cas-a-23027486/>.

⁴² *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

media reporter had once remarked that “India is governed by the paternalistic idea that its citizens are not mature,”⁴³ and sadly the statement is true.

Due to its conservative mindset, the CBFC refused to certify the movie *Fire* only because it dealt with lesbian relationships.⁴⁴ The refusal was arguably in response to the protests by groups of Hindu fundamentalists, who termed the movie against their culture. Similar was the fate of the movie *The Pink Mirror* which was again refused certification because it depicted transsexual relationships.⁴⁵ These burials of movies by the Censor Board shows that when it comes to gender issues, the filmmakers should stick to the traditional boy loves girl story and not explore other relationships, if they wish to see their movie release in India.

In light of the above discussion, it is clear that decisions of the Censor Board or the Government may be made purely on political, religious or moral grounds and have no legal basis. However, in majority of cases, instead of challenging the censorship of their movies, the filmmakers cave in to the Censor Board or the Government’s request and remove the scenes that do not please them. When a filmmaker has knocked on the doors of the courts rather than caving in to the authorities, however, the response has been favourable and the courts have upheld the constitutional values of free speech.

V. Judiciary: Upholder of Free Speech

The Constituent Assembly’s intention was to lay down the broad policies that shall govern Article 19(2). Since the article laid down only the grounds on which restrictions could be imposed, it fell within the domain of the courts to ascertain whether the restriction imposed on the filmmakers were in line with the spirit of the provision. This part discusses the important decisions of the Supreme Court of India wherein the Court has interpreted the law on censorship and come to the rescue of an aggrieved filmmaker.

A. *KA Abbas v. Union of India*⁴⁶

The Petitioner (a filmmaker) had produced a documentary titled *A Tale of Four Cities* wherein he highlighted the relationship between the rich and poor by comparing the four cities of Calcutta, Bombay, Madras and Delhi. The Petitioner applied for a “U” certificate but was instead granted an “A” certificate by the CBFC. On appeal, the CBFC agreed to grant a “U” certificate to the movie, provided that certain changes and cuts in some scenes were incorporated. Dissatisfied with this decision, the Petitioner approached the Supreme Court challenging the certification process and argued that censorship itself offended his freedom of speech and expression enshrined in Article 19 (1)(a) of the Constitution. The matter was referred to a Constitution Bench (consisting of five judges). Speaking through Chief Justice Hidayatullah, the Court upheld censorship in India and laid down a law which is followed today.

⁴³ *Censorship in India based on the paternalistic idea that citizens are not mature*, THE WIRE, (April 3, 2018, 9:00 p.m.) <https://thewire.in/18461/censorship-in-india-is-based-on-the-paternalistic-idea-that-citizens-are-not-mature/>.

⁴⁴ *Controversial film fire is sent back to censor board to Court*, INDIA TODAY, (April 4, 2018, 8:46 p.m.) <https://www.indiatoday.in/magazine/society-the-arts/films/story/19981221-controversial-film-fire-is-sent-back-to-censor-board-matter-taken-to-court-827561-1998-12-21>.

⁴⁵ *Clamping down on creativity*, THE HINDU, (April 3, 2018, 5:10 p.m.) <http://www.thehindu.com/opinion/op-ed/clamping-down-on-creativity/article17739798.ece>.

⁴⁶ *K.A. Abbas v. Union of India*, (1970) 2 S.C.C. 780 (India) [hereinafter *Abbas*].

The Court held that censorship of films and their classification according to the age groups is a valid exercise of power in the interest of public morality and decency.⁴⁷ To prove that such a classification was in fact required, the Court compared cinema to other forms of speech. It opined that a person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not as deeply stirred as by seeing a motion picture. Therefore, the treatment of the latter on a different footing is a valid classification.⁴⁸ This observation of the Court has been the justification of every government for imposing restrictions and censoring movies.

B. S. Rangarajan v. P. Jagjivan Ram

Contrary to the conservative view taken by the Court in *Abbas*, the subsequent decisions have seen the courts adopting a pro-liberty approach when it comes to cinema. A testament to this is the case of *S. Rangarajan*.⁴⁹ The Petitioner (a filmmaker) had produced a movie titled *Ore Oru Gramathile (In One Village)* which was a satire criticizing the government's policy of affirmative action in public employment and how it was unfair to the upper caste Brahmins.⁵⁰ Initially, the Petitioner was granted a "U" certificate; however, later on request by the state/provincial government of Tamil Nadu, the certificate was revoked on grounds that the reaction to the film is bound to be volatile considering the fact that the state/province of Tamil Nadu has long suffered from discrimination on grounds of caste. The Court rejected that argument and, in fact, reprimanded the state government for giving in to the threat of demonstration and processions. The Court observed,

If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and surrender to black mail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.⁵¹

Therefore, the Court categorically held that the government cannot shirk its responsibility to protect freedom of speech of the film makers by citing law and order problems. The Court held further that if a movie cannot be restricted under any of the grounds in Article 19(2), it has to be certified and then released.⁵²

C. Life Insurance Corporation v. Prof. Manu Bhai D. Shah⁵³

⁴⁷ *Abbas*, 2 S.C.C. 780.

⁴⁸ *Id.*

⁴⁹ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 S.C.C. 574 (India) [hereinafter 'Rangarajan'].

⁵⁰ The varna/caste system deeply influences the daily lives in India. Under the system, the society is divided into four casts: Brahmin, Kshatriya, Vaishya and Shudras, with their importance being in the same order. Despite the Constitution of India abolishing any form of discrimination on the basis of caste, the practice continues.

⁵¹ *Rangarajan*, 2 S.C.C. 574.

⁵² *Free Speech and Public Order: Film Censorship and Rangrajan Case*, Indian Constitutional Law and Philosophy, (April 4, 2018, 7:30 PM) <https://indconlawphil.wordpress.com/2013/08/09/free-speech-and-public-order-ii-film-censorship-and-the-rangarajan-case/>.

⁵³ *Manu Bhai*, 3 S.C.C. 637.

The Supreme Court again stepped in to protect the right to freedom of speech of a filmmaker in the case of Prof. Manu Bhai.⁵⁴ The Respondent had made a documentary on the Bhopal Gas Tragedy which went on to win the prestigious Golden Lotus Award.⁵⁵ The movie was slated to be televised in India; however, the national television channels refused to air it, citing resistance by the political parties, as it was critical of the government in power during the tragedy. The Court rebuffed that stance and held that merely because a documentary is critical of the government is no reason to deny its publication.

It often happens that the CBFC grants certification to the movies, but the state/provincial government either bans the movie or passes informal directions to the movie theatres to not screen it. In such cases, the courts have also come to the rescue of the movie makers by categorically stating that the state governments have an obligation to protect the constitutional rights of the makers and ensure that their movies are screened without any obstructions.

*D. Indibility Creative Private Limited v. Govt. of West Bengal*⁵⁶

The Petitioner (a production house) had made a Bengali movie titled *Bhobishyoter Bhoot (Future Ghost)* which was a political and social satire about ghosts who wish to make themselves relevant in the future by rescuing the marginalized and the obsolete. The movie was granted a “U/A” certification from the Censor Board.

Prior to the release of the movie, the Special Intelligence Unit of the State of West Bengal demanded a private screening of the movie, since they believed that the movie might hurt public sentiments. The Petitioner refused to comply with the request, and, in response, the Special Intelligence Unit informally directed the movie theatres to not screen the movie. The Petitioner challenged these actions before the Supreme Court.

The Court, speaking through Dr. Justice Chandrachud, held that once an expert body, i.e., the CBFC, has cleared the movie for release, the government cannot halt the release of the movie on the ground that there may be a law-and-order situation. The Court went on to hold that it is for the concerned state government to see that the law and order is maintained. The Court observed,

In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view from that as taken by the tribunal, and choose to express their views by unlawful means would be no ground for the executive to review or revise a decision of the tribunal. In such a case, the clear duty of the government is to ensure that law and order is maintained by taking appropriate actions against persons who choose to breach the law.

The Court objugated the state government and directed them to pay the Petitioner a hefty compensation along with legal expenses for violating its right to freedom of speech.

*E. Via Com 18 v. Union of India*⁵⁷

⁵⁴ *Id.*

⁵⁵ The Bhopal Gas Tragedy was a gas leak incident at a pesticide plant in Bhopal, India. The tragedy is considered the world’s worst industrial disaster where over 500,000 people were exposed to methyl isocyanate (MIC) gas and over 2000 lost their lives.

⁵⁶ *Indibly Creative Pvt. Ltd. vs Govt. Of West Bengal*, 2019 SCC Online SC 520 (India).

⁵⁷ *Via Com 18 v. Union of India*, 2018 1 SCC 761 (India).

The Petitioner had produced a movie titled *Padmaavat*⁵⁸ which depicted the story of the erstwhile Kingdom of Chittor (present day state of Rajasthan in India) which was attacked by the Ruler of the Delhi Sultanate, i.e., Alauddin Khilji. According to some historians, the motive behind the attack was for Khilji to capture Queen Padmini of Chittor. Khilji killed the King of Chittor, but before he could capture the Queen, she jumped into a veil of fire (referred to as “Jauhar”).

The CBFC had granted a “U/A” certification to the movie; however, the government of Rajasthan banned the movie in the state on the apprehension that it may hurt religious sentiments of the people and create a law-and-order situation in the state. The Court rejected the government’s contention and held that it is the duty of the state government to manage the law-and-order situation whenever a film is exhibited. The Court further went on to hold, that it is also the responsibility of the government to provide protection to the persons involved in the film/exhibition of the film and the audience watching it, if necessary.

The discussions above clearly show that the Indian courts have upheld a maker’s right to freedom of speech wherever the Censor Board or the government has attempted to curtail it. However, ideally in a democracy this should not be the case, as even the government should be an upholder of the constitutional values and rights, and be tolerant to views that it disagrees with. The duty of the government can be best explained through the words of Justice Chandrachud in the *Indibility Creative’s Case* where he opined,

In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom. When organized interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the state to ensure that speech is not silenced by the fear of the mob. Unless we were to read a positive obligation on the state to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance.

VI. Suggestions: Steps To Promote Artistic Freedom

Throughout the paper, the author has argued that there is acute politicisation when it comes to censorship of movies in India. This chapter suggests possible solutions to this problem, which if implemented may restore the spirit of artistic expression as intended by the makers of the Constitution.

A. A Challenge to Abbas Case

Currently, the judgment of *K. A. Abbas v. Union Of India*,⁵⁹ is the leading decision on the law of censorship. The judgment, delivered over 50 years ago, had put cinema on a very high pedestal when it came to censorship, given the influence it had over the masses. However, the times have changed and movies are not the only medium that can influence audiences. With digitalization taking over, virtual mediums have arisen and access to television series, plays,

⁵⁸ The title was inspired from a poem of the same name composed by Malik Mohammed Jayasi.

⁵⁹ *Abbas*, 2 S.C.C. 780.

stand ups and other such acts is available at free/minimal cost online. Interestingly, the standard of regulation for such media is lower than that of movies. Furthermore, they are subject to post-censorship as against pre-censorship review, which movies have to go through.⁶⁰

Recent surveys have revealed that today people prefer watching online content (i.e., tv shows and movies)⁶¹ over physically visiting theatres.⁶² They go on to show that virtual media are becoming a preferred medium over traditional movies. Therefore, it is time that regulations for the two are reconciled and movies are also made subject to less rigorous regulations akin to that imposed on digital content. A petition seeking that relief is pending before the Supreme Court of India.⁶³

B. Amendment to Qualification of Advisory Members:

Under current law, the central government may nominate any person to be a member of the Advisory Panel.⁶⁴ The position of an Advisory Member carries no qualifications and is made on the sole discretion of the central government which can nominate any person. This is problematic as the Advisory Member is given the crucial task of deciding whether a movie should be allowed for public exhibition or not. The law does not provide any parameters to check whether the Advisory Member making such a determination is herself/himself competent or not. Therefore, there is an imminent need for an amendment to the Act and Rules, so that qualifications for appointment to the Advisory Panel can be laid down.

C. Setting up the Film Council of India

A long-standing demand of the film makers has been to establish the Film Council of India [FCI].⁶⁵ The demand to institute such a body has arisen because the CBFC has exceeded its authority and not stuck to the original object behind its creation, i.e., certification of movies. With time, the CBFC has acquired sweeping powers like ordering cuts in the movie and mutilating it.

The proposed FCI would assume those powers from the CBFC. Therefore, in case the CBFC finds any content objectionable, it can refer it to the FCI. The decision over such content shall then be undertaken by the Council, consisting of retired judges, lawyers, film makers, writers and artists, who shall be duly appointed. Unlike the CBFC or the existing bodies under the Act, the FCI shall consist of qualified and competent members who shall have the acumen and the artistic intellect to assess the impact of a movie on the masses.

⁶⁰ In India, content on streaming websites and virtual media is subject to the general penal law in force, including the Indian Penal Code-1860, Information Technology Act-2000 etc. The provisions of these acts are applicable only after the content has been screened online, unlike the movies which have to obtain a certification before they can be publicly exhibited.

⁶¹ *Survey reveals two thirds of Americans prefer watching movies at home over theatre*, PM NEWS WIRE, (April 5, 2018, 7:30 a.m.), <https://www.prnewswire.com/news-releases/survey-reveals-two-thirds-of-americans-prefer-watching-movies-at-home-over-the-theater-and-women-are-more-likely-than-men-to-read-the-book-before-seeing-the-movie-version-278348301.html>.

⁶² *Adults go to fewer movies poll*, ENTERTAINMENT WEEKLY (April 5, 2018, 7:39 a.m.), <http://ew.com/article/2014/01/10/adults-go-to-fewer-movies-poll/>.

⁶³ *Amol Palekar approaches the Supreme Court regarding film censorship*, THE WIRE, (April 4, 2018, 7:39 p.m.), <https://thewire.in/film/amol-palekar-film-censorship-supreme-court-petition>.

⁶⁴ Rule 7 of the Cinematograph (Certification) Rules, 1983 (India).

⁶⁵ Satyam Rathore, *supra* note 39.

Movies have long influenced people and have been a crucial form of expression. Freedom of speech and expression is a constitutional right in India and it is appalling to see that film makers are often denied this right due to non-legal factors. This article has argued that it has been the Courts which have come to the rescue of the filmmakers and upheld their guaranteed rights. As Voltaire famously said, “I may not agree with what you said but I shall defend to death your right to say so.” It is hoped that the government will stop the politicisation of the right to free speech and embark on a path to make India a tolerant nation that upholds free speech in every form.

*Swapnil Tripathi is a practising advocate/attorney, enrolled with the Bar Council of New Delhi (India); swapnil.tripathi221@gmail.com.